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CRS Report for Congress

Public Performance Right in Digital Audio Transmission of Sound Recordings

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PUBLIC PERFORMANCE RIGHT IN DIGITAL AUDIO TRANSMISSIONS OF SOUND RECORDINGS

SUMMARY

The Digital Performance Right in Sound Recordings Act of 1995 amended the 1976 Copyright Act to create a new right to perform copyrighted sound recordings publicly by means of a digital audio transmission.

Under prior copyright law, sound recordings were the only category of copyright subject matter capable of performance which was denied a right of public performance. Virtually all developed countries accord some form of performance right in sound recordings, although not commonly under copyright law. The majority of countries that grant legal protection against copying and performing sound recordings apply laws of unfair competition or "related rights."

The Digital Performance Right Act reflects compromises among the private sector interests most directly affected by this legislation: recording companies, performers, composers and lyricists, music publishers, and digital cable subscription music services.

The new right essentially impacts only subscription (i.e., subscriber, fee-based) or interactive transmissions of sound recordings and musical works. No other works are affected. Interactive services include "pay-per-listen," "audio-on-demand," and "celestial jukebox" services, whether provided on-line or otherwise, and whether or not there is a charge for the service.

Musical works already enjoy a broad public performance right. The music performing right and the limitations on it are unaffected by the new law.

Proponents of the new right contended that recognition of a public performance right in sound recordings was long overdue, and that this legislation was essential to improve the negotiating position of the United States in its efforts to seek greater protection for American sound recordings abroad. They also argued that, since most countries pay sound recording royalties on a reciprocal basis, the new right was necessary to provide a basis for American performers and record producers to claim their fair share of foreign royalties.

Any opposition to the legislation that once existed was largely muted by its narrow scope; the exemption of broadcasters, background music and "on-hold" music services; the statutory license for subscription services; the restrictions on licensing interactive services; and the expansion of the mechanical music license to cover digital phonorecord deliveries.

This report reviews the history of sound recording copyright protection, examines the special status of recordings in the U.S. and abroad, summarizes the Digital Performance Right Act, and explores the significance of the legislation for the national information superhighway and international protection of American performers and record producers.

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PUBLIC PERFORMANCE RIGHT IN DIGITAL AUDIO TRANSMISSION OF SOUND RECORDINGS

The Digital Performance Right in Sound Recordings Act created a new right under the 1976 Copyright Act[1] to perform a copyrighted sound recording publicly by means of a digital audio transmission. S. 227 passed the Senate on August 8, 1995 and the House on October 17, 1995. The President signed the bill on November 1, 1995.[2]

The Act establishes a limited public performance right in sound recordings for the first time in United States copyright law. The act also amends the compulsory license for reproduction of music on records, cassettes, and disks (known as the "mechanical music license").[3] The new right essentially impacts only subscription (i.e., subscriber, fee-based) or interactive transmissions of sound recordings and musical works. No other works are affected. (Literary works, musical works, dramatic works, pantomimes, choreographic works, motion pictures, and audiovisual works already enjoy an even broader public performance right[4] than that extended to sound recordings under the Act.) Radio and television broadcasts -- both analog and digital -- are exempt from the new digital transmission right.

This report briefly reviews the history of sound recording copyright protection, examines the special status of sound recordings in the United States and abroad, summarizes the new law, and explores its significance for the national information superhighway and for protection of the rights of United States performers and record producers in other countries.

HISTORY OF SOUND RECORDING COPYRIGHT IN THE U.S.

Initial Indifference to Copyright Protection

Mechanical devices for capturing and making audible aural works (for example, music boxes) existed for more than 100 years before "sound recordings"

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[1]Copyright Act of 1976, title 17 U.S.C. §§101 et. seq.

[2]Pub. L. 104-39, Act of November 1, 1995. The Act took effect February 1, 1996, except for the amendments to 17 U.S.C.§114(e)-(f), which took effect on the date of enactment. The House companion bill was H.R. 1506.

[3]17 U.S.C. §115.

[4]17 U.S.C. §106(4).

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were granted copyright protection under United States law in 1972. Although Thomas Edison invented phonograph records in 1877 (originally in the form of cylinders), there was little political pressure to extend copyright protection to the performances captured on records until audiotaping technology in the 1960s made mass piracy of recordings highly feasible and profitable.

There were several reasons for the decades-long delay in according records legal protection against copying. First, just when records were developing as a popular entertainment medium early in the 20th Century, the Supreme Court decided a fateful case involving music piano rolls (another mechanical device for capturing and rendering music). The Court in *White-Smith Music Publishing Co. v. Apollo Co.,* 209 U.S. 1 (1908) held that a piano roll was not a "copy" of the music fixed in it under the applicable Copyright Act of 1870. Since the perforations on the piano roll that fixed the music were not visually intelligible (a conclusion since disputed: experts can "read" the music), the piano roll was not a copy of the music. The decision was interpreted to mean not only that the piano roll did not infringe copyright in the music recorded, but that the recording itself could not be the subject of a claim to copyright.

For the first half of the 20th Century, recordings faced an even greater barrier to copyright protection than statutory interpretation. When proposals were made in the 1920s and 1930s to grant copyright protection to recordings, opponents argued that sound recordings were not constitutionally eligible for copyright.[5] Under the Copyright Clause of the U.S. Constitution,[6] Congress can legislate copyright protection only for the "writings" of "authors." Recordings, it was argued, are not "writings" because the sounds are not visible. Also, recordings are not the creations of "authors" because they are mechanical contrivances, produced by the efforts of engineers, technicians, performers, and machines rather than by authors.[7]

A third factor was the mechanical license for reproduction of music on records. Congress responded legislatively to the *White-Smith* case as part of the 1909 general revision of the copyright law. Instead of overruling the case (by making records a "copy" of the works fixed in them), Congress let stand the holding of the case, but created the first compulsory license in copyright law.[8]

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[5]*See,* for example, *Hearings Before the House Committee on Patents on Revision of Copyright Law,* 74th Cong., 2d Sess. 486-89 (1936).

[6]Art. I, Section 8, Clause 8.

[7]By 1965, the eligibility of sound recordings as potential copyright subject matter had generally been accepted. REPORT OF THE REGISTER OF COPYRIGHTS ON PERFORMANCE RIGHTS IN SOUND RECORDINGS, 95th CONG., 2D SESS. at 28 (1978) (House Judiciary Comm. Print 1978) (Hereafter: "1978 Register's Report"). The National Association of Broadcasters made one last effort to challenge the copyrightability of sound recordings during the mid-1960s copyright revision hearings, but they had become a solitary voice on the copyrightability issue. *Id.* at 44.

[8]§1(e) of the 1909 Copyright Act, Act of March 4, 1909, ch. 320, 35 Stat. 1075.

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Under this mechanical music license, the copyright owner has an exclusive right to authorize the first recording of the music (or never authorize any recording). Once the copyright owner authorizes a recording, however, anyone may make another recording of the music by complying with the statutory provisions and paying the statutory licensing fee. The mechanical license meant recording companies had easy access to music for their records, but it also meant the recording company could not get an exclusive right to record particular music. This deprived the recording companies of a major incentive for seeking copyright protection for the recording: exclusivity with respect to what is recorded.

Improvements in Audiotaping Technology

The recording companies did not become seriously concerned about copyright protection until improved audiotaping technology -- especially the development of the cassette format -- made massive unauthorized duplication of their recorded product easy and profitable.

In the early 1960s, the improvements in audiotaping technology coincided with a major legislative program to revise the copyright law generally. Sound recordings were included as copyright subject matter in the general revision bills of the 1960s,[9] although the scope of protection to be granted remained highly controversial.[10] There was little controversy about a right limited to the unauthorized duplication of records for commercial purposes.[11] (The commercial purpose qualification excluded audio hometaping.) Broadcasters, one of the traditional foes of sound recording copyrights, remained adamantly opposed to a public performance right in sound recordings.[12]

Impact of Recording Technology on Performers

Not surprisingly, the interests of employee-performers with respect to legal protection of recordings have not always coincided with the interests of employer- record producers. Somewhat surprisingly, the interests of individual performers in legal protection of recordings have not always coincided with the interests of the unions representing live performance and recording musicians.

For the first two decades of the 20th Century, employment opportunities for performing musicians (especially instrumentalists) greatly expanded.

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[9]1978 Register's Report at 40.

[10]SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, 89 CONG., 1ST SESS. at 51 (House Judiciary Comm. Print 1965). The Report characterized the issue of a sound recording performance right as "explosively controversial."

[11]*Id.* at 51.

[12]1978 Register's Report at 55-56.

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Technological developments initially increased jobs. When orchestral records became feasible, recording companies employed many musicians. When silent motion pictures became popular, thousands of jobs were created in movie theaters (usually as solo performers or in small groups, but sometimes for orchestras) as accompaniment to the exhibition of motion pictures. By 1926, there were 22,000 musicians employed in motion picture theaters.[13] Initially, radio broadcasting also brought performing jobs, as staff musicians at networks and individual stations.

These new, technology-driven jobs had a short life, however, and were eroded and almost destroyed around 1930 --just as the Great Depression hit the United States economy. Motion picture soundtracks ended employment for movie theater musicians almost "overnight." Electrical transcriptions, changes in federal regulatory policy, and expansion of the national radio networks combined to reduce severely the number of job opportunities in radio. On the radio front, performers and their unions attempted to preserve jobs by holding back or mitigating the technological changes. They ultimately failed. In 1940, approximately 2200 musicians were employed by radio stations and networks.[14] Today, unlike European broadcasters, United States broadcasters essentially employ no staff musicians.

As recording technology improved, performers were placed in the invidious position of competing with themselves: they were increasingly displaced by their own recordings. Not only were fewer musicians employed to make recordings (which could be played over and over), but the growth in popularity of recorded music severely depressed the audience for live musical performances. The country became awash in recorded music. Radio, background music, movie soundtracks, phonograph records, and later television and cable television, all relied heavily on recorded music. These entertainment services reduced employment opportunities even for recording musicians. By their very "perfection," recorded music services virtually annihilated public taste for live music except for a comparatively small number of professional classical concerts and for amateur performances by high school and college students (to audiences of parents and friends).

Within the ranks of performing musicians, as job opportunities dissipated, tension and conflict developed between the union members who recorded and the vast majority of the union members who were unemployed most of the time as musicians[15] -- that is, those who could not find life-sustaining work as a performer and had to work outside the field of music. The American Federation

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[13]Gorman, *The Recording Musician and Union Power: A Case Study of the American Federation of Musicians,* contained in the 1978 Register's Report, at 1073.

[14]*Id.* at 1083.

[15]*Id.* at 1072 and 1074.

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of Musicians ("AFM") responded to the technological developments with strikes,[16] sometimes with protracted bans on the recording of music for radio, and collective bargaining for music trust funds that could be used to pay for live musical performances.[17] The AFM, while giving lip-service to a performer's proprietary interest in recordings, did not actively seek recognition of that right, except by making the record companies place restrictive covenants about "home use only" on record labels.[18]

Performers' Proprietary Claims in Recordings

Throughout most of this century, it has been individual performers or small groups of them, apart from their union affiliation, who have pressed the case for legal protection of recorded performances. Various legal theories were advanced in an effort to obtain recognition of a performers' proprietary right analogous to the rights enjoyed by composers and lyricists under copyright law. State misappropriation law, common law copyright, moral rights, and restrictive covenant theories were litigated. Before 1940, the restrictive covenant or equitable servitude doctrine seemed promising.

Collective bargaining agreements in the late 1930s between the record producers and the AFM -- representing live and recording musicians -- required a restrictive legend on record labels designed to provide a legal basis to challenge radio broadcasting of the record without permission of the performer. Legends such as "only for noncommercial use on phonographs in home," "for home use only," or "not licensed for radio broadcast" were placed on the record labels. Individual performers brought test cases against the broadcasters; some of them were successful. Fred Waring prevailed in his case against a local Pennsylvania radio station. *Waring v. WDAS Broadcasting Station, Inc.,* 327 Pa. 433, 194 Atl. 631 (1937).

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[16]The most famous strike occurred in the middle of World War II. James Petrillo, President of the AFM, ordered a strike against the recording and electrical transcription companies. All new recording ceased beginning in August 1942. A partial breakthrough came in September 1943, when Decca Records -- the only major recording company not affiliated with the broadcasters -- broke ranks and acceded to the AFM's contract demands, including payments into a music trust fund. A few small recording companies also capitulated by March 1944. The strike continued, however, against the broadcaster-affiliated companies until November 1944, when RCA and Columbia agreed to a labor contract. The strike had endured for two years and four months. Petrillo had refused an appeal to patriotism from President Roosevelt to end the strike. (Music was considered important to the morale of the public.) Gorman, *id.* at 1076-78. The recording companies, although they eventually capitulated, were able to hold out so long both because of the existing stock of recorded material and because the raw materials for making records were in extremely short supply during the War.

[17]*Id.* at 1076-1081.

[18]*Id.* at 1075.

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The once-promising restrictive covenant theory suffered a mortal blow, however, in *RCA Manufacturing Co. v. Whiteman,* 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). The famous jazz orchestra leader, Paul Whiteman, sued RCA, the owner of the National Broadcasting Company, to stop the unlicensed use of recordings on the radio network. Whiteman and his fellow performers lost their chance for judicial recognition of a performer's proprietary right in the recording when the Second Circuit held that the sale of records divested any common law copyright in the recorded performance. Even more importantly, the court also ruled that state doctrines of unfair competition or restrictive covenants were preempted by the federal copyright scheme, following divestment of common law copyright.

Although other circuits might have reached a different result if cases had been brought, the *Whiteman* case represented a bedrock precedent because of the force of the Judge Learned Hand opinion, his reputation as a copyright judge, and the fact that New York was a major recording center. A victory in the Pennsylvania courts had little precedential effect beyond the parties to the case. The victory for the broadcasters in federal court, with a holding stressing federal preemption of state laws, could not be overcome by the performers[19].

After the *Whiteman* case, performers used the collective bargaining process to achieve the rough equivalent of a proprietary right through recording industry music trust funds. Because of the *Whiteman* case and the Lea Act of 1946,[20] they were unable to stem the erosion of employment opportunities in radio and later in television. They also looked to the legislative process for relief in the form of proprietary rights in acoustical recordings.

Sound Recording Legislation

With respect to legislation, until the late 1950s, conflicts within the ranks of performing musicians contributed to the lack of progress. Legislative initiatives came and went. None succeeded. In the 1940s, performers sought copyright for themselves in acoustical recordings. Record producers then either

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[19]*Id.* at 1076. "The *Whiteman* case prevented the union from using its bargaining power in the recording industry as a means of removing phonograph records from radio broadcasts. Attempts to impose direct pressure on the broadcasters were totally undermined by the Lea Act of 1946 [60 Stat. 89, codified as §506 of title 47 U.S.C.; repealed by Pub. L. 96-507, 94 Stat. 2747 (December 8, 1980)], which outlawed strikes -- and thus effective collective bargaining -- designed to expand or preserve live employment in radio, or to eliminate or restrict the use of records in broadcasting or even to extract performance royalties for the recording musicians for the radio use of their recordings." *Id.* at 1136.

[20]60 Stat. 89, Act of April 16, 1946, codified as §506 of title 17 U.S.C.; repealed in 1980 by Pub. L. 96-507, 94 Stat. 2747. As noted in the above footnote, the Lea Act essentially outlawed musician strikes against broadcasters designed to restrict the use of phonograph records on radio.

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opposed any rights in acoustical recordings or thought the producer should be the sole rightholder.[21]

Record company opposition may have stemmed from their relationships to broadcasters. Many recording companies were broadcaster-owned or -affiliated. At least two of the big four recording companies through the 1950s were controlled by broadcasters (RCA Victor by NBC; Columbia-CBS Records by CBS).

With the advent of improved audiotaping technology, record producers became alarmed by the economic threat of unauthorized commercial duplication of records. They now sought a copyright in sound recordings. After further ambivalence or opposition to a public performance right in sound recordings, the record producers in 1967 joined ranks with the performers and their unions in pressing for full copyright protection, including a public performance right.[22]

The 1967 copyright revision hearings saw true corporate independence when RCA Victor and ABC Records supported a sound recording public performance right, and NBC and ABC opposed the same right.[23]

The record producers remained principally concerned, however, with the reproduction and distribution rights needed to stop commercial piracy. Consequently, when the copyright general revision bill stalled as the 1960s ended, the record producers attained legislative action on a narrow, limited copyright in sound recordings. The Sound Recording Act of 1971,[24] effective February 15, 1972, granted copyright status to sound recordings at the price of a limited scope of protection. Only rights against exact duplication of the recorded sounds and their distribution for commercial purposes were granted.

The limitation to exact duplication meant there was no protection against imitation or "mirror" recordings. There was no adaptation right. The limitation to commercial purposes (expressed in the legislative history rather

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[21]1978 Register's Report at 35-36.

[22]1978 Register's Report at 46. At the beginning of the 1960s general copyright revision effort, the record companies focused primarily on the royalty rate for mechanical music licensing. Authors and music publishers were seeking at least a doubling of the rate that had been frozen since enactment of the license in 1909. When the record companies "won" that battle (the rate was increased and could be periodically adjusted, but it was not doubled immediately), their attention turned to copyright protection for sound recordings.

[23]1978 Register's Report at 46-48.

[24]Pub. L. 92-140, 85 Stat. 391, Act of October 15, 1971.

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than in statutory text) exempted audio hometaping.[25] Broadcasters were also allowed to make a copy for delayed broadcasts. Of course, there was no right of public performance.

The general revision enacted in 1976, effective January 1, 1978,[26] essentially codified the 1971 Sound Recording Act. Protection was again limited essentially to exact duplication. A limited adaptation right was granted, to remix or rearrange the sounds of the original recording. The ephemeral recording privilege of broadcasters to make a copy for delayed broadcast was confirmed. The issue of a public performance right was handled by asking the Copyright Office to study the issue and report back with recommendations to the Congress in January 1978.

In its 1978 Report, the Copyright Office recommended enactment of a broad public performance right in sound recordings.[27]

When asked to study the implications of digital audio technologies in 1991, the Copyright Office again recommended enactment of a sound recording public performance right.[28]

Serious consideration of a public performance right at least in digital transmissions of sound recordings began in the 103rd Congress.[29]

SPECIAL STATUS OF SOUND RECORDINGS IN THE U.S.

This review of the history of copyright protection for sound recordings in the United States explains their special copyright status. The former law, which on the surface appears anomalous and discriminatory, was in fact the

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[25]H.R. REP. NO. 92-487, 92d Cong., 2d Sess. (1971). The Report states:"Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it. This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." *Id.*at 8. Record producers dispute this interpretation of the 1971 Act, and point out that a similar comment did not appear in Senate Report No. 92-72 (1971).

[26]Copyright Act of 1976, Pub. L. 94-553, 90 Stat. 2541, codified as title 17 U.S.C.,

[27]1978 Register's Report at 1062.

[28]REPORT OF THE REGISTER OF COPYRIGHTS ON COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES at 160 (October 1991).

[29]S. 1421 and H.R. 2576, 103d Cong., 1st Sess. (1993).

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product of complex economic, technological, organizational, and cultural factors.

Performers, whose job opportunities declined precipitously after 1930, concentrated their energies for decades in the collective bargaining process. They tried to preserve job opportunities in radio, television, and motion pictures and also require payments to the music trust fund to support the live performance of music. The union belatedly sought direct residual or re-use payments for their members. The union did not actively pursue copyright legislation until the late 1950s.[30]

Recording companies acted like users rather than possible proprietors of rights. They were primarily concerned in the copyright field about the cost of the mechanical music license. At times, the recording companies gave half-hearted support in principle to some form of copyright in sound recordings, but they did not exert real political pressure until the mid-1960s.

The short answer therefore as to why copyright for sound recordings was delayed until 1972, is that no one really asked for it seriously until audiotaping technology made commercial piracy a serious economic threat.

Faced with the economic impact of commercial piracy, record companies needed a law that dealt with this threat. Rights against exact duplication and distribution for commercial purposes were adequate to stop the piracies. The long history of affiliation with broadcasting interests meant that recording companies belatedly saw significant benefit in a sound recording public performance right. When the recording companies appreciated this benefit, they could not overcome the adamant opposition of former allies -- the broadcasters.

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[30]The American Federation of Musicians did not actively support the acoustical recording bills of the late 1940s. Individual performers supported these early attempt to legislate copyright in sound recordings. 1978 Register's Report at 36. Of course, a union's forte is collective bargaining for wages, working conditions, pensions, and other benefits related to the employee status of its members. A copyright in sound recordings creates individually enforceable proprietary rights. There are tensions between status as a union member and assertion of individual proprietary rights, as the movie composers discovered when they attempted to bargain for recognition of copyright in their musical compositions for motion pictures. The movie composers decertified their union at one point in their unsuccessful effort to obtain copyright in their compositions. In claiming copyright, they had to deny they were employees of the motion picture producers. (The producer claimed copyright as employer of a work made for hire.) If the composers were not employees, the union could not bargain collectively on their behalf. When the copyright campaign failed, the movie composers formed a union again. In the end, the musicians were more fortunate than the movie composers. The 1971 Sound Recording Act recognized the performers as "authors" and presumptive co-owners of the sound recording copyright. In one of the ironies of United States copyright law, composers of music for motion pictures, who are recognized virtually everywhere else in the world as authors, are ordinarily not "authors" under U.S. law. They are employees (except in the case of well-established composers like John Williams or Henry Mancini).

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The United States took a path chosen by a relatively few countries -- to accord copyright protection to sound recordings as works of authorship. Other countries relied primarily on unfair competition doctrine or related ("neighboring") rights doctrine. In electing copyright as the vehicle for sound recording protection, the United States, however, virtually alone among countries of the world, decided not to grant one of the major components of copyright to sound recordings -- the public performance right -- until Congress created the new digital audio transmission right in 1995.

The United States delayed in granting a public performance right to sound recordings primarily because of firm opposition from the privately owned broadcasting companies. Broadcasters believe a broad sound recording performance right would add substantial copyright costs, which they could not easily pass own to advertisers. In the face of adamant opposition from the politically powerful broadcasters, the relatively powerless performers were unable to obtain legislative recognition of a public performance right in sound recordings, even when the record producers -- who once opposed or were indifferent to a public performance right -- began to press vigorously for this right. The performers and record producers finally succeeded in 1995, but only by exempting broadcasters from any liability under the new digital audio transmission right.

The United States for some time now has argued strenuously about the inadequate treatment of sound recordings in many countries -- with respect to length of protection (the relevant 1961 Rome Convention[31] sets the minimum term at 20 years) and effectiveness of enforcement against commercial pirates. In making these arguments both in intellectual property fora and trade negotiations, the United States negotiators have been seriously hampered by the limitations of our own law. Although our term of protection is long (75 years), and our reproduction and distribution rights are strong, the United States was not able to press persuasively for improved sound recording protection abroad while this country denied sound recordings any public performance right.

SPECIAL STATUS OF SOUND RECORDINGS ABROAD: RELATED RIGHTS

While it is true that until 1995 the United States was almost alone among developed countries in the failure to accord a public performance right to sound recordings, it is also true that only a relatively small number of countries even extend copyright protection to sound recordings. Most other developed countries, including members of the European Union, have chosen the path of "related" or "neighboring" rights to protect sound recordings.

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[31]International Convention for the Protection of Performers, Producers of Phonogram and Broadcasting Organizations (Rome 1961) (known as the "1961 Rome Convention" or "Neighboring Rights Convention").

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A detailed comparison of copyright and neighboring rights doctrines is beyond the scope of this report. The systems are quite different, however, and copyright is clearly the stronger form of protection (e.g., longer term of protection; broader and more explicit rights; stronger civil and criminal remedies).

Neighboring rights are well-entrenched in Europe, and are rooted in the belief that authors of literary and artistic works merit stronger protection than the producers, performers, and broadcasters who are protected by neighboring rights doctrine. This explains why the European Union has extended the copyright term to life plus 70 but accords only 50 years protection to neighboring rights.

The distinction is drawn, in large part, upon a judgment as to the nature of "authorship:" that is, what is considered the original, creative product of intellectual effort. The distinction is based in part also on who engages in the intellectual effort to create the object of protection.

In Europe, records are considered essentially mechanical contrivances -- the product of engineers, technicians, and technology. The engineers and technicians, whose effort results in an impersonal technological product, are not generally considered "authors" under European copyright theory. Performers are recognized as "artists," but they merely interpret and render the works of composer-lyricists. Performers do not "create works of authorship," as that concept is understood in Europe.

Under European theory, therefore, the author is entitled to a higher status and greater legal protection -- copyright protection. Record producers, performers, and broadcasters warrant a less strong form of protection, which is related to copyright but is lesser in duration, scope, and significance -- "related rights."

Sound recordings have been pegged as the subject of related rights protection. The Europeans do not recognize that sound recordings are eligible for protection under the Berne Copyright Convention. For them, the 1961 Rome Convention on Neighboring Rights is the main vehicle for sound recording protection. International obligations may also be governed by the 1973 Geneva Phonogram Convention, which allows a country to elect the legal theory (neighboring rights, copyright, unfair competition, criminal law, or other laws) under which it protects against piracy of sound recordings.

The United States has encountered a stonewall of resistance in its efforts to upgrade protection for sound recordings, except that the effort to increase the term, from the unacceptable 20 years to the minimally acceptable 50 years, has met with success.

One justification for the Digital Performance Right Act was that further efforts to improve international protection for American sound recordings could

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not be successful until the United States granted some form of a public performance right to sound recording copyright owners.

At the very least, it was argued that, without recognition of a public performance right, American performers will be denied their fair share of foreign performance royalties since these royalties are generally paid on the basis of reciprocity.

DIGITAL PERFORMANCE RIGHT ACT

Basic Features

The Digital Performance Right Act of 1995 creates a narrow, limited right in digital transmissions of sound recordings. Section 106 of the Copyright Act is amended to add a new "exclusive" right "in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

The right applies to audio not video transmissions. That is, it does not apply to transmissions of audiovisual works, including motion pictures. The right applies only to digital transmissions. Most transmissions today are in analog form, and this new right does not apply to them. The transmission must be a public[32] and not a private transmission.

The right applies to subscription transmissions and generally does not apply to noninteractive, nonsubscription transmissions. Most importantly, the right applies to transmissions by interactive services (i.e., "pay-per-listen," "audio-on-demand," or "celestial jukebox" services) whether they are provided on-line or otherwise, and whether or not there is a charge for the service.

Many kinds of digital audio transmissions of sound recordings[33] are exempt: traditional radio and television broadcasts (including future digital broadcasts); background music services that transmit to businesses; so-called "storecasting," that is, internal transmissions by a business on or around its

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[32]A transmission to the public occurs if a performance or display is communicated to a place open to the public, or at any place where a substantial number of persons beyond a normal circle of family and its social acquaintances is gathered, or to the public "by means of any device or process whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." 17 U.S.C. §101 (definition of "publicly").

[33]It is important to understand that these exemptions apply to sound recordings. In many cases, the transmission of the underlying musical work is subject to copyright licensing under the public performance right accorded musical works by 17 U.S.C. §106(4). This existing musical performance right is unaffected by the proposed new right for sound recordings. The musical performance right is much broader than the narrow, limited right the Act accords sound recordings.

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own premises; initial nonsubscription transmissions; initial retransmissions of a network feed to its affiliates; and so-called "on-hold music" transmissions via telephone to a caller waiting for a response.

The Act contains several provisions to safeguard the rights of the composers and lyricists whose musical works are recorded by record producers and performing artists. Public performance of the musical work must be duly licensed, as under prior law, unless one of the limitations to the music performing right applies. The sound recording copyright owner can either clear the music performing right on behalf of its own licensees of the digital audio transmission, or separate music performing right licenses may be obtained by each digital audio transmission service and by any record producer authorizing a transmission of a sound recording containing a musical work. The rights of copyright owners and the limitations on those rights outside of the amended 17 U.S.C. §114 are unchanged, except to the extent 17 U.S.C. §115 is explicitly amended.

Noninteractive Subscription Services

Subscription services are eligible for a new statutory license if they meet five conditions. The service must not be interactive, must not exceed a specially defined "performance complement," must not publish programming schedules in advance or make prior announcements of specific sound recordings, must not cause the receiver's equipment automatically to switch channels (except in the case of a business establishment), and must carry within the transmission certain information the sound recording copyright owner may have encoded in the recording.

The service entity must, of course, also pay the proper royalty fee and comply with other requirements in a new 17 U.S.C. §114(f).

To be eligible for the statutory license, the transmissions must remain within the so-called "sound recording performance complement." The service entity must not transmit, on a particular channel in any rolling three-hour period: i) more than 3 different selections from one phonorecord[34] (vinyl record, cassette, compact disc, etc.) or more than 2 selections consecutively from one phonorecord; or ii) more than 4 different selections by the same featured recording artist[35] or from any set or compilation of phonorecords.

The purpose of these restrictions on eligibility for the statutory license is to inhibit the transmission of record "albums" in their entirety, and to inhibit

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[34]The reference to "different" selections permits the transmission of the same selection without limit. This language was adopted to facilitate "top 40"- type formats.

[35]The term "featured artist" includes not only solo performers, but also a performing group or the most prominent individual artist. Both the group and the individual artist may be "featured artists" if they are identified with equal prominence.

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the transmission over a short time period of many performances by one artist.[36]

The royalty rates and additional terms for the statutory licenses will be set by voluntary negotiations, if possible,[37] or by a copyright arbitration royalty panel ("CARP") supervised by the Librarian of Congress, as a last resort.

The Act specifies the distribution of royalties to both featured and nonfeatured artists in the case of the statutory license. These artists receive 50 percent of the statutory royalties. Of the total royalties, 45 percent are distributed to featured artists; 2 1/2 per cent each will be placed in escrow accounts for distribution to nonfeatured musicians and nonfeatured vocalists.

Royalties received through voluntary licenses will be distributed to featured and nonfeatured artists in accordance with applicable collective bargaining agreements.

To assuage concerns about unfair voluntary licensing practices, the Act also provides restrictions about licensing to affiliated entities. A new 17 U.S.C. §114(h) is intended to ensure competitive licensing practices by requiring that the terms offered non-affiliated, bona fide digital program entities must be no less favorable than those granted to affiliates.[38] These obligations do not apply a license granted solely for promotional purposes. The obligations also do not apply where the affiliate is an interactive service (but other conditions apply, as discussed below).

Interactive Services

Interactive services like pay-per-listen and audio-on-demand are really the main object of the new digital audio transmission right. Sound recording copyright owners believe these services will grow in popularity and, if

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[36]The inadvertent playing of too many selections from different phonorecords is generally not a violation of the performance complement, but the willful attempt to circumvent the complement makes the transmission a copyright infringement. The Act also provides that if you willfully play 5 selections by one featured artist in a three-hour period, a violation occurs even if the selections are from different phonorecords and the transmitting entity did not know it had exceeded the performance complement.

[37]17 U.S.C. §114(e)-(f). The Copyright Office has published a notice in the Federal Register [60 Fed. Reg. 61655, December 1, 1995] initiating the six month voluntary negotiating period. Any terms and rates agreed to will be effective from February 1, 1996 through December 31, 2000. Parties that do not reach an agreement by June 1, 1996, may request arbitration by a CARP panel by filing a petition with the Copyright Office between June 2, 1996 and August 1, 1996.

[38]Where there are material differences in the licenses sought, variations are permitted. For example, rates and terms will depend upon the type of service, the kind and number of recordings licensed, the number of subscribers served, and the frequency and duration of the use.

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uncontrolled, will be capable of substantially displacing retail sales of sound recordings.

Unlike subscription services, interactive services do not have the privilege of statutory licensing. The licenses must be voluntarily negotiated. The bill, nevertheless, subjects these "exclusive" licenses to strict conditions, principally because music copyright owners (whose performance rights are licensed on a nonexclusive basis)[39] did not want the sound recording copyright owners to have the ability to act as "gatekeepers" over which music is available through the interactive services.

No limitations apply if the sound recording copyright owner licenses the interactive service on a nonexclusive basis.

An exclusive license from a sound recording copyright owner to an interactive service generally i) cannot exceed 12 months but may be extended to 24 months if the sound recording copyright owner holds fewer than 1000 copyrights, and ii) cannot be renewed by the same interactive service until 13 months after the expiration of the license.

These conditions on exclusivity do not apply, however, if the sound recording copyright owner grants licenses to 5 different interactive services each covering at least 10 percent of the licensor's sound recording portfolio licensed to interactive services but in no event covering less than 50 sound recordings. Also, the conditions on exclusivity do not apply if the license only permits performance of up to 45 seconds of a sound recording and its sole purpose is to promote the distribution or performance thereof.

Mechanical Royalties in Digital Phonorecord Deliveries

The Digital Performance Right Act also amends 17 U.S.C. §115 -- the compulsory license for mechanical reproduction of music -- by extending the mechanical license to so-called "digital phonorecord deliveries." The existing mechanical license applies to phonorecords primarily "made and distributed" to the public for private use.

Music copyright owners were greatly concerned that, if the new digital audio transmission right were enacted, recording companies might license transmission services whose customers would have copies delivered via the transmission in lieu of purchasing a phonorecord. Sound recording copyright owners would be compensated under the licensing agreements, but music copyright owners would not be compensated for the mechanical royalties lost by the displacement of record sales. The solution proposed by the music copyright owners, and ultimately incorporated in the Act, was to extend the mechanical

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[39]At least in the case of the American Society of Composers, Authors, and Publishers ("ASCAP"), a music licensing society that licenses the public performance of music on behalf of authors and publishers, an antitrust consent decree mandates issuance of the license on a nonexclusive basis.

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license to those "digital phonorecord deliveries" that are the functional equivalent of a sale of a record.

A "digital phonorecord delivery" is defined as delivery of a sound recording by a digital transmission that results in a "specifically identifiable reproduction by or for any transmission recipient." The Act intends that mechanical royalties are payable if a reproduction of the sound recording by its customers could be identified by the transmission service. Unlike the new statutory license in 17 U.S.C. §114 (which does not apply to interactive services), the amended mechanical license would be available either for certain subscription services or for interactive services.

A "digital phonorecord delivery" does not occur, however, in the case of a real-time noninteractive subscription transmission where no reproduction is made to amplify the sound for the recipient. The mechanical license is not triggered by a fee-based noninteractive subscription service even if the customer in fact records the subscription programming. Of course, the subscription service is subject to the "performance complement" and other conditions in order qualify for the statutory license. The "complement" and the rules against publishing program schedules and prior announcement of specific recordings are intended to make it less likely that a customer will copy a subscription transmission.

Legislative Policy Issues Resolved by the Act

At the House hearing on June 28, 1995, Chairman Carlos Moorhead of the Subcommittee on Courts and Intellectual Property announced that the major private sector interests affected by the then pending bill had reached a compromise on the remaining legislative policy issue. This compromise was later incorporated in S. 227 as it passed the Senate on August 8, 1995 and in H.R. 1506 as it passed the House on October 17, 1995.

The major policy issues that were contested in the legislative process and the solutions reflected in the Digital Performance Right Act are as follows:

1. Liability of broadcasters

Historically and in the 104th Congress, broadcasters adamantly opposed the enactment of a public performance right in sound recordings. They believe this right, if legislated and applicable to them, would significantly increase their costs of doing business, and that they can not easily pass the costs on to advertisers. Broadcasters also argue that free airplay substantially increases record sales. They argue that record producers and performers should pay them, if any payments are due, rather than obligate broadcasters to pay for playing records over the air.

Broadcaster opposition to the new digital transmission right in sound recordings was removed by fully exempting traditional broadcasters from any

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liability for performances of sound recordings -- both with respect to analog and future digital transmissions.

Similarly, other existing nonsubscription and noninteractive music services are also generally exempt from any liability. The exempt services include background music, internal transmissions by a business on or around its own premises (i.e., "storecasting"), network retransmissions to affiliates, and "on-hold" music that is transmitted while a telephone caller awaits a response.[40]

2. Exclusivity: The record producer as "gatekeeper"

Music copyright owners, joined by digital cable subscription services, expressed serious opposition to the grant of an exclusive digital transmission right in sound recordings.

Music copyright owners license the music performing right through licensing organizations (ASCAP, BMI, and SESAC) on a nonexclusive basis.[41] In the legislative process, they strongly contested the grant of an exclusive right to record producers which, the music copyright owners said, would make the record producers "gatekeepers" over which recorded music is licensed for digital transmission.

At least one digital cable subscription service was concerned that vertical control of the recording industry and potential transmission services could lead to monopolistic practices, if an exclusive right were granted.

The legislative solution reflected in the Act is two-fold. First, in the case of subscription services, the right is not exclusive. A statutory license (i.e., compulsory license) is available to subscription services who comply with the "sound recording performance complement" and related conditions. Second, in

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[40]Again, these exemptions apply only to the new digital audio transmission right for sound recordings. The exemptions do not affect existing law with respect to public performance of musical works, motion pictures, etc. Most of the exempt sound recording transmissions would require a license from the music copyright owner, if music is transmitted publicly. Broadcasters, background music services, and "on-hold" music services must obtain music performing licenses.

[41]The public performance of music is licensed on a collective basis because this has proved to be the most effective and efficient way to administer and enforce the music performing right. Reduced transaction costs benefit both the licensor and the licensee. Collective administration has been subject to many antitrust challenges, but the Supreme Court's recent jurisprudence upholds the legality of this licensing method. ASCAP is specifically required by an antitrust consent decree to license its musical repertoire on a nonexclusive basis. BMI licenses on a nonexclusive basis also. The same is generally true of the much smaller SESAC, although its specialized repertoire may be licensed exclusively. Since SESAC is small, antitrust considerations are less relevant. Individual music copyright owners can license on an exclusive basis, but the transaction costs for licensor and licensee make this method impractical.

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the case of interactive services, the exclusive right is subject to restrictions. Basically, a license to an interactive service cannot exceed 12 months (or sometimes 24 months) and cannot be renewed by the same service until 13 months after the prior license expires.

3. Mechanical music licensing

Music copyright owners pressed vigorously for changes in the mechanical music license to ensure they would be compensated for the delivery of copies via a licensed transmission, which would have the effect of replacing the purchase of a record.

The solution adopted by the Act extends the mechanical license to those "digital phonorecord deliveries" that are the functional equivalent of a sale of a record and are capable of being identified.

IMPLICATIONS FOR NATIONAL INFORMATION SUPERHIGHWAY

Policy-makers, members of the academic communities, and members of the corporate world who have studied the policy issues involving the national information superhighway generally recognize that legal protection for, and public access to, copyrighted materials on computer networks remain among the major unresolved policy issues.

While the Digital Performance Right Act does not address computer network issues directly, the limited digital audio transmission right for sound recordings may be the forerunner of some of the solutions ultimately adopted. These solutions include: more clearly defined rights; limitations on the rights including, perhaps, some form of statutory licensing; and antitrust-related provisions to guard against undue business barriers, discriminatory licensing, and vertical control of services and access.

The Working Group on Intellectual Property ("IP Working Group") of the White House Information Infrastructure Task Force issued a preliminary draft report in July 1994 containing recommendations for amendments to the copyright law. The IP Working Group, chaired by Commissioner of Patents and Trademarks Bruce Lehman, issued its final recommendations on September 5, 1995.[42] These recommendations are embodied in S. 1284 and H.R. 2441.

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[42]THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE, INFORMATION INFRASTRUCTURE TASK FORCE 9 (September 1995) (Hereafter: "Report of IP Working Group").

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Recommendations of the 1995 Report

The 1995 Report contains three interrelated recommendations to redefine fundamental copyright law concepts with respect to transmissions.[43] The Copyright Act's exclusive right of "public distribution" of copies or phonorecords would be expanded to include "transmissions" to the public. A related proposal would amend the definition of "transmit" to include distribution of a reproduction of a work which has been fixed beyond the place from which it was sent. A third proposal would redefine the term "publication" to include transmissions.

Another recommendation would extend the prohibition on importation of copies or phonorecords to importation by transmission.

Finally, the Report of the IP Working Group recommends adoption of a broadr public performance right in sound recordings rather than the narrow, limited right legislated in the Digital Performance Right Act.

Analysis of the 1995 Report Recommendations

1. Transmission, Distribution, and Publication Redefined

The proposal to expand the public distribution right to include transmissions is a major amendment of the copyright law.

Under existing law, the distribution of the copy or phonorecord is within the control of the copyright owner (subject to exceptions such as the "first sale" doctrine).[44]

The effect of the 1995 Report recommendation is to treat the transmission itself as part of the exclusive right of public distribution, even if the transmission is not a "public" performance and even if multiple copies are not made. Both analog and digital transmissions would be covered by the expanded definitions.

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[43]This CRS Report briefly reviews only the recommendations related to transmissions of copyrighted works. The Report of the IP Working Group also includes recommendations on library exemptions, reproduction for the visually impaired, technological means of safeguarding proprietary rights, copyright management information, patents and trademarks. These issues are beyond the scope of this report. For an analysis of all of the recommendations, *see* Schrader, *Copyright Proposals for the National Information Infrastructure,* CRS Report 95-1166 A.

[44]The "first sale doctrine" refers to the principle of exhaustion of the distribution right by the first authorized sale of a copy. 17 U.S.C.S109. Computer programs and sound recordings, however, are not subject to the first sale doctrine. Copyright owners of these works have an exclusive right to control commercial rentals.

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Unlike the 1994 Draft Report, the final Report does not attempt to define by statute when the transmission becomes a distribution rather than a performance of a work.

Under this proposal, anyone who transmits a copyrighted work (e.g., by a local, regional, national, or international computer network; by broadcasting; by satellite distribution; by wireless communications, etc.) would have to obtain a license from various copyright owners, unless existing exceptions and limitations on distribution of copies or phonorecords apply.

Permission or a license from the copyright owner would apparently be required for each initial and subsequent transmissions. Presumably, it would be possible by contract to clear the rights at the source of the transmission for the entire chain of further transmissions, either by individual transaction licenses or by collectively administered "blanket" licenses. The contract and the attendant compensation would presumably take account of the right of the copyright owner to authorize or deny the transfer of a copy via a secondary or tertiary transmission, etc.

The final Report assumes that existing limitations that have applied to distribution of tangible copies and phonorecords are adequate to set appropriate limits on the new transmission right.[45] No new limitations, specially crafted for electronic transmissions, are recommended.[46] The copyright owner's authorization (that is, a license or permission to transmit) would be required, arguably, for transmissions that are exempt under existing law because the acts do not constitute a "public" performance.

Current copyright law generally maintains a strong distinction between acts that constitute a "distribution of copies" of a work and acts that constitute a "public performance" of a work. The scope of the rights and the limitations on those rights vary depending upon whether the alleged infringing act is a "distribution" or a "performance."

Some examples should illustrate the current distinctions between "distribution" and "performance." Usually, the publication concept applies to distribution of a substantial number of copies or phonorecords, but, under certain circumstances, distribution of one or a few copies may qualify as a "publication." In any case, if publication occurs, that act triggers several legal consequences in U.S. copyright law (e.g., how the copyright term is computed and its length; eligibility of foreign nationals to claim U.S. copyright protection;

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[45]The Report of the IP Working Group asserts that it has not recommended creation of a new right. Its recommendation purports to clarify existing law. Arguably, a "clarification" that is achieved by redefinition of an exclusive right and by changes in key statutory definitions, goes beyond mere clarification of the law.

[46]The Report does contain recommendations for amendment of 17 U.S.C.§108 to permit certain digital copying and digital preservation by libraries. These recommendations, however, do not apparently apply to transmissions.

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application of the public broadcasting compulsory license; application of the digital audio recording statutory license; library reproduction exceptions of 17 U.S.C. §108; and awards of statutory damages and attorneys fees pursuant to 17 U.S.C. §§412, 504, and 505). On the other hand, exposure of a copyrighted work to an audience of millions by means of a public performance does not itself constitute publication.

As another example, the limitations on the rights of "distribution" and "public performance" are markedly different. The first sale doctrine generally applies to distributions. It does not apply to performances.[47] The limitations on the public performance right, although many, are narrowly drawn (e.g., the performance of a motion picture in a face-to-face classroom setting is exempt from copyright liability, but a license must be obtained from the copyright owner for transmission of the motion picture in instructional broadcasting).

The existing law's distinctions between "distribution" and "performance" originated in the early days of copyright law and arise from the "Gutenberg" print era. The distribution or publication of "copies" was assigned one set of legal rules. The live performance of a work, which involved no copy, was assigned another set of legal rules.

As new technologies developed, they were generally "pushed" into either the "copy" or "noncopy" set of rules. Computer-assisted printing and photocopying are treated under the distribution-reproduction rules. Radio, television, cable transmissions, and satellite transmissions are treated under the performance rules.

The convergence of computer and telecommunications technologies in the information superhighway and elsewhere leads to proposals to merge the separate rules that have generally applied to these different technologies.

The effect of the IP Working Group's recommendations would be to blur the traditional copyright distinctions between "copying" and "noncopying" activities. In the electronic environment, it is argued, legal distinctions between "copying" and "noncopying" activities no longer make any sense.

2. Expanded Importation and Public Performance Rights

The 1995 Report also recommends expansion of the importation right to include transmissions, and the grant of a full public performance right in

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[47] The IP Working Group has abandoned the former attempt to define which transmissions are "distributions" and which are "performances." It makes no changes in the first sale doctrine, however, so it is unclear when a transmission exhausts the distribution right.

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sound recordings, although the latter recommendation is not accompanied by proposed statutory language.[48]

The bills now pending to implement the IP Working Group recommendations (S. 1284 and H.R. 2441) do not propose any express change in the digital audio transmission right for sound recordings. The proposed definitional changes for the terms "transmission," "distribution," and "publication," however, may create new liability for traditional users of transmissions, unless new limitations are adopted.

Although the IP Working Group would extend the prohibition on importation to transmissions, the United States Customs Service would not be required to enforce the prohibition. Rightholders would enforce the importation prohibition through the courts.

The major purpose and effect of the expanded distribution and importation rights would be to give United States rightholders the ability to require national and global licensing of their works. Domestic and foreign database vendors and suppliers of information products who utilize the Internet or other computer networks would have to obtain licenses to use American copyrights in their services and products.

INTERNATIONAL IMPLICATIONS

Proponents of a digital transmission right in sound recordings presented two major arguments for the new right. First, they argued, appropriate domestic protection for sound recordings must include the right to authorize or limit the digital transmissions because copies made from these transmissions are likely to displace record sales. The Recording Industry Association of America ("RIAA") asserted that present and future digital music services could eliminate a major source of revenue for record companies. The result could be a "vast reduction in the production of recorded music."[49]

The other major justification for the new right was that its creation should improve the United States negotiating position in international copyright and trade discussions, especially with those countries who are reluctant to upgrade

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[48]Report of the IP Working Group, at 225. No explanation is given for the omission of any proposed statutory language to implement the recommendation in principle with respect to a public performance right in sound recordings. It is possible that the Working Group felt that, since S. 227 and H.R. 1506 were under active consideration when the final report was issued, their recommendation in principle was sufficient. It is also possible that the Working Group concluded it was too late to persuade the Congress to enact a full public performance right in sound recordings as part of the consideration of S. 227 and H.R. 1506.

[49]Testimony of Jason Berman, RIAA, before the House Subcommittee on Courts and Intellectual Property (June 21, 1995) at 8.

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their protection of sound recordings. A related point was that U.S. rightholders and performers should be better able to obtain their fair share of royalties for performances of their works in foreign countries.

Several witnesses at the legislative hearings on S. 227 and H.R. 1506 questioned whether or not United States performers and record producers will receive any sound recording performance royalties from countries who apply a "related" rights regime to sound recordings. Unlike copyright treaties, which are premised on national treatment,[50] related rights protection is generally extended on the basis of reciprocity: country "A" rightholders receive only as much protection in country "B" as the rightholders of the country "B" receive in country "A." Except for the public performance right, the U.S. grants sound recordings more protection than any other country. Nevertheless, it is not clear that the narrow digital audio transmission right granted sound recordings by the Digital Performance Right Act will result in increased royalty payments for performances of American sound recordings in countries that demand strict reciprocity.[51]

International Impact According to Proponents of a Sound Recording Performance Right

Proponents of a performance right in sound recordings argued that creation of the right, even if a limited one, is an essential first step on the road to securing adequate protection of sound recordings abroad and a fair share of foreign performance royalties. U.S. trading partners, especially the European Union, have questioned the U.S. commitment to high level protection for sound recordings. Those countries who favor low-level protection have pointed to the U.S. lack of a public performance right as justification for their position.[52]

Government witnesses at the legislative hearings gave some support to this argument, although they also expressed doubts that the narrow, limited right granted by the then pending bills would have a significant, positive impact on the U.S. negotiating position and the royalty share of Americans. The Commissioner of Patents and Trademarks observed that even a full public

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[50]Under national treatment, the nationals of Country "A" are protected in Country "B" on the same basis as Country "B" protects its own nationals, even if "A" offers a much lower level of protection than "B." Under a system of reciprocity, each country grants and receives approximately the same level of protection.

[51]Both the Register of Copyrights and the Commissioner of Patents and Trademarks in their testimony on the pending bills expressed serious doubt about the positive impact of the bills on the ability of American performers and record producers to receive foreign royalties. Both government witnesses, however, supported enactment of even a limited public performance right, while expressing a preference for a broader right.

[52]Testimony of Jason Berman, Recording Industry Association of America ("RIAA"), before the House Subcommittee on Courts and Intellectual Property (June 21, 1995) at 10-11.

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performance right would not guarantee higher levels of foreign protection but would remove a "tremendous stumbling block" for U.S. negotiators.[53] The Register of Copyrights noted that American performers and record producers should benefit both here and abroad from a public performance right, but stated it is not clear whether the limited right of the pending bills will qualify U.S. authors for royalties where payment is based upon reciprocity.[54]

The representative of performers commented that passage of the bill will demonstrate to other countries that the United States cares about its creative artists as much as the rest of the world cares about their own artists.[55]

International Impact According to Opponents of a Sound Recording Performance Right

While broadcasters did not oppose the digital audio transmission right as enacted since they are exempt from liability, they maintained a watchful eye on the progress of the legislation. They have noted the concerns from government witnesses that the bills may not create a broad enough right to have a positive effect on the international protection of U.S. performers and record producers. Broadcasters cautioned that Congress should guard against any effort to create a broad sound recording performance right through the "backdoor," that is, through an international obligation that the U.S. must create this broader right.[56]

Broadcasters remain the core of the opposition against a broad performance right in sound recordings. They argue as follows with respect to international implications. Sound recording performance rights are found in countries where the broadcasting organizations are state-owned. In this context, the payments by the government to performers and record producers are a subsidy to encourage domestic cultural activity.

Of the six major recording companies in the U.S., five are foreign-owned. Therefore, any increase in record royalties benefits foreign corporations at the expense of U.S. broadcasting interests.

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[53]Testimony of Bruce Lehman, Commissioner of Patents and Trademarks, before the House Subcommittee on Courts and Intellectual Property (June 28, 1995) at 6.

[54]Testimony of Marybeth Peters, Register of Copyrights, before the House Subcommittee on Courts and Intellectual Property (June 28, 1995) at 24 and 27.

[55]Testimony of Dennis Dreith, representative of the Recording Musicians of America and the American Federation of Musicians, before the House Subcommittee on Courts and Intellectual Property (June 28, 1995) at 9.

[56]Testimony of Edward Fritts, National Association of Broadcasters, before the House Subcommittee on Courts and Intellectual Property (June 21, 1995) at 17.

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While virtually all performers on U.S.-produced recordings are American nationals and would arguably benefit from a broader performance right, some countries may be unwilling to pay sound recording royalties to U.S. performers under any circumstances. For example, some countries have stated they will not pay royalties to U.S. interests for copying of sound recordings on digital recording devices because the U.S. law[57] is too narrow (in that it does not cover analog copying). These countries will pay only on the basis of strict reciprocity.

If the price of harmonization is application of the performance right against broadcasters, the price for American broadcasting interests is too high to pay, according to the National Association of Broadcasters. [58] They have urged the Congress to make clear to government officials that the Digital Performance Right Act is as far as Congress is prepared to go in creating performance rights in sound recordings.

CONCLUSIONS

Sound recordings were not granted federal copyright protection until 95 years after Thomas Edison invented phonograph records. When sound recordings gained copyright protection in 1972, the rights were significantly narrower than the rights granted music and other copyright subject matter. Most notably, sound recordings (as distinct from the music or literary work embodied in the recording) did not enjoy a right of public performance.

The lack of a public performance right in sound recordings before 1995 can be attributed since the mid-1960s primarily to the strong opposition of broadcasters. Authors and publishers of musical works and the music performing right societies, while not opposed in principle to the sound recording performance right since the mid-1960s, have had serious reservations about the impact of such a right on performing and mechanical license rights in musical works.

The Digital Performance Right in Sound Recordings Act of 1995 created a new right in sound recordings "to perform the copyrighted work publicly by means of a digital audio transmission," which is generally effective February 1, 1996. Broadcasters are exempt from liability under the Act.

The right applies to audio, not video transmissions. It applies only to digital, not analog transmissions. It applies to public, not private transmissions.

The right applies to subscription transmissions but generally does not apply

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[57]The Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237, codified as chapter 10 of title 17 U.S.C.

[58]*Id.* at 17. Broadcasters also argue that there is no evidence that digital audio broadcasting, which is years in the future in the U.S., will threaten record sales. *Id.* at 18.

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to noninteractive, nonsubscription transmissions. It applies to interactive services such as "pay-per-listen," "audio-on-demand," or "celestial jukebox" services, whether provided on-line or otherwise, and whether or not there is a charge for the service.

In addition to the exemption for broadcasting, many other existing transmission services are exempt (e.g., background music, "storecasting," and music "on-hold"). All of the exemptions apply only to the sound recording itself and do not change the law concerning public performance of musical works.

Noninteractive subscription services are eligible for a statutory license to transmit the sound recording.

Licensing to interactive services, while not subject to statutory licensing, is subject to restrictions on the length of the license and its renewability.

To ensure compensation for music copyright owners for transmissions that may result in reproduction of the music, the mechanical music license of 17 U.S.C. §115 is extended to "digital phonorecord deliveries."

Proponents of the digital audio transmission right contended that recognition of a public performance right in sound recordings was long overdue. The Act does not extend a full public performance right, but instead narrowly restricts the right to the digital transmissions that arguably may have the greatest impact on future marketing of recordings.

Proponents also contended that enactment of this right was essential to improve the negotiating position of the United States as U.S. negotiators seek greater protection for sound recordings abroad. They also argued that, since most countries pay royalties for uses of sound recordings on a reciprocal basis, enactment of the digital audio transmission right was necessary to provide a basis for American performers and record producers to claim their fair share of royalties for performance of their sound recordings abroad.

Serious doubts were expressed by government officials at legislative hearings as to whether or not the narrow, limited digital audio transmission right would have a positive impact internationally. Countries who accord sound recordings a broad public performance right may demand strict reciprocity before paying royalties to American performers and record producers. These government officials nevertheless supported enactment of even this limited performance right for sound recordings.

Any opposition to the digital audio transmission right that once existed was largely muted by its narrow scope, the exemption of entities like broadcasters, the statutory license for subscription services, the restrictions on licensing interactive services, and the expansion of the mechanical music license to digital phonorecord deliveries.

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The digital audio transmission right has significance for the availability of sound recordings through computer networks and the national information superhighway. The IP Working Group has recommended adoption of a broad public performance right in sound recordings, but the pending bills (S. 1284 and H.R. 2441) to implement their recommendations contain no express language to legislate such a broad performance right. The proposed definitional changes concerning transmission, distribution, and publication, however, may create new liability for traditional users of transmissions, unless new limitations are legislated.

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