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## NO MORE ROCKIN' IN THE FREE WORLD: REMOVING THE RADIO BROADCAST EXEMPTION

BRANDON H. NEMEC

### ABSTRACT

In an era of boundless technological advancement, the music industry faces its most turbulent economic landscape to date. The sustainability of the industry relies on the emergence of an innovative strategy to adapt music's business model and continue to incentivize the creation and performance of brilliant music. A modernized industry model necessitates a reorganization of the copyright protections ultimately designed to motivate exceptional musicians. The following comment proposes a shift in one of music's traditional revenue streams, and examines the controversial public performance exemption provided to broadcast radio. While debate has circulated around the public performance exemption for decades, the changing economic tide has generated new issues and concerns for both the radio and record industries. These issues have made their way to the Congressional floor in the form of the Performance Rights Act ("PRA"). This comment analyzes the arguments for and against enacting the PRA. It further exposes several weaknesses in the radio industry's attack of the PRA, including an examination of radio's promotional value, the absence of reciprocal revenue from international stations, and the disparity between digital and broadcast stations. Finally, it gives a practical proposal to amend the PRA and ensure its passage.

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# NO MORE ROCKIN' IN THE FREE WORLD: REMOVING THE RADIO BROADCAST EXEMPTION

BRANDON H. NEMEC\*

“While there is no question that radio promotes music, it is also clear that music promotes radio.”<sup>1</sup>

## INTRODUCTION

In 1956, Elvis Presley roared to national prominence with a cover of the blues anthem “Hound Dog” on *The Milton Berle Show*.<sup>2</sup> His performance introduced rhythm and blues music to mainstream society and completely revolutionized music.<sup>3</sup> The shock factor from his provocative dance moves and his distinctive voice had an impact on American culture still visible today.<sup>4</sup> Years prior to Elvis’ inimitable performance, composers Jerry Leiber and Mike Stoller wrote “Hound Dog.”<sup>5</sup> Willie Mae “Big Mama” Thornton made the number a hit shortly thereafter, but the song did not see worldwide success until Elvis’ vibrant interpretation.<sup>6</sup> Given the overwhelming reaction from Elvis’ cover, it was certainly evident that there was a value to his performance that transcended the song’s melody.<sup>7</sup> Ironically, under copyright laws enacted decades prior to his ground-breaking recording, Elvis did not receive royalties from the song each time it was played on the radio, but composers Leiber and Stoller did.<sup>8</sup>

Although the music industry has seen consistent economic success from acts such as Elvis’ throughout the twentieth century, the record industry has recently seen a drastic decline in album sales as innovative technologies have dried up traditional revenue sources.<sup>9</sup> The drop in sales has generated activism to protect

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\* J.D. Candidate, May 2011, The John Marshall Law School. B.A. Psychology, minor in General Business, Ohio University, May 2008. I wish to thank my mother Dorothea Howe for introducing me to great writing, my comment editor Kyle Badgley, as well as my candidacy editor Ann Hagerty, and finally my publication editor Andrew Cook, along with each and every one of the staff at *The John Marshall Review of Intellectual Property* for their time, dedication and assistance throughout the writing of this comment.

<sup>1</sup> *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 192 (2009) (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America) (quoting Herbie Hancock) [hereinafter *PRA Hearing*].

<sup>2</sup> ALANNA NASH, *ELVIS ARRON PRESLEY: REVELATIONS FROM THE MEMPHIS MAFIA* 67 (HarperCollins Publishers, Inc. 1995).

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> ACE COLLINS, *UNTOLD GOLD: THE STORIES BEHIND ELVIS'S #1 HITS 29–30* (Chi. Rev. Press, Inc. 2005).

<sup>6</sup> *Id.* at 29–32.

<sup>7</sup> *See id.* at 31–32.

<sup>8</sup> *See* Copyright Act of 1909, § 5(e), 35 Stat. 1075 (1909) (current version at 17 U.S.C. § 102 (2006)).

<sup>9</sup> Phil Hardy, *OECD Report Argues That the Online Music Business Will Change Existing Industry Practices*, MUSIC & COPYRIGHT, Jun. 22, 2005, available at 2005 LexisNexis

music's future business model not only from record industry executives and lobbyists, but also from the artists themselves.<sup>10</sup> On March 10, 2009, Billy Corgan, frontman of The Smashing Pumpkins, addressed Congress as an advocate for recording artists in support of legislation to increase monetary rewards for his peers.<sup>11</sup> Corgan was not there to address innovations in digital music webcasting or online piracy, his criticism was instead directed toward every musician's long-standing and most reliable public platform: the radio.<sup>12</sup>

In his testimony, Corgan acknowledged the radio's promotional utility, describing it as the music industry's free market appraiser.<sup>13</sup> The radio rewards artists who make highly regarded music with airtime and listener exposure,<sup>14</sup> but the Copyright Act only requires radio broadcasters to pay royalties to composers each time their composition is played.<sup>15</sup> The problem, according to Corgan, is that the performers who actually play the songs and put the composer's piece of music into audible form do not receive royalties for what the common law has coined "public performances."<sup>16</sup> In sum, Billy Corgan and the record industry's assertion is that this practice exploits the performers, as it grants the radio stations a free ride under the guise that radio sufficiently compensates the recording artists through free publicity.<sup>17</sup>

The record industry's goal is to convince Congress to lift this exemption, allowing recording artists to receive royalties in accordance with the proposed Performance Rights Act ("PRA"). The PRA, originally introduced to Congress in 2007,<sup>18</sup> was reintroduced in early 2009, and specifically provided performers the right to receive royalties for their performances, thus answering their plea for equal copyright protection.<sup>19</sup> In response, radio broadcasters have lobbied for a resolution to counter the PRA and expressly codify the broadcast exemption, permanently barring any royalty payment from radio stations to artists for the use of their sound recordings.<sup>20</sup> Congress now holds the key to require broadcast radio to compensate

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Music&Copyright, June 22. (reporting a 20% drop in music sales between 1993 and 2003 and describing online piracy as a leading cause).

<sup>10</sup> *PRA Hearing, supra* note 1, at 28–30, 230–36 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins) (letters from musicians Celine Dion, Gloria Estefan, Ricky Martin, Paul McCartney, and Brian Wilson).

<sup>11</sup> *Id.* at 28 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins).

<sup>12</sup> *Id.* at 29.

<sup>13</sup> *Id.*

<sup>14</sup> *See id.*

<sup>15</sup> *Id.*; Copyright Act, 17 U.S.C. §§ 101, 106, 114(d)(1) (2006).

<sup>16</sup> *PRA Hearing, supra* note 1, at 29.

<sup>17</sup> *See id.*

<sup>18</sup> H.R. 4789, 110th Cong. (2007); S. 2500, 110th Cong. (2007).

<sup>19</sup> H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009); H.R. 848 was reintroduced to the House on February 4, 2009 and was sponsored by John Conyers (D-MI). H.R. 848. Patrick Leahy (D-VT) sponsored the Senate's version of the Performance Rights Act, S. 379, on the same day. S. 379. Both bills had been introduced two years prior, and were reintroduced for further consideration. H.R. 848; S. 379; H.R. 4789; S. 2500.

<sup>20</sup> H.R. Con. Res. 49, 111th Cong. (2009); S. Con. Res. 14, 111th Cong. (2009). The Local Radio Freedom Act declares that "Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings." H.R. Con. Res. 49; S. Con. Res. 14.

the recording artists, or it can uphold the royalty exemption and maintain the status quo.<sup>21</sup>

First, this comment evaluates the common law and legislative background leading to the PRA's presentment. Second, the article weighs the positions for and against the PRA and further explores the bill's impact on copyright law within the music industry. Finally, the article proposes the appropriate remedy to satisfy the record industry's primary intent behind the PRA, while also maintaining local radio stations as promotional outlets for musicians.

## I. BACKGROUND

To provide the legal setting for the PRA, the following section first examines the common law interpretation of public performance and radio broadcast rights. Next, it focuses in on Congressional legislation codifying copyright protections for the public performance of sound recordings. Finally, the article examines technological innovations and Congress' difficulty in adapting copyright law to these various technologies, given their magnifying effect on the disparity between composers and musicians in the music marketplace.

### A. *The Common Law's Music Copyright History During the Emergence of Radio*

The United States Constitution expressly grants Congress the power to pass laws to secure exclusive rights for authors in their writings.<sup>22</sup> The Supreme Court did not initially categorize sound recordings as "writings,"<sup>23</sup> but intellectual property legislation has since broadened the realm of copyright law to encompass sound recordings.<sup>24</sup>

Musicians' public performance rights were addressed in *Herbert v. Shanley Co.*,<sup>25</sup> where the Supreme Court held that a band's restaurant performance of a copyrighted musical composition without charge for admission to hear it infringed the exclusive right of the owner.<sup>26</sup> At the time, the Copyright Act required compensation to copyright holders for a for-profit public performance.<sup>27</sup> The Court broadly interpreted the 1909 Copyright Act, reasoning that the band's performance

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<sup>21</sup> PRA Hearing, *supra* note 1, at 18 (testimony of Hon. Chris Smith).

<sup>22</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>23</sup> White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

<sup>24</sup> Copyright Act, 17 U.S.C. § 102; *see also Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcomm. on Courts & Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 184–85 (1995) (statement of Marybeth Peters, Register of Copyrights) [hereinafter *DPRA Hearing*], available at <http://www.copyright.gov/docs/regstat062895.html>.

<sup>25</sup> 242 U.S. 591, 594–95 (1917).

<sup>26</sup> *Id.*

<sup>27</sup> Copyright Act of 1909, § 5, 35 Stat. 1075, 1076–77 (current version at 17 U.S.C. § 106 (2006)).

had an indirect value by attracting diners to the restaurant.<sup>28</sup> Therefore, the music was a “performance for profit” within the 1909 Copyright Act’s reach.<sup>29</sup>

As the radio gained popularity in the early 1930s, Congress recognized the value in radio broadcasts.<sup>30</sup> It extended royalties to music composers, because sound recordings were not yet recognized as copyrightable.<sup>31</sup> Accordingly, litigation subsequently emerged regarding the Court’s construction of the Copyright Act in relation to radio broadcasts.

In the *Buck v. Jewell-LaSalle Realty Co.* decision, the Supreme Court again reviewed a public performance right claim, where a hotel amplified a radio broadcast for its patrons.<sup>32</sup> The Court held that the hotel reproduced a copyrighted composition when it played the radio broadcast for its guests.<sup>33</sup> It found the hotel liable for infringement, rejecting the argument that the radio station was the true source of infringement as the station has no power over who intercepted its broadcast and reproduced it.<sup>34</sup>

Several years after the *Buck* decision, the United States Court of Appeals for the Second Circuit in *RCA Manufacturing Co. v. Whiteman*, rejected a musician’s contention that a radio broadcast of his album constituted copyright infringement.<sup>35</sup> Five of his records in dispute displayed a written restriction in an attempt to prevent the album’s radio broadcast.<sup>36</sup> Justice Hand reasoned that the radio broadcast did not copy the album, but concluded that the station lawfully purchased the record and broadcast it to the public.<sup>37</sup>

These early common law copyright interpretations of the public performance right set the stage for the eventual marketplace disparity and power struggle between musicians and radio stations. The *Herbert* decision recognized a promotional value to public performances and addressed the necessity for due compensation to musicians to ensure their art’s continued progression.<sup>38</sup> The *Buck* and *RCA* decisions, however, limited the potential for blanket copyright protection for public performances by refusing to find broadcast radio liable for copyright infringement in both instances.<sup>39</sup>

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<sup>28</sup> See *Herbert*, 242 U.S. at 594–95.

<sup>29</sup> *Id.*

<sup>30</sup> *Performance Rights in Sound Recordings: Hearing before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 95th Cong. 34–45 (1978).

<sup>31</sup> *Id.*

<sup>32</sup> 283 U.S. 191, 195 (1931).

<sup>33</sup> *Id.* at 202.

<sup>34</sup> *Id.* at 200–01. Justice Brandeis reasoned that receiving a radio broadcast and “reproducing” the sound constitutes a performance, not an original recording. *Id.*

<sup>35</sup> 114 F.2d 86, 87, 90 (2d Cir. 1940).

<sup>36</sup> *Id.* at 87. The Second Circuit ruled that the album’s copyright ended upon the broadcaster’s purchase of the album. *Id.* at 88. The radio broadcaster was free to publicize or play the music after he lawfully purchased the album, foreshadowing Congress’ recognition of copyrights for recording artists and record labels. See *id.* at 88–89.

<sup>37</sup> *Id.* (“It would be the height of ‘unreasonableness’ to forbid any uses to the owner of the record which were open to anyone who might choose to copy the rendition from the record.”).

<sup>38</sup> *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917) (“If music did not pay it would be given up.”).

<sup>39</sup> *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 201–02 (1931); *RCA Mfg. Co.*, 114 F.2d at 88.

*B. Proposed Legislative Reform Places the Same Standard on the Public Performance Right*

Prior to the enactment of the 1976 Copyright Act,<sup>40</sup> the record industry lobbied for Congressional action to address the problems created by the early twentieth century case law, and to amend the Copyright Act to increase monetary benefits for recording artists.<sup>41</sup> As a result, Congress introduced and passed the Sound Recordings Act (“SRA”) in 1971.<sup>42</sup> The SRA established uniform federal protections against unauthorized piracy.<sup>43</sup> The courts followed suit and expressly recognized sound recordings as copyrightable works.<sup>44</sup> While Congress intended for the SRA to increase piracy protection for sound recordings,<sup>45</sup> it left out copyright protections for public performances such as radio play.<sup>46</sup>

As the record industry continued to pressure legislators for copyright reform, it faced considerable opposition from broadcast radio’s lobbying group, the National Association of Broadcasters (“NAB”).<sup>47</sup> In 1976, Congress passed the Copyright Act of 1976, which included comprehensive copyright reform.<sup>48</sup> Unfortunately for the record industry, the public performance right to sound recordings was not a central issue, and Congress chose not to address it.<sup>49</sup> Congress did note its intent to further examine the public performance right in subsequent hearings, and the Register of Copyrights followed through with a report to Congress in 1978.<sup>50</sup>

The 1978 Register of Copyrights’ report not only examined the legal and constitutional background related to recording artist’s copyright protections, but also examined the public performance right’s economic and social impact.<sup>51</sup> The report concluded that the performance right would be constitutional and consistent with other similar copyrightable works.<sup>52</sup> Congress considered the report, but did not enact legislation conforming to the music industry’s goals.<sup>53</sup> Again, the record industry went back to the drawing board to influence Congress to pass meaningful reform for recording artists.<sup>54</sup>

<sup>40</sup> Copyright Act of 1976.

<sup>41</sup> See *DPRA Hearing*, *supra* note 24, at 184–85.

<sup>42</sup> Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

<sup>43</sup> *Id.*

<sup>44</sup> See, e.g., *Goldstein v. Cal.*, 412 U.S. 546, 567 (1973) (interpreting “writings” to include sound recordings); *Shaab v. Kleindienst*, 345 F. Supp. 589, 590 (D.D.C. 1972) (per curiam) (qualifying sound recordings as copyrightable).

<sup>45</sup> See *DPRA Hearing*, *supra* note 24, at 184–85.

<sup>46</sup> See Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391.

<sup>47</sup> *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing on H.R. 4789 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 6 (2007) (statement of Marybeth Peters, Register of Copyrights) [hereinafter *Fair Compensation Hearing*].

<sup>48</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1978).

<sup>49</sup> See S. REP. NO. 104-128, at 357–58 (1995).

<sup>50</sup> See *id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* The Register of Copyrights submitted to Congress that a public performance right to sound recordings is “entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically.” *Id.*

<sup>53</sup> *Id.*; see Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1978).

<sup>54</sup> See S. REP. NO. 104-128, at 358–59 (1995).

*C. Technology Sets the Stage for a Breakthrough in Public Performance Legislation*

The Internet boom in the early 1990s revolutionized communication and sparked an ongoing economic crisis for the music industry.<sup>55</sup> As Internet users became technologically savvy, information sharing quickly turned into a means to obtain copyrighted music without paying the songwriters, recording artists, or record labels.<sup>56</sup> Congress acted quickly to protect the music industry and introduced the Digital Performance Right in Sound Recordings Act (“DPRA”) in 1993.<sup>57</sup> The initial draft of the DPRA included exclusive copyright protections for digitally transmitted sound recordings.<sup>58</sup>

The House and Senate held round table meetings to hear concerns from both sides.<sup>59</sup> What came out of those meetings was the 1994 Consensus Agreement, which set forth a compensation system for digital transmissions of sound recordings and included the public performance radio broadcast exemption in the draft language.<sup>60</sup> Based on the Consensus Agreement, several amendments were introduced, including the currently challenged exemption for radio broadcasts.<sup>61</sup> The Agreement proposed that digital and satellite broadcasters would pay royalties to recording artists, but the public performance exemption would remain for AM/FM radio.<sup>62</sup>

Congress enacted the DPRA in 1995, codifying the proposed exemption for AM/FM radio broadcasts.<sup>63</sup> The DPRA still stands as a breakthrough for recording artists, who acquired an apportioned royalty fee for digital and satellite broadcasts.<sup>64</sup> While the record industry and its supporters could not influence Congress to lift the AM/FM radio exemption, the DPRA laid the foundation towards a future blanket royalty on the public performance of sound recordings.<sup>65</sup>

After the DPRA’s passage, Congressional action on public performances temporarily ceased until 2007. In 2007, the Performance Rights Act (“PRA”) made its

<sup>55</sup> See Eric Pfanner, *Global Music Sales Fell 7% in '08 as CD's Lost Favor*, N.Y. TIMES (Jan. 16, 2009), <http://www.nytimes.com/2009/01/17/business/media/17music.html>.

<sup>56</sup> *Id.*

<sup>57</sup> Digital Performance Right in Sound Recordings Act, H.R. 2576, 103d Cong. (1993); S. 1421, 103d Cong. (1993).

<sup>58</sup> *DPRA Hearing*, *supra* note 24, at 168.

<sup>59</sup> *Id.* The Consensus Agreement was endorsed by the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), the American Federation of Musicians (“AFM”), the American Federation of Television and Recording Artists (“AFTRA”), the National Music Publishers Association (“NMPA”), and the Recording Industry Association of America (“RIAA”). *Id.* Not surprisingly, there was no endorsement from the NAB. *Id.*

<sup>60</sup> *Id.* at 170.

<sup>61</sup> S. 227, 104th Cong. (1995) (enacted); H.R. 1506, 104th Cong. (1995).

<sup>62</sup> *DPRA Hearing*, *supra* note 24, at 171.

<sup>63</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, sec. 3, 109 Stat. 336 (codified as amended at 17 U.S.C. § 114 (2006)).

<sup>64</sup> *Id.* The DPRA entitles a featured or non-featured recording artist who performs on a sound recording that has been licensed for a subscription transmission to receive payments as the copyright owner of the sound recording in accordance with the terms of the artist's contract. *Id.* The DPRA provides for the following allocation of the copyright owner's receipts from the statutory licensing of subscription transmission performances of a sound recording: (1) 2.5 percent to be deposited in an escrow account to be distributed to non-featured musicians; (2) 2.5 percent to be deposited into an escrow account to be distributed to non-featured vocalists; and (3) 45 percent to be allocated, on a per sound recording basis, to the featured artists on such recording. *Id.*

<sup>65</sup> See *DPRA Hearing*, *supra* note 24, at 192.

way onto the Senate floor.<sup>66</sup> The PRA proposed equal copyright protections for recording artists and their songwriters in all radio mediums, requiring AM/FM stations to pay royalties to both composers and performers.<sup>67</sup>

To counter the PRA and the record industry's efforts, a House Resolution was introduced called the Local Radio Freedom Act ("LRFA").<sup>68</sup> The LRFA proposed to block Congress from imposing any new fees, taxes, or royalties on AM/FM radio stations for publicly performing sound recordings.<sup>69</sup> After considerable debate and public attention, Congress declined to enact either bill.<sup>70</sup>

In February of 2009, the PRA was reintroduced in Congress.<sup>71</sup> The LRFA immediately followed in both the House and Senate.<sup>72</sup> There is no doubt that considerable Congressional debate will follow, and given the legislative history, both sides' respective lobbying groups will have a large say in the outcome.

## II. ANALYSIS

With record sales in sharp decline over the past decade,<sup>73</sup> the music industry's business model needs to undergo necessary and equitable changes to ensure the struggling industry's continued survival.<sup>74</sup> Granting artists royalties for AM/FM radio broadcasts is a step in the right direction. Billy Corgan made a strong case for copyright protection for public performances as an issue of "fundamental fairness."<sup>75</sup> The record industry has also garnered considerable support in Congress to pass the PRA,<sup>76</sup> which cleared both committees and has been presented to each respective Congressional body for full consideration.<sup>77</sup>

Supporters of the AM/FM radio exemption have alluded to a "symbiotic relationship" between AM/FM radio and recording artists.<sup>78</sup> The NAB continues to

<sup>66</sup> Performance Rights Act, H.R. 4789, 110th Cong. (2007).

<sup>67</sup> *Id.* at sec. 2.

<sup>68</sup> H.R. Con. Res. 244, 110th Cong. (2007).

<sup>69</sup> *Id.*

<sup>70</sup> 2008 Bill Tracking S. Con. Res. 82, 110th Cong. (2008) (LEXIS); 2008 Bill Tracking H.R. 4789, 110th Cong. (2008) (LEXIS).

<sup>71</sup> H.R. 848, 111th Cong. (2009).

<sup>72</sup> H.R. Con. Res. 49, 111th Cong. (2009); S. Con. Res. 14 111th Cong. (2009).

<sup>73</sup> See *Fair Compensation Hearing*, *supra* note 47, at 3.

<sup>74</sup> See *PRA Hearing*, *supra* note 1, at 29–30 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins).

<sup>75</sup> *Id.* at 29.

<sup>76</sup> See 2010 Bill Tracking H.R. 848, 111th Cong. (2009) (LEXIS) (listing forty-eight co-sponsors to the bill).

<sup>77</sup> *Id.*; see also Bill Tracking S. 379, 111th Cong. (2009) (LEXIS) (noting that the Performance Rights Act has cleared the Senate Committee).

<sup>78</sup> See *PRA Hearing*, *supra* note 1, at 207 (testimony of W. Lawrence Patrick, President, Patrick Communications); see also *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003) (addressing the symbiotic relationship between broadcast radio and musicians).

While radio stations routinely pay copyright royalties to songwriters and composers (through associations like the American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. ("ASCAP") and Broadcast Music, Inc. ("BMI")) for the privilege of broadcasting recorded performances of popular music, they do not pay the *recording industry* royalties for that same privilege. Perhaps surprisingly, this state of affairs, until about ten years ago, produced relatively

rely on the assertion that AM/FM radio provides a powerful promotional tool for musicians, most likely due to its past success.<sup>79</sup> Now that Congress has its full attention directed toward the AM/FM radio exemption, broadcasters will find it more difficult to demonstrate that the exemption makes business sense for the struggling music industry.<sup>80</sup>

The following analysis explores the practical economic effect that removing the AM/FM radio exemption will have on the music industry. Next, it compares the public performances right for sound recordings in the United States with other industrialized nations and evaluates the arguments for and against the United States adopting a similar position. Finally, the analysis breaks down the proposed legislation within the PRA and anticipates how each provision will change the music industry's economic landscape.

#### *A. Removing the Radio Broadcast Exemption and the Economic Impact on the Music Industry*

With the PRA, Congress has a great deal to consider, but a significant consideration is the economic breakdown of the music industry.<sup>81</sup> Due to the recent economic collapse, music's future success depends upon the industry's ability to produce revenue while facing a continuing decline in album sales.<sup>82</sup> This includes the ability to attract new recording artists and pay them just compensation.<sup>83</sup> The new

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high levels of contentment for all parties. The recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings. And in return, the broadcasters paid no fees, licensing or otherwise, to the recording industry for the performance of those recordings. The recording industry had repeatedly sought, however, additional copyright protection in the form of a performance copyright.

*Bonneville Int'l Corp.*, 347 F.3d at 487–88 (footnotes omitted)

<sup>79</sup> See *PRA Hearing*, *supra* note 1, at 207 (testimony of W. Lawrence Patrick, President, Patrick Communications); *Fair Compensation Hearing*, *supra* note 47, at 4.

<sup>80</sup> *PRA Hearing*, *supra* note 1, at 27 (testimony of Hon. F. James Sensenbrenner, Jr., Representative F. James Sensenbrenner directed his attention directly to the arguments posed by the broadcasters, stating:

I hope you and your organization get to the table . . . . If you don't want to get to the table, can you please tell us why during your testimony . . . .

. . . .

. . . There is a problem with this law. You can either be a part of fixing the problem or you can be on the outside. And I think this Committee will be very happy to fix it for you.

*Id.*

<sup>81</sup> See Ethan Smith, *Corporate News: U.S. Album Sales Fell by 13% During 2009*, WALL ST. J., Jan. 7, 2010, at B6.

<sup>82</sup> See *id.* Nielsen SoundScan reported that "U.S. album sales have declined for the eighth time in nine years . . ." *Id.*

<sup>83</sup> See *PRA Hearing*, *supra* note 1, at 29–30 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins).

business model will also necessitate action on behalf of local radio stations that are also suffering the effects of the economic meltdown.<sup>84</sup>

Both sides describe the AM/FM radio exemption as a “symbiotic relationship” between radio stations and recording artists, but there is disagreement as to the extent of this relationship.<sup>85</sup> The “symbiosis” refers to the radio stations’ free broadcast of the artists’ music while the artists receive complementary publicity to a mass media audience.<sup>86</sup> The broadcasters rely on the assertion that radio provides a powerful promotional tool to recording artists seeking to attract publicity.<sup>87</sup> Both judges and legislators have implicitly regarded the symbiotic relationship as an accepted form of compensation for recording artists, ultimately codifying the AM/FM radio exemption in the DPRA,<sup>88</sup> granting AM/FM radio statutory legal protection.<sup>89</sup> Although the symbiotic relationship argument has precluded legislation for a public performance right in the past,<sup>90</sup> they lack strong support, both factually and on their legal basis.<sup>91</sup>

To fully understand the radio industry’s impact on album sales and the alleged promotional utility of broadcast radio, Congress reviewed a statistical analysis of radio’s popularity in relation to album sales.<sup>92</sup> Dr. Stan Liebowitz, a managerial economist from the University of Texas, wrote the report, evaluating album sales in their entirety based on radio play.<sup>93</sup> His report ultimately found that radio play has a negative impact on *overall* record sales.<sup>94</sup>

The report concluded that the broadcasters’ argument rested on an economic theory known as the “fallacy of composition.”<sup>95</sup> The radio industry incorrectly presumes that because radio play benefits a single recording artist’s album sales, it

<sup>84</sup> See *id.* at 39–40 (testimony of W. Lawrence Patrick, President, Patrick Communications). In 2008, radio industry revenues fell nine percent and in 2009, the projected downturn will be approximately thirteen percent. *Id.* at 39.

<sup>85</sup> *Id.* at 192 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America); see also *id.* at 207 (testimony of W. Lawrence Patrick, President, Patrick Communications) (discussing the promotional relationship between musicians and radio stations).

<sup>86</sup> Stan J. Liebowitz, *The Elusive Symbiosis: The Impact of Radio on the Record Industry*, 1 REV. ECON. RESEARCH COPYRIGHT ISSUES 93, 94–95 (2004); see also *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003) (“The recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising . . . . And in return, the broadcasters paid no fees, licensing or otherwise . . . .”).

<sup>87</sup> *PRA Hearing*, *supra* note 1, at 20 (testimony of Hon. Bob Goodlatte).

<sup>88</sup> See Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, sec. 3, § 114 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 101, 106, 114–15 (2006)); *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 499–500 (3d Cir. 2003).

<sup>89</sup> *Id.*

<sup>90</sup> See *Fair Compensation Hearing*, *supra* note 47, at 3 (statement of Marybeth Peters, Register of Copyrights).

<sup>91</sup> See *id.* at 4–5, 8–9 (statement of Marybeth Peters, Register of Copyrights).

<sup>92</sup> *PRA Hearing*, *supra* note 1, at 53–141.

<sup>93</sup> Liebowitz, *supra* note 86, at 93.

<sup>94</sup> Liebowitz, *supra* note 86, at 118.

<sup>95</sup> *Id.* at 117. The fallacy of composition analysis looks to an individual economic impact to draw an incorrect conclusion that the individual impact will be the same as the overall economic impact. *Id.* In sum, the radio industry argues that because playing one song increases album sales for one artist, it will increase album sales for the entire record industry based on the numerous songs that it will play to promote various artists. *Id.*

benefits the record industry's sales as a whole.<sup>96</sup> According to Dr. Liebowitz, if radio stations did not broadcast music at all, album sales and digital music purchases would naturally increase and benefit the record industry's overall revenue because it would leave consumers no free music alternative.<sup>97</sup>

To refute these findings, the NAB funded a 2008 study that achieved the opposite results.<sup>98</sup> Dr. James Dertouzos led the economic research project to quantify the benefit that radio play provides record sales and concluded that the incremental value was approximately a fourteen to twenty-three percent increase in sales.<sup>99</sup> The study addressed the conflicting results from Dr. Liebowitz's report, stating that it relied in inferior data and methodology.<sup>100</sup> Dr. Dertouzos stated that he took a more appropriate measure of radio exposure than Dr. Liebowitz's UT study, and concluded that a performance fee would reduce radio music play, taking the artist's promotional benefit along with it.<sup>101</sup>

The obvious discrepancy between the two reports is that the NAB funded the study that found a positive correlation between radio play and music sales, while the study that supports the PRA's passage was purportedly an independent university study.<sup>102</sup> What certainly raises an eyebrow is that in his address to Congress, Dr. Liebowitz stated that he requested to exchange data with Dr. Dertouzos to resolve the discrepancy, but the NAB declined to share its data, leaving a clear picture of radio's economic impact on the music industry out of reach.<sup>103</sup>

In light of the turbulent economic circumstances that the music industry is currently facing, the opposing opinions present a pivotal conflict for Congress to resolve.<sup>104</sup> The House of Representatives raised the issue at the PRA hearings, and some representatives suggested that a logical resolution to the discrepancy would be to initiate a high-level independent study.<sup>105</sup> Although the NAB appears to be dragging their feet, Congress could provide clarity to the power of radio play's influence on record sales if it appointed an unbiased researcher to settle the dispute between the two reports.<sup>106</sup> Regardless, the NAB still has not met the burden of

<sup>96</sup> *Id.*

<sup>97</sup> See *PRA Hearing*, *supra* note 1, at 52 (testimony of Stan Liebowitz, Ph.D., Ashbel Smith Professor of Managerial Economics, University of Texas at Dallas).

<sup>98</sup> JAMES N. DERTOUZOS, NAT'L ASS'N OF BROADCASTERS, RADIO AIRPLAY & THE RECORD INDUSTRY: AN ECONOMIC ANALYSIS 5 (2008), available at [http://www.nab.org/documents/resources/061008\\_dertouzos\\_Ptax.pdf](http://www.nab.org/documents/resources/061008_dertouzos_Ptax.pdf).

<sup>99</sup> *Id.* at 5.

<sup>100</sup> *Id.* at 36. Dr. Dertouzos pointed out that "[Dr.] Liebowitz[s] model and data are incomplete" because he failed to account for several variables, which the NAB study did take into account. *Id.* at 69–70.

<sup>101</sup> *Id.* at 38, 72–73.

<sup>102</sup> Compare *id.* at 1 (noting that Dr. Dertouzos conducted his research on behalf of the National Association of Broadcasters), with *PRA Hearing*, *supra* note 1, at 53 (statement of Stan Liebowitz, Ph.D., Ashbel Smith Professor of Managerial Economics, University of Texas at Dallas) (noting that Dr. Liebowitz issued his study as an academic work which was "neither commissioned nor paid for by third parties," and stated in his address to Congress that he did not attempt to argue for proposed legislation to the committee).

<sup>103</sup> *PRA Hearing*, *supra* note 1, at 60–61 (statement of Stan Liebowitz, Ph.D., Ashbel Smith Professor of Managerial Economics, University of Texas at Dallas).

<sup>104</sup> See *id.* at 22 (testimony of Hon. Darrell Issa).

<sup>105</sup> See, e.g., *id.*

<sup>106</sup> See *id.*

proving their purported promotional value on record sales, and their refusal to resolve the conflicting results ultimately casts doubt on the symbiotic relationship argument.<sup>107</sup>

The NAB further lacks a legal basis to support their symbiosis argument, given the disparity that now exists between AM/FM stations and their digital radio competitors.<sup>108</sup> Since the DPRA's passage in 1995, digital and satellite broadcasters are required to pay recording artists royalties,<sup>109</sup> and the AM/FM stations still stand strongly behind their assertion that their exemption is compensation for their superior promotional value.<sup>110</sup> Interestingly, the Register of Copyrights found in a 2002 ratesetting proceeding that the promotional value for webcasters and AM/FM broadcasters is relatively equal.<sup>111</sup> Additionally, alternative media sources that have emerged since the exemption's enactment have diluted the overall promotional value that AM/FM radio provides.<sup>112</sup>

During the House floor debate, the NAB downplayed the inequity that the DPRA created, noting the vast number of AM/FM radio listeners compared to the relatively small digital radio markets.<sup>113</sup> According to the NAB, the benefit to recording artists for AM/FM publicity is incomparable to the promotional value from digital broadcasts.<sup>114</sup> Would the NAB concede that local niche radio stations playing to a small audience have little to no promotional value, much like the smaller digital and satellite stations? The NAB claims it is fighting for the exemption to save these small stations, but contradicts itself when it states that small stations have promotional value unworthy of creating a substitute for royalty payments.<sup>115</sup>

There are several flaws in the reasoning behind the NAB's justification for upholding the radio broadcast exemption. It is fundamentally inequitable to force digital radio stations with the same promotional value to pay double the royalties that AM/FM stations are required to pay, both to composers and musicians.<sup>116</sup> This flies in the face of the protections provided to every other copyrightable work, as AM/FM stations are the only third party to have an implied blanket copyright exception.<sup>117</sup> Because it is clear that the AM/FM public performance exception is inconsistent with similar copyright protections, and radio's symbiosis argument is

<sup>107</sup> *See id.*, at 22, 238.

<sup>108</sup> *Fair Compensation Hearing*, *supra* note 47, at 2 (statement of Marybeth Peters, Register of Copyrights).

<sup>109</sup> Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, sec. 3, § 114 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 101, 106, 114-15 (2006)).

<sup>110</sup> *PRA Hearing*, *supra* note 1, at 213-14 (testimony of Steven Newberry, President & CEO, Commonwealth Broadcasting Corporation).

<sup>111</sup> Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 45,240, 45,255 (July 8, 2002) (codified at 37 C.F.R. pt. 261); *see also Fair Compensation Hearing*, *supra* note 47, at 4-5 (statement of Marybeth Peters, Register of Copyrights) (noting a recent finding that the promotional value between digital webcasting and broadcast radio was largely the same).

<sup>112</sup> *See Fair Compensation Hearing*, *supra* note 47, at 4.

<sup>113</sup> *PRA Hearing*, *supra* note 1, at 207 (testimony of W. Lawrence Patrick, President, Patrick Communications).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 143.

<sup>116</sup> *See id.* at 207.

<sup>117</sup> *See* 17 U.S.C. §§ 101, 102(a), 106, 114(d)(1)(A) (2006).

questionable at best. This comment now investigates the reasons in favor of passing the PRA.

*B. The Public Performance Right's Effectiveness Overseas*

At the floor hearings, Representative John Conyers made a compelling point that the United States is one of just four industrialized countries that do not recognize the public performance right for sound recordings.<sup>118</sup> The other countries with similar radio exemptions are China, North Korea, and Iran.<sup>119</sup> With such a politically charged statement on their minds, Congressional leaders challenged the NAB for an explanation as to why the United States maintains a radio broadcast exemption.<sup>120</sup>

Accordingly, the NAB presented a study comparing the radio market in countries that recognize a public performance right to the United States radio industry.<sup>121</sup> The report argued that America's broadcast exemption was an innovative practice that has propelled the United States record industry to worldwide success.<sup>122</sup> It further pointed out that the countries that impose the public performance right "tax" also provide substantial government funding to operate radio stations.<sup>123</sup> Finally, the report showed that the majority of those performance fees go to the record labels, with only a small portion going to the top performing artists in the country.<sup>124</sup>

While the report suggests several downfalls to removing the exemption, it does not take into account the numerous factors behind the United States music industry's global success, instead focusing only on the broadcast exemption.<sup>125</sup> The report fails to address other variables such as the cultural implications or the overall skill of United States musicians as the reason for the industry's success. The report also does not explain why the United States would be unable to arrange a proportional royalty fee system and allow small performers to reap an economic benefit relative to their success. Finally, the NAB provides no specific evidence that a copyright fee to recording artists would harm American music's international popularity.

A pivotal concern for the United States music industry is the loss of international revenue from foreign broadcast stations due to the broadcast

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<sup>118</sup> *PRA Hearing*, *supra* note 1, at 13 (testimony of Hon. John Conyers, Jr.).

<sup>119</sup> *Id.*

<sup>120</sup> *See id.* at 19 (testimony of Hon. Howard L. Berman).

<sup>121</sup> JANE MAGO ET AL., NAT'L ASS'N OF BROADCASTERS, SHOULD THE U.S. LEAD OR FOLLOW?: WHY OTHER COUNTRIES' IMPOSITION OF A TAX ON THE PERFORMANCE OF SOUND RECORDINGS DOES NOT JUSTIFY SUCH A U.S. TAX (2009), *available at* [http://www.freeradioalliance.org/International\\_Performance\\_Tax\\_Paper.pdf](http://www.freeradioalliance.org/International_Performance_Tax_Paper.pdf).

<sup>122</sup> *Id.* at 6–7.

<sup>123</sup> *Id.* at 11–12.

<sup>124</sup> *Id.* at 17. The NAB white paper noted that "77 percent to 89.5 percent of the total fees [generated by performance fees in most European countries] are distributed to only 20 percent of the top earning performers."

<sup>125</sup> *See id.* at 15 ("The recording industry in the U.S. – *with no performance fee* – is twice the size of that of next-largest Japan, and larger than most major European countries combined." (emphasis added)).

exemption.<sup>126</sup> A recent industry estimate showed approximately seventy million dollars in lost revenue that the American record industry could have collected if the United States required other nations to pay royalties to American artists.<sup>127</sup> Facing a continuing profit decline, the music industry needs to be able to make the best use of its assets, including collecting royalties due to musicians. By allowing for this royalty collection, Congress would help the music industry as a whole.<sup>128</sup> While musicians will still make art for art's sake regardless of compensation, making and promoting music while sustaining a living is an incredibly daunting and challenging proposition.<sup>129</sup> A powerful reward for artists to continue to create distinctive music outweighs granting broadcast radio freedom from paying royalties.<sup>130</sup> In fact, copyright law is designed to encourage such creativity.<sup>131</sup>

While the NAB's study successfully provided fodder for floor debate to stall the PRA's passage, it failed to address the absence of royalties flowing into the United States from foreign stations who play American artist's songs overseas.<sup>132</sup> A major hurdle for the NAB to keep the exemption will rest on their ability to provide a basis as to why the United States continues to send royalty payments overseas, while receiving nothing in return.<sup>133</sup>

### *C. Analyzing the Performance Rights Act and the Proposed Changes in Law*

The primary intent behind the Performance Rights Act is to remove the AM/FM radio exemption and apply the public performance right across every radio medium.<sup>134</sup> Because of the considerable dispute that this legislation has previously

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<sup>126</sup> *Fair Compensation Hearing*, *supra* note 47, at 14 (statement of Marybeth Peters, Register of Copyrights).

<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

<sup>129</sup> *PRA Hearing*, *supra* note 1, at 28–30 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins).

<sup>130</sup> *See Fair Compensation Hearing*, *supra* note 47, at 15 (statement of Marybeth Peters, Register of Copyrights).

<sup>131</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>132</sup> *See PRA Hearing*, *supra* note 1, at 205 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>133</sup> *See id.*

<sup>134</sup> H.R. 848, 111th Cong. (2009). The relevant portion of the PRA reads:

(a) PERFORMANCE RIGHT APPLICABLE TO RADIO TRANSMISSIONS GENERALLY.—Section 106(6) of title 17, United States Code, is amended to read as follows:

“...  
“(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.”

(b) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING PERFORMANCE RIGHT.—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking “a digital” and inserting “an”; and

(2) by striking subparagraph (A).

(c) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING STATUTORY LICENSE SYSTEM.—Section 114(j)(6) of title 17, United States Code, is amended by striking “digital”.

brought forth, the drafters put in several provisions and specific exemptions to encourage its enactment.<sup>135</sup>

The true parties competing over the PRA are the large radio and record companies, not necessarily small musicians or radio stations.<sup>136</sup> For that reason, the PRA includes a provision proposing a flat \$5,000 fee for radio stations making less than \$1.25 million dollars a year.<sup>137</sup> This nominal fee protects local radio with royalty fees proportional to the station's profits.<sup>138</sup> While the radio industry argues this fee would virtually wipe out local radio,<sup>139</sup> legislators and music industry supporters have already stated that they are willing to reduce the fee.<sup>140</sup> The NAB purportedly responded with a stubborn refusal to negotiate a new fee, demonstrating their unwillingness to participate in negotiations to accommodate local radio and ultimately stalling the PRA's progress.<sup>141</sup> While small radio is a subject of debate, corporate radio is the real reason for the PRA.<sup>142</sup>

The current proposed PRA also contains amendments that provide exemptions for religious and talk radio stations that use sound recordings for "incidental use."<sup>143</sup> It further provides a similar \$1,000 nominal annual fee for public radio stations to broadcast unlimited copyrighted music.<sup>144</sup> These provisions protect local and independent radio, and the record industry is more than willing to negotiate different rate levels to facilitate the full royalty payouts from large radio stations.<sup>145</sup> As the House adjourned, the NAB remained opposed to negotiations on any part of the PRA.<sup>146</sup>

*Id.* at sec. 2.

<sup>135</sup> *Id.* at sec. 3 (providing exemptions for educational, noncommercial, and religious radio stations, among other exemptions).

<sup>136</sup> See *PRA Hearing, supra* note 1, at 192–93 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>137</sup> H.R. 848. Section 3(a)(1)(D) states:

(D) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues in any calendar year of less than \$1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of \$5,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph.

*Id.* at sec. 3(a)(1)(D).

<sup>138</sup> *PRA Hearing, supra* note 1, at 197 (statement of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>139</sup> *Id.* at 47 (statement W. Lawrence Patrick, President, Patrick Communications).

<sup>140</sup> *Id.* at 193 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>141</sup> See *id.*

We just can't find anyone to sit down with. Despite the call last year from Members from this Committee for us to sit down and negotiate, Mr. Rehr, who runs the NAB, said he would rather slit his throat than talk. I have got to tell you that it makes it hard to negotiate with that kind of player.

*Id.* at 193.

<sup>142</sup> *Id.*

<sup>143</sup> H.R. 848, 111th Cong. sec. 3(b) (2009).

<sup>144</sup> *Id.* at sec. 3(a)(1)(E).

<sup>145</sup> *PRA Hearing, supra* note 1, at 244 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>146</sup> *Id.* at 247 (testimony of Steven Newberry, President & CEO, Commonwealth Broadcasting Corporation). Mr. Newberry stated, "We remain opposed to this legislation. To negotiate on that we think is counter to the interests of our industry and service to the public." *Id.*

Regardless, the radio industry must answer to Congress and currently lacks a substantive legal basis for upholding the AM/FM radio exemption.<sup>147</sup> It must also provide evidence to distinguish between the conflicting economic studies regarding the alleged symbiotic relationship promoting overall record sales.<sup>148</sup> Finally, the broadcast radio industry will have to respond to overwhelming pressures from all sides of the music industry, including popular musicians, who face an unprecedented economic crisis.<sup>149</sup>

### III. PROPOSAL

The stage is set for a “yea” vote on the PRA from a Congressional majority. The record industry has set forth lucid arguments to support a public performance right for sound recordings.<sup>150</sup> Coping with a struggling business model, the music industry needs to ensure that there are still monetary rewards for musicians.<sup>151</sup> Copyright law is intended to reward the creative arts,<sup>152</sup> and lifting the AM/FM radio exemption opens a long overdue revenue source to musicians. The following proposal outlines how removing the radio broadcast exemption complies with the spirit and intent behind the Copyright Act, and the economic benefit that will result by suggesting alternative and additional provisions to the PRA that would ensure its passage to make it more effective. With the PRA’s passage, Congress can create royalty parity for all radio stations.<sup>153</sup>

To implement a bill that will pass through Congress, the PRA will need to strike a balance between musicians and broadcasters.<sup>154</sup> Instead of forcing local stations to pay a royalty fee each time it plays a song, the proposed PRA currently imposes a flat \$5,000 fee on stations with profits less than \$1.25 million.<sup>155</sup> To keep the broadcasters from dodging meaningful debate by constantly referring to struggling

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<sup>147</sup> See *Fair Compensation Hearing*, *supra* note 47, at 8–9 (statement of Marybeth Peters, Register of Copyrights).

<sup>148</sup> Compare Liebowitz, *supra* note 86, at 118 (providing one articulated point of view as to the “symbiotic” effect of broadcast radio); with DERTOZOUS, *supra* note 98, at 72-73 (comparing the different results between the studies regarding radio broadcast’s effect on record sales).

<sup>149</sup> *PRA Hearing*, *supra* note 1, at 230–36. Aside from the legislators proposing the bill, Paul McCartney, Gloria Estefan, John Legend, and Ricky Martin are among those who submitted letters to Congress in support of the Performance Rights Act. *Id.*

<sup>150</sup> See *id.* at 192–93 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>151</sup> See Pfanner, *supra* note 55, at 1–2.

<sup>152</sup> See U.S. CONST. art. 1 § 8, cl. 8; 17 U.S.C. §§ 106, 504 (2006).

<sup>153</sup> See *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing on S.379 Before the S. Comm. of the Judiciary*, 111th Cong. 1 (2009) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat070509.html>.

<sup>154</sup> *PRA Hearing*, *supra* note 1, at 193 (testimony of Mitch Bainwol, Chairman & CEO, Recording Industry Association of America).

<sup>155</sup> H.R. 848, 111th Cong. sec. 3(a)(1)(D) (2009).

local radio,<sup>156</sup> the PRA should instead set up progressive proportional fees based on a percentage of the radio station's profits.<sup>157</sup>

For example, stations that make less than \$125,000 annually could pay a flat \$500 fee for unlimited copyrighted broadcasts.<sup>158</sup> A station earning less than \$250,000 would pay \$1,000, etc.<sup>159</sup> Once a station breaks the \$1.25 million threshold, it begins paying per song royalties.<sup>160</sup> This ensures that the PRA is primarily directed towards the radio giants who are making millions by exploiting the radio exemption, while also protecting local radio stations.<sup>161</sup>

The NAB also argued the deterrent effect that royalty payments would have on emerging artists' airtime.<sup>162</sup> It contended that stations will treat musicians as a "return-on-investment proposition", making them unlikely to play a new artist, knowing that it negatively affects their bottom line.<sup>163</sup> On the contrary, up-and-coming artists are usually featured on small niche or independent broadcast stations, whose royalty payments would be covered under the nominal fee plan. Established artists, such as those featured on large classic rock and "oldies" stations, do not derive the same promotional value from radio play.<sup>164</sup> In fact, many of them are deceased or no longer touring, but big radio continues to profit tremendously from their work.<sup>165</sup> The PRA needs to acknowledge this dichotomy.

It follows that the amended PRA would include an opt-out provision. This provision would permit the artist's to exempt all radio stations, including digital and satellite. The opt-out would allow for new artists seeking the radio's promotional value to waive their copyright protection for a specified period of time and would be renewable. Radio stations could continue their "symbiotic" promotional relationship with those artists who choose to waive royalties. This would also require the stations to rightfully pay-to-play for those musicians who receive no value from airtime.<sup>166</sup> Adding the opt-out provision to the nominal fee payment system for local stations effectively silences the broadcasters' primary opposition to the PRA.<sup>167</sup>

In regards to the altered fee system for small radio stations, section 3(a)(1)(D) of the proposed amended PRA would look like this [proposed changes in italics]:

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<sup>156</sup> *PRA Hearing, supra* note 1, at 143 (testimony of Steven Newberry, President & CEO, Commonwealth Broadcasting Corporation).

<sup>157</sup> *See id.* at 202 (testimony of Hon. Howard Berman) (suggesting that smaller stations pay a graduated fee system based on the station's earnings).

<sup>158</sup> *See id.*

<sup>159</sup> *See id.*

<sup>160</sup> *See* H.R. 848 sec. 3(a)(1)(D).

<sup>161</sup> *See* Press Release, Clear Channel Commc'ns, Inc., Clear Channel Reports Announces First Quarter 2008 Results (May 9, 2008) (reporting "revenues of \$1.6 billion dollars in the first quarter of 2008 . . ."), available at <http://www.clearchannel.com/Investors/Documents/296.pdf>.

<sup>162</sup> *PRA Hearing, supra* note 1, at 143 (testimony of Steven Newberry, President & CEO, Commonwealth Broadcasting Corporation, on behalf of the National Association of Broadcasters).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 192 (testimony of Mitch Bainwol).

<sup>165</sup> *Id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See id.*

SEC. 3. SPECIAL TREATMENT FOR SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS STATIONS AND CERTAIN USES.

(a) Small, Noncommercial, Educational, and Religious Radio Stations.—

(1) IN GENERAL- Section 114(f)(2) of title 17, United States Code, is amended by adding at the end the following:

(D) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has *gross revenues in any calendar year of less than a specified amount set forth in subparagraphs (i) through (x), may elect to pay a flat royalty fee for its over-the-air nonsubscription broadcast transmissions each year, in lieu of the amount such station would otherwise be required to pay under this paragraph. A station earning less than:*

- (i) \$125,000 may pay a flat royalty fee per year of \$500*
- (ii) \$250,000 may pay a flat royalty fee per year of \$1,000*
- (iii) \$375,000 may pay a flat royalty fee per year of \$1,500*
- (iv) \$500,000 may pay a flat royalty fee per year of \$2,000*
- (v) \$625,000 may pay a flat royalty fee per year of \$2,500*
- (vi) \$750,000 may pay a flat royalty fee per year of \$3,000*
- (vi) \$875,000 may pay a flat royalty fee per year of \$3,500*
- (vii) \$1,000,000 may pay a flat royalty fee per year of \$4,000*
- (viii) \$1,125,000 may pay a flat royalty fee per year of \$4,500*
- (ix) \$1,250,000 may pay a flat royalty fee per year of \$5,000*

*Any terrestrial radio station that has gross revenues in excess of \$1,250,000 in any calendar year must pay royalty fees per song play consistent with the amended provisions to Title 17 of the United State Code pursuant to this Act, and is not entitled to satisfy their royalty payment to licensed public performances of sound recordings through any of the flat rate payments set forth in subparagraphs (i) through (x) above. The royalty fees in subparagraphs (i) through (x) shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial or other Federal Government proceeding.*

Regarding the additional opt-out provision, a new provision would be added to section 6 of the proposed PRA that looks like this:

*(3) Waiver of Royalties: At any time the copyright owner of a sound recording to a public performance may choose to waive the royalty fees granted to them under Title 17 of the United States Code. The copyright owner may contract to allow for any radio station, including terrestrial radio stations, subscriptions service radio stations, and digital radio stations, to play the copyright owner's licensed music waiving all rights for the copyright owner to receive royalty payments otherwise required by this Act. Such waiver shall be of a determined duration and renewable at the copyright owner's direction.*

This proposed revision to the PRA serves the function of answering the NAB's primary challenges to the PRA.<sup>168</sup> A progressive fee system adjusted to maintain local radio stations, along with an artist opt-out provision removes any distractions and narrows the debate to allow for the PRA's passage.

#### CONCLUSION

Regardless of the appropriate system to obtain artist royalties from AM/FM radio, the PRA's importance is a Congressional reaffirmation of the value behind the public performance of a composition's material interpretation.<sup>169</sup> Removing the AM/FM radio broadcast exemption is consistent with the Copyright Act's treatment of other copyrightable song distribution mediums.<sup>170</sup> While the music industry must adapt to face its economic challenges, it must also fairly compensate the musicians behind the industry. Radio has relied on the promotional value that airplay grants to recording artists in order to substitute for royalties,<sup>171</sup> but just as artists rely on radio promotion, radio relies on the musicians to produce a quality product.<sup>172</sup> As lyrical icon Billy Corgan candidly stated: "At the end of the day, while everybody over here is talking about the turf wars between who gets what in the pie, if you do not have great music, you are not going to be able to have great radio."<sup>173</sup>

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<sup>168</sup> *See id.*

<sup>169</sup> *Id.* at 245–46 (testimony of Hon. Charles Gonzalez).

<sup>170</sup> *See* 17 U.S.C. §§ 102, 106 (2006).

<sup>171</sup> *PRA Hearing, supra* note 1, at 213–14 (testimony of Steven Newberry, President & CEO, Commonwealth Broadcasting Corporation).

<sup>172</sup> *Id.* at 213.

<sup>173</sup> *Id.* at 207 (testimony of Billy Corgan, Vocalist & Lead Guitarist, The Smashing Pumpkins).