DIGITAL KILLED THE RADIO STAR: THE FUTURE OF THE SOUND RECORDING PERFORMANCE RIGHT

INTRODUCTION

In the eyes of the law, not all copyrights are created equal. Whereas the owners of musical compositions, motion pictures, and other works have long been granted the exclusive right to publicly perform their works,[1] the owners of sound recordings have enjoyed no such right until very recently, and then only a narrow one restricted to digital transmissions.[2] Therefore, while the songwriter and publisher of a song get a royalty every time it is played on the radio, the recording artist and record company are paid nothing. This disparity reflects how sound recordings have been relegated to second-class status under American copyright law. In December 2000, however, the Copyright Office made it clear that radio broadcasters face copyright liability for transmitting recordings, at least when they simulcast their signal over the Internet.[3] Although this may at first appear to be a rather narrow ruling, it has the potential to significantly impact the future of the recording industry and finally give sound recordings more equal protection.

I. THE HISTORY OF SOUND RECORDING COPYRIGHTS

Congress passed the first federal Copyright Act in 1790.[4] An 1831 amendment extended protection to musical compositions,[5] followed by recognition of a statutory right of exclusive public performance for dramatic and musical works in 1897.[6] It was not until 1971, however, that sound recordings were afforded any copyright protection.[7] By that time, the recording and broadcasting industries were already well developed. The 1971 Act was a response to widespread record piracy and did not extend a per-

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1 *See* Copyright Act, 17 U.S.C. § 106(4) (2000) (granting exclusive rights to perform musical works publicly).

2 *See id.* §106(6) (granting the exclusive right to artists "to perform the copyrighted work publicly by means of a digital audio transmission").

3 This was the first time in United States history that the Copyright Office was willing to recognize such liability. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (2000) (to be codified at 37 C.F.R. pt. 201) [hereinafter Public Performance of Sound Recordings].

4 *See* Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

5 *See* Copyright Act, ch. 16, 4 Stat. 436 (1831).

6 *See* Copyright Act of Jan. 6, 1897, ch. 4, 29 Stat. 481 (1899).

7 *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified in scattered sections of 17 U.S.C.) (effective February 15, 1972).

formance right.[8] While sound recordings have gained recognition as copyrightable works, they did not enjoy the full bundle of rights given to other works. Thus, while songwriters and publishers of musical works are able to derive significant income from radio and other public performances, the owners of the sound recordings that contain those musical works receive nothing.

United States copyright law underwent major renovations in 1976 when a new act was passed.[9] However, this new Act continued to discriminate against sound recordings and explicitly withheld a performance right from them.[10] Although the Copyright Office recommended to Congress in 1978 that a broad performance right be granted to sound recordings,[11] Congress did not take the advice. Congress was, no doubt, influenced by the vehement opposition and lobbying of groups such as the National Association of Broadcasters ("NAB")[12] and performance rights societies[13] who did not want to have to pay a fee for the use of recordings, or felt their own fees would be diminished.

One of the primary arguments made against the recognition of a performance right is that the owners of sound recordings already benefit from the radio broadcast of their works because it promotes their records, resulting in higher sales.[14] Admittedly, there is little doubt that radio is a very important promotional tool for record companies. This promotional benefit, however, does not necessarily extend to all recordings. Furthermore, simply because a copyright owner might benefit from the exposure does not mean that a right in the performance should be denied altogether. Copyright owners should still be able to participate in the commercial exploitation of their work. A more logical solution would be to grant a performance right to sound recording owners, but take promotional value into consideration when setting a reasonable statutory licensing fee.

Additionally, even if the arguments against a sound recording

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8 *See, e.g.*, Rebecca F. Martin, *The Digital Performance Right in the Sound Recordings Act of 1995: Can It protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733, 737 (1996) (describing the extent of unauthorized reproduction and distribution of copyrighted musical works).

9 *See* 17 U.S.C. §§ 101-801 (2000).

10 *See id.* § 114(a).

11 *See* Performance Rights in Sound Recordings, 43 Fed. Reg. 12,766 (1978).

12 *See, e.g.*, Jeffrey A. Abrahamson, *Tuning Up for A New Musical Age: Sound Recording Copyright Protection in a Digital Environment*, 25 AIPLA Q.J. 181, 201-02 (1997).

13 The two major performing rights organizations are the American Society of Composers Authors and Publishers ("ASCAP") and Broadcast Musicians Incorporated ("BMI.") *See id.* at 202.

14 *See id.*

performance right are accepted, they result in a logically inconsistent system. Songwriters and publishers benefit from increased sales of recordings through mechanical licensing fees, yet their musical compositions still enjoy a performance right. Therefore, they need not be satisfied with the mere promotional benefit from the performance of their works. Again, this demonstrates the second-class treatment sound recordings receive in American copyright law.

Owners of sound recording copyrights are also being deprived of many millions of dollars from foreign performance royalties.[15] While many other countries do recognize a performance right for sound recordings,[16] most only pay revenues to foreign copyright owners on a reciprocal basis.[17] This means that country A will only pay performance revenues to a copyright owner from country B if country B provides a similar performance right and would pay a copyright owner from country A. Because the United States historically has not recognized any performance right in sound recordings, American copyright owners have received nothing for the foreign performance of their sound recordings. With only the narrow digital performance right now being provided, the amount of foreign royalties American record companies and performers might currently be able to collect through reciprocity is minimal.[18]

II. THE DPRA AND DMCA: A STEP FORWARD

Congress finally granted a performance right to sound recordings in 1995 with the Digital Performance Right in Sound Recordings Act ("DPRA").[19] As the name implies, this was not a broad performance right, but rather a narrow one limited to public performances "by means of a digital audio transmission."[20] Instead of simply adding sound recordings to the group of works that enjoy a broad performance right in § 106(4) of the Copyright Act,[21] Congress settled on a limited yet complex statute riddled with exemptions. Its history and structure reveal how its primary purpose was to bolster § 106(1)[22] and 106(3)[23] rights to reproduce and dis-

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15 *See id.* at 221-22. "In this decade alone, it is estimated that American artists, producers, and record companies have lost over $600 million of their share of foreign performance royalty pools." *Id.*

16 Among the countries that recognize such a right are some United States trading partners, particularly those in the European Union. *See id.* at 221-23.

17 *See id.* at 221.

18 *See* Martin, *supra* note 8, at 754.

19 Pub. L. No. 104-39, 109 Stat. 336 (1995).

20 17 U.S.C. §106(6) (2000).

21 *Id.* § 106(4).

22 *Id.* § 106(1).

tribute by protecting against the loss of sales from digital piracy and new digital delivery services,[24] rather than to recognize the intrinsic fairness of a performance right.

The DPRA essentially creates a continuum of copyright protection for digital performances. First, certain types of transmissions are completely exempted from liability. Most importantly, § 114(d)(1)(A)[25] exempts a "nonsubscription broadcast transmission," which includes broadcasts by traditional radio and television stations, whether or not their signal is analog or digital. Second, a statutory licensing scheme was created for "subscription digital audio transmission[s]."[26] Thus, a record company cannot refuse these services permission to transmit their recordings. The rates and terms of the statutory license are to be determined through voluntary negotiations between sound recording owners and transmission services, or if negotiations fail, by the Copyright Arbitration Royalty Panel.[27] To qualify for the statutory license, a transmitter must abide by certain programming and play-list restrictions, such as prohibitions against providing advance notice of the performance of particular sound recordings and the "sound recording performance complement,"[28] which restricts how many times multiple songs from a particular album or artist can be played within certain periods of time.[29] Finally, full liability is provided for transmissions by interactive services.[30] This means that these transmission services must negotiate with each record company individually to obtain permission and set the terms for the transmission of their recordings. Full liability is appropriate for interactive services because such services allow listeners to hear particular recordings on demand and are most likely to displace record sales.

The Digital Millennium Copyright Act ("DMCA"),[31] enacted in 1998, made certain revisions to the DPRA. Most importantly, it amended § 114(d)(2) to include "eligible nonsubscription trans-

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23 *Id.* §106(3).

24 *See* S. REP No. 104-128, at 14-15 (1995).

25 17 U.S.C. §114(d)(1)(A).

26 *Id.* §114(d)(2).

27 *See id.* §114(f) (providing the section entitled, *Licenses for Certain Nonexempt Transmissions*).

28 *Id.* §114(d)(B)(i).

29 *See generally id.* § 114(d)(2)(B)-(C) (restricting the exclusive rights of copyright holders of music).

30 *See id.* § 114(d)(3) (providing the section entitled, *Licenses for Transmissions by Interactive Services*).

31 Pub. L. No. 105-304, 112 Stat. 2861 (1998).

missions" within the statutory licensing scheme.[32] This closed an important loophole by imposing liability upon webcasters, which were not considered by Congress in 1995 and were arguably exempt under the DPRA as "nonsubscription services." The combined provisions of the DPRA and DMCA, therefore, subject Internet transmissions of recordings to liability whether or not they are free or subscription-based. This protection will prove to be important as webcasting continues to expand.

III. INTERNET BROADCASTS OF RADIO TRANSMISSIONS

Although the DPRA and DMCA finally extended a performance right for sound recordings, their narrow focus and significant exemptions limited their protection. Most significantly, radio broadcasters could still play records for free. Controversy arose as radio broadcasters attempted to extend their exemption even further. While the DMCA revisions made it clear that webcasters must pay to transmit recordings, traditional radio broadcasters claimed the protection of their exempt status as they increasingly began to stream their AM/FM signals over the Internet. However, the Copyright Office settled this confusion on December 11, 2000 when it issued a final ruling stating that radio broadcasters are in fact subject to the statutory licensing provisions of the DPRA and DMCA when they transmit their AM/FM signals over the Internet.[33]

The Copyright Office's ruling immediately affected over 3,000 radio stations that currently stream their signals simultaneously over the air and the Internet.[34] Even though radio broadcasters' traditional over-the-air signals are still exempt, this ruling foreshadows a significant shift; for the first time ever, some radio broadcasters will owe performance royalties for the sound recordings they transmit. It represents the first sign of an erosion of the exemption that has always protected radio broadcasters from paying sound recording performance fees.

An important factor considered by the Copyright Office was the illogical and unfair situation that would result by allowing radio broadcasters to stream their signals for free while imposing liability on a third-party webcaster (such as Yahoo! Broadcast)[35] that streams the identical programming through a license from a radio

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[32] 17 U.S.C. § 114(d)(2).

[33] *See* Public Performance of Sound Recordings, *supra* note 3, at 77,299.

[34] *See* Mark Lewis, *Do Broadcasters Owe Record Companies Webcast Royalties? Copyright Office Preparing Ruling, at* http://gareth.membrane.com/leflawnet/082400c (Aug. 24, 2000).

[35] *Yahoo! broadcast, at* http://help.yahoo.com/help/us/bcst/ (last visited Mar. 13, 2001).

broadcaster.[36] The Copyright Office concluded that Congress defined discrete categories of *transmissions*, rather than transmitting *entities*, to which the statutory restrictions and exemptions apply.[37] This means that radio broadcasters themselves do not receive any special treatment or exemption. Only particular types of transmissions, namely "over-the-air transmissions made by an FCC-licensed broadcaster under the terms of that license," qualify for exemption as a "broadcast transmission."[38] The fact that radio broadcasters may have to modify their over-the-air transmissions in order to comply with the programming restrictions necessary for a statutory license when they simulcast their signals over the Internet did not sway the Copyright Office.[39] This further shows how radio broadcasters themselves are not exempt and will face the same copyright liability as anyone else when they try to exploit new media such as the Internet.

The Copyright Office also considered the legislative history of the DPRA. Congress stated that "[t]he classic example of . . . an exempt transmission is a transmission to the general public by a free over-the-air broadcast station, such as a *traditional* radio or television station."[40] Furthermore, when the DPRA was introduced, Senator Orrin Hatch indicated that the DPRA "does not affect the interests of broadcasters *as that industry has traditionally been understood.*"[41] This legislative history reveals a desire to extend an exemption to the radio and television industries only when they are doing business in their traditional manner. As the Copyright Office ruling indicates, these industries will not enjoy this protection when they attempt to enter new markets or offer new services as technology progresses.[42]

IV. Sound Recording Performance Rights in the Future

Digital streaming of music has undergone tremendous growth in recent years, and in all likelihood will continue to expand rapidly. Services that take advantage of new technologies such as the Internet and broadband wireless stand a good chance of becoming the dominant method of transmitting music, whereas the importance of traditional radio and television broadcasts will likely di-

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36 *See* Public Performance of Sound Recordings, *supra* note 3, at 77,300-01.
37 *See id.* at 77,301.
38 *Id.*
39 *See id.* at 77,300.
40 S. Rep. No. 104-128, at 19 (1995) (emphasis added).
41 141 Cong. Rec. S948 (Jan. 10, 1995)(statement of Sen. Hatch) (emphasis added).
42 *See* Public Performance of Sound Recordings, *supra* note 3, at 77,299.

minish. The already struggling radio broadcasting industry may need to offer new digital services in an attempt to bolster their bottom line and ward off increasing competition from webcasting and interactive services.[43] For example, the number of radio broadcasts over the Internet has increased greatly in the several years since a digital performance right was first recognized,[44] and it is probable that many more stations will begin streaming their signals. Digital broadcasting over the airwaves, although exempt itself, may also provide an opportunity for radio broadcasters to expand their services and compete with other digital technologies.[45] In short, as digital technology continues to advance, conventional over-the-air broadcasts, or at least their dominance, are likely to become a thing of the past.

Because the exemption for broadcast transmissions has been conceived and interpreted as a narrow one designed to cover only traditional over-the-air broadcasts, as broadcasters continue to explore new digital opportunities, these new services will likely fall outside of the exemption. They will therefore be subject to licensing fees. Ongoing changes in digital broadcasting technology and related industries could result in a sound recording performance right that is much broader than initially conceived. As digital formats other than traditional broadcasting gain dominance, the digital performance right will eventually extend to the majority of broadcasts being made. As more and more radio broadcasters feel compelled to transmit their signals over the Internet in addition to the airwaves, either by themselves or through a third party, the exemption for the over-the-air transmissions will become increasingly moot. The ability to broadcast recordings for free over the air will not mean much if royalties are already being paid on Internet simulcasts of an identical program. Likewise, as traditional broadcasters expand into more advanced digital services or give way to new methods of digital broadcasting, most broadcasts will become subject to the performance right, making the exemption for traditional broadcasters much less significant. Almost by default, the effect will be the solidification of the currently weak digital performance right into a strong one that allows sound recordings to

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43 *See* Joshua D. Levine, *Dancing to a New Tune, a Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 646 n.146 (1996).

44 *See* Public Performance of Sound Recordings, *supra* note 3, at 77,299 n.8. "[T]he number of worldwide radio broadcasts over the Internet has grown from a meager 56 stations in 1995 to more than 3,500 today." *Id.*

45 *See, e.g.*, Stuart Talley, *Performance Rights in Sound Recordings: Is There a Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B.A. J. 79, 81 (1994).

enjoy first-class treatment as copyrights, and the full bundle of rights they deserve.

As sound recording performance rights are bolstered by the expanding digital landscape, there may also be an opportunity for American record companies and performers to share substantially in the valuable foreign performance royalty pools. Because most of these countries will only extend access to these royalties on a reciprocal basis, the United States would have to provide a performance right that is similar to the rights enjoyed in those countries in order for American copyright owners to receive compensation. As the digital broadcasting industries further grow and evolve, digital broadcasts that are subject to the performance right may become the dominant forms of broadcasting, which would mean that a royalty would be paid on most performances of sound recordings in the United States. When this occurs, it could be possible for the United States to argue that its performance right is, in practice, closely similar to the protection extended in other countries and that American owners of sound recordings are entitled to foreign royalties on a reciprocal basis. This would open the door to millions of dollars of revenue that is currently beyond reach.

Even if the United States is not successful in making this argument, technologically driven changes in broadcasting would make it easier for Congress to close any exemptions or loopholes that prevent participation in foreign royalty pools. For example, if royalties were already being paid on the majority of traditional broadcasts because of the prevalence of Internet streaming of radio signals, the current exemptions traditional broadcasters enjoy would not mean much. Therefore, Congress might have more of an appetite to eliminate current exemptions in order to allow millions of dollars of foreign royalties to flow into the country.

CONCLUSION

Digital technology will no doubt continue to shape the music industry and the way in which sound recordings are exploited. One result of these changes will be a shift in power within the industry away from traditional broadcasters and toward the recording industry as the digital performance right grows to be much broader than when originally conceived. The recording industry will greatly benefit from the millions of dollars of extra performance royalties it is currently denied, and sound recordings may fi-

nally come into parity with musical and other works and get the first-class treatment they deserve.

*Gary M. McLaughlin**

* Received Juris Doctor in 2001, from the University of Virginia School of Law; graduated in 1996 from the University of Virginia with a B.A. in Biology; employed by Akin, Gump, Strauss, Hauer & Feld, L.L.P., in Los Angeles, CA.