THE DIGITAL PERFORMANCE RIGHT IN THE SOUND RECORDINGS ACT OF 1995: CAN IT PROTECT U.S. SOUND RECORDING COPYRIGHT OWNERS IN A GLOBAL MARKET?

I. INTRODUCTION

The right to perform a work publicly[1] has been described as "[o]ne of the greatest sources of revenue in the music industry."[2] Though sound recordings[3] enjoyed limited federal reproduction, distribution, and adaptation rights since 1971, they were previously denied a public performance right.[4] On November 1, 1995, President Clinton signed the Digital Performance Right in Sound Recordings Act of 1995 [hereinafter "The Act"],[5] giving sound recording copyright owners a public performance right. The right is limited, however, by significant exemptions. Thus, despite legislative history showing a desire to protect the livelihood of performers and record companies,[6] the Act will provide only minimal royalties.

Under the Act, sound recording owners are granted the exclusive right "to perform the copyrighted work publicly by means of a

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[1] To "perform" a work is defined as: "to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." 17 U.S.C. § 101 (1994). To "perform or display a work 'publicly'" is defined as:

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) 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.

Id.

[2] Woods v. Bourne Co., 60 F.3d 978, 983 (2d Cir. 1995) (citing Sidney Schemel and M. William Krasilovsky, THIS BUSINESS OF MUSIC 196 (1990)).

[3] "Sound recordings" are defined as: "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied." 17 U.S.C. § 101.

[4] *See* 17 U.S.C. § 114(a) (1994).

[5] Pub. L. No. 104-39, 109 Stat. 336 (1995) [hereinafter the Act]. The Act was generally effective on February 1, 1996.

[6] *See* S. REP. NO. 128, 104th Cong., 1st Sess. 10 (1995); H.R. REP. NO. 274, 104th Cong., 1st Sess. 10 (1995):

> The purpose of [the Act] is to ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used. [The Act] does this by granting a limited right to copyright owners of sound recordings which are publicly performed by means of digital transmission.

digital audio transmission."[7] The right applies, however, only to "interactive"[8] and "subscription"[9] services. All analog broadcasts, non-interactive digital broadcasts, and transmissions to business establishments such as restaurants and clubs are exempt.[10] Those transmissions not entitled to an exemption may qualify for a new compulsory license.[11] In fact, most subscription transmissions do qualify for the compulsory license.[12]

A combination of factors provided the impetus for the Act. First was the growing recognition that new digital technologies threaten to displace the traditional methods of sound recording distribution.[13] Second was the United States' desire to establish sufficient protection in an expanding global market,[14] as evi-

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7 17 U.S.C. § 106(6). A "digital audio transmission" is defined as "a transmission in whole or in part in a digital or other non-analog format." 17 U.S.C. § 101. To "transmit" a performance or a display" is defined as "to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent." *Id.*

8 An "interactive service" is defined as:

> one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

17 U.S.C. § 114(j)(4).

9 A "'[s]ubscription' transmission" is defined as "a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission." 17 U.S.C. § 114(j)(8).

10 17 U.S.C. § 114(d)(1).

11 *Id.* § 114(d)(2).

12 Those services which exceed the "sound recording performance complement" are not entitled to the compulsory license. The "sound recording performance complement" limits subscription transmissions to no more than two consecutive sound recordings and three different selections total on one phonorecord within three hours; or three consecutive selection by a featured recording artist, or from a compilation of sound recordings, and four selections total. Compulsory licensing will still apply to a subscription transmission that exceeds the performance complement, so long as the performance complement was not willfully exceeded. *See* 17 U.S.C. § 114(j)(7).

The Act also expands the current § 115 mechanical compulsory license for nondramatic musical works to encompass distribution by digital phonorecord delivery. 17 U.S.C. § 115(a)(1). *See also id.* § 115(d) (definition of digital phonorecord delivery).

13 "The limited right created by this legislation reflects changed circumstances—that is, the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public." H.R. REP. NO. 274, 104th Cong., 1st Sess. 14 (1995). The first question Ralph Oman, then Register of Copyrights, sought to address at the House of Representatives round table hearings on the earlier version of the Act was: "[w]ill digital transmissions by satellite, radio station, or cable replace the traditional method of distributing prerecorded music to the public?" *Performers' and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 4 (1993) [hereinafter *House Hearing*] (statement of Ralph Oman, U.S. Register of Copyrights).

14 As Representative Moorhead stated during the course of hearings in 1993 on an earlier bill:

> More countries have come to recognize performers' rights in sound record-

denced by successful efforts to include sound recordings within the framework of General Agreement on Trade and Tariff ("GATT"), the Uruguay Round Agreements Act.[15] Third is the United States' efforts to ensure that U.S. sound recording copyright owners will be protected under a proposed new international "Instrument for the Protection of the Rights of Performers and Producers of Phonograms" ("New Instrument"),[16] currently being negotiated in conjunction with a possible protocol[17] to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").[18]

> ings, but these same countries refuse to permit our performers to share in the millions of dollars collected, even though a good part of that money is collected in their good name and because of their performance. The reason given for this anomaly is because the United States has refused to recognize a performance rights [sic] in sound recordings.

House Hearing, supra note 13, at 2-3.

[15] Marakesh Agreement Establishing the World Trade Organization, April 15, 1994, Annex 1C, Agreement on Trade-related Aspects of Intellectual Property Rights, The Results of the Uruguay Round, Art. 14, 33 I.L.M. 81 (1994). *See generally* WILLIAM F. PATRY, COPYRIGHT AND THE GATT, AN INTERPRETATION AND LEGISLATIVE HISTORY OF THE URUGUAY ROUND AGREEMENTS (1995 Supp. to William F. Patry, COPYRIGHT LAW AND PRACTICE) [hereinafter COPYRIGHT AND THE GATT].

[16] *See International Union for the Protection of Literary and Artistic Works, Assembly, Report adopted by the Assembly,* WIPO Doc. B/A/XIII/2 (Sept. 29, 1992); *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Questions Concerning a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Memorandum Prepared by the International Bureau,* 1st Sess., WIPO Doc. INR/CE/I/2 (Mar. 12, 1993) [hereinafter *1993 New Instrument Questions*]; *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Report Adopted by the Committee,* 1st Sess., WIPO Doc. INR/CE/I/3 (July 2, 1993); *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Report Adopted by the Committee,* 2d Sess., WIPO Doc. INR/CE/II/1 (Nov. 12, 1993); *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Questions Concerning a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Memorandum Prepared by the International Bureau,* 3d Sess., WIPO Doc. INR/CE/III/2 (Oct. 5, 1994) [hereinafter *1994 New Instrument Questions*]; *Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, Report Prepared by the International Bureau,* 5th Sess., WIPO Doc. BCP/CE/V/9-INR/CE/IV/8 Prov. (Sept.7, 1995) [hereinafter *1995 New Instrument Report*]. Also, a diplomatic conference on the *New Instrument* was held in December, 1996.

[17] A protocol is a proposed amendment to the Berne Convention for the Protection of Literary and Artistic Works, see *infra* note 18, which requires less than unanimous consent of all Berne Convention member states. There have been two protocols to the Berne Convention for the Protection of Literary and Artistic Works: the first was added in 1914 (effective Apr. 20, 1915), the second, entitled "Protocol Regarding Developing Countries," was added in 1967 (effective Jan. 1, 1970). *See* WILLIAM F. PATRY, 2 COPYRIGHT LAW AND PRACTICE 1268-69 (1994) [hereinafter COPYRIGHT LAW AND PRACTICE].

[18] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised,* at Paris July 24, 1971, 828 U.N.T.S. 221 [hereinafter the Berne Convention]. *See also supra* note 13. As Representative Hughes remarked during a hearing in 1993 on an earlier digital performance bill:

> [W]e are beginning the process of examining the impact of domestic U.S. law that may result from the initiatives currently underway at the World Intellectual Property Organization to conclude a protocol to the Berne Convention and to establish a new convention for the protection of the rights of performers and producers of phonograms.

House Hearing, supra note 13, at 2-3.

This Note analyzes whether the Digital Performance Rights Act sufficiently protects the interests of U.S. sound recording copyright owners. The market for sound recordings has become global[19] and digital technology is proliferating. Therefore, a key question is whether, under present or future international treaties and trade agreements, the rights granted under the Act will provide adequate protection for U.S. copyright owners abroad. Concluding that the thin rights granted under the Act cannot provide U.S. copyright owners of sound recordings with adequate protection, this Note proposes ways for the United States to better protect its sound recording copyright owners' performance rights in foreign markets, principally by amendments designed to bring the statute in compliance with the minimum rights proposed in WIPO's New Instrument.

II. HISTORY OF U.S. PERFORMANCE RIGHTS IN SOUND RECORDINGS

A. *The Pre-Digital Era*

Sound recordings did not receive federal copyright protection until February 15, 1972. The Copyright Act of 1909,[20] the then-governing statute, did not refer to sound recordings even though specific types of works of authorship were enumerated in section 5. Section 4 of the 1909 Act did state generally that "all the writings of an author" were subject to protection. However, due to a requirement that all works be published in discernable copies, sound recordings were excluded from copyright protection under Supreme Court precedent.[21] It was not until Congress amended the 1909 Act by passing the Sound Recordings Act of 1971[22] that sound recordings received federal copyright protection.[23]

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19 *See supra* notes 15-18 and accompanying text.

20 17 U.S.C. §§ 1-216 (repealed 1978) [hereinafter 1909 Act].

21 In White-Smith Co. v. Apollo Co., 209 U.S. 1 (1908), the Supreme Court held that a perforated piano roll was not a "copy" of the musical work embodied therein. *White-Smith* was regarded as precedent for the inability of phonorecords to fulfill the "copy" requirement for sound recordings under the 1909 Act. *See Performance Rights in Sound Recordings Act of 1995: Hearing Before the Senate Committee on the Judiciary On S. 227*, 104th Cong., 1st Sess. 18 (Mar. 9, 1995) [hereinafter *Senate Hearing*] (statement of Marybeth Peters Register of Copyrights and Associate Librarian for Copyright Services). Courts were also in agreement that without an amendment, sound recordings could not be treated as writings under the 1909 Act. *See, e.g.*, RCA Mfg., Inc. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), and Capitol Records Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955). In *Capitol Records*, however, Judge Learned Hand stated, in a dissenting opinion, that in light of the creativity of performers, if Congress chose, sound recordings could constitutionally be considered the "writing" of an "author." 221 F.2d at 664.

22 Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971) (codified as amended in scattered sections of 17 U.S.C.) (effective February 15, 1972) [hereinafter 1971 Act].

23 Protection for sound recordings was nevertheless available under state law. State law

The 1971 Act was passed in response to widespread phonorecord piracy.[24] It effectively recognized that performers' expression of a song deserved copyright protection. The 1971 Act, instead of extending to sound recordings the same bundle of exclusive rights granted to owners of other copyright subject matter, only granted sound recording copyright owners such rights as would protect them from phonorecord piracy.[25] Thus, sound recordings were granted the exclusive rights of reproduction, distribution, and very limited adaptation rights, but were not granted a performance right.[26] When the 1909 Act was replaced in 1976,[27] the new Act retained the limitations on rights formerly contained in the 1971 Act. Thus, although sound recordings were protected as early as 1971 they were not treated like other works of authorship.

The lack of a public performance right was, of course, the most obvious difference with musical works, audiovisual, and other works enjoying the lucrative financial rewards that flow from the right. The lack of a public performance right for sound recordings in the 1976 Act was not, however, due to a lack of trying. Early drafts of the 1976 Act proposed granting sound recordings performance royalties.[28] Performers and the recording industries strongly endorsed this draft, as did the Copyright Office.[29] Broad-

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for sound recordings first published before February 15, 1972 are not preempted until 2047. 17 U.S.C. § 301 (1994).

24 H.R. REP. No. 487, 92d Cong., 1st Sess. 3 (1971).

25 Congress limited the rights granted to those enumerated in the 1971 Act on the presumption that they would sufficiently protect sound recordings from piracy. *See* S. REP. No. 128, 104th Cong., 1st Sess. 10 (1995).

26 The legislative history of the 1971 Act emphasizes that the Act did not "encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes." H.R. REP. No. 487, 92d Cong., 1st Sess. 3 (1971).

27 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 [hereinafter 1976 Act]. Although enacted in 1976, the Act became generally effective on January 1, 1978.

28 William H. O'Dowd, Note, *The Need for a Public Performance Right in Sound Recordings*, 31 HARV. J. ON LEGIS. 249, 253 (1994).

29 After the passage of the 1971 Act, "[t]he Recording Industry Association of America (RIAA) continued to lobby for increased rights, but others, including broadcasters . . . continued to oppose performance rights. Representatives of performers, manufacturers, publishers, jukebox interests, and motion picture-interests were also vocal." *Senate Hearing*, *supra* note 21, at 20 (statement of Marybeth Peters). In 1978, the Register of Copyrights unequivocally supported performance rights for sound recordings in her report to Congress:

> The lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performers and the recording arts. . . . [A]ny economic burden on the users of recordings for public performance is heavily outweighed, not only by the commercial benefits accruing directly from the use of sound recordings, but also by the direct and indirect damage done to performers whenever recordings are used as a substitute for live performance. In all other areas the

casters[30] and performing rights societies,[31] though, vigorously challenged the proposal[32] and threatened to prevent the passage of the new Act if it included a performance right for sound recordings.[33] The Senate's version of the 1976 Act reflected the broadcasters' strong disapproval of performance rights in sound recordings, and expressly declined to create such an exclusive right.[34] The House version also did not include a performance right for sound recordings. It did, however, call for a Copyright Office study on the issue. The Conference Committee adopted the House version, and instead of granting sound recordings performance rights, Congress

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> unauthorized use of a creative work is considered a copyright infringement if it results either in damage to the creator or in profits to the user. Sound recordings are creative works, and their unauthorized performance results in both damage and profits. To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.

REGISTER OF COPYRIGHTS, HOUSE SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., 95th Cong., 2d Sess., PERFORMANCE RIGHTS IN SOUND RECORDINGS 1062-63 (Comm. Print) (1978).

30 The legislative history of the 1976 Act shows that Congress clearly intended that broadcasts fall within the ambit of public performance:

> Clause (2) of the definition of "publicly" in section 101 makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in [any] form, the case comes within the scope of clauses (4) or (5) of section 106.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 64-65 (1976).

31 Performing rights societies police, license, and administer copyright interests of music composers and publishers. The American Society of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. are the main performing rights societies. *See* 17 U.S.C. § 114(d)(3)(E)(ii) (1994); *see generally* SIDNEY SHEKEL & M. W. KTRASILOVSKY, THIS BUSINESS OF MUSIC (6th ed. 1990).

32 Broadcasters, including Vincent Wasilewski, President of the National Association of Broadcasters in 1975, vigorously opposed granting performance rights for sound recordings:

> [T]he performance rights amendment does not belong in this copyright bill. It is recommended neither by the constitutional guidelines nor the economic marketplace.
>
> It fails to promote the progress of science, it imposes an unreasonable burden on a symbiotic partner in the music industry, and promises windfall profits for those for whom no need can be demonstrated. For all of these reasons we ask that you reject it.

Performance Royalties: Hearings on S. 111 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm., 94th Cong., 1st Sess. 73 (1975) (statement of Vincent Wasilewski).

33 See Allen E. Molnar, Comment, *Performance Royalties and Copyright: A Question of "Sound" Policy*, 8 SETON HALL L. REV. 678, 680-81 (1977).

34 S. 22, 94th Cong., 2d Sess. § 114(a) (1976).

directed the Copyright Office to prepare a study on the issue.[35]

To make it unmistakably clear that no public performance right had been created under the new Act, section 114(a) stated that "the exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2) and (3) of section 106, and do not include any right of performance under section 106(4)."[36]

The Copyright Office conducted a careful study and opined that a Congressional grant of performance rights for sound recordings would be constitutional.[37] The Office also strongly recommended to Congress that, as a matter of policy, sound recordings be granted an exclusive performance right.[38] The Office concluded that:

> Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances.[39]

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35 17 U.S.C. 114(d) (1994):

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

Id.

36 17 U.S.C. § 114(a). This section was superfluous because § 106—the section of the Copyright Act in which rights are granted—did not accord sound recordings a public performance right. *See* 17 U.S.C. § 106(4).

37 In her report to Congress, the Register of Copyrights Barbara Ringer stated:

> [T]he courts have consistently supported Congress [sic] constitutional authority to protect sound recordings as copyrightable subject matter . . . . With the principle established that sound recordings may be protected, the question of protection becomes one of statutory policy.

REGISTER OF COPYRIGHTS, HOUSE SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., 95th Cong., 2d Sess., PERFORMANCE RIGHTS IN SOUND RECORDINGS 3 (Comm. Print) (1978).

38 *See supra* note 29.

39 REGISTER OF COPYRIGHTS, HOUSE SUBCOMM. ON COURTS, CIVIL LIBERTIES, AND THE AD-

Despite the Copyright Office's report, Congress declined to enact legislation to implement the Office's recommendations, even though bills were introduced and hearings held.[40] Broadcasters had won the day.

Thus, prior to the Digital Performance Right Act, the revenue stream for (and therefore the incentive to create) sound recordings rested upon the right to receive royalty payments for each sound recording embodied in phonorecords reproduced, distributed to record stores, and sold to the public. It was not until digital technology was introduced and made its way into mainstream culture that performance rights for sound recordings were again seriously considered by Congress.

B. *The Digital Era*

In 1990, Senator Dennis DeConcini, then Chairman of the Subcommittee on Patents, Copyrights, and Trademarks, asked the Copyright Office for a report on the copyright implications of digital audio broadcasts and cable services.[41] In October of 1991, the Office delivered its report.[42] Once again, the tension between the interests of broadcasters and the recording industry surfaced and refueled the debate over performance rights. Not surprisingly, the Copyright Office continued to support performance rights for sound recordings. The Office noted that during the thirteen years since its last report:

> [t]echnological changes ha[d] occurred that facilitate transmission of sound recordings to huge audiences. Satellite and digital technologies make possible the celestial jukebox, music on demand, and pay-per-listen services. . . . Sound recording authors and proprietors are harmed by the lack of a performance right in their works.[43]

No legislative initiative immediately arose from the report. However, in the following Congress, Representative William J. Hughes, Chairman of the House Subcommittee on Intellectual Property and Judicial Administration, held an oversight hearing on the issue, followed by round-table discussions, where broadcasters,

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MINISTRATION OF JUSTICE OF THE HOUSE JUDICIARY COMM., 95th Cong., 2d Sess., PERFORMANCE RIGHTS IN SOUND RECORDINGS 177 (Comm. Print) (1978).

40 *See* H.R. 6063, 95th Cong., 1st Sess. (1977); H.R. 977, 96th Cong., 2d Sess. (1980); S. 1552, 96th Cong., 2d Sess. (1980); H.R. 1805, 97th Cong., 1st Sess. (1981).

41 S. REP. NO. 128, 104th Cong., 1st Sess. 11 (1995).

42 U.S. COPYRIGHT OFFICE, REPORT ON COPYRIGHT IMPLICATIONS OF DIGITAL AUDIO TRANSMISSION SERVICES 160 (Oct. 1991).

43 *Id.* at 154-55.

the recording industry, performers, satellite digital audio service owners, owners of musical works, and owners of sound recordings were invited to speak.[44] As a result of these discussions, Chairman Hughes introduced a bill that granted sound recording copyright owners an exclusive public performance right, without any special limitations. The bill was limited, however, to digital transmissions.[45] Senators Hatch and Feinstein subsequently introduced a similar Senate bill.[46] The Senate did not conduct hearings until 1995, at which time the legislation had changed considerably.[47] The revised legislation, the result of multiple discussions and significant compromise, is the Digital Performance Rights Act.

III. THE THREAT OF DIGITAL TECHNOLOGY

Digital technology enables information (including copyrighted works of authorship) to be stored and transmitted by electronically encoding the information into a series of bits (1s and 0s). These bits form unique combinations which, in the case of sound recordings, will produce a series of sounds and silences when read.[48] The ability to digitally encode sounds has transformed the ways in which sound recordings are reproduced in audio formats, perceived by machines and devices, and transmitted to the public. The first major impact digital technology had on the sound recording industry was introduced in 1983, the compact disc ("CD").[49]

When an original master recording is reproduced using analog technologies, the quality of the sound is diminished. By using a digital recording device, however, sound data is converted into an electronic code which is then impressed onto a CD. The code is then reconstructed by a digital playback machine—in this instance a CD player—without the resulting loss of sound quality.[50] Thus, CDs are able to reproduce sounds more precisely and with less distortion than their analog counterpart, the traditional tape or pho-

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44 For an overview of the debates among performers, composers, performance rights organizations, record companies, broadcasters, cable transmission companies, restaurant owners, and satellite transmission companies, and the compromises that led to the Digital Performance Right Act, see *Senate Hearing, supra* note 21, at 2-7 (statement of Marybeth Peters).

45 H.R. 2576, 103d Cong., 1st Sess. (1993).

46 S. 1421, 103d Cong., 1st Sess. (1993).

47 *See Senate Hearing, supra* note 21.

48 *See* Jay L. Bergman, Note, *Digital Technology Has the Music Industry Singing the Blues: Creating a Performance Right For the Digital Transmission of Sound Recordings*, 24 SW. U. L. REV. 351, 360-61 (1995).

49 *See* Kamesh Nagarajan, *Public Performance Rights in Sound Recordings and the Threat of Digitalization*, 77 J. PAT. & TRADEMARK OFF. SOC'Y 721, 725 (1995).

50 *Id.*

nograph.[51] One result of digital technology's precision is that a pirated copy of a digital recording is virtually indistinguishable from the master.[52] Like the CD, the less commercially successful Digital Audio Tape ("DAT") is also able to reproduce sound with greater precision, yielding better sound quality than an analog tape.[53]

Digital technology has transformed not only sound recording formats, but also the way in which sound recordings are transmitted. Before digital technology was introduced, consumers could either listen to sound recordings played on the radio, choose from a limited selection of sound recordings available at local libraries, or buy phonorecords or tapes from record stores. Digital transmission has opened up an entirely new means of delivering sound recordings to consumers, including compression technology which permits phonorecords to be transmitted to consumers in "real time," which in this instance is the same amount of time it would take consumers to play the recording on a CD.

The new phase of digital technology—in which private homes are able to receive transmissions directly—seriously threatens the incentive to create sound recordings by displacing the traditional market for "hard" copies sold in record stores. Bruce Lehman, the Commissioner of the Patent and Trademark Office, addressed this concern in the section of the *White Paper* supporting performance rights in sound recordings:

> Some transmissions that clearly constitute public performances may, in effect, substitute for distributions in the future. If consumers are offered a service through which they can receive a performance of any sound recording at any time, they may stop buying phonorecords. The market for distributed phonorecords may shrink to include only the providers of that service to consumers.[54]

Presently, authorized services offering consumers interactive,

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[51] A CD is created by converting sounds into binary numbers which are then impressed onto a disc. When a compact disc is played on a compact disc player, a laser beam electronically reads the digital information and converts the information back into analog form. *See* Bergman, *supra* note 48, at 360.

[52] *Id.*

[53] In 1992 Congress passed the Audio Home Recording Act in response to concerns over digital audio home copying devices. *See* H.R. REP. NO. 873, 102d Cong., 2d Sess. 1 (1992). *See generally* Taro J. Kawamua, *Digital Audio Tape Technology: A Formidable Challenge to the American Copyright System*, 4 AM. U. J. INT'L L. & POL'Y 409 (1989).

[54] INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 222 (Sept. 1995) [hereinafter WHITE PAPER].

pay-per-listen performances of sound recordings, often referred to as "the celestial jukebox,"[55] do not exist. The "celestial jukebox" is a generic term describing any interactive database that allows consumers to browse through music offerings and make a selection, which is then transmitted directly into their homes.[56] An important goal of the Digital Performance Right Act was to have protection in place before such services are offered, and therefore become entrenched.[57]

Currently, digital audio cable services are offered on a monthly, flat-fee subscription basis and transmitted in real-time. These digital audio cable services transmit digitized music either via coaxial cable[58] (the same type of cable wire attached to cable television boxes and home stereo systems), or via satellite.[59] The services offer up to fifty-seven channels of original sound recordings. The channels are for the most part divided into different musical categories ranging from country and western to salsa, pop, and classical.[60] The allure of this service is that, as opposed to traditional analog broadcasting, it offers CD-quality music without advertising or disc jockeys. In 1993, this service was offered as an additional cable television or satellite charge of, on average, ten dollars per month.[61] There are currently only two companies which offer these services in the United States.[62]

Fiber optic cable offers even more potential for the enhancement of sound quality of the "celestial jukebox."[63] Fiber optics reduce the degree of signal loss, and can carry a signal for twenty miles without amplification, resulting in the reduction of inciden-

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55 The term "celestial jukebox" has been attributed to U.S. House Representative George Danielson. *House Hearing, supra* note 13, at 3 (statement of Rep. Hughes).

56 Bergman, *supra* note 48, at 362-63. *See generally* N. Jansen Calamita, Note, *Coming To Terms With The Celestial Jukebox: Keeping The Sound Recording Copyright Viable In The Digital Age*, 74 B.U. L. REV. 505 (1994) (discussing digital technology and the "celestial jukebox").

57 "An important rationale for enactment of this legislation is to address the potential impact on the prerecorded music industry of digital subscription and interaction [sic] services." H.R. REP. No. 274, 104th Cong., 1st Sess. 13 (1995).

58 Coaxial cable has the capacity to transmit about 250,000 times more data than standard telephone wire. Thus, coaxial cable is capable of transmitting works which are much more data intensive, such as video and audio works. *See House Hearing, supra* note 13, at 31 (statement of Nicholas Garnett, Director General and Chief Executive, International Federation of the Phonographic Industry).

59 *See* Nagarajan, *supra* note 49, at 725.

60 *See House Hearing, supra* note 13, at 31 (statement of Nicholas Garnett).

61 *Id.*

62 International Cablecasting Technologies, Inc. ("ICT") is a company which currently markets and distributes a digital music subscription service known as Digital Music Express ("DMX"). DMX's competition is Digital Cable Music, which owns "Music Choice," another digital music subscription service, which is also owned in part by Time Warner, Sony, and EMI, three of the world's largest record companies. Both music subscription companies offer services in the United States, and are expanding into the European markets. *See id.*

63 *See id.*

tal noise and distortion caused by amplification. This in turn enhances the channel capacity of the system and the potential for superior transmissions.[64] As a result, these new technologies require new forms of protection for the works being transmitted.

IV. THE DIGITAL PERFORMANCE RIGHT ACT

Digital technology threatens many aspects of protection for sound recordings.[65] It is eradicating the physical distinctions that U.S. copyright law had drawn upon to distinguish owners' rights[66] and challenges the utility of the traditional fixation requirement.[67] The Digital Performance Right Act was enacted in response to only "the most immediate threat to the owners of copyright in sound recordings—the ease of copying and greater fidelity that is achievable through the transmission of sound recordings by means of digital technology."[68]

The Act provides sound recording owners rights protection against digital audio services' threat to the economic incentive to create, an incentive formerly provided by the rights of reproduction and distribution. Yet, the only exclusive right the Act grants is in digital performances transmitted by interactive services.[69] In the case of subscription services, the Act provides a new compulsory license in section 114.[70] The Act also clarifies the reproduction right[71] and expands section 115 "mechanical" compulsory license[72]

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64 *See id.*

65 Don. E. Tomlinson identifies six different ways in which the digitization of information threatens to undermine the incentive to create sound recordings: (1) ease of replication; (2) ease of transmission and multiple use; (3) plasticity of digital media; (4) equivalence of works in digital form; (5) compactness of works in digital form; and (6) new search and link capacities. Don E. Tomlinson, *Journalism and Entertainment as Intellectual Property on the Information Superhighway: The Challenge of the Digital Domain*, 6 STAN. L. & POL'Y REV. 61 (1994); *see also* Pamela Samuelson, *Digital Media and the Changing Face of Intellectual Property Law*, 16 RUTGERS COMPUTER & TECH. L.J. 323 (1990).

66 As Tomlinson observes, "[a]t one time, there existed a discernable copyright-law distinction between a sound recording, having unique physical characteristics, and a still photograph, having certain other physical characteristics. On the information superhighway, however, the two will have no physical differences." Tomlinson, *supra* note 65, at 61.

67 *See generally* Ysolde Gendreau, *Digital Technology and Copyright: Can Moral Rights Survive the Disappearance of the Hard Copy*, 6 ENT. L. REV. 214 (1995); Jeffrey C. Selman, *Copyright Protection in a Digital World: Judicial, Legislative, Technological, and Contractual Solutions*, 7 J. PROPRIETARY RTS. 4 (1995).

68 *Senate Hearing*, *supra* note 21, at 2 (statement of Senator Hatch).

69 *See infra* notes 85-97 and accompanying text.

70 *See infra* notes 77-84 and accompanying text.

71 Under the Digital Performance Right Act, sec. 3, § 114(b), the reproduction right for sound recordings is no longer limited to particular types of fixations, and broadly includes all media, including machine-readable copies. This amendment was apparently made in response to Judge Motley's decision in Agee v. Paramount Communications, 853 F. Supp. 778 (S.D.N.Y. 1994), 869 F. Supp. 209 (S.D.N.Y. 1994), *rev'd*, 59 F.3d 317 (2d Cir. 1995). *See infra* notes 152-157 and accompanying text.

72 Compulsory licensing was initially established in 17 U.S.C. § 1(e) (1909). The provi-

to include "digital phonorecord deliveries."[73]

A. *Exemptions*

The digital performance right granted in section 106(6) is subject to a number of limitations, the most important of which is the exemption of all analog transmissions. Furthermore, certain digital transmissions are fully exempted under section 114(d)(1): (1) nonsubscription broadcasts; (2) incidental nonsubscription transmissions[74]; (3) retransmissions of nonsubscription broadcasts within a 150 mile radius; (4) transmissions by businesses if the transmission is within the business's immediate vicinity (for example stores, clubs, and restaurants); and (5) retransmissions authorized by a primary transmitter licensed to perform publicly the sound recording (for example a non-digital broadcast retransmitted on cable).[75]

Moreover, if traditional broadcasters switch to digital transmission, they are still exempt from the digital performance right. The result is that the status quo for over-the-air broadcasters is maintained, leaving sound recording copyright owners without a substantive digital public performance right in a market that might have proved to be an important source of revenue.[76]

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sions of § 1(e) were retained, in a modified form, in § 115 of the 1976 Act. This section is commonly referred to as a "mechanical license." There are four other compulsory licenses in the statute: (1) the cable license in § 111; (2) the public broadcasting license in § 118; (3) the retransmission license in § 119; and the new compulsory license provisions in § 114(d)(2) by the Digital Performance Right Act. Section 116 originally contained a compulsory license for jukebox performances of nondramatic musical works, but this license was replaced by voluntary negotiations instituted under the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (effective Mar. 1, 1989).

73 A "digital phonorecord delivery" is defined as:

> [E]ach individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

17 U.S.C. § 115(d).

74 Examples of exempt incidental transmissions include nonpublic satellite feeds from one radio or television station to another and "backhaul" feeds from sports or news events. In other words, to qualify for this exemption, the purpose of the transmission must be to facilitate an otherwise exempt transmission. 141 CONG. REC. S11, 1952 (daily ed. Aug. 8, 1995).

75 17 U.S.C. § 114(d)(1).

76 "This exemption would drastically curb future rights as top 40 stations switch to over-the-air digital broadcasts. It would force sound recording copyright owners to subsidize future digital transmissions of over-the-air broadcasts and give these services an unfair advantage over other providers of similar services." *Senate Hearing*, *supra* note 21, at 10 (statement of Marybeth Peters).

B. *Compulsory Licensing*

Those transmissions which are neither exempt nor interactive digital transmissions most likely fall under the definition of "subscription transmission."[77] An example of a subscription transmission is a cable or satellite transmission for which the user pays a fee but cannot request a particular sound recording.[78] A web site that transmits a sound recording could also be a subscription transmission, if a user pays a fee either directly to the web site or to an Internet service provider, so long as the user cannot select the sound recording on demand.[79]

Most subscription transmissions are subject to compulsory licensing under section 114(d)(2). Compulsory licensing applies to subscription services that do not exceed the "sound recording performance complement,"[80] publish in advance titles of the sound recordings or phonorecords,[81] and do not cause a transmission receiver to switch from one channel to another.[82] The royalty rates for subscription transmissions subject to compulsory licensing may be voluntarily negotiated.[83] In the absence of such agreement, the rates will be decided by compulsory arbitration before a copyright arbitration royalty panel.[84]

Subscription transmissions which do not qualify for the compulsory license must negotiate licensing royalty fees directly with the sound recording copyright owners.

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77 *See supra* note 9.

78 *See* 141 CONG. REC. S11,953 (daily ed. Aug. 8, 1995).

79 The definition of a subscription transmission requires only that "consideration is . . . paid or otherwise given on or on behalf of the recipient." *Id.* According to one source, the RIAA has adopted the position that even an Internet connection fee satisfies the consideration requirement. Under this interpretation, any web site that provides sound recordings and is not otherwise exempt is a subscription transmission. *See* Lisa E. Davis & Rhonda A. Medina, *The Piper Must Be Paid: New Law Grants Performance Rights for Digital Age,* N.Y. L. J., Apr. 8, 1996, at S1.

80 17 U.S.C. § 114(j)(7). *See also supra* note 12.

81 17 U.S.C. § 114(d)(2)(C).

82 17 U.S.C. § 114(d)(2)(D). The statute makes an exception for transmissions to a place of business.

83 17 U.S.C. § 114(f)(1), (f)(3).

84 17 U.S.C. § 114(f)(2). As of July 1996, the statutory rate has not been set. Until the statutory licensing rate is set by the copyright arbitration royalty panel ("CARP"), digital subscription transmission services must comply with the notice requirements set by the Librarian of Congress, and must agree to pay the royalty fees when the fees are set. *See* 17 U.S.C. § 114(f)(5)(A)(ii); *see also* Notice and Recordkeeping for Subscription Digital Transmissions, 61 Fed. Reg. 22,004 (1996) (to be codified at 37 C.F.R. ch. II) (proposed May 3, 1996). The arbitration began on December 2, 1996. The arbitrators' decision will be delivered to the Librarian of Congress no later than May 30, 1997. 61 FED. REG. 40,464-66 (1996). After the compulsory royalty fees are set, the statute requires that all payments in arrears must be made on or before the 20th day of the month following the month in which the fees are set. *See* 17 U.S.C. § 114(f)(5)(B).

C. *Exclusive Right*

The result of all the limitations set forth in the Digital Performance Right Act is that sound recording copyright owners only have an exclusive public performance right in transmissions by interactive services. BMI, a performing rights society, has taken the position that an audience is not required in order for a digital transmission to qualify as an interactive transmission.[85] Whether this is correct or not,[86] interactive transmissions need not be seen or heard in real-time to be covered by the digital performance right. Compressed transmissions or those downloaded for play at a later time are also subject to the exclusive right.[87] Licensing for interactive transmissions is voluntary; the rights owner has the discretion to grant or refuse a license to an interactive service. Statutory and compulsory licensing does not apply to interactive transmissions.[88]

While the Act does not limit non-exclusive licensing for interactive transmissions, it does limit the duration of exclusive licenses a rights owner may grant.[89] The limitations are intended to foster the growth of interactive services in order to encourage the wide dissemination of works.[90] In general, owners of rights to more than 1,000 sound recordings cannot grant more than a twelve month exclusive license to an interactive service.[91] Owners of rights to 1,000 or fewer sound recordings may only grant up to two-year exclusive licenses.[92] After the exclusive license terminates, the interactive service must wait at least thirteen months before it can receive another exclusive license to perform the same sound re-

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85 *See Hearings on the NII Copyright Protection Act of 1995, H.R. 2441, Before Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 28 (1996) ("The transmission does not lose its characterization as a performance depending on the number of people who choose to receive the transmission. Indeed, an electronic transmission of a musical work is a public performance even if no one hears the transmission.") (statement of Frances W. Preston, President and CEO of BMI).

86 In fact, BMI's position is not unique to digital performances and is inherent in the existing definition of to perform a work "publicly." *See* 17 U.S.C. § 101 and *supra* note 1.

87 As the President of BMI testified before Congress, "[c]ompressed transmissions . . . implicate the performance right every bit as much as real-time transmissions. The fact that the performances may occur in diverse locations and at different times will not exempt them for the public performing right." *Hearings on the NII Copyright Protection Act of 1995, H.R. 2441, Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 28 (1996).

88 17 U.S.C. § 114(e)(2).

89 *See* 17 U.S.C. § 114(d)(3).

90 *See Senate Hearing, supra* note 21, at 14 ("the provisions of section 114(d)(3) . . . impose certain limitations on the granting of exclusive licenses under the new performance right in order not to hinder the growth of interactive services").

91 *See* 17 U.S.C. § 114(d)(3)(A).

92 *Id.*

cording(s).[93] Rights owners can only avoid these statutory limits by granting exclusive licenses to more than five interactive services for at least ten percent of the total number of the owners' licensed sound recordings, but not less than fifty sound recordings.[94] The purpose of this limitation is to preclude record companies from granting one interactive company an exclusive license to a substantial portion of its catalogue.[95] The time limit on the duration of an exclusive license does not apply to promotional transmissions that are forty-five seconds or less.[96]

D. *Mechanical Licensing*

Section 115 is a predecessor of the first compulsory license in a national copyright act: the 1909 Act's "mechanical" compulsory license.[97] Section 115 provides that when a copyright owner of a nondramatic musical work publicly distributes phonorecords,[98] a third party may obtain a compulsory license for the making and distribution of another phonorecord of that musical composition. The Digital Performance Right Act expands section 115 beyond "hard" phonorecords made and manufactured by record companies and sold to consumers to include "digital phonorecord deliveries"[99]—sound recordings digitally transmitted to consumers who then make "copies" of the phonorecords. Record producers have generally been opposed to the compulsory licensing system.[100] Ironically, in passing the Digital Performance Right in Sound Recording Act of 1995, it was the music publishers who opposed the repeal of the statutory mechanical license in section 115.[101]

The statutory distinction between a "digital delivery" and a digital performance is that a "digital delivery" does not "result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction . . . is made from the inception of the transmission . . . through to its receipt . . . in order to make the

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93 *Id.*

94 *See* 17 U.S.C. § 114(d)(3)(B)(I).

95 Julie A. Garcia, *An Analysis of the Digital Performance Right in Sound Recordings Act of 1995*, 8 J. PROPRIETARY RTS. 13, 16 (1996).

96 *See* 17 U.S.C. § 114(d)(3)(B)(ii).

97 17 U.S.C. § 1(e) (1909). *See also supra* note 72.

98 A "nondramatic musical work" is a work not embodied in dramatic presentations such as operas or musical plays.

99 *See supra* note 73.

100 *See, e.g.*, Recording Indus. Ass'n of America v. Copyright Royalty Tribunal, 662 F.2d 1, 4 (D.C. Cir. 1981, Mikva, J.) (Since the 1909 Act "record producers have continued to argue that a danger of monopolization and discriminatory practices exist, and Congress has concluded that a compulsory licensing system is still warranted.").

101 17 U.S.C. § 115(d).

sound recording audible."[102] The digital delivery compulsory license and the digital performance right exist independently. For example, there may be a digital transmission that constitutes a digital delivery, but which is exempt from a sound recording copyright owner's digital performance right. Or, if no copy is made of the underlying musical work, a sound recording could be digitally performed without implicating the new mechanical license.[103]

Until January 1, 1998, the statutory mechanical royalty rate for digital phonorecord delivery will be the same as the current rate for "hard" copies.[104] After this date, the rate will be determined by a collective negotiation process or, if no agreement is reached, by a copyright arbitration royalty panel.[105] Mechanical licenses are administered by the Harry Fox Agency.[106] Harry Fox uses a standard form agreement that includes the statutory rate.[107] By expanding

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102 *Id.*

103 Though computers make transitory copies whenever they transmit information, the contours of "digital distribution" and "copy" of a digital transmission have not been conclusively defined by Congress or the courts. During the 104th Congress, H.R. 2441, "The NII Copyright Protection Act of 1995," and S. 1284, "National Information Infrastructure Copyright Protection Act," would have amended the Copyright Act by declaring that digital transmissions constitute distribution. Neither bill, however, was enacted. Not surprisingly, on-line servers argue that copies made solely for the purposes of transmission do not violate the statute. Publishing companies, of course, would rather see the definition of "digital delivery" strictly construed. *See* Garcia, *supra note* 95, at 17.

Just prior to the passage of the Digital Performance Right Act, on October 25, 1995, the issue of licensing distributions of digitally transmitted musical compositions was addressed in the settlement of Frank Music Corp. v. CompuServe, Inc. In *Frank Music*, a class of rights owners claimed that the on-line server infringed their distribution rights by permitting subscribers to upload and download unauthorized versions of copyrighted musical compositions. As part of the settlement, the server is required to provide on-line users with a licensing agreement. The license only applies to musical compositions that are "stored" in computer databases. "Stored" is defined as "the maintenance of a phonorecord of a musical composition in digital data form as an electronic file either on a computer system or offline media designated for backup, reference, or archival purposes and shall include all reproductions of such data incidental to such maintenance a musical composition." *See* Frank Music Corp. v. CompuServe, No. 93 Civ. 8153, agreement dated Oct. 25, 1995, at 10 (filed S.D.N.Y. Nov. 7, 1995). The licensing rate is substantially equivalent to the royalty rates currently set for mechanical compulsory licenses. *See infra* note 104.

The definition of digital distribution is also a controversial topic of discussion in the international negotiating of a Protocol and New Instrument to the Berne Convention. *NII Copyright Protection Act of 1995: Joint Hearings on H.R. 2441 and S. 1284 Before the Subcomm. On Courts and Intellectual Property of the House Judiciary Comm. and the Senate Judiciary Comm.*, 104th Cong., 1st Sess. 58 (1995) (Statement of Mihaly Ficsor, Assistant Director General of the World Intellectual Property Organization).

104 After the Digital Performance Right Act was passed, the mechanical license royalty rate was adjusted to 6.95 cents per work or 1.3 cents per minute of playing time, whichever is larger. 60 Fed. Reg. 61,657 (1995) (to be codified at 37 C.F.R. § 255.5).

105 17 U.S.C. § 115(c)(3)(C),(D) (1994). In addition, the statute requires that royalty rates established under this section distinguish between general and incidental digital deliveries.

106 The Harry Fox Agency is a wholly owned subsidiary of the National Music Publishers' Association.

107 Royalty rates for mechanical licenses may be voluntarily negotiated. In practice, however, the statutory rates usually set the ceiling for mechanical royalties.

the mechanical license to include digital deliveries, the Harry Fox Agency's role, and, consequently, the revenues derived from administrative fees, substantially increased. This expansion of the Harry Fox Agency's revenue base comes at the expense of restricting composers' ability to establish a fair price for their work.[108]

V. Overview of the History of U.S. Efforts to Secure Performance Rights for Sound Recordings Abroad

Rapid developments in digital technology and the emergence of electronic networks are simultaneously creating new possibilities for the creation of works of authorship as well as a global marketplace for those works, while also calling into question the adequacy of conventional methods of protection.[109] Therefore, in order to study the effects of digital technology on sound recordings and how the United States can best protect the interests of its sound recording copyright owners, it is necessary to look at international copyright issues affected by digital technology.

In 1995, the Clinton Administration's Working Group on Intellectual Property Rights of the Information Infrastructure Task Force released its *White Paper*,[110] in which it advocated an active U.S. role in securing international copyright protection of works of authorship, particularly those works created and disseminated through the use of electronic technological advancements.[111] "The ownership and control of information and the means of disseminating it are emerging as national and international policy issues. . . . The adequacy of the legal structure to cope with the pace and rate of technological change frequently has been called into

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108 The statutory rate may be privately negotiated. However, once the copyright arbitration royalty panel has set a standard royalty rate, it is unclear why a prospective user of a sound recording would prefer to privately negotiate rather than accept the statutory rate, unless a user wanted to pay a lower rate. *See generally* Robert A. Gorman, *A Case Study of the American Federation of Musicians*, 37 Sw. L. J. 697 (1983).

109 As the U.S. Working Group on Intellectual Property noted: "[c]hanges in technology generate new industries and new methods of reproduction and dissemination of works of authorship, which may present new opportunities for authors, but also create additional challenges." White Paper, *supra* note 54, at 7.

110 *See supra* note 54.

111 As early as 1978 the Register of Copyrights predicted that:

> Congress, in its deliberations on performance rights, should not be unmindful of the possibility that technological developments could well cause substantial changes in existing systems for public delivery of sound recordings. In that event, it is equally possible that a performance right would become the main source of income from, and incentive to, the creation of such works.

Register of Copyrights, House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Comm., 95th Cong., 2d Sess., Performance Rights in Sound Recordings 174 (Comm. Print) (1978).

question."[112] The products of the copyright industries are a significant source of economic international trade for the United States.[113]

A. *The Berne Convention*

No international intellectual property law automatically protects fixed works of original authorship throughout the world. For the most part, laws protecting an author's writings are controlled by the country in which unauthorized use occurs.[114] There are, however, treaties and conventions that require signatories to extend protection to the foreign works of other participating countries. The largest and most influential international copyright convention is the International Union for the Protection of Literary and Artistic Works,[115] commonly referred to as the Berne Convention or Berne Union.[116]

The Berne Convention was formed as a result of the efforts of Victor Hugo and others to convene an international assembly in Berne, Switzerland in 1886. It is the oldest multilateral copyright treaty and maintains the highest standards of copyright protection for artistic works of any multilateral copyright treaty.[117] The original Berne Convention was intended to promote five objectives: (1) the development of copyright laws in favor of authors to bring about better worldwide copyright protection; (2) the removal over time of reciprocity as a basis for rights, with protection to be based instead on national treatment; (3) the elimination of discrimination in rights against foreign authors in all countries by assimilating foreign authors via national treatment; (4) the reduction of formal requirements for the recognition and protection of copyright in foreign works; and (5) the promotion of a high uniform level of international legislation for the protection of literary and artistic works.[118]

Under the Berne Convention, there are two ways in which pro-

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112 *House Hearing, supra* note 13, at 1 (statement of Rep. Hughes).

113 In 1993, the U.S. copyright industries alone reduced the United States's trade deficit by $45.8 billion. *See* WHITE PAPER, *supra* note 54, at 131.

114 William F. Patry, *Developments in International Copyright from the U.S. Perspective*, 318 PLI 349, 369 (Oct. 1991).

115 *See supra* note 18.

116 The other principal international treaty is the Universal Copyright Convention ("U.C.C."), which was formed shortly after World War II and took effect in the United States on September 16, 1955, *as last revised* at Paris, July 10, 1974. The U.C.C. is administered by a United Nation's agency, UNESCO. As of 1989, 26 country members of the U.C.C. were not Berne Convention members. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 373 n.6 (2d ed. 1995).

117 *See* Patry, *supra*, note 114, at 371.

118 *Id.* at 377-78.

tection for authors may be achieved: through nationality and through the place of publication. Nationals of Berne Convention member countries receive protection in their published and unpublished works in all other member countries. Authors from countries that are not signatories to the Berne Convention are nevertheless protected in Berne countries, so long as the works are first or simultaneously published in a Berne Convention member country.[119] Over a period of one hundred and ten years, Berne Convention membership has expanded to include over 100 countries, including the United States, which joined on March 1, 1989.[120] The convention has been revised five times.[121] Berne Convention members are not required, however, to ratify later acts, although the latest text must be adopted by any new members.[122]

It is important to distinguish between performers' rights in sound recordings and performance rights in musical compositions. Even though the terminology is confusing, the distinction is essential to understanding what rights are granted under the Digital Performance Right Act and to whom those rights are granted. Performers' rights are "rights granted to performers for their individual contributions"[123] to sound recordings. Thus, "where a performance is part of a copyrighted sound recording, absent a work-for-hire situation, the performer [or the producer] is usually a joint author of the sound recording."[124] A performance right to a musical composition, on the other hand, is a separate right granted to the copyright owner of a musical work, which might be either the composer, music publisher, or record company, to perform or authorize a public performance of a musical composition.[125] This distinction is important because performers or producers who have rights in a sound recording by virtue of their authorship, have only the rights of reproduction, distribution, and now, a limited digital public performance right. By contrast, the copyright owner of a musical work has an exclusive performance

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119 Berne Convention, *supra* note 18, art. 3(1). Because the Berne Convention is not self-executing, protection is granted only according to domestic U.S. copyright law. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1989).

120 Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.).

121 There are six separate Berne convention texts: Berne (1886), Berlin (1908), Rome (1928), Brussels (1948), Stockholm (1967), and Paris (1971). COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1268.

122 *See* Berne Convention, Paris Act, art. 29(1).

123 COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 877.

124 *Id.* Most often record companies own the rights in sound recordings. *See* Bergman, *supra* note 48, at 354.

125 *See* 17 U.S.C. § 106(4) and (6), and § 101 (1994) (definition of "to perform or display a work 'publicly'"); *supra* note 1.

right in that musical work, without the many statutory limitations imposed on sound recording copyright owners by 17 U.S.C. § 114.[126]

The distinction between performers' and producers' rights and performance rights becomes even more convoluted when studied from an international perspective. The Berne Convention grants "literary authors"[127] and authors of "dramatic, dramatico-musical and musical or other artistic works"[128] public performance rights. Significantly, the Berne Convention does not protect sound recordings or producers or performers of sound recordings.[129]

B. *The Rome Convention*

International performance rights in sound recordings are protected under a neighboring rights[130] regime by the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations ("Rome Convention"). The Rome Convention extends rights to "performers," "producers," and "broadcasting organizations." The rights granted are limited to reproduction, public performance, and broadcasting.[131] One might assume that rights in sound recordings would be greater in a copyright regime than a neighboring rights regime, and thus that the United States would easily be able to join the Rome Convention. This is not the case. Until the Digital Performance Right Act, the United States did not grant sound recording copyright owners a public performance right, nor do the limited rights granted under that Act meet the requisite minimum standards for adherence to the Convention. Sound recording copyright owners who are nationals of a Rome Convention member country are granted performance rights in other member countries. Performers and producers from other countries (such as the United States) that do not adhere to the Rome Convention are not

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126 17 U.S.C. § 106(4).

127 Berne Convention, *supra* note 18, arts. 11*bis*, 11*ter*(1).

128 *Id.* at art. 11(1).

129 COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 834.

130 The term "neighboring rights" refers to rights granted to performers and producers of phonograms, and sometimes is used to describe the rights of broadcasters as well. The distinction between authors' rights and neighboring rights is that "neighboring rights are nearly always rights in derivative works because they presuppose a pre-existing work." International copyright scholars have frequently noted that there is no merit to the argument that these derivative works are inferior to authors' works or that they demand less artistic skills. *See* STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS 191 (2d ed. 1989).

131 Rome Convention, arts. 5 (producers of phonograms), 6 (broadcasting organizations), and 7 (performers).

treated as nationals and thus are not protected.[132]

However, several commentators have taken the position that it is not desirable for the United States to join the Rome Convention. The Convention has never been updated and has received much criticism for its inability to keep up with the demands of modern technology.[133]

In light of passage of the Digital Performance Right Act, it may be possible for United States sound recording copyright owners to receive reciprocal bilateral public performance rights from foreign countries under the theory of material reciprocity.[134] Due to the very limited protection granted under the Act, the amount of royalties, if any, that can be expected to flow across the Atlantic under material reciprocity will be *de minimis* for the foreseeable future.

There are two major obstacles impeding expansion of United States sound recording public performance rights to conform to international standards: the opposition of broadcasters and performing rights societies.[135] The number of members of Congress who represent states in which a large contingency of recording artists and producers exist is very small. By contrast, every representative's district is home to numerous broadcasters who are likely to use the airwaves to reach constituents in order to excoriate legislators who threaten broadcasters' economic interests.[136] Performing

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132 The United States does adhere to the Geneva Phonograms Convention of 1971, however that convention does not cover performance rights in sound recordings or performers' rights. *See* COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 878 n.10.

133 *See* Jean-Francois Verstrynge, *The Spring 1993 Horace S. Manges Lecture—The European Commission's Direction on Copyright and Neighboring Rights: Toward the Regime of the Twenty-First Century*, 17 COLUM.-VLA J.L. & ARTS 187 (1993). The deficiencies of the Rome Convention have not escaped the attention of the WIPO which is currently seeking to redress the outdated Rome Convention text in the proposed language of the New Instrument. *See 1994 New Instrument Questions*, *supra* note 16, at 6.

134 Professor Patry draws a distinction between two different types of reciprocity: formal and material.

> Formal reciprocity means that Country A will protect the works of authors of Country B if Country B protects Country A's authors. Material reciprocity means that Country A, while generally protecting the works of Country B's authors, will extend a particular right to Country B's authors only if Country B extends that particular right to Country A's authors.

COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1236 n.4.

135 As Professor Patry notes, "[t]he lack of a performance right for sound recordings is attributable to opposition from broadcasters and the performing rights societies." COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 877; *see also supra* notes 30-40 and accompanying text.

136 This political short-sightedness is not limited to the United States. Interested lobby groups are a major threat to international copyright negotiations as well. As Verstrynge has warned:

> Domestic lobby groups, motivated by short-term interest—which may even be ill-conceived and self-defeating—should not be allowed to have their cake and eat it too. If the interests of these lobby groups are to prevail, the whole copyright community, including the exporting country, will lose out in the end.

rights societies easily mobilize popular composers to lobby against the diminution of royalties they believe would result from a full public performance right for sound recordings.

C. *The Geneva Convention*

While the United States is not a signatory to the Rome Convention, it does adhere to the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms.[137] The Geneva Convention protects "producers of phonograms"[138] against unauthorized "duplication"[139] and unauthorized duplicates of phonograms distributed to the public.[140] The distribution rights protected under the Geneva Convention are consistent with the distribution rights for sound recordings granted under United States copyright law.[141] However, neither performance rights nor performers' rights are granted under the Geneva Convention.[142] Instead, the Geneva Convention leaves it to the discretion of each signatory country to determine whether performers are granted performance rights.[143]

Verstrynge, *supra* note 133, at 205.

137 25 U.S.T. 309 (1971) [hereinafter Geneva Convention]. When the Copyright Act was amended in 1971 to grant protection for sound recordings, the United States became eligible to join the Geneva Convention. In 1973 the Senate ratified the Geneva Convention, and the Convention became effective in the United States on March 10, 1974. *See* COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1263.

138 The terms "producer of phonograms," "duplicate," "phonograms," and "distribution to the public" are all defined in the Geneva Convention, *supra* note 137, art 1.

139 "Duplication" is defined in the Geneva Convention. *Id.* at art 2.

140 The right of distribution granted under the Geneva Convention is set forth in article 2:

> Each contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Id. For a description of the terms of the Geneva Convention see COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1263-64.

141 The definition of "producer of phonograms" under the Geneva Convention is "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds." Geneva Convention, *supra* note 137, art. 1(b). This definition comports with the U.S. copyright definition of "sound recordings" as " works that result from the fixation of a series of musical, spoken, or other sounds . . . ." 17 U.S.C. § 101. *See also* COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1264 ("[T]he Geneva Phonograms Convention does not accord either a performance right in sound recordings or performers' rights, but rather, consistent with United States law, gives more limited protection . . . .").

142 The Geneva Convention specifically states that the rights granted performers and broadcasters under the Rome Convention are not affected by the rights granted producers under the Geneva Convention: "The Contracting States . . . anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which afford protection to performers and to broadcasting organizations as well as to producers of phonograms . . . ." Geneva Convention, *supra* note 137, Preamble ¶ 12.

143 "It shall be a matter for the domestic law of each Contracting State to determine the

The Geneva Convention was created in response to the perceived widespread piracy of phonograms.[144] The contracting states decided that the best means by which to address these piracy concerns was to protect the reproduction and distribution rights of phonogram producers.[145] There has been no international movement to update the Geneva Convention.

As the Geneva Convention now stands, the definition of "distribute to the public" could protect digitally transmitted sound recordings. The term "distribution to the public" is defined as "any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof."[146] Distribution as defined by the Geneva Convention is limited to duplicate articles. "Duplicate" is defined as "an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram."[147] The term "article" is not defined in the Geneva Convention text. If digital bits could be interpreted as "articles," then digital sound recordings could be covered by the Geneva Convention. Theoretically, this definition could encompass digital, or even analog, broadcasting of a sound recording, because broadcasting is a form of copying; such a result would effectively create a performance right, contrary to the admitted scope of the Geneva Convention.[148] If interpreted broadly, the Geneva Convention distribution right may be able to protect broadcasts of sound recordings. Of course, this would create a real conflict with the Rome Convention, contrary to assurances made in the Geneva text.[149]

It is less likely that the distribution right in the United States

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extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection." *Id.* art. 7(2).

144 The official report of the Geneva Convention states that "its purpose was the prevention of the piracy of phonograms." The Geneva Convention, Report Presented by the General Rapporteur, WIPO Doc. PHON.2/38 (Oct. 29, 1971), *reprinted in* RECORDS OF THE INTERNATIONAL CONFERENCE OF STATES ON THE PROTECTION OF PHONOGRAMS 38 (WIPO 1975) [hereinafter *Report of the Rapporteur General*].

145 The signatory states were "concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms." Geneva Convention, *supra* note 137, at Preamble ¶ 9.

146 *Id.* art. 1(d).

147 *Id.* art. 1(c).

148 The Report of the Rapporteur General states that "the essential feature of a duplicate was the fact that the article contained sounds taken directly or indirectly from a phonogram. . . . what is aimed at, particularly by the insertion of the word 'indirectly,' is the copying . . . even if the copying take place from the broadcasting of a phonogram or from a copy of a phonogram." *Report of the Rapporteur General, supra* note 144, at 38.

149 *See* Geneva Convention, *supra* note 137, at Preamble and art. 7(1).

Copyright Act[150] could be interpreted to protect broadcasts.[151] Recently, in *Agee v. Paramount Communications, Inc.*, the Second Circuit held that a television satellite transmission of a sound recording is not a distribution.[152] Judge Newman, writing for the court, equated "distribution" with the exclusive right of "publication" under the 1909 Copyright Act.[153] Based upon this reading of section 106(3), the court defined "distribution" of a sound recording as "a transmission of a material object in which the sound recording is fixed: a work that is of more than transitory duration."[154] Applying this definition of distribution to the broadcast of a sound recording, the court found that since a broadcast of a sound recording does not disseminate a physical material object to the public, it cannot be a distribution.[155] Judge Newman also noted that if a broadcast of a sound recording did constitute a distribution, sound recording copyright owners would have the performance rights expressly denied to them under the statute.[156] Thus, it would appear that under the standards adopted by the Second Circuit in *Agee*, digital broadcasts are "non-material" distributions and do not fall within a sound recording copyright owner's distribution right.[157]

Because the United States adheres to the Geneva Convention,

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150 "[T]o distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3).

151 Some courts have held that transmissions by cable networks to local cable companies constitute public performances. *See, e.g.*, Coleman v. ESPN, Inc., 764 F. Supp. 290 (S.D.N.Y. 1991) (holding that transmission by cable networks or services to local cable companies who transmit to individual subscribers is public performance); David v. Showtime/The Movie Channel, Inc., 697 F. Supp. 752 (S.D.N.Y. 1988) (holding that transmission to cable operator by cable programmer is public performance); WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622 (7th Cir. 1982). *See also* Playboy Enterprises, Inc. v. Frena, 839 F. Supp. 1552 (M.D. Fla. 1993) (holding that unauthorized uploading of copyrighted images onto a computer bulletin board with the knowledge that images would be downloaded by other bulletin board subscribers constitutes distribution).

152 Agee v. Paramount Communications, Inc., 59 F.3d 317 (2d Cir. 1995) (holding that copying a sound recording on tape as part of a television program soundtrack violates a sound recording copyright owner's exclusive reproduction right).

153 *Id.* at 324-25.

154 *Id.* at 325 (citing 17 U.S.C. § 101 definition of "copy").

155 The legislative history of the 1971 Act states that "any form or dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed." H.R. REP. NO. 487, 92d Cong., 1st Sess. 1 (1971).

156 *Agee*, 59 F.3d at 325. The court did not establish a *per se* rule that distribution requires dissemination of physical material. *Id.* at 325-26. However, the court did identify the relevant factors for determining whether a broadcaster engaged in broadcasting (public performance) or dissemination (the distinction between material and non-material embodiments), and whether the program is transmitted to the public. *Id.* at 326.

157 *Agee* is perhaps better known for holding that sound recording copyright owners have a synchronization right. Synchronization rights evolved with talking motion pictures as directors utilized sound in synchronization with the visual images. Judge Newman found that a synchronization right is an example, not an extension, of the sound recording copy-

United States producers of sound recordings are protected under the terms of the convention in all signatory countries. Since the minimum requirements to join the Geneva Convention are less stringent than those required to adhere to the Rome Convention, most countries who are members of the Rome Convention are also members of the Geneva Convention. However, even creators of sound recordings who are nationals of countries that do not protect sound recordings or that do not adhere to the Geneva Convention are eligible for protection of their works in the United States. Under U.S. copyright law, national eligibility exists if the author's country adheres to any treaty or convention specified in 17 U.S.C. sections 104(b)(1)-(2), and (b)(4).[158]

Thus, any author of a published[159] sound recording who satisfies one of section 104's criteria is now eligible for the limited performance rights granted under the Digital Performance Rights Act of 1995. The converse, however, is not true; United States nationals are not granted digital performance rights abroad, because none of the conventions or treaties the United States adheres to grants any performance rights in sound recordings. This is a point of major contention for United States sound recording owners.

D. *Harmonizing United States Digital Performance Rights and Existing International Conventions*

The Rome Convention is the only international treaty presently in place that could incorporate the digital performance rights granted under the Digital Performance Right Act, as it is the only existing treaty which protects sound recording performances. However, the United States does not adhere to the Rome Convention, nor can it hope to join the Rome Convention because the U.S. Copyright Act cannot reasonably be expected to be amended to meet the minimum requirements of the Rome Convention.

Even if Congress did amend the Copyright Act and the United States joined the Rome Convention, it is uncertain whether this would provide domestic sound recording copyright owners with sufficient performance rights in this new digital era. The Rome Convention has not been revised since it was first created in

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right owners' reproduction right explicitly granted by § 106(1) of the 1976 Act. *See Agee*, 59 F.3d at 322.

158 National eligibility also exists if the country is covered by a presidential proclamation issued under subsection 5, or under § 109(b)(3) if the work was first published by the United Nations or the Organization of American States. COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1263.

159 Unpublished sound recordings have always been protected in the United States without regard to national eligibility.

1961.[160] It does not include any language on cable transmission or satellite broadcasting, and most importantly, it does not address the concerns raised by digital technology and transmissions.[161] Furthermore, articles 12 and 16 of the Rome Convention exempt the remuneration right for the broadcasting of music from the rule of national treatment. These rights are instead subject to reciprocity. Since the United States does not grant its sound recording copyright owners these rights, U.S. sound recording copyright owners would not enjoy these reciprocal rights abroad. Thus, in order for the United States to ensure that the digital performance rights now granted to all nationals of any member of the expansive treaty list in section 104(b)(1)[162] will be similarly granted to U.S. sound recording copyright owners, the United States will have to seek such protection by other means.

VI. CURRENT ATTEMPTS TO SECURE INTERNATIONAL PROTECTION FOR U.S. SOUND RECORDING COPYRIGHT OWNERS

A. *GATT/TRIPs Agreement*

Until the mid 1980s, the World Intellectual Property Organization ("WIPO") which administers the Berne Convention and co-administers the Rome Convention was the most influential force shaping international copyright law. In the mid-eighties, as countries sought greater and more rapid protection of their intellectual property, international trade negotiation agreements and new political unions emerged to challenge the venerable WIPO treaty system.[163]

The first major trade negotiations to challenge the WIPO treaty system began in 1986 with the initiation of the Uruguay Round of the Multilateral Trade Negotiations to amend the General Agreement on Tariffs and Trade ("GATT").[164] The Uruguay Round was the first GATT revision proposing the inclusion of intel-

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160 STEWART, *supra* note 130, at 299.

161 The Rome Convention would only cover secondary use. For example, only broadcasts and communications to the public would be covered. Rome Convention, art. 12. Left unprotected would be primary use, such as transmissions to users at home. Nick Garnett & Lisa Gordon, *Future Developments & New Technologies, reprinted in* DIGITAL CABLE RADIO-THE TENSIONS BETWEEN THE MUSIC INDUSTRY AND THE BROADCAST INDUSTRY 95, 104 (Robert w. Allen eds. 1994).

162 17 U.S.C. § 104(b)(1).

163 *See* Ralph Oman, *Berne Revision: The Continuing Drama*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 139-140 (1993).

164 General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 55 U.N.T.S. 187. As of January 1, 1995, the GATT Secretariat was replaced by the World Trade Organization ("WTO") which will now oversee the trade agreement. COPYRIGHT AND THE GATT, *supra* note 15, at 1.

lectual property. This proposal was ultimately embodied in Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods ("TRIPS Agreement").[165] The goal of the GATT is to encourage free trade by reducing trade distortions.[166] The theory behind incorporating protection of intellectual property in trade agreements is that inadequate protection of intellectual property leads to trade distortions, thereby inhibiting free trade.[167]

The United States also sought to incorporate intellectual property provisions in the GATT because of the lack of dispute resolution procedures under the Berne Convention, and because it was more efficient to negotiate a single multilateral treaty than to negotiate many bilateral treaties, as had been the U.S.'s practice prior to conclusion of the Uruguay Round.[168] The United States sought to incorporate national treatment protection for performances of sound recordings into the GATT text, which would have allowed U.S. sound recording copyright owners to receive performance rights in those countries party to the TRIPS Agreement. If these efforts had succeeded, U.S. copyright owners would have had performance rights in sound recordings in European countries, all of which were signatories to the TRIPS Agreement and provided for neighboring rights on a reciprocal basis. Not surprisingly, these efforts failed. In fact, the United States' efforts to provide for national treatment of sound recordings was a source of major contention between the United States and the European Union, which almost caused the entire TRIPS negotiations to collapse.[169]

It is not difficult to understand why the European Union was so adamantly opposed to incorporating national protection for sound recordings into the GATT text. European Union nationals would not be granted performance rights in their sound recordings under U.S. copyright law, which provides no such protection,

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165 Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); *see* COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1308. The provisions of the Uruguay Round are also commonly referred to as "the Dunkle Draft" named after the ex-Director of the GATT, Arthur Dunkle, who submitted the proposal draft. LEAFFER, *supra* note 116, at 396 n.126.

166 COPYRIGHT AND THE GATT, *supra* note 15, at 2.

167 "Absent sufficient protection, creators can no longer recover the cost of their investment in research and development, resulting in lower production, fewer trading opportunities, and higher cost to consumers." LEAFFER, *supra* note 116, at 395. *See generally* A. Jane Bradley, *Intellectual Property Rights, Investment, and Trade in Services in the Uruguay Round: Laying the Foundations*, 23 STAN. J. INT'L L. 57 (1987).

168 *See* COPYRIGHT AND THE GATT, *supra* note 15, at 2.

169 *Id.* at 2-3. The United States also failed to win provisions in the GATT text to extend national protection for audiovisual works, for content quotas on broadcasts, and for television and market access for audiovisual works. *Id.*

while considerable royalties would have to be paid to U.S. sound recording copyright owners for performances in the European Union.[170]

Even though the GATT/TRIPS Agreement did not provide U.S. sound recording copyright owners performance rights abroad, the final text does grant performers "the possibility of preventing" the unauthorized fixation and reproduction of their live performances, as well as the "possibility of preventing" wireless broadcasts and communication to the public of their live performances.[171]

While these measures grant performers protection against the broadcasting of unauthorized fixations of their live performances (commonly referred to as "bootlegs"), this right does not extend to performances of pre-recorded sound recordings.[172] Furthermore, the term "fixation" is undefined in the TRIPS text.[173] Therefore, it is unclear whether the term "fixation" includes unauthorized digital representations of sounds in binary numbers that could occur without any initial sound having been created.[174] Thus, in order for U.S. copyright owners in sound recordings to receive international digital performance rights in pre-recorded sound recordings under a multilateral trade agreement, either the TRIPS Agreement text would need to be amended, or a new multilateral agreement would have to be negotiated.

B. *The Relationship of the TRIPS Agreement and WIPO*

Trade agreements such as TRIPS challenge the structure of the WIPO treaties by providing a parallel vehicle for the protection of intellectual property. Trade agreements can also supplement the WIPO treaties, providing procedures for resolving disputes and sanctions for those parties who infringe or threaten authors'

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170 The Recording Industry Association of America estimates that in 1991 foreign royalty pools distributed over $120 million in performance royalties. *House Hearing*, *supra* note 13, at 46 (statement of Jason Berman).

171 In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

TRIPS Agreement, *supra* note 15, art. 14(1).

172 For a history of the decision not to extend protection to pre-recorded sound recordings in the TRIPS Agreement text, see COPYRIGHT AND THE GATT, *supra* note 15, at 7 n.23.

173 The language of the TRIPS Agreement text is derived from the Rome Convention, which does not define "fixation." *Id.* at 10 n.31.

174 *Id.* (discussing a comparative analysis of the definition of "fixation" under the Rome Convention and under U.S. copyright law).

rights.[175] The Berne Convention does not provide specific sanctions for the infringement of authors' rights.[176] Under the Berne Convention, any sanctions for infringement are determined by the laws of the Berne Convention member country.[177] The strength of the WIPO treaties does not lie in dispute resolution procedures, but in the creation of minimum global standards for the international protection of authors' and performers' works.

Since 1990, WIPO has been working to create two new documents in an effort to advance international copyright protection. The first document is a "Protocol to the Berne Convention"[178] ("Berne Protocol"), the second is a "New Instrument for the Protection of the Rights of Performers and Producers of Phonograms."[179]

The Berne Protocol will address issues such as protection for computer programs and databases, non-voluntary licenses for musical works and primary broadcasting and satellite communication, distribution rights including rental and importation rights, photographic works, enforcement, and national treatment.[180] Unlike a full revision of the Berne Convention text, a Protocol does not re-

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175 *Id.* at 2.

176 *Id.*

177 *Id.*

178 *See Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, Questions Concerning a Possible Protocol to the Berne Convention Part I, Memorandum Prepared by the International Bureau,* 1st Sess., WIPO Doc. BCP/CE/I/2 (July 18, 1991); *Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, Questions Concerning a Possible Protocol to the Berne Convention Part II, Memorandum Prepared by the International Bureau,* 1st Sess., WIPO Doc. BCP/CE/I/3 (Oct. 8, 1991); *Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, Report Adopted by the Committee,* 2d Sess., WIPO Doc. BCP/CE/II/1 (Feb. 19, 1992); *International Union for the Protection of Literary and Artistic Works, Assembly, Questions Concerning a Possible Protocol to the Berne Convention, Memorandum by the Director General,* 13th Sess., WIPO Doc. B/A/XIII/1 (July 10, 1992); *International Union for the Protection of Literary and Artistic Works, Assembly, Report Adopted by the Assembly,* 13th Sess., WIPO Doc. B/A/XIII/2 (Sept. 29, 1992); *Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, Questions Concerning a Possible Protocol to the Berne Convention Part I Introduction, Memorandum Prepared by the International Bureau,* 3d Sess., WIPO Doc. BCP/CE/III/2-1 (Mar. 12, 1993); *Protection of Literary and Artistic Works, Questions Concerning a Possible Protocol to the Berne Convention Part II Items Already Discussed, Memorandum Prepared by the International Bureau,* 3d Sess., WIPO Doc. BCP/III/2-II (Mar. 12, 1993); *Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, Questions Concerning a Possible Protocol to the Convention Part III New Items, Memorandum Prepared by the International Bureau,* WIPO Doc. BCP/CE/III/2-III (Mar. 12, 1993); *Committee of Experts on a Possible Protocol to the Berne Convention, Report prepared by the International Bureau,* 3d Sess., WIPO Doc. BCP/CE/III/3 (June 25, 1993); *Committee of Experts on a Possible Protocol to the Berne Convention, Report Prepared by the International Bureau,* 5th Sess., WIPO Doc. BCP/CE/V/9-INR/CE/IV/8 (Sept. 12, 1995) [hereinafter *Protocol Report*].

179 *See supra* note 16.

180 *See Protocol Report,* supra note 178.

quire unanimous approval.[181] The terms of the Berne Protocol are currently being developed by a committee of experts made up of Berne Convention member states who convene at meetings called by the chairman of WIPO. The committee of experts has met five times to date.[182] The last meeting was held in September 1996.[183] The experts' meetings were preparation for a diplomatic conference, to be held in December 1996.

There are drawbacks to the administration of the Berne Convention that make updating and promoting enhanced international copyright protection rather difficult. First, Berne Convention members are not required to ratify later acts.[184] Second, only the latest text is available to new members.[185] These factors have the potential to impede the promotion of uniform international copyright laws that would sufficiently protect works of authorship in the digital era.

C. *Reciprocity*

A particularly contentious issue in the Berne Protocol debates has been the erosion of the principle of national treatment by reciprocal protection. Reciprocity is of major concern to the United States. In its efforts to secure protection for its intellectual property owners, the United States has engaged in multi-level international trade agreements, which by necessity rely upon reciprocity for the enforcement of the terms of the agreement.[186] The theory of international trade agreements requires countries to agree to the proposed terms only if they receive trade concessions in return.[187] This presented the United States with substantial problems in trying to include foreign protection for sound recording owners in the TRIPS Agreement text. The United States and the European Union could not formulate satisfactory trade incentives in return for national treatment of U.S. sound recording copyright owners.

Reciprocity is not only a problem in practice, but it is also a problem in theory. Technological advances are rapidly being made and are constantly providing new challenges to the existing copyright protection of authors' works. National treatment acts to

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181 *See supra* note 17.
182 *See supra* note 178.
183 *See 1994 New Instrument Report, supra* note 16, at 98.
184 *See* COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1268.
185 *Id.*
186 *See* Verstrynge, *supra* note 133, at 200-01.
187 *Id.* at 201.

increase the minimum level of protection for authors' works around the world and secures every country against a decrease in copyright protection.[188] It also promotes the ideological framework for international copyright: "[p]romotion of ideas, science and creativity around the world for their own sake."[189] International trade treaties, while providing effective enforcement mechanisms within the treaties themselves if the terms are breached, essentially swap corn for performance rights in sound recordings. Such a swap does not further the promotion of arts and sciences around the world. It does more to rectify the perception that the United States can only secure protection for its sound recording copyright owners by making trade concessions, rather than by becoming the international leader in intellectual property rights.

There is a disturbing new trend, particularly within the European Union, to rely on material reciprocity, as opposed to national treatment as a means by which to avoid a substantial outflow of royalties to United States copyright owners without a simultaneous inflow of royalties back to Europe.[190] This trend is not limited to digital technologies, and has been applied to databases[191] and to extensions of the term of copyright protection.[192]

In the current negotiations over the provisions of the Berne Protocol and the New Instrument, the most important players, particularly the European Union and its member states, are insisting on eradicating mechanical compulsory licensing for non-dramatic musical works.[193] In the most recent meeting of the committee of experts on a Possible Protocol to the Berne Convention, the chairman of WIPO acknowledged the deep tension between the European Union and the United States in his introduction of the issue of non-voluntary (compulsory) licenses for the sound recordings.[194] In particular, the chairman acknowledged that the European Union "had proposed treaty language for abolishing those non-voluntary licenses, while the United States of America indicated it would have difficulty with such abolition on account of established business practices relying on such non-voluntary

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188 *Id.* at 202.

189 *Id.*

190 COPYRIGHT LAW AND PRACTICE, *supra* note 17, at 1235-36.

191 Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases, art. 11(3), 1996 O.J. (L 77).

192 Council Directive 93/98/EC of 29 October 1993 harmonizing the term of protection of copyrighted and certain related rights, art. 7(2), 1993 O.J. (L 290).

193 *See Protocol Report, supra* note 178, at 18.

194 *Id.* There are currently no compulsory licenses for sound recordings outside the U.S.

licenses."[195]

In fact, the chairman's comment on the United States' position on the abolition of compulsory licensing is quite diplomatic. Ralph Oman, then the United States Register of Copyrights, indicated that the U.S. recording industry would refuse to support the Berne Protocol if it abolished compulsory licensing.[196] Meanwhile, a majority of Berne Convention members supports the abolition of non-voluntary licensing.[197] The result is that the chairman of WIPO proposed that the Committee on a Possible Protocol to the Berne Convention use the language drafted by the European Union as the basis for negotiations over this provision in the Protocol.[198]

The passage of the Digital Performance Right in Sound Recordings Act of 1995, with its expanded compulsory licensing provisions will only increase the tension over this issue in international negotiations.[199] If the Berne Protocol includes language abolishing compulsory licensing, then either the United States will have to make major substantive changes to its current copyright laws,[200] or it will apparently be unable to join the Protocol, which would represent a tremendous defeat.[201] The biggest shortcoming of the Berne Protocol for sound recording copyright owners is, of course, the fact that it does not cover sound recordings. Such protection is proposed in a second document, the New Instrument.

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195 *Id.*

196 "The U.S. recording industry, which was fairly enthusiastic about the possibilities of the New Instrument improving protection for their works, would walk away from the Protocol if it jeopardized the compulsory license." Oman, *supra* note 163, at 153.

197 *Protocol Report*, *supra* note 178, at 18.

198 *Id.*

199 The Digital Performance Right Act had not been signed by President Clinton when the last meeting of the Committee of Experts on a Possible Protocol to the Berne Convention convened in September of 1995. However, at the meeting the United States drew attention to the pending Act, noting that "[t]his new legislation, if passed, would make it even more difficult for the Delegation to agree on abolishing such non-voluntary licenses. Nevertheless, the Delegation added that it did not oppose discussing this issue further." *Protocol Report*, *supra* note 178, at 18.

200 As the United States is trying to rid the rest of the world of unjustified and unnecessary compulsory licensing systems, which force U.S. copyright owners to accept statutory licensing fees for the use of their works abroad, we cannot justify keeping this unnecessary compulsory license in our law. Continuing an unnecessary compulsory licensing scheme that has outlived its justification sends the wrong message abroad and sets a undesirable precedent internationally.

Senate Hearing, *supra* note 21, at 61 (statement of Bruce A. Lehman).

201 The abolition of all compulsory licensing would also affect 17 U.S.C. § 111(d), which currently provides for the compulsory licensing of cable retransmissions. 17 U.S.C. § 111(d). A majority of WIPO's committee of experts were in favor of abolishing compulsory licensing for primary broadcasting and satellite communications. It was also decided that the European Union's proposed treaty language would be the basis for upcoming discussions on this issue. *Protocol Report*, *supra* note 178, at 20.

D. *The New Instrument*

Having failed to receive reciprocal protection for a performance rights for sound recording copyright owners in TRIPS, the United States has been presented with a new opportunity to see that its sound recording copyright owners receive international performance rights, or alternatively, performance rights limited to digital performances as defined under the Digital Performance Right Act.

In 1990, WIPO adopted a program providing that the International Bureau would prepare a "New Instrument" to operate in tandem with the Protocol to the Berne Convention.[202] The WIPO program thus continues to distinguish between the rights of authors and the rights of producers of sound recordings.[203] Work on the New Instrument began with a committee of experts.[204] The proposed New Instrument addresses the deficiencies in both the Rome and Geneva Conventions with respect to the moral and economic rights of performers and producers in their fixed performances and phonograms. Specifically, it seeks to address "[the] developments related . . . to the effect of digital technology on the creation, exploitation, and use of phonograms and fixed performances."[205]

The issues raised in the New Instrument include, but are not limited to, national treatment for phonogram producers and performers, exclusive performance rights versus the possibility of preventing unauthorized uses of performances, rights of remuneration for public performances, the possibility of a distinction to be made between digital delivery and other means of communication to the public,[206] moral rights of performers,[207] reproduction, adap-

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202 *See 1993 New Instrument Questions, supra* note 16, at 3.

203 *Id.*

204 This decision was made by the Assembly and the Conference of Representative of the Berne Union on September 29, 1992. *Id.*

205 *1994 New Instrument Questions, supra* note 16, at 20. In the first meeting, the International Bureau articulated the stated goal of the New Instrument as follows:

> the capacity to make perfect copies of phonograms and fixed performances from either existing copies or from digital broadcasts or interactive systems, and the capacity of persons who subscribe to "pay-per-listen" services for on-demand access to phonograms and fixed performances, have blurred the distinction among the traditional rights of reproduction and distribution, broadcasting and communication to the public, and public performance. At the same time, the potentially broad scope of an existing right—communication to the public—may offer the possibility of embracing many of the new forms of access to and use of phonograms and fixed performances, without erring on the side of "over-legislating" at a time when new commercial arrangements, particularly at the international level are still developing.

Id.

206 *See Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers*

tation, distribution, and derivative rights of both performers in fixed performances and of producers in their phonograms.[208] These proposals present a number of problems for the United States. If they were required today, the United States would have to amend its copyright law to provide moral rights in sound recordings and broaden performance rights for sound recordings to provide for an exclusive performance right not limited to digital transmissions.[209]

1. Moral Rights

The Rome Convention does not provide moral rights for performers.[210] The WIPO committee on the New Instrument recognized that digital technology presents many challenges to the moral right of integrity in performers' works, including "distortion, mutilation or other modification[s]"[211] of performances that could prejudice the performer. The committee also recommended a right of attribution[212] in both fixed and unfixed performances. Even though United States copyright law has generally been adverse to moral rights,[213] some moral rights in sound recordings are

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and Producers of Phonograms, Report Adopted by the Committee, 2d Sess., WIPO Doc. INR/CE/II/1 (Nov. 12, 1993).

> Some delegations and observers from non-governmental organizations said that a distinction should be made among basic types of communication to the public, namely among broadcasting digital delivery and other ways of communication to the public, and the possible overlap between these notions and those of distribution and public performance should be examined further. The proposals of the International Bureau should be further itemized, along with an appropriate modification of the definitions to facilitate the progress in the work of the Committee.

Id. at 4.

207 *Id.* at 13 (discussing the issues raised by digital technology on the moral rights of performers). *See generally* Gendreau, *supra* note 67 (discussing the impact of digital technology on moral rights, and proposals for how both civil law and copyright schemes could harmonize moral rights in the digital era).

208 *See 1995 New Instrument Report*, *supra* note 16, at 31.

209 The Copyright Office presented to the Senate amendments which would be necessary in order to adapt U.S. copyright law to the requirements proposed in the Protocol, including the New Instrument. *Senate Hearings*, *supra* note 21, at 12-13 (statement of Marybeth Peters).

210 *Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights of Performers and Producers of Phonograms to be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions*, WIPO Doc. CRNR/DC/5 (Aug. 30, 1996) 32 at ¶ 5.01.

211 *See 1994 New Instrument Questions*, *supra* note 16, at 13.

212 The right of attribution for a performer is the right to claim that one is a performer of a performance. In practice, this would entail indicating on a fixed performance the name of the performer, several performers, the name of an orchestra or band, the name of the artistic director, and the name of the featured performers. For a description of the proposed moral rights and examples of the beneficiaries of these rights, see *id.*

213 The two moral rights recognized under U.S. federal copyright law are the rights of attribution and integrity. These rights were incorporated into the Copyright Act in 1990

amenable to United States copyright law.[214] For example, the Digital Performance Right Act grants performers a limited attribution right in digital transmissions.[215] However a right of integrity is lacking.

The most important concern for the United States over moral rights is economic rather than doctrinal, and relates to the fact that a phonorecord of a sound recording typically embodies a second copyright in the musical work, separately owned by the songwriter or music publisher. Moral rights in sound recordings may impede the exploitation rights of the musical copyright owners. Copyright is based upon the theory that the public benefits from the creation of original works of authorship. If the public is denied access to a musical work embodied in a phonorecord because a sound recording copyright owner objects to the exploitation of that work based upon the infringement of his or her moral rights, while the composer does not object to the exploitation of the musical composition, this could be perceived as an improper extension of the limited monopoly granted to a sound recording copyright owner.

The methods used to balance the right of attribution language and the economic rights of musical composers in the Digital Performance Right Act can be applied to the moral rights provisions introduced in the New Instrument, so that the United States would be able to adhere to these provisions and adapt the U.S. copyright statute without undue hardship. During the most recent WIPO discussions on the inclusion of moral rights for performers in the New Instrument, it was decided that Article 6*bis* of the Berne Convention, which grants the rights of attribution and integrity, would be the basis for drafting moral rights language.[216] The U.S. delegation proposed that the language in Article 6*bis* of the Berne Convention be modified, such that these rights could be waived by the performer.[217] If adopted, this language would provide moral rights

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under Pub. L. No. 101-650, § 106A, 104 Stat. 5089, 5129-30, and only apply to "works of art" as defined in § 101.

214 *See generally* Gendreau, *supra* note 67 (discussing the amenability of copyright law to moral rights).

215 [E]xcept as provided in § 1002(e) of this title, the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

17 U.S.C. § 114(d)(2)(E).

216 *See 1995 New Instrument Report, supra* note 16, at 31 (statement of the Chairman).

217 The U.S. delegation proposed that "[moral] rights should be waivable, and waivable only in the context of the specific use covered by the contract between the performer and the producer of the sound recording." *Id.* at 24-25.

for performers while insuring that these rights would not interfere with the economic exploitation of a sound recording. The United States would have to amend the Copyright Act to include integrity rights for sound recordings. It is unlikely that such an amendment would be introduced. The only moral rights in the present Copyright Act are narrowly drawn and are limited to "works of visual art."[218]

It is difficult to imagine that strong moral rights would be granted to sound recordings, which are traditionally one of the most thinly protected works of authorship.[219] Nonetheless, if a waivable right of integrity was granted to sound recordings and this waiver became a standard contract clause, it would not restrict other copyright owners' rights.

2. Exclusive Performance Rights and Compulsory Licensing

At the first meeting on the New Instrument, the International Bureau prepared a memorandum proposing that the New Instrument include an exclusive performance right for performers and producers.[220] At the same time, the International Bureau recognized that exclusive rights "might not be appropriate for all means of digital broadcasting, communication to the public and performance."[221] The issue is that the "secondary use" language in article 12 of the Rome Convention provides only for the right to remuneration for broadcasting and communication to the public.[222] This provision is no longer adequate because it only remedies performers' and producers' economic losses when private copies are made from an authorized broadcast or communication to the public. Digital technology may replace the purchasing of phonorecords, so performers and producers would suffer economic loss from the availability of direct electronic delivery of the performance into the home, and not from the "secondary use," or private copying of an authorized broadcast or performance.[223]

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218 *See supra* note 213.

219 Musical composers and publishers were very concerned that their rights could be restricted by digital performance rights in sound recordings. *See Senate Hearings, supra* note 21. They would conceivably be equally if not more concerned by any grant of moral rights.

220 *1994 New Instrument Questions*, supra 16, at 21.

221 *Id.* at 21.

222 *Id.* Article 12 of the Rome Convention states in relevant part:

> If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both.

Rome Convention on Neighboring Rights, Oct. 26, 1961, 496 U.N.T.S. 43.

223 *New Instrument Questions, supra* note 16, at 21.

The committee proposed that even if exclusive rights are not appropriate for all performances, the New Instrument should at least include an exclusive right for on-demand, interactive digitally delivered performances.[224] The term "on-demand" has not yet been defined in the New Instrument. If it is defined as "any time a member of the public requests the delivery of recorded music for reception at a time and place chosen by the member of a public," then the United States would not have to amend its copyright statute. In fact, the definition of "interactive transmission" in 17 U.S.C. § 114, as amended by the Digital Performance Right Act, is: "[a]n interactive service' is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient."[225]

The Digital Performance Right Act does not grant exclusive rights to performers and producers for subscription transmission services.[226] Nonetheless, "subscription transmission" is specifically defined under the same section[227] that defines "interactive service," from which it can be inferred that the two are not interchangeable. Thus, so long as the United States can limit the definition of "on-demand, interactive digital delivery" in the New Instrument to interactive transmission services as defined in section 114, the United States will not have to repeal its compulsory licensing of digital subscription services.[228]

Even if section 114 of the Copyright Act of 1976 would not have to be revised to comply with the terms of the New Instrument, section 115 would have to be revised if not completely eliminated.[229] Compulsory license creates a very difficult hurdle for the

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224 *Id.*

225 17 U.S.C. § 114(j)(4).

226 *See supra* notes 77-84 and accompanying text.

227 17 U.S.C. § 114(j)(8).

228 Compulsory licensing is not necessarily the most effective means to stimulate the creation and dissemination of new works. As one industry representative stated:

> [R]egimes of equitable remuneration are both over and under inclusive. In operation, they prevent copyright owners from entering into zero or *de minimis* licensing of particular activities that may promote other important economic uses, while at the same time placing a cap on the ability to secure market rates for uses that may exhaust the economic value of the copyrighted work. This in turn, could result in the elimination of certain socially valuable uses of copyrighted works by organizations who, under market forces, could have obtained more favorable conditions. It could also erode the economic incentives necessary for the production of recorded music by providing only a nominal return in particular uses that . . . exhaust the economic value of the work.

Jason Berman, *The Music Industry and the Technological Development: Are We Winning the War?*, *in* WIPO WORLD WIDE SYMPOSIUM ON THE IMPACT OF DIGITAL TECHNOLOGY ON COPYRIGHT AND NEIGHBORING RIGHTS 96 (WIPO 1993).

229 Before the Digital Performance Right Act was passed, the U.S. Copyright Office advised Congress that including a compulsory license provision in the new Act could nega-

United States to overcome in international negotiations over the Berne Protocol and the New Instrument.[230]

Compulsory licensing could make it easier for the United States to comply with minimum New Instrument requirements if it adopted performance rights for all transmissions. The European Union has indicated that if both digital and analog performance rights were adopted, the remedies available for producers and performers could be limited to equitable remuneration,[231] and could be administered by collection agencies. The United States has rejected this proposal in the Digital Performance Right Act and is unlikely to adopt it in the future.[232]

Notwithstanding the potential of the United States to comply with the on-demand, interactive digital service right requirements, it will not be able to secure national treatment for analog performances. Analog public performance rights are currently the only lucrative performance rights in sound recordings. Unless the United States is able to amend the copyright statute to include an analog public performance right, or unless it can ensure that performance rights will not be subject to reciprocity in the New Instrument, it appears that international protection for analog performances in sound recordings will remain out of reach.

3. Digital Agenda

In the most recent round of discussions, the Chairman of WIPO included a new section called the "digital agenda."[233] This digital agenda is dedicated to issues relating to reproduction and distribution via digital transmissions, "the digital delivery issue,"[234]

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tively affect U.S. participation in the Berne Protocol and the New Instrument. *See Senate Hearing, supra* note 21, at 63. As early as 1993, the Copyright Office reported to the House of Representatives that the draft of the Berne Protocol included language abolishing compulsory licensing. The Copyright Office also reported that § 115 of the Copyright Act of 1976 would have to be repealed if this Protocol language was adopted. *See House Hearing, supra* note 13, at 13.

230 In the White Paper, the Working Group on Intellectual Property, chaired by Bruce Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, warned that "*any*, special limitations on [the digital performance right] weakens our position internationally." WHITE PAPER, *supra* note 54, at 225.

231 *1995 New Instrument Report, supra* note 16, at 56:

> [I]ts proposal included the granting of rights of broadcasting and communication to the public to both performers in respect of their fixed performances, and producers of phonograms in respect of their phonograms, with the exception that those rights of performers would not extend to audiovisual productions. Exceptions could be established to limit such rights to a right to equitable remuneration, and/or to require that these to rights be administered by collective administration organizations.

232 *See* H.R. REP. NO. 274, *supra* note 57, at 13-14.

233 *See 1995 New Instrument Report, supra* note 16, at 59.

234 *Id.*

and to "protection measures and rights management information."[235] The discussions on the digital agenda are not well developed as it was first introduced in the September 1995 session. However, the United States has proposed that the digital agenda address in particular, public communications, performances, distribution, and adaptation of copyright owners' works.[236] Since the United States now has limited protection for digital performance rights, if it can ratify only this section of the New Instrument, perhaps it can obtain international protection for digital performance rights in sound recording copyright owners.

VII. CONCLUSION

The New Instrument holds the key to international protection for performance rights in sound recordings. Since the United States has a history of denying performance rights to sound recording copyright owners, the best chance it has to secure international protection is to adopt the performance rights proposed under the digital agenda.

*Rebecca F. Martin**

235 *Id.*

236 *Id.* at 60.

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