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# Twenty-First Century Music Performance Licensing and the Great Royalty Debates

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These are exciting times for musicians and the music industry. Despite the well-publicized decline of the “old” business model (based on the sale of physical products), the rapid rise of the “new” music business (based on digital exploitation of music content) is presenting new opportunities for participants at all levels of the industry.

This article focuses on one new and rapidly developing segment of the music business—the advent of a new “public performance right” that has become the basis for a growing pool of royalty revenue. Many of the primary beneficiaries of this new pool of money—recording artists, artists’ estates, and record labels—do not even know they are entitled to collect the revenue they have already earned. Indeed, thousands of recording artists and labels are forfeiting money by not claiming royalties at all. Thousands more have thus far failed to manage a growing and ongoing royalty stream, effectively leaving many millions of dollars under-collected.<sup>1</sup>

Accordingly, the intent of this article is to help raise awareness of these new rights, highlight recent developments and debates, and serve as a primer for those with responsibility for managing these important new revenue streams, such that collection and payment of digital music royalties is maximized, to the benefit of the entire music community. Before exploring this new set of rights—best known as “neighboring rights” from a recording artist’s perspective—it is necessary to have a basic understanding of music copyright, and the attendant right of public performance.

## A Short History of Performance Rights

### Music Components—Songs and Sound Recordings

From a legal perspective, recorded music has two components. First, there is a song written by a composer/songwriter, who typically owns the property jointly with a music publisher.<sup>2</sup> The publisher takes responsibility for marketing and negotiating licenses for use of the song, and pays the writer a share of the proceeds. Songs are known as “musical works” under the copyright law. Licensing revenue flows whenever musical works are reproduced on compact discs; sold as downloads; “sampled” in other songs; “synchronized” in films or commercials; and (importantly for our discussion) performed publicly. This last category broadly includes dissemination through radio, television and, Internet broadcasting, and performances in concert halls, bars, clubs, retail establishments, and venues of every kind where music is played.

The second, separate component of music is the *recorded version* of a song, known in copyright terms as a “sound recording.”<sup>3</sup> Historically, sound recordings remain the property of music labels that finance their production. Labels then pay recording artists their contractual share of the revenues realized from distribution and licensing. As with songs, licensing revenue flows whenever sound recordings are reproduced on compact discs, sold as downloads, sampled in other sound recordings and incorporated into films or commercials.

In stark contrast to songs however, until recently no “public performance” right attached to sound recordings.<sup>4</sup> Traditionally, neither the labels who own sound recordings, nor the recording artists who create them, have realized royalty revenue from broadcasting or other public performances of their recordings.

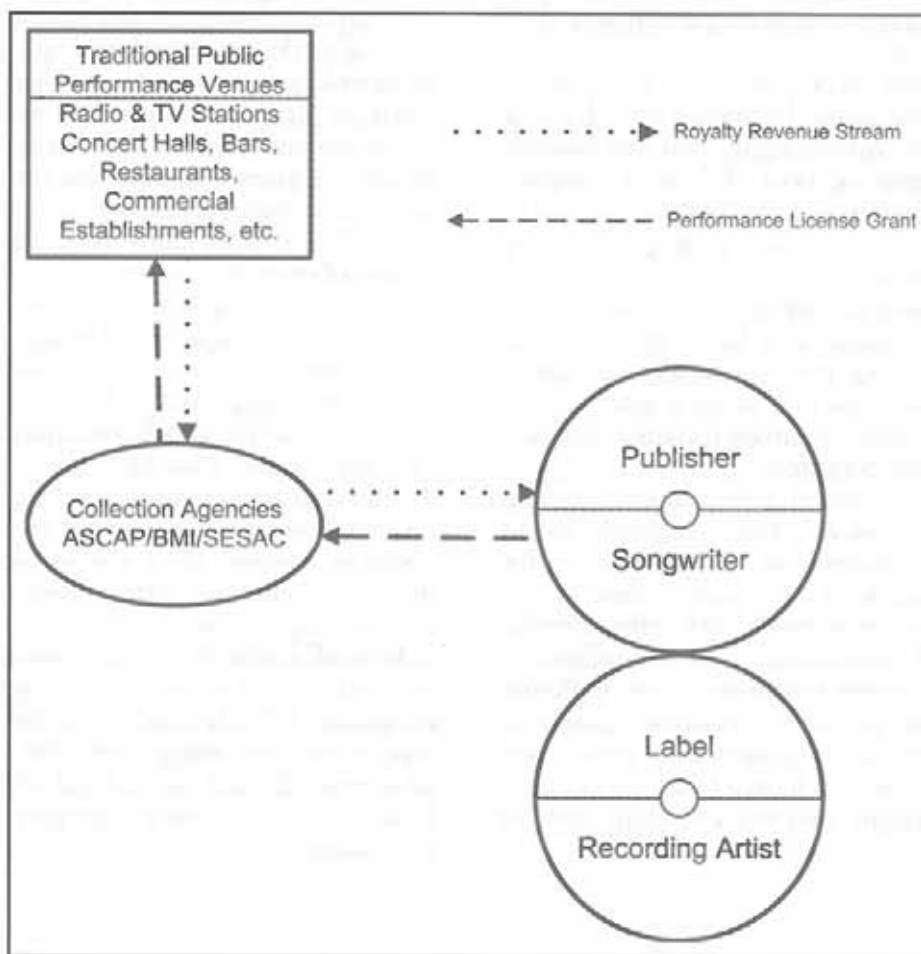
An example will help clarify this important distinction. Consider the beloved holiday classic, "White Christmas," written by Irving Berlin for the 1942 movie *Holiday Inn*, starring Bing Crosby and Fred Astaire. The musical work "White Christmas" is owned and controlled by Berlin Music (The Berlin Estate), who earn royalties whenever this song is broadcast on the radio (or by other means) which, especially around the holidays, is quite often. Over the years, these public performance royalties have amounted to millions of dollars.

The most famous recorded version—*sound recording*—of "White Christmas" was made by Bing Crosby in 1942, when the artist was under contract to the Decca music label, now part of the Universal Music Group. The recording rose to Number 1 in October 1942 and, amazingly, topped the charts two more times in 1945 and 1947. A true perennial, "White Christmas" remains Bing Crosby's best selling recording, and the best-selling Christmas single of all time.

Despite this sales success, neither Crosby (including his estate) nor Universal has earned any royalties from the ubiquitous broadcasting of this world-famous sound recording. As previously noted (and illustrated in Exhibit 1), the reason is that until recently, US copyright law neglected to recognize any public performance right for sound recordings, as opposed to musical works (songs). In traditional public performance licensing, revenue flows to music publishers and songwriters only.

The disparate treatment of musical works and sound recordings never rested on legally sound principles. Powerful lobbying efforts on behalf of the broadcasting industry, specifically the National Association of Broadcasters (NAB), have prolonged this historical inequity and successfully managed to resist legislation that would increase costs, paid out in the form of performance royalties to labels and recording artists.

### Exhibit 1: Traditional Public Performance Licensing



## The Recording Artist's Holy Trinity of Copyright Laws

The historical disparity between songs and sound recordings gained new significance with the onset of digital music distribution and performance. By the early nineties, the major record labels (also a formidable lobby), through the efforts of the Recording Industry Association of America (RIAA), began pressing their case with Congress. The labels claimed that because listeners could more easily access and obtain streamed digital music, this form of broadcasting could eventually "replace" compact disc purchases and, therefore, alter the established patterns of music consumption to the detriment of labels and artists.

As a result, between 1995 and 2002, three amendments to US copyright law occurred, which, in a limited way, began to correct this historical imbalance. First, in 1995 Congress passed the Digital Performance Right in Sound Recordings Act (DPRSRA), adding a new section to the Copyright Act that for the first time recognized a "public performance right" in sound recordings. The new right was limited however, to public performances resulting from "digital audio transmissions." Traditional radio and television broadcasting, and other "analog" transmissions, were not included.<sup>5</sup>

Three years later Congress passed the Digital Millennium Copyright Act (DMCA). The DMCA was a far-reaching and complex piece of legislation, which confirmed that "digital audio transmissions" included the nascent "webcasting" business, and created a new statutory license that enabled "internet radio" stations to play unlimited recordings without undertaking the laborious process of negotiating with each of the label groups for a public performance license. In return, Webcasters paid a license fee established through an arbitration process in the Copyright Office.<sup>6</sup>

Finally, in 2002 the Small Webcaster Settlement Agreement (SWSA) came into force.<sup>7</sup> For the most part, the SWSA represented an agreed, temporary fix for small Webcasters who complained that statutory licensing rates were excessive. For recording artists, however, the law took the significant step of requiring that fully *half* the licensing fees generated from digital broadcasting be paid *directly* to artists, without passing through the vague filters of label contracts and accounting processes.<sup>8</sup> In this measure, a new intellectual property right—one "neighboring" on copyright—had sprung into being. Suddenly, with every digital "play" of their recorded songs, recording artists became entitled to direct and ongoing payments from Webcasters, satellite radio operators, and others who broadcast music digitally.

Few recording artists realized the fact or the significance of their new rights granted under the SWSA, when the law took effect on December 4, 2002. Five years later, with the first serious money now flowing through the system, it is time for artists, estates, and managers to know their "neighboring rights" more closely, in the interest of managing and leveraging royalty flows most effectively. Before exploring the details of these new rights, however, some historical and international perspective is in order.

## International Development of Neighboring Rights

In granting some form of "neighboring rights" to recording artists, the United States joined an international community with a legal history reaching back to the late 1920s.<sup>9</sup> Then, as now, new technologies had strained copyright law; new advances—photography, broadcasting and sound recording—exceeded the scope of the existing copyright scheme. Initially, they were viewed more as products of a technological process rather than true, individual "authorship." Nevertheless, some form of protection was due these new works. Thus, beginning with certain European countries and expanding into international discussions as early as 1928,<sup>10</sup> a new rights regime emerged that existed in the penumbra of copyright: "neighboring" traditional copyright interests.

Individual countries continued to pass neighboring rights legislation in the 1930s and 1940s, but it was not until after World War II that international discussion again gained momentum. Ultimately, on October 26, 1961 some 40 countries, with the notable exception of the United States, signed onto the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, commonly known as the Rome Convention.<sup>11</sup>

As its full name suggests, the Rome Convention created neighboring rights protection for three groups.<sup>12</sup> First, "broadcasting organizations" acquired the right to authorize or prohibit the fixation and transmission of broadcast properties, the practical equivalent of a traditional copyright. Similarly, "producers of phonograms" (record labels) gained international protection and control over the reproduction, public performance and broadcasting of their recordings, as well as the right to be paid for "secondary uses," such as broadcasts of pre-recorded music. The third group, "performers,"<sup>13</sup> received lesser degrees of protection and, in the case of recording artists in particular, were left with no ability whatsoever to prevent broadcasting or other public performances of their recorded musical works. Instead, recording artists realized only

the right to payment for such performances: a right of "remuneration."<sup>14</sup>

There is little scholarship in this area of pseudo-copyright, particularly with respect to performers' rights. Legal commentary has advanced both historical and social reasons as possible justification for the weakness of performers' rights, relative to broadcasters and producers. Regardless, the plain fact remains that "the rights conferred on performers in the Rome Convention were the weakest of all."<sup>15</sup>

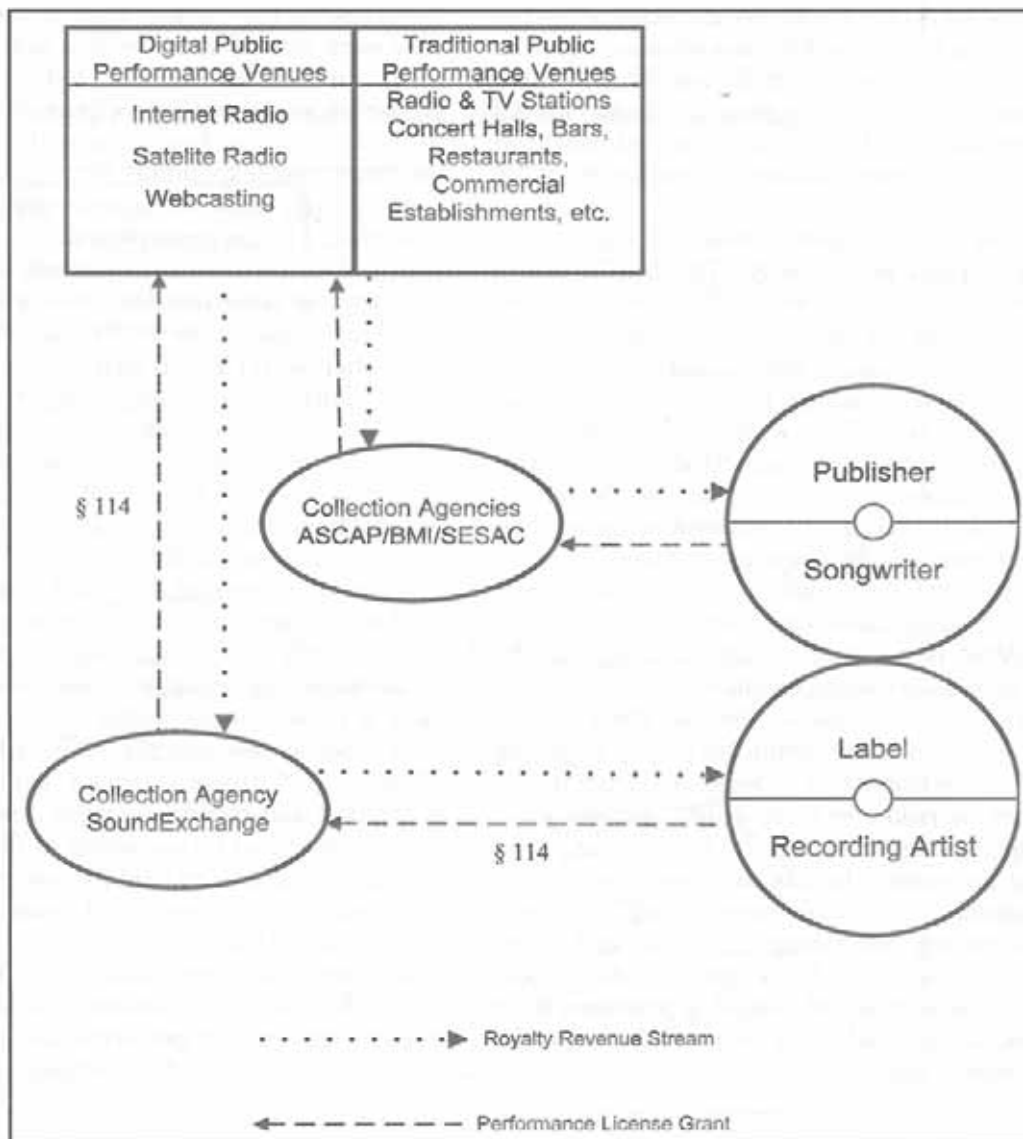
Finally, there is the WIPO Performances and Phonograms Treaty (WPPT). Organized under the auspices of the World Intellectual Property Organization in 1996, this copyright treaty intended to buttress and update the performer and producer rights established under the Rome Convention.<sup>16</sup> As with its

predecessor, the WPPT "provides that performers and producers of phonograms enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms...for broadcasting or communication to the public."<sup>17</sup>

### The United States and the WPPT

The United States was among the initial signatory nations when the WPPT took effect on May 20, 2002, marking this country's first foray into international neighboring rights recognition and administration.<sup>18</sup> When the direct payment provisions of the SWSA came into force later that year, recording artists in the United States at last became eligible to collect royalty income from public perfor-

**Exhibit 2: Traditional and Digital Public Performance Licensing**



mance of their recorded music. At least in theory, under the reciprocal terms of the WPPT, these artists also became entitled to their share of performance royalties earned in other countries. However, there was a catch. The terms of the WPPT provided that member countries could elect to recognize the remuneration right only as to "certain uses," such as the "digital only" provisions of US law. Adopting this narrow interpretation in its treaty ratification, the United States recognized that the right to payment would apply "only in respect of...broadcasting...by digital means."<sup>19</sup> Nonetheless, recording artists' arduous legislative journey toward neighboring rights reached its initial destination within the United States, through acceptance of the WPPT. Even this limited recognition of artists' neighboring rights in digital transmissions marked a significant step, presenting even niche<sup>20</sup> recording artists with an ongoing new revenue stream,<sup>21</sup> as illustrated in Exhibit 2. Under changes in copyright law, for the first time recording artists and labels earn royalties from the digital public performance of music. Songwriters and publishers receive income from both traditional and digital public performances.

## Collection and Distribution of Neighboring Rights Royalties

Whenever new pools of money are created, the question inevitably arises as to who will collect and distribute the funds. In the case of royalties for neighboring rights in the United States, this function is served by SoundExchange, a Washington, DC based not-for-profit. Formed originally as an arm of the RIAA, SoundExchange now acts on behalf of both record labels and recording artists in collecting and distributing public performance royalties for sound recordings.<sup>22</sup> The organization also represents these constituents in government proceedings where royalty rates are negotiated and set.<sup>23</sup>

Through the third quarter of 2007, SoundExchange claimed to have paid out over \$90 million in digital royalties.<sup>24</sup> However, the specific amounts collected by SoundExchange are just starting to be reported.<sup>25</sup> Further, some have criticized SoundExchange for the scope of its efforts to locate recording artists who are owed royalties, and as of December 15, 2006, artists began to forfeit unclaimed royalty money.<sup>26</sup> These vagaries in the current system have led to the emergence of independent administrators, who work on behalf of recording artists and estates in monitoring and collecting funds.<sup>27</sup>

Sound recording performance royalties flow through a true "statutory license," whereby SoundExchange

collects payments from digital broadcasters who make qualifying broadcast transmissions under Section 114 of the Copyright Act and distributes the funds to rights holders.<sup>28</sup> In general terms, the structure of this collective compulsory license, executed through digital per-play tracking, collection and distribution of royalties by a central agency, has proven itself a workable and efficient model. Indeed, a future where anytime access to the performance of music—the proverbial "celestial jukebox"—prevails over the purchase of music product may further validate the need for such a system.<sup>29</sup> In this environment, because royalties generated through the neighboring rights of recording artists become much more significant, the specific nature of these rights deserves greater scrutiny.<sup>30</sup>

## Nature of Recording Artists' Neighboring Rights in the United States

Neighboring rights are named for the fact that they exist alongside (*i.e.*, "neighbor") copyright interests, which in the case of sound recordings are typically held by music labels. Essentially a new legal animal in the United States, the precise nature and scope of recording artists' neighboring rights are not yet clear and there are many open questions as to their scope, as well as artists' ability to enforce and assign these new rights.

### The "Featured Artist" Conundrum

Foremost among the looming questions for recording artists is the very basic issue of who is entitled to payment. Section 114(g) of the Copyright Act<sup>31</sup> requires payment of digital broadcast royalties "to the recording artist featured on [the] sound recordings," yet there is no definition of what it means to be "featured" on a recording.<sup>32</sup> SoundExchange and others now speak in terms of "Featured Artist" royalties, but this critically important term is not defined in the law, and was not addressed directly in the legislative history of Section 114(g).

According to a Senate Report on the Digital Performance Right in Sound Recordings Act of 1995, a "Featured Recording Artist" is "the performing group or ensemble or, if not a group or ensemble, the individual performer, identified most prominently in print on, or otherwise in connection with, the phonorecord actually being performed."<sup>33</sup> However, this definition of a similar term, "Featured Recording Artist," was addressed in relation to the so-called sound recording "performance complement" defined in Section

114 (j)(13); a discreet section of the law pertaining to certain broadcasting restrictions and not to an artist's right to payment.<sup>34</sup>

The same Senate Report notes that "there will ordinarily be only one 'featured recording artist' per phonorecord," and goes on to state that unless a soloist or vocalist "is identified in connection with the phonorecord as the primary performer," that person is not a "featured recording artist."<sup>35</sup> Recognizing the confusion that is bound to ensue, the Report acknowledges situations, such as a recording by "Diana Ross and the Supremes," in which both an individual and group would appear to be legitimate claimants to "Featured Artist" royalties.<sup>36</sup> SoundExchange, the entity charged with distributing royalties, also acknowledges the lack of clarity and precedent in making "Featured Artist" determinations. In recent testimony before the Copyright Royalty Board, SoundExchange Chief Operating Officer Barrie Kessler addressed the difficulties arising from statutory ambiguity, pointing to additional scenarios in which competing "Featured Artist" claimants could emerge. According to Kessler:

The general rule we have created is to distribute royalties on a *pro rata* basis among the members of the band, but that is not always as easy as it sounds. For example, there is no guidance in the statute or legislative history on how SoundExchange should distribute royalties to Tom Petty and the Heartbreakers. Is Tom Petty entitled to 50% of the featured artist share with the remaining 50% allocated on a *pro rata* basis among the members of the Heartbreakers? Similarly, should there be a special split for the Dave Matthews Band, where the name of the band is the name of one of the members of the band?<sup>37</sup>

Although Featured Artist disputes are largely theoretical at present, these uncertainties have created a breeding ground for "overlapping claims" among Featured Artist claimants. Such ambiguity raises fundamental questions as to how they will be resolved and according to what standards, procedures and guidelines. Presently, each recording artist who designates SoundExchange as its agent to collect royalties agrees to "present solely to the Royalty Claims Committee...any dispute artist has relating to the royalties payable hereunder, and that the procedures governing such dispute resolution shall be those adopted by the SoundExchange Board."<sup>38</sup> On information and belief, there are presently no published procedures in existence, nor has the Royalty Claims Committee convened for the purposes of developing guidelines

for dispute resolution. As the flow of sound recording performance royalties increases, the need for guidelines, formal dispute resolution procedures, and for artist advocacy and representation in this critical area, will grow.

## Term, Alienability and Enforcement of Neighboring Rights

Assuming we find satisfactory answers to the Featured Artist conundrum, and an adequate forum and procedure for resolving disputes, there will remain equally elusive questions as to the substance of recording artists' neighboring rights. It is clear that, for now, royalties flow from digital broadcasting only, but what are the other parameters of this new asset? For example, how long does the right last?

The Copyright Act does not set forth the term of a recording artist's right to royalties under Section 114. The WPPT provides that signatories must adhere to a neighboring rights term of protection of at least 50 years,<sup>39</sup> but there are no specific provisions in the domestic law addressing the issue. It is logical to think that the term of artists' neighboring rights would be at least coextensive with the term of the underlying sound recording copyright, but nothing in the Copyright Act confirms this. Additionally, a reasonable argument can be made for the proposition that the right should be longer than the underlying copyright, even perpetual, on the ground that recording artists (and their heirs) are enjoying the right for the first time, and have much lost ground to make up relative to other rights holders.

Additional open questions surround the general issue of alienability. Are neighboring rights descendible? May they be freely assigned, and if so under what framework? Again, the gut reaction is to treat neighboring rights as "copyright-type" property, freely assignable during an artist's lifetime, descending to heirs upon death. For practical purposes, neighboring rights presently are treated as descendible, even on behalf of the heirs of artists who were deceased before the rights came into being, as evidenced by SoundExchange's payment of royalties to artist estates. Yet, one is hard pressed to find any statutory basis for these payments.

Similarly, may the rights be sold and assigned to third parties, in whole or in part? The answer again is presumably, but not explicitly so. Section 114(g)(2)(D) of the Copyright Act provides for payment to the artists featured on a sound recording, "or the persons conveying rights in the artists' performance in the sound recording," but the intent of this language is unclear and, apparently, not addressed in the legislative history. For its part, SoundExchange appears to

recognize certain rights transfers but not others. For example, SoundExchange acknowledges, and will act on an artist's "Letter of Direction." This operates as an assignment of sorts, by directing the agency to pay a portion of an artist's royalties directly to a third party such as a sound recording producer.<sup>40</sup> On the other hand, SoundExchange will not make payments to an artist's independent collection agent, even where a power of attorney or assignment demonstrates such a transfer or authority.<sup>41</sup> In the author's view, this is an unnecessary practical precedent, as it complicates the collection process for those artists who wish to designate an agent and administrator for collection purposes.<sup>42</sup>

The statutes of other countries, for example Canada,<sup>43</sup> contain clear provisions allowing for the assignment and transfer of neighboring rights. As unfettered, freely alienable rights are inherently more powerful and valuable, hopefully, through either reform or by administrative and judicial interpretation, US law will develop in a fashion that recognizes the transferability of neighboring rights and their revenue streams. Looking forward, from a recording artist's perspective, alienability (the right to divide and sell) neighboring rights may be the single most important aspect of the new rights regime.

As previously discussed, neighboring rights call for remuneration—payment—and little else. Thus, unlike a true copyright owner, a recording artist would seem to have no ability to sue infringers—those who might make digital audio transmissions without paying Section 114 royalties. Indeed, under recent regulations promulgated by the Copyright Royalty Board, a recording artist does not even have authority to *audit* statutory licensees, let alone sue for injunctive relief or damages. Under current regulations, artists' audit rights extend only to SoundExchange, not to individual licensees.<sup>44</sup>

As a final note on the nature and scope of neighboring rights, the distinction between the rights of recording artists, relative to record labels needs to be made. Bear in mind that under the current statutory scheme, royalties flow directly to artists only with respect to "noninteractive" digital audio transmissions.<sup>45</sup> Noninteractive digital radio may be a growing medium, but many of the opportunities for exploiting sound recordings digitally, for example, in the context of the burgeoning "social networking" Web destinations, involve "on-demand," "interactive" services that fall outside of the Section 114 license parameters altogether. As copyright owners, music labels have the authority to license such interactive services, for which *all* royalties will flow through them, subject to sharing with artists by the terms of

their individual contracts, not by statute. While a full exploration of these related issues is beyond the scope of this article, they are nonetheless valid additional considerations in negotiating recording artist contracts, and an area in which recording artists' rights are subject to uncertainty.

## The Twin Debates: Royalty Rates and "Full Performance Rights"

Recent events have set the stage for a renewed debate over the scope of sound recording performance rights, and the notion that they should be expanded to cover not just digital audio transmissions, but traditional (*i.e.*, analog) public performances as well. Specific examples include terrestrial radio, broadcast television, clubs, and other venues where recorded music is played for the public. With billions in potential license fees and royalty dollars at stake, the debate over so-called full performance rights has led lobbyists to position their heavy artillery around the legislative battlefield in Washington, where the future of music as a business will play out, as opposed to the entertainment capitals of Los Angeles, New York, or Nashville.

The current debates can be traced to a proceeding initiated before the Copyright Royalty Board (CRB) in early 2005, in which royalty rates for the period 2006-2010 were ultimately set for the Section 114 license utilized by internet Webcasters. Millions in legal and expert fees and resources were devoted to the extensive administrative litigation process, involving written and live testimony from dozens of witnesses, presented (by SoundExchange) on behalf of music labels and recording artists, and primarily through the Digital Media Association (DiMa) on behalf of the digital broadcast community.<sup>46</sup> As the proceeding wound its way toward completion, SoundExchange made the case for a significant increase in rates. In opposition, digital broadcasters presented arguments for more moderate increases, and the ability to calculate royalties based on a percentage of revenue, instead of the strict number of song performances or aggregate tuning hours, as applied in prior years. No stone was left unturned, and the proceeding became nothing less than a referendum on the future of radio, if not the music business altogether.

On March 2, 2007, the CRB issued a lengthy decision, essentially adopting the rate structure proposed by SoundExchange, and causing an immediate uproar from the digital broadcasting community.<sup>47</sup> As the July 15 implementation date for the new rates

approached, the legal, lobbying and public relations efforts went into full swing. Arguing that the new rates would put many of them out of business, Webcasting interests filed a motion with the US Court of Appeals for the District of Columbia Circuit to stay implementation pending their appeal, ultimately denied by the court on July 11. A new grass-roots organization, SaveNetRadio, formed to advance small Webcaster interests, which SoundExchange quickly accused of operating as a front for large Webcasters trying to dodge increased rates.<sup>48</sup> For their part, Webcasters portrayed SoundExchange's efforts as a major label money grab—an attempt to revive a dying business model through exorbitant fee increases at the expense of technological developments and consumer interests.

Over the ensuing months, debate continued at a fever pitch in the form of Congressional hearings, flurries of news releases, an organized “day of silence” for Internet radio, and the introduction of the Internet Radio Equality Act (IREA). This initiative, lead by Representatives Jay Inslee (Democrat-WA) and Don Manzullo (Republican-IL), was designed to void the CRB rate decision and replace it with a revenue-based rate structure.<sup>49</sup> In addressing the House of Representatives on July 10, Rep. Inslee decried the CRB decision as “frankly, wrong,” “wildly disproportionate” and “grossly unfair to the distributors of music,” and promised that if the interested parties could not reach an economically viable solution, “this drumbeat will continue...”

Under continued Congressional pressure, and on the eve of the July 15 rate implementation, SoundExchange issued a limited proposal to cap certain small Webcaster fees, while maintaining that “commercial Webcasters such as Yahoo! and AOL” remained obligated to begin paying increased fees.<sup>50</sup> DiMa accepted the offer, noting its limited scope, but confirming that the “agreement marks an important first step in the internet radio royalty negotiation process.”<sup>51</sup>

In the meantime, the IREA appeared in the Senate,<sup>52</sup> and on August 2, 2007, co-sponsors Ron Wyden (Democrat-OR) and Sam Brownback (Republican-KS) issued a statement putting additional pressure on SoundExchange. Referring to the CRB rates as “unfounded,” the Senators expressed that:

[A]fter the July 15 deadline came and went we were pleased to learn that SoundExchange was negotiating with Webcasters, and we expected to avoid pushing forward with this legislation. But, as Congress heads into its August recess, we are troubled by the lack of negotiating progress being reported.

Noting that traditional broadcasters (through the NAB) had also entered the debate in support of the IREA, the Senators expressed that “[i]f great progress toward a fair resolution for Webcasters is not made by Congress’ return to Washington after Labor Day, then we plan to take expeditious steps toward passage” of the Act.<sup>53</sup>

Three weeks later, SoundExchange made another gesture to smaller Webcasters, offering individual agreements that extended the rates and terms of the SWSA of 2002 through 2010, for Webcasters with annual revenue of up to \$1.25 million.<sup>54</sup> Although a number of smaller Webcasters embraced the offer, many others complained that it failed to address the major issues in the royalty debate and would not allow them to grow their businesses properly. For them, the gesture amounted to SoundExchange “yet again pretending to offer us a deal so that Congress can see them as benevolent, while they’re really just cornering the internet radio market to increase airplay for the major music labels.”<sup>55</sup> In October of 2007, the debate reached New York Senator and Democratic presidential hopeful Hillary Clinton, who issued an email statement voicing her support for “an open Internet that fosters innovation.” The Senator diplomatically acknowledged that technological advances create “new public policy dilemmas, such as how to properly balance copyright protection for music and other property with the innovation that the Internet continues to cultivate.” In the end, Senator Clinton claimed her spot squarely in the middle of the road, promising she would “continue to monitor this situation with the hope that [ongoing negotiations] produce a fair and equitable resolution for all sides.”<sup>56</sup>

## Full Performance Royalties: Artist’s “Right” or Broadcaster’s “Tax”?

In the wake of the ongoing debate on royalty rates, the closely related issue of the scope of sound recording performance rights has crept once again to the fore. In early 2006, SoundExchange celebrated a decade of digital performance rights by gathering some of the leaders who had helped pass the DPRSRA. The news releases reporting on the occasion called the digital performance right “a good beginning,” but said, “the next step is to secure a full performance right”—to include payment for use by “radio and television stations, stadiums, and other commercial establishments that use music,” creating true parity with music publishers and songwriters.<sup>57</sup> Positioning the issue as a matter of artist rights

(as opposed to an income-stream for music labels), SoundExchange Executive Director John Simson announced, "[W]e are determined not only to serve [recording artists] but to obtain for them what should rightfully be theirs. It is easy to see that songwriters, with a full performance right, can retire with royalties as their annuity, while most performers, without this right, must tour until they die.<sup>58</sup> These words were not lost on the NAB, whose President and CEO David K. Rehr spoke to the issue in his keynote address to the group's annual convention in April 2007. Mr. Rehr's speech returned to the basis on which broadcasters have historically avoided a full performance provision in US law: "Free music for free promotion." Rehr continued,

Imagine the brazen greed it takes for the record companies to expect *us* to pay them for promoting *their* artists' music. It would make much more sense for us to charge *them* for our promotional efforts. We will advocate that Congress oppose this levy on the market. If successful, it would be a government imposed performance tax. And we will fight it with everything we have.<sup>59</sup>

The NAB's print advertising campaign was equally blunt, claiming, "[f]or decades, radio has been promoting new music free of charge, contributing to record sales and the growth of new stars and new genres of music. But the international record label conglomerates have a problem—they haven't adapted to the digital age. Now they are asking Congress to tax local radio stations to subsidize their failing business model—to the tune of billions of dollars."<sup>60</sup>

SoundExchange countered this activity by helping to establish and launch the musicFIRST coalition in June 2007. Using an acronym for "Fairness In Radio Starting Today," the organization positioned itself as a coalition of recording artists and recording industry organizations working together for broader rights. In recent months, musicFIRST has assumed a leading role as the public face of and advocate for a full performance right.<sup>61</sup>

In Congressional hearings held in July and October 2007, the "royalty rate" and "full performance right" debates began to coalesce. In testimony heard before the House Subcommittee on Intellectual Property on July 31, recording artists Judy Collins and Sam Moore represented musicians' rights, while the NAB argued against the imposition of further royalties. Weighing in on the debate was Mary Beth Peters, the US Register of Copyrights. In keeping with the Copyright Office's longstanding support

for broader performance rights,<sup>62</sup> Ms. Peters noted that:

[T]errestrial broadcasters have long enjoyed the freedom to use the newest record releases without any payment to the artists or the record companies. While in the past, broadcasters' argument that airplay promotes the sale of records may have had validity, such a position is hard to justify today in light of recent technological developments and the alternative sources of music from other music services, and declining record sales. So what is to be done?

Answering that query, she added, "[i]n 1995, Congress accepted the notion that terrestrial over-the-air broadcasts offered no threat to the record industry and actually promoted the sales of records. The actual turn of events since that time, however, casts doubt on this premise..." Peters concluded by stating:

[I] strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales. Such an approach has multiple benefits... [I]t would provide performers and record producers with an ongoing and growing source of revenue, and it would also level the playing field between, on the one hand, digital music services and Webcasters who today pay a performance royalty on each digital transmission and, on the other hand, broadcasters who pay nothing for their use of sound recordings when transmitted over-the-air.<sup>63</sup>

The parties again expressed their views on "The Future of Radio" before the full Senate Committee on Commerce, Science & Transportation on October 24, 2007. Speakers on behalf of DiMa members targeted the ongoing rate debate, while the NAB's representative spoke out against full performance rights.<sup>64</sup> However, the NAB's legislative surprise attack came one week later on Halloween, when Texas Representatives Gene Green (Democrat) and Mike Conaway (Republican), along with 51 co-sponsors, introduced the Local Radio Freedom Act. Following its patriotic introduction noting the "symbiotic" and "mutually beneficial" historical relationship between the broadcasting and recording industries, as well as broadcasters' public service in times of national crisis, this resolution

ardently asserted that "Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such performance of sound recordings."<sup>65</sup> The proposal is a resolution and not a bill for legislation, a method used to by congressional representatives to encourage their fellow members to take a stand one way or the other. Yet, it signals the fact that both the royalty rate full performance debates are officially merged and fully engaged. Ramping up the rhetoric another notch, musicFIRST sent the NAB a copy of the American Heritage Dictionary definition of "tax," and artist Martha Reeves (a member of the Detroit City Council) and SoundExchange's John Simson spoke out against the misleading characterization of performers' royalties as "taxes."<sup>66</sup> Not to be outdone, the NAB responded by delivering plush toy ducks to each member of Congress, along with a print ad that began "If it walks like a duck, and swims like a duck and quacks like a duck...well, you know....," and concluded by stating that in passing performance royalty legislation "Congress would be taxing the [local radio] stations in their backyards to line the pockets of international record label executives."<sup>67</sup>

The drama was heightened in mid-November, 2007 when, testifying on behalf of the MusicFIRST Coalition, recording artists Alice Peacock and Lyle Lovett appeared in Congress, with Lovett urging the Senate Judiciary Committee to consider full performance right legislation that would acknowledge the efforts of "thousands of performers across the country who work so hard to earn livings that are so modest in relation to their talent." "I love radio and appreciate the support," Lovett added, "but business is business, and fair is fair. Radio shouldn't be able to profit without compensating us."<sup>68</sup> The next day, Representatives Howard Berman (Democrat-CA) and Darrell E. Issa (Republican-CA) wrote to their colleagues on the House Judiciary Committee, stating their intention to introduce performance right legislation, and on December 18 holiday tidings were delivered as the Performance Rights Act—bipartisan, bicameral legislation designed to bring traditional radio broadcasting within the ambit of the Section 114 statutory license.<sup>69</sup>

The NAB immediately responded with a seasonal reference, saying, "After decades of Ebenezer Scrooge-like exploitation of countless artists, RIAA and the foreign-owned record labels are singing a new holiday jingle to offset their failing business model. NAB will aggressively oppose this brazen attempt to force America's hometown radio stations to subsidize

companies that have profited enormously through the free promotion provided by radio airplay." The MusicFIRST Coalition used a similar tactic, delivering a "holiday poem" to its "friends on Capital Hill wishing them a happy holiday season." Penned to the cadence of "T'was the Night Before Christmas," the poem began: "T'was the night before recess in the Senate and House/As our leaders worked hard to correct a great louse/A fair performance right danced in their mind/They could no longer leave the artists behind..."

Is it possible for all these competing interests to have a Happy New Year? One can imagine a far-reaching settlement scenario in which SoundExchange agrees to reconfigure the CRB-imposed digital royalty rates,<sup>70</sup> in return for recognition of an expanded performance right that applies to all broadcasting. The simplicity and logic of such a resolution is there, but one look at the press release rosters and public relations efforts of the various participants makes it hard to imagine as reality. Worse yet, a mudslinging mentality threatens to mask the delicate and important underlying policy questions. In any event, the election year of 2008 promises to be a banner year for the Great Royalty Debates.

## Billion Dollar Questions

Perhaps the only thing all participants can agree on is that the full performance right debate presents billion dollar questions. With a full right implemented, the sound recording performance royalty regime (including neighboring rights) would come into full bloom for US artists and copyright owners. Not only would US royalty revenue increase dramatically, but also US based rights holders would gain access to a far more substantial worldwide royalty pool. The money is worth fighting about. Whereas SoundExchange distributed just under \$33 million in royalties in 2006,<sup>71</sup> the IFPI (representing the recording industry worldwide) estimates that music labels' share of global sound recording performance revenues for 2006 totaled nearly \$730 million, up 8 percent from the prior year.<sup>72</sup> Adding a conservative 40 percent share for recording artists to this number reveals an estimated \$1 billion a year marketplace.

## The Future Is Now

The availability of performance based income for US music labels and recording artists is, thus far, an underappreciated bright spot amidst the recent travails of the music business. As the tenor of the Great Royalty Debates makes clear, the consensus view is

that as music consumption shifts from "ownership" of physical product, toward "access" to vast libraries of recorded content, digital and other performance royalties will experience continued growth. Technology, from the growth of Internet radio as an advertising-supported media channel to the explosion of mobile platforms enabling increased digital transmission and "consumption" of music, is fueling these trends. Indeed, one could say that music "consumers" are the missing link in the royalty debates, as they have taken the matters into their own hands, experiencing music in huge quantities through peer-to-peer sharing networks, leaving the "industry interests" to engage in archaic debates as to the value of broadcast music.

Certainly, the royalty debates are part of a broader shifting music industry landscape, with pressure bearing on traditional industry players, including music labels and broadcasters alike. Recent events underscore these significant changes. Concert producer Live Nation has now launched its "Artist Nation"

division, luring superstar Madonna from her long-time label partner, Warner Music. The parties struck a broad "rights management" based deal, thereby usurping traditional label functions. More recently, Wall Street analysts Pali Research released a bearish report on Warner Music (the only US-based publicly traded major music label). In it, Pali downgraded the stock and bluntly stated that Warner could expect to make little progress in the current music industry landscape until it realizes that in consumers' eyes, music is "free."<sup>73</sup>

If not quite here, the digital future of the music business is coming more clearly into view. If there is order to be brought from the current chaos of the music industry, it will create new, performance based "markets in music," and untold fortunes for those who can achieve the delicate balance among creators, distributors, and those who form the most important link in the chain of success—technology-empowered consumers.

1. See [http://www.soundexchange.com/unpaid\\_list\\_faq.html](http://www.soundexchange.com/unpaid_list_faq.html).
2. 17 U.S.C. § 102(2) (1978).
3. 17 U.S.C. § 102(7) (1978).
4. See 17 U.S.C. §§ 106(6) (1995) and 106(4) (1978).
5. 17 U.S.C. § 114(d) (1998).
6. See 17 U.S.C. §§ 114 (d) and (f) (1998).
7. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780, 2781, and 2784 (2002).
8. 17 U.S.C. § 114(g)(2) (1998).
9. Stewart, *International Copyright and Neighbouring Rights*, Second edition, (Butterworths 1989). See Chapter 7 generally.
10. *Id.* at 7.10.
11. Presently, 29 countries adhere to the Rome Convention. The United States is not a member.
12. See generally, Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, Art. 12. See also, Goldstein, *International Copyright* (Oxford 2001), § 2.2.
13. Under Art 3(a), Rome Convention, "actors, singers, musicians, dancers, and others persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works."
14. See Stewart, *supra*, n.9 at 7.69; 7.32; and 7.16. It is notable that under Rome Convention Article 12, an individual country could provide for payment "to the performers, or to the producers of the phonograms, or to both." Thus, a decision to direct payments to producers only could nullify the recording artists' neighboring rights altogether.
15. Herman Cohen Jehoram, "The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations," *Columbia-VLA Journal of Law & The Arts*, Vol. 15:75 (1990), p. 81. See also Stewart, *supra* n.9 at 7.16.
16. See Wolke, "Some Catching Up To Do: How the United States, in Refusing to Fully Sign On to the WPPT's Public Performance Right in Sound Recordings, Fell Behind the Protections of Artists' Rights Recognized Elsewhere in this Increasingly Global Music Community," *Vanderbilt Journal of Entertainment Law & Practice* (Summer 2005).
17. Summary of the WIPO Performances and Phonograms Treaty, available at [www.wipo.org](http://www.wipo.org).
18. A total of 62 countries are now parties to the WPPT treaty.
19. WPPT Notification No. 8: Ratification by the United States of America, September 14, 1999. Available at [www.wipo.org](http://www.wipo.org).
20. See [http://www.soundexchange.com/unpaid\\_list\\_faq.html](http://www.soundexchange.com/unpaid_list_faq.html): "[T]he playlists of digital music services do not necessarily look like the Billboard Hot 100—and many of the artists making the most money are those who are relatively unknown outside of their specific genre."
21. 17 U.S.C. § 114(g)(2) (1998).
22. See <http://www.soundexchange.com>.
23. See *In the Matter of Digital Performance Rights in Sound Recordings and Ephemeral Recordings*, Docket No. 2005-1 CRB DTRA. Though some

- have questioned its ability to do so within its current charter, SoundExchange has participated in lobbying activities in connection with the "full performance right" and other debates.
24. See <http://www.soundexchange.com>. SoundExchange By the Numbers.
25. See Chris Kirkham, "Satellite Radio is Asked to Pay More," *Wash. Post*, Nov. 1, 2006, at D4, wherein SoundExchange estimates 2006 collections at between \$55 and \$60 million. The SoundExchange Draft Annual Report for 2006 states that \$62,158,184 in statutory royalties was collected in 2006.
26. See <http://www.soundexchange.com>. Unregistered Artists List; Unregistered Sound Recording Copyright Owner List.
27. The author is affiliated with the Performing Artists Royalty Collection Service (PARCS), [www.soundies.com/cons\\_lic/consulting.asp](http://www.soundies.com/cons_lic/consulting.asp).
28. 17 U.S.C. § 114.
29. See generally William W. Fisher III, *Promises to Keep* (Stanford University Press 2004); see also the Electronic Frontier Foundations White Paper, "A Better Way Forward: Voluntary Collective Licensing of Music File Sharing," available at [http://www.eff.org/share/collective\\_lic\\_wp.pdf](http://www.eff.org/share/collective_lic_wp.pdf).
30. In one reported case, an artist experienced an increase in royalties of 2,000 percent between 2001 and 2004. See Ben Sisario, "Old Songs Generate New Cash for Artists," *N.Y. Times*, Dec. 28, 2004, at E1.
31. 17 USC § 114(g)(2)(D).
32. Per 17 USC § 114(g)(2)(B) and (C), 5 percent is paid into union funds for "nonfeatured" vocalists and musicians. Per 17 USC § 114(g)(2)(A), 50 percent of the receipts are paid to the sound recording copyright owner.
33. Sen. Rpt. 104-128 at 32 (Aug. 4, 1995).
34. Between Section 114 of the Copyright Act and the legislative history, there are at least four different variations of the term "Featured Artist," and none are defined clearly. Section 114(g)(1)(A) uses the term "Featured Recording Artist," whereas Section 114 (g)(2)(D) refers to "Recording Artist" and "Artists Featured." In contrast, the aforementioned Senate Report uses the terms "Artists Featured," "Recording Artists," "Featured Artist" and "Featured Recording Artist," yet only attempts to define the latter in relation to the sound recording performance complement. See also 17 U.S.C. § 1001(7)(C), referring to, but not defining, "a featured recording artist" for purposes of royalty distribution under the Audio Home Recording Act of 1992.
35. Sen. Rpt. 104-128 at 32 (Aug. 4, 1995).
36. *Id.*
37. Written Direct Testimony of Barrie Kessler, "Digital Performance Right In Sound Recordings and Ephemeral Recordings," Docket No. 2005-1, CRB DTRA.
38. SoundExchange "Designation and Authorization for Featured Artists."
39. "Summary of the WIPO Performances and Phonograms Treaty," available at [www.wipo.org](http://www.wipo.org).
40. See Letter of Direction forms at [www.soundexchange.com](http://www.soundexchange.com).
41. On information and belief, SoundExchange will acknowledge a sound recording copyright owner's designation of an agent for royalty collection,

- and will make direct payments to the order of such agents, but will not do so with respect to artists.
42. In discussion at the Future of Music's 2007 Policy Summit in Washington DC, one commentator suggested that artists' rights should be further circumscribed by making them nonassignable, or assignable only to certain parties. See *Patent, Trademark & Copyright Journal*, Vol. 74, No. 1835, p. 601 (BNA 9-21-07). The author suggests that any such attempt to legislate further restrictions on artists' already limited rights would be short-sighted and counterproductive to artists' interests generally.
  43. Consolidated Statutes of Canada, R.S.C. 1985, c. C-42, s. 19 and 13(4) to (7).
  44. See CFR Part 262.6. See also, CRB decision in Digital Performance Right In Sound Recordings and Ephemeral Recordings, Docket No. 2005-1, CRB DTRA, p. 94-96 (March 2, 2007).
  45. 17 U.S.C. § 114.
  46. Digital Performance Right In Sound Recordings and Ephemeral Recordings, Docket No. 2005-1, CRB DTRA; the author submitted written testimony on behalf of independent music labels and recording artists.
  47. CRB decision in Digital Performance Right In Sound Recordings and Ephemeral Recordings, Docket No. 2005-1, CRB DTRA, (March 2, 2007).
  48. See April 30, 2007 SoundExchange News Release, "Royalty Statistics Disprove 'Sky Is Falling' Claims of CRB Critics."
  49. H.R. 2060, 110th Cong., 1st Sess. (2007).
  50. See July 13, 2007 SoundExchange News Release, "SoundExchange Confirms Minimum Fee Offer."
  51. DiMa press release, August 23, 2007. See also July 15, 2007 Digital Music News, "Large Broadcasters Accept SoundExchange Minimum Fee Offer."
  52. S. 1353, 110th Cong., 1st Sess. (2007).
  53. US Senate News Release, August 2, 2007, "Wyden, Brownback Call CRB Rates for Webcasters 'Unfounded.'"
  54. See August 21, 2007 SoundExchange News Release, "SoundExchange Offers Small Webcasters Discounted Rate Through 2010."
  55. August 22, 2007 Digital Music News, "Small Webcasters Rally Against SoundExchange Offer."
  56. Email statement of Hilary Clinton, October, 2007, available at <http://blog.wired.com>.
  57. February 1, 2006, SoundExchange News Release, "Tenth Anniversary Celebration."
  58. *Id.*
  59. April 16, 2007. NAB news release. "Rehr Delivers Opening Keynote Address at NAB 2007."
  60. NAB print advertisement, "No performance tax on local radio;" see also David K. Rehr May 9, 2007, letter to US Senators, both available at [www.nab.org](http://www.nab.org).
  61. See [www.musicfirstcoalition.org](http://www.musicfirstcoalition.org).
  62. See Statement of David O. Carson, General Counsel, US Copyright Office, Before the Subcommittee on Courts, The Internet and Intellectual Property of the House Committee on the Judiciary, 108th Congress, 2d Session, July 15, 2004.
  63. Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives, 110th Congress, 1st Session, July 31, 2007.
  64. See summary at *Royalty Week*, October 30, 2007, available at [www.royaltyweek.com](http://www.royaltyweek.com).
  65. HCR 244.
  66. See FMQB November 5, 2007, "musicFIRST to Rehr: Don't Call It A Tax," available at <http://www.fmqb.com/Article.asp?id=507038>.
  67. NAB print advertisement, "No performance tax on local radio."
  68. AP report and Billboard.biz Bulletin, November 13, 2007.
  69. S. 2500, H.R. 4789.
  70. On December 3, 2007 the CRB also issued its decision in Docket No. 2006-1 CRB DTRA, setting increased rates for satellite radio broadcasting under Section 114. Beginning January 1, 2008, satellite broadcasters will pay 6% of gross revenues for the license, increasing to 8% in 2012.
  71. SoundExchange Draft Annual Report for 2006 Provided Pursuant to 37 C.F.R. § 370.5(d), p. 6.
  72. See IFPI Recording Industry in Numbers p. 15, "Performance Rights Income 2006."
  73. In its November 1, 2007, report the firm concluded, "No matter how many people the RIAA sues, no matter how many times music executives point to the growth of digital music, we believe an increasing majority of worldwide consumers simply view recorded music as 'free.' A new model for music consumption must emerge and that model most likely involves DRM-free downloadable music at no cost to consumers, fully-supported by advertising (within some form of social networking environment that enables consumers to discover/explore music). The music industry is not ready to endorse such a move at this point and even if it was, the economic model transition will be incredibly painful."