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Copyright: Commercial Use of Sound Recordings Amendment

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involved, the statutory classification will nearly always be upheld. To continue to follow a rigidified approach to equal protection claims would put the Court in a position either to begin recognizing more fundamental rights or suspect classes, or to uphold laws that are invidiously discriminatory but that do not meet the requirements necessary to warrant strict judicial scrutiny.

All rights not fundamental and all classes not suspect are not the same; the Court should act on equal protection claims only after a "reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded."[101] The Court has not created an unreasonable test for equal protection claims. The approach used in these cases is just, and there are still specific requirements that must be met before the Court will require the state to show a substantial interest in support of its statute.

This balancing test or intermediate scrutiny allows the Court some leeway in determining claims arising under the equal protection clause. Although the outcome of such cases will not be as predictable as cases decided under the strict two-tier structure of judicial review, the decisions rendered will be based on a more thoughtful approach based on the circumstances involved in each case. By considering the circumstances of each case as they relate to the balancing test for intermediate scrutiny, the Court will be able to protect those prized rights of our society not deemed fundamental and protect those disadvantaged and powerless classes not deemed suspect without being required to establish those rights as fundamental or those classes as suspect. This approach will allow the Court to protect from invidious discrimination those rights or classes without raising the level of scrutiny to the level of strict scrutiny, and thereby assuring nearly every state statute will be struck down, even where there may be a substantial interest to be protected by the statute in question.

Deirdre Dexter

Copyright: Commercial Use of Sound Recordings Amendment*

Although copyright protection was deemed to be important enough to be included in the Constitution of the United States,[1] the entire area of copyright has been extended far beyond the original grants of protection, which covered "authors of any maps, chart, book or books already printed."[2] The expansions made by Congress in the area of copyright have included etchings and

101. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320-21 (1976).

* This paper has been entered in the 1983 Nathan Burkan Copyright Law Writing Competition.—*Ed.*

1. U.S. CONST. art. 1, § 8, cl. 8.
2. Act of May 31, 1790, ch. 15, 1 Stat. 124.

engravings,[3] musical compositions,[4] dramatic compositions,[5] and photographs.[6] The purview of copyright has at no time extended, however, to performance rights for recording artists. This practice of excluding performance rights for recording artists could be remedied by a bill currently pending before the House of Representatives.[7]

Cited as the "Commercial Use of Sound Recordings Amendment,"[8] H.R. 1805 would broaden copyright to include performance rights for recording artists. A similar bill was proposed in an earlier Congress under the title "Sound Recording Performance Rights Amendment"[9] but was not passed.

The Commercial Use of Sound Recordings Amendment and the Sound Recording Performance Rights Amendment both concern the same goal—to enable recording artists to be compensated for public performance of their recorded work. In fact, the only difference between the two bills is in the amounts specified for royalties.[10] The Sound Recordings Performance Rights Amendment would establish a blanket royalty of $25 per calendar year, whereas the Commercial Use of Sound Recordings Amendment proposes that royalty rates be established by the Copyright Royalty Tribunal within one year from the date the Act takes effect.[11] The Copyright Royalty Tribunal has more control under the second bill and may better respond to market variations, while the first bill would have required a congressional amendment to alter the royalty rates.

Brief History of Copyright

Congress is empowered by the United States Constitution "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[12] The phrase "writings and discoveries" has been expanded in definition to include areas not previously considered. Expansion is a necessity in light of the evolution of technology. The drafters of the Constitution, of course, had no premonition of technological advances such as computer programs, the electronic media, and video games. Yet these may be original works that should be protected. In order to fall within copyright protection, an item must qualify as a "writing."

Throughout the history of United States copyright, the definition of a

3. Act of Apr. 29, 1802, ch. 36, 2 Stat. 171.
4. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436.
5. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.
6. Act of Mar. 3, 1865, ch. 126, 13 Stat. 540.
7. H.R. 1805, 97th Cong., 1st Sess. (1981).
8. *Id.*
9. H.R. 997, 96th Cong., 1st Sess. (1979).
10. H.R. 1805, 97th Cong., 1st Sess., § 8(E) (1981); H.R. 997, 96th Cong., 1st Sess., § 8(E) (1979).
11. H.R. 1805, 97th Cong., 1st Sess., § 8(E) (1981); H.R. 997, 96th Cong., 1st Sess., § 8(E) (1979).
12. U.S. CONST. art. 1, § 8, cl. 8.

"writing" has been expanded many times. In 1909, Congress expanded the scope of copyrightable material by passing the Copyright Act.[13] This Act included coverage for such items as drawings or plastic works of a scientific or technical nature, motion pictures, and sound recordings, among others.[14] Many technological advances occurred between 1909 and 1976, and Congress responded with the Copyright Act of 1976.[15] The Copyright Act of 1976 expanded the definition of "writings" to include even pantomime and choreography.[16]

The new Act has many significant changes. For example, copyright protection now begins with the creation of the work,[17] rather than at the time of registration of the copyright. Thus, a writer is now protected by copyright from the moment that writer records his ideas in a tangible medium, such as on paper. If the Commercial Use of Sound Recordings Amendment is passed, then, according to the new Act, performers' copyright protection will run from the moment the sounds are recorded.

The constitutionality of copyright is solidly supported by case law. In *Dallas Cowboys Cheerleaders v. Scoreboard Posters*,[18] the Court of Appeals of the Fifth Circuit ruled against a defendant who relied upon a defense of parody and first amendment rights. In that case, the court stated: "The judgment of the constitution is that free expression is enriched by protecting the creations of authors from exploitation by others, and the Copyright Act is the congressional implementation of that judgment. . . . The first amendment is not a license to trammel on legally recognized rights in intellectual property."[19] This case suggests that courts will liberally construe the terms "authors and inventors" because the protected item here was a poster.[20] A musical performance would seem to be as much an intellectual property as a poster.

One of the purposes of copyright is to grant to authors and inventors a monopoly over their work product for a limited time.[21] The idea of the limited monopoly gives rise to the theory of paying royalties. The court in *Chess Music, Inc. v. Spite*[22] referred to royalties by stating: "Those who profit from copyrighted music are obliged to pay not only the piper but the author."[23] The Commercial Use of Sound Recordings Amendment would require those who profit from copyrighted music to pay the performer as well.[24]

Although authors and inventors holding copyrights are granted a monopoly,

13. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.
14. 17 U.S.C. § 5 (1909) (superseded 1976).
15. Pub. L. No. 94-553, 90 Stat. 2541 (1976) codified at 17 U.S.C. § 101 (1976) (effective Jan. 1, 1978) (revising 1909 Copyright Act).
16. 17 U.S.C. § 102(a)(4) (1976).
17. 17 U.S.C. § 302(a) (1976).
18. 600 F.2d 1184 (5th Cir. 1979).
19. *Id.* at 1187.
20. *Id.*
21. U.S. CONST. art. 1, § 8, cl. 8.
22. 442 F. Supp. 1184 (D. Minn. 1977).
23. *Id.* at 1185.
24. H.R. 1805, 97th Cong., 1st Sess. (1981).

this monopoly is not absolute during its term. Devices such as compulsory licenses[25] serve to limit the breadth of the monopoly. In essence, a compulsory license compels the owner of the copyright to license others to use his copyrighted material in certain circumstances. For example, once the copyright owner of a musical work allows one person to record that work, the owner is compelled to allow anyone, anywhere in the world, who so desires also to record that work under a compulsory license.[26] In addition, anyone wishing to broadcast a copyrighted musical work is free to do so upon filing a notice and making royalty payments for the composer to the Register of Copyrights. Failure to pay the royalty fees subjects the broadcaster to penalties for infringement.[27]

Another purpose of copyright is to protect the originality of an author's work, although the requirement of originality needed to obtain a copyright is minimal.[28] It can be argued that this requirement forbids payment to those persons who merely perform music or lyrics written by other persons. On the other hand, it can be argued that most recording artists (singers and/or instrumentalists) add at least a modicum of originality in their individual rendition of the material. Therefore, it appears that even a minimal contribution of originality via a performer's own rendition of certain material should enable that performer to be paid royalties.

Purpose Behind H.R. 1805

The definition of "perform" is set forth in the Copyright Act of 1976[29] in this manner:

> To "perform" a work means 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 audio-visual work, to show its images in any sequence or to make the sounds accompanying it audible.[30]

This definition is not abandoned in any manner by the proposed Commercial Use of Sound Recordings Amendment. The amendment would add to the last sentence, "in the case of a sound recording, to 'perform' the work means to make audible the sounds of which it consists."[31] This change, then, clearly delineates the sphere of potential infringements. Because broadcasters, under this definition of recorded music, would be "performing" the music

25. 17 U.S.C. § 115 (1976).
26. *Id.*
27. *Id.*
28. Thomas Wilson & Co. v. Irving J. Dorfman Co., 433 F.2d 409 (2d Cir. 1970); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951); Original Appalachian Artworks v. Toy Loft, 489 F. Supp. 174 (D.N.D. 1980); R. Dakin & Co. v. A & L Novelty Co., 444 F. Supp. 1080 (E.D.N.Y. 1978).
29. 17 U.S.C. § 101 (1976).
30. *Id.*
31. H.R. 1805, 97th Cong., 1st Sess., § 2 (1981).

and thus be required to pay royalties, they have lobbied successfully to keep any type of performance rights amendment from being passed. Broadcasters helped prevent the Sound Recording Performance Rights Amendment from becoming law and are continuing to fight against the Commercial Use of Sound Recordings Amendment.[32]

Originally, there was a provision for performance rights in sound recordings in the bill that became the 1976 Copyright Act.[33] The Register of Copyrights recommended, however, that the provision be deleted before the bill was passed.[34] One of the main reasons for this opposition was that there had not been an extensive analysis made of the significance that such a provision would have on the law of copyrights.[35] Following the enactment of the 1976 Copyright Act, Congressman George E. Danielson of California introduced the Sound Performance Amendment.[36] When that did not pass in the House, he introduced the revised but substantially similar Commercial Use of Sound Recordings Amendment.[37] Apparently the concept of paying recording artists performance royalties is at least as old as the 1976 Copyright Act. The stiff opposition that the idea has faced may indicate difficulty in seeing the concept actually become law.

Various factors control the rights of authors of musical and written works that may be applicable to performers of musical works as well, should the Commercial Use of Sound Recordings Amendment be passed. The Copyright Act of 1976 provides for a situation in which an employer of an author or inventor is deemed to be entitled to the copyright of that employee's work.[38] The product is termed a "work made for hire."[39] This is not a mandatory

32. The opposition lobby includes the National Association of Broadcasters and National Radio Broadcasters Association, among others. Both associations emphasize the value of free radio air-play to record companies.

33. 17 U.S.C. §§ 101-810 (1976) (effective Jan. 1, 1978).

34. Note, *Performance Rights in Sound Recordings: The Proposed Amendment to the Copyright Law*, 5 ART. & L. 63 (1980).

35. *Id.*

36. H.R. 997, 96th Cong., 1st Sess. (1979).

37. H.R. 1805, 97th Cong., 1st Sess. (1981).

38. 17 U.S.C. § 101 (1976).

39. *Id.* § 101 states:

> A "work made for hire" is—
>
> (1) a work prepared by an employee within the scope of his or her employment; or
>
> (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instruction activities.

arrangement any time an employee is hired to create an original work for an employer, however, because the parties are free to contract that the situation shall be otherwise.[40] In the past, there have been attempts to change the "work made for hire" concept to a provision giving the copyright to the employee subject to a royalty-free right of the employer to use the copyrighted work, but this change has been rejected.[41]

Presumably, were the Commercial Use of Sound Recordings Amendment to become law, those who would benefit the most would be the lesser-known performers because the well-known performers who are consistently hired by recording companies have the bargaining power to satisfy themselves with favorable terms in their recording agreements. Yet, such a benefit to the lesser-known performers may be circumvented by the "work made for hire" provision of the 1976 Copyright Act.

Another consideration that may affect a performance right in sound recordings is the definition of a performer in reference to sound recordings. Presumably, a performer would include anyone who makes a contribution to the music being recorded. Because originality is required for copyright protection, it could be argued that certain performers are incapable of contributing enough originality to warrant protection. Clearly, a pianist, a vocalist, or a flautist should be deemed to contribute originality by their performance because of the ability to control the tone and mood of a composition through their instruments or voices. A percussionist may pose a more difficult problem, however, in terms of categorizing for purposes of copyright because it can be argued that a percussionist has less control over the output of his instruments. It would, however, make little sense to allow a pianist, a vocalist, or a flautist to obtain a copyright on a performance, but not allow the same to a percussionist. A percussionist is also capable of contributing originality through the different instruments (triangle, bass drum, snare drum, etc.) that he chooses to use. Judge Learned Hand recognized this issue more than twenty-five years ago. In *Capitol Records v. Mercury Record Corp.*,[42] a 1955 copyright case, he noted in dissent:

> There may indeed be some instruments—e.g., percussive—which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself, which § (b) [of the 1909 Copyright Act] makes copyrightable.[43]

Regardless of the instrument, or voice, used to perform a composition, and regardless of whether the music performed is in exact accord with the notes

40. *Id.*

41. HOUSE COMM. ON JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. No. 1476, 94th Cong., 2d Sess. (1976).

42. 221 F.2d 657 (2d Cir. 1955).

43. *Id.* at 664.

on a musical staff, there will always be some degree of originality because performers and vocalists differ as much stylistically as they do genetically.

The view and definition of performers would be changed substantially by the proposed Commercial Use of Sound Recordings Amendment. Currently, the Copyright Act provides the copyright owner with the exclusive right to perform the copyrighted work publicly in the case of literary, musical, dramatic and choreographic works, pantomimes, and motion pictures and other audio-visual works.[44] This list of copyrightable works included within a performance right specifically excludes any performance right in sound recordings in two other sections of the 1976 Copyright Act.[45] The Commercial Use of Sound Recordings Amendment purports to alter this exclusion, and "performer" is defined in this amendment as follows:

> (2) "Performers" are instrumental musicians, singers, conductors actors, narrators, and others whose performance of a literary, musical, or dramatic work is embodied in a sound recording, and, in the case of a sound recording embodying a musical work, the arrangers, orchestrators, and copyists who prepared or adapted the musical work for the particular performance of the sounds fixed in the sound recording.[46]

This section of the amendment also states that a person will be deemed a "performer" regardless of whether he made a contribution under a "work made for hire." There may be some criticism of this section because of the lack of clarity in its reference to "work made for hire." By saying that a contributor to the sound recording is still considered a "performer," there is no previous or subsequent provision clarifying whether this states an exception to "work made for hire." Is a "performer," even though in a position of an employee whose "work" is "made for hire," still to be able to receive royalty payments on his behalf? The answer is unclear from the text of the amendment. However, the logic of the "work made for hire" provision in the Copyright Act of 1976[47] seems to indicate that a "performer" in a "work made for hire" situation will not receive royalties.

The amendment formalizes the division of royalties to be paid performers,[48] and states that neither a performer nor a copyright owner may transfer his right to the royalties to the copyright owner or performer, respectively.[49] This provision is commendable because it prevents either performers or copyright owners with greater bargaining power, achieved by fame or otherwise, from

44. 2 M. NIMMER, COPYRIGHT § 8.14 (1982); 17 U.S.C. § 106(4) (1976).

45. 17 U.S.C. §§ 102(a) & 114(a) (1976).

46. H.R. 1805, 97th Cong., 1st Sess., § 7(E)(2) (1981).

47. Pub. L. No. 94-553, 90 Stat. 2541 (1976) codified at 17 U.S.C. § 101 (1976) (effective Jan. 1, 1978) (revising 1909 Copyright Act).

48. H.R. 1805, 97th Cong., 1st Sess., § 7(C)(14) (1981). Under this section, one-half of the royalties for distribution would go to the copyright owners, and one-half would go to the performers. The one-half to the performers would be divided among the individual performers on a sound recording on a per capita basis.

49. H.R. 1805, 97th Cong., 1st Sess., § 7(C)(14) (1981).

preying upon lesser-known performers or copyright owners by contract, thus creating an equal distribution of bargaining power.

The amendment also states that the Copyright Royalty Tribunal shall hire private entities to distribute royalty funds to the entitled performers.[50] In the United States, at the present time, there are three major organizations that license the use of copyrighted music, and the copyright statute specifically recognizes the authority of them to license musical works.[51] The three are the American Society of Composers, Authors & Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc. (formerly the Society of European Stage Authors and Composers).[52] ASCAP and BMI, both nonprofit organizations that distribute, less costs, all licensing fees to songwriters and music publishers, license 35% and 65%, respectively, of the year's top 100 songs, as rated according to music trade publications.[53]

Most likely, organizations such as ASCAP, BMI, and SESAC would be the entities to distribute royalties to performers under the Commercial Use of Sound Recordings Amendment. These organizations ensure punishment against infringers of copyrighted music by policing establishments that refuse to pay for a license from ASCAP or BMI.[54] An establishment owner or manager is wise to pay the license fee because if the establishment plays copyrighted music, of which such unauthorized play constitutes an infringement, suit will be brought in federal court.[55] Should the federal court rule that the establishment is guilty of an infringement, the establishment will have to pay statutory damages,[56] which may even exceed the original licensing fee.[57]

The policing undertaken by these licensing organizations is serious, unrelenting, and capable of inducing the owners of the establishments to pay the licensing fees.[58] Commercial establishments liable for royalty fees have been broadly defined to include stores in which radio is played over speakers for the enjoyment of customers.[59] An action was brought by ASCAP against The Gap Stores, Inc. for using music without having paid a licensing fee.[60] The court

50. H.R. 1805, 97th Cong., 1st Sess., § 10(C) (1981). Under this section, the Copyright Royalty Tribunal is to appoint private entities to collect royalties, but such appointment does not relieve the Tribunal of the responsibility to ensure fair and equitable distribution of royalties, so that the Tribunal would oversee the work of the private entities.

51. 17 U.S.C. § 116(e)(3) (1976).

52. *Id.*

53. Goldstein, *The Performance of Music Under the New Copyright Law*, 43 TEX. B.J. 516 (1980).

54. *Id.*

55. 28 U.S.C. §§ 1338(a), 1400(a) (1976).

56. 17 U.S.C. § 101(b) (1976); 3 M. NIMMER, COPYRIGHT § 14.04 (1982). There are maximum and minimum limits on statutory damages, but the decision as to amount is within the judge's discretion. The minimum statutory damage amount is $250 (although there are exceptions) for infringement, while the maximum statutory amount is $10,000 (and there are exceptions here also).

57. Widenski v. Shapiro, Bernstein & Co., 147 F.2d 909 (1st Cir. 1945).

58. Goldstein, *supra* note 53.

59. Sailor Music v. The Gap Stores, 668 F.2d 84 (2d Cir. 1981), *cert. denied*, 102 S.Ct. 2012 (1982).

60. 668 F.2d at 84.

noted in that case that to be exempt from the licensing fee, the defendant would have had to satisfy the following three requirements: (1) its apparatus would have to have been a kind commonly used in private homes; (2) no direct charge could have been made to listen to the performances; and (3) the transmissions could not be further transmitted to the public.[61]

Such requirements as these are well-stated and are in accord with the definition of a performer under the Commercial Use of Sound Recordings Amendment. In the above case, there was no contention that the defendants charged customers to listen to the music, but the case was nevertheless decided against the defendant.[62] Therefore, although commercial use of recorded music is the most easily ascertainable element of infringement, this element is not essential in finding that infringement has occurred.

The record piracy trade does not go unpunished for its infringement, either. In *CBS, Inc. v. Waters*,[63] a federal district court awarded statutory copyright damages against a record company from which the FBI seized approximately twelve tons of bootleg records, consisting of several live performances of Bruce Springsteen, which were recorded without his consent. This case "resulted in what may be one of the largest awards of statutory copyright damages ever made."[64]

One can easily see that the rights of copyrighted music (copyright presently belonging only to composers of the melody and/or lyrics) are zealously guarded by ASCAP and BMI, as well as by SESAC, although SESAC has a more limited sphere of influence than either ASCAP or BMI. In the event the Commercial Use of Sound Recordings Amendment were to become law, there is little doubt that the rights of performers also would be guarded with such zeal.

A Comparison to English Law

In various other countries, a performance right in sound recordings has been recognized. For example, Great Britain provides for royalty payments to performers of sound recordings.[65] The amount of the royalty to be given the performer is decided on the basis of a grading system.[66] After listening to a sound recording, a board of musicians discuss the originality contained

61. *Id.* at 85-86.

62. *Id.*

63. 2 ENTERTAINMENT L. REP. 7 (No. 18 1981), reporting on CBS, Inc. v. Waters, Case No. CV-79-2559 - MML (C.D. Cal. 1980).

64. *Id.*

65. McFarlane, *A Question of Arrangement*, 139 NEW L.J. 33 (1980) (published in England). *See also Performance Rights in Sound Recordings, 1978, Hearings on H522-7*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Performance Rights Hearings*]. At this hearing, the statement was made in reference to performance rights in sound recordings and in reference to attending the IFA (the International Federation of Actors along with the International Federation of Musicians): "And it is a source of embarrassment always to us—is it not, Mr. Bikel?—that every year the issue of the Rome Convention and copyright comes up at this congress, and they are amazed that this country is still that far behind." (Statement of Kathleen Nolan, Screen Actors Guild president in 1978), at 57.

66. McFarlane, *supra* note 65.

in the sound recording, and then assign to the recording a fraction that represents a point value.[67] Under this grading system, a sound recording that is so creative as to have become a new composition in form is given the highest rating (12/12), and thus the performers on that sound recording are entitled to the largest amount of royalties for sound recording performances.[68] The degree of originality of the performance dictates the point value that particular recording is to receive, thereby also dictating the royalty amount to be received by the performer(s). Even minor alterations to melodic lines are recognized as a contribution of some degree of originality, and thus are appointed a 2/12 value.[69] Some writers indicate that this approach is both practical and logical.[70]

The solution in existence in Great Britain, however, would be fraught with problems in the United States. The foremost problem would be one of discretion initially: i.e., who would draw the line in terms of originality of a sound recording? Even among experienced musicians and composers, there are differences of opinion about music, and these differences are as variable as human nature. There would be disharmony, at least some of the time. Furthermore, having a board of experienced musicians and performers decide whether certain other performers of recorded music are entitled to royalties, with such decisions being based on the opinions of this board, may raise a constitutional due process issue.

At any rate, it is significant that the United Kingdom is among the countries that have faced the problem of performance rights in sound recordings and decided to issue royalties on that basis. The British system does contain a solution to recognizing performances as a valid contribution in sound recordings and should not be overlooked in attempts to design an American solution.

The Proposed Amendment

As mentioned previously, the broadcasters' lobby strongly opposes the passage of any bill allowing performance rights in sound recordings.[71] The broadcasters base their objections to any proposed amendment of this nature on the value of free radio air-play to record companies.[72]

Under the current broadcasting system, new releases are sent to radio stations free of charge in exchange for air-play.[73] Record companies that send the

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* McFarlane contends that the Copyright Act of the United Kingdom deals in abstractions when it talks of original works, but that the English system is a logical and practical way of solving the gray area of granting performance rights.

71. *Performance Rights Hearings, supra* note 65. The opposition includes Durham Live Broadcasting Service (representing North Carolina Association of Broadcasters), Southern California Broadcasters Association, National Association of Broadcasters, Amusement and Music Operators Association, National Radio Broadcasters Association, Combined Communications Association and California Music Merchants Association.

72. *Id.* at 28.

73. *Id.*

free new releases, of course, do so in the hope that the publicity will spur popularity and thus boost record sales.[74]

Broadcasters claim that the benefit of publicity to the new releases is of greater value to record companies than the need to compensate performers. No one can dispute that without radio providing widespread dissemination of recorded material, the popularity of any given recorded performance could not possibly be as great because any other audience would be limited.

The antithesis of the broadcasters' argument is that radio stations are currently receiving the benefit of free programming via the new releases. This constitutes a rather obvious reason for the broadcasters' opposition to a sound performance amendment to the copyright law.[75]

On the other hand, there are strong supporters of an amendment to the 1976 Copyright Act to include a performance right in sound recordings.[76] These supporters are able to pierce the broadcasters' argument that the record companies benefit by the free releases by looking at the goal of broadcasting.[77] Because the goal of broadcasters is to increase their number of listeners (and thereby increase their advertising business and hence their profits), the radio stations are the true beneficiaries under the current broadcasting/record-releasing system. The newly released records unjustly enrich the broadcasting stations because they are able to use the records to increase their profits without having to pay any compensation.

Furthermore, the goal of broadcasting stations is in no way related to promoting unknown performers. Often, a radio listener does not know who he is listening to because the name of the performer has not been mentioned by the broadcaster, and other vocalists, such as back-up singers, and instrumentalists are rarely publicized on the air. When sound recordings are used to provide background music, the individual artists are never promoted, although their work is being exploited.[78]

Congressman Danielson, in referring to the need for a performance rights amendment, stated: "I've never believed that people should contribute their

74. *Id.*

75. By way of analogy, 17 U.S.C. § 110(7) (1976) exempts from royalties the playing of recorded music in record stores when the purpose of that play is to induce people to buy the records. The transmission of the recorded music, however, cannot go beyond the establishment, and this is a significant difference from broadcasting. The record store exemption is allowed because the purpose behind the exemption is to induce customers to enter the store and then buy the record. Listening to a recording on the radio does not have the same effect because a listener is not a customer of anything in particular.

76. *Performance Rights Hearings, supra* note 65. Supporters include the American Federation of Musicians, the American Federation of TV and Radio Artists, the Los Angeles Philharmonic Orchestra, the American Council for the Arts (ACA), Screen Actors Guild, National Citizens Communication Lobby, the Recording Industry Association, the president of the entertainment group of 20th Century Fox Film Corp., Crescendo Records, A and M Records, International Federation of Producers of Phonograms and Videograms, and Elektra Asylum Records.

77. *Id.* (testimony by Jack Golodner, AFL-CIO Department for Professional Employees).

78. *Id.* at 5. "We cannot keep taking and expect to keep taking from our creative people without returning in some measure the profits reaped from the taking" (specific statement by Golodner).

property or their services to another without fair compensation. It just simply amounts to unjust enrichment which is contrary to our theory of law."[79]

Performers are indeed contributing their intellectual property (their own originality in contributing to the sound recording) and their services. After all, there would be virtually no product without the performers. Very few composers have the capabilities of playing every instrument necessary to make a sound recording that is totally a product of their own performance. Those performers who do contribute to the making of a sound recording should be considered worthy of receiving royalties.[80]

Conclusion

Thus far, copyright law has expanded slowly to accommodate changing technology. The rights of recording artists for their performances is rather obviously missing from this expansion. The opposition to any such amendment by broadcasting associations and the support of it by artists and artistic organizations has been consistent since the proposed revision in the 1976 Copyright Act. Briefly, broadcasters oppose a performance right because of the economic effect it would have on their businesses, and artists support it because they believe there is creativity involved in a musical performance.

Copyright is a constitutional right to grant a monopoly to "writings," and the past has shown that copyright has been revised slowly to expand the meaning of a "writing." There is no solid argument against expanding the meaning of "writing" to include a performance right in sound recordings.

Furthermore, a performance right has been recognized by various other countries and by the Rome Convention.[81] The United States lags far behind in this area, and this is contrary in general to this country's usual concern for the protection of property. Intellectual property should merit as much protection as does real or various other categories of personal property.

Musicians are in a position whereby others are allowed to profit by the musicians' works without making just compensation.[82] Moreover, it is ironic that recording companies, through their sound engineers, are able to obtain copyright on the end product of the performers' labors,[83] yet the performers

79. *Id.* at 9-10 (statement by Congressman George E. Danielson).

80. *Id.* at 6. Golodner stated that his father, a musician, was a violinist with the NBC Symphony for 12 years under the directorship of Toscanini:

> But then he was displaced by NBC because NBC didn't need him anymore. They still used his work. . . . In his later years he listened to himself on the radio making money for others while he was unemployed. He had only social security checks when he died, but he made millions for others. . . . It's little wonder that he didn't and could not encourage his children to pursue music as a career.

81. *Id.* at 57. (by statement of Kathleen Nolan, Screen Actors Guild, 1978 president).

82. *Id.* at 6. (statements by Golodner). See note 80 *supra.*

83. 1 M. NIMMER, COPYRIGHT § 2.10[A][2][b] at 2-147 (1982). This section states: "It is true that the record producer may acquire the engineer's copyright by virtue of an employment for hire relationship, or possibly by direct assignment, but not merely by virtue of the fact that he 'set up' the recording session." This statement is a recognition of *how* the record company