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## I. INTRODUCTION

John Coltrane's recording of the song *My Favorite Things* is an example of his striking ingenuity. On the recording, Coltrane performs a fourteen-minute “overhaul ... of the saccharine show tune” originally from *The Sound of Music*. Some commentators have claimed that jazz musicians would not play *My Favorite Things* today, “had Coltrane not established its surprising potential.” Despite Coltrane's transformative contributions, the Copyright Act does not grant him, as the performer, the right to exclude others from publicly performing his rendition. Coltrane is not entitled to receive royalties when his recording is played on the radio, on television, or in a public setting such as a restaurant or hotels. Rather, the Copyright Act grants the composers of *My Favorite Things*, Richard Rodgers and Oscar Hammerstein, the exclusive right to authorize the analog public performance of the song.<sup>1</sup>

U.S. Federal Copyright law divides musical recordings into two separate copyrights: A copyright in the musical work (typically the songwriter's written product) and a copyright in the sound recording (typically the band or performer's finished audible product).<sup>2</sup> When a person plays music publicly, musical work copyright-holders receive performance royalty payments. Generally, holders of sound recording copyrights have no analogous means through the duration of the copyright for continued income outside of sales – they may only prevent copying and encourage sales of their records.<sup>3</sup>

Aside from its unfairness, the disparity between protection of musical work and sound recording copyrights places the United States in stark contrast to global practice.<sup>4</sup> Indeed, the

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<sup>1</sup> Shourin Sen, *The Denial of a General Performance Right in Sound Recordings: A Policy that Facilitates our Democratic Society?*, 21 Harv. J. L. & Tech. 233, 234 (2007) (internal citations omitted) [hereinafter “*General Performance Right*”].

<sup>2</sup> See 17 U.S.C. §§ 102, 106.

<sup>3</sup> *Id.* Note that Congress recently granted sound recording copyright-holders the right to control digital audio transmissions of their work, which will be discussed in detail later in this report. 102 U.S.C. § 106. There is an obvious disparity here, as these onerous payments impact the then-new Internet radio stations, whereas their established and much better funded AM and FM siblings do not have to pay the same royalties.

<sup>4</sup> See generally Kara M. 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*, 7 VAND. J. ENT. L. & PRAC. 411 (2005).

CEO of the Recording Industry Association of America (RIAA) recently noted that “We're the only OECD [Organisation for Economic Co-operation and Development] country and virtually the only industrialized nation that doesn't provide the creator compensation for performance on the radio, putting us in the company of nations such as Iran, China, and North Korea.”<sup>5</sup>

#### A. THE PROBLEM IN BRIEF

This research report and the accompanying bill address the disparate treatment of holders of musical work and sound recording copyrights. The former have a federally-mandated right to control public performances of their copyrighted material, while the latter do not.<sup>6</sup> This causes public performers to seek permission for a public performance only from the musical work copyright-holder, creating an inherent unfairness that disincentivizes artists to revitalize or adapt existing compositions, and which brings the U.S. out of line with intellectual property regimes throughout the world.<sup>7</sup>

#### B. THE PROBLEM IN CONTEXT

The U.S. copyright system constitutes an extremely complex and nuanced area of law that Congress has continually modified throughout the years.<sup>8</sup> Congress's continual adjustments evidence both copyright's complexity and its imperfection, with some vocal

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<sup>5</sup> Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right In Sound Recordings*, 21 NO. 8 INTELL. PROP. & TECH. L.J. 10, 11 (2009) (citing The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America)).

<sup>6</sup> 17 U.S.C. §§ 102, 106.

<sup>7</sup> See generally Wolke, *Some Catching Up to Do*, *supra* note 4.

<sup>8</sup> JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 28 (2006) (“In the 30 years since the 1976 [Copyright] Act, it has been amended over 25 times.”). For a chronological listing of these amendments, see *id.* at 28-29.

commentators going so far as to advocate for copyright's abolition.<sup>9</sup> Of copyright's many issues, orphan works –works with an unknown copyright-holder who cannot be asked for permission to use the work – constitute perhaps the greatest single problem.<sup>10</sup> The orphan work problem directly impacts the solution proposed in this research report, and greatly influenced the transitional measures detailed below. While copyright has many issues that Congress would be well-advised to examine, this research report and the accompanying bill address only the narrow concern of public performance rights for sound recording copyright-holders ("SRCHs").

### C. PROPOSED SOLUTION IN BRIEF

The proposed solution eliminates this disparity by extending the performance right afforded to holders of musical work copyrights to holders of sound recording copyrights. The proposed solution will force public performers to seek permission of sound recording copyright-holders before a publicly performing a work. This solution allows for comparatively simple integration of sound recording copyright-holders into the systems that already exist to handle licensing of sound recording copyrights. Further, because the vast majority of performers also composed their material,<sup>11</sup> owners of musical work copyrights likely have considerable overlap with owners of sound recording copyrights. This suggests relatively minimal difficulty in implementing the proposed solution, as most SRCHs already understand of the scope of the

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<sup>9</sup> See generally Ben Depoorter, Adam Holland & Elizabeth Somerstein, *Copyright Abolition and Attribution*, 5 REV. OF L. & ECON. (2009), available at <http://www.bepress.com/rle/vol5/iss3/art5>; Steven Shavell, *Should Copyright Of Academic Works Be Abolished?* (advocating for the abolition of copyright of academic works) (working paper), available at [http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Copyright 7-17HLS-2009.pdf](http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/Copyright%207-17HLS-2009.pdf).

<sup>10</sup> See generally U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

<sup>11</sup> Sen, *General Performance Right*, *supra* note 1, at 235.

performance right and presently use the system that administers it for their coexisting musical work copyrights.

#### D. METHODOLOGY

The research report and the bill that it supports take a problem-solving approach to legislation.<sup>12</sup> Rather than working from a solution – such as “we should provide universal healthcare” – the problem-solving approach seeks to isolate a specific social problem to which it closely tailors an optimal solution through a fact-intensive process. Repetitive patterns of behavior, which we call institutions, cause social problems.<sup>13</sup> Laws dictate actions, and well-constructed laws focus on changing problematic<sup>14</sup> institutions to rectify the resulting social problems.<sup>15</sup>

This research report begins by identifying a narrow social problem. It frames that problem in its societal context, and identifies the problematic institutions and the causes that underlie the attendant behaviors. After identifying the problem, the behaviors that cause it, and the root of those behaviors, this report turns to an examination of the available solutions and their attendant enforcement mechanisms. It walks through each potential solution, examining the social impact and goes on to perform a cost-benefit analysis of each. Through this comparison, this research report empirically demonstrates the superiority of the proposed

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<sup>12</sup> See generally Ann Seidman, Robert B. Seidman & Malin Abeysekere, Legislative Drafting for Democratic Social Change (2004) [hereinafter the “Manual”].

<sup>13</sup> *Id.* at 15.

<sup>14</sup> Note that “problematic” is used with its literal definition: “posing a problem.” See Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/problematic> (last visited Feb. 7, 2010). Unless stated explicitly, this research report makes no moral judgments. Failure by a venue to pay a performer for the public performance of a sound recording speaks to a problem in the system that governs the venue’s behavior rather than to the venue’s theoretical moral inferiority.

<sup>15</sup> *Id.*

solution: addressing the problematic institution underlying the social problem using a narrowly tailored solution with minimal social cost.

## II. THE PROBLEM

This research report focuses on an imparity in U.S. copyright law's treatment of holders of musical work and sound recording copyrights, resulting in the attendant failure of public performers to seek permission of sound recording copyright-holders before a public performance. Because this report examines a small and nuanced aspect of a relatively complex system of law, it must first outline the relevant legal landscape before discussing the problem in depth.

### A. LEGAL FRAMEWORK: THE COMPLEXITIES OF U.S. COPYRIGHT LAW

Like many areas of the law, copyright has a lot of complexity and nuance.<sup>16</sup> This section briefly runs through the relevant aspects of current U.S. copyright law, with a focus on how a sound recording copyright might come into being, and how a corporation, rather than a performer, might come to own that copyright.

#### 1. THE COPYRIGHT ACT

The Copyright Act grants the owner of a copyright numerous exclusive rights, including the right to reproduce the work or make derivative works.<sup>17</sup> Owners of a musical work

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<sup>16</sup> See generally Nimmer on Copyright (multi-volume treatise on copyright); Mike Masnick, *Want To Get A Sense Of Just How Complex And Confusing Copyright Law Really Is?*, TECHDIRT, Apr. 9, 2009, <http://www.techdirt.com/articles/20090408/2314274447.shtml>.

<sup>17</sup> 17 U.S.C. § 106.

copyright can also control public performances of that work, while SRCHs cannot.<sup>18</sup> When a person infringes a copyrighted work, the copyright owner may turn to the U.S. federal court system<sup>19</sup> for a number of remedies including monetary damages, injunctive relief, and destruction of the infringing goods.<sup>20</sup> Further, the copyright in a new work “vests initially in the author or authors of the work,”<sup>21</sup> so except in the case of a work made for hire,<sup>22</sup> a performer would own the copyright in his or her sound recording unless the performer transferred that copyright to a third party.<sup>23</sup>

## 2. TRANSFER OF COPYRIGHT

Copyrights are property, and like any property a person may transfer them to someone else.<sup>24</sup> An author typically transfers a copyright via contract;<sup>25</sup> the means through which many record companies obtain copyrights on their artists’ songs.<sup>26</sup> The transferability of copyright impacts the present discussion as it means that the current SRCH may not be the original performer of a song, potentially making the SRCH difficult to identify and locate, thereby exacerbating the orphan works issue.

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<sup>18</sup> *See Id.*

<sup>19</sup> FED. R. CIV. P. 1331 (“The [federal] district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

<sup>20</sup> 4-14 Nimmer on Copyright §§ 14.01-14.10.

<sup>21</sup> 17 U.S.C. § 201(a).

<sup>22</sup> *See infra* Section II(A)(0).

<sup>23</sup> *See infra* Section II(A)(2).

<sup>24</sup> U.S. Copyright Office, Copyright Basics 6 (2008), <http://www.copyright.gov/circs/circ1.pdf>.

<sup>25</sup> *Id.*

<sup>26</sup> Courtney Love, *Courtney Love does the math*, Salon.com, June 14, 2000, <http://archive.salon.com/tech/feature/2000/06/14/love>.

### 3. WORKS MADE FOR HIRE

“In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author” and thus initially owns the copyright.<sup>27</sup> The Copyright Act defines a work made for hire as (1) any “work prepared by an employee within the scope of his or her employment” or (2) otherwise commissioned as part of a work, provided the parties agree in writing that the work is a work made for hire.<sup>28</sup> The works for hire doctrine is analogous to copyright transfer – it is a means by which the current copyright holder can be made more difficult to find, resulting in an orphan work.

### 4. JOINT COPYRIGHT

Congress defines a “joint work” as any “work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.”<sup>29</sup> “The authors of a joint work are co-owners of copyright in the work.”<sup>30</sup> Absent an agreement to the contrary, the relevant record company, through its employees, likely introduces enough originality into “capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording” to qualify as an author of the work.<sup>31</sup> Accordingly, a performer may at best share a joint copyright in the musical work with the record company or record producer responsible for the mastering of the sound recording, which can make it difficult for a public performer to determine who to ask for permission to perform the work.

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<sup>27</sup> 17 U.S.C. § 201(b).

<sup>28</sup> 17 U.S.C. § 101.

<sup>29</sup> 17 U.S.C. § 101.

<sup>30</sup> 17 U.S.C. § 201(a).

<sup>31</sup> 1-2 Nimmer on Copyright § 2.10 (quoting 38. H. Rep., p. 56).

## 5. COMPILATION WORKS

“A ‘compilation’ is a work formed by the collection and assembling of preexisting materials . . . in such a way that the resulting work as a whole constitutes an original work of authorship.”<sup>32</sup> A musical album can constitute a compilation, as can a grouping of older recordings such as a greatest hits album.<sup>33</sup> A person may even obtain a copyright in a compilation of works in the public domain.<sup>34</sup> Quoting *Nimmer on Copyright*, the copyright bible: “It follows, then, that a record company is entitled to a musical work compilation copyright in an album to the extent that such company has made (or is the assignee of one who has made) the selection and grouping of the particular songs contained in the album.”<sup>35</sup> With a *musical work* compilation copyright, the copyright-holder has the right to control the public performance of all or substantially all of the compilation.<sup>36</sup> This holds true even if the compilation copyright-holder does not own the copyrights on the individual sound recordings in the compilation. Accordingly, a person wanting to publicly perform all or substantially all of an album must presently obtain permission both from the compilation copyright-holder and from the musical work copyright-holders of the individual songs, but *not* from the sound recording copyright-holder.

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<sup>32</sup> 17 U.S.C. § 101

<sup>33</sup> 2-8 *Nimmer on Copyright* § 8.21 (citing *Harry Fox Agency, Inc. v. Mills Music, Inc.*, 543 F. Supp. 844, 868 n.111 (S.D.N.Y. 1982) (“greatest hits” album is a “compilation”), rev’d, 720 F.2d 733 (2d Cir. 1983), rev’d sub nom. *Mills Music, Inc. v. Snyder*, 469 U.S. 153 (1985). See *National Ass’n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367 (D.C. Cir. 1982) (selection and arrangement of programs to be contained in the broadcast day of a television station constitutes copyrightable compilation, which copyright is owned by the station even if copyrights in individual programs owned by others); *National Ass’n of Broadcasters v. Copyright Royalty Tribunal*, 772 F.2d 922 (D.C. Cir. 1985) (same)).

<sup>34</sup> *E.g.*, *Hartfield v. Peterson*, 91 F.2d 998 (2d Cir. 1937); *Jeweler’s Circular Pub. Co. v. Keystone Pub. Co.*, 281 F. 83 (2d Cir. 1922).

<sup>35</sup> *Id.* (internal citations omitted).

<sup>36</sup> *Id.* (citing 17 U.S.C. § 106(4)).

## 6. THE DIGITAL AUDIO TRANSMISSION RIGHT

With the rise of the Internet, pirating music became easier than ever before. Modern technology not only made the cost to make a copy – previously requiring some medium such as a cassette tape – effectively zero, it made it trivial to make many copies simultaneously throughout the world. These capabilities hit the mainstream through the Napster computer program, and any person with an Internet connection could pirate music with apparent anonymity.<sup>37</sup> CD sales – SRCHs' main source of revenue – declined while Internet music piracy came into its prime, and the record companies pointed to piracy as responsible for decreased profits.<sup>38</sup>

While Napster and its ilk received the vast majority of the press attention in the mid 1990s, legitimate subscription-based services allowed subscribers to listen to songs on demand without actually purchasing the album.<sup>39</sup> Because consumers might never purchase the album, owners of musical recording copyrights worried that they might never receive compensation, despite subscribers' ability to play a song at will – just as if the subscriber owned the album.<sup>40</sup> Congress responded to this worry in 1995 by giving musical recording copyright-holders a narrow right limited to public performances “by means of a digital audio transmission,”<sup>41</sup> which

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<sup>37</sup> *E.g.*, *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (9th Cir. 2001).

<sup>38</sup> This claim of causation is hotly debated, and cannot be relied upon as fact. *See, e.g.*, Martin Peitz & Patrick Waelbroeck, *The Effect of Internet Piracy on CD Sales: Cross-Section Evidence*, (CESifo Working Paper No. 112, Jan. 2004), available at [www.SSRN.com/abstract=511763](http://www.SSRN.com/abstract=511763) (“internet piracy played a significant role in the decline in CD sales in 2001, but can hardly account for the subsequent drop in 2002”).

<sup>39</sup> Sen, *General Performance Right*, *supra* note 1, at 265 (internal citations omitted); 2-8 Nimmer on Copyright § 8.21.

<sup>40</sup> Sen, *General Performance Right*, *supra* note 1, at 265 (internal citations omitted); 2-8 Nimmer on Copyright § 8.21.

<sup>41</sup> 17 U.S.C. § 106(6).

applies primarily to satellite and internet radio providers.<sup>42</sup> The statute explicitly states that it “do[es] not include any right of performance” for sound recordings.<sup>43</sup>

This narrow and unprecedented right reflects the negotiations between the interested parties – primarily record companies and traditional radio stations<sup>44</sup> – rather than the Copyright Office’s longstanding recommendation of a full-fledged performance right or another public-focused legislative methodology.<sup>45</sup> Congress ultimately produced an extremely complex act.<sup>46</sup> While a detailed discussion of when the transmission right does and does not apply exceeds the scope of this research report, it contains two sweeping primary exemptions for nonsubscription transmissions and retransmission of radio stations<sup>47</sup> and provides complex rules for compulsory licensing.<sup>48</sup> If Congress intended the Act to give SRCHs an Internet right analogous to the well-established performance right for musical works copyrights, it fell rather far from the mark. For these and other reasons, academics have vigorously criticized the law.<sup>49</sup>

Under the existing system, the Copyright Royalty Judges, part of the Library of Congress, “are responsible for determining and adjusting the rates and terms of the statutory licenses and determining the distribution of royalties from the statutory license royalty pools that the

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<sup>42</sup> Sen, *General Performance Right*, *supra* note 1, at 266 (internal citations omitted); 2-8 Nimmer on Copyright § 8.21.

<sup>43</sup> 17 U.S.C. 114(a).

<sup>44</sup> See Les Watkins, *The Digital Performance Right in Sound Recordings Act of 1995*, 13 ENTER. & SPORTS L. 1 (Winter 1996).

<sup>45</sup> 2-8 Nimmer on Copyright § 8.21 [B].

<sup>46</sup> See generally David Nimmer, Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right, 7 *UCLA Ent. L. Rev.* 189 (2000).

<sup>47</sup> 2-8 Nimmer on Copyright § 8.22 [B].

<sup>48</sup> 17 U.S.C. 114(a).

<sup>49</sup> *E.g.*, 2-8 Nimmer on Copyright § 8.21[B] (*citing* Watkins, *supra* note 44, at 19 (the law is more “compromise between interested corporate parties than a result of skilled and knowledgeable drafting by legislators”)); Sobel, *A New Music Law for the Age of Digital Technology*, 17 ENTER. L. RPT. 3, 3 (Nov. 1995) (“[T]he organization of the new Act makes it appear that each subsection was written on a separate 5-by-7 inch card, and that the cards were spilled on the floor and accidentally reassembled out of order just before the bill was retyped in the form in which it was enacted.”)); Sen, *General Performance Right*, *supra* note 1, at 267; Nimmer, *Ignoring the Public*, *supra* note 46.

Library of Congress administrators.”<sup>50</sup> They set royalty rates based on a number of factors, and have designated a company named SoundExchange “as the sole entity in the United States to collect and distribute these digital performance royalties on behalf of featured and non-featured recording artists, master rights owners (usually record labels), and independent artists who record and own their masters.”<sup>51</sup> SoundExchange answers to the Copyright Royalty Judges, who themselves answer to stakeholders through the appeal process.<sup>52</sup>

## B. EXISTING LICENSING SYSTEMS FOR MUSICAL WORKS COPYRIGHTS – PERFORMANCE

### RIGHTS ORGANIZATIONS

Prospective public performers must (and generally do) obtain permission from the relevant musical works copyright-holder before publicly performing a work.<sup>53</sup> Performance rights organizations (“PROs”) typically manage public performance licenses on behalf of copyright-holders.<sup>54</sup> In the United States, the three performance rights agencies are: The American Society of Composers, Authors and Publishers (“ASCAP”); Broadcast Music, Inc. (“BMI”); and SESAC, Inc. (“SESAC”).<sup>55</sup> As ASCAP is the largest U.S. performance rights organization,<sup>56</sup> this research report will use it as a case study for how the industry works.

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<sup>50</sup> Copyright Royalty Board: Background, <http://www.loc.gov/crb/background/>.

<sup>51</sup> SoundExchange, About << SoundExchange, <http://soundexchange.com/about/>.

<sup>52</sup> See generally *Intercollegiate Broadcast Sys., Inc. v. Copyright Royalty Board*, 571 F.3d 69 (D. D.C. 2009).

<sup>53</sup> 17 U.S.C. 106.

<sup>54</sup> MusicBootCamp.com, *Royalties*, <http://musicbootcamp.com/royalties-ascap-bmi-sesac-socan/> (last visited Feb. 22, 2010).

<sup>55</sup> *Id.*

<sup>56</sup> Events-in-Music.com, *ASCAP vs. BMI vs. SESAC -- A Look at the PROs*, <http://www.events-in-music.com/ascap-vs-bmi-vs-sesac.html>.

## 1. REGISTRATION OF WORKS

After creating a work, to leverage collective rights agencies to generate royalty fees, a musical work copyright-holder must register the work with a PRO.<sup>57</sup> This allows the agency to determine who owns rights to a given work so that the PRO can pay royalties to the proper person.<sup>58</sup>

## 2. WHO PAYS TO PERFORMANCE RIGHTS ORGANIZATIONS?

ASCAP boasts a very large customer base, including:

- The three major television networks: ABC, CBS and NBC
- Public television – the Public Broadcasting System (PBS) and its affiliated stations
- The majority of the 11,000 cable systems and virtually all of the cable program services
- Over 1,000 local commercial television stations, including affiliates of the Fox, Paramount (UPN), Warner Bros. (WB) Networks and PAX
- The Univision Television Network and its stations
- About 11,500 local commercial radio stations
- About 2,000 non-commercial radio broadcasters, including college radio stations and National Public Radio (NPR) stations
- Hundreds of background music services (such as MUZAK, airlines)
- About 2,300 colleges and universities
- About 5,700 concert presenters
- Over 1,000 symphony orchestras
- Over 2,000 web sites
- Tens of thousands of “general” licensees: bars, restaurants, hotels, ice and roller skating rinks, circuses, theme parks, veterans and fraternal organizations and more.<sup>59</sup>

While most of these customers have a single blanket license that gives them access to the entire ASCAP library, some choose to pay on a per-performance basis.<sup>60</sup>

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<sup>57</sup> ASCAP, The ASCAP Payment System 4 (2008), available at [http://www.ascap.com/about/payment/pdf/paymentSystem/ASCAP\\_PaymentSystem.pdf](http://www.ascap.com/about/payment/pdf/paymentSystem/ASCAP_PaymentSystem.pdf).

<sup>58</sup> *Id.* (“we can’t pay you for the performance of a work if we don’t know you are the writer or publisher”).

<sup>59</sup> *Id.* at 5.

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

### 3. DETERMINING WHAT PUBLIC PERFORMERS PLAYED

PROs rely on a variety of streams to determine what songs public performers played.<sup>61</sup> These include information from customers, industry surveys and analyses.<sup>62</sup> PROs also seek out infringers – people that did not pay for a public performance – and seek payment, going to court if necessary.<sup>63</sup>

### 4. ROYALTY PAYMENTS

Performance rights organizations collect royalties in exchange for access to their music libraries.<sup>64</sup> A licensee may purchase a blanket license to a PRO's entire library or may purchase a license to individual works as necessary.<sup>65</sup> PROs often use complicated formulae to determine the exact royalty amount for a particular copyright holder.<sup>66</sup> Regardless, PROs pride themselves on returning a high percentage of income to their members, with ASCAP paying approximately 88% of its revenue out to members in 2007 and 2008.<sup>67</sup>

### 5. ENFORCEMENT FOR NON-COMPLIANCE

While ASCAP “only take[s] legal action when all other means of resolution have been exhausted,” it does not hesitate to initiate civil action on behalf of its members.<sup>68</sup> Furthermore, ASCAP has a very high success rate in copyright infringement litigation.<sup>69</sup> While the scope of

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<sup>61</sup> See *id.* at 9.

<sup>62</sup> *Id.*

<sup>63</sup> See generally Benjamin S. Thompson, *You Gotta Pay to Play: An Analysis of Copyright Infringement Actions Brought by Performance Rights Organizations* (2009) available at [http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ben\\_thompson](http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=ben_thompson) (last visited Feb. 22, 2010).

<sup>64</sup> ASCAP, *supra* note 57 at 3.

<sup>65</sup> *Id.* at 5.

<sup>66</sup> See *id.* at 11.

<sup>67</sup> ASCAP, 2008 ANNUAL REPORT 2 (2008), available at [http://www.ascap.com/about/annualReport/annual\\_2008.pdf](http://www.ascap.com/about/annualReport/annual_2008.pdf).

<sup>68</sup> See *id.*; ASCAP, *ASCAP LAUNCHES INFRINGEMENT ACTIONS AGAINST ESTABLISHMENTS PERFORMING COPYRIGHTED MUSIC WITHOUT PERMISSION*, [http://www.ascap.com/press/2005/infringement\\_012405.html](http://www.ascap.com/press/2005/infringement_012405.html) (Jan. 24, 2005) (last visited Feb. 22, 2010).

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

this research report does not include a detailed discussion of remedies for copyright infringement, copyright-holders may obtain multiple remedies including injunctive relief and monetary damages.<sup>70</sup>

### C. IS THIS DISPARITY A PROBLEM?

#### 1. THIS DISPARITY IS A PROBLEM: ARGUMENTS & ANALYSIS

Supporters of a sound recording performance right subscribe to three theories: international parity, fairness, and incentive to create.<sup>71</sup> Accordingly, this research report briefly summarizes and discusses each argument.

##### a. INTERNATIONAL PARITY

The United States signed many major international agreements related to the protection of intellectual property such as the Berne Convention and The Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”).<sup>72</sup> Nonetheless, the disparity between protection of musical work and sound recording copyrights places the United States in stark contrast to global practice.<sup>73</sup> Indeed, all of the United States’ peer countries provide sound

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<sup>70</sup> For further information about copyright infringement damages, see 17 U.S.C. 501-505; 4-14 Nimmer on Copyright Ch. 14.

<sup>71</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 11.

<sup>72</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, (Paris Text 1971, as amended Sept. 28, 1979), 828 U.N.T.S. 221; World Trade Organization, Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (WTO has 153 members as of Jul. 23, 2008) (last accessed Dec. 13, 2009); World Trade Organization, Intellectual property: protection and enforcement, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) (last accessed Dec. 13, 2009).

<sup>73</sup> See generally Wolke, *Some Catching Up to Do*, *supra* note 4.

performance copyright holders, or their international equivalents, with public performance rights.<sup>74</sup>

Further, because the U.S. does not provide a public performance right to foreign performers, many foreign broadcasters do not pay for publicly performing songs by U.S. performers.<sup>75</sup> The U.S. has lost an estimated \$600 million in foreign royalties as of 2000.<sup>76</sup>

b. FAIRNESS

“Proponents of the fairness argument assert that a performer's creative contribution and responsibility for success of a song is equal to that of the composer's.”<sup>77</sup> It follows that the current U.S. system unfairly provides royalties to composers when their songs are performed publicly, given that recording artists do not receive royalties for the same performance.<sup>78</sup> Public performance rights opponents argue that artists have other available revenue streams such as concert tickets and merchandise.<sup>79</sup> Artists respond that “most musical performers are not stars who are able to generate large sums from concert tours or T-shirt sales. Instead, performers often hold day jobs and struggle to make a living.”<sup>80</sup>

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<sup>74</sup> See Evitt, *Money, That's What I Want*, *supra* note 5, at 11 (citing The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO Recording Industry Association of America)).

<sup>75</sup> *Id.* (citing Wolke, *Some Catching Up to Do*, *supra* note 4, at 413-14).

<sup>76</sup> *Id.* (citing Wolke, *Some Catching Up to Do*, *supra* note 4, at 414). *But see Id.* (citing Matthew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC'Y U.S.A. 473, 496-500 (2004)) (Were the U.S. to institute a broad public performance right, payment of foreign royalties to U.S. performers would not be strictly compulsory.)

<sup>77</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 11 (citing DelNero, *Long Overdue*, *supra* note 76, at 501-04).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (citing National Association of Broadcasters All About the Issue, <http://www.NoPerformanceTax.org/issue.asp>).

<sup>80</sup> *Id.* (internal citations omitted).

c. INCENTIVES TO CREATE

Congress derives the ability to pass copyright laws from the U.S. Constitution, which gives it the power to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings.”<sup>81</sup> Some proponents of performance rights sound recordings argue that copyright law incentivizes artists with money, and so royalties for public performances of sound recordings should provide increased incentives.<sup>82</sup>

2. THIS DISPARITY IS NOT A PROBLEM: ARGUMENTS & ANALYSIS

Opponents of a public performance right for sound recordings follow a number of arguments: radio constitutes free promotion, and so constitutes a quid pro quo; the right would hurt broadcasters; the right would hurt composers; and the right will primarily benefit record companies and give them too much power.<sup>83</sup> Also, one commentator suggests that the lack of a public performance right for sound recordings encourages performers to write their own songs, thereby producing better music.<sup>84</sup>

a. RADIO CONSTITUTES FREE PROMOTION

Some argue against public performance rights for sound recordings on the grounds that performers and record companies benefit from radio broadcasts, which constitute free promotion.<sup>85</sup> They support this by noting that record companies would gladly pay radio

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<sup>81</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>82</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 11 (citing DelNero, *Long Overdue*, *supra* note 76, at 504-06).

<sup>83</sup> *Id.* at 12-13.

<sup>84</sup> See generally Sen, *General Performance Right*, *supra* note 1, at 235.

<sup>85</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 12 (internal citations omitted).

stations to play their songs.<sup>86</sup> Still, people hotly contest the degree of correlation between radio play and album sales.<sup>87</sup>

Proponents for the right counter that songwriters receive the same promotion that performers do, despite receiving royalties. Further, many radio stations focus on older music, for which radio play is unlikely to inspire numerous album purchases.<sup>88</sup> Lastly, if radio truly constitutes free promotion, in exchange for that promotion holders of musical recording copyrights will likely consent to forego all or some of the royalties stemming from a public performance right.

b. THE RIGHT WOULD HURT BROADCASTERS

The National Association of Broadcasters describes a performance right for sound recordings as “a proposed tax that could kill local radio as we know it.”<sup>89</sup> They argue that the resultant royalties would overwhelm small, local stations, which provide public services such as coverage of local high school sports to their communities.<sup>90</sup> However, media conglomerates that could easily absorb additional costs, such as Clear Channel, heavily dominate the radio industry, including many “local” stations.<sup>91</sup>

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<sup>86</sup> *Id.* (internal citations omitted). While pay-for-play is presently illegal, record companies still pay independent agents to promote their songs to radio stations. *Id.* (internal citations omitted).

<sup>87</sup> *Id.* (internal citations omitted).

<sup>88</sup> *Id.* (internal citations omitted).

<sup>89</sup> The National Association of Broadcasters, *No Performance Tax*, <http://www.noperformancetax.org/>.

<sup>90</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 12-13 (internal citations omitted).

<sup>91</sup> *Id.* (citing DelNero, *Long Overdue*, *supra* note 76, at 512); The Free Library by Farlex, *Big radio's bad boy: Clear Channel owns one of every ten radio stations in the country. It is remaking the airwaves and making enemies in the process. Is this the future of radio?*, <http://www.thefreelibrary.com/Big+radio%27s+bad+boy:+Clear+Channel+owns+one+of+every+ten+radio...-a094222618>.

The effect of any new royalties will depend upon the size of those royalties.<sup>92</sup> Further, if radio serves as free promotion as discussed in Section II(C)(2)(a) of this research report, SRCHs will eagerly negotiate mutually agreeable rates for radio broadcasters.

c. THE RIGHT WOULD HURT COMPOSERS

Some argue that a public performance right for sound recordings would hurt composers because they typically do not have access to additional revenue streams – such as concert tickets and merchandise – that performers do. They claim that if radio stations have to divide royalty payments between composers and performers, the composers will necessary receive less money.<sup>93</sup>

This argument, however, does not stand up well to scrutiny. First, the federal government sets the royalty paid to composers when someone sells an album,<sup>94</sup> and many argue that radio play results in increased CD and other album sales.<sup>95</sup> Second, as of 2004, performers wrote or co-wrote 88% of the most popular songs.<sup>96</sup> Accordingly, the vast majority of performers receive a proportion of existing royalty payments, and so may voluntarily forego all or some of any additional royalties.

d. THE RIGHT WOULD PRIMARILY BENEFIT RECORD COMPANIES

One argument against a public performance right for sound recordings claims that the right would primarily benefit record companies.<sup>97</sup> Given that record companies tend to initially

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<sup>92</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 12-13 (internal citations omitted).

<sup>93</sup> *Id.*

<sup>94</sup> Nashville Songwriters Association International, *SONGWRITERS ARE AMERICA'S SMALLEST SMALL BUSINESS*, <http://legislative.nashvillesongwriters.com/news.php?viewStory=76> [hereinafter "NSAI, *SONGWRITERS*"].

<sup>95</sup> See *infra*, Section II(C)(2)(a).

<sup>96</sup> Sen, *General Performance Right*, *supra* note 1, at 235.

<sup>97</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 13 (internal citations omitted).

own the copyright in fledgling performers' sound recordings, this assertion has some merit.<sup>98</sup> However, this argument seems to be a solution in search of a problem – *so what* if it will primarily benefit record companies? First, some argue that additional cash flow to record companies would give them greater leeway to take risks on new artists.<sup>99</sup> Second, the Internet provides new distribution channels that have allowed many small, independent record companies and artists to popularize their music outside of traditional channels.<sup>100</sup>

e. SINGER/SONGWRITERS MAKE BETTER WORKS

One commentator, Shourin Sen, asserts “that the Copyright Act's incentive structure, which led to the rise of the performer-songwriter movement, substantially contributes to the exchange of political ideals that underlies our democratic institutions, while imposing only small costs on performers.”<sup>101</sup> Sen argues that “performers hold the power to overcome their inferior status under the Copyright Act by reinventing themselves as performer-songwriters.”<sup>102</sup> Indeed, as of 2004, performers wrote or co-wrote approximately 90% of the most popular songs.<sup>103</sup> Sen claims that “the creative processes employed by performer-songwriters encourage[s] an emotional investment in their material that often leads to artistically and socially forward-leaning content,” which furthers the democratic process.<sup>104</sup>

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<sup>98</sup> See Love, *Courtney Love does the math*, *supra* note 26.

<sup>99</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 11-12 (citing DelNero, *Long Overdue*, *supra* note 76, at 506).

<sup>100</sup> *E.g.*, Michael Pfahl, *Giving away music to make money: Independent musicians on the Internet*, FIRST MONDAY, Aug. 6, 2001, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/880/789>.

<sup>101</sup> Sen, *General Performance Right*, *supra* note 1, at 236.

<sup>102</sup> *Id.* at 235.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 236.

This argument has flaws. As the paper extolling the virtues of singer/songwriter works notes, the singer-songwriter movement “cascaded into a mainstream cultural norm.”<sup>105</sup> The paper argues that “[t]he performer-songwriter movement was originally driven by artists’ desire to obtain performance royalties on their songs’ underlying compositions and to avoid paying reproduction royalties on their albums.”<sup>106</sup> However, the argument fails to acknowledge that these incentives for performers to write their own songs will not dry up due to a public performance right for sound recordings.<sup>107</sup> Further, despite acknowledging the unfairness of the current system, Sen does not acknowledge as legitimate the plight of performers who want to focus solely on performing.<sup>108</sup>

### 3. THE PROBLEM: SUMMARIZED

Supporters of a sound recording performance right argue for the right because the U.S. system starkly contrasts with those in peer countries, the U.S. system produces an unfair disparity between sound recording and musical works copyrights, and the right would provide an increased incentive to create as prescribed by the U.S. Constitution. Opponents of the right counter that radio constitutes free promotion, the right would hurt broadcasters, the right would hurt composers, the right will primarily benefit record companies and give them too much power, and the lack of a public performance right for sound recordings furthers the democratic process.

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<sup>105</sup> *Id.* at 235.

<sup>106</sup> *Id.*

<sup>107</sup> See NSAI, *SONGWRITERS*, *supra* note 94 (Royalties amounts on a musical work copyright are mandated by federal law.).

<sup>108</sup> See generally Sen, *General Performance Right*, *supra* note 1.

One cannot easily dismiss any of the arguments, either pro or con, and both industry and academia hotly debate whether or not we should implement the right.<sup>109</sup> This research report supports a narrowly tailored solution that satisfies the proponents of the right while minimizing or eliminating the reasons for which people oppose it.<sup>110</sup>

#### D. THE PROBLEM AND ITS COMPONENT BEHAVIORS

At the macro level, one might simply state the behaviors underlying the social problem as follows: people who publicly perform sound recordings do not pay the SRCHs, and the copyright-holders have no recourse to seek compensation for those public performances. The next section explores these behaviors in greater detail, focusing on the underlying incentives and how the proposed enforcement mechanisms would serve to modify existing behavior.

### III. UNDERLYING BEHAVIORS AND INTERESTS

When approaching a social problem and the underlying problematic behaviors, we must understand *why* those behaviors occur.<sup>111</sup> To do this, we identify the role occupants – the people or institutions whose problematic behavior lies at the social problem’s root – and explore what causes those behaviors, exploring objective factors such as the relevant existing law and subjective factors such as financial, religious or societal interests in the situation.<sup>112</sup> We also identify the implementing agency, which applies conformity-inducing measures to

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<sup>109</sup> See, e.g., *Id.*; Evitt, *Money, That's What I Want*, *supra* note 5; Sen, *General Performance Right*, *supra* note 1; Nimmer, *Ignoring the Public*, *supra* note 46.

<sup>110</sup> See *infra* Section 0.

<sup>111</sup> Manual, *supra* note 12, at 93-95.

<sup>112</sup> *Id.* at 93-99.

ensure role-occupant compliance with the bill.<sup>113</sup> Like all narrow bills, the proposed bill has a set of primary role occupants and an implementing agency. This section of the research report discusses the primary role occupants, the underlying problematic behaviors, and the implementing agency, as well as conformity-inducing measures and available enforcement mechanisms.

## A. ROLE OCCUPANTS, IMPLEMENTING AGENCIES AND PROBLEMATIC BEHAVIORS

### 1. ROLE OCCUPANTS

In this case, persons who publicly perform works protected by a sound recording copyright without obtaining permission from the copyright-holder constitute the primary role occupants. Their failure to obtain permission from SRCHs results in a lost revenue stream for those copyright-holders, and constitutes the problematic behavior that this bill seeks to change.<sup>114</sup> The U.S. has lost an estimated \$600 million in foreign sound recording public performance royalties as of 2000,<sup>115</sup> which does not account for the high number of domestic public performances.

### 2. IMPLEMENTING AGENCY AND CONFORMITY-INDUCING MEASURES

An “implementing agency” means an actor that applies conformity-inducing measures, typically to role occupants, to enforce a law.<sup>116</sup> In the present case, the law does not require

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<sup>113</sup> See *id.* at 16.

<sup>114</sup> I note again that despite the colloquial connotations associated with the words used to describe the situation, this research report does not reflect a value judgment of any kind regarding the behavior of those who publicly perform sound recordings. See *supra* note 14.

<sup>115</sup> *Id.* (citing Wolke, *Some Catching Up to Do*, *supra* note 4, at 414). But see *Id.* (citing Matthew S. DeInero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 51 J. COPYRIGHT SOC'Y U.S.A. 473, 496-500 (2004)) (Were the U.S. to institute a broad public performance right, payment of foreign royalties to U.S. performers would not be strictly compulsory.)

<sup>116</sup> See Manual, *supra* note 12, at 16.

public performers to seek permission for a performance from the applicable SRCH. Accordingly, there is no implementing agency to enforce the law.

## B. ROOT CAUSES OF PROBLEMATIC BEHAVIORS

ROCCIPI is a mnemonic of seven “categories aim[ed] to help drafters identify the detailed probable, interrelated causes of problematic behaviors.”<sup>117</sup> This subsection focuses on the relevant influences on the role occupants, walking through the seven ROCCIPI categories one-by-one.

### 1. RULES

This report explored the existing legal framework above in Section II(A). The present law does not require permission from a SRCH to publicly perform a work.<sup>118</sup>

### 2. OPPORTUNITY

Under existing law, the role occupants have no obligation to SRCHs regarding public performances. Accordingly, the role occupants do not presently lack the opportunity to comply with existing rules.

### 3. CAPACITY

All role occupants have the capacity to comply with their current non-existent obligations to SRCHs.

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<sup>117</sup> Manual, *supra* note 12 , at 93-99.

<sup>118</sup> See 17 U.S.C. 106.

#### 4. COMMUNICATION OF THE LAW

Some role occupants may not know about the current law. However, as the law requires no action on their part, role occupants cannot fail to satisfy the requirements of existing law because of lack of knowledge.

#### 5. INCENTIVES

Under the current system, no meaningful incentives exist for people to get permission from SRCHs prior to publicly performing a work. First, the law does not require it.<sup>119</sup> Second, a person wishing to publicly perform a work has no easy and effective way to locate a relevant SRCH, leading to potentially high search costs to obtain permission. Third, persons making public performances have no social incentive to pay SRCHs, as society does not expect them to.

#### 6. PROCESS

Role occupants, despite their failure to seek permission from applicably SRCHs for the public performance of a sound recording, currently *are* obeying the law. Thus, there presently is no process by which role occupants choose whether to obey the law.

#### 7. IDEOLOGY

As role occupants' behavior is presently in compliance with the law regarding permission SRCH permission prior to publicly performing a work, ideology does not currently factor into whether or not to obey the law.

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<sup>119</sup> See *supra* Section II(A).

## IV. PROPOSED SOLUTION

This section moves from the detailed discussion in Sections II and III above related to the problem and its underlying behaviors, and turns to the proposed solution. It begins by briefly examining the alternative potential solutions considered, and then turns to a detailed discussion of the proposed solution and its expected impact on the problem.

### A. ALTERNATIVE SOLUTIONS CONSIDERED

#### 1. NO PUBLIC PERFORMANCE OR TRANSMISSION RIGHTS FOR ANYONE

While no one appears to be advocating for a total revocation of all performance rights, it seems to be the logical conclusion of some arguments against performance rights for SRCHs. After all, if radio play constitutes free advertisement for a performer, it also constitutes advertisement for the songwriter.<sup>120</sup> At some level, it seems that all parties recognize that the financial benefit to a venue – say, a professional sports arena – to broadcast a song far outweighs the approximately one dollar cost to buy that song on an album.<sup>121</sup> Accordingly, it makes sense that no one seriously argues against *all* performance rights.

#### 2. MAINTAINING THE STATUS QUO – DIGITAL TRANSMISSION RIGHT

Section II(C) above discusses the status quo in considerable detail. It ultimately concludes that while meaningful arguments for maintaining the status quo exist, a narrowly tailored solution will serve to correct a disparity between musical work and sound recording copyright-holders and provide an increased incentive to create while largely undercutting the primary arguments against moving forward.

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<sup>120</sup> See discussion, *supra* Section II(C)(2)(a).

<sup>121</sup> This *very* rough estimate of the cost of a track reflects a cost of \$16/album, where the album contains 16 songs.

### 3. ROBUST TRANSMISSION RIGHT – CURRENT HOUSE AND SENATE BILLS

On February 4, 2009, a bipartisan group of Senators and Representatives introduced parallel bills, both referred to as the “Performance Rights Act.”<sup>122</sup> The Act goes further than the existing digital audio transmission right<sup>123</sup> by extending SRCHs’ public performance rights to any performance via audio transmission.<sup>124</sup> According to one commentator, “[t]o curb criticism and opposition, . . . the Performance Rights Act contain[s] provisions limiting the scope of the new right . . . [, which] anticipate many of the classic arguments against a public performance right in sound recordings.”<sup>125</sup> Because the current bills would expand SRCHs’ performance right from *digital* audio transmissions to *all* audio transmissions, venues that play music without *transmitting it* would be unaffected by the change, perpetuating the unfairness to SRCHs.<sup>126</sup> Further, the act charges the Copyright Royalty Judges, part of the Library of Congress,<sup>127</sup> to set statutory (i.e., compulsory) licensing rates, and provides for minimal or no royalty fees for places of worship, educational institutions, and small commercial radio stations.<sup>128</sup> Accordingly, while the Act goes a long way to further SRCHs’ public performance right and to assuage the arguments against a stronger right, it fails to completely level the playing field, so to speak, between musical work and sound recording copyright holders.

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<sup>122</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 10; S. 379, 117th Congress (2009); H.R. 848 117th Congress (2009).

<sup>123</sup> See discussion *supra* Section II(A)(0).

<sup>124</sup> S. 379, 117th Congress (2009); H.R. 848 117th Congress (2009).

<sup>125</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 13.

<sup>126</sup> *Id.*

<sup>127</sup> Copyright Royalty Board: Background, <http://www.loc.gov/crb/background/>.

<sup>128</sup> Evitt, *Money, That's What I Want*, *supra* note 5, at 13 (internal citations omitted).

## B. PROPOSED SOLUTION

This subsection details the specific narrowly tailored solution in the proposed bill, including the transitional provisions designed to ease the bill into effect.

### 1. FULL PUBLIC PERFORMANCE RIGHT

In contrast to the limited digital transmission right granted by Congress in 1995, the Copyright Office, Patent & Trademark Office, and the Clinton White House all recommended a full public performance right for sound recording copyright-holders. This would wholly address the problematic behavior of public performers neglecting to ask SRCHs for permission to make public performances.<sup>129</sup> As discussed above in Section II(C), a stark disparity exists between musical work copyright-holders and SRCHs. The proposed bill's narrow tailoring and transitional provisions mitigate arguments against creation of a full performance right for SRCHs. Accordingly, the proposed bill contains a full public performance right for sound recording copyright-holders paired with targeted transitional provisions to ease the impact of the legislative change.

### 2. INTERIM IMPLEMENTING AGENCIES – TRANSITIONAL PROVISIONS

The proposed bill includes transitional provisions designed to ease the attendant changes, as well as addresses the concern of orphan copyrights. It makes use of the existing system rather than starting completely from the ground up, which should reduce the time necessary to implement the proposed bill's changes.

The proposed transitional system leverages elements of the system already in place. It charges the Copyright Royalty Judges to set royalty rates for public performances that will serve

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<sup>129</sup> Nimmer, *supra* note 46, at 190 & n.9 (internal citations omitted).

as a price floor, serving to drive down the prices of private PROs. The Copyright Royalty Judges must designate a person, like SoundExchange in the current system, to manage the royalty collection and distribution process.

Because the Copyright Royalty Judges set rates for compulsory licenses, the interim system allows would-be public performers access to currently orphan works. Further, because a SRCH can only receive compensation after registering a work with either the designee or the Copyright Office, the interim system actively incentivizes owners of orphan works to claim those works, thereby reducing the societal cost imposed by the orphan works problem. Lastly, the interim system operates for only five years after the enactment of the bill, which will serve to give SRCHs of orphan works the ability to come out of the woodwork, and independent PROs the opportunity to implement private systems to compete with and then take over for the interim system.

### C. PROPOSED SOLUTION'S EFFECT ON UNDERLYING CAUSES

This section returns to the causes underlying the problematic behaviors<sup>130</sup> that the proposed bill addresses, using the ROCCPI factors to discuss how those causes should be affected by the suggested solution.

#### 1. RULES

The current law does not require public performers to seek permission from SRCHs before publicly performing a sound recording.<sup>131</sup> The proposed bill changes the legal landscape to require permission of the applicable SRCH to publicly perform a work.

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<sup>130</sup> See *supra*, Section III(B).

<sup>131</sup> See 17 U.S.C. 106.

## 2. OPPORTUNITY

The role occupants in this situation presently face a potential difficulty in locating SRCHs to obtain permission for public performances of copyrighted works. Many people in many contexts struggle with an inability to locate relevant copyright holder(s), resulting in an orphan work.<sup>132</sup> Many proposed solutions to this issue exist.<sup>133</sup> PROs exist to bridge the gap between public performers and musical work copyright holders (who presently enjoy a full performance right), and the transitional provisions of the proposed bill allow time for existing or new PROs to fill the newly-created need. In the interim, the transitional measures provide a stopgap, ensuring that public performers are able to obtain licenses that cover orphan works.<sup>134</sup>

## 3. CAPACITY

Large broadcasters and small establishments constitute role occupants, and while many role-occupants will have little or no trouble complying with the proposed bill, some role-occupants will inevitably not have the capacity to comply. Despite the potential negative impact on some small businesses as discussed in Section 0, this research report argues that the social benefit of the proposed bill outweighs the harm to some small businesses, particularly as mitigated through the transitional measures.

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<sup>132</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf> (“the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner” results in an Orphan Work).

<sup>133</sup> See, e.g., *id.* at 69-89.

<sup>134</sup> See discussion, *supra* Section 0(0)(2).

#### 4. COMMUNICATION OF THE LAW

Sometimes role occupants fail to obey a law because they do not know about it.<sup>135</sup> As the Seidmans point out, “[n]o one can *consciously* obey a law unless he or she knows about its commands.”<sup>136</sup> With regards to the proposed bill, however, lack of knowledge about the law does not seem to be an issue. The potential for a sound recording public performance right has received considerable presence in the news.<sup>137</sup> Further, existing PROs take considerable efforts to pursue infringers and to inform those infringers of the law *prior* to filing suit.<sup>138</sup> Accordingly, role occupants’ lack of knowledge of the law does not pose a large issue for the law proposed in this research report.

#### 5. INCENTIVES

The proposed bill will alter the existing incentive structure. The bill proposes a system where people failing to obtain permission from an applicable SRCH prior to publicly performing a work face the expense of a lawsuit as well as any resulting damages. Of course, any applicable SRCH will have to *find out* about the infringement to enforce the proposed bill, and so the less public a performance (e.g., a performance at a private event as opposed to a performance in Times Square), the less incentive a role-occupant will have to conform. While this may seem to constitute a problem, it serves both to give some allowance for small one-off events and events not rising to the level of ‘public.’ Further, PROs have demonstrated an

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<sup>135</sup> Manual, *supra* note 12, at 98.

<sup>136</sup> *Id.* (emphasis in original).

<sup>137</sup> *E.g.*, Danielle Grant, *Potential Radio Tax Could Kill Industry*, LocalNews8.com, <http://www.localnews8.com/Global/story.asp?S=12027640> (Feb. 23, 2010).

<sup>138</sup> *See Intern'l Korwin Corp. v. Kowalczyk*, 665 F.Supp. 652, (N.D. Ill. 1987) (“Before plaintiffs commenced this action, ASCAP contacted defendant on numerous occasions.”).

uncanny ability to uncover infringements,<sup>139</sup> and the threat of suit will serve to encourage compliance.

## 6. PROCESS

In the instant case, no meaningful process concerns exist.<sup>140</sup> The risks of non-compliance likely ensure compliance by the vast majority of role occupants, particularly as role occupants will know of the law involved.

## 7. IDEOLOGY

Many role occupants object to obtaining SRCH permission for public performances for a variety of reasons.<sup>141</sup> For instance, radio stations feel that they give SRCHs free advertising, and so a performance right for sound recordings constitutes a tax.<sup>142</sup> While this bill does not directly eliminate these ideological concerns, it does implement transitional measures to ease people into the proposed legal framework. Further, given the norm-setting properties of law, the passage of time will serve to largely (although not entirely) quiet these concerns.<sup>143</sup>

## D. RIC-D-FRETT ANALYSIS

One way to analyze a bill is via RIC-D-FRETT, an acronym for **R**ole-Occupant, **I**mplementing Agency, **C**onformity-Inducing Measures, **D**ispute Settlement, **F**unding, **R**ule-Making, **E**valuation, **T**ransitional Provisions, **T**echnical.<sup>144</sup> Exploring these categories helps a

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<sup>139</sup> See, e.g., *Intern'l Korwin Corp. v. Kowalczyk*, 665 F. Supp. 652 (N.D. Ill. 1987) (infringement action against 2664 square foot facility with a capacity of 200 persons).

<sup>140</sup> Manual, *supra* note 12, at 98 ("Usually, if a set of role occupants consists of individuals, the 'process' category yields few useful hypotheses.").

<sup>141</sup> See *supra* Section II(C)(2).

<sup>142</sup> See *id.*

<sup>143</sup> Hans Kelsen, *Pure Theory of Law*, 225-30 (Max Knight, Trans., 2002).

<sup>144</sup> See Ann Seidman & Robert B. Seidman, *Chapter 2: Using Theory As A Guide To Design And Draft Evidence-Based Transformatory Legislation*, <http://ldg.apkn.org/health/using-law-for-better-health/chapter-2-using->

legislative drafter ensure that a bill fits into a legislative scheme and fully considers the applicable underlying causes.

#### 1. ROLE OCCUPANT

The Role Occupants in the proposed bill are institutions that make public performances of copyrighted works. Clear examples would be broadcasters – TV, radio, satellite and Internet-based – as well as venues such as sporting arenas.<sup>145</sup> The proposed bill requires the role occupants to obtain permission from the relevant SRCH before publicly performing a copyright recording.

#### 2. IMPLEMENTING AGENCY

The problematic behavior that the proposed bill addresses concerns a civil matter, thus the implementing agency will be the relevant copyright-holders (or performance rights organizations as designees) by way of the U.S. court system. Also, for the five years after the proposed bill's enactment, another implementing agency is the transitional PRO charged with liaising between public performers and SRCHs.

#### 3. CONFORMITY-INDUCING MEASURES

Copyright-holders presumably want payment for the use of their copyrighted works. If someone infringes a copyright, the copyright holder can turn to the U.S. civil court system to enforce their copyright.<sup>146</sup> The court system has broad powers of enforcement, from requiring the violator to stop using the copyrighted work, to paying damages to the copyright-holder, or

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theory-as-a-guide-to-design-and-draft-evidence-based-transformatory-legislation (last visited April 22, 2010).

<sup>145</sup> See discussion *supra*, Section III(A).

<sup>146</sup> FED. R. CIV. P. 1331.

both.<sup>147</sup> Accordingly, the existing legal structure will provide sound recording copyright-holders (the implementing agency) with the courts as an enforcement mechanism and the threat of suit as the primary conformity-inducing measure.

#### 4. DISPUTE SETTLEMENT

The U.S. Civil Court System is, at its core, a dispute settlement institution. It routinely interprets and applies varied legal rights, thereby settling disputes between parties. Because the proposed solution would create a civil recourse for sound recording copyright-holders, the courts will be put in the position of settling disputes.

#### 5. FUNDING

The funding concerns with the proposed bill are relatively minor, because rather than creating a new governmental organization, the proposed solution grants rights to one group that another already has. That way, existing clearing-houses can administer the new rights and courts can continue to adjudicate.

#### 6. RULE-MAKING

Outside of the transitional period, rule-making is not a very important aspect of this topic. While the copyright landscape is fairly complicated, courts arbitrate disputes and endeavor to implement the intent of Congress.

#### 7. EVALUATION

The interested parties – primarily record companies on the one hand and broadcasting companies on the other – carry a lot of sway in Congress, and if the law fails to achieve its intended goals (or, for that matter, if any of them plain don't like it) they will certainly put their

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<sup>147</sup> 17 U.S.C. 501-505; 4-14 Nimmer on Copyright §§ 14.01-14.10.

full lobbying weight behind a new change to the legal framework. For further discussion, see Section 0(F).

Further, Congress can determine the effectiveness of the bill by auditing any resulting PROs and examining how many SRCHs register with the Copyright Office, thereby alleviating the larger orphan works problem.

#### 8. TRANSITIONAL PROVISIONS

Section 0(0)(2) above extensively discusses the proposed bill's transitional provisions. These transitional provisions provide for measures to minimize objections to the full performance right embodied in the proposed bill by minimizing the perceived-negative effects of the new right.

#### 9. TECHNICAL

The transitional provisions of the proposed bill enable Congress to enact it relatively quickly.<sup>148</sup> Congress would only have to allow the Copyright Royalty Judges, who are charged with implementing the proposed bill, enough time to determine royalty rates and identify a designee, as discussed above in Section 0(0)(2).

### E. COST-BENEFIT ANALYSIS

From a cost-benefit standpoint, the proposed bill's primary effect is to shift the cost of a public performance to the person making that performance. While SRCHs derive some benefit from public performances, the person making the public performance clearly derives most of the benefit. This becomes doubly apparent when considering public performances in sporting

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<sup>148</sup> See *supra*, Section 0(0)(2).

or social venues. A listener seems less likely to purchase a song because of hearing a small portion of it at a hockey game than listening to the entire song on the radio. Accordingly, this bill will move the cost of a public performance to the party who stands to gain the most from that performance.

This research report has thoroughly examined the cost of refusing SRCHs any form of performance right above. Both of the alternative solutions considered implement a partial right that requires a PRO and relies on courts to enforce copyright violations. Further, because the alternative solutions only extend partial rights, society would bear a high cost for courts to clarify the exact boundaries of any partial right granted. Lastly, only by implementing a full performance right can society avoid the loss of international performance royalties, which constitutes an amount well over half a billion dollars.<sup>149</sup> A full performance right for sound recording copyright-holders taxes the legal system only minimally, avoids the loss of international royalties, and shifts the cost of public performances to the person who stands to benefit most from and is actually responsible for the performance.

Further, the proposed bill will incentivize people holding copyrights in orphan works to identify themselves. “By its very definition, an orphan work represents a failed opportunity: someone wants to use copyrighted material but cannot locate the copyright owner to acquire permission. As a result, the potential user must choose to either refrain from using the work or use the work under the shadow of copyright infringement liability.”<sup>150</sup> Accordingly, the proposed bill also benefits society as a whole by inducing previously unknown SRCHs to identify

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<sup>149</sup> See Evitt, *Money, That's What I Want*, *supra* note 5, at 11 (citing Wolke, *Some Catching Up to Do*, *supra* note 4, at 414).

<sup>150</sup> Joel Sage, *Revenue Streams and Safe Harbors: How Water Law Suggests a Solution to Copyright's Orphan Works Problem*, 16 B.U. J. OF SCI. & TECH. L. (forthcoming summer 2010).

themselves, thereby making their copyrighted works available for use in compilations, republications and other works such as soundtracks to documentaries.

## F. MONITORING PERFORMANCE

The interested parties – primarily record companies on the one hand and broadcasting companies on the other – carry a lot of sway in federal politics.<sup>151</sup> If the law fails to achieve its intended goals they will certainly put their full lobbying weight behind a new change to the legal framework. Finally, courts play a large role in the creation of law through judicial review,<sup>152</sup> and possess considerable leeway in determining how to implement a law.

In an effort to assess the proposed bill's effectiveness, Congress could easily examine whether the bill successfully encourages SRCHs to register their works, thereby reflecting the change of incentives for SRCHs and lessening copyright's greater orphan work problem.

## V. CONCLUSION

This research report argues that public performers' failure to obtain permission from sound recording copyright-holders prior to publicly performing a work constitutes a social problem on multiple fronts. This problem also puts the U.S. in stark contrast with its peer countries, which all require SRCH permission. While critics of the performance right raise many concerns, this research report proposes a solution that minimizes the social costs of granting

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<sup>151</sup> See National Association of Broadcasters, Advocacy, <http://www.nab.org/advocacy/default.asp> (describing itself as "the voice of broadcasters in the nation's capital");

<sup>152</sup> See generally Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2001-02).

sound recording copyright-holders a performance right while still moving the cost of a public performance to the person who stands to gain the most from it – the public performer.

## APPENDIX A – THE BILL

(1) This bill amends Title 17 of the United States Code (concerning Copyright).

(2) This bill amends Section 106(6) as follows:

in the case of sound recordings, to perform the copyrighted work publicly ~~by means of a digital audio transmission.~~

[Drafter's note: 17 U.S.C. 106 is written in rights-based language. While it would be clearer to use actor-based language, I use rights-based language in modifying a single prong to preserve grammatical consistency.]

(3) This bill amends Section 116(a) (Negotiated licenses for public performances by means of coin-operated phonorecord players) as follows:

(a) Applicability of Section.— This section applies to ~~any~~ nondramatic musical work or sound recording embodied in a phonorecord.

(4) This bill amends Section 114 (Scope of exclusive rights in sound recordings) by striking all of the text and replacing it with the following:

(a) For five years from the enactment of this statute, a sound recording copyright-holder shall grant a public performance license to a person paying a royalty under the next paragraph.

(b) For five years from the enactment of this statute, the Copyright Royalty Judges shall determine, at least yearly, per-performance and blanket royalty rates for the public performance of a sound recording.

(c) In determining the royalty rates, the Copyright Royalty Judges may consider only the following:

- (1) The overarching purpose of the performing person (e.g., non-profit, religious institution educational institution, etc.);
- (2) The annual gross income of the performing person;
- (3) Inflation, as measured by CPI;
- (4) The estimated number of individuals the public performance will reach;
- (5) The time of day of the public performance;
- (6) The popularity of the sound recording performed as determined by Billboard or a comparable service;

- (7) Whether the sound recording's then-current copyright holder registered with either the Designee or the Copyright Office; and
- (8) Change in cost of production for sound recording copyright-holders.

(d) The Designee means the person designated by the Copyright Royalty Judges pursuant paragraph (e).

(e) For five years from the enactment of this statute, pursuant to paragraph (f), the Copyright Royalty Judges shall designate a person to manage both the collection of royalties as determined by the previous paragraph and the payment of those royalties to sound recording copyright-holders.

(1) A sound recording copyright holder may receive funds under this paragraph only if it registered itself and the sound recording with either the Designee or the Copyright Office.

(2) Each quarter, the Designee shall pay a sound recording copyright-holder a proportion of the total royalties the Designee took in that quarter. The amount of the payment by the Designee shall correspond to proportion of royalties attributable to that copyright-holder's works, less any expenses under subparagraph (4).

(3) The Designee shall pay into a Separate Account any royalties, less expenses, not paid out under the paragraph (e)(2) (royalties attributable to those who failed to register under subparagraph (1) above). The Designee shall use funds remaining in this account to pay any back-royalties to sound recording copyright-holders who later register pursuant to subparagraph (1) above. If the Copyright Royalty Judges undesignate the Designee under paragraph (f), the Designee will transfer this account to the new Designee. Five years after the enactment of this statute, if a sound recording copyright-holder has not registered a copyrighted work with the Designee or the Copyright Office, the Designee shall return any funds received by the Designee for performance of that work to the person that paid the funds to the Designee, and shall donate any remaining funds to a national charity dedicated to furthering the arts.

(4) Each quarter, the Designee may take administrative expenses of up to 15% of its gross quarterly royalty income. The Designee shall deduct its administrative expenses first from the Separate Account, and shall deduct any remainder from the funds designated for registered sound recording copyright holders.

(f) In selecting a Designee, the Copyright Royalty Judges shall issue a call for potential Designees to remain open for at least two weeks. A potential Designee shall submit to The Copyright Royalty Judges a written document detailing: the potential Designee's experience as a Performing Rights Organization; the potential Designee's actual or proposed system to manage calculation and collection of royalties; a summary of any prior copyright-holder complaints filed against the potential Designee; the response to any such complaints; and any other information targeted at aiding in the selection of the designee that the Copyright Royalty Judges request in the call for potential Designees. In selecting a Designee, the Copyright Royalty Judges shall consider only the content and completeness of a potential Designee's written response, and shall issue a written report supporting the selection of Designee.

(g) For five years from the enactment of this statute, the Copyright Royalty Judges shall ensure that the Designee meets its obligations under this Act. If the Copyright Judges find that the Designee substantially fails to meet its obligations and fails to correct the failure within 90 days, the Copyright Royalty Judges shall undesignate the then-Designee and select a new Designee pursuant to paragraph (f). In determining whether the Designee meets its obligations, the Copyright Royalty Judges shall hear complaints from sound recording copyright holders, and shall direct the Designee to rectify any failures so discovered.