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Performance Royalties for Sound Recordings on Terrestrial Radio: A Private Solution to a Public Problem

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ABSTRACT

US copyright law provides for a digital performance right in sound recordings but does not provide for a performance right in sound recordings when broadcast over terrestrial radio. Proponents of this asymmetry posit that the difference relates to the promotional value of terrestrial radio to record labels, but this rationale has eroded in recent years. The recording industry experienced a drastic decline at the turn of the millennium, and record labels have attempted many creative approaches to bridging the profit gap. Major labels and radio conglomerates of late have begun negotiating private contracts that effectively extend the benefits of a performance right to sound recordings broadcast over terrestrial radio. This Note argues that Congress should allow these private parties to continue experimenting with these agreements. As it stands, the government's regulation of digital performance of sound recordings is creating negative consequences, and Congress should only intervene in the terrestrial radio arena if a holdout problem arises.

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The complex technological and commercial trajectory of the laws governing the recording industry left performing artists and sound-recording owners without performance royalties for terrestrial radio play.[1] US copyright law only requires payments to publishers and songwriters through performing-rights organizations like the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC (originally the Society of European Stage Authors & Composers).[2] These societies act as intermediaries between radio stations and the copyright owners of the compositions transmitted.[3] With the extreme downturn in the industry,[4] record labels and performing artists have searched for any means possible to tap into new revenue streams that might fill the profit gap that remains after music went digital.[5] In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRA), which called for the addition of "digital transmission" to the definitions section of Title 17 of the United States Code.[6]

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1. *See infra* Part I (detailing the developments leading to the lack of a full performance right in sound recordings).

2. *About SESAC*, SESAC, http://www.sesac.com/About/About.aspx (last visited Aug. 10, 2013) ("Though the company name was once an acronym, today it is simply SESAC and not an abbreviation of anything."); *see* 17 U.S.C. § 114 (2012); *infra* Part I.B (explaining the role of performing-rights organizations and the legislation that creates an asymmetry between Internet and terrestrial radio).

3. *See infra* Part I.B.

4. The causes of the industry's decline are beyond the scope of this Note, but some suggested causes include file sharing, technology increases, the economy generally, and others. *See, e.g.*, Kristina Groennings, Note, *An Analysis of the Recording Industry's Litigation Strategy Against Direct Infringers*, 7 VAND. J. ENT. L. & PRAC. 389 (2005) (citing file sharing as the main cause of the industry's troubles).

5. *See infra* Part I.A.

6. *See* 17 U.S.C. § 114(j)(5) (2012); *infra* Part I.B.

Because of the DPRA, free streaming services, like digital radio, and subscription services, like Rhapsody and Spotify, must pay public performance royalties to artists, labels, and other legal and beneficial owners of sound recordings based on section 114 of Title 17.[7] The statute mandates that each type of streaming service divide royalties among industry parties.[8]

As the DPRA's name implies, Congress limited its extension of the sound-recording performance royalties to digital broadcasters. It did not require traditional terrestrial radio stations to pay sound-recording performance royalties, leaving sound recordings with an asymmetrical performance right.[9] US copyright law continues to require radio stations to pay performance royalties to performing-rights organizations—and thus to publishers and songwriters—but that revenue stream does not flow to record labels and artists.[10] Traditional arguments against paying performance royalties to record labels and artists rest on the premise that radio serves as a free promotional tool for record labels, so terrestrial radio stations owe no money to the labels and artists—reasoning that is much less convincing today than in previous decades.[11]

Recently, however, some members of the recording industry began a push toward extending the performance royalties required of webcasters for digital transmissions to terrestrial radio.[12] For example, Big Machine Label Group signed deals with Clear Channel Communications and Entercom Communications in June 2012 and September 2012.[13] These are two massive radio-station conglomerates, with Clear Channel owning over one third of all US radio stations.[14] Although the details remain confidential, these private deals seem to fix the anachronistic difference between terrestrial and streaming radio while allowing ongoing market

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7. *See* 17 U.S.C. § 114(d) (2012); *What is Rhapsody?*, RHAPSODY, http://www.rhapsody.com/what-is-rhapsody/what-is-rhapsody.html (last visited July 22, 2013); *About Us*, SPOTIFY, http://www.spotify.com/us/about-us/contact/ (last visited July 22, 2013); *infra* Part I.B.

8. *See* 17 U.S.C. § 114(g) (2012) (listing the copyright owner of the sound recording, nonfeatured musicians, nonfeatured vocalists, and recording artists or artists featured on the sound recording (or "persons conveying rights in the artists' performance in the sound recording").

9. *See id.* § 114(d).

10. *See id.* § 114(d)(1)(A) (exempting non-subscription broadcast transmissions); *infra* Part I.B.

11. *See infra* Part II.

12. *See infra* Part III.

13. *See infra* Part III.

14. *See* Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARD (June 5, 2012, 7:00 AM), http://www.billboard.biz/bbbiz/industry/legal-and-management/exclusive-clear-channel-big-machine-strike-1007226762.story; *infra* Part III.

negotiations, a flexible market-based solution that stands in stark contrast to ossifying legislation in other areas of copyright law.[15]

The federal government should allow the private sector to continue remedying the asymmetry between the treatment of performance royalties in sound recordings on Internet radio and terrestrial radio until government intervention actually becomes necessary. Part I describes the decline of the industry and the current laws that govern it. Part II analyzes changing industry conditions that demand a new revenue stream in performance royalties for sound recordings and the drawbacks of legislative attempts to force the creation of that revenue stream. Part III suggests that Congress postpone intervention, allowing the private sector to develop an efficient marketplace between labels and radio stations until all that remains is a holdout problem.

I. REVENUE IN THE RECORDING INDUSTRY: A STRUGGLING BUSINESS MODEL

Many different factors contributed to the ongoing decline in the recording industry, but the fact of its occurrence is irrefutable.[16] Although musicians will continue to create music, the industry that produces quality recordings for eager listeners depends on a reliable source of revenue.[17] In a move to grant labels and artists another revenue source, Congress granted record labels and artists a performance right in digital transmissions but not in terrestrial radio transmissions.[18] The treatment of entertainment technology in two US Supreme Court cases demonstrates the effects of government remedies in the industry.[19]

A. Declining Sales and Falling Profits

The recording industry has been in a depression since the turn of the millennium.[20] Until the late 1990s, retailers sold most recorded

15. *See infra* Part III.

16. *See infra* Part I.A.

17. *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) (describing the theoretical underpinnings to the US copyright system).

18. *See infra* Part I.B.

19. *See infra* Part I.C.

20. *See generally, e.g.*, Arista Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding in favor of the Recording Industry Association of America (RIAA) and taking down file-sharing service Napster for infringement); Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (illustrating that the RIAA turned its strategy to suing individual file-sharers).

music on compact discs (CDs), and CD sales generated ample profits to fuel the then-thriving industry.[21]

With the advent of peer-to-peer file sharing and the means to store and listen to music without the inconvenience of physical media like the CD, the music business declined unexpectedly, leaving the recording industry in shambles.[22] Since then, record labels, publishers, performing-rights organizations, performing artists, songwriters, and Congress have attempted to restore order to what remains of the business.[23] Despite these efforts, the recording industry remains in a depressed state, which negatively affects all parties involved.[24]

Before peer-to-peer file sharing took hold of a substantial share of the music distribution market, the recording industry experienced all-time-high profits, with its total annual revenue exceeding $14.6 billion in 1999.[25] By 2009, however, the industry's total annual revenue plummeted to a mere $6.3 billion.[26] Forrester Research predicted that if the recording industry continues on its current trajectory, revenues could bottom out at $5.5 billion per year in 2014.[27] Industry players began targeting other revenue streams because of the sharp decline in CD sales and the fact that digital sales have not filled that profit gap.[28]

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21. *See* David Goldman, *Music's Lost Decade: Sales Cut in Half*, CNN MONEY (Feb. 3, 2010, 9:52 AM), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry; *see also* Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME (Jan. 6, 2012), http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011/ (stating that digital sales surpassed physical sales in 2011 and that CDs and licensing generated the majority of revenue in the 1990s).

22. *See* Goldman, *supra* note 21; *see also* Karl Taro Greenfield, Chris Taylor & David E. Thigpen, *Meet the Napster*, TIME, Oct. 2, 2000, at 60 (explaining that peer-to-peer services, more specifically Napster, operate by allowing users to download files directly from other users' computers, allowing free and rapid file dissemination).

23. *See generally, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding in favor of the RIAA and affirming the district court's preliminary injunction shutting down file-sharing service Napster for infringement); Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (illustrating that the RIAA turned its strategy to suing individual file-sharers).

24. *See* Goldman, *supra* note 21.

25. *Id.*

26. *Id.*

27. *Id.* This Note does not attempt to explain all of the potential causes or proposed solutions for this staggering downfall, but these numbers are a vivid illustration of the problems the industry faces.

28. *Id.*; Digital Performance Right in Sound Recordings Act of 1995, 17 U.S.C. § 114 (2006) [hereinafter DPRA] (requiring webcasters to pay performance royalties to the owners of sound recordings).

B. Laws Controlling Performance Royalties

One major problem for Congress, as well as for industry parties like labels and publishers, is that technologies—predominantly mobile and Internet technologies—advance too rapidly for the law to keep pace.[29] The authors of the Copyright Act of 1976 (1976 Act) could not have envisioned the new revenue streams that the industry has embraced, and as the market changed, the law lagged behind.[30]

The 1976 Act granted copyright holders the rights to reproduce, publicly perform, and publicly display their works, as well as the right to create derivative works.[31] A sound recording, one of the categories of works that the 1976 Act protects, contains two independently copyrightable aspects: the recording itself and the underlying composition.[32]

Under the 1976 Act, the public-performance right applied only to the underlying composition of a recording and not to the recording itself.[33] The DPRA updated this aspect in the mid-1990s. Congress drafted the DPRA to blunt the impact of technological changes that made music portability and Internet streaming increasingly attractive to listeners.[34] The DPRA requires streaming and interactive services, such as iTunes Radio, Rhapsody, Spotify, Pandora, and Last.fm, to pay public-performance royalties both to performing-rights organizations for performance of the composition and to record labels for performance of the sound recording based on section 114 of Title 17.[35]

Section 114 mandates that streaming services pay online performance royalties to performing-rights organizations, which then

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29. *See generally* Groennings, *supra* note 4, at 389 (describing how the RIAA won against Napster, but file-sharing technology advanced to a decentralized system that made piracy much more difficult to monitor and prevent).

30. 17 U.S.C. §§ 101–810 (2012).

31. *Id.*

32. *See* Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 182 (2004).

33. 17 U.S.C. §§ 101–810 (2012); *see also infra* Part II.A (describing the long-held arguments underlying the lack of a performance right in sound recordings—namely that labels used radio to promote their repertoires).

34. *See* Interview with Patrick Sullivan, CEO, RightsFlow, Inc. (Sept. 28, 2010) (stating that portability is one of the main components of future success in music-industry profitability).

35. Performing-rights organizations such as ASCAP, BMI, and SESAC collect performance royalties from venues, webcasters, radio stations, and other music-transmittal outlets. *See* ASCAP, http://www.ascap.com/ (last visited Feb. 10, 2013); BMI, http://www.bmi.com/ (last visited Feb. 10, 2013); SESAC, http://sesac.com (last visited Feb. 10, 2013).

distribute them evenly between songwriters and publishers.[36] Performance royalties for sound-recording plays on the Internet follow a different rubric than the performance royalties paid for the underlying composition; this difference takes into account nonfeatured performers on the recording, as demonstrated in the table below:[37]

Receiving Party	**Percentage of Royalties**
Copyright owner of the exclusive right to publicly perform a sound recording by means of a digital audio transmission.	50%
Recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings)	45%
Nonfeatured instrumental musicians through the American Federation of Musicians (AFM)	2.5%
Nonfeatured vocalists through the American Federation of Television and Radio Artists (AFTRA)	2.5%

Private companies act as middlemen for the licensing transactions between online services, on the one hand, and the labels and artists on the other.[38] RightsFlow, Inc., for instance, manages licensing among interactive streaming services and industry entities so that record companies and artists can worry about creating and marketing music instead of dealing with multiple complex licensing agreements.[39] Similarly, non-interactive streaming services like Internet radio stations pay public-performance royalties to SoundExchange, a nonprofit performing-rights organization that collects and distributes royalties for streams of recordings and based on the percentages detailed above.[40]

Under the DPRA, when Internet radio owners and copyright holders are unable to negotiate a royalty rate, the Copyright Royalty Board (CRB), a committee under the auspices of the Library of Congress, "establish[es] rates and terms that most clearly represent the rates and terms that would have been negotiated in the

36. *See, e.g.*, *General Royalty Information*, BMI, http://www.bmi.com/creators/royalty/general_information/detail (last visited Jan. 14, 2013).

37. 17 U.S.C. § 114(g)(2) (2012) (setting the royalty-distribution percentages).

38. *See Labels and Distributors*, RIGHTSFLOW, http://rightsflow.com/what-we-do/labels-and-distributors (last visited Feb. 10, 2013); *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about (last visited Feb. 10, 2013).

39. *See Labels and Distributors*, *supra* note 38.

40. *See About*, *supra* note 38.

marketplace between a willing buyer and a willing seller."[41] Many factors affect this determination, but the goal is to determine a reasonable price based on this "hypothetical market" is the goal.[42] In 2007, when the CRB made its first ruling, some webcasters experienced royalty-rate increases of up to 1,200 percent.[43]

Previous US copyright law did not cover digital audio transmissions, but the DPRA's selective addition of required payments to record labels and performing artists set the stage for developing tensions between Internet and terrestrial radio broadcasters.[44] While Internet radio stations faced new fees for the sound recordings as well as the underlying compositions, terrestrial radio stations continued to pay only for the underlying compositions that sound recordings embody.[45]

On the opposite end of the revenue stream, a mirror-image tension exists between record labels (and their artists) and publishers (and their songwriters). Record labels and artists receive no income from performances of their recordings on AM or FM radio stations, but songwriters and publishers do receive royalties from similar performances of their compositions.[46] This difference entitles publishers and songwriters to payments that have been completely unavailable to record labels and performers.[47]

C. Sony *and* Grokster*: Judicial Decisions in the Entertainment Industries*

As described above, Congress has been active in attempting to adapt laws to advancing industry technologies.[48] The judicial branch has been equally influential on the state of the industry.[49] Two Supreme Court decisions, *Sony Corp. of America v. Universal City*

41. 17 U.S.C. § 114(f)(2)(B) (2012); *see also Rate Proceedings*, LIBRARY OF CONGRESS, http://www.loc.gov/crb/rate (last visited Feb. 24, 2013) (providing updates of the status of rate proceedings).

42. Blake Holland, Note, *The Winding Stream: Entitlement Theories and Intellectual Property Rights in Emerging Media Technologies*, 25 BERKELEY TECH. L.J. 247, 265 (2010).

43. *See* Mark D. Robertson, Note, *Sparing Internet Radio from the Real Threat of the Hypothetical Marketplace*, 10 VAND. J. ENT. & TECH. L. 543, 543 (2008).

44. *See* Lauren E. Kilgore, Note, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 562 (2010) (citing Lee Grossman, *Learning to Love Your Inner Pirate*, TIME, June 4, 2007, at 54, *available at* http://www.time.com/time/magazine/article/0,9171,1625209,00.html); *infra* Part II.A.

45. *See* Kilgore, *supra* note 44, at 563–64.

46. *See id.*

47. *See infra* Part II.A.

48. *See supra* Part I.B.

49. *See infra* Part II.E.

Studios, Inc.[50] and *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,[51] made significant impacts.

1. *Sony*: Allowing Commercial Progress

Devices that increase access to copyrighted material may be used for either legal or illegal purposes, which is especially true for devices that bring copyrighted material to consumers.[52] In *Sony*, the Supreme Court analyzed whether home videotape recorders (VTRs) were capable of substantial non-infringing uses (the legal standard for one defense against contributory copyright infringement) to determine whether the manufacture and sale of such devices constituted contributory infringement of the respondents' copyrights.[53] The respondents, representatives of television studios, worried that allowing consumers to record live television with the petitioners' devices would decrease licensing revenue and harm the commercial value of their copyrights.[54] Ultimately the Court decided that because VTRs were indeed capable of substantial non-infringing uses, their manufacture and sale did not infringe upon the respondents' copyrights.[55] This permissive ruling allowed the marketplace and law to adapt to paradigm-shifting technology to benefit artists, consumers, and the industry.[56]

2. *Grokster*: Ossifying Policy

The *Grokster* decision and its aftermath exemplify what can occur when the government uses its power to resolve a nascent conflict without considering the possibility of future change.[57] In *Grokster*, the parties called upon the Court to resolve a conflict between copyright holders—including songwriters, music publishers, and movie studios—and Grokster, Ltd.[58] Grokster distributed free peer-to-peer software that enabled users to share any type of digital file directly with one another without using a centralized server.[59]

Grokster acknowledged that a majority of its network users engaged in the unauthorized sharing of copyrighted files, but the

50. Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).
51. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
52. *See Sony*, 464 U.S. at 434.
53. *Id.* at 417.
54. *Id.* at 459.
55. *Id.* at 443–46, 498.
56. *See infra* Part II.E.
57. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
58. *Id.* at 913.
59. *Id.* at 920.

district court and the US Court of Appeals for the Ninth Circuit nonetheless found that the software was capable of substantial non-infringing uses.[60] The Supreme Court reversed, enjoining Grokster from operating, and a decade of industry scandal ensued.[61]

II. ANALYSIS OF THE TERRESTRIAL RADIO–INTERNET RADIO ASYMMETRY IN PERFORMANCE ROYALTIES AND GOVERNMENT RESPONSE TO TECHNOLOGY-TRIGGERED COPYRIGHT ISSUES

As the recording industry has grown, changed, and shrunk since the 1976 Act, major industry participants and Congress have tried to change the laws, policies, and agreements that control the industry.[62] These changes left anachronisms in their wake, including an asymmetry in the performance rights and royalties associated with compositions and sound recordings.[63] Terrestrial radio has progressed—or regressed, depending on one's point of view—from a promotional tool to a mere source of free music.[64] But Congress should not intervene hastily in this situation; instead, the DPRA should serve as a case study in unintended consequences.[65]

A. The Rationale Underlying the Performance-Right Asymmetry

During negotiations for the DPRA, advocates for terrestrial radio stations argued that digital radio and over-the-air

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60. *Id.* at 914, 933–34. The Court summarized the lower court's reasoning and the doctrine of substantial nonfringing uses:

> [T]he distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. Because the appeals court found respondents' software to be capable of substantial noninfringing uses and because respondents had no actual knowledge of infringement owing to the software's decentralized architecture, the court held that they were not liable.

Id.

61. *Id.* at 913–14; see *infra* Part II.E. The Court explained:

> One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses.

Grokster, 545 U.S. at 913–14.

62. *Id.*

63. This history includes all of the file-sharing cases, the DPRA, the Digital Millennium Copyright Act (DMCA), and RIAA prosecutions. *See* Digital Performance Right in Sound Recordings Act of 1995, codified in 17 U.S.C. § 114; Heather Neaveill, *The RIAA Versus the People: A File-Sharing Witch Hunt*, 21 DCBA BRIEF 24, 24 (2009).

64. *See infra* Part II.B.

65. *See infra* Part III.

radio are fundamentally different.[66] They asked Congress to retain the terrestrial radio broadcasters' exemption from the performance-royalty requirement for sound recordings, and Congress obliged.[67]

One primary motivation for maintaining the status quo for sound recordings on terrestrial radio was that the Senate Committee on the Judiciary—presumably based largely on the arguments from broadcasters' lobbyists—feared damaging terrestrial radio's economic interests.[68] The committee reported hearing, "concern[s] . . . that granting a performance right in sound recordings would make it economically infeasible for some transmitters to continue certain current uses of sound recordings."[69] Broadcasters were indeed hostile to the idea of paying for the use of both the recording and the composition, in part because they perceived their stations as spurring sales.[70] Major radio-station broadcasters were already paying hundreds of millions of dollars in performance royalties for compositions, and they were unwilling to double that number.[71]

B. Times Have Changed; Radio Serves a Different Function

Congress's decision to exclude terrestrial radio broadcasters from paying performance royalties to the sound-recording owners is an anomaly of American intellectual property law.[72] The United States is the world-wide leader in terms of the music business, yet it is the one nation that does not require remuneration for over-the-air broadcasts of sound recordings."[73]

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66. *See* Kilgore, *supra* note 44, at 563 (citing *Digital Performance Right in Sound Recordings Act of 1995: Hearing on H.R. 1506 Before the Subcomm. on Courts and Intellectual Prop. Comm. on the Judiciary*, 104th Cong. 1 (1995) (statement of Marybeth Peters, Register of Copyrights)) (noting the continued objection to an extension of performance right in sound recordings by the National Association of Broadcasters (NAB) and the interactive nature of Internet radio).

67. *See* Kilgore, *supra* note 44, at 563–64.

68. *See* S. REP. NO. 104-128, at 16 (1995).

69. *Id.*

70. *See* Debbie Bush, *Taking a Stand: Protecting Local Radio Stations*, 14 NEWS, http://www.14news.com/global/story.asp?s=11971775 (last updated Feb. 11, 2010, 3:20 PM).

71. ARNOLD P. LUTZKER, COPYRIGHTS AND TRADEMARKS FOR MEDIA PROFESSIONALS 115 (Focal Press 1997).

72. *See* William Henslee, *What's Wrong with U.S.?: Why the United States Should Have a Public Performance Right for Sound Recordings*, 13 VAND. J. ENT. & TECH. L. 739, 752 (2011) (quoting *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 100th Cong. 28 (2007) (statement of Marybeth Peters)); *supra* Part I.B.

73. Henslee, *supra* note 72, at 752.

Congress bases its refusal to extend a performance right to over-the-air broadcasts partially on the fact that airplay traditionally has been a source of free music-promotion that presents record labels' products to millions of potential consumers.[74] For some time, scholars have been predicting that the rationale behind the laws that "unfairly advantage" traditional broadcasters would one day come into serious question.[75] That time is now.

For much of the twentieth century, radio legitimately influenced the popularity of music, and music-ranking services like Billboard measured music's popularity by its radio play.[76] Payola schemes in the 1940s and 1950s evidenced that the recording industry used radio to introduce its music to an audience that would pay for it in other forms.[77] This promotional-radio paradigm has shifted in recent years, eroding the reasoning behind the sound-recording exemption from the receipt of performance royalties.[78]

One major indicator of this shift away from terrestrial radio being a singular promotional tool for record labels is the development of Billboard's new ranking scheme.[79] Billboard began ranking several of its music categories by considering digital-download sales from online marketplaces like iTunes and streaming data from services like Spotify and Rhapsody instead of radio play.[80] This new methodology

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74. *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 101 (2006) [hereinafter *Digital Radio Revolution Hearing*] (statement of Gary Parsons, Chairman of the Board of Directors, XM Satellite Radio Inc.); *see* Henslee, *supra* note 72, at 750 (noting that nearly every industrialized country besides the United States requires broadcast radio to pay performance royalties to the owners of sound recordings).

75. *See* Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 188 n.112 (2003) (citing Brad Stone, *Greetings Earthlings: Satellite Radio for Cars Is Taking Off and Adding New Features – Now Broadcasters Are Starting to Fight Back*, NEWSWEEK, Jan. 26, 2004, at 55); *infra* Part III (arguing for a private-sector solution until such time that legislation is necessary to bring holdout stations into conformity).

76. *See, e.g.*, *Billboard Shakes Up Genre Charts with New Methodology*, BILLBOARD (Oct. 11, 2012, 8:50 AM), http://www.billboard.biz/bbbiz/industry/record-labels/billboard-shakes-up-genre-charts-with-new-1007978302.story (describing the evolution of Billboard's ranking methodology).

77. Payola was the practice of song pluggers paying disc jockeys to play their artists' songs. *See* 47 U.S.C. § 317 (2012) (outlawing payola schemes); TYLER COHEN, IN PRAISE OF COMMERCIAL CULTURE 164, 166 (2000).

78. *Cf. Digital Radio Revolution Hearing*, *supra* note 74, at 101 (statement of Gary Parsons, Chairman of the Board of Directors, XM Satellite Radio Inc.) (describing Congress's rationale behind limiting performance royalties in sound recordings to digital radio).

79. *See, e.g.*, Jon Freeman, *Billboard Introduces New Chart Methodology*, MUSIC ROW (Oct. 11, 2012), http://www.musicrow.com/2012/10/billboard-introduces-new-chart-methodology/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+Musicrow+%28MusicRow%29.

80. *Id.*

keeps terrestrial radio data as one of its factors, but it becomes just that, a factor no different than digital-streaming data.[81] Justifying its switch to this new methodology, Billboard's Director of Charts explained that "[t]he way people consume music continues to evolve and as a result so do our genre charts, which now rank the many new ways fans experience, listen to[,] and buy music."[82]

Country starlet Taylor Swift's 2012 hit, "We Are Never Ever Getting Back Together" illustrates the decline of terrestrial radio as a promotional medium.[83] It hit number one on Billboard's Hot Country chart using the new methodology, while sitting at number thirty-six on Billboard's Country Airplay chart, which measures terrestrial radio play.[84] The broader success of a song receiving relatively limited air-time suggests that times have changed.[85]

Label support or established fan bases might explain the ability of an established artist like Swift to bypass terrestrial radio play on the way to the top of the charts, but lesser-known artists have done the same.[86] Little Big Town, a country act with significantly less industry clout than Swift,[87] nabbed a number one single on the Billboard's Country Digital Songs chart with "Pontoon."[88] At the time, "Pontoon" was at a mere number twenty on the charts measured by radio airplay.[89]

In an attempt to justify their recalcitrant opposition to a full performance right in sound recordings, broadcasters assert that "radio [is] an invaluable asset to communities" and that "stations generate six billion dollars in public service annually, and provide vital news and community information to listeners."[90] While radio performs important public services in exchange for use of the public airwaves,

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81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.*

86. *See, e.g.*, Wade Jessen, *Little Big Town Gets First No. 1 Single of Its Decade-Long Career—From Fans, Not Radio*, BILLBOARDBIZ (July 12, 2012, 5:33 PM), http://www.billboard.biz/bbbiz/others/little-big-town-gets-first-no-1-single-of-1007564152.story.

87. *See* Zack O'Malley Greenburg, *Country Cash Kings 2013: Toby Keith Leads List of Top Earners*, FORBES (July 1, 2013, 10:02 AM), http://www.forbes.com/sites/zackomalleygreenburg/2013/07/01/country-cash-kings-2013-toby-keith-leads-list-of-top-earners (ranking Taylor Swift at number two and leaving Little Big Town off of the list).

88. *See* Jessen, *supra* note 86.

89. *See id.*

90. *See* Kilgore, *supra* note 44, at 575 (citing STOP THE PERFORMANCE TAX, http://www.noperformancetax.org).

music radio stations bring in significantly more revenue than their purely public-service counterparts.[91]

On average, music-oriented radio stations realize 50 percent more annual revenue than their non-music counterparts.[92] Professor Henslee analyzed the revenue that labels and artists could generate from performance royalties from terrestrial radio, and on average, commercial radio stations that utilize music predict annual revenues of $675,000, while non-music stations predict annual revenues of $450,000—a 50 percent difference.[93] While the recording industry deflated at the turn of the millennium, radio seemed to have been insulated from the digital switch and the recession.[94] According to a US Government Accountability Office study, radio—a $20 billion industry[95]—owes a substantial portion of its revenue to sound recordings and musical content.[96]

Admittedly, the revenue generated for sound-recording owners will come directly from broadcasters' profits, but "this is not in itself a compelling reason" for broadcasters to avoid payment.[97] After all, one of the most basic notions underlying American property rights is that private property cannot be taken from its owner without compensation.[98]

C. Attempted Government Solutions and Their Drawbacks

Congress has discussed legislation that would eliminate the asymmetry between the performance right in sound recordings on Internet and terrestrial radio to remedy the administrative quagmire

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91. *See* Henslee, *supra* note 72, at 760 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-826, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 6, 14 (2010)).

92. *See id.*

93. *See id.*

94. *See* Kilgore, *supra* note 44, at 575 (citing *Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 192 (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-8_47922.pdf (statement of Mitch Bainwol, Chairman and Chief Executive Officer, Recording Industry Association of America)); *supra* Part I.A.

95. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-826, TELECOMMUNICATIONS: THE PROPOSED PERFORMANCE RIGHTS ACT WOULD RESULT IN ADDITIONAL COSTS FOR BROADCAST RADIO STATIONS AND ADDITIONAL REVENUE FOR RECORD COMPANIES, MUSICIANS, AND PERFORMERS 11 (2010).

96. *See* Henslee, *supra* note 72, at 760.

97. Kilgore, *supra* note 44, at 575.

98. *See Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary*, 111th Cong. 192 (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-8_47922.pdf (statement of Mitch Bainwol, Chairman and Chief Executive Officer, Recording Industry Association of America), at 192.

that the DPRA created.[99] As described above, when the CRB handed down its first ruling, many webcasters experienced royalty-rate increases between 300 and 1,200 percent.[100] This dramatic change based on the "willing-buyer/willing-seller" standard provoked outrage.[101] For instance, Pandora Media, Inc., creator of the Pandora Internet radio service, argues that the rates the CRB established hurt their business model.[102] Additionally, BMI, a performing-rights organization, filed a rate action against Pandora after negotiations for increased fees did not result in an agreement.[103] Pandora, BMI, and other industry actors could have avoided the wild fluctuations in CRB-established royalty rates if the government had allowed technology and negotiations to advance before ossifying the market.[104]

The argument that traditional broadcasters enjoy an unfair advantage because they do not have to pay performance royalties to sound-recording owners is certainly not novel.[105] In a move that demonstrates how apparent the asymmetry has become, in June 2013, Pandora even purchased a small terrestrial radio station in South Dakota just to try to qualify for terrestrial rates.[106] Congress has introduced bills attempting to create a full performance right, and scholars have speculated hopefully about such bills' eventual passages.[107] But each time a new bill is introduced, the stalemate of interest groups on each side of the issue helps to prevent its signature into law.[108] The National Association of Broadcasters (NAB), for

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99. *See* Robertson, *supra* note 43, at 544 (introducing the means by which the government handles the administration of mandatory performance royalties with Internet radio).

100. *See supra* note 43 and accompanying text.

101. *See Lawmakers Zero in on AM/FM Royalties*, RADIOINK (Nov. 28, 2012), http://www.radioink.com/ARTICLE.ASP?ID=2583077 (noting that Pandora finds the rates unfair).

102. *See id.* (explaining that Pandora accounts for approximately 7 percent of radio listening in the United States, but more than half of its revenue is paid to SoundExchange).

103. Press Release, Broadcast Music, Inc., BMI Files Rate Action Against Pandora (June 13, 2013) (available at http://www.bmi.com/press/entry/561960).

104. *See infra* Part III.

105. *See supra* Part II.B.

106. *See* Julianne Pepitone, *Pandora Buys South Dakota Radio Station in Bid for Lower Fees*, CNN MONEY (June 11, 2013, 9:17 PM) http://money.cnn.com/2013/06/11/technology/pandora-buys-radio-station/index.html.

107. *See, e.g.*, Performance Rights Act, H.R. 848, 111th Cong. (2009); Kilgore, *supra* note 44, at 564–65, 580 (describing and arguing in favor of the Performance Rights Act, a bill seeking to create a full performance right in sound recordings).

108. *See* Brooks Boliek, *Performance Rights Act on Repeat*, POLITICO (Feb. 10, 2011, 4:45 AM), http://www.politico.com/news/stories/0211/49194.html (indicating that the Performance Rights Act failed in the 111th Congress and also noting arguments on both sides of the issue); *see, e.g.*, Debbie Bush, *Taking a Stand: Protecting Local Radio Stations*, 14 NEWS (Feb. 11, 2010,

instance, holds firm to its assertion that "a [public-performance] royalty in sound recordings would be a death tax, forcing many broadcast networks to go out of business."[109] While Part II.B demonstrated that this argument is flawed—music radio stations have significantly higher profits than non-music stations—sound-recording owners have yet to convince groups like NAB.[110]

D. The Holdout Problem

Legislation may well become necessary because of the holdout problem inherent in many situations involving many actors.[111] This problem is especially pronounced when some parties are primarily motivated by non-financial concerns.[112] Clear Channel's recent agreements with record companies illustrate that big radio stations are increasingly willing to cooperate.[113] This cooperation could either signal a willingness to support a law or at least a business-minded notion of fairness toward the music creators, but it also may set the stage for small stations to hold out.[114]

To explain this holdout problem, consider the example of government land-assembly programs.[115] As the government attempts to acquire land for public use, large inefficiencies arise.[116] It is unclear whether individuals who are unwilling to sell their land refuse to do so based on "strategic holdout behavior"—wanting a higher price—or a "more genuine disagreement arising because a buyer's offer is below a seller's reservation price," a moral consideration.[117] The holdout may

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2:28 PM), http://www.14news.com/global/story.asp?s=11971775 (describing the argument against the Performance Rights Act from the perspective of local radio stations).

109. *See* Henslee, *supra* note 72, at 759 (citing *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 293 (1979) (statement of Sis Kaplan, President, National Association of Broadcasters) (stating that any effort to pay for performance right in sound recordings would upset the delicate balance between broadcasters and artists)).

110. *See id.*

111. *See* John Cadigan et al., *An Experimental Study of the Holdout Problem in a Multilateral Bargaining Game*, 76 S. ECON. J. 444, 444 (2009).

112. *See id.* at 449.

113. Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARD.BIZ (June 5, 2012), http://www.billboard.biz/bbbiz/industry/legal-and-management/exclusive-clear-channel-big-machine-strike-1007226762.story ("We found a way to create the terrestrial artist performance right. . . . We found a ground in the middle to move forward into the future as a partner with radio." (quoting Scott Borchetta, Chief Executive Officer, Big Machine Label Group)).

114. *See id.*

115. *See* Cadigan, *supra* note 111, at 444.

116. *See id.* at 445.

117. *Id.*

increase the reservation price to extort the buyer.[118] This problem is the main rationale behind eminent domain, in which the government, to acquire the remaining land, pays just compensation to the holdouts based on a fair market value.[119]

The holdout problem may eventually apply to the broadcast-radio industry.[120] Clear Channel started negotiating deals with labels establishing royalty payments for the performance of sound recordings.[121] Entercom followed suit, and it is likely that other large-volume station owners will do so, as well.[122] Eventually, however, local radio stations that view the performance royalty as a "death tax" will refuse to sign agreements, no matter how reasonable the rate may be.[123] If the market cannot prevent holdouts from freeriding on the good-faith negotiations of the larger stations, then a solution to the holdout problem could involve legislative intervention.[124] If Congress gets involved too early, however, it could prematurely ossify mutually beneficial free-market negotiations.[125]

E. When Government Ossifies Markets

If legislators or courts develop laws that prevent industries from progressing in reaction to technology and the economic environment, negative consequences—similar to the inefficiencies that have arisen in the Internet radio context—could result.[126] *Sony* and

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118. *Cf.* Julie Niederhoff & Panos Kouvelis, *Generous, Spiteful, or Profit Maximizing Suppliers in the Wholesale Price Contract: A Behavioral Study* 2 (Nov. 1, 2012), *available at* http://ssrn.com/abstract=2173555 (finding that sellers' prices sometimes reflect spite, not pure profit-maximization).

119. *See* Cadigan, *supra* note 111, at 445.

120. *See id.*

121. *See* Christman, *supra* note 113.

122. *Now Entercom Inks Side Deal with Big Machine Label Group*, RADIOINK (Sept. 19, 2012), http://www.radioink.com/article.asp?id=2536579.

123. *See* Henslee, *supra* note 72, at 759 (citing *Copyright Issues: Cable Television and Performance Rights: Hearings Before the Subcomm. on Courts, Civil Liberties, & the Admin. of Justice of the H. Comm. on the Judiciary*, 96th Cong. 293 (1979) (statement of Sis Kaplan, President, National Association of Broadcasters)).

124. *See infra* Part III.

125. *See infra* Part III.

126. *Compare* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984) (allowing VTRs to exist), *and* Thomas K. Arnold, *2012 Home Entertainment Revenue Stabilizes*, HOME MEDIA MAG. (Jan. 8, 2013), http://www.homemediamagazine.com/research/2012-home-entertainment-revenue-stabilizes-29271 (describing a thriving multi-billion dollar industry), *with* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (enjoining the file-sharing service Grokster), *and supra* Part I (describing the depressed state of the recording industry).

Grokster are helpful in demonstrating the cost of error in acting too soon and ossifying policy.[127]

In *Sony*, the Court held that the district court was correct in finding that the VTR was still useful for legally recording non-copyrighted material or copyrighted material with consent.[128] The Court was unwilling to outlaw the devices and deprive consumers of the benefits of this new technology.[129] If the Court had decided the other way—outlawing the sale of video-recording devices—the multi-billion-dollar home-entertainment industry might never have developed a substantial fraction of its value.[130] While this policy rationale is not explicitly indicated in *Sony*, the Court's reasoning and history tend to show that policy considerations influenced the majority.[131] The Court notes that time-shifting use of the VTR "enlarges the television viewing audience."[132] Additionally, two rounds of arguments occurred in two separate terms of the Supreme Court before it released its opinion.[133] By the time the Court heard the second round of arguments, "approximately 10 percent of US households owned [VTRs]."[134] It is nearly unimaginable that this rise in popularity did not play some role in the Court's decision.[135]

The *Grokster* case involved similar circumstances with a much different outcome.[136] In reversing the Ninth Circuit's decision that Grokster was capable of substantial non-infringing uses, the Court distinguished the *Sony* decision, relying on evidence of Grokster's intent that those who downloaded its software would use it to share copyrighted works.[137] In *Sony*, the Court had a survey showing 9 percent of video recordings were authorized (i.e., non-infringing), and the Court noted a "significant potential for future authorized copying."[138] In *Grokster*, there was a similar percentage of non-infringing uses (10 percent), but the fact that Grokster intended

127. *See generally Sony*, 464 U.S. 417; *Grokster*, 545 U.S. 913.

128. *See Sony*, 464 U.S. 427, 454–55.

129. *See id.*

130. *See* Arnold, *supra* note 126 (describing the income generated in 2012 by home entertainment).

131. *See* Peter S. Menell & David Nimmer, *Unwinding* Sony, 95 CALIF. L. REV. 941, 972 (2007).

132. *Sony*, 464 U.S. at 421.

133. *See* Menell & Nimmer, *supra* note 131, at 962–73.

134. *Id.* at 969.

135. *See id.*

136. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 913 (2005) (enjoining Grokster's continued operation).

137. *See id.* at 939, 950.

138. *See id.*

to allow users to share copyrighted works proved to be the deciding factor in the Court's ruling.[139]

While it remains unclear what future negotiations and agreements the entertainment industry might have entered with Grokster and other peer-to-peer services, the *Grokster* decision effectively outlawed an efficient distribution method and started the chain of events that caused a large population of would-be music consumers to develop a passionate aversion to labels.[140] While the *Sony* majority arguably considered strongly the growing popularity of the VTR and similar home video devices (e.g., Betamax and VCR), the Court did not consider the popularity of peer-to-peer music sharing when deciding *Grokster*.[141] The *Grokster* litigation and the Recording Industry Association of America's (RIAA) ensuing litigation campaign led to public backlash and perhaps a lost opportunity to make efficient use of file-sharing technologies.[142]

Without the *Grokster* decision, the copyright holders may have had an incentive to resolve the pirating issue in a commercial manner instead of a legal one.[143] Like the movie industry after *Sony*, the music industry could have an opportunity to privately solve the asymmetry between digital and terrestrial radio royalties until such time that only holdout radio stations remain, at which point the government could still act.[144]

III. A PRIVATE SOLUTION AND WHY THE GOVERNMENT SHOULD STAY OUT FOR NOW

After discussing the rationales behind extending performance royalties in sound recordings to terrestrial radio, the question remains: How can the recording industry accomplish such an

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139. *See id.* at 939–40.

140. *See* Heather Neaveill, *The RIAA Versus the People: A File-Sharing Witch Hunt*, 21 DCBA BRIEF 24, 24 (2009).

141. *See* Menell & Nimmer, *supra* note 131, at 969.

142. *See* Capitol Records, Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010) (illustrating that the RIAA turned its strategy to suing individual file-sharers); Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 977 n.44 (2008) (noting that the RIAA's lawsuit campaign is seen as subversive toward the rights of the public).

143. Maggie A. Lange, *Digital Music Distribution Technologies Challenge Copyright Law: A Review of* RIAA v. MP3.com *and* RIAA v. Napster, 45 BOS. B.J. 14, 14 (2001) (describing, in the midst of new file-sharing technology's popularity, the lack of a consumer-friendly digital download service). This Note does not describe the likelihood of a commercial solution—nor does it advocate for illegal file sharing. It merely indicates that the industry and the file-sharing network developers were prevented from negotiating an efficient solution because of the ruling, which was completely in favor of the recording industry.

144. *See infra* Part III.

industry-altering shift in a way that promotes the best interest of all parties?[145] The answer to that question is chiefly through private contracts and negotiations.[146]

Without the give-and-take of discussions between industry players, Congressional or judicial misaction will only ossify the existing tensions in a manner that could ultimately harm the industry.[147] The lessons of *Sony* and *Grokster* show that allowing private contracting around the problems of performance royalties is preferable until a holdout problem develops.[148] Moreover, agreements such as Big Machine Label Group's deals with Clear Channel and Entercom are prime indicators of the direction the industry will take if left alone.[149]

A. The Cost of Premature Government Intervention

The rationale behind allowing private industry players to negotiate the transition to performance royalties in sound recordings on terrestrial radio can be explained easily: if the government gets the solution wrong, then the law may prevent the industry from acting efficiently towards its best interests in the future.[150] Comparing the Supreme Court's decisions in *Sony* and *Grokster* illustrates the cost of such a governmental intrusion.[151]

For example, when Congress decided to require performance-royalty payments to sound-recording owners from Internet streaming services, it inserted itself into a sphere where sophisticated parties could have negotiated rates that were acceptable to each party.[152] Instead, the copyright owners and Internet businesses today are still feeling DPRA's one-side negative effects on streaming service providers.[153]

Under the current statutory system, the CRB determines the fees that online-webcasting services pay to copyright holders based on

145. *See supra* Part II.B.

146. *See infra* Part III.A.3.

147. *See generally* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); *supra* Part II.E.

148. *See supra* Part II.D–E.

149. *See supra* Part II.D; *infra* Part III.B.

150. *See supra* Part II.A (describing the problems with the DPRA and the willing-buyer/willing-seller standard).

151. *See infra* Part III.A.1–2.

152. *See* 17 U.S.C. § 114(d) (2012).

153. *See Lawmakers Zero in on AM/FM Royalties*, *supra* note 101.

a supposed fair market value.[154] The CRB applies the "willing buyer/willing seller" standard to establish rates based on fair market value.[155] In other words, the standard is supposed to approximate what the parties would negotiate without the statutory license.[156] From there, the streaming services pay SoundExchange, which pays performing-rights organizations and labels.[157] The performing-rights organizations then distribute the income to music publishers and songwriters, and labels distribute to their artists.[158]

As noted above, Internet service companies have complained that the government-determined and enforced rates they pay to labels and artists are prohibitively high, and performing-rights organizations claim that the rates are not high enough.[159] If the rates were subject to real negotiations instead of beholden to statutory mandate, the negotiated rates would be fluid and, hopefully, eventually arrive at a compromised middle-ground that would be mutually beneficial to copyright holders and Internet services.[160]

B. The Solution is in the Private Sector

To avoid legal-ossification problems, the government should leave the resolution of the issue to the marketplace where solutions are quickly developing.[161] The cost of error in resolving the issue incorrectly is high.[162] As in the buildup to *Grokster*, the recording industry now faces an issue of revenue-stream mismatches between industry players.[163] If the government uses its power to resolve that issue like it did in *Grokster*, labels could lose the ability to efficiently

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154. *See Performance Rights and Digital Royalties Heat Up in Congress*, SOUNDEXCHANGE BLOG (Sept. 10, 2012), http://www.soundexchange.com/performance-rights-and-digital-royalties-heat-up-in-congress-2.

155. *See id.*; *supra* Part II.B.

156. *See Performance Rights and Digital Royalties Heat Up in Congress*, *supra* note 152; *supra* Part II.B.

157. *See About*, *supra* note 38.

158. *See The Music Royalty Breakdown*, INDIE AND UNSIGNED (Apr. 3, 2012), http://www.indieandunsigned.com/the-music-royalty-breakdown.

159. *See Lawmakers Zero in on AM/FM Royalties*, *supra* note 101 (explaining that Pandora accounts for approximately 7 percent of radio listening in the United States, but more than half of its revenue is paid to SoundExchange).

160. *See Performance Rights and Digital Royalties Heat Up in Congress*, *supra* note 154.

161. *See* Christman, *supra* note 113; Dan Rys, *Clear Channel Inks Second Radio Royalties Label Deal, This Time with Glassnote*, BILLBOARDBIZ (Sept. 27, 2012, 1:41 PM), http://www.billboard.biz/bbbiz/industry/radio/clear-channel-inks-second-radio-royalties-1007962302.story (describing the deal struck between Clear Channel and Glassnote).

162. *See supra* Part II.E.

163. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 913 (2005); *see supra* Part I.B.

exploit a valuable revenue stream, much like the music and movie industries lost the ability to explore the commercial possibilities of the distribution system in *Grokster*.[164]

Using the Clear Channel and Entercom deals as examples, labels and media groups should solve the performance-royalty asymmetry contractually.[165] There is substantial tension between industry actors about the royalty-payment gap between the Internet and terrestrial radio.[166] The industry has a strong incentive to alleviate the tension through these agreements to ensure that a situation like that developing around CRB determinations of Internet royalties does not occur again for terrestrial radio.[167]

As an example of this ongoing dialogue, not only is Big Machine Label Group pushing radio conglomerates to sign performance-royalty deals, but Clear Channel also recently signed a deal with another label group for the same purpose.[168] In September 2012, Clear Channel entered into a partnership with Glassnote Entertainment Group to pay to the label and its artists performance royalties for its terrestrial radio stations.[169] This is important because Glassnote's lineup included several major acts that have garnered significant radio airtime.[170] Coming only months after the Big Machine deal, this development may have signaled to the rest of the industry that these agreements are the way of the future.[171]

The recording industry's innovative efforts to deal with the terrestrial radio gap provide all the more reason for the government to refrain from regulating unless intervention becomes imminently necessary.[172] The courts and Congress should treat this situation as a *Sony* issue rather than a *Grokster* issue.[173] Icing the market in this

164. *See Grokster,* 545 U.S. at 940–41.

165. *See* Christman, *supra* note 113 (describing the deal between Clear Channel and Big Machine); Rys, *supra* note 159 (describing the deal struck between Clear Channel and Glassnote, coming just three months after the first deal with Big Machine).

166. *See* Henslee, *supra* note 72, at 746, 749.

167. *See* Rys, *supra* note 161; *see also* Henslee, *supra* note 72, at 762–63; *supra* Part II.B.

168. *See* Rys, *supra* note 161 (describing the deal struck between Clear Channel and Glassnote).

169. *See id.*

170. *See id.* (noting that Glassnote's artists include Mumford & Sons, Phoenix, and Two Door Cinema).

171. *See id.*

172. *See id.*; Christman, *supra* note 113. While courts—besides, of course, the Supreme Court—cannot decide what cases come before them, they can make narrow rulings after taking policy into account.

173. *See supra* Part III.A.

arena could have grand negative effects on an industry that may not survive added crisis.[174]

As noted above, achieving symmetry in the performance right in sound recordings may *eventually* require congressional intervention.[175] Where other scholars miss the point is that legislation is a solution to the final holdout problem, not the solution to the entire royalty asymmetry.[176]

Like in the land-assembly context, in which many landowners would voluntarily sell their land, many station owners would agree to pay performance royalties for the use of sound recordings on their stations.[177] Rather than assembling contiguous land for public use, the challenge here is to assemble fractions of the individual radio stations' profit streams.[178] In the land-assembly situation, some landowners inevitably will refuse to sell on principles independent of economics.[179] When this inefficiency arises in the radio-station context—in other words, when small stations that consider the performance royalty a "death tax" are the only remaining unlicensed stations freeriding on the other stations' performance royalty payments—congressional intervention will become appropriate.[180]

The form of that intervention should be much like the eminent domain context.[181] Through eminent domain, the government is required to pay landowners "just compensation" for the forced sale of their lands.[182] This Note's last-resort legislative solution involves the government requiring the holdout radio stations to pay a reasonable royalty to sound-recording owners.[183] This reasonable royalty—either a flat rate or a percentage of revenue—should mirror closely the average prices in the deals made by the stations that voluntarily pay the performance royalty.[184] This method is nominally similar to the so-called "willing-buyer/willing-seller" standard the CRB uses for Internet radio royalty determinations, but it has the advantage of

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174. *See supra* Part I.A.

175. *See supra* Part II.D.

176. *See, e.g.*, Henslee, *supra* note 72 at 763–65 (suggesting a full performance right in sound recordings and advocating for the passage of the Performance Rights Act).

177. *See supra* Part II.D.

178. *See supra* Part II.D.

179. *See supra* Part II.D.

180. *See* Henslee, *supra* note 72, at 769.

181. *See* Brett Talley, *Restraining Eminent Domain Through Just Compensation:* Kelo v. City of New London, 127 S. Ct. 2655 (2005), 29 HARV. J.L. & PUB. POL'Y 759, 759 (2006).

182. U.S. CONST. amend. V; *see* Talley, *supra* note 181, at 759.

183. *Cf.* U.S. CONST. amend. V.

184. *But see* Henslee, *supra* note 72 (advocating for the Performance Rights Act, which establishes the royalty scheme without the benefit of knowledge from years of successful private negotiation).

relying on a market that would actually include willing buyers and sellers.[185]

The legislation here, though, would avoid the problems the CRB has faced.[186] Congress enacted the DPRA before the creation of services like Pandora—making it impossible to establish a reasonable royalty upon which to base a "willing-buyer/willing-seller" standard of calculation.[187] The last-resort legislation this Note proposes will have the advantage of relying on a developed free-market standard to make its rate determinations.[188]

IV. CONCLUSION

The recording industry has been dealing with the aftermath of the digitalization of music and its dissemination across the Internet since the end of the twentieth century. As business models develop and change, new ways of creating revenue streams that incentivize music creation and financial investment in that creation must have room to develop as well. As these business models evolve, new technologies will inevitably appear that lawmakers did not anticipate. The government may be tempted to prematurely respond to these changes because of pressure from industry lobbyists, but the impetus for finding an answer to the asymmetry between terrestrial radio and Internet radio should instead fall on industry players acting in the private sector.

US copyright law has never provided for a full performance royalty in sound recordings, but the old rationales no longer justify the asymmetry. The arguments for the full performance right may tempt the government to codify that right, but based on the continuing complexities of the DPRA's performance right for sound-recording performances over the Internet, a legislative approach here will likely lead to a similar sub-optimal result. Thus, the private sector holds the key to a satisfactory solution.

Labels like Big Machine Label Group and Glassnote Entertainment Group in conjunction with radio conglomerates like Clear Channel and Entercom are leading the way in the push for extending performance royalties in sound recordings to terrestrial radio.[189] By signing deals with radio conglomerates like Clear

185. *Performance Rights and Digital Royalties Heat Up in Congress*, *supra* note 154.

186. *See supra* Part I.B.

187. *See supra* Part I.B.

188. *Performance Rights and Digital Royalties Heat Up in Congress*, *supra* note 154.

189. *See* Glenn Peoples, *Stakes Are High as Labels, Broadcasters Lobby over Performance Royalties*, BILLBOARD.BIZ (Mar. 25, 2010), http://www.billboard.com/biz/articles/news/publishing/1209352/stakes-are-high-as-labels-broadcasters-lobby-over-performance (describing

Channel and Entercom, labels and artists are able to tap into a new revenue stream to make up for the income they lost when music went digital. Barring government intervention, this private-agreement trend will most likely continue until a holdout problem arises. Then, perhaps Congress can one day pass a law codifying the bargain agreed upon by members of the industry to remedy the holdout problem.

J.P. Urban[*]

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the money spent by several labels and broadcast groups to lobby Congress regarding performance royalties); Rys, *supra* 161 (stating Clear Channel has signed its second deal with an independent record label, teaming up with Glassnote Entertainment Group to pay out digital and terrestrial revenues to the label and its artists); *supra* Part III.B.

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