

2005

## Some Catching Up to Do

Kara M. Wolke

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/jetlaw>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Kara M. Wolke, *Some Catching Up to Do*, 7 *Vanderbilt Journal of Entertainment and Technology Law* 411 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol7/iss3/4>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in *Vanderbilt Journal of Entertainment & Technology Law* by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# 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

[By Kara M. Wolke\*]

**T**he United States currently lags behind the international community in one critical aspect of copyright law: public performance rights in sound recordings. This Article focuses on the refusal of the United States to fully sign on to the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT)<sup>1</sup> Article 15(1), which recognizes a right to remuneration for performers and produc-

Congress' partial implementation of the WPPT through the Digital Millennium Copyright Act of 1998 (DMCA) and the digital performance right. Part II explores the value that recognition of the full public performance right under the WPPT would create for the American music industry. Finally, Part III proposes a solution in the form of an amendment to the Copyright Act and the coordination of national and international performance rights organizations.

**“The WPPT updated the protections of “neighboring rights” owners with the intention of harmonizing the myriad conflicting copyright systems that had been developing around the world.”**

ers from public performances of their sound recordings.<sup>2</sup>

The analysis begins with a discussion of the purposes behind the WPPT and the international recognition of a general sound recording performance right. Part I discusses

**I. History: The Development of International Copyright Laws and the WPPT's Recognition of a General Public Performance Right in Sound Recordings**

WIPO, responding to the challenges of protecting musical and other copyrightable works in the wake of global developments in digital technology, adopted the WPPT and the Copyright Treaty in Geneva on December 20, 1996.<sup>3</sup> The WPPT built upon rights of performers and producers of phonograms first established under the 1961 Rome Convention on Musical Rights,<sup>4</sup> and clarified certain provisions of the 1994 Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement.<sup>5</sup> The WPPT updated the protections of "neighboring rights" owners<sup>6</sup> with the intention of harmonizing the myriad conflicting copyright systems that had been developing around the world.<sup>7</sup>

The WPPT entered into force on May 20, 2002,<sup>8</sup> and to date forty-seven countries have acceded to its terms.<sup>9</sup> In addition to recognizing performers' rights in unfixed performances,<sup>10</sup> and the rights of reproduction and distribution for both performers and producers,<sup>11</sup> the WPPT significantly grants a general performance right in sound recordings,<sup>12</sup> considerably increasing the protections afforded artists and producers worldwide.

## II. An Examination of the Public Performance Right as it Exists Today with Congress' Partial Implementation of WPPT Article 15 through the DMCA

### A. The Public Performance Right Generally

Understanding the significance of the public performance right requires a preliminary discussion of the copyrightable interests created under U.S. law when a song is recorded. The "musical work" copyright vests to the songwriter or composer,<sup>13</sup> who often subsequently assigns the right to a publisher.<sup>14</sup> The "sound recording" copyright vests to the performing artist who brings the work to life<sup>15</sup> and is often contractually assigned to the producer or record company that financed the project.<sup>16</sup> U.S. copyright law provides that the owner of the underlying musical work has, among other rights, the *exclusive* right to public performance of the work.<sup>17</sup> However, the sound recording copyright owner does not enjoy an equal right

in the United States.<sup>18</sup>

### B. The Digital Performance Right and the DMCA

Key government officials supported prompt ratification of the WPPT to promote U.S. policy of strong intellectual property rights and to "encourage other countries to provide adequate and effective intellectual property protection."<sup>19</sup> Congress, however, fell short of that goal when it implemented the WPPT through the DMCA,<sup>20</sup> and invoked the reservation clause of WPPT Article 15(3) to limit the sound recording performance right.<sup>21</sup>

Despite the purported concern for international uniformity of strong copyright laws, when the Department of State presented the WPPT for ratification, it recommended that the U.S. "apply the provisions of Article 15(1) only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception..."<sup>22</sup> Congress effectuated that recommendation when it enacted the DMCA.<sup>23</sup> Clarifying the digital performance right first established in the Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA),<sup>24</sup> the DMCA gave sound recording copyright owners a right to royalties from performance by digital audio transmission, but significantly excluded other traditional forms of public performance including television and radio broadcasts.<sup>25</sup>

Of the major signatories to the WPPT, Japan was the only other country to invoke Article 15(3) to limit the remuneration right in any manner,<sup>26</sup> but Japan's limitation was not restrictively narrow and did not exclude traditional broadcasting.<sup>27</sup> Thus, in a serious rebuff to American sound recording copyright owners, the U.S. is the only WPPT signatory to exclude broadcast performances of sound recordings from the right to remuneration provided under Article 15(1).

## III. The Domestic and International Importance of Recognizing Full Public Performance Rights in Sound Recordings

From the largest record companies down to the newest performer recording their first

## Some Catching Up To Do

album, a full public performance right in sound recordings is necessary to achieve legal, economic, and artistic equality for American performers and producers both at home and abroad. The right would align U.S. and foreign copyright law, with significant benefits to the music industry.

### A. Achieving Equal Legal Protections for Performers and Producers in the U.S. and Abroad

In failing to fully adopt Article 15(1), Congress missed a prime opportunity to address the inequities that have permeated U.S. copyright law for years. While owners of musical works enjoy exclusive performance rights,<sup>28</sup> the U.S. Copyright Act has historically

recordings; they are denied hundreds of millions of dollars in royalties from the recording's broadcast in all of the other WPPT countries that do recognize full performance rights under Article 15(1).<sup>32</sup>

### B. A Full Public Performance Right in Sound Recordings Would Be a Significant Source of Revenue to the Music Industry

The performance right is recognized as "one of the most significant sources of income from a musical composition, and potentially one of the most lucrative from the sound recording."<sup>33</sup> Article 15(1) has been described as conferring "among the economically most important rights of performers and phonogram

**"American sound recording copyright owners are not only afforded weaker protections than composers and songwriters, but they also receive lesser protections than their foreign counterparts."**

denied equal rights to sound recording copyright owners.<sup>29</sup> These inequities are important because at some point in most performers' careers, their ability to generate income from touring, merchandising, and record sales will decline, and except for the digital performance right discussed earlier, the performer's income stream will dry up. Meanwhile, a composer continues to collect royalties every time a song he or she wrote is performed publicly.

American sound recording copyright owners are not only afforded weaker protections than composers and songwriters, but they also receive lesser protections than their foreign counterparts. The effects of the U.S. decision to restrict the sound recording performance right must be examined in light of WPPT Article 4(2),<sup>30</sup> which allows foreign jurisdictions to condition the right on a nation's reciprocal legal treatment.<sup>31</sup> Therefore, American sound recording copyright owners are not only denied a royalty for domestic broadcasts of their

producers."<sup>34</sup> Especially given the financial struggles faced by the American recording industry recently,<sup>35</sup> a general performance right in sound recordings would provide an invaluable new income stream. Worldwide, over \$3 billion in royalties are generated annually from public performances of musical works, with U.S. performing rights societies collecting approximately \$1 billion of that amount for American composers and songwriters.<sup>36</sup> Digital sound recording performance royalties totaled \$6.5 million in 2003, with over \$22.5 million in digital performance royalties allocated since 2001.<sup>37</sup>

Furthermore, because the United States is one of the world's leaders in the creation and distribution of sound recordings,<sup>38</sup> the revenue to the American recording industry from foreign sources would be considerable. Industry experts estimated that, as of 2000, American sound recording copyright owners lost approximately \$600 million in foreign performance

royalties due to the U.S. failure to recognize the right.<sup>39</sup> The failure of the U.S. to maximize these foreign revenues provides a strong argument in favor of re-examining the current law.

#### IV. Catching Up and Making the Change

The solution to these problems begins with amending §§ 106(6) and 114(a) of the Copyright Act to recognize a general public performance right in sound recordings. The subsequent steps are to establish a domestic performing rights organization to administer the right, and to work with an international agency to coordinate the collection and distribution of royalties among participating countries. Before this solution has a realistic possibility of success, however, one must confront the issue at the heart of the long-standing disparate treatment of recording artists, whose contributions are not accepted as worthy of equal copyright protection.

##### A. As a Fundamental Issue, Both the Music Industry and Congress Must Recognize the Merit of Intellectual Creativity Involved in the Performance of a Musical Work

Music adds creative value to society, and as such, is a copyrightable commodity.<sup>40</sup> The challenge to establishing a sound recording performance right is to agree that recording artists contribute equally with songwriters to that creation of value. Before lawmakers will agree that performers and producers are creative authors of a useful art, constitutionally deserving of copyright protection in the form of a general performance right equal to that af-

forded composers and songwriters, the deeply-rooted theoretical belief that performing artists and producers are less valuable to the creative process must be overcome.

##### B. Amending the Copyright Act

Given the legal framework already in place for the digital performance right for sound recordings in the DPRSRA and the DMCA, and the musical work performance right of §106(4), amending the Copyright Act will not be a difficult task for Congress. These laws could be further developed into a general sound recording performance right with relative ease.

Since one of the goals of this change is to achieve equal treatment of sound recordings and musical works, the performance right should resemble the structure of the royalty system currently in place for musical works and should consist of a compulsory license administered by a performing rights society. Ensuring that performers and producers are properly protected also requires Congress to be cognizant of the industry practice whereby record companies usually own the entire copyright in their artists' sound recordings.<sup>41</sup> Given this custom, Congress should mandate that a portion of the performance royalty go to the artist and producer.<sup>42</sup>

Making this change will require considerable lobbying efforts.<sup>43</sup> However, there has not yet been a concerted action by the Recording Industry Association of America ("RIAA"), the National Association of Recording Industry Professionals ("NARIP"), or SoundExchange, the organization that administers digital performance licenses, for recognition of a full sound recording performance right in the United States. These major recording industry

**“Ensuring that performers and producers are properly protected also requires Congress to be cognizant of the industry practice whereby record companies usually own the entire copyright in their artists’ sound recordings.”**

## Some Catching Up To Do

associations have the collective power and responsibility to launch an intensive lobbying effort to convince Congress that a sound recording performance right is not only fair, but necessary.

### C. The Task of Administering Licenses and Distributing Royalties: Determining the Appropriate Performing Rights Society

The U.S. performance rights societies, the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Inc. (BMI), and SESAC, Inc., have established a successful business model for the administration of blanket musical work licenses, which has proven to be satisfactory to both licensors and licensees. This licensing scheme should be applied similarly to sound recordings, but the administrative body should take a new form.

ASCAP, BMI, and SESAC were built upon the principle of protecting composers and songwriters, and have developed over the years to serve their unique interests.<sup>44</sup> Recording artists, producers, and record companies have needs unique to them as well, and those needs should be addressed by an association particularly suited for them. SoundExchange is so situated, currently administering digital sound recording performance licenses, and representing over 800 record companies and labels, and thousands of recording artists.<sup>45</sup> SoundExchange is governed by nine artist representatives and nine record label representatives;<sup>46</sup> this structure provides fair representation of both groups' interests and enables artists and record companies to work together in the collection of sound recording performance royalties.<sup>47</sup>

### D. Working with an International Performance Rights Organization

The challenges of administering the sound recording performance right globally are not insignificant, but these challenges can be overcome. During WPPT negotiations, the WIPO Committee of Experts proposed that the right should be administered by collecting rights societies.<sup>48</sup> Collecting rights societies, or performance rights organizations, exist in virtually every country with copyright laws.<sup>49</sup> One

international intellectual property scholar has described musical performing rights societies as "the most numerous and probably the most powerful in their impact on the formation of copyright policy, domestically and internationally."<sup>50</sup>

Once American law recognizes a full sound recording performance right, administered by a domestic performance rights organization, the U.S. should join the effort to coordinate the administration of the right globally.<sup>51</sup> Representatives from WIPO countries' respective performance rights organizations should work together with the International Federation of Phonogram and Videogram Producers (IFPI), the principal international trade association representing recording industries, to coordinate the administration of royalties across borders and ensure accountability of member nations. As the umbrella organization for recording industry associations in forty-eight countries, the IFPI has a structure conducive to such a task.

## V. Conclusion

Driven by artistic talent, the music industry is dependent upon adequate copyright protection. However, as this examination of the U.S. response to Article 15(1) of the WPPT has shown, the limited protection of the digital performance right in the DMCA fails to keep pace with the international music community at great expense and fundamental unfairness to American sound recording copyright owners. Now is the time to catch up and recognize the right in full.

## ENDNOTES

\* J.D. Candidate, The Ohio State Moritz College of Law.

<sup>1</sup> WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 [hereinafter WPPT]; *see also* Ratification by the United States of America, September 14, 1999, *available at* [http://www.wipo.int/edocs/notdocs/en/wppt/treaty\\_wppt\\_8.html](http://www.wipo.int/edocs/notdocs/en/wppt/treaty_wppt_8.html) [hereinafter U.S. Ratification].

<sup>2</sup> See WPPT, *supra* note 1, at art. 15(1) (“Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of the phonograms published for commercial purposes for broadcasting or for any communication to the public”).

<sup>3</sup> WIPO Copyright Treaty, Dec. 20, 1996, S. Treaty. Doc. No. 105-17, Preamble; *see also* WPPT, *supra* note 1, Preamble. While both Treaties are milestones in the development of international copyright law, this paper focuses specifically on the WPPT.

<sup>4</sup> JÖRG REINBOHE & SILKE VON LEWINSKI, THE WIPO TREATIES 1996 26, 313 (2002) [hereinafter WIPO Treaties 1996].

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

<sup>6</sup> *See generally* PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 11, 32, 43, 274 (2001) (explaining “neighboring rights,” such as sound recording performance rights, as outside of what were traditionally considered authors’ rights. The rights are comparable across countries, with recognition contingent upon reciprocity).

<sup>7</sup> Carol M. Morrissey, *WIPO Legislative Update*, CONGRESSLINE, May 22, 1997, available at <http://www.llrx.com/congress/052297.htm>.

<sup>8</sup> WPPT Notification No. 32, Feb. 20, 2002, available at [http://www.wipo.int/edocs/notdocs/en/wppt/treaty\\_wppt\\_32.html](http://www.wipo.int/edocs/notdocs/en/wppt/treaty_wppt_32.html).

<sup>9</sup> *See WPPT Contracting Parties*, WIPO Treaties Database, available at [http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty\\_id=20](http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20) [hereinafter *WPPT Contracting Parties*].

<sup>10</sup> WPPT, *supra* note 1, at art. 6.

<sup>11</sup> *See* WPPT, *supra* note 1, at arts. 7–9, 11–13.

<sup>12</sup> WPPT, *supra* note 1, at art. 15(1).

<sup>13</sup> *See* 17 U.S.C. § 101 (1996); *See also* DONALD S.

PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 208–09 (4th ed. 2000).

<sup>14</sup> *See* Rajan Desai, *Music Licensing, Performance Rights Societies, and Moral Rights for Music: A Need in the Current U.S. Music Licensing Scheme and a Way to Provide Moral Rights*, 10 U. BALT. INTELL. PROP. J. 1, 18 (2001).

<sup>15</sup> *See* PASSMAN, *supra* note 13, at 296–97.

<sup>16</sup> *See, e.g.* Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recordings Act of 1995 Kept Pace with Technological Advances in Musical Performance, or Is Copyright Law Lagging Behind?*, 21 HASTINGS COMM. & ENT. L.J. 651, 656 (1999).

<sup>17</sup> 17 U.S.C. § 106(4).

<sup>18</sup> *See* 17 U.S.C. §§ 106(6), 114(a) (Supp. 2003).

<sup>19</sup> *Letter of Submittal*, July 22, 1997, available at [http://cyber.law.harvard.edu/globaleconomy/3.3\\_WIPO.doc](http://cyber.law.harvard.edu/globaleconomy/3.3_WIPO.doc); *see also Letter of Transmittal*, July 28, 1997, available at [http://cyber.law.harvard.edu/globaleconomy/3.3\\_WIPO.doc](http://cyber.law.harvard.edu/globaleconomy/3.3_WIPO.doc).

<sup>20</sup> *See* 17 U.S.C. § 106(6).

<sup>21</sup> *See* WPPT, *supra* note 1, at art. 15(3) (“[A]ny Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all”); *See also* U.S. Ratification, *supra* note 1.

<sup>22</sup> *Letter of Submittal*, *supra* note 19.

<sup>23</sup> U.S. COPYRIGHT OFFICE, DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998, SUMMARY 2 (Dec. 1998) available at <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>24</sup> Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in various sections of 17 U.S.C. (1995)) (effective Feb. 1, 1996).

## Some Catching Up To Do

<sup>25</sup> See 17 U.S.C. §§ 106(6), 114(a).

<sup>26</sup> See *WPPT Contracting Parties*, *supra* note 9 (Canada, the European Communities, France, Germany, Italy, Mexico, the Netherlands, Spain, and the United Kingdom all signed on to Article 15(1) without limitation).

<sup>27</sup> See *Ratification by Japan*, available at [www.wipo.int/edocs](http://www.wipo.int/edocs) (declaring that Japan would “apply the provisions of Article 15(1) in respect of direct uses for broadcasting or for wire diffusion...but will not apply the provisions of Article 15(1) to the phonograms made available to the public...in a way that the public may access them from a place and a time individually chosen by them”).

<sup>28</sup> 17 U.S.C. §§ 106(4), 102(2)(a)(2) (1996).

<sup>29</sup> Before the DPRSRA and the DMCA, there were no sound recording performance rights.

<sup>30</sup> WPPT, *supra* note 1, art. 4(2) (“[T]he obligation [to provide equal treatment to citizens of signatory countries] does not apply to the extent that another contracting party makes use of the reservations permitted by Article 15(3) of this Treaty”).

<sup>31</sup> 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 (2004).

<sup>32</sup> See KRASILOVSKY & SHEMEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 73 (8th ed. 2000).

<sup>33</sup> See WIPO Treaties 1996, *supra* note 4, at 379.

<sup>34</sup> John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization – And the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1041, 1046 (2002) (internal citation omitted); see also *Woods v. Bourne Co.*, 60 F.3d 978, 983 (2d Cir. 1995).

<sup>35</sup> See generally MOSES AVALON, *CONFESSIONS OF A*

RECORD PRODUCER 237–40, 250 (2002) (discussing the financial struggles facing the record industry).

<sup>36</sup> See ASCAP, *Performing Right Payments*, [www.ascap.org/musicbiz/money-payments.html](http://www.ascap.org/musicbiz/money-payments.html) (last visited May 2, 2005).

<sup>37</sup> Press Release, Doretha Dixon, SoundExchange Announces its Fall 2004 Allocation of Over \$6,500,000.00 in Performance Royalties to Artists and Labels (Nov. 2004) available at [http://www.soundexchange.com/news/documents/Fall\\_2004\\_Dist\\_Press\\_Release.pdf](http://www.soundexchange.com/news/documents/Fall_2004_Dist_Press_Release.pdf) [hereinafter SoundExchange Royalties].

<sup>38</sup> See *IFPI's International Structure*, at [www.ifpi.org/site-content/about/structure.html](http://www.ifpi.org/site-content/about/structure.html) (last visited May 2, 2005); see also Joshua D. Levine, *Dancing to a New Tune, A Digital One: The Digital Performance Right in Sound Recordings Act of 1995*, 20 SETON HALL LEGIS. J. 624, 643–44 (1996) (reporting that roughly forty percent of all music distributed internationally comes from the United States).

<sup>39</sup> KRASILOVSKY & SHEMEL, *supra* note 32, at 73.

<sup>40</sup> 17 U.S.C. § 102(a)(2) (1996).

<sup>41</sup> Kettle, *supra* note 34, at 1073.

<sup>42</sup> SoundExchange administers such a system with the digital performance right: 45% to featured artists; 50% to sound recording copyright owners; 5% to nonfeatured musicians and vocalists. See Press Release, Doretha Dixon, U.S. Music Industry Votes for SoundExchange Spin-Off (Sept. 30, 2003), available at [www.soundexchange.com/news/2003\\_09\\_30.html](http://www.soundexchange.com/news/2003_09_30.html) [hereinafter SoundExchange Spin-Off].

<sup>43</sup> While the legal changes seem basic, starting the action may be difficult. The opposition by broadcasters is great; every legislator has at least one radio station in his or her constituency; only legislators from New York, Nashville, Los Angeles, or Austin are likely to represent record companies or recording artists. See Podolsky, *supra* note 16, at 684.

<sup>44</sup> See, e.g. Statement of Mr. Dean Kay on behalf of the American Society of Composers, Authors and Publishers Before the House Subcommittee on Courts and Intellectual Property, June 15, 2000, available at [www.ascap.org/legislation/kayonwebcasts.html](http://www.ascap.org/legislation/kayonwebcasts.html).

<sup>45</sup> See SoundExchange Royalties, *supra* note 37.

<sup>46</sup> SoundExchange Spin-Off, *supra* note 42.

<sup>47</sup> Critics may argue that separate organizations for musical work and sound recording performance rights may cause undue administrative expense in the case of songwriters who are also performers, but the interest in providing the fullest protection to performers and producers through a separate administrative body outweighs such costs.

<sup>48</sup> WIPO Treaties 1996, *supra* note 4, at 375.

<sup>49</sup> GOLDSTEIN, *supra* note 6, at 228.

<sup>50</sup> *Id.* at 229.

<sup>51</sup> SoundExchange has already entered into reciprocal agreements for digital performance royalties with performance rights organizations in the U.K., the Netherlands, and Ireland. See Press Release, SoundExchange and PPL Announce Historic Reciprocal Agreements (June 2004) available at [http://www.soundexchange.com/news/documents/PPL\\_SoundExchange\\_Press\\_Release.pdf](http://www.soundexchange.com/news/documents/PPL_SoundExchange_Press_Release.pdf).

## Some Catching Up To Do

# symposium

