

1975

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Recommended Citation

Kurlantzick, Lewis, "Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It" (1975).
Faculty Articles and Papers. 215.

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Citation: 43 Geo. Wash. L. Rev. 152 1974-1975



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A Public Performance Right in Recordings: How to Alter the Copyright System Without Improving It

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Federal copyright law extends public performance rights only to composers. Pursuant to these rights, composers are compensated for broadcasts and other public performances of their music or records using their music; record producers' earnings are limited to record sales. Whether public performance rights should be extended to record producers, although considered by Congress during its numerous attempt to revise the Copyright Act of 1909, remains an unresolved issue. Evaluating this issue in terms of economic theory and equitable and legal consequences, Professors Bard and Kurlantzick find no convincing argument for granting record producers such rights. Record public performance rights, it is contended, will not redress alleged injustices to

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Professors Bard and Kurlantzick wish to acknowledge the contributions of two economists, Professor Shorey Peterson, University of Michigan (Ret.) and Professor Marnie Mueller, Wesleyan University, who have reviewed the economic aspects of the article.

THE FOLLOWING AUTHORITIES ARE CITED AS INDICATED BELOW:

S. 1361, 93d Cong., 1st Sess. (1973) [hereinafter cited as Revision Bill].

S. SHEMEL & M. W. KRASILOVSKY, THIS BUSINESS OF MUSIC (rev. ed. 1971) [hereinafter cited as SHEMEL & KRASILOVSKY].

Hearings on S. 597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967) [hereinafter cited as Hearings on S. 597].

musical artists whose records continue to be broadcast long after the exhaustion of their sales potential. Composers, rather than record companies and performers, would be the most likely beneficiaries of such a revision. Any benefits that accrued would not be divided equally between performers and record companies, as contemplated by the supporters of the proposed legislation, but would be divided according to the relative bargaining positions of the parties. The authors contend that the only potential positive effect of a public performance right would be a slight increase in the production of classical records with concomitant benefit to classical record companies, and, perhaps, composers. It is feared, however, that such a restriction would increase incentive to payola. These considerations are important because public performance rights will likely be included in the Copyright Revision bill to be reintroduced in the 94th Congress. In the 93rd Congress, the bill was initially referred to the Senate Judiciary Committee and, after being reported out of that committee, was sent to the Senate Commerce Committee. On September 9, 1974, the Senate passed the measure without the public performance right provision, but the House failed to act. The authors refer to the bill as amended by the Senate Judiciary Committee, with the subsequent modifications by the Senate indicated where appropriate.

The Federal Copyright Act grants the creator of a musical idea the right to control three potential uses of his creation: Reproduction of the idea in written form—sheet music; use of the music to produce a record, tape, or movie soundtrack; and use of the music in a public performance.¹ The right to control the recording of copyrighted music is called the mechanical reproduction right, the right to control the use of the music in a movie soundtrack is called the synchronization right, and the right to control the use of copyrighted music in a public performance is called the public performance right. Via the public performance right, a music copyright holder may prohibit the public performance of his music for profit, whether by live musicians or through broadcast of a record using that music. Thus, under existing law, composers can demand compensation for the right to allow live artists to perform the copyrighted music in concerts or radio or television broadcasts, and for the right to broadcast records using their music.

Record producers, that is, performers and record companies, have sought analogous rights with respect to their product. They argue that unauthorized record duplication threatens their financial integrity and that uncompensated public performance of their records represents an expropriation by certain record users, principally broadcasters, of economic benefits to which they have a legitimate claim.

1. 17 U.S.C. §§ 1(a), (e) (1970).

They also claim that certain members of the record producer family, namely performers of classical and semi-classical music,² are particularly injured under the existing legal regime. To remedy these alleged injustices, record producers have demanded protection against unauthorized duplication of their recordings—"record piracy"—and the right to profit from the public performance of their recordings. The 1971 McClellan anti-piracy amendment granted temporary protection against unauthorized duplication, which Congress has since made permanent,³ and the latest version of the general Copyright Law Revision bill (Revision Bill), as introduced by Senator John McClellan (D-Ark.), would provide record producers a public performance right for their product.⁴ Limited federal protection of record producers against unauthorized reproduction of their products is justifiable. The lower production costs of duplicators permit them to undersell original record producers who must incur the expenses of recording a performance and must earn sufficient revenues from their successful records to compensate for losses suffered from unprofitable releases.⁵ But we oppose a public performance right for record producers.

The conflict between record producers and broadcasters regarding the appropriate measure of control record producers should exercise over their product was formalized a generation ago when efforts were made to establish a performance right for record producers through the judicial process. For example, in *Waring v. WDAS Broadcasting Station, Inc.*,⁶ Fred Waring sued a Philadelphia radio station under Pennsylvania law for unauthorized broadcast of records made by his orchestra. By agreement with the record company, Waring's records

2. "Classical" refers to "serious" music, which is commonly considered to include symphonies, chamber music, operas, choral works, oratorios, sonatas, and other recital pieces. See generally Anderson, *Editorially Speaking: Classipops*, STEREO REVIEW, June 1973, at 6. The term "semi-classical" has been contrived by the authors. It refers to recorded music which continues to be broadcast after the possibilities for sales of the record have been exhausted, essentially the programming which is featured on so-called "good music" stations such as WPAT in New York. Performers of this music, such as Stan Kenton, claim that they are particularly injured under current arrangements by the lack of a public performance right in the recordings. See text accompanying notes 150-52 *infra*.

3. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391, amended the Copyright Act to protect recordings against unauthorized duplication. The result is that for the first time copyright protection has been extended to the recorded performance or rendition of a musical composition in addition to the long standing protection afforded by the Copyright Act to the composition itself. See notes 62-66 *infra* and accompanying text. Congress has permanently protected record producers from record piracy. Act of Dec. 31, 1974, Pub. L. No. 93-573, 88 Stat. 1873.

4. Revision Bill §§ 106, 114. The version passed by the Senate did not grant record producers a public performance right.

5. In the authors' upcoming book, *Legal Protection for Recordings: Private Rights and the Public Interest*, they analyze the need for protection of recordings against duplication and define the dimensions of an optimal balance between the requirements of record producers for protection and the interests of the public in the widest dissemination of music at the lowest prices. There they reject most of the traditional arguments for copyright protection. They conclude that some measure of protection against unauthorized duplication is appropriate, but that record producers need less protection than they have demanded.

6. 327 Pa. 433, 194 A. 631 (1937).

bore the restrictive legend, "not licensed for radio broadcast." The Pennsylvania Supreme Court enjoined the broadcasts, relying on a number of grounds ranging from unfair competition to right of privacy. During the same period other suits were brought in other jurisdictions against unauthorized users of records, with mixed results.⁷ The last reported case involving purported common law performing rights was *R.C.A. Mfg. Co. v. Whiteman*,⁸ a federal diversity case factually indistinguishable from *Waring*. Applying New York law, Judge Learned Hand, consistent with his deep suspicion of state copyright power, refused to follow the *Waring* decision and ruled that any common law property of the record producer in the recorded performances ended with the record's sale, thereby making the restrictive legend on the label legally ineffective.

The lack of suits since *Whiteman* may have resulted from record producers' pessimistic evaluation of their opportunity for legal success or a judgment that the sales promotional benefits of unrestricted radio play of new records outweigh potential losses attributable to uncontrolled and unremunerated record broadcasts. Furthermore, record companies have not tried to establish a public performance right through state legislation as they successfully did with respect to unauthorized record duplication.⁹ Additionally, while *Waring* presum-

7. *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939) (suit to enjoin the playing of electrical transcriptions which had never been sold to the public); *Noble v. One Sixty Commonwealth Ave., Inc.*, 19 F. Supp. 671 (D. Mass. 1937) (performer was denied an injunction against nightclub broadcasts because his rights, if any, had been assigned to recorder); *Crumit v. Marcus Loew Booking Agency*, 162 Misc. 225, 293 N.Y. Supp. 63 (Sup. Ct. 1936) (performer denied recovery because his rights, if any, were assigned to recorder).

Several cases on unlicensed broadcast analyze the issue in terms of the enforceability of equitable servitudes on chattels. See generally Chafee, *The Music Goes Round and Round: Equitable Servitudes on Chattels*, 69 HARV. L. REV. 1250 (1956); Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928).

8. 114 F.2d 86 (2d Cir. 1940), *rev'g* 28 F. Supp. 787 (S.D.N.Y. 1939), *cert. denied*, 311 U.S. 712 (1940). *But cf.* *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

9. As of June 1, 1974, twenty-four states had enacted legislation which makes the unauthorized manufacture or sale of duplicate recordings a crime: ARIZONA REV. STAT. ANN. § 13-1024 (Supp. 1973); ARKANSAS STAT. ANN. §§ 41-4617 to 41-4621 (Supp. 1973); CAL. PENAL CODE ANN. § 653h (West 1970); Conn. Public Act No. 74-160 (Reg. Sess. 1974); FLA. STAT. ANN. § 543.041 (1972); Indiana House Act No. 1192, *amending* IND. CODE OF 1971, 35-17, by adding a new chapter 7 (Reg. Sess. 1974); Kentucky House Bill No. 378 (Reg. Sess. 1974); LA. REV. STAT. tit. 14, §§ 223-223.4 (Supp. 1974); Ch. 657, Laws of Md. of 1973, MD. ANN. CODE art. 27, § 467A; MASS. GEN. LAWS ANN. ch. 266, § 143 (Supp. 1974-75); MINN. STAT. ANN. §§ 325.841-325.844 (Supp. 1974); Miss. Senate Bill No. 2105 (1974); Legislative Bill 683, Nebraska Legislature, 1974; NEV. REV. STAT. §§ 205, 217 (Ch. 636) (1973); N.M. STAT. ANN. § 40A-16-41 (House bill 72, enacted 1974); N.Y. GEN. BUS. LAW § 561 (McKinney 1968); N.C. GEN. STAT. §§ 14-432 to 14-437 (Ch. 1279) (Sess. Laws 1974); ORE. REV. STAT. 164.865 (Ch. 747) (1973); PA. STAT. ANN. tit. 18, § 4116 (Supp. 1973); TENN. CODE ANN. §§ 39-4244 to 39-4250 (Supp. 1971); TEXAS REV. CIV. STAT. ANN. art. 9012 (Supp. 1974); Ch. 17 (§§ 13-10-1 to 13-10-6), 1973 Utah Laws; VA. CODE ANN. §§ 59.1-41.1 to 59.1-41.6 (1973); Ch. 100, 1974 Washington

ably still represents the law in Pennsylvania, there have been no attempts in any state to use the authority of that decision to collect performance right fees for recordings through establishment of a licensing system.¹⁰ On the contrary, it has been broadcasters who have used legislative action to fight *Waring*. Through strenuous lobbying, broadcasters have succeeded in persuading several states to enact laws abrogating any common law performing rights in recordings once the records are publicly sold.¹¹

Moreover, state recognition of performance rights in records may be constitutionally preempted by the Federal Copyright Act and may also violate the commerce clause. Section 1(e) of the Copyright Act gives the proprietor of a musical composition copyright exclusive control over public performance for profit. State recognition of a performance right would involve a significant dilution of the control over performance which Congress vested in the proprietor of the composition.¹² The Federal Copyright Act should therefore be held to preclude state recognition of a performance right in a recording of a copyrighted work. Furthermore, state recognition of a performance right, particularly as applied to the broadcasting media which operates across state lines, might conceivably constitute undue interference with interstate commerce.¹³ The recent Supreme Court decision in

Laws. New Hampshire has a civil statute which prohibits the unauthorized manufacture or sale of duplicate recordings. N.H. REV. STAT. ANN. §§ 352-1A: 1-4 (Supp. 1973).

10. Diamond, *Copyright Problems of the Phonograph Record Industry*, 15 VAND. L. REV. 419, 431 (1962).

11. FLA. STAT. ANN. § 543.02 (1972); N.C. GEN. STAT. § 66-28 (1965) (overruling *Waring v. Dunlea*); S.C. CODE ANN. §§ 66-101 (1962). Interestingly, duplicators have argued that the state statutes passed in response to *Waring* should be construed to sanction unauthorized duplication. See Helfer, *Copyright Revision and the Unauthorized Duplication of Phonograph Records—A New Statute and the Old Problems: A Job Half Done*, 14 BULL. COPY. SOC'Y 137, 150 (1966). The two courts which have considered the claim, however, have quite correctly rejected this construction. *Liberty UA, Inc. v. Eastern Tape Corp.*, 11 N.C. App. 20, 180 S.E.2d 414, appeal dismissed, 278 N.C. 702, 181 S.E.2d 600 (1971); *Columbia Broadcasting System, Inc. v. Custom Recording Co.*, 189 S.E.2d 305, 174 U.S.P.Q. 309 (S.C. 1972).

12. See Kalodner & Vance, *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1122 (1959). See generally Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 CONN. L. REV. 204, 228-36 (1972).

The preemptive effect of section 1(e) of the Copyright Act, 17 U.S.C. § 1(e) (1970), should not extend to state-created public performance rights in a recording of a work in the public domain. Works become part of the public domain either after expiration of the copyright or if no copyright was obtained. Thus there can be no dilution of the copyright proprietor's rights. The Act's purpose in providing incentives for composers has already been satisfied. One might argue that recognition of a right to control the performance of a recording of a musical work would impair the congressional policy in support of maximum public dedication of copyrighted works after the expiry of the copyright. Even if record producers are given a public performance right, however, the public still will have access to the work through sheet music and purchase of recordings, and it is probable that it will usually have access through radio performances of the record, though at a higher cost to the broadcaster. But see Kalodner & Vance, *supra*, 72 HARV. L. REV. at 1125-26. Cf. *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (2d Cir. 1952).

The commerce clause, though, would apply equally to recordings in the public domain and to recordings protected by the Copyright Act.

13. See generally Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, *supra* note 12, 5 CONN. L. REV. at 236-46.

Goldstein v. California,¹⁴ upholding the constitutionality of state anti-piracy legislation, does not necessarily imply analogous state power with respect to public performance rights. Though the Copyright Act might be interpreted to give composers exclusive authority over the duplication of records using their copyrighted music, it does not explicitly provide such powers. By contrast, state legislation granting record producers a public performance right would directly conflict with section 1(e) of the Copyright Act which explicitly grants composers a public performance right.¹⁵ Moreover, since radio and television broadcasters are the predominant public performers of recorded music the disruption of interstate commerce attributable to state recognition of a record public performance right would be considerably more severe than that to be expected from state anti-piracy legislation.

The conflict has now shifted to Congress and its consideration of the Revision Bill. Though certain factual ambiguities render it impossible to make completely unequivocal judgments, under the most plausible assumptions the argument for granting a federal public performance right to record producers is unconvincing. Although such action might decrease the revenues collected by composers from broadcasters, it probably would increase the aggregate revenues collected by both composers¹⁶ and record companies from broadcasters. This initial distribution, however, would be economically unstable. The ultimate distribution of the revenues among composers, record companies and performers, generated by the granting of a second performance right, would depend upon the resolution of a complex set of economic and legal factors. None of the possible permutations, however, is clearly preferable to the existing distribution. Furthermore, the establishment of a record public performance right would not materially assist certain categories of performers—classical and semi-classical musicians—who allegedly are injured under current arrangements.

Evaluation of the argument for such a right requires careful application of price theory, resolution of certain factual issues, and some difficult value judgments. Economic analysis is necessary to determine the economic relationships among the interested parties and the

14. 412 U.S. 546 (1973).

15. 17 U.S.C. § 1(e) (1970).

16. Unless otherwise indicated by the context, the term "composer" includes both the creator of the music and the lyricist, as well as the music publisher, who usually hold the copyright and shares mechanical reproduction and public performance fees with the songwriter(s). While there may be conflicts among these groups, cf. SHEMEL & KRASILOVSKY 131-32, they generally share a common interest in the maximization of mechanical reproduction and public performance fees. Depending on the details of corporate organization, there may, however, be situations where the publisher's concern for maximizing royalties is not as great as the songwriter's. See text accompanying notes 18-19 *infra*.

effect on each of giving record producers a public performance right for their product in addition to the extant composers' public performance right in the underlying music. Furthermore, one must consider the additional costs of collecting and allocating license fees and the economic effect upon performers, composers, broadcasters, the listening public, and private record buyers. Particular attention must be given to the special claims made by classical music performers and classical radio stations. Finally, the significance of copyright practices in other countries must be considered.

Granting a public performance right to record producers, a group allegedly injured under the existing legal regime, represents a legislative effort to redistribute the revenues attributable to the sale and public performance of records for their benefit. The Revision Bill also attempts to equally divide the expected benefits between record companies and performers.¹⁷ Under all conceivable circumstances, the ultimate division of record public performance revenues among composers, record companies and performers will not conform to that envisioned by the Revision Bill.

Since the establishment of a second public performance right will redistribute some of the existing income derived from record production, the gains by one or more groups will be at the expense of other groups. In addition to record companies and performers, the impact of the legislation potentially affects the interests of broadcasters, composers, advertisers, the listening audience and private record purchasers. Our analysis suggests that record companies will derive short term gains, though considerably less than would seem probable based on the terms of the proposed legislation. Record companies, however, would not gain in the long run. Performers should gain through increased employment, though these gains will not be of particular benefit to classical and semi-classical performers. Advertisers and radio listeners will not be affected, composers and private record buyers will benefit, and broadcasters will be injured. Therefore, evaluation of the wisdom of establishing a public performance right for records requires the assignment of priorities to the varied interest groups making claim to the benefits conferred by the production and use of recorded music.

The specific redistribution of benefits and losses ultimately depends upon the broadcasters' response to the increased costs of playing records that would follow from granting record companies a public performance right in addition to that now enjoyed by composers. Broadcasters probably will absorb these costs without reducing their demand for record licenses and, if so, both composers and record purchasers will gain at the broadcasters' expense, though, in the short run, the new public performance right will generate additional revenues for record producers. Eventually, composers should capture a portion of these new revenues; additional revenues not so captured should be dissipated by lower record prices resulting from increased record production by existing and new record companies.

17. See note 82 *infra* and accompanying text.

To the extent these predictions are erroneous, and record producers do achieve some net increase in their income, this additional income will not be divided between record companies and performers according to the formula established by the Revision Bill. Therefore, the fundamental policy issue is whether the losses to broadcasters can be justified by any benefits to record producers, composers, and private record buyers. Additionally, the consistency of such a redistribution with certain antitrust decrees imposed upon ASCAP also must be considered.

Although unlikely, if the imposition of an additional license fee for record producers of the magnitude contemplated by the Revision Bill reduces broadcasters' demand for recorded music, the problem increases in complexity. Record producers would gain and broadcasters would lose. The impact upon composers would be more difficult to predict. It would depend upon three considerations: the extent to which composers are maximizing their revenues under the existing regime; the extent to which the new price to broadcasters resulting from the imposition of an additional license fee for record producers departs from the price that maximizes the joint revenues of composers and record producers; and the ability of composers to capture through exercise of their mechanical reproduction rights some of the new revenues earned by record producers pursuant to their public performance right. Under existing law administrative restraints and an antitrust consent decree force composers to set their license fees below the maximization point. The advent of a public performance right for record producers will raise the price and cost of recorded music to broadcasters, and any increase in the total license fees payable by broadcasters initially must reduce the public performance earnings of composers. If the new price of broadcasting recorded music increases the joint revenues of composers and record producers above the revenues that composers could earn if they were the sole owners of the public performance right, however, some of the record producers' earnings will be at the expense of broadcasters rather than composers. Indeed, if the establishment of a second public performance right does increase the joint revenues of composers and record producers, composers could profit. This would occur if composers balance their public performance losses by capturing some of the record producers' public performance revenues through increases in the revenues composers received from record companies for the privilege of recording their music. The composers' ultimate position will depend, therefore, upon the extent to which the second public performance right permits record producers to extract revenues from broadcasters that composers cannot get by themselves, and the extent to which composers can balance their public performance losses by capturing record producers'

public performance revenues through increases in mechanical reproduction fees.

Amending the Copyright Act confronts an important principle which also is relevant to the formulation of copyright policy generally, indeed, to all economic regulation. At times there are desires to restructure the benefits of copyright law to favor creators—authors, composers, and performers—more, and the commercial participants in the creative and distribution process, such as publishers, record companies and broadcasters, less. It may be that authors and artists “deserve” a larger share of the revenues generated by the exploitation of their work, but it may not be possible to achieve this through changes in the copyright law. Whatever the initial allocation of rights in creative work under the law, a large part of these rights must be assigned to others in order to render them capable of returning significant income to their original holders. The author must usually deal with a publisher, the performer with a record company, etc. The author’s success will depend less on the statutory rights which he initially possesses than on the variety of economic factors which determine his relative bargaining strength. In most circumstances, attempts to strengthen a weak bargaining position through granting an author or artist additional legal rights which affect one part of the economic relationship with a publisher or record company may be frustrated by a compensating adjustment in the remaining relationship.¹⁸

Certainly our analysis of the possible results from granting record companies and performers a public performance right in their records is a prime example of this phenomenon. Another example may be the experience of composers and lyricists who write for television and the movies. The Copyright Act clearly permits the composer of such music to own the copyright thereon. In practice, however, the television or movie producer takes the copyright out in his own name. Due to their superior bargaining position, producers have been able to insist on standard terms which provide that the composer expressly characterize himself as an employee for hire, that the composer perpetually relinquish all rights to the composition, and that the composer grant all publication rights to a publisher selected by the producer. Composers have complained, to no avail, about these practices, insisting that these publishers do not fully exploit the compositions, but, rather, are only interested in them to the extent that they enhance the value of the television program or movie into which they are integrated. Recently, one of the major television producers, CBS, agreed to alter these terms to permit the composer to hold the copyright on the music. Under the new arrangements the composer will retain all rights, except that CBS will receive a 50 percent share of the ASCAP performance money for network performances plus synchronization rights.¹⁹ This agreement, however, was not caused by

18. See generally ECONOMIC COUNCIL OF CANADA, REPORT ON INTELLECTUAL AND INDUSTRIAL PROPERTY 145-47 (1971); Keyes, *Letter from Canada, COPYRIGHT*, June 1972, at 137.

19. N.Y. Times, Sept. 27, 1972, at 95, col. 1; Variety, Sept. 27, 1972, at 45.

any change in the copyright law. Rather, it was due to an increase in the composers' bargaining position stemming from their filing an anti-trust suit against the producers. The suit charged the producers with unlawfully refusing to contract with composers except on the standard terms noted above, in violation of sections 1 and 2 of the Sherman Act.²⁰

It is possible to alter existing economic relationships, but in most instances the process is far more difficult and complex than would appear. Rarely can a permanent change be accomplished through a single, simple legislative action. Supply of and demand for music and performers capable of recording songs with wide appeal to record buyers and broadcasters constantly exert pressure to readjust legislative schemes inconsistent with these economic forces. Often these forces induce the development of business practices better able to exploit the economic advantages of particular interests. The effectiveness of the legal scheme depends upon the comprehensiveness of the legislative arrangements, and the vigor with which public and interested private parties enforce these arrangements. If complete readjustments to economic realities are not possible through existing institutions, and if these institutions cannot be changed, the result may be a permanent disequilibrium always threatening to undermine the official arrangements via legal and illegal means. Since enforcing a legal regime inconsistent with prevailing economic forces always exacts substantial social costs, these situations should be avoided unless equitable and economic benefits are clear and substantial.

Legal Framework

Composers now earn most of their income from licensing broadcasters to perform publicly records using their copyrighted music. They also earn substantial revenues through licensing record companies to record their music pursuant to their mechanical reproduction right. Since performances must be recorded before records can be broadcast, the mechanical reproduction right is more powerful than the public performance right, and for this reason, as we shall demonstrate, the composer, as sole owner of the mechanical reproduction right, should be able to appropriate much of the revenues that record producers might earn through the proposed record public performance right. A thorough understanding of the economic implications of establishing a record public performance right, therefore, requires elucidation of both mechanical reproduction and public performance rights.

20. *Bernstein v. Universal Pictures, Inc.*, Civil No. 72-542 (S.D.N.Y., filed Feb. 7, 1972).

Composers also earn some revenues from sheet music although these represent only a small percentage of composers' total returns from their copyrighted compositions. Usually the copyright on a musical composition is held in the name of the music publisher rather than the composer, with the division of mechanical reproduction royalties between composers and publishers specified by the contract establishing their mutual rights and duties. Generally they are divided evenly so that of every 2 cents paid to the publisher, the composer will be entitled to 1 cent.²¹ Publishers, like composers, collect their public performance revenues through joining a public performance licensing association.

The Mechanical Reproduction Right

The mechanical reproduction right permits composers to control the initial recording of their music and to profit from all subsequent recordings. The composer's mechanical reproduction right is subject to compulsory licensing which limits the degree of the composer's control in this regard. Under the compulsory licensing provisions, whenever the proprietor of the copyright on a musical composition agrees to a recording of the composition, anyone else may record the song upon following the statutory formalities and paying the prescribed fee of 2 cents per record to the copyright holder.²² Record companies usually obtain voluntary licenses²³ which permit them to avoid the burdensome statutory formalities.²⁴ Negotiated licenses also permit record

21. See Songwriter Contract Form of American Guild of Authors and Composers, ¶¶ 4(g), (h), in SHELLEY & KRASILOVSKY 517; *id.* at 179-80.

22. 17 U.S.C. § 1(e) (1970) provides in pertinent part:

[A]s a condition of extending the copyright control to . . . mechanical reproductions, . . . whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work [e.g. piano rolls], any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the 20th day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalties shall be due on the parts manufactured during any month upon the 20th of the next succeeding month.

17 U.S.C. § 101(e) (1970) provides in part:

[W]hensoever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice . . .

23. See, e.g., Mechanical License, in SHELLEY & KRASILOVSKY 534; Form 10.1, Mechanical License, in RECORD AND MUSIC PUBLISHING FORMS OF AGREEMENT IN CURRENT USE 431 (I. Spiegel & J. Cooper eds. 1971).

24. For example, payments can be made quarterly rather than monthly, as authorized by the statute. Moreover, the record company is relieved of its obligation under section 101(e) to file a notice of intention to use. See generally Diamond, *Copyright Problems of the Phonograph Record Industry*, 15 VAND L. REV. 419, 422 (1962); Seton, *Music—Domestic Phonograph Records*, in THE BUSINESS AND LAW OF MUSIC 22-23 (J. Taubman ed. 1965).

companies to pay royalties only on records sold rather than on those manufactured and sometimes composers agree to accept less than 2 cents per record.²⁵ It is difficult to determine the frequency of arrangements in which record companies do not pay the full 2 cents per song on a newly released full-price album, but there are at least two recurrent situations in which they regularly pay less. The first is when a number of songs from the same publisher are to be used in a particular album, and the second is when the featured performer is also the songwriter—an increasingly common phenomenon. In both situations the royalty is likely to be 1.5 cents per song.²⁶

The Revision Bill continues the existing compulsory license scheme with minor modifications.²⁷ Most importantly, the Revision Bill increases the statutory rate to either 3 cents or 0.75 cent per minute of playing time, whichever amount is larger.²⁸ Under the proposed legislation royalties are to be paid quarterly on records "made and distributed" rather than on those "manufactured" as provided by the present law. The Revision Bill also slightly extends the period of absolute composer control. Under the present Act the license is triggered when the owner of the musical copyright records the song or when he "permits" or "knowingly acquiesces" in the recording by another. Under the Revision Bill, however, the right of other companies to obtain compulsory licenses is delayed until the initial distribution of records to the public.

Composers' Public Performance Right

The Revision Bill slightly expands the categories of music users who are liable to the composers' public performance right. Under the current Copyright Act, the composers' right to control the public perform-

25. See *Hearings on S. 597*, pt. 2, at 410-16.

26. See, e.g., Form 1.1, Exclusive Artist's Recording Agreement, ¶ 16, in Spiegel & Cooper, *supra* note 23, at 7-8. In the case of songs of more than normal length, where the duration of use on a recording is more than approximately 3.5 minutes, the license fee commonly exceeds 2 cents. Compositions of more than 5 minutes duration are regularly licensed at more than 2 cents by the Harry Fox Agency, which represents approximately 80 percent of the popular music publishers. The extra compensation is ordinarily at the rate of 0.5 cent for each additional minute or fraction thereof. SHEMEL & KRASILOVSKY 181-82.

Classical composition licenses are generally granted at the rate of 0.25 cent for each minute of playing time. In no event, however, can the license fee be less than 2 cents. Thus, for a 40 minute album of a copyrighted serious composition a record company would pay a mechanical license fee of 10 cents. S. SHEMEL & M. KRASILOVSKY, *MORE ABOUT THIS BUSINESS OF MUSIC* 27 (1967).

27. Revision Bill § 115.

28. Revision Bill § 115(c) (2), as amended by the Senate Judiciary Committee, June 11, 1974. When originally introduced in 1965, the Revision Bill called for an increase to 3 cents in the statutory royalty. Opposition from the record industry led to the compromise figure of 2.5 cents, which was the royalty contained in the bill which passed the House in 1967. See generally H.R. REP. NO. 83, 90th Cong., 1st Sess. 66-75 (1967). The Revision Bill as originally introduced in the 93d Congress contained the 2.5 cents figure.

ance of their music includes all performances "for profit."²⁹ Thus, composers are entitled to collect compensation when their copyrighted music, including a recording incorporating that music, is broadcast over radio or television.

Though "jukeboxes" are operated for profit, section 1(e) of the Copyright Act exempts "[t]he reproduction or rendition of a musical composition by or upon coin-operated machines" from payment of public performance fees to composers "unless a fee is charged for admission to the place where such reproduction or rendition occurs."³⁰ In 1909, when the current Copyright Act was enacted, coin-operated music machines apparently were a novelty of little economic consequence, and the exemption was included at the last minute with almost no discussion.³¹ Despite repeated hearings and numerous bills aimed at its repeal or modification,³² the exemption has never been dislodged.³³ In the past the record industry opposed its repeal on two grounds. First, jukebox operators purchase a substantial number of records each year, and the record companies accordingly opposed any change which might cut into their sales volume. Second, they argued that if the jukebox operator is compelled to pay the composer, he also should have to pay the performers and record company who contributed to the final product.³⁴

The Revision Bill removes the exemption and substitutes a compulsory licensing system under which jukebox operators are obligated to pay an annual fee of \$8 per "coin-operated phonorecord player."³⁵

29. 17 U.S.C. § 1(e) (1970). This section provides in pertinent part: "Any person entitled thereto . . . shall have the exclusive right . . . [t]o perform the copyrighted work publicly for profit if it be a musical composition" Throughout this article the existence and validity of composers' public performance right and revenues is assumed.

30. *Id.*

31. REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., COPYRIGHT LAW REVISION, REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW TO THE HOUSE COMM. ON THE JUDICIARY 32 (Comm. Print 1961). See Finkelstein, *The Copyright Hang-up: Do We Hang Together or Separately*, 3 PERFORMING ARTS REV. 405, 422 (1972).

The jukebox exception did not appear in any of the bills considered at the hearings on the entire Copyright Act of 1909, and there is no mention of it in the hearings. The only explanation appearing in the congressional proceedings for the jukebox exception is the terse statement in the report of the House committee which reported out the 1909 bill:

The exception regarding the public performance of a musical composition upon coin-operated machines in a place where an admission fee is not charged is understood to be satisfactory to the composers and proprietors of musical copyrights. A representative of one of the largest musical publishing houses in the country stated that the publisher finds the so-called penny parlor of first assistance as an advertising medium.

H.R. REP. NO. 2222, 60th Cong., 2d Sess. 9 (1909).

32. See, e.g., H.R. REP. NO. 83, 90th Cong., 1st Sess., at 75 (1967); S. Doc. No. 155, 84th Cong., 2d Sess. 20, 33 (1956).

33. A useful compilation of the arguments of proponents and opponents of repeal of the exemption is contained in A REVIEW OF THE EVIDENCE RELATING TO THE COPYRIGHT LAW AS IT APPLIES TO JUKEBOXES, S. Doc. No. 155, 84th Cong., 2d Sess. (1956). This document contains a succinct description of the structure of the jukebox industry. *Id.* at 20-21.

34. See *id.* at 30-31.

35. Revision Bill § 116(b) (1) (A), as amended by Senate Judiciary Committee, June 11, 1974. As originally introduced in the 93d Congress, the Bill called

One-eighth of these fees is allocated to the recordings' copyright owners, that is, the record companies, and the performers of recordings, and the remainder is distributed to the owners of copyright in musical works, the composers. The fees allocated to the record companies and performers are to be divided equally.³⁶ Although jukebox operation is generally a small business, the Revision Bill probably will not result in a significant reduction in the number of jukeboxes since the statutory fee is relatively small when compared with the gross income per machine.³⁷

The Revision Bill also enlarges the range of music uses subject to the public performance right in music. Currently, the public performance right applies only to performances "for profit." The bill eliminates the "for profit" limitation and substitutes specific exemptions. The net effect is to require "public" or "educational" broadcasters who do not now pay public performance fees to obtain permission and pay performance royalties.

Composers' and publishers' public performance rights are exercised through a performing rights organization. The two principal organizations³⁸ are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI). SESAC, Inc. is a third such organization, though much smaller than ASCAP and BMI. ASCAP, formed in 1914, is the oldest organization. BMI was formed by broadcasters in 1940 in response to a dispute between ASCAP and the broadcast industry.³⁹ ASCAP and BMI function as clearinghouses for the licensing of music performance rights. The broadcasters' need for ready access to virtually the entire body of copyrighted music, the huge number of copyrighted compositions and the number of separate performances of such compositions each year, the impracticability of negotiating individual licenses for each com-

for an annual payment of \$9 per jukebox with one-ninth of the fees to be distributed to record companies and performers, and the remainder to the owners of copyright in the underlying musical works.

36. Revision Bill §§ 116(c) (3) (B), 114 (f) (the version passed by the Senate deleted this provision).

37. See H.R. REP. NO. 83, 90th Cong., 1st Sess., 82-83 (1967) (average operator annually grosses roughly \$1,000 per box).

38. The United States is unusual in having more than one performing rights organization. In most other countries the common pattern is a single organization which is subject to some measure of public regulation. In England, for example, the Performing Right Society, Ltd. administers the performance right in music and its actions are subject to review by a Performing Right Tribunal. See Copyright Act of 1956, 4 & 5 Eliz. 2, c.74, §§ 23-30.

39. Apparently, BMI was officially incorporated in 1939, but did not start its operations until 1940. Letter from Edward M. Cramer, President of BMI, to Lewis Kurlantzick, Aug. 6, 1973. For a short history of ASCAP and the rise of BMI, see B. KAPLAN & R. BROWN, CASES ON COPYRIGHT 424-441 (1960); Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, 7 COPYRIGHT PROBLEMS ANALYZED 69 (1951); Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 LAW & CONTEMP. PROB. 275 (1954).

position, and the inability of composers to effectively enforce their rights on an individual basis combine to require a central agency to license performance of copyrighted music. ASCAP and BMI sell licenses, monitor unauthorized users to discover copyright violations, bring infringement actions when unlicensed use is discovered, take samples to determine the relative frequency with which various compositions are used, and distribute revenues to composers and music publishers.⁴⁰ Since at one time or another, almost every station will wish to use compositions which are in the repertoire of one of the performing rights organizations, virtually all radio and television broadcasters operate with licenses from all three licensing agencies. ASCAP presently charges radio stations 1.725 percent of net advertising receipts for a blanket license to use any of ASCAP's repertoire and BMI charges 1.7 percent for a similar license. Although per program licenses which also permit use of the entire repertoire are available, broadcasters almost always take blanket licenses.⁴¹ Under a blanket license the licensee is permitted unlimited use of the organization's entire repertoire for a fee based on a percentage of annual net advertising receipts.

Compositions from a musical play or opera may be used in two ways. The music may be performed alone—the non-dramatic or so-called “small” rights—or the entire production may be performed—the dramatic or “grand” rights. The performing rights organizations license the right to perform the music, but not the right to perform the entire production from which the music derived. Thus, if a radio or television station, or a dramatic society, wished to perform a musical comedy it would have to obtain a license from the proprietor of the dramatic right. Recent cases involving concert performances of songs from the show “Jesus Christ Superstar” illustrate the difficulties of drawing the line between non-dramatic and dramatic rights.⁴²

Both functional considerations and certain antitrust consent decrees to which both major licensing organizations are subject⁴³ significantly

40. For an explanation of the workings of ASCAP and BMI, see SHELLEY & KRASILOVSKY 135-52; Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, note 39 *supra*; Finkelstein, *ASCAP as an Example of the Clearing House System in Operation*, 14 BULL. COPY. SOC'Y 2 (1966); Kleinfeld, *Name That Tune: If Joe Schmieg Can't Probably Nobody Can*, Wall Street J., Dec. 14, 1972, at 1, col. 4.

41. The per program licensee pays a specified fee for each program in which any of the licensor's music is performed. This fee is a percentage of the net advertising receipts of the program involved.

42. See, e.g., *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50 (2d Cir. 1972). The presentation of the whole or part of a musical play is usually administered by the writers, pursuant to rights reserved to them by Dramatists' Guild contracts. With respect to most music publishers who publish show music, the copyright is maintained in the name of the writer; accordingly, publishers do not acquire dramatic rights. In many instances, shows previously produced on the Broadway stage are licensed by writers' agents to amateur and stock groups and to television for dramatic performances. SHELLEY & KRASILOVSKY 151-52.

43. *United States v. American Soc'y of Composers, Authors, and Publishers*, [1940-1943] Trade Cas. ¶ 56,104 (S.D.N.Y. 1941), *decree amended*, [1950-1951] Trade Cas. ¶ 62,595 (S.D.N.Y. 1950), *decree amended*, [1960] Trade Cas. ¶

limit the capacity of these organizations to maximize the earnings of composers through exercise of their public performance rights. As previously mentioned, the administrative problems associated with making a huge number of individual copyrighted compositions available to a large number of users demand some form of central bulk licensing of music, that is, broadcasters must be licensed to use the entire repertoire of the performing rights organization rather than be charged fees for use of individual compositions.⁴⁴ The large number of users and the even greater number of copyrighted compositions require performing rights societies to establish licensing rates through collective bargaining with representatives of the major segments of the broadcast industry.⁴⁵ As of January 1, 1971, there were 687 commercial TV stations, 4250 commercial AM radio stations, and 2122 commercial FM radio stations on the air in the United States.⁴⁶ A large percentage of the revenues of both ASCAP and BMI is derived from a small number of users; perhaps 80 to 85 percent of revenues comes from 15 to 20 percent of licensees. These licensees are primarily the commercial AM stations and the commercial TV stations. While TV stations account for the largest portion of revenues from the licensing of music, radio broadcasting is more relevant to this article because radio stations are the principal large scale users of recordings. Ap-

69,612 (S.D.N.Y.); *United States v. Broadcast Music, Inc.*, [1940-1943] Trade Cas. ¶ 56,096 (E.D. Wis. 1941), *decree amended*, [1966] Trade Cas. ¶ 71,941 (S.D.N.Y.).

44. The most succinct statement of the need for bulk licensing by a central licensing agency is probably found in an amicus curiae brief filed by the Solicitor General in a case involving an antitrust challenge to ASCAP and its licensing methods:

The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music.

If this market is to function at all, there must be—at least with respect to licensing the performance of recorded music—some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them. . . . And because users' requirements for separate pieces are continuous, the volume of demand enormous, and the value of each single performance small, separate negotiations on a per piece basis are not practicable. There is simply no escaping, as a practical matter, the licensing of the works in bulk.

Brief for the United States as Amicus Curiae on the Petition for Certiorari at 10-11. *K-91, Inc. v. Gershwin Publ. Corp.*, 372 F.2d 1 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968).

45. See, e.g., Finkelstein, *Antitrust Laws and the Arts*, in CONFERENCE ON THE ARTS, PUBLISHING, AND THE LAW 55, 58 (U. Chi. Law School Conference Ser. No. 10, 1952); Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, *supra* note 39, at 275, 288. Other users usually negotiate through their respective associations such as the American Hotel Association and the National Association of Ballroom Operators.

46. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1972, at 496.

proximately 75 percent of radio broadcasting is devoted to the programming of recorded music.⁴⁷ Radio stations are represented by the All-Industry Radio Music License Committee.⁴⁸

Any combination of a large number of competing products into a single sales unit is inherently anticompetitive and potentially dangerous. The dangers of price fixing, price discrimination and tying are inherent in such arrangements. Clearinghouses which pool composers' public performance rights for wholesale supply to music users are no exception. The resulting problems are analogous to those created by patent pooling⁴⁹ and the package licensing of patents with percentage-of-sales royalties.⁵⁰ The risks of eliminating bargaining between individual copyright holders and individual broadcasters may be less significant with respect to records than other products, however, since records are not completely fungible commodities. To a considerable extent they are unique products not easily substituted for each other in response to small price changes.⁵¹

Despite their uniqueness, records are substantially interchangeable and the concentration of virtually the entire supply of copyrighted music in a single entity affords the composers a powerful bargaining position vis-a-vis potential users. This power has induced economic and legal reactions by music users. In 1940-41, a bitter conflict developed between ASCAP and the broadcast industry, at that time the strongest and best organized customer for ASCAP's music, over the size and method of calculating royalties. ASCAP music was not played over the air for almost a year. One result of that conflict was the establishment by the broadcast industry of BMI as an alternative source of broadcast music. Another was the filing of civil antitrust complaints against both ASCAP and BMI. The complaints charged these organizations, *inter alia*, with price fixing, price discrimination, and insistence upon blanket licenses which did not establish a direct relationship between license fees and actual use of copyrighted music. There were also extensive criticisms by composers and music publishers of ASCAP's internal organization, including the requirements for

47. See C. Corry, *The Phonograph Record Industry: An Economic Study* 99 (M-150 Lib. of Cong. Leg. Ref. Service, Feb. 9, 1965); *Hearings on S. 597*, pt. 4, at 1344 & n.21; *id.*, pt. 2, at 481, 485-93.

48. *New ASCAP Agreement Gives Radio Big Break*, BROADCASTING, Dec. 11, 1972, at 9. The All-Industry Radio Music License Committee represents approximately 1200 stations. The Committee-recommended agreements, however, have historically been accepted by virtually all stations—whether or not directly represented by the Committee. *Id.*

49. See, e.g., *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945); *Standard Oil Co. (Ind.) v. United States*, 283 U.S. 163 (1931).

50. See, e.g., *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969). See generally Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW & CONTEMP. PROB. 294, 297-98 (1954); Brief for the United States as Amicus Curiae on the Petition for Certiorari, K-91, Inc. v. Gershwin Publ. Corp., 372 F.2d 1 (9th Cir. 1967).

51. See Finkelstein, *Antitrust Laws and the Arts*, *supra* note 45, at 67:

There is no competition between catalogues of songs such as there is between commodities. One may choose to buy steel or automobiles from any one of a number of companies. But a musical program must be balanced and must include works from all repertoires that contain compositions demanded by the public.

membership and the methods used in determining the distribution of license fees.

As a result of these complaints, both performance rights organizations entered into consent decrees designed to curb their economic power. These decrees, as amended, remain in force⁵² and constitute a prime restraint on ASCAP's and BMI's behavior with respect to the sale of public performance rights. Both organizations are prohibited from discriminating in rates between licensees similarly situated.⁵³ This bars the kind of price discrimination that would permit ASCAP to vary its rates for use of its music in accordance with the ability of the user to profit from such use. They also must offer users the option of license arrangements which establish fees in proportion to the use of the performing right society's music. Until now the proportionality requirement has had few practical consequences because virtually all users have opted for blanket licenses.⁵⁴ At least one music user, however, the CBS television network, may have altered its position in this regard. In a recently filed lawsuit, CBS's complaint charges that the practical unavailability of per use licensing fee structures violates the antitrust laws.⁵⁵

In addition, the consent decree establishes judicial supervision over ASCAP's prices. Under the procedure outlined in the decree, on receipt of a written application for a license, ASCAP is obliged to inform the applicant of the proposed fee. If the parties are unable to agree on the fee within 60 days of the receipt by ASCAP of the initial application, the potential user of copyrighted music under ASCAP's control may request the federal district court for the Southern District of New York to determine a reasonable rate. ASCAP has the burden

52. See note 43 *supra*.

53. *United States v. Broadcast Music, Inc.*, [1966] Trade Cas. ¶ 71,941 at 83,326 (S.D.N.Y.); *United States v. American Soc'y of Composers, Authors and Publishers*, [1950-1951] Trade Cas. ¶ 62,595 at 63,752 (S.D.N.Y. 1950). Although joint action by broadcasters in negotiating with ASCAP arguably constitutes an antitrust violation, the cost of bargaining individually with broadcasters would be prohibitively expensive. The restraints on competition flowing from such action are therefore unavoidable and should be legally acceptable. Furthermore, the legality of such bargaining seems implicit in the consent decrees' recognition of the need for central bulk licensing and in the decrees' prohibition of price discrimination among similarly situated licensees.

54. Broadcasters rarely request per program licenses. See note 41 *supra* and accompanying text. A BMI spokesman estimated that it had granted a dozen such licenses to stations in a recent year; ASCAP estimated even less. Although under the consent decree music users now may obtain a license for an individual selection, this option is rarely, if ever, used, since the difficulty and relative expense of negotiating an individual license make it impractical.

55. The CBS action is presently before the courts. *Columbia Broadcasting System, Inc. v. American Soc'y of Composers, Authors and Publishers*, Civil No. 69-5740 (S.D.N.Y., filed Dec. 31, 1969). The refusal of summary judgment in favor of ASCAP is reported in 337 F. Supp. 394, 172 U.S.P.Q. 355 (S.D.N.Y. 1972).

of proving the reasonableness of its proposed fee.⁵⁶ Broadcasters frequently have invoked this right,⁵⁷ but so far, the federal district judge never actually has set the rate himself; rather, he has induced the parties to agree upon a rate which he has then approved, though sometimes the judge has participated further by mediating the dispute.⁵⁸ Certainly, the ultimate power of the judge to set the rate himself strongly influences the parties to seek agreement at mutually acceptable rates.

Although formally, BMI's decree is less restrictive than ASCAP's, the net effect upon BMI is substantially similar. BMI's prices are not subject to judicial supervision, and while ASCAP's decree extensively regulates its internal structure and operations, BMI retains greater freedom in this regard. Many of the limitations imposed on ASCAP by the consent decree, however, affect BMI as well. Thus, it is doubtful whether BMI could refuse to deal with a potential user. Furthermore, BMI's bargaining strategy in negotiating rates with broadcasters is affected by ASCAP's rates which are, in turn, subject to judicial scrutiny. For example, the present ASCAP rate for radio stations, established at the end of 1972 for a five-year term, is 1.725 percent of net advertising receipts. The prior rate had been 2 percent. In negotiating its new arrangement with radio stations BMI was able to resist any decrease in the old rate of 1.7 percent. One probable reason for BMI's success is that there are now more performances of BMI music on the radio than ASCAP music, which justifies rates charged by BMI at least as high as those charged by ASCAP. Also, BMI's agreement with local television stations presently gives BMI 58 percent of the amount payable to ASCAP under the terms of the current form of blanket license between ASCAP and local stations, again showing a close nexus between BMI's and ASCAP's rates.⁵⁹

Public Performance Right for Recordings

The present Copyright Act does not give the producers of a recorded performance of a song any control over the public performance of their product.⁶⁰ That is, commercial users of recordings need only

56. *United States v. American Soc'y of Composers, Authors and Publishers*, [1950-1951] Trade Cas. ¶ 62,595 at 63,754 (S.D.N.Y. 1950).

57. See, e.g., *Hearings on Policies of ASCAP Before Subcomm. No. 5 of the House Select Comm. on Small Business*, 85th Cong., 2d Sess. 140 (1958) (Statement of Victor R. Hansen, Assistant Attorney General in Charge of the Antitrust Division: "This right to secure licenses at reasonable royalties given users of ASCAP music has been invoked many more times than has the comparable right given in other judgments in connection with patent licenses."); ASCAP Consolidated Statement of Receipts, Expenses and Change in Fund Balance for Year Ended Dec. 31, 1971, Note 4 ("The Society is continually involved in rate proceedings with licensees . . .").

58. See generally *New ASCAP Agreement Gives Radio Big Break*, BROADCASTING, Dec. 11, 1972, at 9.

59. Broadcast Music, Inc., Local Station Television License Agreement ¶ 4A (1971-1973).

60. Both the existing Act and the Revision Bill use the term "sound recording" to identify the object of copyright protection. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken,

receive permission from ASCAP and BMI, the composers' representatives, and need not seek permission from or provide compensation to the record company and performers who produced the recording. The same is true for performances of dramatic and literary works. The author of the underlying work is granted a public performance right; but the actors and record company who produce the recording of the work are not entitled to a separate performance right in the recording.⁶¹ The only federal copyright protection presently given to recordings is against unauthorized duplication, and that protection has only recently been granted. Until 1971, recordings received no protection under the Copyright Act. In October of that year the Act was amended to protect recordings against unauthorized duplication, i.e., record "piracy."⁶² Thus, records "fixed"⁶³ and published between February 15, 1972, and January 1, 1975, were entitled to copyright protection against unauthorized reproduction.⁶⁴ The January 1, 1975 termination date for protection has since been eliminated.⁶⁵ Recordings of both copyrighted and uncopyrighted music are eligible for this protection. The Revision Bill also would provide permanent protection against unauthorized duplication of records.⁶⁶

The Revision Bill would drastically alter the current treatment of public performance of copyrighted music by establishing in the sound recording itself a public performance right parallel to that long enjoyed by composers.⁶⁷ Under the structure established in the bill, commercial users of a record would have to pay the producers of the

or other sounds . . . " 17 U.S.C. § 26 (Supp. II, 1972); Revision Bill § 101. The sound recording, that is, the performance which is captured, is to be distinguished from the "phonorecords," the material objects in which the recording is embodied and from which the sounds can be communicated. See *id.*

61. 17 U.S.C. §§ 1(c), (d) (1970).

62. See 17 U.S.C. §§ 1, 5, 19, 20, 26 (Supp. II, 1972).

63. "Fixation" refers to the embodiment of the work in a tangible form which is sufficiently permanent or stable to permit the work to be perceived, reproduced or otherwise communicated for a period of more than transitory duration. See Revision Bill § 101. Thus, in the case of a sound recording the work is fixed when the series of sounds is first produced on a final master recording that is later reproduced in published copies. U.S. COPYRIGHT OFFICE, COPYRIGHT FOR SOUND RECORDINGS 1, 2 (Circular 56, 1972).

64. According to the House Report, the purpose of limiting the amendment to recordings produced before January 1, 1975, was "to provide a period for further consideration of various alternatives for solving the problems in this area, before resorting to permanent legislative enactment. By January 1, 1975, moreover, the protection of sound recordings will, it is hoped, be part of a copyright law revision." H.R. REP. NO. 487, 92d Cong., 1st Sess. 1-2 (1971).

65. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 101, 88 Stat. 1873.

66. Revision Bill §§ 106(1), (3). If Congress had failed to extend such protection to recordings produced after January 1, 1975, however, record producers could have only relied upon state law for protection of these recordings. The Supreme Court recently held that state laws aimed at unauthorized duplication of recordings are constitutional. *Goldstein v. California*, 412 U.S. 546 (1973). See note 14 *supra* and accompanying text.

67. Revision Bill §§ 106(4), 114(b) (these provisions were deleted in the version passed by the Senate).

recording used, as well as the composer of the song recorded. The bill establishes the fee payable to record producers for broadcast of their works at 1 percent of the broadcaster's net advertising revenues, although those with relatively small advertising revenues will pay less than the 1 percent rate.⁶⁸ This fee is to be divided equally between record companies and performers. In addition, similar to the current treatment of the composers' public performance rights, record companies are obligated to license all potential users of their product at the statutory fee.⁶⁹

The original form of the Revision Bill introduced in the mid-1960's did not include a public performance right for recordings. The Register of Copyrights viewed the establishment of a performance right as a highly explosive issue. The vigorous opposition by broadcasters to such a right would, he feared, endanger the chances for passage of the bill.⁷⁰ The House Judiciary Committee agreed that recognition of a performance right was then "impracticable,"⁷¹ and the bill which passed the House in 1967 did not include a public performance provision. Up to that point, the record industry had taken no official position on the performance right question, although individual record company executives had supported such a right. Instead, the industry had concentrated its efforts on maintenance of the compulsory license for music and prevention or limitation of any increase in the compulsory license royalty rate. At the 1967 Senate Hearings on the Revision Bill,⁷² however, the Recording Industry Association of America (RIAA), the American Federation of Musicians (AFM), and the National Committee for the Recordings Arts, an organization of well-known performers, supported recognition of a performance right. The resulting amendment to the bill, introduced in 1967 by Senator Harrison Williams of New Jersey,⁷³ was the precursor of the public performance provision in the present Revision Bill.

Under the Revision Bill, the record producers' ability to control the public performance of their recordings would be limited by compulsory licensing requirements.⁷⁴ Once records have been distributed to the public under the authority of the copyright owner, any user could publicly perform the recording upon compliance with the various notice and reporting requirements and payment of the statutory royalty. The compulsory license ensures that public performance licenses will not be refused in situations where the prospective licensee is willing to pay a fee. In England, where no compulsory license exists, licenses

68. Revision Bill § 114(c) (4) (this provision was deleted in the version passed by the Senate).

69. Revision Bill § 114, as amended by the Senate Judiciary Committee, June 11, 1974 (this provision was deleted in the version passed by the Senate).

70. *Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 3, at 1863 (1965).*

71. H.R. REP. NO. 83, 90th Cong., 1st Sess., 65 (1967).

72. *Hearings on S. 597.*

73. Performers' Amendment, S. Amend. No. 9 to S. 543, 90th Cong., 1st Sess. (1969).

74. Revision Bill § 114(c) (this provision was deleted in the version passed by the Senate).

are refused in such situations. The reason for such refusals is that the English Musicians' Union uses the performance right to safeguard employment by controlling the use of recorded music. The Union regards the imposition of fees for the public performance of records and restrictions on their use as a means of promoting and safeguarding its members' interests. They are not so much concerned with the payment of fees as with the control of record broadcasts, and they employ this control to limit the amount of air time for radio record play and to promote the employment of live musicians.⁷⁵ The American Federation of Musicians (AFM), long an opponent of record use by broadcasters, undoubtedly would use an unrestricted public performance right to control record broadcasts. The AFM, however, has endorsed the Revision Bill with its compulsory license provision. This endorsement reflects two factors. First, the AFM recognizes that Congress would not accept the British system.⁷⁶ Second, the impact of displacement of live musicians probably no longer plays a critical role in the union's thinking. A generation has passed since the introduction of widespread record use on the radio. To a union member there is a significant difference between having a job and losing it and never having a radio job. Thus, internal pressure on the union leadership on this issue probably has diminished substantially. As a result, the AFM is quite willing to accept the Revision Bill.⁷⁷

The statutory fee for the right to use any and all recordings applicable to radio and television stations licensed by the FCC would depend upon the gross annual receipts from advertising sponsors. For stations with gross receipts of more than \$25,000 but less than \$100,000, the yearly fee is \$250; for stations with gross receipts between \$100,000 and \$200,000, the yearly fee is \$750; stations with gross receipts of more than \$200,000 will pay a blanket rate of 1 percent of net advertis-

75. See, e.g., REPORT OF THE COPYRIGHT COMMITTEE, CMD No. 8662, at 51-53, 55-56 (1952); *Luddism on the Record*, THE ECONOMIST, Nov. 26, 1955, at 723; Stewart, *Royalties for Record Play on the Radio*, 13 BULL. COPY Soc'y 61, 63 (1965); BILLBOARD, Oct. 21, 1972, at 56, col. 3; *id.*, Oct. 28, 1972, at 56, col. 2 (new agreement regulates amount of record airplay, "needle time," and requires new stations to allocate 3 percent of their advertising revenue to the employment of live musicians).

76. See 47 U.S.C. § 506 (1970) (Lea Act).

77. Some conflict has always existed within the AFM membership with respect to the attitude towards recordings. A small percentage of the union membership record with regularity and accordingly have an interest in increasing their earnings from recorded performances. The AFM, as representative of all musicians, has opposed their displacement by mechanical reproduction, despite the fact that a few of its members can find employment in the making of such reproductions. Any action which the union may take in opposition to the use of mechanical music will be contrary to the interests of those few members, and opposition by the AFM to any campaign by recording artists to increase the value of those interests may generate hostility among such members to the union. See Countryman, *The Organized Musicians: II*, 16 U. CHI. L. REV. 239, 251-62 (1949). For a statement and analysis of the opposing arguments of broadcasters and the AFM with respect to commercial use of recorded music, see *id.* at 288-92.

ing receipts or, if a prorated rate is chosen, some fraction of 1 percent. The prorated fee is to be established by the Register of Copyrights, taking into account the amount of the stations' commercial time devoted to playing copyrighted recordings and whether the station is a radio or television broadcaster.⁷⁸ The bill also sets the royalty rate for background music services and other transmitters of performances of sound recordings. The blanket rate is 2 percent of the gross receipts from subscribers. Again, the Register of Copyrights will define an alternative prorated rate.⁷⁹ It is difficult to estimate the revenue that might be earned by record companies from public performances by background music services. While some producers of such services duplicate and then piece together existing recordings, the larger services, such as Muzak, hire musicians to create their own musical product.⁸⁰ In the absence of negotiated licenses between record users and record producers, royalties due under compulsory licenses are to be paid to the Copyright Office, which will administer the public performance scheme.

In lieu of using the compulsory licensing procedures, record users and record producers may negotiate a license. But the negotiated license cannot set a fee less than the rate established by the statute or by the regulations of the Register of Copyrights.⁸¹ Since a user

78. Revision Bill § 114(c) (4) (A), as amended by the Senate Judiciary Committee, June 11, 1974 (this provision was deleted in the version passed by the Senate). The bill exempts from liability non-profit and small radio stations with annual gross advertising receipts of less than \$25,000. Revision Bill §§ 114(c) (4) (A), (d) (1). As originally introduced in the 93d Congress, the Revision Bill's fee for radio and television broadcasters, except for the small exempt stations, was 2 percent of net advertising receipts. The prorated fee would have been a fraction of the 2 percent rate. The amendments adopted by the Senate Judiciary Committee altered and substantially reduced this fee schedule.

"Educational" broadcasters, such as a college radio station with no advertising support, are exempt from liability under the record public performance right. The Revision Bill sets the royalty rate for stations licensed by the FCC at a percentage of net advertising receipts; such a station is both licensed by the FCC and without advertising receipts and therefore exempt. Such stations will be subject to the composer's public performance right under the Revision Bill, which deletes the "for profit" phrase from the definition of the composer's performance right. Whether de jure or de facto, such stations presently pay no fees under the Copyright Act. If approached, BMI extends a gratuitous license; ASCAP simply leaves them alone. Whether such stations are presently liable legally depends upon one's reading of *Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F.2d 852 (2d Cir. 1944), the leading case on this subject, where the court found a performance "for profit" although the broadcaster was a non-profit organization. Part of its operating expense was covered by income from commercially sponsored programs which constituted only a part of its total air time. The rest of the air time, about two-thirds, consisted of unsponsored programming. Expenses not covered by the income from commercial broadcasts were paid through substantial private donations. The alleged infringement had occurred during one of the unsponsored programs. See generally Varner, *Limitations on Performing Rights*, in *STUDIES FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SEN. COMM. ON THE JUDICIARY*, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION 90-91 (Comm. Print 1960); 1 M. NIMMER, *COPYRIGHT* § 107.32 (1973).

79. Revision Bill § 114(c) (4) (B) (this provision was deleted in the version passed by the Senate).

80. See S. SHEMEL & M. KRASILOVSKY, *MORE ABOUT THIS BUSINESS OF MUSIC* 61-63 (1967).

81. Revision Bill § 114(c) (4) (this provision was deleted in the version passed by the Senate).

would have no reason to pay more than the statutory fee, the statute, in effect, establishes a fixed compulsory license rate. Apparently this provision, the language of which was negotiated by the representatives of record companies and performing artists, was motivated by the performers' concern that financial relationships between record companies and radio stations might result in license rates which did not adequately reflect the performers' contribution, since both NBC and CBS are affiliated with large record companies, RCA Victor and Columbia respectively. In short, they wished to preclude the possibility of "sweetheart" contracts.

The Revision Bill also specifies the division of performance royalties between performers and record companies. These revenues are to be equally divided between the copyright owners, presumably the record companies, and the performers of the records.⁸² Apparently the provision mandating an even distribution between performers and record companies and precluding any other arrangement was included to meet performers' concern that the superior bargaining position of record companies could result in performing artists being forced to sign contracts giving most of the performance royalties to the record company. As will be demonstrated, despite the statutory language, the ultimate distribution of these revenues between record companies and performers will, in fact, be strongly influenced by the parties' relative bargaining strength.

The bill, however, does not explicitly indicate how the two equal license fee pools, established for record companies and performers respectively, are to be divided among the individual record companies and individual performers. The bill probably anticipates that the criteria for distribution will be determined by contractual arrangements within the class concerned. With respect to distribution of royalties by the Copyright Office, and presumptively with respect to negotiated arrangements, the bill provides that claimants may agree among themselves to the proportional division of fees in each pool among them or may designate a common agent to receive payment without risking antitrust violations.⁸³ The American Federation of TV and Radio Artists (AFTRA), which represents vocalists, and the AFM, which represents instrumentalists, already have held discussions with respect to the division of the performers' pool. The provision permitting claimants to agree among themselves over the proportionate division of royalties refers to distribution of the individual royalty funds which have been equally allocated to the record companies

82. *Id.* §§ 114(e) (3) (A), (f) (this provision was deleted in the version passed by the Senate).

83. *Id.* § 114(e) (1) (this provision was deleted in the version passed by the Senate). The motivation for this provision is obscure since it is difficult to see how such arrangements could violate the antitrust laws.

and performers. It does not permit variations in the equal distribution of royalties between the two groups themselves.⁸⁴

The bill anticipates the formation of an ASCAP-like organization representing both record companies and performers to collect and disburse performance right revenues. These revenues would be disbursed in accordance with the arrangements negotiated by the parties. In their congressional testimony, record company spokesmen explicitly indicated their intention to establish a clearinghouse.⁸⁵ The ability to negotiate licensing arrangements is a prerequisite to a private clearinghouse arrangement, and the bill recognizes, albeit obliquely, the possibility of a negotiated, rather than a statutory, license. Section 114(c) (3) provides that in the case of a negotiated license the user need not comply with the notice and reporting formalities incident to a statutory license, nor need he deposit his royalty payments with the Copyright Office. As noted previously, however, the negotiated license cannot set a fee less than the rate established by the statute or by the regulations of the Register of Copyrights.⁸⁶

The Economic Case for a Record Public Performance Right

The establishment of new legal rights for particular economic units can be justified upon only two grounds: the better use of existing resources to satisfy consumer wants, or the rectification of inequities in the existing distribution of revenues among those providing goods or services to a particular productive process. Under most varieties of private capitalism, including our own, maximization of consumer satisfaction is the primary concern. Theoretically, the equitable distribution of revenues among suppliers of economic goods and services is less important. Our legal-economic system, in theory,

84. The draftsmen of the Revision Bill intended that negotiations among claimants not vary the initial fifty-fifty division and that the interested parties share this understanding. Telephone Conversation between Lewis Kurlantzick and Thomas C. Brennan, chief counsel, Senate Subcomm. on Patents, Trademarks, and Copyrights, Aug. 2, 1973. The language of the bill, though, is ambiguous. Section 114(e) (3) (A) dictates an equal division of royalties with respect to recordings "for which claims have been made under clause (1)." Clause 1 outlines the procedure for claiming royalties deposited with the Register of Copyrights. If an ASCAP-like organization is established, however, it will directly receive and distribute license fees. Since such a structure will obviate the need for administration of the performance right by the Copyright Office, no "claims made under clause (1)" will result. Similarly, the provision permitting claimants to agree among themselves to the division of their royalty pool without fear of antitrust violation states that this exemption from antitrust scrutiny is "for purposes of this subsection." Revision Bill § 114 (e) (1). The subsection deals with the process of making claims on the Register of Copyrights. As already noted, the Register will not function as a collector and distributor of revenues if an ASCAP-like organization is formed. The antitrust exemption presumably will apply to negotiated arrangements among claimants on the ASCAP-like organization since there are no functional differences in the two situations, and that is the reading of the draftsmen. Telephone Conversation between Lewis Kurlantzick and Thomas C. Brennan, *supra*. The language, however, is unclear in this regard.

85. See *Hearings on S. 597*, pt. 2, at 506-10.

86. See note 81 *supra* and accompanying text.

does not require any proportionality between the price of the good and the benefits it confers. Prices need be paid only to the extent necessary to induce the desired level of production. In the past 50 years, however, capitalist countries have paid increasing attention to the economic needs of particular groups, especially labor and agriculture.

Impact Upon Price and Records Output

Although granting record producers a public performance right probably will increase record production and lower record prices, the resulting increase in consumer satisfaction does not necessitate government intervention. Certainly, popular record producers and performers do not seem to require a public performance right to provide adequate incentives for maintaining popular record production and dissemination at existing levels, particularly if records are protected against unauthorized duplication. There is no shortage of record companies and, unlike the situation with respect to record piracy where even without federal protection state remedies have been available, the record companies are prospering without a public performance right, state or federal.⁸⁷ Finally, there are no positive externalities;

87. See, e.g., *Pop Records: Moguls, Money & Monsters*, TIME, Feb. 12, 1973, at 60. See generally F. Stuart, *Distribution of Income from Broadcast Performance and Sale of Phonograph Records* (1970) (unpublished study done for National Ass'n of Broadcasters). The market for records has grown dramatically since 1950. The introduction of the long-playing record, high-fidelity and stereophonic reproduction and magnetic tape recording, plus improved demographics accompanied by a general increase in income available for recreation and culture, tripled the record market from 1950 to 1960 and doubled it again during the next decade. The only available statistics are based on suggested retail list price.

COMPOSITE ESTIMATE OF THE TOTAL RECORD COMPANY
SALES TO DISTRIBUTORS AND RETAILERS IN THE
UNITED STATES (RIAA)

Calendar Year	Retail List Price Value in Millions of Dollars
1950	\$189
1951	199
1952	214
1953	219
1954	213
1955	277
1956	377
1957	460
1958	511
1959	603
1960	600
1961	640
1962	687
1963	698
1964	758
1965	862
1966	959
1967	1,051

increased production will render no benefits beyond those enjoyed by record purchasers and radio listeners.

Impact Upon Popular Records. The establishment of a public performance right for records should increase record production, lower record prices, and temporarily increase record company earnings. Profits of existing record companies will increase since the record production costs will be unaffected while some records will earn public performance fees in addition to revenues realized from record sales. Assuming the demand for broadcast recording licenses remains at its current level, under the rates established by the Revision

1968	1,124
1969	1,170
1970	1,182
1971	1,251
1972	1,383
1973	1,436

Moreover, in the period from 1967 to 1970, the dollar volume of pre-recorded tape sales quadrupled, from approximately \$120 million to \$480 million, representing a jump from approximately 10 to 30 percent of the total record-tape market.

MANUFACTURERS' SALES TO RETAILERS AND DISTRIBUTORS OF PRE-RECORDED TAPES

	1967 (Retail)	1968 List Price	1969 Value in	1970 Millions)
8-Track Cartridges	\$60	\$155	\$300	\$378
Cassettes	6	17	75	77
Reel-to-Reel	20	22	20	18
4-Track Cartridges & Others	36	40	21	5
Total Pre-Recorded Tapes	\$122	\$234	\$416	\$478

These statistics are conservative estimates compiled by the Recording Industry Association of America (RIAA), the trade association of record producers. See also *\$2 Billion Worth of Noise*, FORBES, July 15, 1968, at 22.

Record companies charge distributors about 40-45 percent of list price. For example, the record company sells a record with a \$5.98 list price to the distributor for approximately \$2.55. But to compute total earnings, earnings from foreign sales, which are significant, must be included. See, e.g., BILLBOARD, June 5, 1971, at 1, col. 1 (CBS Int'l.); Strauss, *Foreign Income in the Music Industry*, 3 THE VANDERBELT INT'L 90 (1970). (The RIAA figures include sales of foreign produced recordings sold by United States companies in the United States.)

The bulk of the increase in record sales is attributable to popular music, a popular record considered one that appears in trade magazine charts under the headings of "Top 100," "Soul" (or "Rhythm & Blues"), "Easy Listening" (or "Middle of the Road"), or "Country." Although classical record sales have increased in absolute terms, their share of the total record market has decreased. Today, classical recordings represent only approximately 5 percent of the market. E.g., *Crisis in American Classical Music Recording*, STEREO REVIEW, Feb., 1971, at 57; *Classical-Record Crisis*, NEWSWEEK, Aug. 10, 1970, at 78.

The only available published data concerning the financial operations of record companies from industry or government sources are annual estimates of total record and tape sales (see tables above). Most companies are divisions or subsidiaries of larger corporate entities, and the results of divisional operations are not publicly available. Moreover, unlike some other trade associations, the RIAA does not compile detailed industry information. Annual surveys performed for the textbook and tradebook publishers' associations, for example, not only break down total publishing revenues by categories of books, but also report pre-tax profits as a percentage of sales and indicate the percentage of net revenues, on the average, spent on particular cost items, such as promotion or editorial work. Furthermore, the Commerce Department does not publish figures on record production comparable to those provided for book publishing. See UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1967 CENSUS OF MANUFACTURES, 2 INDUSTRY STATISTICS, pt. 3, at 360-27; *id.*, pt. 2 at 27A25-27; UNITED STATES DEPARTMENT OF COMMERCE, 1972 UNITED STATES INDUSTRIAL OUTLOOK 67-70, 252.

Bill, gross revenues for record producers from public performances could total approximately \$11.3 million annually.⁸⁸ Assuming these

88. This estimate is based, in part, on the amounts paid to ASCAP pursuant to the composers' public performance right. In 1971, ASCAP's rate to radio broadcasters was 2 percent of net advertising receipts, which is twice the rate set in the Revision Bill for a record public performance right. In 1971, ASCAP received \$18.7 million from radio licenses. Application of a 1 percent rate would have yielded \$9.35 million. Adjusting for an 11.8 percent increase in radio revenues through 1972, the latest year for which data is available, the radio figure would reach \$10.45 million. Radio station payments, however, would be less than this figure since those stations with annual gross advertising receipts of less than \$200,000 will not pay at the 1 percent rate; rather, most will pay a yearly fee of \$250 or \$750 depending on their gross receipts. See text accompanying note 78 *supra*. Approximately 60 percent of radio stations have revenues of under \$200,000. See Letter from Thomas C. Brennan, chief counsel, Senate Subcomm. on Patents, Trademarks, and Copyrights, to Lewis Kurlantzick, June 28, 1974. The National Association of Broadcasters (NAB) estimates that the fee schedule will generate \$11.5 million in payments from radio broadcasters. The chief counsel to the Senate Subcommittee estimates revenues in the range of \$9.6 million to \$11.1 million. See Letter from Thomas C. Brennan, *supra*. In light of our ASCAP-derived figure, the NAB estimate seems a bit high, though it may be correct since it purports to account for revenue increases since 1972, and we have employed an estimate of \$10 million in reaching our figure in the text.

Estimates of radio station payments must be qualified in one further respect. We have assumed that stations with gross advertising receipts of more than \$200,000 will pay the blanket rate of 1 percent of net advertising receipts. However, for several years many stations might well choose to use the prorated fee, which will be a fraction of 1 percent. See text accompanying note 78 *supra*. The reason is that the public performance right will not cover all performances subsequent to the effective date of the Revision Bill; rather, it will only apply to performances of copyrighted recordings, which means either those recordings produced after the effective date of the Bill or, more probably, those recordings produced after February 15, 1972, the effective date of copyright protection for recordings against unauthorized duplication. The latter is the interpretation of the chief counsel to the Senate Subcommittee, Telephone Conversation between Thomas C. Brennan and Lewis Kurlantzick, July 19, 1974. The Recording Industry Association of America itself estimates that more than 60 percent of radio airplay is devoted to "oldies," that is, recordings which no longer have significant retail sales. See RECORDING INDUSTRY ASSOCIATION OF AMERICA, S. 1361 PERFORMANCE ROYALTY Q. & A. 4 (1974). Those stations which program a large percentage of "oldies" would probably choose, for several years, to pay the prorated fee established by the Register of Copyrights rather than the 1 percent rate.

In 1971, ASCAP received \$31.9 million from television licensees, of which approximately \$12.2 million represented payments by the television networks. Thus, payments by television stations were approximately \$19.7 million. The Revision Bill only requires payments by stations licensed by the FCC; it makes no provision for payments by the networks. In 1971, ASCAP's effective rate for television stations was 1.67 percent of net advertising receipts. Using that rate as a base, the 1 percent rate in the Revision Bill would yield approxi-

mately \$11.8 million. $\left(\frac{19.7}{1.67} \times \frac{1}{1} ; x = 11.8\right)$ Again, this figure should be

adjusted for the increase in television revenues since 1971. Through 1972, television revenues had increased 15.6 percent, but this increase includes increases in network revenues. In 1971, network advertising receipts comprised approximately 45 percent of gross television revenues from sales to advertisers. See UNITED STATES DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1973 STATISTICAL ABSTRACT 500. Using these proportions the stations' revenues must be adjusted upward by a factor of 8.27 percent, yielding a figure of \$12.8 million.

Whether the above figure is too low depends on whether the term "net receipts from advertising sponsors" in the Revision Bill is read to include the revenues earned by affiliated stations from the sale of station time to the net-

revenues are divided evenly⁸⁹ between record companies and performers, as provided by the Revision Bill, record company revenues will increase by \$5.65 million. This represents a 0.65 percent increase over present gross revenues, which are estimated at \$867 million.⁹⁰

Potential public performance revenues also might induce existing record companies to issue new records that previously seemed to offer too low a potential return to warrant the necessary investment.⁹¹ Such effects would be concentrated on so called "adult popular artists," such as Andre Kostelanetz and Henry Mancini, who play established favorites with conventional instrumentation, that is, without

works, so-called "network compensation." ASCAP and BMI do not include these revenues in their definitions of "net receipts." See ASCAP, Local Station Blanket Television License Agreement ¶ 5D; BMI, Local Station Television License Agreement ¶ 4D. But these societies receive substantial compensation directly from the networks. If the sale of station time to networks were included, it would significantly raise "net receipts from advertising sponsors" since network compensation comprises a significant proportion of an affiliated station's total revenues. In 1972, for example, sale of time to networks amounted to approximately 10 percent of total sales of station time. See FCC, 1972 TV Broadcast Financial Data, Schedule 1, Public Notice (Aug. 22, 1973). It is most probable that "net receipts" does not include the revenues earned from the sale of station time to the networks. The Revision Bill as reported by the Senate Subcommittee on Patents, Trademarks, and Copyrights on April 16, 1974, added a definition of "net receipts from advertising sponsors." Such receipts constitute gross receipts from advertising sponsors less any commissions paid by a radio station to advertising agencies." (Apparently the limitation to radio stations was inadvertent and the bill in final form will apply the same definition to television stations.) This definition, which is similar to those used by ASCAP and BMI, should be read to exclude network compensation from "net receipts" and such is the understanding of the Subcommittee counsel. See Letter from Thomas C. Brennan, chief counsel, Senate Subcomm. on Patents, Trademarks, and Copyrights, to Lewis Kurlantzick, June 13, 1974.

The television figure of \$12.8 million must be modified in an important respect in order to obtain an accurate projection. Under the Revision Bill a broadcaster may choose to compute his record public performance royalty fees on an alternative, prorated basis. This prorated fee, which will be a fraction of 1 percent, will be established by the Register of Copyrights, which will consider the amount of the station's commercial time devoted to playing copyrighted recordings and whether the station is a radio or television broadcaster. Since television stations make very little use of recordings, they will choose the prorated basis for payment rather than the 1 percent rate. They might well pay at a 0.1 percent rate. Using that rate, television station license fees would equal approximately \$1.3 million. Combining that sum with the radio figure derived previously yields a total of \$11.3 million, the figure referred to in the text.

The \$11.3 million is, of course, a gross figure which does not account for the administrative costs involved in operating a public performance system. ASCAP's expenses in 1971, for example, were \$13.6 million.

89. As discussed in the text accompanying notes 153-56 *infra*, the ultimate earnings of record companies will not correspond to those specified in the Revision Bill.

90. According to the RIAA's estimate, in 1973 record sales at retail list value amounted to \$1.436 billion and pre-recorded tape sales amounted to \$581 million, a total of \$2.017 billion. Using a 43 percent figure, see note 87 *supra*, record companies' gross revenues from domestic sales would approximate \$617 million for records and \$250 million for tapes, a total of \$867 million.

91. Record production is characterized by a large proportion of fixed versus variable costs. The major fixed cost is the recording cost, which involves the creation of the master tape. Recording costs include studio charges and payments at union scale to the featured performer, as well as scale payments to back-up instrumentalists, vocalists, copyists, and arrangers. In addition, the company must contribute to the pension and welfare funds of the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA). While recording costs vary and while several rock groups are known for spending inordinate amounts of time in the studio, the common and representative cost for popular records is \$25,000-\$30,000.

electric guitars. The actual effect of a public performance right on record production will depend on record companies' estimates of the amount of expected additional revenue per record from public performance fees. The effect will be most pronounced for adult popular artists since these artists' recordings, compared to popular rock artists, enjoy relatively greater public performance potential and relatively lower sales potential, although it is unlikely that a public performance right would significantly affect the decision-making process of record companies with respect to new releases. In fact, these artists' records seem to enjoy substantial sales, and public performance revenues would constitute a small fraction of earnings from record sales.

Potential additional revenues from a public performance right are even less likely to affect decisions on new records of established rock performers and composers and those of unproven songwriters and performers. New songs from composers and performers with good reputations will be recorded automatically. Records of new songs from unproven composers, performed by unproven artists, are risky enterprises and decisions to make such records are based on educated guesses regarding the sales potential and the record companies' need to maintain their flow of new releases. Public performance revenues in these instances will be very difficult to calculate and only represent a small fraction of revenues obtainable from record sales. The margin of error in these decisions is so large that the small amounts of additional potential revenues from the sale of a public performance right are unlikely to be considered. Conceivably, public performance revenues might be weighed where a record company is considering making a new recording of an already successful song with proven performers. Here, calculations of potential revenues may be easier to make and additional revenues from public performances may be considered.

Whatever the impact of a record public performance right upon the behavior of individual record companies, overall record production will increase and, assuming some elasticity in record demand, record prices should decrease. Increased production can originate from two sources: an increase in new releases by existing companies or the entry of new companies attracted by higher record company profits attributable to public performance revenues. The new entrants add to the supply of records, which decreases prices, or, if prices are rigid, reduces sales of older companies. The price reductions might initiate at the manufacturing, wholesale or retail level, depending upon each component's response to changes in costs, supply and demand.

For these and other reasons, record company profits will revert to pre-public performance right levels, that is, resumption of normal profit levels for the marginal producer. Since entrance into the record

industry is relatively easy, this process should develop rather rapidly. In addition, some, perhaps all, revenues derived from a record public performance right will be captured by composers through exercise of their mechanical reproduction right.⁹² Finally, the performers might be able to obtain more than their statutory half of the record public performance revenues, or record companies might be able to increase their revenues from a public performance right by encroaching upon the performers' statutory share.⁹³

It appears, then, that establishment of a record public performance right will make more records, popular and classical, available to consumers at lower prices. But do we "need" more records? That is, do we want more resources devoted to record making? To a strong free market proponent it is rank heresy to even ask that question. For him the only standard is maximum responsiveness to consumer preferences at prices covering all costs. This test, however, will not work here. Government already is interfering with market processes by establishing copyright protection for composers. The issue is whether further intervention is appropriate via public performance protection for records. Here, the only available standard is personal preference. Our intuition, naturally, is that we need more "good" music and less soft "rock."

Before reaching final conclusions in this regard, however, the real costs of increased record production should be determined. Strictly speaking, the cost of any product is measured by the value of the alternative product that could be made with the same resources. For records, it costs approximately 43 cents to make a record from a master tape.⁹⁴ Much of this consists of raw material costs. Under our old

92. See text at pages 227-31 *infra* for a discussion of this phenomenon.

93. See text accompanying notes 153-54 *infra*.

94. Manufacturing includes the costs of pressing and packaging the album. The manufacturing cost might break down as follows:

Printing of album artwork into "slicks"	3 cents per copy
Fabrication of jacket cover with mounting of slicks onto cardboard shells	6 cents per copy
Pressing (including cost of vinyl, printing of labels, white inner sleeve, and shrinkwrap)	34 cents per copy
	43 cents per copy

Within the last year the costs of materials required for manufacturing—for example, vinyl—have been increasing continuously. The figures in the text and this footnote are estimates as of the end of 1973.

Records are issued today in two forms. The first is the "single" or "45." This is a seven-inch disc containing one song or performance on each side and designed to be played on a turntable revolving at 45 revolutions per minute. The cost of pressing a single is about 11-12 cents. The second is the "album" or "LP." This is a twelve-inch long-playing stereophonic (or quadrasonic) disc containing, in the case of a pop album, usually eleven performances or "cuts" and designed to be played on a turntable revolving at 33½ revolutions per minute. In recent years albums have accounted for an increasing percentage of record company revenues. In 1971, this percentage reached approximately 87 percent. The number of albums released annually has risen from approximately 1600 in 1955 to approximately 4000 in 1972. See generally Trow, *Profiles: Kal Rudman*, THE NEW YORKER, Dec. 23, 1972, at 34 ("Except for black-oriented companies, no important record company counts on making real money from its singles business. . . . The record business is really the record-album business. . . .").

wasteful ways this would not be of much importance. Now, however, we face a worldwide vinyl shortage and, therefore, we must give more weight to the materials cost of increased record production.

The professional services of composers, performers, and technicians comprise the bulk of record production costs.⁹⁵ These may be relatively unimportant for our purposes, however, since musicians, singers and composers eager for the chance to make records are in great surplus and most of these artists have few productive alternatives to a musical profession. Therefore, increased demand for recording artists would not divert resources from more productive ventures. Indeed, it may well be argued that increased record production would help find productive use for talents currently without any useful outlet. Whether these possible gains are worth the extra vinyl is hard to say. *Classical Music.* The same economic forces that would "convert" a record public performance right into increased production of popular music, assuming no decrease in the demand for broadcast licenses, also should increase production of classical records. This will benefit both classical record companies and performers, and perhaps classical composers. Arguably, the continuity and development of our musical culture requires a reasonably stable stock of trained classical musicians and composers. If so, the financial assistance rendered to classical performers provides some justification for a record public performance right. However, record industry spokesmen go further. They predict particular benefits to classical music that would help classical music relatively more than popular music. Although the particular benefit theory can muster some theoretical support, the practical effect is likely to be an insignificant factor in support of a record public performance right.

Certainly the record industry is heavily weighted in favor of youth-oriented popular music.⁹⁶ The record industry claims this imbalance

95. Technicians include sound engineers and "producers." As the term is used in the record industry, the producer is the person who is formally in charge of both the recording session and the final editing or "mixing" process. He often shares equal responsibility with the performing artist for the quality of a recording. See Rich, *Some Definitions Redefined*, NEW YORK, March 13, 1972, at 68-69; Kwitny, *How Record Producers Use Electronic Gear To Create Big Sellers*, WALL STREET J., Feb. 12, 1974, at 1, col. 1. See generally P. Hirsch, *The Structure of the Popular Music Industry* 26A (Institute for Social Research, Univ. of Mich. 1969). Salaried staff producers have become rare, and most records are made with the use of an outside producer hired by the record company on either a one-shot or a continuing basis.

96. See *Hearings on S. 597*, pt. 2, at 499, 503-04, 542-43; *Hearings on H.R. 4347*, H.R. 5680, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 2, at 950-51, 956 (1965). According to record companies, the lack of a performance right forces them to concentrate on recording youth-oriented popular music to the detriment of classical and adult popular music. The term "adult popular" music as used by record industry spokesmen corresponds essentially with our term "semi-classical." See note 2 *supra*. It refers to the type of music generally included in middle-of-the-road easy listening radio formats. In a letter to one of the authors, Alan

is due, in part, to the unfairness of the current legal regime towards classical music and musicians. According to this argument, the popular music audience is not only much larger than that for classical, but it has a higher propensity to purchase records.⁹⁷ Classical music listeners, it is argued, though numerous, are more likely than popular fans to listen to their music over the radio than to purchase records. Under current copyright law, however, radio play yields no revenue for the record performers or producers. Moreover, the free advertising that partially compensates popular record companies for the lack of revenue from the broadcast of their recordings may not stimulate classical sales to the same extent. Unlike listeners to popular music who "pay" the record producers for broadcast music through increased purchase of the records they have heard without charge, classical broadcast listeners do not make an equivalent contribution to the cost of producing classical records. The reason may be that radio play is less likely to stimulate record purchases, or simply that for classical fans broadcast music represents a larger proportion of their total music listening than is true for popular music listeners.

Assuming the validity of these factual assumptions, establishment of a record public performance right would permit classical music producers to profit from classical music broadcasts which, under current law, neither produce direct revenues from public performance fees nor induce much indirect revenues through increased record sales. Conceivably, the higher preference of classical music fans for broadcast music even might increase classical music's share of total record production.

Every decision to issue a record is based upon the costs of producing the record compared with the anticipated revenues to be derived therefrom. Classical records always suffer from a relatively small audience and high production costs. Under current law the only source of revenues for record producers is record sales. With the establishment of a public performance right, record companies can expect additional revenues from public performance of their product, particularly radio broadcasts. Assuming costs of production remain constant, increased potential revenues will induce record companies to issue records with

Livingston, the former president of Capitol Records who testified in favor of a public performance right at the 1965 and 1967 congressional hearings, offered examples of performers whom he would place in the "adult popular" or "good music" category. These included instrumentalists such as David Rose, Henry Mancini and Andre Kostelanetz, jazz artists such as George Shearing, and vocalists such as Tony Bennett, Peggy Lee and Perry Como. According to Mr. Livingston,

although there are occasional exceptions, recordings by most of these artists sell relatively little, and certainly not enough to keep a record company in business by themselves, let alone supply a satisfactory source of income to the artists in relation to the use and exposure to which the recordings are put.

Letter from Alan W. Livingston to Lewis Kurlantzick, July 30, 1973. One must at least wonder whether sizable sales for the instrumentalists named are more than an "occasional exception." Albums by these artists are consistently released and are consistently profitable, though their sales, of course, do not approach the proportions of a hot "rock" artist.

97. See *Hearings on S. 597*, pt. 2, at 504, 542-43.

lower sales potential, since sales revenues will be augmented by public performance earnings. If classical music fans, indeed, listen to a larger percentage of their music over the radio than do popular music fans, the potential earnings for the marginal classical record should increase relatively more than the increased total earnings of the marginal popular record. This should increase the proportion of total records represented by classical records, since the revenue earning potential of public performance of classical records is relatively greater than that of popular records. These arguments are valid even if most of the revenues earned by record makers through a public performance right ultimately would be captured by the composers, which we believe would occur.⁹⁸ Most classical music is uncopyrighted and therefore there is no music copyright holder with which to contend. Thus, unlike the situation with respect to recordings of copyrighted music, the classical record maker could retain all earnings from public performances.

The validity of the aid-to-classical-music argument depends, in part, upon the actual record buying habits of classical music listeners. There are no statistics upon which one can calculate either the marginal propensity of classical music lovers to purchase records or their likelihood to buy records heard over the air. While there is some overlap among those who purchase popular records and those who purchase classical, the demographics of record consumption make it clear that purchasers of popular recordings comprise an essentially different group than those who purchase classical. According to the market research of one major record company, 16 percent of classical purchasers are under twenty years of age, 49 percent are between twenty and forty, and 35 percent are over forty. On the other hand, 78 percent of "contemporary," i.e., "rock" and its variants, purchasers are under twenty, 21 percent are between twenty and forty, and 1 percent are over forty. It may be that popular music fans spend more of their available income on records, but this could be a function of the relative youth of the popular audience who, as a group, have fewer demands upon their resources. Classical music listeners, however, probably have higher incomes.⁹⁹ Therefore, the higher propensity of popular music listeners to purchase records may be counterbalanced by the larger total income available to classical music listeners for record purchases.

It does seem reasonable to conclude that broadcasting affects classical record sales less than popular record sales. Unlike popular music, which is ephemeral and ever-changing, the pool of classical

98. See text at pages 227-31 *infra*.

99. See BILLBOARD, Sept. 8, 1973, (study indicated classical listeners received highest income of any radio audience).

music, by definition, changes very slowly,¹⁰⁰ and classical music fans already are familiar with the body of classical music. Thus, the decision to purchase a new classical record will be less dependent upon hearing it broadcast than is the case with popular music. That classical music producers actively seek exposure for their new releases does not contradict this position, since the cost of gaining such exposure is low and therefore worthwhile so long as there is any possible chance of increasing sales.

The high income level of classical music listeners lends some further support to the unfairness arguments of record producers. Certain advertisers are attracted to programs which command high income audiences. This attitude benefits broadcasters in their program sales, but does not benefit record producers. This is worse than the analogous situation with respect to popular records with low sales but high public performance potential. Popular record producers benefit from their product's public performance possibilities through their ability to negotiate lower royalty rates with composers concerning the mechanical reproduction right. That is, composers should be willing to consider potential earnings from the broadcast of records using their music during negotiations with record producers over the royalty rates to be paid on record sales.¹⁰¹ But classical music usually is not copyrighted, and record companies, which must rely exclusively on record sales, are unable to take any advantage of the advertising value of classical music broadcasts, since the broadcasters keep all the benefits.

Whatever the merits of these arguments, classical records will not earn sufficient revenues from public performance fees to have any appreciable impact upon the production of classical records. In 1973, gross revenues from classical record sales were roughly \$32 million.¹⁰² According to our estimates, record producers will earn no more than \$59,000 from public performance fees, and probably less.¹⁰³ These rev-

100. See generally Anderson, *Editorially Speaking: Popsical Music (Second Verse)*, STEREO REVIEW, July 1973, at 6.

101. See text at page 227 *infra*.

102. This figure is an estimate which was derived as follows. In 1973, the Recording Industry Association of America (RIAA), the record industry trade association, estimated LP record sales at list price value at \$1,246,000,000 and pre-recorded tape sales at \$581,000,000. The approximate percentage of the LP market held by classical recordings is 5 percent, see, e.g., Wall Street J., Sept. 19, 1974, at 1, col. 5; *Crisis in American Classical Music Recording*, STEREO REVIEW, Feb. 1971, at 57; and classical recordings represent 2 percent or less of pre-recorded tape sales. Multiplication of the RIAA totals by 5 percent and 2 percent respectively produces a figure of \$73,920,000. The record producer *qua* producer generally receives 40-45 percent of the list price. For example, a \$5.98 list price record is sold to distributors for about \$2.55. Multiplication of the \$73.9 million figure by 43 percent yields gross revenues to classical producers of \$31.8 million.

Thirty-two million is a rough estimate. The sales figures are RIAA estimates and "classical," as used in the industry, is a vague term. If anything, this figure may be too high. In any event, the order of magnitude of sales revenues compared with probable public performance revenues clearly indicates the de minimis effect of public performance rights on classical record production.

103. This estimate was derived from the amount presently paid composers by classical stations pursuant to the composers' public performance right.

venues would be divided equally between performers and producers. The producers' portion will, in turn, be divided, presumably on the basis of frequency of current play, among those classical producers whose recordings have been publicly performed.¹⁰⁴ Obviously, for each record company the increased income from this source is far too small to be considered in estimating the potential revenues from new classical record releases.

Although the earnings of classical records cannot be significantly increased directly through public performance fees, classical music could be helped indirectly. Record producers argue that increased revenue from broadcasts will improve their general economic position, thereby permitting increased support to unremunerative but culturally worthwhile music projects.¹⁰⁵ There is evidence that at least one secure record company, Columbia, has used some of its profits from nonclassical records for "good works," such as classical record production.¹⁰⁶ In fact, this is another variation of a familiar theme: High profits from popular records are justified because they can be used to subsidize classical music.

Obviously, this argument presumes that record company profits will increase. As previously demonstrated, such profits should not increase, at least not for very long. Even if record company profits

Though a high percentage of the music programmed by classical stations is in the public domain, these stations are charged the same royalty rate by ASCAP and BMI as are other commercial stations. See text accompanying notes 113 and 115 *infra*. The rate charged by BMI is 1.7 percent of net advertising revenues. In recent years the application of this rate has resulted in the payment of less than \$100,000 a year to BMI by commercial classical stations. If one took \$100,000 as the base figure indicating the current return under the 1.7 percent rate and then applied a 1 percent rate, the Revision Bill rate, the result would be approximately \$59,000 as the probable return from classical stations under the record public performance right of the Revision Bill

$$\left(\frac{1.7}{100} \times \frac{100,000}{X} \right) = \frac{1}{100} ; X = \$59,000.$$

In fact, classical stations will pay less than \$59,000 since many of them have gross annual advertising revenues of less than \$200,000. These stations will not pay at the 1 percent rate, but, rather, will pay an annual fee of \$250 or \$750. See text accompanying note 78 *supra*. Of the thirty-two members of the Concert Music Broadcasters Association twelve have gross revenues of less than \$100,000, seven have revenues of more than \$100,000 but less than \$200,000, and thirteen have revenues in excess of \$200,000.

Though the payment figure and the sales revenue figure are admittedly rough estimates, they are sufficiently precise to support the conclusion reached in this footnote.

104. See notes 84-85 *supra* and accompanying text.

105. See *Hearings on S. 597*, pt. 2, at 499, 503-04, 542-43; *Hearings on H.R. 4347*, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess., pt. 2, at 933-34, 950-51, 956 (1965); Note, *Protection of Sound Recordings Under the Proposed Copyright Revision Bill*, 51 MINN. L. REV. 746, 773 (1967).

106. See *Hearings on S. 597*, pt. 3, at 808; *Hearings on H.R. 4347*, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Judiciary Comm., 89th Cong., 1st Sess., pt. 2, at 933-34 (1965). See generally F. MACHLUP, *THE ECONOMICS OF SELLERS' COMPETITION* 553-54, 556 (1952).

do increase, this variation of trickle down theory involves complex fact and value judgments. For example, there is no evidence that record companies commonly use supernormal profits to support classical music.¹⁰⁷ Furthermore, if support of classical music from popular music earnings would be a significant factor in a congressional decision to establish a public performance right for records, there is no easy way of ensuring that the extra revenues that might flow to record companies from that source would, in fact, be used to assist classical music.¹⁰⁸ It would be difficult to know precisely where these revenues were going, and there is no public body to find out. Thus, the new public performance right would be based, in part, upon anticipated support to classical music, but continuation of the right would not be dependent on proof of delivery.¹⁰⁹

Assuming classical music "deserves" more support, it would be better to accomplish this through direct government subsidy. Much of the thrust of recent writings on the respective merits of tax incentives and direct expenditures in achieving social objectives seems applicable to this question. Particularly relevant is the recognition that the direct expenditure process may provide a somewhat better opportunity to order priorities by decisions on open subsidies, to maintain control over expenditures, and to ensure they are being used for the desired purposes.¹¹⁰ Assuming that all records will receive protection against unauthorized duplication, if the market process fails to yield a large output of classical records, the considerations for and against an open subsidy would be similar to those relevant to subsidizing the performing arts in general.¹¹¹ On the other hand, if popular record makers really are supporting classical music to a significant extent, one may hesitate to alter the existing structure and be reluctant to exchange this seemingly solid support for problematical support through the political process. The point is that there are better means, aside from copyright, to foster and develop creative activities. With respect to

107. According to the recordings editor of the New York Times, most classical and popular departments are operated as separate entities, and each must be self-supporting:

One of the more popular myths of the record industry, and one that dies hard, is the notion that profits from popular sales sustain the losses from the manufacture of classical albums. Actually the two departments are generally run as separate entities and must support themselves.

Davis, *The Classical Upsurge*, HIGH FIDELITY, April 1973, at 62.

108. See generally Plant, *The Economic Aspects of Copyright in Books*, 1 ECONOMICA 167, 192 (new series 1934); Davis, *supra* note 107, at 63.

109. "Subsidies to an activity that are not conditional upon the recipient performing that activity . . . are usually inefficient." B. HINDLEY, *THE ECONOMIC THEORY OF PATENTS, COPYRIGHT, AND REGISTERED INDUSTRIAL DESIGNS* 65 n.1 (1971).

110. See, e.g., Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison With Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970); Warren, Krattenmaker & Snyder, *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 292-306 (1971). See also Wilson, *The Dead Hand of Regulation*, 25 THE PUBLIC INTEREST 39, 45-46 (Fall 1971).

111. For a succinct statement of these considerations from an economist's perspective, see W. BAUMOL & W. BOWEN, *PERFORMING ARTS—THE ECONOMIC DILEMMA* 369-86 (1966).

performers, for example, particularly younger and less well known performers in certain classes of cultural activity, necessary support might be provided more effectively through an expanded use of selective grants and subsidies from public sources. Of course, these subsidies should be carefully structured so that the intended beneficiaries would, in fact, be the ones benefited.

Although the effect of establishing a record public performance right on the production of classical records would be negligible, it might have a profound impact upon classical music broadcasters. Few classical stations are profitable, and many are marginally operational.¹¹² Under these circumstances any additional payments would threaten their financial integrity.

In considering the effect of a record public performance right upon classical broadcasters, it should be noted that broadcasters, in effect, now pay fees to composers for performance of uncopyrighted music. Thus, it could not be argued that fees paid to record companies would represent payment for access to music which classical broadcasters now get free. Current arrangements with ASCAP and BMI require radio stations using any copyrighted music to pay composers a stipulated percentage of advertising revenues. Thus, for the purpose of computing composers' public performance license fees, it does not matter that some of the music played is uncopyrighted. In effect, this arrangement already seems to treat uncopyrighted music as if it were copyrighted. But this may not be the case. True, the method chosen by ASCAP and broadcasters for computing public performance fees does not distinguish between copyrighted and uncopyrighted music. Yet, in all probability this payment arrangement is dictated by considerations of administrative convenience rather than a desire to use copyrighted music as leverage to charge broadcasters for use of uncopyrighted music, since it is much easier to calculate net advertising revenue from all sources than to keep track of elapsed air time devoted to copyrighted music. Given the administrative difficulties and the small proportion of total broadcast music represented by un-

112. Hyatt, *Classical Radio Stations Find Dollars Are Harder To Come By Than Fans*, Wall Street J., April 5, 1972, at 1, col. 1 ("[B]roadcasters estimate that only one-third to one-half of the 30 or so full-time commercial classical stations are profitable."); Gent, *Classical Music Dwindling on City's Radio Stations*, N.Y. Times, Aug. 10, 1971, at 51, col. 1; Letter from John H. Beck, Program Director, WGBH Radio, Boston, Mass., to Robert L. Bard, Jan. 10, 1974 ("The great problem in having fees paid to classical record producers is that [commercial] classical radio stations are . . . scarcely profitable. . . . For commercial classical stations, many of which already lose money, to pay such a fee would probably cause many to change to a more profitable format."). The number of commercial classical stations may be larger than previously believed. A recent survey indicated that there are at least 43 commercial stations that devote all or a substantial amount of their time to classical music. Previous industry estimates were as low as 25. BILLBOARD, July 21, 1973, at 67.

copyrighted classical music, the best arrangement would be to apply a slightly lower rate to an advertising revenue base which includes revenues attributable to use of uncopyrighted music. Since classical stations earn less advertising revenues than standard commercial stations, they pay less in public performance fees per broadcast hour. ASCAP and BMI impose the same terms upon classical stations, however, as are imposed upon commercial stations, including percentage-of-revenues royalty terms.¹¹³ As one might expect, radio stations which specialize in classical music and thus program a high percentage of public domain works are unhappy with current arrangements and would support alternative payment schemes which would recognize their lesser use of copyrighted music.¹¹⁴

If current practices are, indeed, dictated by administrative considerations, and composers do not really earn fees from the broadcast of uncopyrighted music, establishment of a public performance right for recordings of uncopyrighted as well as copyrighted music might be of particular benefit to classical music. Since usually no one owns a copyright on the composition, only broadcasters, record companies and performers would be affected.

Conceivably, if necessary to protect their principal means of exposure, classical record producers might be willing to reduce their license fees or to forego performance fees entirely.¹¹⁵ Analogously, efforts have been made to obtain occasional waiver of the performance fee with respect to recordings of contemporary operas to ensure that these works receive radio exposure.¹¹⁶ The Revision Bill makes such an adjustment by record companies difficult, however, by providing that a negotiated license substituted for the compulsory license must not

113. As one might expect, there have been recent indications that classical stations are not content with this situation. At least twenty-three members of the Concert Music Broadcasters Association declined to sign the new ASCAP five-year contract and conducted negotiations with ASCAP in which the stations requested new "more equitable" agreements to reflect "the special circumstances of such stations, which are devoted largely to 'public domain' music." *BILLBOARD*, Aug. 18, 1973, at 1, col. 1. These negotiations between ASCAP and the Concert Music Broadcasters Association failed to produce an agreement. As a result, pursuant to the ASCAP antitrust consent decree, 14 members of the Association filed suit in the Southern District of New York on Nov. 28, 1973, for the determination of reasonable fees and other license terms. The petitioners have asked the court to fix a reasonable licensing agreement reflecting the amount of ASCAP music realistically available to, and played by, petitioners. *United States v. ASCAP*, Civil No. 13-95 (S.D.N.Y., filed Nov. 28, 1973).

114. Industry sources estimate that 20 to 30 percent of the music played by classical stations is copyrighted. Some music which otherwise would be in the public domain is subject to copyrighted arrangements, see 17 U.S.C. § 7 (1970), but the amount of such music is relatively insignificant.

115. An executive of one leading classical producer expressed to one of the authors the fear that payment to record companies and artists for radio play would cause a further attrition of classical broadcasting, and he thought that major record companies would be willing to reduce or forego the receipt of public performance fees from classical stations under certain conditions. It has been contended that in recognition of their low profitability, ASCAP charges stations specializing in classical music lower license fees than those applying to normal commercial stations. See Note, *Protection of Sound Recordings Under the Proposed Copyright Revision Bill*, 51 MINN. L. REV. 746, 772 n.167 (1967). This contention is erroneous. See text accompanying note 113 *supra*.

116. *BILLBOARD*, July 10, 1971, at 1, col. 5.

provide for a negotiated royalty rate less than the statutory fee.¹¹⁷ As noted previously, the reason for this provision was a concern by performers that financial relationships between record companies and radio stations might result in license fees which did not adequately reflect the artist's contribution. In short, they wished to preclude the possibility of "sweetheart" contracts. The language of the provision was negotiated by the representatives of record companies and performing artists. Conceivably, the record producer could refrain from suing the station for the statutory fee, and could further agree in advance not to sue the station. For the agreement to be effective, however, the performers who were involved in the creation of the particular recording and who have a claim on one-half the statutory fee would have to participate and be made parties. Furthermore, it might prove difficult and costly to negotiate an agreement with all the necessary performer-parties, particularly where a classical recording employed a large number of musicians.

However, even if composers actually do not earn revenues from the radio play of uncopyrighted music, classical music stations do pay composers royalties computed in accordance with total advertising revenues, and pay at the same rate as stations which primarily use copyrighted music. Imposition upon classical broadcasters of an additional public performance fee for record producers would injure them further, although no more than all other broadcasters, and to the extent public performance fees affect the use of recorded music, classical records would be injured. Classical music would benefit most from legal arrangements which reduce or eliminate payments by broadcasters to composers based upon use of uncopyrighted music. Classical music programs then would be liable only to record producers for public performances of uncopyrighted music. Classical record producers would then be able to retain all such revenues, since composers could not use their mechanical reproduction right as leverage to capture producers' public performance earnings. Of course, classical broadcasters would have to pay these fees and, given their well known precarious financial health, such additional costs might threaten their economic viability. The loss of even a few of the limited number of classical stations might well outweigh any gains classical record producers might make from access to public performance revenues.

Impact on Efficiency of Recorded Music Distribution

Economic justification for legal intervention into a particular industry normally is grounded upon an anticipated redistribution of resources to better meet consumer preferences or on the achievement of some

117. Revision Bill § 114(c) (4) (this provision was deleted in the version passed by the Senate).

collective end. According to the previous analysis, a record public performance right probably will not have such effects. A third possible justification would be that a public performance right would permit the distribution of recorded music at lower real costs. It is more likely, however, that the opposite would occur; that is, the establishment of a record public performance right would increase the costs of disseminating music through recordings. The extent of the cost increase and the willingness of various parties to meet such costs would depend upon the legal form of the public performance right, the benefits of that right to each potentially affected group and the economic factors inherent in the recorded music process.

The cost factors affected by a public performance right are those administrative expenses incurred in securing permission to use a work, including the cost of contacting the copyright owner, negotiating with him and arranging for payment, as well as the costs involved in structuring the contractual relations of the relevant parties—composers, performers, record companies, and broadcasters—in accordance with the relevant legal and economic requirements. For purposes of this analysis, the term “transaction costs” is used to describe this set of distinct but related costs. Transaction costs, similar to all economic costs, affect the economic decisions of record makers and record users, and impose a burden on the entire economy. These factors must be considered in determining the wisdom of restructuring the legal framework of the record industry in directions proposed by the Revision Bill.

Transaction costs would be very large if every potential record user had to bargain individually with holders of a public performance right over the price and terms of licenses. Use of a clearinghouse would reduce these costs, but experience with performing rights societies which represent composers and music publishers indicates that a clearinghouse arrangement still would involve substantial costs. In 1971, ASCAP spent approximately \$13.6 million to collect and distribute gross domestic and foreign receipts of \$68.2 million. BMI, in fiscal 1971, distributed \$31.5 million to its members from revenues of \$36.3 million. As noted previously, ASCAP and BMI sell licenses, monitor unauthorized users to detect violations, bring infringement actions when unlicensed use is discovered, take samples to determine the relative frequency with which various works are used, and distribute revenues to numerous composers and music publishers. Administration of a public performance right in recordings would involve similar functions and costs.

The public performance right proposed in the Revision Bill entails compulsory licensing at statutorily determined fees,¹¹⁸ thereby eliminating negotiations over rates with the copyright holder. The other costs incident to the administration of a public performance right, however, would not be eliminated. In addition, the simplification

118. See notes 27-28 *supra* and accompanying text.

gained by compulsory licensing at a fixed fee creates other problems. To have Congress establish a fixed fee may embed an arbitrary sum in the law for many years.¹¹⁹ The Revision Bill attempts to minimize this possibility by providing for periodic review of royalty rates by a copyright royalty tribunal.¹²⁰ Nevertheless, to ask a copyright royalty tribunal or the Register of Copyrights to set and adjust the price involves complex and virtually unsolvable disputes over the fairness of any suggested price.

Another category of transaction costs implicit in granting a record public performance right is the costs attributable to the need to develop new kinds of contractual relations among the various parties to respond to the new legal regime. Initially, all contractual arrangements would have to be restructured to reflect the new legislation. Undoubtedly, this would initially be costly, but much of the restructuring need only be done once and then the new arrangements could be used without further major changes or associated costs. A second kind of cost within the same general category, though, would be a continual one. According to our analysis, if a second public performance right were granted with respect to records, composers would attempt to increase their compensation with respect to record sales as a means of sharing in revenues earned through public performance fees. This strategy necessarily requires composers to estimate revenues from three sources rather than two, thereby increasing the probability of miscalculations by any or all of the participating parties. The seriousness of this additional burden is moderated by the fact that in calculating the public performance earnings of record companies, the estimation of the frequency of public performances will be the same figure the composer uses to calculate his returns from his own public performance right. The only additional factor will be the rate of return per performance for the record company. After the system has operated for some period, this rate should stabilize. In general, misestimations by parties to a contract are presumed to result in some misallocation of resources. Such errors may be conceived as transaction costs, and to the extent miscalculations are more probable, transaction costs are thereby increased.

Increased transaction costs, like increases in any cost, make it more expensive to provide the same good or service. Such increases may lead suppliers of the service to reduce their demand for recorded music in favor of relatively cheaper services. An example would be

119. Ciancimino, *The Copyright Hang-up: Do We Hang Together or Separately*, 3 PERFORMING ARTS REV. 405, 415 (1972). See generally Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 326, 333-34 (1970).

120. See Revision Bill §§ 801-09 (adjustment of royalty rates may be requested every five years).

the substitution of live musicians for records by broadcasters occasioned by the increased cost of using recorded music. This might provide work for unemployed musicians which would have some positive effect. If musicians were scarce, however, the society would be using a scarce resource, talented musicians, when a recording could provide the listener with equivalent entertainment at a much lower expenditure of resources. If such substitution were not warranted, and the economics of broadcasting were such that the increased transaction cost would not reduce the broadcast of recorded music, the sole impact would be the additional expenditure of resources to meet the transaction requirements.

The only way in which transaction costs may be distinguished from other costs is in their relative invisibility. The license fees broadcasters will pay record companies under the Revision Bill are clear enough, although the costs broadcasters might incur in keeping the necessary records, or in negotiating fee schedules and requirements with record companies, are less visible. Indeed, broadcasters themselves might have difficulty in calculating them. Therefore, in making legislative decisions in this area, it is important to consider these hidden transaction costs as well as the specified license fee rates.

Record companies, of course, will be perfectly willing to incur these transaction costs since they are necessary to benefit from their newly acquired public performance right. From the perspective of the economy as a whole, however, these increased costs are pure waste, since they redistribute existing wealth rather than create new wealth. That is, the additional income record companies may earn from a public performance right does not flow from an increase in the supply of broadcast music or a net reduction in the costs of producing and distributing such music; rather, the increased income is at the expense of composers, broadcasters, advertisers or consumers.

It has been demonstrated that establishment of a public performance right for records will increase the transaction costs of the record and broadcast industries, thereby increasing the total amount of society's resources commanded by this particular segment of the economy. Generally, there is no easy method of determining whether such a reallocation of resources is appropriate. Under a free enterprise system, individuals have very wide capacity to command and thereby reallocate resources by bidding them away from other potential users. Thus, it is usually very difficult to judge each new demand for resources by particular individuals or enterprises. In this situation, however, some judgments can be made.

Since the primary impact of a record public performance right will be redistributive, the propriety of society expending additional resources for this purpose must rest on grounds of fairness and equity rather than increased economic efficiency. Our analysis, however, questions the principal reasons adduced by the record industry in support of a record public performance right. Record companies and artists make the general moral argument that broadcasters who play

records without paying the record company which produced them are depriving record companies of some kind of property right. In addition, certain artists argue that performers whose records are broadcast more than they are sold are being injured. It will be demonstrated that under the existing system performers are compensated for their contribution to the production of those records likely to be widely broadcast. It also will be demonstrated that record companies now benefit to some degree from public performances of their product in that the revenues a composer may earn through his public performance right may serve to reduce the composers' price for licensing their mechanical reproduction right on record sales. Beyond this, no conclusions can be made. Once it is concluded that increased compensation for record companies is not required to encourage an adequate supply of recorded music, one can only estimate the actual redistributive effect of the record companies' public performance right specified in the Revision Bill upon all participants in the process of producing and publicly performing records by calculating all the costs of such redistribution, and then trying to determine if the increased equity of the new system is worth the anticipated costs.

A public performance right based upon record broadcasts would exacerbate the allocational difficulties caused by the free advertising unavoidably provided by record broadcasts. It is an accepted fact that radio play stimulates record sales by exposing new releases to potential buyers; in other words, radio play advertises records.¹²¹ Further-

121. Airplay is the principal way record companies get their product before the public. It is radio which provides effective advertising and creates consumer demand. It is not surprising, therefore, that companies direct a good deal of their promotional energies to getting their material broadcast. See P. Hirsch, *The Structure of the Popular Music Industry* (Institute for Social Research, Univ. of Mich., 1969); STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 86TH CONG., 2D SESS., *SONGPLUGGING AND THE AIRWAVES: A FUNCTIONAL OUTLINE OF THE POPULAR MUSIC BUSINESS* 9 (Comm. Print 1960); Trow, *Profiles: Kal Rudman*, *THE NEW YORKER*, Dec. 23, 1972, at 33-34; I. REIN, *RUDY'S RED WAGON: COMMUNICATION STRATEGIES IN CONTEMPORARY SOCIETY* 88 (1972) ("a manufacturer's survey of rock sales found that over 80 percent of albums are purchased because people have heard a particular portion—one or two of the songs—over the radio and liked them").

Until five or ten years ago, airplay was more important for singles than albums. At that time, it was unusual to release an album by an unknown artist. Singles were usually the vehicle for introducing new artists who could ill afford the loss of exposure through airplay. Albums usually were reserved for established artists or new artists with a hit single, who had some reputation to attract buyers. Today, many companies will launch a new artist with an album release. Therefore, there is now a need for airplay of both singles and albums.

More fundamentally, the strategy of most companies is to use singles as a promotional vehicle to sell albums, which are significantly more profitable. "Except for black-oriented companies, no important record company counts on making real money from its singles business. . . . The record business is really the record-album business. . . ." Trow, *Profiles: Kal Rudman*, *supra*, at 34. For example, in 1971 and 1972, albums accounted for approximately 87 percent of total record sales in terms of dollar volume. Thus, the objective is to get airplay for a particular performance by a particular artist. The ve-

more, if air time is free there is no opportunity for market processes to allocate the resource among potential users and, therefore, though the net effect is difficult to measure and judge, the availability of free advertising probably distorts the allocation of air time among record companies. Since air time is scarce, those desiring it, including record companies, could be forced to bid for it. Those who deem this time most valuable thus would be assured of receiving it. We are not, however, dealing with normal economic goods. Broadcasting, records, and advertising do not easily lend themselves to standard price theory analysis. Since it is very difficult to determine the benefits conferred by advertising, it is difficult to be sure that giving more air time to the records of the company willing to pay the most for the opportunity would result in a better allocation of resources. While it is difficult to measure the benefits, the advertising supplied by broadcasting new record releases is most effective. Unlike most advertising which only describes the product and its effectiveness, a record broadcast precisely apprises potential record buyers of the nature of the product involved. Moreover, the record carries the endorsement of a supposedly neutral source, the station's music programmer or the disc jockey who plays it.

Broadcasters have been unable to charge for their advertising because all effective methods for making record companies pay for broadcast of their records are precluded by legal or business considerations. They cannot openly charge record companies for the privilege of having their products played on record shows because this would undermine the integrity of record programs, such as the "top forty" stations, which, presumptively, select their records on the basis of current popularity or the disc jockey's judgment of their intrinsic artistic merit. Additionally, they cannot charge record companies covertly because the Federal Communications Act requires on the air disclosure of any payments received by radio stations for the purpose of promoting the play of particular records.¹²² Similar constraints apply to the relationships between broadcasters and composers' representatives, who also have a great financial interest in getting their records played in order to maximize public performance revenues. Currently the only economic nexus between record companies and broadcasters is the radio advertising purchased to promote particular records. Broadcasters could try to coerce record companies into increasing such advertising as a means of recompensing broadcasters for the free advertising provided. Prospects here, however, are not promising. Although radio stations might threaten an overall reduction in record play unless record companies increase their radio advertising, broad-

hicle required in order to approach most radio stations is a single record, although some stations will play album cuts. However, the single selection is often picked from an album, and a concentrated effort is made to make a hit of the single. If the single hits, album sales should increase dramatically. Additionally, if the selection is only released as a single, any significant sales movement which indicates hit potential will often result in an album being readied for market.

122. See 47 U.S.C. §§ 317, 508 (1970).

casters are too dependent upon record shows to make such reductions a credible threat.¹²³ Furthermore, threats against individual record companies with respect to the use of their records would run afoul of anti-payola legislation.

Free advertising has one unambiguously bad effect. It tempts those interested in record sales to bribe those selecting records to be broadcast. The advertising effect alone has been sufficient to make payola a perennial problem.¹²⁴ The advent of record public performance rights will make it worse by adding to the incentives of record companies to get their recordings broadcast.

Payola primarily stems from the effectiveness of radio play as a means of advertising new records, particularly new records by relatively unknown artists. Payola is indefensible in that the recipients are employees of radio stations who, presumptively, are pocketing the proceeds from the sale of an asset belonging to their employer, the use of air time to advertise records. Although such practices have long been common knowledge in the broadcast and record industry, they first came to public knowledge around 1960 as the result of a congressional investigation into record and broadcast industry practices.¹²⁵ Congress responded by amending the Communications Act to make payola, in effect, a federal criminal offense. Under the 1960 amendment an employee accepting a payment is obliged to inform the station, which must inform the public through an announcement on the program involved. Any violation of these provisions of the Act subjects the offender to a fine of up to \$10,000 or imprisonment for up to one year or both.¹²⁶ Following the payola revelations, many

123. The requirements of radio broadcasting make it difficult to reduce the use of records without drastic changes in broadcast strategy.

124. As used in the record industry, "payola" refers to the secret payment to and acceptance by broadcasting personnel of money, services or other valuable consideration in exchange for their broadcast use of a particular record or song. The broadcasting personnel usually involved are disc jockeys, record librarians and program directors.

125. Hearings on payola were conducted in 1960, *Responsibilities of Broadcasting Licensees and Station Personnel, Hearings on Payola and Other Deceptive Practices in the Broadcasting Field Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 2d Sess., pts. 1-2 (1960), and received a good deal of publicity. The subcommittee issued an interim report in February, 1960, INTERIM REPORT OF THE SUBCOMM. ON LEGISLATIVE OVERSIGHT OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, INVESTIGATION OF REGULATORY COMMISSIONS AND AGENCIES, H.R. REP. NO. 1258, 86th Cong., 2d Sess. (1960), and its recommendations ultimately resulted in the 1960 amendments to the Communications Act aimed at payola, 47 U.S.C. §§ 317, 508-09 (1970).

One author has speculated that the taint on the record industry's image produced by the payola revelations may have hindered the industry's efforts to gain copyright protection for its products. C. McCaghy & R. Denisoff, *The Criminalization of Record Piracy: An Analysis of Conflict and Politicalization* 13 (unpublished mimeo, Sociology Dept., Bowling Green State Univ.). See generally BILLBOARD, July 7, 1973, at 1, col. 4 (recent payola reports may harm chances for enactment of public performance right in recordings).

126. 47 U.S.C. §§ 317, 508 (1970). For the legislative history and purpose

radio stations responded by depriving disc jockeys of the authority to select records for broadcast. This function was to be performed by a non-broadcasting music director who compiles a weekly playlist of records. Nevertheless, the practice of payola has not died out. Recently there have been reports of continued payola¹²⁷ which have instigated investigations by several federal agencies, including the Justice Department.¹²⁸ These reports indicate that gifts to radio station personnel persist, ranging from cash to airline tickets to drugs.¹²⁹

As noted above, optimum allocation of broadcast time seems to require that record companies pay for the advertising services provided by record broadcasts. If the price of these services equalled their value to the marginal record company purchaser of advertising, payola would disappear. Unfortunately, legal business considerations extraneous to a claim for compensation for valuable services rendered preclude broadcasters from charging record companies for the full advertising value of record broadcasts. Although radio stations may be unable to capitalize on the value of the air time they control, employees of the radio station may be tempted to so capitalize for their personal benefit. Thus we have the classic ingredients for corruption: a valuable product sought by people willing to pay for it, no legitimate method for meeting these demands, opportunity for individuals to covertly provide the service, and most importantly, a highly ambiguous moral situation where it is difficult to pinpoint the actual harm done by such corruption. It is not difficult for a person offered payola to argue that someone is entitled to be paid for giving records free air time, and, if the radio station cannot be paid, an employee is the next best recipient. In fact, the victims are listeners who are deprived of the unbiased judgment of the person selecting the music to be played. The extent of the injury, however, is blurred by the inherent arbitrariness of such choices even when no payola is involved.

If payola is an almost inevitable consequence of the pressure of economic forces operative in the broadcast record industry, it seems unwise, all things being equal, to increase such pressure by adding direct financial returns to record companies from license fees for public performance in addition to the inherent and unavoidable indirect benefits to record sales from radio play.

of the 1960 amendments, see H.R. REP. NO. 1800, 86th Cong., 2d Sess. (1960).

127. It is not clear, but the dismissal of Clive Davis as president of Columbia Records in May, 1973, was probably related to the allegations of a new payola scandal.

128. See, e.g., Kwitny, *Oiling the Wheels: Is It Just Business as Usual in Record Industry or Do New Probes Reveal Crime at High Levels?*, Wall Street J., June 19, 1973, at 46, col. 1. The Federal Trade Commission has also construed payola to be an "unfair or deceptive" practice under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). See *Hearings on Payola and Other Deceptive Practices in the Broadcasting Field*, supra note 125, pt. 1, at 641. For a short description of the various forms of payola and the legal responses thereto, see SHELLEY & KRASILOVSKY 96-101.

129. Some reports suggest that payola is more prevalent at black-oriented radio stations where the disc jockeys are not paid as well as their counterparts at other stations. See Kwitny, *Oiling the Wheels: Is It Just Business as Usual in Record Industry or Do New Probes Reveal Crime at High Levels?*, Wall Street J., June 19, 1973, at 46, col. 1.

In theory, any public performance right provides incentives for such owners to influence record broadcast selection. In practice, however, composers generally have not engaged in payola. This may be partially explained by the fact that the sale of composers' public performance right has been institutionalized through ASCAP and BMI. Whatever the reason, it is clear that record companies have been the payola culprits, and, therefore, the potential effect of a record public performance right, increasing temptations towards influencing record selection, must be counted against the case for a record public performance right.

Externalities

The direct economic and social consequences from possible legal intervention into a particular economic sector often are accompanied by positive and negative side effects, externalities, extending beyond the particular area where the intervention occurs. There are situations where the social benefits of production exceed the value of that product to individual consumers. Such arguments have been advanced in support of copyright; that is, the social benefits of increased availability of literary published work are such to warrant increasing authors' income through copyright protection even though this raises the price of books to consumers. The externalities of a record public performance right are primarily negative ones such as the increased incentive to payola. The only potential beneficial externality is the cultural benefit from increased support of classical music and musicians. These arguments have been explored above and little merit has been found in them.

Conceivably, the establishment of a record public performance right might also affect efforts to establish effective international copyright protection. International considerations, however, are not particularly relevant to a determination of the desirability of granting a public performance right to records produced in the United States. Although many foreign countries recognize a performing right in recordings,¹³⁰ Canada recently has abolished public performance rights.¹³¹ The widespread endorsement of public performance rights by European countries may be due to a particular attitude toward the promotional value of radio air play. While the American record

130. See *Hearings on S. 597*, pt. 4, at 1340-53.

131. An Act to Amend the Copyright Act, 19 & 20 Eliz. II, c. 60 (Assented to Dec. 23, 1971). See Keyes, *Letter from Canada*, *supra* note 18, at 138; Alley, *The Phonographic Industry Deprived of Its Performing Right in Canada*, *EUROPEAN BROADCASTING UNION REV.*, March 1972, at 46. The action of the Canadian Parliament, and the recommendations of the official studies preceding it, seem particularly noteworthy since Canada has traditionally modeled its copyright law on the British statute, and that statute recognizes a performance right in recordings.

industry generally regards air play as an essential, effective means of advertising with a direct correlation between the extent of radio exposure and sales, European record executives often fear that unrestricted play of a record will diminish its sales.¹³² Canada's experience may be of particular relevance here since, like the United States, its broadcast industry is largely privately owned and managed.¹³³ Canada's action undoubtedly was influenced by two extensive studies of intellectual property.¹³⁴ The opposition of the first commission to public performance rights was based upon its concern that the British experience, where performance rights are used by the Musicians' Union to control the broadcast of records, would be repeated in Canada.¹³⁵ The more recent report exhibited misgivings with the concept of paying a record company for each use of the record. Record companies, they argued, were "really in the business of selling a physical item."¹³⁶ Moreover, charging for each record broadcast would be like charging for each reading of a book.¹³⁷ This report also found no shortage of records and concluded that public performance rights were unnecessary as an incentive. Ignoring questions of administrative feasibility, we find no difficulty with the author of a book charging actor Emlyn Williams for each public reading of the author's work. Similarly, a record company is in the business of making money from its product through any means permitted by the law and the market.

Some of the countries that recognize public performance rights, such as the Scandinavian countries, insist upon reciprocal treatment for their records as a condition for recognizing public performance rights of foreign records.¹³⁸ Therefore, because our law does not provide any system of compensation when their recordings are performed publicly in the United States, recordings originating in the United States are not entitled to any compensation when they are per-

132. See BILLBOARD, July 10, 1971, at IMIC-13, col. 3. But see BILLBOARD, Oct. 28, 1972, at 56, col. 1; REPORT OF THE COPYRIGHT COMMITTEE, *supra* note 75, at 55 (improbable that unlimited broadcasting injures a record's sales in Britain).

133. The Canadian broadcasting industry is owned and operated both by private interests and by the government. The government operation is under the Canadian Broadcasting Commission (CBC) and is much smaller than the private operation.

134. ROYAL COMMISSION ON PATENTS, COPYRIGHTS, TRADEMARKS AND INDUSTRIAL DESIGNS, REPORT ON COPYRIGHT 77-78 (1957) (Ilseley Commission); ECONOMIC COUNCIL OF CANADA, *supra* note 18, at 158-59. In abolishing the performance right the Canadian Parliament was probably influenced by at least two other factors. First, the relevant committees expressed sympathy for the performers on recordings, and the failure of the record companies to conclude a voluntary sharing arrangement with musicians may have hurt the companies' cause. Second, those committees might have seen the benefits of the right as likely to go to foreign, rather than domestic producers and performers. The picture which emerged from prior hearings was that of an industry primarily "controlled from abroad . . . and having shown in the past very little concern for the development of Canadian talent or of a domestic record industry." Allyn, *The Phonographic Industry Deprived of Its Performing Right in Canada*, *supra* note 131, at 49-50.

135. ROYAL COMMISSION ON PATENTS, COPYRIGHTS, TRADEMARKS AND INDUSTRIAL DESIGNS, *supra* note 134, at 78. The British experience is described at note 75 *supra* and accompanying text.

136. ECONOMIC COUNCIL OF CANADA, *supra* note 18, at 158.

137. *Id.*

138. See *Hearings on S. 597*, pt. 2, at 508-09 (Denmark); Stewart, *Royalties for Record Play on the Radio*, *supra* note 75, at 66 (Sweden).

formed in these countries. While this might support the United States in granting a public performance right for records on the grounds that the increased earnings for American record producers through the public performance rights of these foreign countries might be sufficiently great to overcome the drawbacks of such action, this argument is faulty. All countries do not insist upon reciprocity. For example, public performance fees are generally paid in Great Britain with respect to recordings of United States origin. Under British law all recordings first, or simultaneously, published in the United Kingdom are entitled to public performance protection,¹³⁹ and the major American companies appear to effect such simultaneous publication.¹⁴⁰ Similarly, an American recording receives public performance protection in Germany if it is published there within 30 days after publication in the United States.¹⁴¹ Moreover, the lack of royalties from those countries requiring reciprocity does not seem to have undermined incentives for record production in the United States.

A second international aspect of public performance rights relates to the effect from granting such rights upon the structure of international protection of artistic works. Two international conventions are relevant here. The International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (The Rome Convention), which went into effect on May 18, 1964, fixes certain minimum requirements for the protection to be granted by each contracting state to performing artists in their performances, to record manufacturers in their recordings, and to broadcasting organizations in their broadcasts.¹⁴² The Convention for the Protec-

139. See Copyright Act of 1956, 4 & 5 Eliz. II, c.74, §§ 12(2), (5); Letter from W. Wallace, Assistant Comptroller, Department of Trade and Industry, London, to Lewis Kurlantzick, Jan. 29, 1973. More precisely, simultaneous publication either in Britain or in one of the countries listed in Schedule 3 of the Copyright (International Conventions) Order 1972, STAT. INSTR. 1972, No. 673, secures the necessary protection. The practice of American companies appears to be to publish simultaneously either in the United Kingdom or in a "scheduled" country.

140. Letter from I.D. Thomas, International Federation of the Phonographic Industry, London, to Lewis Kurlantzick, March 16, 1973.

141. See Copyright Statute, Art. 125(3), 126(2) (German Federal Republic), 1 UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (1971). See also International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention), May 18, 1964, art. 5, § 2, 496 U.N.T.S. 46, 48.

142. The official text of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations is contained in 496 U.N.T.S. 43 (1964). The text was agreed upon in Rome in October, 1961, and the Convention went into effect on May 18, 1964. The series of meetings leading up to the Convention and its subsequent history can be followed in the annual reports of the director-general of UNESCO. Useful background and comparative material can be found in Bodenhausen, *Protection of "Neighboring Rights"*, 19 LAW & CONTEMP. PROB. 156 (1954); E. ULMER, *THE PROTECTION OF PERFORMING ARTISTS, PRODUCERS OF SOUND RECORDINGS AND BROADCASTING ORGANIZATIONS: A STUDY IN INTERNATIONAL AND COMPARATIVE LAW* (1957); STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT ON

tion of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, in Article 2, commits each contracting state to protect producers of recordings who are nationals of other contracting states against the making, distribution, and importation of duplicate recordings without the consent of the producers. The Convention became effective on April 18, 1973, three months after deposit of the fifth ratification. The United States ratified the Convention on October 1, 1973, and it went into effect with respect to the United States on March 10, 1974.¹⁴³ Only a few countries have joined the Rome Convention.¹⁴⁴ The United States has not joined nor does it appear likely to. In any event, the United States could join the Convention without establishing a performance right since the terms of the Convention provide that declarations of reservations are admissible. A contracting country may thus declare that it will not apply the performing right provisions, without losing the other benefits of Convention membership.¹⁴⁵ Similarly, failure to establish a public performance right would not prevent United States participation in the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the recently concluded international treaty to deal with record "piracy." This treaty focuses exclusively on the problem of unauthorized duplication of recordings. Therefore, international considerations do not require the establishment of a public performance right for record producers.

The Equitable Case for a Record Public Performance Right

Traditional economic arguments do not seem to support the establishment of a record public performance right. If anything, a public performance right will misdirect resources towards marginally needed record production and increase the costs of disseminating recorded music. Therefore, the establishment of a public performance right must be justified, if at all, by its power to correct existing distributive injustices and not by possible improvements in the allocation of economic resources. Thus, the question is whether the existing system

THE DIPLOMATIC CONFERENCE FOR THE ADOPTION OF AN INTERNATIONAL CONVENTION CONCERNING THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANIZATIONS IN ROME, ITALY (Comm. Print 1962); Ulmer, *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, 10 BULL. COPY. SOC'Y 90, 165, 219 (1963).

143. The text of the convention is printed in BNA PATENT, TRADEMARK & COPYRIGHT J., at D-1 (Nov. 18, 1971). For a report on the October, 1971, diplomatic conference at which the final draft was approved and signed by twenty-three nations, including the United States, and a summary of the convention's provisions, see Kaminstein, *Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms*, 19 BULL. COPY. SOC'Y 175 (1972); Ulmer, *The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplications of Their Phonograms*, 3 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 317 (1972).

144. See COPYRIGHT, Jan. 1973, at 26.

145. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, May 18, 1964, arts. 12, 16, 496 U.N.T.S. 52, 54.

works unacceptable injustices upon the individuals comprising the record industry.

Benefits to Record Companies and Performers

Whatever sophisticated arguments may be offered in favor of the existing legal-economic arrangements respecting the public performance of recorded music, broadcasters using records as a major part of their programming seem to receive very large economic benefits without any cost, since new releases usually are promoted by giving them to radio stations free of charge. This kind of imbalance raises the suspicion that someone is being hurt, and that broadcasters are receiving something they do not deserve. The groups that might be injured under current legal arrangements include record producers, performers, particularly classical and semi-classical performers, and composers. In this section the current position of record companies and performers will be explored. The position of composers under the existing and proposed legal regime will be analyzed at length in a subsequent section.

It is argued that unrestricted record broadcasting substantially reduces record sales and, therefore, record producers should receive some compensation from broadcasters for these losses.¹⁴⁶ Through free use of records, broadcasters are able to obtain the prime ingredient of saleable entertainment at zero cost. This, of course, sharply contrasts with almost every other enterprise, including other forms of radio entertainment, which must pay for the products or services they purvey. Moreover, record broadcasts further injure record producers by providing music listeners with a service that they otherwise could receive only by purchasing records. Yet, record sales are assisted through the free advertising provided by these same record broadcasts.

Thus, the reasonable proposition that broadcasters should pay record companies for the recorded music, produced at great expense and risk by the record companies, which fills so much of the commercial broadcast day, may be countered by the equally cogent response that broadcasters provide record companies an equally valuable service without charge. Until now these crossclaims have, in effect, nullified each other. The record companies have been unable to charge for their services because they had no legal right to preclude any use made of their product by a purchaser. Also, they recognized the value of the free advertising they received.

If the value to record companies of free advertising exceeds the value of lost sales from listeners who otherwise would have purchased

146. See *Hearings on S. 597*, pt. 2, at 541; Bass, *Interpretative Rights of Performing Artists*, 42 *DICK. L. REV.* 57-58 (1938); Diamond & Adler, *Proposed Copyright Revision and Phonograph Records*, 11 *AIR. L. REV.* 29, 42 (1940).

the record, there is little reason to give records a public performance right the principal effect of which would be to require broadcasters to pay additional sums to record companies. Furthermore, if a public performance right is granted, it should take a form which permits the broadcasters to offset the free advertising services against their public performance fee liability. This would be possible if public performance fees were to some extent negotiable. The implicit threat to reduce use of recorded music might cause record industry negotiators to moderate their demands with respect to public performance fees, just as similar threats to composers' representatives may have an equivalent impact in view of the composers' dual interest in record broadcasts: They collect public performance fees and record sales are promoted, which increases their mechanical reproduction royalties.

The proposed legislation, however, establishes mandatory public performance fees, thereby precluding any possibility for such adjustments. Broadcasters would seem to be doubly injured. They must pay fees for playing records which they previously played without charge, and they are deprived of the opportunity of using negotiations over public performance fees as a means of recouping the value of the free advertising they provide the record industry. The legally imposed relationships are, therefore, inconsistent with the applicable economic forces. Such situations inevitably generate pressures to avoid or violate the legal restraints. Payola is one response to a situation where no legitimate market mechanisms exist to adjust the price of radio services to reflect the value of record play to record companies.

Record companies and performers, especially the latter, have supported their claim for a public performance right as compensation for the damage caused by radio broadcasts to the possibilities for live performances by singers and musicians.¹⁴⁷ The demise of live radio broadcasting reduces one potential kind of damage from unrestricted record broadcasting since it can no longer be claimed that the playing of a performer's record involves self-competition with his own live radio show.¹⁴⁸ Actually, radio and television exposure is likely to be helpful rather than detrimental to the artist's live bookings. Indeed, that exposure of his record will benefit him in other markets leads performers, particularly new artists, to record initially for small compensation.

Of course, granting record producers a public performance right will not eliminate the possibility that record broadcasts would adversely affect record sales and live performances; it will only provide additional revenues which might be deemed to compensate for such losses. Although the Revision Bill recognizes a public performance right, it does not permit record producers to stop broadcasters from using their product. Pursuant to the compulsory licensing requirements, radio

147. Bass, *Interpretative Rights of Performing Artists*, *supra* note 146, at 57-58; Chafee, *Reflections on the Law of Copyright: II*, 45 COLUM. L. REV. 719, 733 (1945); Diamond & Adler, *Proposed Copyright Revision and Phonograph Records*, *supra* note 146, at 42-43.

148. Comment, *The Twilight Zone: Meanderings in the Area of Performers' Rights*, 9 U.C.L.A.L. REV. 819, 861 (1962).

stations are permitted unlimited broadcast of records upon payment of the legally established license fees.¹⁴⁹

Extension of a public performance right to record producers has also been justified in terms of the beneficial effect of such action upon groups allegedly injured under the existing copyright laws. In addition to the alleged unfairness of permitting broadcasters to profit from the use of records without compensating record producers, it has been further contended that certain performers of recorded music are particularly injured by the existing system. These are artists whose records continue to be broadcast after the possibilities for sales of the records have been exhausted.¹⁵⁰

Record companies derive their bargaining power from the ability of artists under contract to make records which will be purchased and publicly performed. Thus, record companies and artists should be viewed as a single bargaining unit vis-a-vis composers and broadcasters. Between record companies and artists, the artists' bargaining power derives from the same source, and, to the extent that certain artists have established themselves as effective record sellers, they may demand a premium for their services. Since there are many record companies, competition will ensure that artists are paid in accordance with their record selling capacity. Of course, performers without proven capacities are in a much weaker bargaining position and must compete with the numerous musical artists anxious to make recordings.¹⁵¹ To some extent the compensation of marginal per-

149. See Revision Bill § 114(c). Cf. *Hearings on S. 597*, pt. 3 at 866.

150. See *Hearings on S. 597*, pt. 2, at 542-43; Kenton, *The Recording Artists' Case for Copyright Revision*, BEVERLY HILLS BAR J., Jan. 1970, at 21.

151. In fact, most performing artists never get to the point where they earn royalties on record sales. See Kwitny, *Genya Ravan Struggles To Become a Success on Rock Music Circuit*, Wall Street J., May 11, 1972, at 1, col. 1. A prime reason for this result is the standard recoupment arrangement between artists and companies. Generally, agreements between performers and record companies provide that recording costs are recouped from the artist's royalties. Recording costs include studio charges and payments at union scale to the featured performer, as well as scale payments to back up instrumentalists, vocalists, copyists and arrangers. In other words, until the royalties otherwise payable to the artist equal the recording costs, no royalty is payable to the artist, and he is only paid royalties thereafter. See, e.g., Agreement Between Record Company and Recording Artist § 4, in SHELLE & KRASILOVSKY 546. For example, assume recording costs of \$25,000 and a royalty of 24 cents per album sold, the figures based on a 5 percent royalty rate on 90 percent of sales on a \$5.98 album, and subject to a 10 percent deduction for packaging. Under such an arrangement, the artist would begin to receive royalties only after approximately 104,000 records had been sold. In addition, recording agreements commonly provide that no royalties will be paid on a profitable recording until the unrecovered costs attributable to previous recordings by the artist have been recovered. A survey performed on behalf of the National Committee for the Recording Arts (NCRA) found that in 1966, of 1449 recording artists under contract to a variety of record companies, only 13.8 percent received sufficient royalties to offset recording costs. The remaining 86.2 percent were paid the minimum union scale. See *Hearings on S. 597*, pt. 4, at 1251-52. (The authors attempted to obtain a copy of this survey in order to assess its validity. However, NCRA's counsel was unwilling to make it available.)

formers may be increased through union negotiated minimum per recording session wages. If these wages exceed these performers' productivity, this may affect the amount record companies can pay artists who can command compensation above the minimum scale.

The performer's bargaining power derives from his capacity to make records that sell or that are broadcast. Contrary to popular impression, performers whose records do not sell particularly well, but which are publicly performed over a long period, will be compensated for their talents. Thus, the complaints by artists, such as Stan Kenton, that their work is appropriated by broadcasters without benefit to them is ill founded. Under existing law, in choosing which company will first record their song, and in determining the price which they will charge that company to record their song, composers evaluate the capacity of the artists under contract to the company to make records which will yield the composer revenues through public performances as well as through record sales. This factor will be taken into account in the negotiations between the composer and the record company, and the artist with such capabilities can compel record companies to compensate him accordingly. For the same reasons the performer with public performance potential also will be compensated by record companies exercising their compulsory licensing power.¹⁵²

The Revision Bill, as initially introduced, both grants a record public performance right and specifies that revenues earned through public performance of recordings be equally divided between record companies and performers. Although the legislation does not specify how the ultimate distribution to individual companies and performers is to be achieved, the expectation seems to be that record companies and performers will form an ASCAP-like organization which will collect revenues, divide them equally between record companies and performers, and distribute the equal pools according to some negotiated arrangements.¹⁵³ To the extent that the fifty-fifty split provided by the Revision Bill conflicts with the relative bargaining positions of the parties, compensating adjustments will be made in the royalties with respect to record sales.

While the recoupment structure sketched above is typical, it is, of course, not unalterable. The bargaining power of some big-selling popular artists may enable them to negotiate not only higher royalty percentages but also a "flat" arrangement whereby part or all of the recording costs are absorbed by the record company and not charged to the artist as an advance against royalties. But this is uncommon. In the case of established classical performers, however, particularly "star" solo artists, recording costs often are not recoupable from royalties. Also, the royalty rate itself may be relatively high when public domain music is recorded. See S. SHEMA & M. KRASILOVSKY, *MORE ABOUT THIS BUSINESS OF MUSIC* 23-24, 27 (1967).

152. The price-setting process between composers and record companies is analyzed in the text at pages 227-33 *infra*.

153. As noted previously, see text accompanying notes 83-84 *supra*, the AFM and AFTRA have already discussed how the performers' pool will be divided. Presumably the principal determinant of the distribution of revenues will be the current frequency of performances of a recording. Other criteria are possible, however. ASCAP, for example, offers composers the option of compensation solely on the basis of current performances of their works or on a more complex "four-fund" basis which provides for long-range factors and is designed to give steadier income to a songwriter as compared to the income based on a current performance computation.

Statutory specification of the performer's compensation for public performance of the records he helps make may affect, but will not finally determine, the performer's actual earnings from this source. With respect to every record, the artist's compensation can be divided into two components: his compensation with respect to record sales, and his compensation with respect to public performances. Under existing legislation, the artist sets a single price for his services based upon his combined capacity to sell records and to have them broadcast. Since now only composers enjoy a public performance right, the broadcast potential of an artist does not directly benefit record companies, but it is relevant to the agreement between composer and record company which, in turn, affects the compensation of the performer. Under the new public performance right provided by the Revision Bill, record companies are granted a specified percentage of broadcasters' advertising revenues, and performers are to receive one-half of these revenues. Since these requirements, however, will in most instances be inconsistent with the market power of the various participants in the record-making and performance process, the statutory division will be under constant pressure from extant market forces.

With respect to the ultimate outcome of the conflict between the statutory division and market forces, one must remember that both record companies and performers are interested only in the performers' total compensation; the division into record sale and public performance components is irrelevant. Therefore, if the public performance component of the performer's compensation is fixed and if the total of public performance fees and normal compensation for record sales exceeds the compensation that the performer could earn through the free play of market forces, downward adjustments would be made in that component of the performer's compensation attributable to record sales. Subject to the limits imposed by union minimum scales, one would expect that the record sale component would be reduced to the extent necessary to bring the total compensation in conformity with economic realities.

Complete adjustment to market forces might be prevented by several factors. Conceivably, with respect to less popular artists, the required reduction of the record sale component might bring it below minimum union scale. In addition, such adjustments in the performers' compensation may be deemed inconsistent with the equal division specified by the Revision Bill. It is difficult to predict the ultimate outcome of the possible conflict between union minimum scales and market forces. The most direct response would be reduction of the union scale, but experience clearly demonstrates the difficulty in reducing minimum union scales. It is more likely that record companies would have to make the necessary adjustments similar to that

of employers responding to minimum wage legislation. In this instance, this means a reduction in the employment of artists whose "productivity" falls below the compensation record companies must pay them under the terms of the Revision Bill, 50 percent of public performance revenues, and minimum scale requirements. It also may force marginal record companies out of business, which would, in turn, reduce the demand for performers. This would free resources for other uses, however, given the relatively small size of the additional costs imposed by a record public performance right, the effect on employment opportunities is likely to be very insignificant.¹⁵⁴

154. The reduction in the number of record companies would shift resources from record production and make them available for other uses. Whether this would be desirable depends entirely upon one's judgment on the appropriate level of record output compared to the output of those goods and services which could be produced with the resources now devoted to record production. In the context of book publishing, for example, Professor Stephen Breyer has speculated that a modest decline in college textbook revenue should not cause serious social concern. Threats to the royalty income of authors, who are primarily college teachers, might induce these authors towards scholarly articles or to devote more time to teaching. Since these activities provide considerable spillover benefits, he concludes that substituting more of them for somewhat fewer college textbooks should not prove socially harmful. Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 309 (1970).

It is impossible to know where the resources withdrawn from record production will move and difficult to determine the value of the alternate social product that would be produced by the marginal performer and the capital and managerial resources of the marginal record company. The capital and human resources commanded by record companies should be readily transferable to a wide variety of economic goods with little loss of efficiency. Performers, however, may be uniquely qualified for making records and little else. That is, for any other purpose than record making, performers must be viewed as unskilled labor. Professional athletes are in a similar position. Thus, it would appear that up to some point, total social product will be maximized by keeping performers in the record business rather than having them shift to the next best use of their capacities. Moreover, many performers derive great psychic income from their profession, which means that they would be likely to continue as performers for less compensation than they could earn elsewhere. This gives both record companies and society the opportunity to exploit such people. Therefore, there may be considerable justification for union established minimum scales, even where the minimum salary is higher than actual productivity.

Though the marginal performer may be vulnerable to exploitation, successful performers and composers are overpaid in the sense that many recording artists and many popular composers would probably continue to record and compose for less than they are presently paid rather than resort to other occupations. Among performers who consistently produce best-selling albums and composers who consistently produce best-selling songs, the fact that their incomes are comparatively large, that some have a particular talent for music and recording, that they enjoy what they are doing, and that some at least may be more interested in music than money, all suggest that these performers and composers will not prove highly sensitive to changes in income. Economists would term part of the return to a successful performer or composer with a large income a "pure rent." That is, like the successful professional ballplayer, the highly paid performer or composer is paid more than is necessary to coax out his talent. If part or all of this pure rent could be eliminated without causing the performer or composer to refrain from recording or composing, the result would be one which increases the general welfare of consumers, for the outcome would be that output would remain the same and consumer wants would be satisfied while cost would be reduced. See generally P. SAMUELSON, *ECONOMICS* 369 n.8, 380, 541, 546, 555 (8th ed. 1970). However, in considering actions which might reduce the income of composers and performers, it should not be overlooked that price structures which provide pure rent also serve other allocative functions which might be impaired by efforts to reduce the rent component in the income of composers and performers. Whether such a reduction would be fair to composers and artists is a difficult and unresolved problem.

The Revision Bill, as introduced, grants a public performance right to the companies producing the record, but then requires that revenues earned by the companies from this source be divided equally with the performers involved.¹⁵⁵ Other arrangements are possible, but in fact it does not matter which of these two groups is the legal holder of the right. The production and exploitation of records require the cooperation of record companies and performers, so that neither can profit from the public performance right without assistance from the other. Thus, no matter who is given the legal right to public performance revenues, such revenues would be seen by both groups as part of the total financial returns that can be expected to flow from the production of a successful record. The share of each party will depend upon their respective bargaining power, which depends in turn upon the contribution each can make to the record sales and public performances, and the availability and skill of other record companies and other performers. The only circumstances in which distribution of the legal rights in the public performance of records might be significant is where full adjustment of these legal rights to accord with the underlying market power of each group is blocked by outside circumstances, such as union established minimum wage scales. In any event, the key circumstance is the mutual interdependence of performers and record companies with respect to earning revenues from public performances, which requires that whoever is formally granted the legal right to such benefit must in practice share this right with the other party.

The foregoing analysis of the underlying economic factors affecting the division of public performance proceeds between record companies and performers also applies to jukebox performances. The Revision Bill calls for an equal split, between record companies and performers, of the licensing fees earned by record producers from jukebox operators.¹⁵⁶ The ultimate distribution of these revenues, however, is likely to differ from the statutory scheme and will be determined by the relative bargaining positions of the parties. Adjustments in response to the economic realities would be accomplished within the contract, which defines the performer's compensation with respect to record sales.

Who Pays the Piper?

So far, our efforts to probe the validity of the major equitable arguments that have been or might be advanced in support of a public performance right for records have focused upon the possible benefits

155. This provision was deleted in the version passed by the Senate.

156. See text accompanying note 36 *supra*.

of such action to particular groups allegedly injured by the existing legal-economic structure. Another important consideration is to determine who will bear the costs.

Granting a public performance right to record producers, in addition to that held by composers, initially increases the profitability of making records by increasing the potential revenues from each new record by the amount of record public performance fees that a record producer can collect and retain. It has been demonstrated, however, that a record public performance right will not increase the productivity of the record or broadcasting industries. Furthermore, assuming full employment of the nation's material and human resources, an increase in the earnings of record producers must be at someone else's expense, either broadcasters, composers, advertisers, or the radio and television audience. Determination of the impact upon composers requires some rather complex analysis, which will be presented in the next section. The radio and television audience will be affected if broadcasters attempt to raise their advertising rates, and advertisers, in turn, attempt to recoup these costs by raising the prices of advertised products. They also will be affected if broadcasters reduce their use of recorded music in response to higher license fees.

Broadcasters, however, are unlikely to attempt to increase advertising rates in response to the increase in public performance license fees that would result from granting a public performance right to record producers. Broadcasting is a highly atypical economic enterprise. The radio music listener pays nothing for his music *qua* listener since the cost of the broadcast is supported by advertisers who pass the cost on to the purchasers of their products. Determination of the economic impact of advertising requires very complex economic analysis. Therefore, if advertising rates were raised, it is difficult to determine how this would affect advertisers and consumers of the advertised products. Advertising rate increases, however, are unlikely. In the short run, radio stations establish their advertising rates in accordance with the value of their product, which is determined by the audience commanded by each broadcaster. Rates are changed only in response to changes in audience size and not in response to cost changes.¹⁵⁷

157. Starting from an equilibrium position, in the long run, the least efficient producer must earn enough revenues to cover his full costs of providing a good or service. If not, this producer must stop production, and total supply will contract. This will cause prices to rise, which will, in turn, induce increased production, either by new or existing firms, and equilibrium will be established at the new, higher price. In the short run, however, price is determined by demand. Price increases in the cost of goods or services used to produce a product must be absorbed by the producers because demand conditions establish the optimum price, and no producer can increase his price without reducing total revenues. Advertising rates are set in accordance with the audience commanded by a particular station in a particular time period. Increases in the cost of recorded music caused by the necessity to pay record companies for the use of their product do not increase the value of the sponsored programs to advertisers. Therefore, they will not pay higher advertising rates and the broadcasters must absorb these costs.

If these costs, however, are substantial, advertising rates will increase. This will occur through the mechanism specified above, *viz.*, marginal broadcasters must get higher rates or cease production. Advertisers will recognize this fact

Moreover, advertising rates are based upon the time period within which the program is broadcast rather than the nature of the specified program. Thus, any rate increases could not be limited to record programs, but would have to apply to all programs within each relevant time period. For these reasons small cost increases, such as paying public performance license fees, are likely to be absorbed by the station and would not be passed on to advertisers through rate increases.

If broadcasters are unlikely to raise their advertising rates in response to higher costs for playing records caused by the imposition of a license fee payable to record producers in addition to that charged by composers, they might be expected to reduce their demand for music licenses. If this occurs to any significant extent, composers probably will be injured, as will those listeners who prefer record shows. It is very unlikely, however, that broadcasters will reduce their demand for records. A reduction in the demand for records involves rather drastic action. One simply cannot reduce the number of records played during a show; rather, one must cancel the entire show and substitute another program for the cancelled record show, since dead air is bad for business and discouraged by the FCC.

It is very unlikely that broadcasters would attempt to substitute other types of programs for record programs to any appreciable extent. Although program selection is affected by costs, it is primarily determined by listener acceptability. Therefore, broadcasters do not lightly change a format they deem effective in a particular time slot. Moreover, license fees represent a very small component of the total costs of producing a record show. Although the presence of large overhead costs makes precise allocation of costs difficult,¹⁵⁸ license fees represent no more than approximately 3.7 percent of a typical record show's costs.¹⁵⁹ Under the proposed legislation, the fee for record licenses would increase total license fees by 29 percent.¹⁶⁰ This would

and pay the higher rates, though they may well reduce their demand for radio and television programs through shifts to cheaper media, if available, or reductions in their total advertising efforts.

158. A very large proportion of broadcast expenses, such as technical expenses, selling expenses and general and administrative expenses, would be incurred no matter what the program format.

159. According to FCC data, total radio broadcast expenses in 1972 amounted to \$1,101,110,000. Music license fees were \$32,765,000, and thus represented approximately 3 percent of total expenses. See FCC, 1972 AM-FM Broadcast Financial Data, Schedule 2, Public Notice (Dec. 21, 1973). Approximately 75-80 percent of radio broadcasting is devoted to the programming of recorded music. See note 47 *supra* and accompanying text. By taking 80 percent of total broadcast expenses, \$880,888,000, the percentage of these expenses which went to music license fees, \$32,765,000, would be 3.7 percent.

160. ASCAP presently charges radio stations 1.725 percent of net advertising receipts, and BMI charges 1.7 percent for a total of 3.425 percent. The Revision Bill adds a charge of at most 1 percent of net advertising receipts for the record public performance right. The total license fees, thus, would amount to 4.425 percent, which is a 29 percent increase.

raise the costs of record licenses to only 4.7 percent of total record show costs,¹⁶¹ hardly enough to warrant a change in format. Finally, record shows are one of the least expensive available broadcast formats. Talk shows using mediocre talent also are inexpensive, but a station can have only so many uninspired talk shows during a broadcast day.

The peculiar method of packaging music licenses constitutes a further impediment to reductions in the use of recorded music. Price and administrative considerations lead virtually all broadcasters to purchase licenses on a blanket rather than a per program basis. This behavior is based on factors that would continue to operate if record producers were granted public performance rights. Under a blanket license broadcasters pay composers a percentage of all their net advertising receipts. Under a per program license the station pays on only those programs in which music in the licensing society's repertoire is performed. ASCAP's fee for a blanket license is 1.725 percent of all advertising revenues and BMI's is 1.7 percent. But for a program license the ASCAP fee is 8 percent of net advertising receipts from these programs and BMI's fee is 4 percent. Under these rate schedules, it rarely pays to use per program licenses since, as the portion of broadcast time devoted to recorded music programs increases, a point is reached where total per program fees exceed those payable under a blanket license and it benefits broadcasters to switch to the blanket license.

Another feature of the blanket license is that a single fee is charged for unlimited use of the entire repertoire of each of the two major composers' performing rights licensing societies. Therefore, unless broadcasters could switch to purchasing music licenses on a per program basis, they would have to eliminate all use of recordings of copyrighted music. Theoretically, licenses are available on a per program basis, but under most broadcasting formats, per program licenses are more expensive and involve substantial additional administrative costs. They are only preferable for stations which use very little music, for example, an all news and talk station. It is therefore doubtful that many broadcasters would shift from a blanket license to per program licensing unless they were prepared to adopt programming formats requiring practically no use of recorded music.

Not only are per program licenses usually more expensive, but they also involve substantial additional administrative costs. First, the broadcaster must keep separate records of the revenues earned by any show(s) in which copyrighted music is played. Second, both ASCAP and BMI require per program licensees to keep logs of all the music they play¹⁶² in order to permit the licensing society to ensure that the station, which cannot be familiar with the society's entire

161. A 29 percent increase would raise license fees and total broadcast expenses allocated to record shows by approximately \$9.5 million to \$880,888,000. See note 159 *supra*. The result would be that license fees would account for approximately 4.7 percent of record show costs.

162. See ASCAP, Local Station Per Program Radio License ¶ 5A; BMI, Single Station Per Program License, Radio ¶ VI.

repertoire, has not failed to pay license fees with respect to a program which in fact has used some of the society's music. Under these circumstances it would be preferable for a broadcaster to take a per program license only when its use of music had been reduced to the point where the total of per program fees plus additional administrative costs was less than the blanket license fee. Generally such a situation would arise only if a station drastically reduced its use of music or introduced a highly atypical pattern of music programming. For example, broadcasters might schedule one hour of copyrighted music and 11 hours of public domain music. Of course, if a record public performance right increased license fees to the point where they threatened serious injury to broadcasters, the entire rate structure might have to be changed to permit reductions in record use without the drastic consequences of such action under the current arrangements.

Choosing the Victim

For all these reasons, broadcasters almost certainly would absorb the increased costs of record shows without reducing their demand for recorded music. More precisely, broadcasters would not attempt to substitute cheaper forms of entertainment for records, and, therefore, would maintain their present demand for record licenses, unless the increased license costs drove stations, or their successors, out of commercial broadcasting. Obviously, if the advent of a public performance right for record companies does not reduce broadcasters' demand for records, composers would maintain their current earnings level. Indeed, as will be later demonstrated, composers might increase their earnings. Record producers, of course, would gain, though not to the extent contemplated by the Revision Bill. Broadcasters would thus foot the entire bill. As previously discussed, increased record producer earnings should result in greater output of popular and classical records, with all that entails.¹⁶³

The gains of record producers, consumers, and composers would be at the broadcasters' expense. The establishment of a record public performance right would increase the costs of broadcasting records, but the broadcaster would be unable to fully compensate for these additional expenses. Assuming that broadcasters could not substitute other forms of entertainment for records and assuming further that broadcasters were maximizing their profits, if forced by law to pay a specified additional licensor, record producers, for the right to broadcast records, it would be irrational for the station to raise its advertising rates. In the short run, under these circumstances, the new public

163. See text at page 183 *supra*.

performance right would be paid from these broadcasters' above normal or monopoly profits. If no such profits are earned, the station would suffer losses and in the long run, if license fees were not reduced, such broadcasters might go out of business.

By virtue of their exclusive FCC licenses many radio and television stations enjoy substantial monopoly power and, therefore, may well earn more than competitive profits.¹⁶⁴ The strongest equitable argument for a record public performance right is that such action will transfer income to record producers from broadcasters who now earn unjustifiably high profits from their legal monopolies. Arguably, broadcasters have no right to monopoly profits and no legitimate interest would be damaged if broadcasters were forced to share monopoly profits with record producers and composers. Although licensed broadcasters enjoy a monopoly of a particular broadcast frequency, they must compete with other stations and with other advertising media. Under these circumstances, it is difficult to determine the degree of monopoly power possessed by each broadcaster. Certainly, stations will vary greatly in this regard. But all stations will have to pay the increased license fees that will result from establishing the record public performance right, and there is no necessary correlation between extent of record use and extent of monopoly power.

As we have said, record companies only could be sure of earning increased profits in the short run. Thereafter, these extra profits are subject to redistribution. Increased mechanical reproduction fees charged by composers would take away part of these profits. Remaining public performance revenues may be dissipated by increased output and lower record prices or through sharing these profits with new record companies until the marginal record company's earnings are reduced to competitive levels. If increased record production derives from existing firms rather than new entrants, however, existing record companies might enjoy increased profits beyond the short run. Record performers also will gain from increased record production through increased employment opportunities. In any event, consumers would benefit through the availability of more and cheaper records, both popular and classical.

Broadcasters, as legal monopolists, have no valid complaint concerning income losses that might result from granting record producers a public performance right. Neither record companies nor composers warrant our eleemosynary concern. The Justice Department, at least, has been willing to use the antitrust laws to protect broadcasters from the market power of composers' performing rights licensing societies. If record producers presently enjoyed a public performance right and the issue was whether they should be terminated, the fact that broadcasters would be the principal beneficiaries of such action would be

164. Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 22-23 (1959).

a good argument against changing the status quo. However, if we accept the concept that the burden of proof always is upon the proponents of redistribution of existing benefits through the exercise of public power, the fact that broadcasters may be undeserving beneficiaries of monopoly power is not sufficient reason to justify granting record producers a public performance right. It is necessary to demonstrate that a redistribution of a portion of broadcasters' proven monopoly profits to record companies and composers would be better, in some sense, than the existing distribution. There is little merit in the record producers' economic and equitable case for a public performance right. The only significant effects of redistribution of possible broadcast monopoly profits to the record industry would be an increase in the production of popular records and increased earnings for composers.¹⁶⁵ The question then boils down to a choice between devoting additional resources to record output vis-a-vis whatever use the recipients of broadcast profits would make of the same income if the legal status quo were retained.

Impact on Composers

Of all the economic participants in the process of producing and distributing recorded music—composers, record companies, performers, broadcasters, advertisers, record buyers, radio listeners—the economic impact of a record public performance right upon composers is most difficult to predict. Understandably, composers fear that the revenues earned by record producers from a public performance right will be at their expense. Under certain circumstances, this could occur. It is more likely, however, that composers will benefit from the establishment of a public performance right for record producers. The ultimate effect upon composers will depend upon the broadcasters' reaction to higher license fees for the privilege of airing recorded music, the extent to which legal and administrative obstacles preclude composers from maximizing their own public performance rights, and the composers' capacity to use their mechanical reproduction right to capture the record producers' public performance revenues. It should be noted, however, that the price for public performance licenses will not be set in accordance with standard price theory. Composers bargain through two large organizations, ASCAP and BMI, and broadcasters, the overwhelmingly predominant purchaser of public performance licenses, bargain collectively as a unit. Thus, we have a duopoly selling to a monopolist and the result is called bilateral monopoly.

165. See note 91 *supra* and accompanying text; text at pages 226-31 *infra*.

Every broadcaster requires access to the repertoires of all three licensing agencies. Theoretically, the repertoires of ASCAP and BMI are substitutable. In practice they are not. An ASCAP spokesman could recall only one example of a radio station operating solely with a license from BMI and not infringing upon any ASCAP copyright. Since there are three public performance licensing agencies and each negotiates separately with representatives of the broadcast industry in bargaining with each licensing agency the broadcasters must always consider the fees they will have to pay the other agencies. Record selection depends upon listener interest and very few record shows could survive if they limited their selections to those of one of the two major licensing agencies. Even if a station could structure its programming around just one of the licensing agencies, the administrative expense of segregating ASCAP and BMI songs and monitoring their performance to avoid infringements would be more costly than the license fee paid the second performing rights organization. This de facto non-substitutability operates in favor of the licensing organizations and their principals since broadcasters must purchase licenses from both licensing agencies and thus cannot offset one organization against the other. Composers, however, still would earn more with a single organization since it is more difficult for two sellers acting independently to set license fees at the maximization point than it would be for one.

Under normal demand conditions economic theory would clearly indicate how a composer should behave to maximize his return from the public performance of his copyrighted music. Administrative, economic and legal considerations, however, limit his ability to reach this objective. In theory, each potential music user has a demand schedule which represents the amount he will pay to secure the right to play a given quantity of music. In addition, for each composer there exists a price or fee which maximizes the total revenue obtainable from the broadcast performance of his music or a record using his music. Under existing law the composer would attempt to set each broadcaster's price at the point which maximizes total revenues obtainable from that broadcaster. Unlike most other economic goods, cost curves are irrelevant here. Once a composition has been recorded, licensing public performers imposes no further costs upon the composer. Therefore, to maximize returns from licensing, the composer, since marginal cost is zero, should set the price at that quantity where marginal revenue equals zero. Full price discrimination should be possible since the product is an intangible and therefore cannot be traded among purchasers.

Both administrative and legal considerations require that public performance fees be set for all broadcasters through industry-wide bargaining between ASCAP and BMI and representatives of the major segments of the broadcast industry. Normally, one would expect that this method of price setting would limit ASCAP's capacity to maximize its revenues from the sale of public performance licenses through price discrimination among music users. The peculiar method

for computing license fees, however, results in a considerable degree of price discrimination among broadcast music users. Although ASCAP cannot charge higher rates to stations which make greater use of its repertoire, ASCAP's earnings still are directly related to broadcasters' intensity of demand for such products.

License fees are computed as a percentage of net advertising revenues earned by broadcasters. Advertising rates for broadcasters vary in accordance with the buying power of their audience. Stations with wide audiences in large cities command far higher advertising rates than marginal stations in small towns. For example, the highest rate charged by WABC radio in New York City for a one minute spot announcement broadcast one time per week is \$224. KFQD radio in Anchorage, Alaska charges \$16 for the same spot.¹⁶⁶ Obviously, the higher the rates a broadcaster may charge advertisers, the more it is willing to pay for the items it requires to maintain its listening audience. And if record shows are effective formats, it will be willing to pay a substantial price for the privilege of playing records embodying copyrighted music. Therefore, the payment formula used by ASCAP and BMI takes full advantage of the broadcaster's relative need for recorded music. License fees are computed as a fixed percentage of advertising revenues and the higher the advertising rates, the higher the advertising revenues, and the greater the license fees. In effect, the composers have achieved very substantial price discrimination while under legal restraints requiring them not to discriminate among record users. They comply with this requirement by charging all record users at the same rate. But since the rate is applied to advertising revenues which greatly vary in accordance with the intensity of demand for record licenses, the broadcasters are subject to intense discrimination.

Broadcasters' monopsony power is the most significant limitation upon the composers' capacity to maximize their returns from public performance rights under existing conditions. Since there is no alternative to radio broadcasting as a medium for the public performance of records, broadcasters as a unit are monopsonists with respect to ASCAP and BMI, who are, of course, duopolists. Moreover, broadcasters are licensed monopsonists. Under these conditions, price is set through a bargaining process which divides the monopoly profits or revenues attributable to broadcasting copyrighted music between the two monopolists, broadcasters and composers, in accordance with their bargaining power and negotiation skills. Thus, under existing law, broadcasters probably are retaining a very sizeable portion of the profits they earn through public performance of copyrighted music.

166. See STANDARD RATE & DATA SERVICE, INC., SPOT RADIO RATES AND DATA at 94, 610 (May 1, 1974). Charges for such a spot ranged from \$25 to \$95 among radio stations in Hartford, Conn. *Id.* at 191-93.

As previously discussed, the operations of ASCAP and BMI are restricted by antitrust consent decrees.¹⁶⁷ These decrees prohibit price discrimination and provide for judicial supervision of licensing charges. While there is no way to quantify the impact of these restrictions upon composers' earnings, we must assume that they have some measureable effect. A further limitation which may become relevant if record makers are granted a public performance right stems from the compulsory licensing requirements of the existing and proposed copyright legislation.

Effect of a Record Public Performance Right Upon Composers' Public Performance Revenues

This section will analyze the impact of a record public performance right upon composers' public performance revenues. The extent to which the composers' loss of public performance revenues can be balanced through increased earnings from their mechanical reproduction right will be discussed in the next section. Composers will not lose public performance revenues if broadcasters do not reduce their demand for music licenses. If broadcasters do reduce their demand, composers will lose public performance revenues, but the extent of the loss will depend upon how successful composers had been in maximizing their public performance revenues when they held the only public performance right.

As contended previously, public performance fees represent a small portion of the total costs of producing a recorded music show. Therefore, the additional fees paid to record companies probably would be absorbed by most broadcasters without reducing their demand for records. This would mean that under a dual rights system composers would be selling the same quantity of music public performance licenses at the same price and that the record companies' revenues would be extracted from the broadcaster's profits rather than at the composers' expense.¹⁶⁸ Demand for recorded music would be reduced only to the extent higher license fees force station owners either to cease commercial broadcasting or to adopt formats not requiring recorded music.

If composers have been maximizing revenues and if higher license fees do cause broadcasters to reduce their demand for record and music licenses, the establishment of a second public performance right for record producers must reduce composers' revenues from public performance rights and may reduce the total revenues extracted from broadcasters for broadcasting recorded music. That is, the total price broadcasters must pay composers and record producers for the privilege of playing copyrighted music and records will not correspond with the price that maximizes the joint revenues of composers and record producers.¹⁶⁹ Composers will be forced to share these revenues with

167. See text accompanying notes 52-59 *supra*.

168. See text at pages 210-13 *supra*.

169. It would be very difficult for two copyright holders setting their fees

record producers, whereas under existing law, composers, of course, need not share public performance revenues.

Assuming that ASCAP has been setting its fees at the maximization point, which leaves the marginal broadcaster no profits, a higher price would reduce the number of licenses demanded sufficiently to reduce total revenues, whereas a lower price would not increase the number of licenses demanded sufficiently to compensate for the lower unit price. Armed with a coordinate public performance right, record companies will require broadcasters to pay a fee for use of their records in addition to the fee charged by the composers' representatives. If the demand for music licenses is affected by this price increase, in the absence of coordination the price to broadcasters will be above the maximization level, thereby injuring composers and record companies as well as broadcasters and the listening public. Since record companies previously earned no public performance revenues they would not mind a reduction in total joint revenues. Under these circumstances any gains by the record companies would be at the expense of the composers. This would not be true, however, under all circumstances. To some extent the categories of composers and record producers overlap. Many popular performers, who are guaranteed by the Revision Bill 50 percent of the revenues earned through public performances of the recordings, write their own music, and record companies maintain music publishing affiliates.¹⁷⁰ Under these circumstances, losses to composers and publishers would be offset to some extent by revenues earned by performers and by record companies from record public performance fees. That license fees charged broadcasters by record companies exercising their public performance right are statutorily limited by compulsory licensing at a predesignated fee limits the potential loss to composers.¹⁷¹ Thus, the

independently to achieve the revenue maximizing price. Game theory would be relevant to an analysis of the probable outcome of moves and countermoves by the holders of the two performance rights. See generally P. SAMUELSON, *ECONOMICS* 480-82 (8th ed. 1970).

170. See F. Stuart, *Distribution of Income from Broadcast Performance and Sale of Phonograph Records* 2-3, 36-38 (1970) (unpublished mimeo, study done for National Ass'n of Broadcasters). For example, Columbia Records maintains two publishing firms, April Music and Blackwood Music, one of which is associated with ASCAP, and the other with BMI. In recent years the record companies' in-house publishing firms have begun to exert a more active role and have increased their relative share of the income going to music publishers. While their share is decreasing, however, the bulk of the payments made by ASCAP and BMI still go to the older, larger music publishers, like MGM, who are not in-house affiliates of record companies. This generalization, however, must be qualified in light of the relationship of some older publishers to new conglomerate corporations. Thus, Warner Brothers Music, one of the large publishers, is now part of the Warner Communications Company, which also includes three record companies within its overall corporate structure. See generally Lees, *Record Companies and Music Publishers—When They Unite, Music Suffers*, *HIGH FIDELITY*, Oct. 1973, at 36.

171. If record producers had full discretion in setting their fees, their capac-

capacity of the record company either to affect the total price of broadcasting recorded music or to cut into the composers' share of public performance revenues is limited by its inability to increase its license fees above the statutory amount, or to threaten composers with such action.

If coordination between record companies and composers were possible and legally permissible, composers would offer to lower their price sufficiently to bring the total price to the maximization point, if record companies shared with composers some of the additional revenues earned thereby. There are a number of possible arrangements which might improve their ability to achieve a revenue maximizing price. The holder of the second right might, for example, assign his right to the other holder or appoint the other as his agent, or the two might appoint a common agent to bargain with users. These arrangements, however, raise serious antitrust problems. The legal status of the joint arrangements under the antitrust laws involves the balancing of several factors: the probable anticompetitive effects, their severity, and the social benefits expected from the arrangements at issue. While the two parties are selling to the same buyer, they are not selling the same product. Also, as previously noted, in the absence of a collusive agreement the total price of both license fees is likely to be above the maximization level. Under these circumstances, everyone will lose including broadcasters and the listening public. In addition to possible antitrust violations, these coordinating arrangements also might be deemed inconsistent with the intent of the statute which recognizes a second performance right at a fixed fee.

To the extent composers are not now maximizing their legal monopoly, some portion of the revenues paid by broadcasters to record producers will not be at the composers' expense; rather, they will represent revenues that composers cannot reach under existing legal and economic conditions. Under these circumstances, superimposing a fee for record producers over that charged by composers might raise the price of recorded music, that is, place the total cost of the two licenses closer to the maximization point. Broadcasters could pay record producers the additional fees without reducing, or even increasing, the total revenues earned by both composers and record producers. Since composers must share these revenues with record producers, composers' revenues would be reduced. As will be shown, however, composers should be able to recapture some of these revenues through manipulation of the mechanical reproduction right. Since the advent of a second public performance right may increase the total revenues available to composers and record producers, composers' earnings can increase to the extent record producer revenues can be captured through increasing the price composers charge record companies for the privilege of recording their copyrighted music.

ity to cut into composers' revenues by charging high fees which reduce demand for records by broadcasters would be increased significantly. Composers' capacity to retaliate is limited by the consent decrees.

It is very difficult to predict the potential increase in the joint revenues of composers and record companies under a dual rights system. All such increases must represent revenues that now escape composers resulting from the economic and legal constraints upon their bargaining power. ASCAP now charges radio broadcasters 1.725 percent of net advertising receipts for use of its music, and BMI charges 1.7 percent. Since almost every broadcaster uses both ASCAP and BMI music, this makes a total cost of 3.425 percent. The proposed statutory rate for the record public performance right varies with the station's gross advertising receipts: \$250 annually for gross receipts between \$25,000 and \$100,000; \$750 annually for gross receipts between \$100,000 and \$200,000; and 1 percent of net annual receipts for gross receipts over \$200,000. Stations with gross annual receipts under \$25,000 pay no royalties. The 1 percent rate would raise the broadcaster's total cost for playing recorded music to at most 4.425 percent of net advertising receipts, an increase of nearly 29 percent. The cost to radio broadcasters for record public performance rights would be approximately \$10 million.¹⁷²

Since composers are price discriminating under the existing legal regime, only the price setting provisions of the antitrust consent decree and the broadcasters' monopsony power restrict composers' earnings. The economic impact of judicial review over license fee rates depends upon the extent to which this procedure sets effective limits on the rates that would have otherwise prevailed. Although the judicial price review requirements only apply explicitly to ASCAP, BMI's rates, in effect, are subject to the same restraints. Since broadcasters require licenses from both ASCAP and BMI, license fee negotiations with both organizations must be based upon the same principles—the extent to which broadcasters are likely to use the music of each performing right society. Although, in theory, BMI might attempt to charge fees out of proportion to those charged by ASCAP, such action is sure to engender legal response. If the total fee to broadcasters is perceived to be too high relative to past rate setting formulae, broadcasters are likely to bring the matter to the courts under the guise of challenging ASCAP's rate. If the court perceives the same discrepancy, and attributes it to overreaching by BMI rather than ASCAP, the matter will come to the attention of the Justice Department which will threaten antitrust action. With the precedent established by the ASCAP consent decree, all parties will perceive

172. See note 88 *supra* and accompanying text. In calendar year 1971, ASCAP's domestic receipts from radio license fees were approximately \$18,700,000. ASCAP's rate then was 2 percent of net advertising receipts, twice the rate the Revision Bill sets for record public performance rights. If one adjusts the \$18.7 million figure to account for the increase in radio broadcasting revenues from 1971 through 1972, the final figure is approximately \$10.5 million.

that similar constraints can be placed upon BMI under the antitrust laws. The net effect is to restrain BMI from starting this process and to induce BMI to use the same rate setting formulae as employed by ASCAP.

During the 10 year period prior to the effective date of the 1950 decree, the combined ASCAP-BMI rate to radio stations was 3.45 percent of net advertising revenues; in 1960, the combined rate was 3.325 percent. The rate climbed to 3.35 percent in 1967, to 3.428 percent in 1970, to the present rate of 3.425 percent.¹⁷³ Although royalty rates seemed to have stabilized subsequent to the consent decree, public performance revenues of composers continued to increase, and it is the composers' earnings, not the royalty rates, that count. Of course, if both the royalty rates and the base to which these rates are applied, net advertising revenues, had increased, composers would have earned even more.

The problem, then, is: Although composers' revenues have increased despite the consent decree, they might have increased even more absent the antitrust decree. Certainly, the economic parameters of both broadcasting and advertising changed after 1945. The advent of television significantly increased the absolute and relative amounts of advertising conducted through electronic rather than print media, and this increase was reflected in dramatic increases in advertising rates for radio and television time. Television also increased the total amount of music broadcast, and radio programming underwent radical change with respect to the use of music. Recorded music became the dominant form of radio fare, with television taking over all other types of entertainment formerly featured by radio stations. Broadcasters' increased demand for music should have improved the composers' bargaining power, but this increased power could be manifested either through increased royalty rates or by stable rates applied to a larger base of advertising revenues or both. That royalty rates remained stable while composers' earnings increased indicates that composers did benefit from these economic changes, but does not tell us whether they maximized their position. Conceivably, were it not for the consent decree, royalty rates also would have increased, thereby further improving composers' revenues; or, it is possible that the increased earnings achieved by composers represented all that their improved bargaining position could yield.

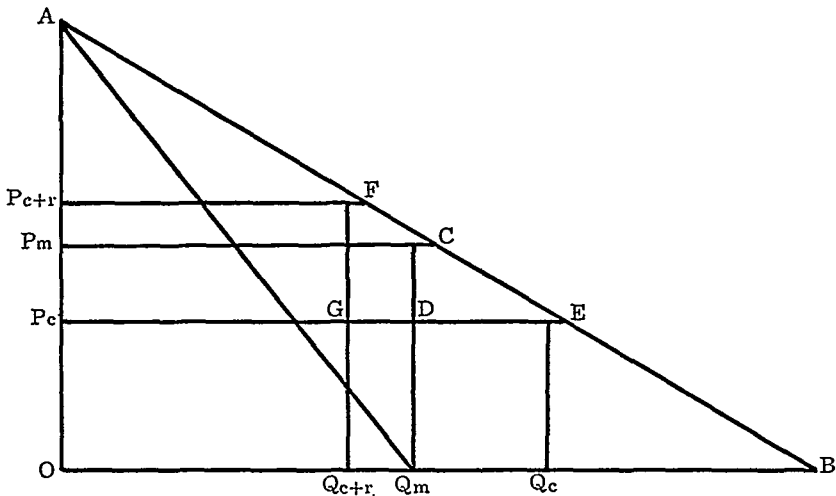
We might suspect that increased demand for music resulting from increased advertiser demand for broadcast time would be reflected in increased advertising revenues for broadcasters, which would be shared by composers through the royalty formula based on such revenues. Increases in the relative use of music by radio broad-

173. ASCAP's rate from 1941 to 1959 was 2.25 percent. It was reduced to 2.125 percent in 1959, to 2 percent in 1967, and to 1.725 percent in 1972. BMI's rates have been as follows: 1941-1965, 1.2 percent; 1966-1968, 1.35 percent; 1967-1970, 1.48 percent; 1971, 1.5 percent; 1972, 1.525 percent; 1973, 1.7 percent. Thus, in the last decade the combined rate has, within a very narrow range, moved up and then down, with BMI's rates steadily increasing.

casters in lieu of other programming formats, however, should be reflected only in higher royalty rates, since these changes would not affect advertising revenues. That royalty rates remained stable might permit us to infer that the consent decree does limit composers' earnings to some extent. But we cannot be entirely confident of this conclusion since it is possible that the overall increase in demand for broadcast advertising would not itself support the experienced increase in composers' earnings and that part of this increase is explained by the relatively higher use of music in radio and television programming. That radio and television broadcasters negotiate separately with composers, and that radio programming has increased the amount and proportion of music used without increasing royalty rates for radio-used music, increase the likelihood that the consent decree has limited royalty rate increases that might otherwise be warranted by the prevalent economic forces.¹⁷⁴

Certainly, however, the broadcasters' monopsony power has reduced composers' earnings. These losses, combined with whatever losses might be attributed to the antitrust decree, could well be sufficient to permit record producers to earn substantial revenues from their public performance right without affecting the broadcasters' demand for recorded music.

If composers have not been maximizing their revenues under a single right regime, the economic position and possibilities of composers and record producers under a dual right regime may be represented graphically.



174. ASCAP executives seem to discount the decree as a factor in determining the rates charged broadcasters. Instead, they point to the collective bargaining strength of the broadcasters. BMI executives, on the other hand, think the decree has been a factor in determining the ASCAP rate.

Line AB represents the demand curve for music and record licenses, and line AQ_m is the marginal revenue curve for that demand curve. Since sale of public performance licenses relates to an existing record, and no additional costs are involved in selling these licenses, only demand curves need be considered. Revenues from sale of a public performance right will be maximized at the price where marginal revenue is zero. P_m is the price that would maximize revenues from the sale to broadcasters of a public performance right, and Q_m is the quantity of record public performance licenses that would be purchased at this price. Total revenues is represented by the rectangle $P_m CQ_m O$. P_c is the price composers set when they hold the only public performance right and Q_c is the quantity of licenses purchased by broadcasters at this price. The price is below the maximization price due to the restrictions imposed upon composers by the broadcasters' monopsony power and by the existing antitrust consent decree against ASCAP. Under these circumstances, composers' revenues are represented by the rectangle $P_c EQ_c O$, which is smaller than rectangle $P_m CQ_m O$ by the area of rectangle $DE Q_c Q_m$. $P_{c+r} - P_c$ is the price to be paid by broadcasters to record producers for their public performance right under the Revision Bill. P_{c+r} is the total price broadcasters must pay to composers and record producers for the right to publicly perform copyrighted music incorporated into copyrighted records, and Q_{c+r} is the quantity of licenses that will be purchased by broadcasters at this price. Total revenues of composers and record producers generated at this price is represented by rectangle $P_{c+r} F Q_{c+r} O$. Of these revenues, composers would receive $P_c G Q_{c+r} O$, and record producers would receive $P_{c+r} F G P_c$. To compare the joint revenues of composers and record producers under a dual rights arrangement with composers' earnings when they hold the sole public performance right, the areas of rectangles $P_{c+r} F G P_c$ and $G E Q_c Q_{c+r}$ must be compared. Since $P_c E Q_c O$ represents composers' revenues when they own the only public performance right, the second rectangle $G E Q_c Q_{c+r}$, represents the composers' revenues lost due to the establishment of a second public performance right for record producers. The first rectangle, $P_{c+r} F G P_c$, represents the revenues earned by record producers under a dual rights system. If the first rectangle is larger than the second, the total revenues paid by broadcasters to composers and record producers for public performance rights will be larger under a dual rights system than was paid composers under a single right system.

The total revenues of composers and record producers will be larger under a dual rights system than were composers' public performance revenues under a single right system if the price for music licenses under the single right system (P_c) was below that price (P_m) where marginal revenue equals zero, the price which maximizes composers' earnings, and if the combined price for composers' and record producers' public performance right under a dual rights system (P_{c+r}) is closer in absolute terms to the maximization price (P_m) than was P_c . In the figure, P_{c+r} is closer to P_m than P_c , and therefore rectangle P_{c+r}

$F G P_c$, record producers' revenues, is larger than $G E Q_c Q_{c+r}$, composers' lost public performance revenues. If the new price of broadcasting recorded music is further from the joint maximization price of composers and record producers, the joint revenues of composers and record producers will be lower than the revenues earned by composers when they held the only public performance rights. Although composers might be able to recapture some or all of the revenue earned by record companies from their public performance right, composers will become net losers since total earnings available to all music producers will have been reduced and, at best, they can only get the entire reduced amount.

The impact of record public performance rights upon the joint revenues of composers and record producers is important for two reasons. With respect to composers' public performance revenues, greater joint revenues means a smaller loss to the composer. That is, if composers were charging too little for their sole public performance right, and the establishment of a second public performance right significantly increased the joint revenues of composers and record companies, a large portion of the record producers' revenues would come from broadcasters' profits rather than from composers' earnings. In the figure, record producers' earnings are represented by rectangle $P_{c+r} F G P_c$. Of these revenues, only the amount represented by rectangle $G E Q_c Q_{c+r}$ is at the composers' expense; the remainder represents additional payments by broadcasters.

Another consequence of increasing joint revenues of composers and record producers is that the total sums paid by broadcasters have been increased. Since total revenues paid by broadcasters to composers under a single right system is $P_c E Q_c O$, and total revenues paid to composers and record producers under a dual rights system is $P_{c+r} F Q_{c+r} O$, and since rectangle $P_c G Q_{c+r} O$ is common to both of those rectangles, total sums paid by broadcasters will increase, since it has been assumed that rectangle $P_{c+r} F G P_c$ is larger than rectangle $G E Q_c Q_{c+r}$. To the extent composers are able to capture record producers' public performance revenues by increasing their price to record producers for the right to record their music, that is, through mechanical reproduction rights, the net increase in available revenues from broadcasters permits composers to compensate for their public performance revenue losses, and probably to increase their total earnings from public performance and mechanical reproduction rights above those earned when they held the sole performance right.

To illustrate, public performance fees are computed as a percentage of net advertising revenues, and, for purposes of this example, it is assumed that advertising revenues subject to the license fee are prorated in accordance with the quantity of copyrighted music and re-

cordings used. Assuming that under a single right system the license fee is set at 5 percent, and that net advertising revenues total \$20 million, composers would earn \$1 million in license fees from record broadcasts. Establishment of a record producers' public performance right requires broadcasters to pay an additional 1 percent of net advertising revenues. This price increase reduces copyrighted recordings use and thereby reduces net advertising revenues subject to the license fees of composers and record producers to \$18 million. Under these circumstances, composers, assuming no change in their license fee schedules, earn only \$900,000. Record producers earn \$180,000, which increases total earnings of composers and record producers to \$1,080,000. If composers can capture \$100,000 from record producers through increases in mechanical reproduction fees, they can return to their pre-record producer public performance right position, whereas, if they can capture more than \$100,000, they gain. Whatever remains of the record producers' initial \$180,000 increases record producers' reserves by that amount.

Benefits to Composers from a Record Public Performance Right

If composers' earnings from their sole public performance right have not been maximized, establishment of a record public performance right will enable record producers to extract from broadcasters additional revenues that composers are unable to reach through their own public performance right. Record producers, however, are dependent upon composers for the right to produce records using copyrighted music. This enables composers to use their mechanical reproduction right to better their initial position by appropriating much, if not all, of the revenues to be earned by record companies from broadcasters. The principal limitation upon composers' capacity to extract the record producers' public performance revenues is the compulsory licensing requirements applicable to the mechanical reproduction right.

In terms of the graphic analysis, the revenue earned by record producers from broadcasters, represented by rectangle $P_{c+r} F G P_c$, is a potential additional revenue source for composers. If this rectangle is larger than rectangle $G E Q_c Q_{c+r}$, which represents composers' public performance revenues lost due to the introduction of a second public performance right, composers will have the opportunity to recoup or exceed their public performance losses by capturing the record producers' public performance earnings through increased fees for licensing their mechanical reproduction right to record companies. At most, composers might capture all the record producers' revenues through this method.

In addition to their public performance right, composers control the mechanical reproduction of their music through recordings. Thus, composers may collect a fee for every record sold from record companies wishing to record their music. Unless live musicians are used, copyrighted music must be recorded before it can be broadcast. This necessitates a close economic nexus between mechanical reproduction and public performance rights.

If the composer is the sole holder of both mechanical reproduction and public performance rights, in negotiating with a record company for the mechanical reproduction of his music, the composer considers potential revenues both from sale of the record and from licensing broadcasters. If the composer believes that a particular record company would be able to produce a record with exceptional broadcast possibilities, he would consider that fact in setting his royalty for each record sold; that is, the composer would be willing to lower his price with respect to record sales in order to have his music recorded by a record company with peculiar capacities to make products attractive to broadcasters. Therefore, even though current law only recognizes public performance rights in composers, record companies can benefit from their products' public performance earnings. In fact, a composer might forego all record sales proceeds where public performance fee profits constitute an abnormally high percentage of the composition's total economic value. Where sales possibilities are limited but public performance possibilities are extensive, it might be rational for the composer to subsidize the record's production if necessary.

To analyze the relationship between composers' mechanical and public performance rights, the division of profits attributable to the sale and to the public performance of a recording of copyrighted music between composer and record company must be understood. Within the limits imposed by the special capacities of particular record companies—the artists under contract and the efficiency of their sales organization—and by statutory compulsory licensing requirements on recording license fees, the composer should be able to extract from the record company all monopoly profits that the record company can earn from the record produced with copyrighted music, monopoly profits defined as those earnings greater than the normal return on capital from enterprises of equivalent risk. Presumptively, successful records of copyrighted music can earn monopoly returns for record producers because they are demanded and the record company is the sole legal source of supply. Since there are many record companies vying for the right to use a copyrighted song, competition for copyrighted music will permit the composer to increase his price to the point where the successful record company earns no more than a normal profit from producing and selling the record. Through this process, the composer extracts from the record company all monopoly profits earned by the recording of his song.

The foregoing analysis assumes that the record industry is competitive. Pure competitive conditions similar to those prevailing for raw agricultural commodities, however, are rare, and the record industry is no exception. Instead there are numerous companies, all of which are both unique and interchangeable to some degree, and entry into

the industry seems relatively easy. The record making industry exhibits monopolistic competition in which product differentiation is achieved through the record companies' differing highly competitive capacities to exploit particular copyrighted songs. Record companies will therefore compete for songs, and abnormally large profits by existing record companies will attract new entrants. Nevertheless, record companies differ in important respects. These differences emanate from their varying capacities to market recordings and from the varying popularity of the artists under contract to each company. Most established artists are under contract to some record company, and composers, in licensing their songs, consider this fact. Indeed, the contractual arrangements between composers and record companies usually specify which artists will record. To the extent certain record companies enjoy a particular capacity to exploit a song, the composer would be willing to permit that company to retain more of the profits earned by the record through sales or public performance fees, and such companies could earn more than normal returns on capital. More precisely, the composer and record company would share the extra income the more efficient record company could earn from the copyrighted song. The precise share to each cannot be predicted. The record companies' power to exploit their record selling capacities is limited by the competition of other record companies which, though less efficient, are still capable of exploiting the song. Thus, the more efficient company could only demand a higher percentage of the record's profits up to the point where the composer's return is driven below the level he could achieve with the next best company, as limited by the bargainer's knowledge of the relevant economic parameters.

Since the supply of new music is limited by the number of people with the requisite talent for such work, the capacity to write successful music confers upon the holder a special kind of monopoly power. In economics, the income attributable to unique talents is generally called "economic rent." New composers have limited bargaining power and must accept minimum royalty rates from record companies. Established composers, however, can exert significant market power. Once a composer has proven that records of his music will sell, record companies will compete for his work. Such composers can therefore demand royalty arrangements which extract a large percentage of the profits expected from exploitation of records with their songs.

Since the only legal relationship between the composer and record company arises from the composer's licensing of the record company to record the copyrighted music, the transfer of the record company's expected earnings from the sale of the public performance right must be accomplished in the contract accompanying the basic license for recording the composer's song. Theoretically, there are many ways this could be done. From the composer's standpoint, the simplest and most effective method would be to require the record company to assign all public performance rights to the composer. If legally possible, this would effectually return the composer to his former position as

sole owner of the public performance right. He again would be free to ensure that the price to broadcasters for the public performance right would be set at the level which maximized his total revenues. Such an arrangement, however, would seem to be inconsistent with the requirements and intent of the current legislative proposals for the granting of a public performance right to record companies and with any legislation likely to be enacted for this purpose.¹⁷⁵ Arguably, this arrangement also might be deemed an antitrust violation.¹⁷⁶

Although composers should be able to extract a significant portion of record producers' public performance earnings, certain legal and economic factors may permit record producers to retain some of these earnings. The arrangement least likely to conflict with the anticipated statutory scheme would be a negotiated adjustment in the per record royalty established with respect to record sales. The composer could attempt to estimate the anticipated earnings by the record company from public performance licensing fees and accordingly adjust upward the royalty rate attributable to record sales. This approach, however, has two drawbacks. There are possible difficulties in estimating the potential earnings of the record from both sales and the record company's public performance right. The second problem derives from the limitations imposed upon the record sale royalty by the compulsory licensing requirements of the Copyright Act. Under the current Act, once a composer has licensed anyone to record his music, or has recorded it himself, anyone is entitled to a license at the fee of 2 cents per record manufactured. Since every potential initial licensee knows the limits upon the royalty rate of subsequent licensees, initial licensees will balk at paying royalty rates much above the statutory maximum.¹⁷⁷ The current Revision Bill would raise the

175. See text at page 158 *supra*.

176. See notes 43-52 *supra* and accompanying text.

177. Whether and to what extent initial licenses at more than 2 cents for songs of normal length are issued is unclear. That such licenses, though uncommon, have been granted is indicated in SHEMEL & KRASLOVSKY 175-76. In a letter to one of the present authors, Sidney Shemel stated that although he had never been involved in a transaction which included such a license, he had been informed by the Harry Fox Agency that such licenses have been issued. Letter from Sidney Shemel to Lewis Kurlantzick, Oct. 9, 1973. The Harry Fox Agency is the principal licensing agency for the mechanical reproduction right; it represents approximately 80 percent of the popular music publishers. However, in a letter to one of the authors, an executive at the Harry Fox Agency stated that he personally had never heard of an initial license at more than the 2 cent rate. Letter from Howard Balsam, The Harry Fox Agency, to Lewis Kurlantzick, Oct. 18, 1973. In a later letter, however, the managing director of the agency indicated that initial licenses at more than 2 cents occur, but are quite rare. Letter from Albert Berman to Lewis Kurlantzick, Oct. 29, 1973.

As noted previously, note 26 *supra*, license fees for songs of more than normal length, that is, where the duration of use on a recording is more than approximately 3.5 minutes, commonly exceed 2 cents. Compositions of more than 5 minutes duration are regularly licensed by the Harry Fox Agency at more than 2 cents. The extra compensation is ordinarily at the rate of 0.5

statutory compulsory licensing fee from 2 to 3 cents. Yet, even with the augmented fee, the compulsory licensing requirement imposes a ceiling on the royalties the composer can charge both the initial licensee and all subsequent licensees. Although the compulsory licensing requirements do limit the price charged the first licensee to a figure close to the statutory fee, the royalty could exceed 3 cents if the first licensee gains significant financial advantages from being first. Under most circumstances the first licensee of a music copyright enjoys some advantage over subsequent licensees. Compulsory licensing rights now mature when the composer records his song or permits someone else to record it. The licensee selected by the composer thus enjoys the advantage of having the only available recording for at least a short period of time, though this could be as little as a week, depending on the impact of the song. The Revision Bill would formally increase the lead time advantage¹⁷⁸ to the initial licensee somewhat by conditioning the right of other record companies to demand a compulsory license upon public distribution of a record using the copyrighted music rather than agreement to permit the initial recording.¹⁷⁹

Whatever the impact of lead time, the statutory 3 cents fee sets some limit on the rate that can be charged the first licensee, and clearly establishes a 3 cents limit for subsequent licensees. To the extent that the royalty rate attributable to record sales is below that limit, the composer can raise these rates to the limit in recognition of the record companies' potential earnings from a public performance right. If all such earnings can be captured through rates below the limit, the composer will not suffer from legislation granting record companies a second public performance right. If capture of all record company public performance earnings requires a rate above the statutory limit, however, the composer may be unable to capture all such earnings and the record company may be able to retain some portion thereof. The record company can retain these earnings unless the composer can compel it to grant other valuable concessions. There is some evidence that composers with a "hot" song have been able

cent for each additional minute or fraction thereof. SHEMEL & KRASILOVSKY 181-82. The composer's leverage derives from the record company's desire to conclude a negotiated license in order to avoid the statutory requirements of monthly accountings on the basis of records manufactured. See notes 23-24 *supra* and accompanying text. This source of leverage would be diminished under the Revision Bill, which requires quarterly payments on the basis of records made and distributed, rather than monthly accountings on the basis of records manufactured. For classical compositions, licenses are generally granted at the rate of 0.25 cent for each minute of playing time. Thus, for a 40-minute album of copyrighted serious music, a record company would pay a mechanical license fee of 10 cents. S. SHEMEL & M. KRASILOVSKY, *MORE ABOUT THIS BUSINESS OF MUSIC* 27 (1967).

178. "Lead time" refers to the "headstart" advantage, the advantage of being the first and only one on the market with a product for a period of time.

179. Lead time is likely to be most important in those situations where a song has already received some exposure, such as in a movie or show or via performances abroad. The composer and first licensee may also be concerned with lead time where the composer sincerely desires to reserve the initial exposure to a particular artist.

to tie the license for that song to the purchase of other less popular tunes at higher royalty rates than was merited by the intrinsic value of the second song.¹⁸⁰ Such devices would increase composers' capacity to capture record companies' public performance earnings in situations where the limits imposed by compulsory licensing preclude a royalty rate high enough to achieve this end.

The composer's capacity to capture all revenues earned by record companies from the sale of public performance rights does not necessarily mean that record companies will have no incentive to maximize such earnings. If the analysis is correct in concluding that the composer will probably attempt to extract these earnings through adjustments in the royalty rates for record sales, the record company would retain all its public performance earnings. Since it would be overpaying the composer for the mechanical reproduction right, to break even the record company will be forced to maximize its public performance earnings. In practice the royalty arrangements between composer and record company in each instance can only approximate the rate necessary to extract all public performance revenues. Thus in each instance the record company has the opportunity to earn more from public performances than it loses on the record sale arrangements. The record company will therefore always do its best to maximize public performance earnings since it has, in effect, paid the composer in advance for such earnings.

The foregoing analysis of the underlying economic factors affecting the relationship between composers and record producers applies as well to jukebox performances. Similar to the fate of the fees paid by broadcasters to record companies pursuant to the proposed public performance right, the composer, subject to the 3 cents compulsory license ceiling, should be able to "recapture" much, if not all, of the revenues earned by record companies from jukebox royalties. This recapture would be effected by altering the price the composer charges the record company for the right to record his music in the first instance.

Although the limitations imposed by the compulsory licensing requirements for copyrighted music will, in some important cases, restrict the capacity of composers to capture earnings from the record companies' public performance right, composers can improve their position by establishing their own record companies. Such action would fit the classic pattern whereby institutional arrangements which fail to reflect current economic realities are abandoned for alternative arrangements. Thus, if composers' capacity to capture rec-

180. See *SHEMEL & KRASILOVSKY* 175-76.

ord companies' earnings from the public performance right are limited by the compulsory licensing requirements on copyrighted music, composers, instead of exploiting their music through record companies, can do better by establishing their own record companies. Through such action, consumers can retain all earnings that the first recorder of a composition could earn through a record public performance right.

Even so, the composer still would be endangered by record companies exercising their statutory compulsory licensing right for use of the copyrighted music. This would be a problem with respect to songs with a very high prospect for record sales and public performance. A composer-record maker would welcome a demand from a second company for a license to record his song only in situations where the artists available to the second company could increase the sales and public performance potential of a song beyond those realizable through sale and performance of the initial record. Under these conditions, the composer might license at less than the statutory fee if this were necessary to induce the second company to record the song. The establishment of a public performance right in records would make other record companies more anxious to take out licenses, but again, composers should be able to capture such earnings through higher license fees, up to the statutory limit. Thus, for example, if, in the absence of a record public performance right, the price of a license by a second recorder would be 1.5 cents per record and a record public performance right was worth no more than an additional 0.5 cent per record to a potential licensee, the composer should be able to increase the license fee to 2 cents. Since the second record company could earn 0.5 cent per record through public performance earnings, this would make his net royalty obligation 1.5 cents, and it has been assumed that this price represents the true bargaining position of the second record company. If the second record company were unwilling to raise the license fee to 2 cents, other companies would bid up the price of licenses to that level. Ignoring the differences in the capacities of record companies to exploit a song commercially, competing record companies would be willing to pay up to 2 cents per record, since they could expect to earn 0.5 cent from a public performance right in addition to earnings expected from record sales which we have assumed to be no more than 1.5 cents per record.¹⁸¹

Where the sum of the license fees, absent a record public performance right, plus the expected revenues from such a public performance right, exceeds the statutory compulsory license fees the composer, even if he established his own record company, probably will be unable to capture all revenues earned by record companies from the public performance right. This is most likely to happen with respect to the most popular songs where demand for licenses should drive license fees up to the statutory maximum. Moreover, licensed record

181. With respect to the graduation among record companies caused by efficiency differences, see text at pages 227-28 *supra*.

companies can anticipate substantial public performance fees, but since the license fee already is at the maximum, the composer has no method of capturing these public performance fees. It might be argued that the composer is being doubly injured; the compulsory licensing provisions limit his direct license fees to the statutory maximum in a situation where a higher price could be obtained, and, additionally, although substantial record public performance fees will be earned, the composer has no way of capturing them. The compulsory licensees, however, may not be able to keep all the performance fees either. Since any record company may obtain a license to record at the statutory fee, popular songs are likely to generate many renditions which will then compete for broadcast time. The result will be a large total of public performance fees generated by a particular copyrighted song divided among many recorders.

Should Composers Benefit?

The government might view the prospects of increased composer earnings through capture of public performance fees initially earned by record producers as a violation of ASCAP's consent decree. The principal thrust of this decree, and, in part, that applicable to BMI, is to ensure access to copyrighted music to broadcasters. The decree also imposes limits on the price composers can charge broadcasters, which may be viewed as a device to ensure that ASCAP does not circumvent the decree by setting unreasonably high license fees. Increased earnings by composers through capture of record producers' public performance revenues might be deemed an indirect violation of these price limits. Arguably, congressional recognition of a second performance right would be an implicit authorization of the recapture process; Congress could be held to have intended all the consequences of granting a second public performance right, including increased earnings by composers. Such an argument, however, is unsound. The legislative history unequivocally demonstrates that the new public performance right is intended to benefit record companies and performers, not composers. There is no suggestion of any interest in relieving composers from any restraints imposed under the antitrust laws. To imply such an intent would exceed the claims of the most imaginative and sympathetic interpreter.

Perceiving the inconsistency between increased composer revenues through capture of record producers' public performance earnings and the clear intent of the consent decree is easier than devising effective restraints. An effective remedy would require the Justice Department and the courts to expand their surveillance of composer pricing to include the agreements between composers and record producers with respect to the mechanical reproduction right, in addition to the

prices charged broadcasters for the public performance right. Unless the violation was quite unambiguous, the Justice Department would be very reluctant to undertake continuous supervision and evaluation of the huge number of recording contracts.

The treatment of composers by our legal economic system is a subject of constant controversy and complexity. Some composers do very well; many do quite badly. Undoubtedly, while most of the benefits accruing to composers from a second public performance right will go to the more successful ones, some benefits will trickle down to the less fortunate majority. In any event, it is quite clear that although the proponents of a record producers' public performance right did not intend to harm composers, neither did they particularly desire to benefit them. Indeed, their predominant, if not exclusive, concern was to assist record companies and performers. If composers are to be assisted, there exist far more effective methods of accomplishing this than by granting record producers a public performance right.

Methodological Matters

The organization of this article has been dictated by the pending revisions of the federal copyright law. This may be deemed a lawyer's perspective. An economist specializing in industrial organization would view the same legal and institutional arrangements quite differently. He would perceive the various contending groups as an industry consisting of composers, record companies, performers, broadcasters, and advertisers. The establishment of a public performance right for record producers would interest him primarily in terms of the effect of introducing a new claim upon the division of industry's total revenues. The economist certainly would commence his analysis with the assumption that the ultimate division of additional revenue would differ from that envisioned by proponents of the record public performance right. He also would be quite wary of relying too heavily upon behavioral conclusions deduced from a priori economic models. Most models, including the one employed here, assume maximizing behavior by all participants. But any economist knows that the reality of such an assumption may be undermined by inadequate knowledge, rigidity of response, and peculiar institutional constraints.

According to the foregoing analysis, amending the Copyright Act to establish a record public performance right is unlikely to produce the results envisioned by its proponents. Bearing in mind the cautions just stated, the economic situation is too complex to permit any but tentative, specific a priori predictions of the actual impact of the proposed legislation. Under these circumstances, if a second public performance right is created the legislation should ensure that the relevant statistics are generated to permit Congress to determine the actual results of its action, and Congress should be willing to reexamine the legislation if the outcome does not conform with its expectations.

Perhaps Congress should go further and limit the initial operation of the public performance right to a limited period, such as 5 years, with permanent enactment depending upon the experience during the experimental period. Although Congress has the authority to require the interested parties to keep and make available financial data relevant to the activities affected by copyright legislation, some crucial questions will be very difficult to answer even if all financial information at the disposal of the record industry is made available.

The ultimate effect of the establishment of a public performance right for records in accordance with the Revision Bill will depend upon the response of broadcasters to higher license fees, the capacity of composers to maximize their earnings under the existing legal regime, the ability of composers to capture the public performance earnings of record companies through increased royalty rates for mechanical reproduction rights, and the respective abilities of record companies and performers to alter the statutory division of record public performance fees between them through adjustments in the compensation received by performers from record sales. Broadcasters' reaction to higher license fees should be easy to measure. ASCAP and BMI keep detailed accounts of the records broadcast by radio and television stations. Similar accounts will be kept by whatever organization is established to distribute record public performance fees to individual performers and record companies. If broadcasters' demand for music licenses does not decrease, composers have not been injured; if such demand decreases, composers' public performance revenues also must decrease. It is possible, however, that some of these losses might be balanced by increases in composers' earnings from their mechanical reproduction right. Unfortunately, this phenomenon may be very difficult to measure. To do so, it would be necessary to know the actual contractual terms between composers and record companies, both before and after the establishment of the record public performance right, and to isolate the effect of the new public performance right from all other possible factors that might affect the terms of these arrangements. Clearly, this only could be done on a sample basis, thereby creating the problem of devising adequate sampling techniques. To ensure the availability of the necessary data, Congress would have to require composers or record companies to retain all relevant contracts and to make these available to authorized congressional investigators. It would not be necessary to know actual earnings under these contracts; the per record sale royalty rates should be sufficient.

Assessment of the actual division of public performance revenues between record companies and performers would present analogous problems. The authors predict that this division will not correspond

to the equal split dictated by the Revision Bill, but, rather, ultimately will be determined by the economic forces establishing the relative bargaining strength of the parties. Evaluation of the validity of this prediction would require knowledge of the royalty rates paid to artists by record companies. Changes in these rates, however, are influenced by many factors, for example, how "hot" the artist is at the moment. Given the large number of performers and the extremely rapid turnover among recording artists, record companies must be the ones required to maintain adequate files of their contracts with performers. The authors also predict that, after an adjustment period, record production would increase, but that record company profit levels would remain constant. Monitoring record production is simple enough, although isolating the effect of the public performance right might be very difficult. Monitoring the profit levels for all record companies would present formidable problems, but it might be sufficient to limit the investigation to the larger companies which, hopefully, would be typical of the industry as a whole. Since profit figures for record companies are now closely held secrets, public access to this information would require special legislation.

Conclusion

Although tracing all the consequences of granting record producers a public performance right for their product, in addition to those long held by composers of the music used in the recording, requires complex economic analysis, reasonably accurate predictions can be made of the impact of such action upon all potentially affected parties. None of the likely outcomes would justify the establishment of a second public performance right with respect to records.

The key factor is the broadcasters' reaction to the increased costs of using recorded music that would result from legislation requiring radio and television stations to acquire licenses from record producers as well as composers. Almost certainly, broadcasters will absorb the increased costs and will not reduce their demand for music licenses. More popular records would be produced and prices for records might well decrease, but there would be no significant impact upon the production of classical records. Record companies and performers would benefit in the short run, but probably not in the long run. Moreover, the division of public performance fees between record companies and performers would not conform with the equal split specified by the Revision Bill. Composers should gain by capturing most of the revenues collected by record producers pursuant to the proposed legislation, thereby avoiding some of the restrictions on composers' earnings imposed by the existing antitrust consent decree against ASCAP. Furthermore, there seem to be no workable legal devices to prevent the composers' recapture of revenues.

The best possible outcome from giving record producers their own public performance right would be to reallocate resources to increased record production at the expense of broadcasters' profits. The desir-

ability of such reallocation, of course, depends upon one's evaluation of the utility of additional popular recordings. Nevertheless, the efficiency of resource use would be reduced via an increase in the costs of administering a copyright regime incorporating a public performance right for record producers in addition to that enjoyed by composers. Income attributable to the sale and performance of recorded music would be transferred from broadcasters to record companies and popular performers. Yet, both these groups seem to be prospering under the existing copyright regime and record companies seem to enjoy sufficient incentives to produce a very large output of new recordings. Claims that certain performers are injured under the current arrangements are unfounded. According to the analysis, performers already are compensated for their capacity to produce records attractive to broadcasters. Moreover, the record producers' increased income ultimately may be translated into increased record production and increased earnings for composers. After a short adjustment period, profit levels and compensation of performers should return to current levels.

Classical music may need and deserve financial support, but establishing a record public performance right will be of limited benefit. Although this right will increase slightly the earnings of classical records, the additional revenues will be too small to affect classical record production. Whatever the reality of record companies using their earnings from popular records to subsidize their classical operations, no substantial amounts of additional revenues for this purpose will be available, since the public performance right will increase record company earnings only in the short run. In any case, direct public subsidy of the arts, such as the National Endowment for the Arts, is preferable since it is subject to public scrutiny and certain in amount and recipient.

The uncertainty of result, the tenuousness of the individual claims of potential beneficiaries to an increased share of the revenues attributable to the public performance of music, and the inevitable increase in transaction costs attendant upon the establishment of a new public performance right, combine into a strong argument against enactment of the proposed changes in the copyright laws. Furthermore, in considering such action, one should consider that the temporary federal protection against unauthorized record duplication has become permanent. Although such protection is warranted, anti-duplication protection assists record producers at the expense of imposing significant additional costs on record buyers and to some degree dilutes the composer's control over the use of his music.¹⁸² Therefore, caution

182. See Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, *supra* note 12, at 232-36.

is warranted before granting record producers further benefits at the expense of broadcasters, and possibly composers and radio listeners. Finally, establishment of the public performance right inevitably will increase the existing strong pressures inducing record producers to offer improper inducements to employees of the broadcast industry to get their records played on the air.