

**THE DENIAL OF A GENERAL PERFORMANCE
RIGHT IN SOUND RECORDINGS:
A POLICY THAT FACILITATES OUR DEMOCRATIC
CIVIL SOCIETY?**

*Shourin Sen**

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* B.M., Music Performance, Northwestern University, 2001; M.M., Jazz Studies, New England Conservatory of Music, 2003; J.D., Boston University School of Law, 2007. I sincerely thank Wendy Gordon, Matthew Leary, Anneke Schaul-Yoder, Frank Laforge, and the editors at the *Harvard Journal of Law and Technology* for their comments, inspiration and assistance. This article is dedicated to Steve Lacy, in loving memory, with a black and white photograph on the first stave.

I. INTRODUCTION

John Coltrane's recording of the song *My Favorite Things*¹ is an example of his striking ingenuity. On the recording, Coltrane performs a fourteen-minute "overhaul . . . of the saccharine show tune" originally from *The Sound of Music*.² Some commentators have claimed that jazz musicians would not play *My Favorite Things* today, "had Coltrane not established its surprising potential."³ Despite Coltrane's transformative contributions, the Copyright Act does not grant him, as the performer, the right to exclude others from publicly performing his rendition.⁴ Coltrane is not entitled to receive royalties when his recording is played on the radio, on television, or in a public setting such as a restaurant or hotel.⁵ Rather, the Copyright Act grants the composers of *My Favorite Things*, Richard Rodgers and Oscar Hammerstein, the exclusive right to authorize the analog public performance of the song.⁶

For more than three-quarters of a century, the inability of musical performers to profit from the public performance of their recordings has inspired heated controversy.⁷ Legal scholars have traditionally cast this controversy as David versus Goliath, with musicians struggling to get their due from the broadcast monoliths.⁸ Nearly all of the articles published on the subject bemoan the plight of the musical performer.⁹ Members of Congress have also joined the fray, proposing at

1. JOHN COLTRANE, *My Favorite Things*, on MY FAVORITE THINGS (Atlantic 1990).

2. Edward Strickland, *What Coltrane Wanted: The Legendary Saxophonist Forsook Lyricism for the Quest for Ecstasy*, ATLANTIC, Dec. 1987, at 100, 101.

3. Francis Davis, *Coltrane at 75: The Man and the Myths*, N.Y. TIMES, Sept. 23, 2001, § 2, at 25.

4. See 17 U.S.C. §§ 106(4), 106(6) (2000) (granting a full public performance right for authors of "musical works" but only a partial public performance right for authors of "sound recordings"); see also *id.* § 114(a) ("[T]he exclusive rights of the owner of copyright in a sound recording . . . do not include any right of performance under § 106(4).").

5. Playing sound recordings in these settings qualifies as a public performance. See H.R. REP. NO. 94-1476, at 63 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5676-77 ("[A] broadcasting network is performing when it transmits [a] performance (whether simultaneously or from records)," and "a cable television system is performing when it retransmits the broadcast to its subscribers . . ."); *Herbert v. Shanley Co.*, 242 U.S. 591, 595 (1917) (Holmes, J.) (holding that performance in a restaurant or hotel infringes the copyright owner's public performance right).

6. See 17 U.S.C. § 106(4).

7. See Robert W. Woods, *Copyright: Performance Rights for Sound Recordings Under the General Copyright Revision Act — The Continuing Debate*, 31 OKLA. L. REV. 402, 403 (1978).

8. See, e.g., Stephen J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168-69 (1981).

9. See, e.g., Kara M. Wolke, *Some Catching Up to Do*, 7 VAND. J. ENT. L. & PRAC. 411, 413 (2004) ("[A] full performance right in sound recordings is necessary to achieve legal, economic, and artistic equality for American performers and producers both at home and abroad."); John E. Mason, Jr., *Performers' Rights and Copyright: The Protection of Sound Recordings from Modern Pirates*, 59 CAL. L. REV. 548, 574 (1971) ("The United States, by not recognizing a performers' right, is behind the times and prevents its own artists from

least thirty ultimately unsuccessful bills, which sought to extend to musical performers a general performance right in sound recordings.¹⁰

But performers can claim the royalties granted to composers simply by writing their own songs. Congress and legal scholars have failed to recognize that performers hold the power to overcome their inferior status under the Copyright Act by reinventing themselves as performer-songwriters. Indeed, many performers already have. For the most popular hits on *Billboard's* year-end singles charts, the percentage of songs written or co-written by their performers has steadily increased: 7% in 1950; 22% in 1960; 50% in 1970; 60% in 1980; 64% in 1990; 68% in 2000; and 88% in 2004.¹¹

The increase in musicians who perform their own compositions was spurred by changes that occurred in the music industry around the end of World War II. In the 1940s, a combination of market and technological developments enabled a broad swath of performers to reap royalties on their own compositions. These changes included shifts in the ways composition royalties were distributed, the expansion of the music industry, and a rise in the financial importance of the recording.¹² The performer-songwriter movement took root in a cross-section of influential musicians, including Buddy Holly, Dizzy Gillespie, and Charlie Parker. Following their cue, artists such as The Beatles began to compose their own material.¹³ The performer-songwriter movement was originally driven by artists' desire to obtain performance royalties on their songs' underlying compositions and to avoid paying reproduction royalties on their albums, however, it has since cascaded into a mainstream cultural norm.

The story could end there; musical performers changed their creative practices to circumvent an ostensibly objectionable law. But this change in behavior has had more far-reaching results. This Article argues that by inducing performers to compose, the Copyright Act changed the content produced by the music industry. When performers compose their own songs, they produce music that is more politically and socially forward-leaning and diverse than the music written

being protected under foreign statutes which demand reciprocity."); Quarterly Review of Decisions, *Copyrights—Unfair Competition—Injunction to Restrain Unauthorized Use of Musical Recordings*, 10 AIR L. REV. 315, 316 (1939) ("[T]he copyright law should be enlarged either by a liberal judicial construction of the Act, or by an amendment; so as to afford protection to an artist's electrical transcription of a musical composition.")

10. See, e.g., H.R. 1805, 97th Cong. (1981); S. 1361, 93d Cong. (1973); H.R. 1270, 80th Cong. (1947); H.R. 11,420, 74th Cong. (1936); H.R. 10,434, 69th Cong. (1926).

11. Data on file with author. The data are drawn from the following sources: *Hot 100 Singles & Tracks*, BILLBOARD, Dec. 25, 2004, at YE-23; *Hot 100 Singles & Tracks*, BILLBOARD, Dec. 30, 2000, at YE-46-47; *Number One Awards: Top Pop Singles*, BILLBOARD, Dec. 22, 1990, at YE-14; *Pop Singles*, BILLBOARD, Dec. 20, 1980, at A; *Top Artists Singles*, BILLBOARD, Dec. 26, 1970, at TA-18; *The Year's Top Tunes*, BILLBOARD, Jan. 13, 1951, at 17.

12. See *infra* Part II.

13. See THE BEATLES ANTHOLOGY 22 (2000).

by professional songwriters.¹⁴ These new creative practices, in turn, have shaped our democratic civil society.

This Article asserts that the Copyright Act's incentive structure, which led to the rise of the performer-songwriter movement, substantially contributes to the exchange of political ideals that underlies our democratic institutions, while imposing only small costs on performers. This net social gain weighs against the creation of a full public performance right for sound recordings. Part II examines how the Copyright Act's distribution of performance royalties creates incentives for performers to compose, and it traces the statistical growth of the performer-songwriter trend. Part III discusses how emerging technologies in the 1940s created a business structure that enabled performers to earn royalties on their own compositions. It continues by outlining how the performer-songwriter movement cascaded into a mainstream norm. Part IV examines how the increase in performer-songwriters decentralized the production of content by the music industry. It also describes how the creative processes employed by performer-songwriters encourage an emotional investment in their material that often leads to artistically and socially forward-leaning content. Finally, Part V discusses the ways in which the performer-songwriter trend should inform our views on copyright legislation and concludes that Congress should repeal the grant of a digital audio transmission right.¹⁵

II. COPYRIGHT FRAMEWORK

Music recordings have two copyrightable elements: 1) the underlying composition, or "musical work,"¹⁶ and 2) the recorded performance, or "sound recording."¹⁷ For example, in John Coltrane's recording of *My Favorite Things*, the composers Rodgers and Hammerstein are granted a copyright in the underlying musical composition. The performer, John Coltrane, is granted a copyright in the collection of musical sounds that he used to realize the underlying composition.¹⁸

A. Performance Royalties

The Copyright Act grants composers the exclusive right to authorize the public performance of their songs.¹⁹ Pursuant to this grant,

14. See *infra* Part IV.

15. See 17 U.S.C. § 106(6) (2000).

16. *Id.* § 102(a)(2).

17. *Id.* § 102(a)(7).

18. *Id.* § 101 (defining "sound recordings"); *id.* § 102(a)(7).

19. *Id.* § 106(4).

a composer receives royalties when his composition is performed “publicly”, defined as a performance in any “place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.”²⁰ This includes the playing of recordings of the composition on radio or television, in addition to live performances in public places.²¹ Though performers have the right to control the reproduction and distribution of their sound recordings, they do not have the right to authorize most public performances and thus cannot profit from such performances.²² When Coltrane’s rendition of *My Favorite Things* is played on the radio or in a public establishment, only the owner of the composition is paid a royalty.

The absence of a full performance right in the Copyright Act reflects the political clout of the broadcast industry.²³ Simply put, the broadcasters “do not want to pay” performers.²⁴ According to broadcasters, performers already receive a promotional benefit through air-play; any additional payments would represent an unwarranted handout.²⁵ Some radio and television broadcasters have even “suggested, not entirely with tongue in cheek, that producers and performers should pay them” for their advertising services.²⁶ According to the broadcast industry “unless it can generate more money by increasing advertising rates, it cannot afford” the proposed royalty payments to musical performers.²⁷

20. *Id.* § 101.

21. *See supra* note 5.

22. *See Performance Royalty: Hearings on S. 1111 Before the Subcomm. on Patents, Trademarks, and Copyright of the S. Comm. on the Judiciary*, 94th Cong. 10 (1975) [hereinafter *1975 Hearings*] (statement of Barbara Ringer, Register of Copyrights) (noting that the creators of sound recordings do not receive royalties from public performances). In 1995, Congress created a “carefully crafted and narrow performance right, applicable only to certain digital transmissions of sound recordings.” H.R. REP. NO. 104-274, at 12 (1995); *see* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 1, 109 Stat. 336, *amended by* Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 405(a)(6), 112 Stat. 2860. This Part does not address the impact of the digital performance right on composition practices. For more discussion on the digital audio transmission right, *see infra* Part V.C.

23. *See* Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 131 (2002).

24. Jon M. Waxman, *Performance Rights in Sound Recordings*, 52 TEX. L. REV. 42, 49 (1973).

25. *1975 Hearings*, *supra* note 22, at 72 (statement of Vincent T. Wasilewski, President, National Association of Broadcasters; John Dimling, Vice President, Research, National Association of Broadcasters; Harold Krelstein, Chairman, Radio Board of Directors; Wayne Cornils, Chairman, Small Market Radio Commission; and Thomas Wall, Esq., Counsel, Dow, Lohnes & Albertson).

26. STAFF OF SUBCOMM. ON COURTS, CIVIL LIBERTIES, & THE ADMIN. OF JUSTICE OF THE H. COMM. ON THE JUDICIARY, 95TH CONG., PERFORMANCE RIGHTS IN SOUND RECORDINGS 5 (Comm. Print 1978) [hereinafter *1978 REPORT*].

27. Waxman, *supra* note 24, at 49.

Even the limited rights enjoyed by performers are a relatively recent development. Before 1972, musical performers were not granted any rights at all in their recorded performances.²⁸ The only element of a sound recording in which an author could enforce a copyright was the underlying composition or musical work.²⁹ At that time, under a strict textual reading of the 1909 Copyright Act, a person could legally make copies of a Coltrane recording, provided that he compensated the composer of the underlying work.³⁰ The Sound Recordings Act of 1971³¹ granted performers statutory protection against duplication of their albums, but it did not create a legal entitlement to a royalty when the performers' recordings were publicly performed.

Performers who record songs written by others are also precluded from collecting the royalties they would have received if another musician were to subsequently perform works they wrote. Thus, when Coltrane recorded *My Favorite Things* in lieu of composing a new musical work, he denied himself two potential royalty payments: the one he would have received for the public performance of his record, and the royalty payment he would have received every time a subsequent artist performed his new song.

The Copyright Act, as currently implemented, also creates incentives for performers to compose because it provides limited protection for musical arrangements.³² A musician rarely records a song exactly as it was played by an earlier artist. Performers commonly rework the melody, lyrics, harmony, or orchestration.³³ The arranging of an un-

28. See Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971), amended by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified at 17 U.S.C. § 102 (2000)).

29. See Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075 (1909) (extending copyright to "all the writings of an author").

30. In practice, however, performers were able to obtain some protection against unauthorized duplication of their works through a variety of means. See, e.g., H.R. REP. NO. 92-487, at 2 (1971), reprinted in 1971 U.S.C.C.A.N. 1566, 1567 (noting that in 1971 eight states had already "enacted statutes intended to suppress record piracy"); Note, *Piracy on Records*, 5 STAN. L. REV. 433, 438 (1952) (describing music executives' "multipronged attack" against piracy); *Metro. Opera Ass'n v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S.2d 483 (N.Y. Sup. Ct. 1950) (granting creators of a sound recording a preliminary injunction against the unauthorized reproduction of phonograph records, based on state unfair competition law). However, performers still could not claim royalties when their sound recordings were publicly performed.

31. Pub. L. No. 92-140, 85 Stat. 391.

32. See Note, *Jazz Has Got Copyright Law and That Ain't Good*, 118 HARV. L. REV. 1940, 1945 (2005).

33. The standard *Blue Moon* shows the many and varied ways a song is commonly interpreted by different artists. RICHARD ROGERS & LORENZ HART, *Blue Moon* (MGM 1934). Compare MEL TORME, *Blue Moon*, on CALIFORNIA SUITE/THE VELVET FOG (Jasmine 1949) (a jazz interpretation), with ELVIS PRESLEY, *Blue Moon*, on ELVIS PRESLEY (RCA 1956) (a rock and roll interpretation), and THE MARCELS, *Blue Moon*, on BLUE MOON (Colpix 1961) (a doo-wop interpretation).

derlying composition is an art in itself, and it has a considerable effect on the impact of a song.³⁴

The Copyright Act classifies “musical arrangement[s]” and adaptations of “preexisting” songs as “derivative work[s].”³⁵ The Act also contains a compulsory licensing provision which allows a performer to use any non-dramatic musical composition without having to negotiate with the copyright owner for permission,³⁶ provided the performer pays the statutory royalty³⁷ and the musical work has been previously “distributed to the public in the United States under the authority of the copyright owner.”³⁸ This allows any artist to record *My Favorite Things* without negotiating with Rodgers and Hammerstein, provided that the artist pays the fixed statutory fee. The compulsory licensing provision, however, does not automatically extend to new musical arrangements. Under the Copyright Act, a musical arrangement is not “subject to protection as a derivative work” without “the express consent of the copyright owner.”³⁹ In order to enforce a performer’s copyright on his arrangement against an allegedly infringing party, a musician must first negotiate for the permission of the composer of the original work.⁴⁰ For example, Coltrane’s recording of *My Favorite Things* features the elegant arrangement that is characteristic of his style. Under the Copyright Act, Coltrane would have to negotiate with Rodgers and Hammerstein, the composers of the original work, for permission *before* he could bring suit against a party that infringes his arrangement. Absent such an agreement, a subsequent performer is free to appropriate Coltrane’s manipulation of the original composition and use it on his sound recordings.

Unfortunately, obtaining permission is often not a tenable solution. Large publishers are unlikely to acquiesce to musicians’ claims to exclusive rights in arrangements of the publisher’s songs.⁴¹ Moreover, negotiating permission for a derivative copyright often has prohibitively high transaction costs.⁴² As one author noted, “these

34. For treatises on orchestration, see, for example, HECTOR BERLIOZ & RICHARD STRAUSS, *TREATISE ON INSTRUMENTATION* (Theodore Front trans., Dover Publ’ns 1991) (1904); NIKOLAY RIMSKY-KORSAKOV, *PRINCIPLES OF ORCHESTRATION* (Edward Agate trans., Dover Publ’ns 1964) (1913).

35. 17 U.S.C. § 101 (2000); I MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 2.05[C] (2007).

36. *See* 17 U.S.C.A. § 115 (West 2007).

37. The statutory royalty rate “[f]or every phonorecord made and distributed after January 1, 2006” is the larger of “either 9.1 cents, or 1.75 cents per minute of playing time or fraction thereof.” 37 C.F.R. § 255.3(m) (2007).

38. 17 U.S.C. § 115(a)(1) (2000). For more discussion of the issue, see Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 681 (2003).

39. 17 U.S.C. § 115(a)(2).

40. *See id.*

41. Jonathan Z. King, *The Anatomy of a Jazz Recording: Copyrighting America’s Classical Music*, 40 COPYRIGHT L. SYMP. (ASCAP) 277, 295 (1997).

42. *See id.* at 295–96.

negotiations simply do not take place in the real and anonymous world of compulsory licensing.”⁴³ Little has changed since 1942, when one commentator proclaimed that “no such consent is usually obtained as a practical matter.”⁴⁴

B. Statistical Analysis of the Rise of the Performer-Songwriter

Billboard, a leading music industry trade publication, publishes weekly rankings that are the industry standard for tracking the popularity of songs and albums. At the end of each year, *Billboard* aggregates its data to create year-end standings.⁴⁵ As with any ranking system, there is a degree of arbitrariness in the way *Billboard* weighs the criteria in which it ranks songs.⁴⁶ Indeed, over the decades, *Billboard* has changed the methodology it uses for tabulating its charts.⁴⁷ Despite these changes, it can be said with confidence that the charts comprise a collection of each year’s more popular songs.

As shown in Figure 1, between 1950 and 2004, the percentage of the top fifty⁴⁸ songs on *Billboard*’s year-end charts that were written by their performers grew steadily: 7% in 1950, 22% in 1960, 50% in 1970, 60% in 1980, 64% in 1990, 68% in 2000, and 88% in 2004.⁴⁹ In an industry that increasingly expects performers to write their own material,⁵⁰ the musician who uses material composed by another songwriter is becoming rarer.

43. *Id.* at 295.

44. Comment, *Protection of the Performing Artist’s “Interpretative Rendition” Through the Arranger’s Copyright*, 37 U. ILL. L. REV. 245, 248 (1942).

45. *Billboard* totals the chart details from the individual fifty-two weeks to form the “raw ingredients” of the year-end standings. *The Final Chart Tallies: How They Work*, BILLBOARD, Dec. 25, 2004, at YE-16.

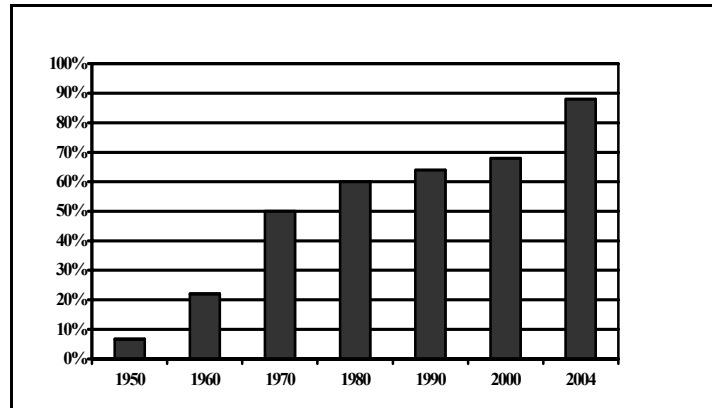
46. In 2000, the periodical’s criteria consisted of “accumulated radio and sales” and “small-market radio-playlist[s].” *How We Chart The Year*, BILLBOARD, Dec. 30, 2000, at YE-36. As with many ranking systems, there is human judgment involved in the weighting of each of these criteria.

47. In 1950, the tallies were based on 225,000 “machine-tabulated” votes from “weekly dealer and operator reports.” *The Billboard’s Fifth Annual Music-Record Recapulations*, BILLBOARD, Jan. 13, 1951, at 17.

48. For 1950, *Billboard* listed only thirty songs on their year-end chart. *The Year’s Top Tunes*, *supra* note 11, at 17. I have calculated the data for 1950 using the smaller sample size.

49. Data on file with author.

50. See Don Cusic, *In Defense of Cover Songs*, POPULAR MUSIC & SOC’Y, May 1, 2005, at 171.

Figure 1: Percentage of Songs on *Billboard* Charts Composed by Their Performer by Year⁵¹

The authorship data in this study is from a database published by All Music Guide (“AMG”), a recognized content company that licenses its data to retailers, online content sites, and other companies in the entertainment media industry.⁵² AMG’s authorship data is compiled primarily from the information listed by artists on the physical product and packaging of their albums, including liner notes and album covers.⁵³ This information appears to be more accurate than sheet music or copyright office filings for three reasons: composition credit and royalties are often (1) assigned for gift purposes, (2) contractually assigned, or (3) stolen outright.

The first reason that copyright office filings and sheet music are misleading is that composition credit and royalties are sometimes assigned as gifts. For example, Chano Pozo was given partial composing credit for George Russell and Dizzy Gillespie’s song *Cubana Be, Cubana Bop*.⁵⁴ As Russell recalls, “Now, actually, Dizzy and I were

51. The figures used in this Article’s data are available in their respective year-end issues. See *supra* note 11.

52. All Music Guide, About Us, http://wm01.allmusic.com/cg/amg.dll?p=amg&sql=32:amg/info_pages/a_about.html (last visited Dec. 1, 2007) (listing major clients including Microsoft, AOL, Yahoo!, Amazon, Barnes & Noble, Best Buy, Ticketmaster, Musicmatch, and Napster). The website for AMG was awarded the 36th Annual American Society of Composers, Authors & Publishers Deems Taylor Internet Award for outstanding new media coverage of music. Press Release, Esther SanSaurus & Jim Steinblatt, 36th Annual ASCAP Deems Taylor Award Winners Announced (Oct. 28, 2003), available at http://www.ascap.com/press/2003/deemstaylorwin_102803.html.

53. E-mail from Matthew Rogers, Sales Manager, AMG, to Shourin Sen (Aug. 31, 2005, 14:53:25 EST) (on file with author). In “rare cases,” AMG “compile[s] information from electronic feeds provided . . . by distributors, labels, studios, etc.” *Id.*

54. DIZZY GILLESPIE & GEORGE RUSSELL, *Cubana Be, Cubana Bop*, on DIZ ‘N BIRD AT CARNEGIE HALL (Blue Note 1947).

the writers, but when it began to get to the stage where Victor recorded it, Chano insisted that he also be listed as a composer. . . . So out of respect to Chano, we all agreed that he should be the third party. He was listed as one of the composers.”⁵⁵

Secondly, formal copyright filings are misleading because composition credit is often contractually assigned to non-composers. Buddy Holly contracted away composing credit for the song *That'll Be the Day* to his manager and publisher Norman Petty in exchange for producing his demo recording.⁵⁶ Holly believed it to be “the price he had to pay for a shot at stardom.”⁵⁷

Third, copyright office filings are often misleading because theft of songwriting credit is common.⁵⁸ As Dizzy Gillespie noted, “Somehow, the jazz businessman always became the owner and got back more than his ‘fair’ share, usually at the player’s expense. . . . They stole a lot of our music, all kinds of stuff. You’d look up and see somebody else’s name on your composition and say, ‘What’d he have to do with it?’ But you couldn’t do much about it.”⁵⁹

Given these three practices, discerning the identity of a song’s composer is often nearly impossible. While AMG’s database unquestionably contains errors, the company’s methods capitalize on industry knowledge, which appears to be more reliable than the formal copyright filings.

55. DIZZY GILLESPIE & AL FRASER, *TO BE OR NOT TO BOP: MEMOIRS — DIZZY GILLESPIE* 324 (1979).

56. ELLIS AMBURN, *BUDDY HOLLY: A BIOGRAPHY* 62 (1996).

57. *Id.* at 68.

58. Miles Davis’s career may provide examples of this uncomfortable business practice. Davis claims he wrote the song *Donna Lee*, most commonly attributed to Charlie Parker, when he was a young musician performing as a sideman for Parker. See MILES DAVIS & QUINCY TROUPE, *MILES: THE AUTOBIOGRAPHY* 103–04 (1989). Later in his career, when Davis was more established, he took credit for songs widely associated with his sidemen. For example, Davis claimed that he was the sole composer of all of the songs on his album *Kind of Blue*. *Id.* at 234. However, one of the songs on the album, *Blue in Green*, is regularly attributed in jazz circles to Bill Evans, one of his sidemen on the recording. Of the 160 versions of *Blue in Green* in the AMG database, 79 list Bill Evans as a co-composer along with Davis, and 22 list Evans as the only composer. AMG, *Blue in Green*, <http://allmusic.com/cg/amg.dll?p=amg&token=&sql=17:168173> (last visited Dec. 1, 2007). As Davis explains, “[When sidemen] were playing with me their reputations were as big as anybody’s. . . . You play with me and then you become a bandleader, because after that, everybody was saying that’s the only place to go.” DAVIS & QUINCY TROUPE, *supra*, at 279. Davis would later comment, “some musicians feel sometimes I don’t give them enough credit [for their compositions]” *Id.* at 297. For more discussion, see GILLESPIE & FRASER, *supra* note 55, at 166 (alleging that Count Basie stole composition credit from Dizzy Gillespie).

59. GILLESPIE & FRASER, *supra* note 55, at 301.

III. EMERGING BUSINESS STRUCTURES

To help understand why performers did not begin to write their own material earlier, an examination of the music business's structure is helpful. For it to be financially beneficial for performers to write their own material, a business structure first had to develop that allowed them to receive royalties for their compositions. There was no mechanism through which performers could acquire royalties on their songs until: (1) performance rights societies were compelled by court order to distribute royalties in a fashion that allowed composers not aligned with the industry powerbrokers to be paid; (2) the music industry expanded to the point where it was no longer dominated by the New York print conglomerate; and (3) the recording emerged as a viable source of royalties.

A. Equitable Distribution by Performance Rights Societies

The statutory right to control the public performance of a musical work was first given to composers in 1897.⁶⁰ However, the right largely amounted to an empty promise due to practical difficulties with enforcement. At that time, it was “almost impossible” for an individual copyright proprietor to monitor and police the public performances of his work.⁶¹ For example, Rodgers and Hammerstein would have had to monitor *all* radio broadcasts and restaurant performances of their compositions in order to reap all of the royalties to which they were legally entitled. Likewise, it was impractical for broadcasters to negotiate for and obtain licenses from multitudes of individual copyright owners.⁶²

Beginning in 1914, composers and publishers began to join together to form performance royalty societies that licensed the public performance of their works as a collective.⁶³ These societies, including the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Inc. (“BMI”), and SESAC, Inc.,⁶⁴ primarily offer blanket licenses to users. These licenses allow users of musical works to “perform any musical composition in [the societies’]

60. See Act of Jan. 6, 1897, 29 Stat. 481, 481–82 (1897). The right to publicly perform a dramatic work has been recognized since 1856. See Act of Aug. 18, 1856, 11 Stat. 139 (1856).

61. Herman Finkelstein, *Public Performance Rights in Music and Performance Rights Societies*, in 7 COPYRIGHT PROBLEMS ANALYZED 73 (Theodore R. Kupferman ed., 1952).

62. U.S. COPYRIGHT OFFICE, 87TH CONG., COPYRIGHT LAW REVISION: REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 136 (1961) [hereinafter 1961 REPORT].

63. See *United States v. Am. Soc’y of Composers, Authors & Publishers*, 32 F.3d 727 (2d Cir. 1994); 17 U.S.C. § 114(d)(3)(E)(ii) (2000).

64. See 17 U.S.C. § 114(d)(3)(E)(ii).

extensive catalogue[s].”⁶⁵ The fees assessed by the performance rights societies for a blanket license are usually either a flat rate or a percentage of total revenues and “do not directly depend on the amount or type of music used.”⁶⁶ The performance rights societies then distribute the user license fees to the owners of the underlying musical works.⁶⁷ For example, Oscar Hammerstein has registered 552 of his compositions, including the song *My Favorite Things*, with ASCAP.⁶⁸ Broadcasters and public establishments can obtain permission to perform all of Hammerstein’s compositions, as well as any of the other songs in the ASCAP repertory, by acquiring a blanket license from the society.⁶⁹ ASCAP would then distribute a portion of its income from the sales of the licenses to Oscar Hammerstein, or more correctly, to the publisher that now owns the copyrights in his compositions.⁷⁰

In the 1940s, the government began regulating the way performance rights societies could distribute the user license fees the societies collected, which had the effect of empowering musical performers to collect royalties on the public performance of their own compositions.⁷¹ Prior to the 1940s, the performance rights societies’ methods of distributing royalties were “subject to the whims” of their boards of directors.⁷² The prevailing distribution methods were skewed to ensure that career composers, rather than those composers whose songs were performed most, were granted the lion’s share of the societies’ intake. This result occurred because the societies used payment formulas in which the number of actual performances was secondary to factors such as the longevity of membership and the availability of the musical work in the catalog.⁷³ These methods of distribution allowed entrenched composers aligned with industry powerbrokers to essentially garner the royalties of less-established composers, whose compositions were often being performed more frequently. For example,

65. *Woods v. Bourne Co.*, 60 F.3d 978, 984 (2d Cir. 1995).

66. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979).

67. For example, ASCAP claims that “[n]early 88¢ of each dollar [they] collect goes right back to [their] members in royalties.” ASCAP, *The ASCAP Advantage*, <http://www.ascap.com/about/ascapadvantage.html> (last visited Dec. 1, 2007).

68. See ASCAP, *ACE Title Search*, <http://www.ascap.com/ace> (last visited Dec. 1, 2007). The ACE Database “contains information on all compositions in the ASCAP repertory which have appeared in any of ASCAP’s domestic surveys.” *Id.*

69. ASCAP, *Radio License FAQs*, <http://www.ascap.com/licensing/radio/radiofaq.html> (last visited Dec. 1, 2007). Between 1996 and 2000, the rate for a blanket license was “1.615% [of a station’s annual revenues] for stations that have annual gross revenue over \$150,000 or a minimum of 1% of adjusted gross income.” *Id.*

70. See ASCAP, *supra* note 67.

71. See Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees*, 8 *FORD. INTELL. PROP. MEDIA & ENT. L.J.* 733, 743–46 (1998).

72. *How ASCAP Cuts a Melon: Songwriters’ Payoff for ‘33*, *VARIETY*, Dec. 4, 1935, at 37.

73. See *id.*

in 1933 a member of the ASCAP directorate received \$3,417 for 1,020 performances, whereas Cole Porter was only paid \$1,174 for 24,476 performances.⁷⁴ These formulas made it difficult for individual performers to obtain substantial royalties for their own compositions.

In response to this “racketeering,”⁷⁵ the United States government brought a criminal indictment against ASCAP⁷⁶ and a civil proceeding against BMI⁷⁷ under the Sherman Antitrust Act. In 1941, ASCAP and BMI entered into consent decrees that allowed the government to regulate them as it would a public utilities commission.⁷⁸ Under the consent decree, ASCAP could no longer require musicians to have more than one musical composition as a condition for membership eligibility.⁷⁹ For the first time, *all* composers that registered with the performance right societies were able to collect royalties, not just composers with extensive catalogues of musical works who were associated with the major publishing houses.⁸⁰ Furthermore, the consent decrees forbade societies from distributing the collected licensing fees on any basis other than “the number, nature, character and prestige of the copyrighted musical compositions composed, written or published by each member,” and the length of time that member had been in the society’s catalog.⁸¹

The new equitable methods of revenue distribution turned performance royalties into a viable revenue stream for an expanded group of composers. After the implementation of the consent decrees, composers no longer needed to be aligned with the major publishing houses to collect royalties on their compositions.

74. *Id.*

75. *General Revision of the Copyright Law: Hearings Before the H. Comm. on Patents*, 72d Cong. 151 (1932) [hereinafter *1932 Hearings*] (comment by William I. Sirovich, Chairman, H. Comm. on Patents).

76. *United States v. Am. Soc’y of Composers, Authors and Publishers*, 1941 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941), 1941 U.S. Dist. LEXIS 3944.

77. *United States v. Broad. Music, Inc.*, 1941 Trade Cases (CCH) ¶ 56,096 (E.D. Wis. 1941).

78. *Pre-1978 Distribution of Recordings Containing Musical Compositions; Copyright Term Extension; and Copyright per Program Licenses: Hearings Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. 196–97 (1997) (statement of Edward G. Atsinger, President and CEO, Salem Communications Corp.), available at http://commdocs.house.gov/committees/judiciary/hju43666.000/hju43666_0.htm.

79. *Am. Soc’y of Composers*, 1941 Trade Cas. (CCH) ¶ 56,104 at *11–12.

80. See JOHN RYAN, *THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY: THE ASCAP-BMI CONTROVERSY* 118 (1985) (“In 1939, there were approximately 1,100 writers and 137 publishers who shared in performance-rights income. Twenty-five years later 6,000 writers and 3,500 publishers shared in such income.”).

81. *Id.*

B. Industry Expansion

The second development in the 1940s that enabled musical performers to collect royalties on their own compositions was the expansion of the recording and sheet music industry. In the 1920s and 1930s, the prevailing market structure made it unprofitable for performers to write their own repertoire. The popular music industry was “dominated” by Tin Pan Alley,⁸² a powerful sheet music publishing conglomerate that George Gershwin labeled “Racket Row.”⁸³ These publishers would employ song “pluggers,” described in 1930 as: “He . . . who, by all the arts of persuasion, intrigue, bribery, mayhem, malfeasance, cajolery, entreaty, threat, insinuation, persistence, and whatever else he has, sees to it that his employer’s music shall be heard.”⁸⁴ Radio, in this era, was the principal advertising medium through which Tin Pan Alley could develop its songs into hits, and the publishing houses were willing to invest substantial sums to achieve these ends.⁸⁵ Tin Pan Alley publishing houses would usually purchase songs outright from songwriters⁸⁶ and then, dangling money in exchange for exposure, send advance-artist or professional copies of pre-selected songs to an influential core of executives and musicians at the commercial broadcast networks.⁸⁷ These “hit-makers” included the producers, musical directors, and staff vocalists from the commercial network broadcasts.⁸⁸ It was common for a major network radio bandleader during the 1930s to have as many as 10 to 14 pluggers at a performance, attempting to cajole him into performing the various publishing houses’ songs.⁸⁹ This method of promoting songs actively created incentives for the most influential broadcast musicians to perform Tin Pan Alley repertoire rather than compose their own material; broadcast musicians had little impetus to write their own repertoire because they were compensated with bribes which could “range from

82. DAVID A. JASEN, *TIN PAN ALLEY: THE COMPOSERS, THE SONGS, THE PERFORMERS AND THEIR TIMES: THE GOLDEN AGE OF AMERICAN POPULAR MUSIC FROM 1886 TO 1956*, at xvi (1988). Thirteen New York City publishing houses, “all affiliated in some way with the motion-picture business, dominated the top songs each week.” RUSSELL SANJEK, *FROM PRINT TO PLASTIC: PUBLISHING AND PROMOTING AMERICA’S POPULAR MUSIC* 19 (1983).

83. George Gershwin, *Introduction to ISAAC GOLDBERG*, *TIN PAN ALLEY: A CHRONICLE OF THE AMERICAN POPULAR MUSIC RACKET*, at xi (1930).

84. GOLDBERG, *supra* note 83, at 203 (1930).

85. See KERRY SEGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY 1880–1991*, at 37 (1994). At times, publishers spent more on bribes to radio musicians than they received in performance royalties because they could recoup their investment through increased sheet music sales. *Radio Gives Plugs — Yes, and Takes Coin — Plenty*, *VARIETY*, Nov. 10, 1931, at 61.

86. NICHOLAS E. TAWA, *THE WAY TO TIN PAN ALLEY: AMERICAN POPULAR SONG, 1866–1910*, at 43 (1990); accord SANJEK, *supra* note 82, at 15.

87. See SANJEK, *supra* note 82, at 19–20.

88. *Id.* at 20.

89. See SEGRAVE, *supra* note 85, at 31.

cars and race horses to yachts” for performing the repertoire of Tin Pan Alley.⁹⁰

In the 1940s, the growth in the number of music-publishing firms, record companies, and radio stations, diminished the tight control Tin Pan Alley had over hit-making. The music industry became too dispersed for the print conglomerate to be able to dictate the content that artists selected for their recordings through bribery. Wesley Rose, president of Acuff-Rose Publications, recalls that by the 1940s, “the music publishing business operate[d] in all States, not just in New York and California.”⁹¹ Independent record labels were producing fifty million records a year by 1946.⁹² A “portion” of these recordings were from small firms, many of which exclusively recorded songs written by the firm’s “performers, the owner, or his assistants” in an effort to avoid paying royalties to the larger publishing houses.⁹³

In the 1940s and 1950s, the numerical growth of record labels was accompanied by a similar expansion in the number of independent radio stations. In 1932, there were roughly 600 broadcasting stations in the United States.⁹⁴ In 1945, the Federal Communications Commission (“FCC”) lifted its wartime freeze on radio station licensing and construction. By 1950, there were 1,517 radio stations.⁹⁵ Of these stations, 890 were not network-affiliated and often relied heavily on musical programming.⁹⁶

Songs performed by their songwriters received widespread attention on these independent stations that were outside the reach of Tin Pan Alley’s bribes. Tin Pan Alley and Hollywood publishers had “no interest” in the new market of smaller radio stations.⁹⁷ The play lists of these independent stations often focused on highly influential regional styles ranging from “hillbilly and country and western to r&b and the hybrid rock ‘n’ roll.”⁹⁸ Most importantly, these stations featured artists who composed their own music.⁹⁹ The print conglomerate

90. JOHN SHEPHERD, *TIN PAN ALLEY* 9 (1982).

91. *Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. of the Judiciary*, 90th Cong. 379 (1967) (statement of Wesley Rose).

92. RUSSELL SANJEK, *PENNIES FROM HEAVEN: THE AMERICAN POPULAR MUSIC BUSINESS IN THE TWENTIETH CENTURY* 223 (1998).

93. *Id.*

94. *1932 Hearings*, *supra* note 75, at 168 (statement of Louis G. Caldwell, National Broadcasters’ Association).

95. SANJEK, *supra* note 82, at 34.

96. *Id.* at 34–35.

97. *Id.* at 40. During the 1940s, deejays at the smaller broadcasting operations still accepted gifts in exchange for influence over their play lists. However, these bribes were from the independent record labels, as opposed to the established publishing conglomerate. *Id.*

98. STEVE CHAPPLE & REEBEE GAROFALO, *ROCK ‘N’ ROLL IS HERE TO PAY: THE HISTORY AND POLITICS OF THE MUSIC INDUSTRY* 57 (1977).

99. Beginning in the 1920s, many independent recording labels made it a “general policy” to sign exclusively artists who could write their own music or who used popular or folk songs that could be easily developed into a new composition. SANJEK, *supra* note 82, at 38.

was no longer able to use under-the-table payments to coax the entire radio industry into performing its material.

C. Dominance of the Musical Recording over Sheet Music

The third industry development in the 1940s that enabled performers to collect royalties on their own compositions was the growth in importance of the musical recording. Beginning in the 1920s, a gradual transition occurred in which sound recordings displaced sheet music as the dominant source of composition royalties in the music industry.¹⁰⁰ In the 1920s and 1930s, songs were labeled “hits” based on their ability to push sheet music sales of the songs up to certain target amounts.¹⁰¹ At that time, the record industry was not fully established and only a few labels offered national distribution.¹⁰² The ascendancy of the sound recording in the 1940s and 1950s brought “dramatic changes” in the structure of the music industry.¹⁰³ As musical recordings increased in popularity, and shellac became more readily available with the end of World War II,¹⁰⁴ “[t]he hot medium was no longer print, as it had been when radio performers and bandleaders made the hits,” but records, supplied by the recording studios.¹⁰⁵ By 1960, sheet music, once the chief revenue stream for publishers, had been completely marginalized.¹⁰⁶

The increased importance of sound recordings created a market structure in which performers no longer needed to sell their songs to print publishers to get paid for composing. By 1950, a performer or his label would be entitled to substantial royalties simply by recording the songs he had written. The new significance of the sound recording transformed composing into a considerable revenue stream for all performer-songwriters, not just the few who were well-connected within the publishing industry.

100. Tin Pan Alley, throughout most of its history, had received the largest percentage of its profits from the sale of sheet music. JASEN, *supra* note 82, at xvi. By the end of World War II, recordings accounted for more income than did the sales of sheet music. *Id.* at 246.

101. SANJEK, *supra* note 82, at 22.

102. *Responsibilities of Broadcasting Licensees and Station Personnel: Hearing Before the Subcomm. of the H. Comm. on Interstate and Foreign Commerce, 86th Cong. 901 (1960) [hereinafter 1960 Hearings]* (statement of Paul Ackerman, Music Editor, Billboard Magazine).

103. *Id.*

104. JASEN, *supra* note 82, at 246.

105. SANJEK, *supra* note 82, at 40.

106. *1960 Hearings*, *supra* note 102, at 901 (statement of Paul Ackerman, Music Editor, Billboard Magazine); *cf.* 2 NIMMER, *supra* note 35, § 8.21 n.3 (“Musical notation in the form of sheet music plays only a negligible role . . . in dollar receipts.”).

D. Spread of the Performer-Songwriter Movement: Fringe Genres

Once there was a market structure that made it profitable for performers to write their own material, the final requirement for the spread of the performer-songwriter movement was knowledge of its financial advantages. This Section explores how the performer-songwriter became part of the cultural mainstream.

In the 1940s, the burgeoning independent recording industry targeted performers in fringe genres, such as country, race music, and bebop who had the ability to compose.¹⁰⁷ These labels were interested in recording artists who created their own material because the labels did not have the resources to pay royalties for the reproduction of Tin Pan Alley songs on their albums. The small recording companies operated on shoestring budgets with narrow profit margins, small sales, and limited distribution.¹⁰⁸ Adequate resources for engineering, studio time, rehearsals, and composition fees were often not available.¹⁰⁹ For studios operating on meager budgets, the prospect of not having to pay royalties to Tin Pan Alley for the use of its repertoire was attractive. The owners of many minor labels opened up “desk-drawer” publishing companies through which they often took songwriting credit and the associated royalties from their artists for songs the owners then published.¹¹⁰ Bebop saxophonist Bud Johnson recalls, “I know some fellows used to run up and down [42nd Street] getting guys recording dates. Because we were all down on the Street at the time and we were making these records and everything was original.”¹¹¹ Teddy Reig, the executive in charge of repertoire at Savoy Records recalls, “I built a very successful catalog which after thirty years has been sold for over a million and a half dollars. That was the whole legend of so-called bop, modern music. Some Dizzy, Charlie Parker, Serge Chaloff, Allen Eager, Don Byas, Lester Young.”¹¹²

Many musical performers began using their leverage in the new independent recording industry to retain their copyrights and to establish their own publishing firms, instead of assigning the rights to their labels.¹¹³ For example, Dizzy Gillespie made a conscious effort to perform primarily repertoire in which he owned the copyright in an effort to earn more on performance royalties. As Walter Gilbert Fuller, the arranger for Gillespie’s big band, explained:

107. SANJEK, *supra* note 82, at 38.

108. James Patrick, *Charlie Parker and Harmonic Sources of Bebop Composition: Thoughts on the Repertory of New Jazz in the 1940’s*, 2 J. JAZZ STUD. 3, 11 (1975).

109. *Id.*

110. SANJEK, *supra* note 82, at 38.

111. GILLESPIE & FRASER, *supra* note 55, at 298.

112. *Id.*

113. Telephone interview with Helene Blue, Member of Bd. of Dir., Nat’l Music Publishers’ Assoc. (June 2, 2005).

The first band, we took all of Dizzy's records, and he and I sat down and wrote them out. My argument was, why give [the labels] the royalties off of 'Be-bop' when we don't control the publishing, and give them everything, and they don't pay you anyhow. So, let's write something new, another melody on top of it.¹¹⁴

Charlie Parker's "brilliant" and "indispensable"¹¹⁵ Dial recordings are another example of a musician making a conscious effort to record his own compositions to earn additional royalties.¹¹⁶ Charlie Parker "received both flat wages and composing royalties" for his Dial recording sessions.¹¹⁷ During these sessions, Parker used what at times appeared to be a "willful strategy" of recording preexisting songs with minor alterations and new titles, so that he could claim royalties as if the recordings were new compositions.¹¹⁸ "Desperate for heroin," Parker then "signed half of his Dial royalties to his dealer," Emry Byrd, nicknamed "Moose the Mooch," under a written agreement that was later typed and notarized.¹¹⁹ In the agreement, Parker conveyed a number of songs that have become standard repertory in the jazz cannon, including *Confirmation*, *Moose the Mooch* (named after the aforementioned drug dealer), *Yardbird Suite*, and *Ornithology*.¹²⁰

For some musicians, the motivation to compose was influenced by socio-political considerations as well as economic concerns. As musicologist James Patrick notes, the decision by artists to compose "involve[d] a complex interaction between ideological issues of artist self-identification, race-consciousness, and exploitation."¹²¹ Drummer and jazz luminary Max Roach recalled:

When we got downtown, [white audiences] wanted to hear something they were familiar with, like 'How

114. GILLESPIE & FRASER, *supra* note 55, at 224. Recording studios transcribed compositions of their records onto sheet music and registered them with the Copyright Office, which required a "deposit" of the work. This practice enabled labels to claim composition royalties for the songs on their albums even if a sheet music copy had not existed on the recording date. By 1961, the Copyright Office accepted a "sound recording" as a "deposit for a musical work." 1961 REPORT, *supra* note 62, at 78. The Office created this exception because the "transcription into the written notation required for deposit is difficult and expensive." *Id.*

115. BARRY DEAN KERNFELD, *THE BLACKWELL GUIDE TO RECORDED JAZZ* 221 (2d ed. 1995).

116. See EDWARD M. KOMARA, *THE DIAL RECORDINGS OF CHARLIE PARKER: A DISCOGRAPHY* 11-13 (1998).

117. *Id.*

118. Patrick, *supra* note 108, at 18.

119. KOMARA, *supra* note 116, at 19.

120. *Id.*

121. Patrick, *supra* note 108, at 19.

High the Moon,' 'What Is This Thing Called Love?' Can you play that? So in playing these things, the black musicians recognized that the royalties were going back to these people, like ASCAP, the Jerome Kerns, the Gershwins. So one revolutionary thing that happened, they began to write parodies on the harmonic structures.¹²²

For Roach the decision to perform new compositions based on existing songs was linked to a desire to avoid paying royalties to the primarily white establishment of professional songwriters.

The spread of the performer-songwriter movement was thus spearheaded by both independent record labels and the artists themselves. At the core of the trend was a desire to avoid paying royalties to Tin Pan Alley for the reproduction of Tin Pan Alley's songs on its albums, and the desire to earn performance royalties on their own compositions.

E. Spread of the Performer-Songwriter Movement: Mainstream Popular Culture

The next question is: how did the performer-songwriter movement grow from a small fringe behavior into a large shift in industry behavior?¹²³ Social science research suggests that informational cascades may be behind this phenomenon. An informational cascade occurs when a person copies the behavior of earlier actors without evaluating on an individual basis whether the behavior is necessarily in his best interest.¹²⁴ Stated bluntly, "[i]f an experienced individual acts first, others frequently imitate."¹²⁵ Research on informational cascades has shown that experienced individuals can have a disproportionate effect on cultural trends.¹²⁶

Performance practices in the music industry appear especially susceptible to informational cascades. Musicians often learn their trade by imitating the creative practices of high-profile performers without fully examining all of the underlying artistic or economic factors of those practices. For many young musicians, the practice of memorizing and imitating others' recording practices is "almost a rite

122. GILLESPIE & FRASER, *supra* note 55, at 209.

123. See Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992–93 (1992).

124. *Id.* at 994.

125. *Id.* at 1002.

126. *Id.* at 1002–03.

of passage.”¹²⁷ This tendency to emulate meant that only a small cross-section of influential musicians had to learn the financial advantages of composing for the performer-songwriter movement to flourish. Mainstream artists then adopted the practice of composing in imitation of these fringe musicians. By changing the creative practices of an influential fringe group, copyright law affected the behavior of performers who had little knowledge of the existing financial incentives.

Buddy Holly, and the influence he had on other musicians, provides an example of how copyright law can cause an informational cascade. Holly developed as a young musician in a fringe genre, country music, in which a premium was placed on performers who wrote their own repertoire.¹²⁸ Buddy Holly’s writing career was “galvanized” by the prospect of a recording contract.¹²⁹ Holly wrote his first four original songs on a demo album at the request of his business manager in order to attract interest from Nashville record labels.¹³⁰ Holly’s writing career was thus spurred by the Copyright Act’s incentive structure and an attempt to make himself more marketable. Shortly before his death, Holly considered refocusing his career exclusively on songwriting and producing, so that he could earn a living without suffering the demands of touring.¹³¹

The Beatles, in contrast, began composing in imitation of the musical practices of Holly and were not, at least initially, seeking royalties.¹³² As Paul McCartney commented, “John [Lennon] and I started to write because of Buddy Holly. It was like, ‘Wow! He writes and is a musician.’”¹³³ The Beatles were “attracted” to the “fact that there was always ‘Holly/Petty’ or ‘Petty/Holly’ on the records, so [they] knew he was one of the writers.”¹³⁴ When McCartney began writing, he was likely unaware of, or ambivalent, to the financial benefits of composing.¹³⁵ As the publisher Helene Blue says, “Money is not the goal. But it all leads to money.”¹³⁶

127. PAUL F. BERLINER, THINKING IN JAZZ: THE INFINITE ART OF IMPROVISATION 97 (1994).

128. SANJEK, *supra* note 82, at 38.

129. AMBURN, *supra* note 56, at 39.

130. *Id.*

131. *Id.*

132. See Telephone interview with Helene Blue, *supra* note 113.

133. THE BEATLES ANTHOLOGY, *supra* note 13, at 22. As a British ensemble, The Beatles provide an intriguing example of the far-reaching impact of American copyright law. Performance practices reach across borders.

134. *Id.* *Peggy Sue* is an example of how a copyright filing may not always accurately reflect who should receive composition credit. See AMBURN, *supra* note 56, at 79 (suggesting that Holly’s manager, Norman Petty, received songwriting credit for a song that Holly and Jerry Allison wrote).

135. Telephone interview with Helene Blue, *supra* note 113.

136. *Id.*

The Beatles, influenced by Buddy Holly's composition practices, in turn popularized the concept of the performer-songwriter and cemented its place in American pop culture. McCartney recalled, "One of the main things about The Beatles is that we started out writing our own material. People these days take it for granted that you do, but nobody used to then."¹³⁷ For example, suppose your daughter starts a garage band and decides to write the songs that the band will perform. She probably does not understand copyright law. Even if she does, her band probably does not sell records, so her decision to compose cannot be financially motivated. When your daughter chooses to write her own songs, she is therefore likely imitating the practices of influential musicians.

Copyright's influence is thus not limited to professional musicians. By influencing the creative practices of role model performers such as Charlie Parker, Buddy Holly, and The Beatles, the entitlements created by copyright law can affect the behavior of non-professional and recreational musicians, who represent a more diverse cross-section of the musical community. Copyright has defined the broader structure of the music industry by changing the practices of a smaller subset of influential fringe performers.

IV. CULTURAL IMPACT

This Section examines the effect of the performer-songwriter trend on the structure and content of the music industry and discusses its larger cultural impact.

A. Increase in the Number of Songwriters

The Copyright Act's denial of a full performance right led to a steady increase in the number of songwriters.¹³⁸ As a result, composing is no longer the exclusive dominion of a select group of professional New York writers. It has become commonplace.

Some publishers and music critics question the benefits of the performer-songwriter trend. According to those critics, the increased prevalence of albums comprised solely of new compositions has lowered the average quality of the individual songs.¹³⁹ As publisher Helene Blue explains, "The Beatles had the talent [to write an album comprised solely of originals]. We no longer care if the artists have the talent. This is why we don't have albums with twelve great songs. We have albums with one or two good songs."¹⁴⁰ In Ms. Blue's opin-

137. THE BEATLES ANTHOLOGY, *supra* note 13, at 22

138. *See supra* Parts II, III.

139. *See Cusic, supra* note 50, at 171.

140. Telephone interview with Helene Blue, *supra* note 113.

ion, one of the results of the increased number of performers who write their own compositions is a corresponding increase in the abundance of “[a]lbums with “weak ‘B’ sides.”¹⁴¹

The publishing community’s negative opinions about performer-songwriting must be viewed in context, however. The performer-songwriter movement undercut the vitality of the publishing industry. Publishers, who were the kings of the American music business for over a century, became secondary to record labels and the performers with whom the publishers associated.¹⁴² As Martin Cane, the President of Famous Music Corporation, commented in the trade magazine *Record World*: “For a while, the publishing marketplace didn’t know what happened. An abundance of talented writers, professional people, and publishers were caught unexpectedly by this new trend and really had no place to turn.”¹⁴³

There are also three possible responses to the claim that the performer-songwriter movement has resulted in lower quality songs. First, publishers and music critics may have an idealized view of past musical eras. For every enduring masterpiece, such as Washington and Young’s *My Foolish Heart*, there was a soon-forgotten novelty hit, like Merrill’s composition *If I Knew You Were Comin’ I’d ‘ve Baked a Cake*.¹⁴⁴ There has always been a mixture of enduringly brilliant and fleetingly popular songs on the *Billboard* singles charts. Some publishers and music critics tend to judge past eras based only on the works of genius that survive, while forgetting the less-notable works that have faded.

Second, professional songwriters are not always the most skilled at their trade. For songs to be sold for use by a third party — as is the case when a label buys music for a performer — the song usually must be distilled into sheet music. Thus, musicians who are brilliant songwriters, but not musically literate, are largely barred from this

141. *Id.* When Ms. Blue mentions “B” sides, she is referring to the second side of musical tapes and records.

142. See *Hearings on Copyright Law Revision Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 95th Cong., at 1400 (1976) (Testimony of Stanley M. Gortikov, President, Recording Industry Association of America).

[The music publishing industry’s] function today is heavily administrative and clerical. They are largely service entities, conduits for the processing of income and paper transactions. They do not promote as they used to. They do not advertise as they used to. They do not help create demand as they used to. They do not employ field representatives as they used to.

These promotional functions necessarily have been taken over by the recording companies.

Id.

143. PAULA DRANOV, *INSIDE THE MUSIC PUBLISHING INDUSTRY* 23 (1980).

144. *My Foolish Heart* reached number twenty-two on the *Billboard* charts, while *If I Knew You Were Coming, I’d ‘ve Baked a Cake* reached number eleven. See *The Year’s Top Tunes*, *supra* note 11, at 17.

profession.¹⁴⁵ In contrast, a musician who performs his or her own compositions does not have to write out the songs in musical notation.¹⁴⁶ The denial of a full performance right has pushed record labels to discover such influential writers as Jimi Hendrix, Buddy Holly, Paul McCartney, and Hank Williams, even though those writers were never musically literate according to the standards of professional songwriters.¹⁴⁷ As Miles Davis commented, “[t]here are a lot of great musicians who don’t read music — black and white — that I have known and respected and played with.”¹⁴⁸ The Copyright Act created incentives for labels to forsake Tin Pan Alley’s established process and record artists’ innovative compositions.

Finally, even if one accepts the argument that the increased number of songs has generally lowered album quality, the performer-songwriter trend is not necessarily adverse to the development of American popular music. The increased popularity of songwriting, even if much of it is done by mediocre writers, may nevertheless lead to a net increase in the variety of musical works available and the opinions expressed in those songs. Like the American federal system, for which it is often said that “the 50 States serve as laboratories for the development of new social, economic, and political ideas,”¹⁴⁹ the exponential increase in the number of writers has created countless musical sub-genres, which serve as laboratories for development and exploration outside of the mainstream industry. The growth in the number of composers has decentralized the content produced by the music industry.

Others have also posited a connection between mediocre performer-written music and the “downloading problem.”¹⁵⁰ As Ms. Blue explains, “[n]o one wants to buy an album, because only one or two songs are valuable.”¹⁵¹ In her view, consumers are motivated to illegally download songs because they do not want to pay for a complete

145. See, e.g., SHEPHERD, *supra* note 90, at 28–29 (describing the barriers faced by black ragtime pianists who could not read or write sheet music).

146. See Charles Cronin, *Virtual Music Scores, Copyright and the Promotion of a Marginalized Technology*, 28 COLUM. J.L. & ARTS 1, 8–9 (2004).

147. See DAVIS & QUINCY TROUPE, *supra* note 58, at 292 (observing that Jimi Hendrix could not read the sheet music Miles Davis had given him); AMBURN, *supra* note 56, at 138 (noting that none of the members of Buddy Holly’s band could read music); THE BEATLES ANTHOLOGY, *supra* note 13, at 19; COLIN ESCOTT, GEORGE MERITT & WILLIAM MACEWEN, *THE BIOGRAPHY* 36 (1994) (reporting that Hank Williams would sell song portfolios at his concert that contained “only the words . . . not the music” because he “didn’t know musical notation and wasn’t about to pay somebody to transcribe for him”).

148. DAVIS & QUINCY TROUPE, *supra* note 58, at 292.

149. *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 788 (1982) (O’Connor, J., concurring in part); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

150. Telephone interview with Helene Blue, *supra* note 113.

151. *Id.*

album when there are only a few listenable songs.¹⁵² To the extent that performer-songwriters are blamed for illegal downloading, they also must receive credit for the “booming demand”¹⁵³ for music on the Internet that has led to steep increases in legitimate online music sales. Digital music sales more than tripled between the first half of 2004 and 2005.¹⁵⁴ The digital music market has surpassed the value of the global singles market.¹⁵⁵

B. Differences in Composition Processes

Music composed by a performer-songwriter is substantively different from music composed by a professional songwriter for two reasons. First, performers who write their own music often feel a strong personal connection to their works.¹⁵⁶ Vocalist Sachal Vasandani estimates that “nine times out of ten” he is more attached to songs that he composes than those written by others.¹⁵⁷ Vasandani relates:

In the beginning, when you have a song that you have written, you want to nurture it like it is your own child. Other pieces of music are other people’s children. But when you have a song that you have written, you want to care for it like it is your own.¹⁵⁸

Guitarist Jeff Libman notes that while it depends on the individual composition, “[s]ome of the songs you write you really love.”¹⁵⁹

Of course, songs written by other composers can also become “intensely personal.”¹⁶⁰ As Libman explains, “[s]ome of the music that other people have written becomes so dear to me and is such a part of my life that it reaches the level of the favorite music that I’ve written.”¹⁶¹ But there appears to be an immediacy to artists’ attachment to their own repertoire that is lacking when they perform songs written by other people. Says Libman, “[b]y the time you complete a piece of your own music . . . [y]ou may have never heard it performed, and

152. *Id.*

153. Press Release, Int’l Fed’n of the Phonographic Indus., Digital Sales Triple to 6% of Industry Retail Revenues as Global Music Market Falls 1.9% (Oct. 3, 2005), available at http://www.ifpi.org/content/section_news/20051003.html.

154. *See id.*

155. *Id.*

156. Telephone Interview with Jeff Libman, Adjunct Professor of Music, Phoenix College (Jan. 14, 2007).

157. Telephone Interview with Sachal Vasandani, Recording Artist, Mack Ave. Records (Jan. 14, 2007).

158. *Id.*

159. Telephone Interview with Jeff Libman, *supra* note 156.

160. *Id.*

161. *Id.*

you already love it, whereas a lot of the music that you didn't write has to grow on you."¹⁶²

Some performers appear to be burdened by their attachment to their own compositions. Libman comments that when she writes her own songs, her "goal" is to produce a "masterwork" that compares to the "great music [she] listened to growing up."¹⁶³ Drummer Andy Beaudoin states, "I'm so critical when I bring in my own music that I can be overly self-conscious; in that sense I feel closer to it."¹⁶⁴ Agreeing that he also certainly has more of a connection with his own songs, but is "overly critical" of such songs, saxophonist Ben Bokor explains, "I have a narrow way I expect my own [compositions] to sound [W]ith other people's stuff I have a much wider view"¹⁶⁵

A performer's personal attachment to material he wrote also encourages compositions that are socially and artistically progressive. Beaudoin observes that at the root of the motivation to compose a song "is an attempt to do something new and original. The action alone can be more controversial than playing a song just because it's popular and has been around."¹⁶⁶ Vasandani agrees stating, "The lyrics you write mean a whole hell of a lot to you With every song that I write I'm trying to deal with something substantive and not just skimming the top."¹⁶⁷ Bokor finds that his compositions tend to be socially and artistically progressive especially when he writes "something that's meant to be programmatic" for an "event, activity, or person."¹⁶⁸

The second reason why music composed by a performer-songwriter is substantively different from music composed by professional composers is that performer-songwriter compositions are marketed to a different audience. The professional songwriter's primary audience, at least initially, is the industry executive, who is often searching for material that is representative of what is currently successful. This top-down process of repertoire selection encourages conservatism. Recording executives, who are trying to appeal to the broadest possible audience, will often shy away from novel or unorthodox material. For example, in the early 1960s, music publishers steered popular singers towards "more innocuous general songs" and away from "damning direct statements."¹⁶⁹ In that era of social up-

162. *Id.*

163. *Id.*

164. Telephone Interview with Andy Beaudoin, Adjunct Professor of Music, Cy-Fair College (Jan. 14, 2007).

165. Telephone Interview with Ben Bokor, Freelance Musician (Jan. 14, 2007).

166. Telephone Interview with Andy Beaudoin, *supra* note 164.

167. Telephone Interview with Sachal Vasandani, *supra* note 157.

168. Telephone Interview with Ben Bokor, *supra* note 165.

169. JOSH DUNSON, FREEDOM IN THE AIR: SONG MOVEMENTS OF THE SIXTIES 79 (1965).

heaval, publishers pushed for material that “contained enough protest to catch what was in the air, but not enough to start any winds blowing.”¹⁷⁰

When composing, a performer-songwriter appears to be driven largely by his own standards, with the twin goals of self-satisfaction and financial reward. As Libman comments, “[p]eople who write don’t only try to satisfy others. They try to satisfy themselves first.”¹⁷¹

C. Politically and Socially Forward-Leaning Content: Historical Analysis

The performer-songwriter’s historical role in American counter-culture showcases the difference between the composition process of a performer writing for himself and that of a professional songwriter writing songs for sale to industry executives. One of the first examples of the pronounced contrast in creative practices between musicians who performed their own compositions and those who performed works written by professional composers occurred during the Great Depression. During the 1930s, Tin Pan Alley popular music songs tended to “scrupulously avoid any mention of social problems.”¹⁷² Indeed, “while Tin Pan Alley and Hollywood provided vivid fantasies of life among the elite,”¹⁷³ early country and blues performer-songwriters “chronicled the suffering of the homeless and unemployed: the Dust Bowl farmers whose way of life was threatened by ecological, as well as economic disaster; and the textile and mine workers of the South, whose attempts to unionize were resisted — sometimes violently — by big business.”¹⁷⁴

By the mid-to-late 1960s, the ever-growing performer-songwriter movement had enabled music to become a “centrally significant medium for the dissemination of a range of socio-political issues, from U.S. involvement in the Vietnam War to the Civil Rights Movement, to the rejection of western political and cultural ideology.”¹⁷⁵ Popular music contributed to the development of a new political consciousness.¹⁷⁶ Performer-songwriters helped to “sustain a countercultural

170. *Id.*

171. Telephone Interview with Jeff Libman, *supra* note 156.

172. DUNSON, *supra* note 169, at 118.

173. *Id.*

174. *Id.* at 118–19. Examples of songs by performer-songwriters that dealt with the Depression include early country star Uncle David Macon’s *All in Down and Out Blues*, which argued that “Wall Street’s propositions were not all roses,” and Casey Bill Weldon’s *WPA Blues*, which described a government demolition crew destroying dilapidated housing still occupied by African American families. *Id.*

175. ANDY BENNETT, *CULTURES OF POPULAR MUSIC* 29 (2001).

176. RON EYERMAN & ANDREW JAMISON, *MUSIC AND SOCIAL MOVEMENTS: MOBILIZATION TRADITIONS IN THE TWENTIETH CENTURY* 106 (1998).

and political movement associated with drug experimentation, generational rebellion, and opposition to the Vietnam War.”¹⁷⁷ These cultural giants, ranging from The Beatles and Bob Dylan to Jimi Hendrix and Janis Joplin, contributed to the political movement with songs that were often “heavily weighted” with political and social messages.¹⁷⁸ During this period, political and social ideas were disseminated through popular music written by performer-songwriters; in turn, the prevailing political movements influenced the content of popular music.¹⁷⁹

Lastly, no discussion of performer-songwriters and their often politically-orientated messages would be complete without addressing rap music. This performer-written genre’s lyrics have been described as “deeply political” in both “content” and “spirit”¹⁸⁰ and have been credited with having a “profound impact on the African American community in the United States.”¹⁸¹ Indeed, rap has been said to “negotiate the experiences of marginalization, brutally truncated opportunity, and oppression within the cultural imperatives of African-American and Caribbean history, identity, and community.”¹⁸²

The historical legacy of performer-songwriters is marked by music with a greater tendency to raise issues that are often controversial when compared to music composed by professional songwriters. From the Great Depression to the new millennium, performer-songwriters have played a central role in drawing attention to social and political issues and have affected democratic discussion in our civil society.

D. Politically and Socially Forward-Leaning Content: Empirical Analysis

There are limitations, of course, of looking to history to compare the impact of songs written by performer-songwriters and those written by professional writers. Prevailing opinions on musical trends are colored both by people’s subjective tastes and by the passage of time. However, empirical analysis of the lengths of songs created using the two different composing practices provides evidence that suggests the two practices produce music that is inherently different.

177. MARK MATTERN, *ACTING IN CONCERT: MUSIC, COMMUNITY, AND POLITICAL ACTION* 16 (1998).

178. *Id.*

179. See EYERMAN & JAMISON, *supra* note 176, at 108.

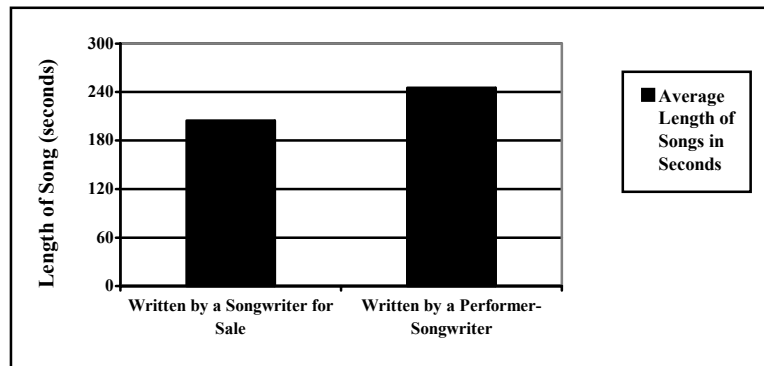
180. Tricia Rose, “*Fear of a Black Planet*”: *Rap Music and Black Cultural Politics in the 1990s*, 60 *J. NEGRO EDUC.* 276, 289 (1991).

181. Errol A Henderson, *Black Nationalism and Rap Music*, 26 *J. BLACK STUD.* 308, 310 (1996).

182. TRICIA ROSE, *RAP MUSIC AND BLACK CULTURE IN CONTEMPORARY AMERICA* 21 (1994).

As shown in Figure 2, for the most popular songs on *Billboard Magazine*'s year end charts, songs composed by their performers average 245.1 seconds in length while those written by a second party average 204.6 seconds, a difference of 40.5 seconds. An analysis of variance ("ANOVA") shows that the difference in average song length is statistically significant.¹⁸³

Figure 2: Average Song Length



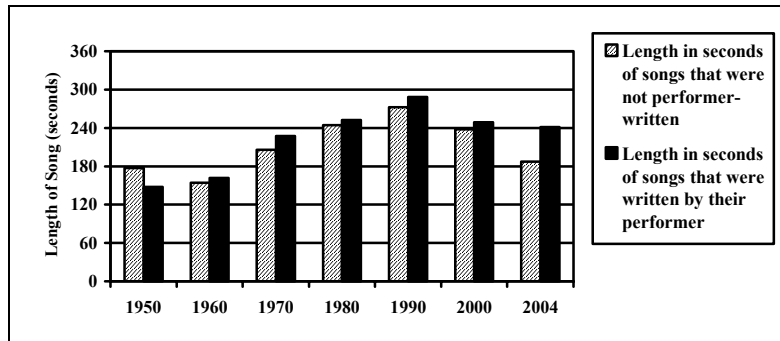
As Figure 3 demonstrates, a year-by-year comparison of the song lengths for the two categories shows that, with the exception of 1950, the average length of music written by a performer-songwriter on the year-end charts is always longer: 161.5 compared to 154.0 seconds in 1960; 227.5 seconds compared to 206.0 seconds in 1970; 252.0 seconds compared to 244.5 seconds in 1980; 288.6 seconds compared to 272.5 seconds in 1990; 248.8 seconds compared to 237.7 seconds in 2000; and 241.3 seconds compared to 217.5 seconds in 2004.¹⁸⁴ The data for 1950 are not dispositive because of the small sample size; only 2 of 30 songs were composed by performer-songwriters.¹⁸⁵ Songs written by performer-songwriters were consistently longer than those written by songwriters for sale in every other test interval.

183. The ANOVA p-value is less than .0001. Statistical analysis and interpretation assisted by Sunil Sen, an actuary.

184. Data on file with author.

185. *See id.*

Figure 3: Average Song Length by Year



Determining the length of a song on the *Billboard* charts presents a unique challenge. There are often scores of releases featuring an artist performing a particular composition. For example, there are twenty-seven different versions of Frank Sinatra singing *Fly Me To The Moon* in the AMG database.¹⁸⁶ Selecting the version that corresponds with the *Billboard* listing is impossible. Labels often make multiple releases for a song climbing the charts in the form of a second printing or regional release. In these situations, there is no one length for the “original” song on the *Billboard* charts. This study mitigated the problem of having to decide which release of a song to use in the computations by consistently using the data from the earliest recording, or first listing in the AMG database.¹⁸⁷ This provided a consistent point of selection so that human bias would not factor into the data. Furthermore, the earliest release is more likely to reflect the “original” recording that was on the *Billboard* charts.

The empirical analysis of the length of songs shows a consistent difference between compositions written by a performer-songwriter and those written by a second party, but it does little to immediately suggest the reasons for the results. One intuitive explanation is that a musician who is invested in his or her repertoire may produce songs that are longer. Though it is difficult to draw firm conclusions about

186. AMG, Frank Sinatra: Fly Me to the Moon, <http://www.allmusic.com/cg/amg.dll?p=amg&token=&sql=33:0v6ftv49kl5x> (last visited Dec. 1, 2007). If the different releases are of from the same recording date, the disparity between the lengths of the releases is marginal. For example, the recording of Sinatra singing *Fly Me to the Moon* with the Count Basie Orchestra was released on both the album *Sinatra at the Sands*, and on a compilation album for the label DJ Specialist. See FRANK SINATRA, *Fly Me to the Moon*, on SINATRA AT THE SANDS (Warner Bros. Records 1966); FRANK SINATRA, *Fly Me to the Moon*, on MY WAY: THE BEST OF FRANK SINATRA (DJ Specialist 1997). In the Warner Brothers release, *Fly Me to the Moon* is listed at 2:30. The same recording is listed at 2:29 in the DJ Specialist version.

187. The study had one uniform exception: if the first listing in the AMG database was labeled a “re-mix” in the song title, the study used the data from the second listing.

the relationship between a song's authorship and its length, there are examples that might suggest a correlation between authorship and content. Across genres, some of the most forward-leaning musical compositions are also among the longest.¹⁸⁸

V. LEGISLATIVE IMPLICATIONS

This Section describes how the performer-songwriter movement should push the copyright community to re-evaluate its criticism of the lack of a general performance right in recordings. This segment ends with a discussion of why Congress should revoke the Copyright Act's grant of a limited digital audio transmission right.

A. Efficiency and Fairness

When legislators and scholars advocate the establishment of a full public performance right, they usually rely on two types of arguments: equity-based and incentive-based.¹⁸⁹ Equity arguments are usually comparative. If performers contribute more to the success of a musical recording than composers, then performers should be compensated at least as much as the composers.¹⁹⁰ Equity arguments state that a performer's interpretation is "no less a contribution to, or an integral part of, the recorded product tha[n] is the composer's score and lyrics."¹⁹¹ In this view, a full performance right is consistent with the fact that it is the performer who "brings the composer's work to life" and is ultimately responsible for whether the recording is artistically and commercially successful.¹⁹² Thus, under an equity argument, by granting only the composer the right to profit from the public performance of his compositions, the Copyright Act fails to adequately reward per-

188. See, e.g., SIR GEORGE SOLTI & CHICAGO SYMPHONY ORCHESTRA, MAHLER: SYMPHONY NO. 8 "SYMPHONY OF A THOUSAND" (Decca 1972) (classical music from the romantic era, timed at 1:33:35); ARLO GUTHRIE, *Alice's Restaurant Massacre*, on ALICE'S RESTAURANT (Reprise 1967) (folk, timed at 18:20); JOHN COLTRANE, *Ascension (I)*, on ASCENSION (Impulse! 1965) (jazz, timed at 40:56); GRANDMASTER FLASH & THE FURIOUS FIVE, *The Message*, on THE MESSAGE (Sugar Hill Records 1982) (hip-hop, timed at 7:12).

189. See, e.g., Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 193-96 (2004).

190. See *id.* at 193; cf. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 664 (2d Cir. 1955) (Hand, J., dissenting) ("[I]n the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a 'composition' as an 'arrangement' or 'adaptation' of the score itself . . .").

191. *Digital Performance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 104th Cong. 36 (1995) [hereinafter *1995 Hearings*] (statement of Jason S. Ber- man, Chairman and Chief Executive Officer, Recording Industry Association of America).

192. Waxman, *supra* note 24, at 42.

formers for their creative contributions. Performers deserve a proportional reward for their creative efforts.

Incentive arguments are rooted in copyright law's constitutional directive to "promote the Progress of Science and useful Arts."¹⁹³ Incentive arguments are premised on the proposition that "copyright was not designed 'primarily' to 'benefit' the 'author'";¹⁹⁴ instead, copyright's "sole interest" and "primary object" are to benefit the public.¹⁹⁵ According to this view, by denying a full performance right, Congress may have failed to strike the "necessary balance" between granting authors monetary incentives and providing the public with access to the authors' works.¹⁹⁶ Without performers to convey the compositions of songwriters, the public has only limited access to those creations. Performers' significant role, combined with the stated purpose of copyright, suggests that granting performers a public performance right would be one way to ensure greater public access to musical works. Arguably, when copyright law inadequately rewards performers for their contributions, it fails to provide the optimal degree of incentive.

While incentive and equity arguments have intrinsic appeal, many musical performers are able to collect performance royalties by composing their own songs. The ability to obtain those royalties undermines the claim that copyright policy is blatantly unfair or inefficient with respect to performers when performers can write non-infringing new compositions.

Of course, the burden of songwriting is hardly trivial for musicians who are unable to compose. Musicians who cannot write original works that they would be willing to perform are certainly disadvantaged by the denial of a full performance right. In order to reap royalties on the public performance of albums by performance-only artists, a record label would have to acquire the copyright in the songs recorded by the artists, making the production of their albums less attractive because of the higher costs and inconvenience.¹⁹⁷

However, the denial of a public performance right does not completely deny non-composing musicians the ability to earn a living. For most professional performers, recording and publishing royalties are not the primary sources of income. Instead, most professional musicians have to "commit themselves" to earning the majority of their

193. U.S. CONST. art. I, § 8, cl. 8.

194. *Eldred v. Ashcroft*, 537 U.S. 186, 247 (2002) (Breyer, J., dissenting) (quoting H.R. REP. NO. 60-2222 at 6-7 (1909)).

195. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932).

196. *1995 Hearings*, *supra* note 191, at 187 (1995) (Statement of Marybeth Peters, Register of Copyrights and Associate Librarian for Copyright Services, Library of Congress).

197. "Most labels" will only show an "interest" if a performer is "listed as a writer or co-writer." Cusic, *supra* note 50, at 171.

income though live performances and teaching.¹⁹⁸ In 1977, the United States Copyright Office prepared a report providing evidence of the insignificant financial benefit of copyright royalties for non-star professional musicians. Among members of the American Federation of Musicians, the preeminent union for musicians in the record industry,¹⁹⁹ only 23% received royalties from any of their sound recordings.²⁰⁰ Of this 23%, 41% stated that sound recordings royalties comprised 2% to 5% of their income, and 35% indicated that the royalties were 1% or less.²⁰¹ These statistics suggest that for most artists who do not compose, the lack of the right to profit from the public performance of their albums may not be a large burden.

Furthermore, the harm from the denial of a performance right for the “small percentage”²⁰² of musicians who do earn a “substantial”²⁰³ amount of money from recordings is generally mitigated. These musicians, who are the most successful artists in the industry, are likely to be in a financial position to acquire their own catalog. In practice, the denial of a public performance right only has a marginally direct effect on most professional musicians.

B. Copyright as a Means to Facilitate Democratic Civil Society

Of course, it does not necessarily follow that the denial of a full performance right is good policy solely because the equity- and incentive-based arguments in favor of such a right are not as strong as many would contend. The benefits associated with decentralizing the production of content must outweigh the burden imposed by the policy. This evaluation forces the difficult appraisal of the non-monetary benefits of performer-composed content.

Professor Neil Weinstock Netanel argues that “copyright’s primary goal is not allocative efficiency, but the support of a democratic culture.”²⁰⁴ In this view, copyright has two “democracy-enhancing functions.”²⁰⁵ First, copyright provides an incentive for creative expression on “political, social, and aesthetic issues.”²⁰⁶ Second, copyright supports a “sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cul-

198. Telephone interview with Jeff Libman, Adjunct Professor of Music, Phoenix College (Nov. 9, 2007).

199. See M. WILLIAM KRASILOVSKY & SIDNEY SHEMEL, THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY 59 (8th ed. 2000).

200. 1978 REPORT, *supra* note 26, at 117.

201. *Id.* at 118.

202. Telephone interview with Jeff Libman, *supra* note 198.

203. *Id.*

204. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996).

205. *Id.*

206. *Id.* at 347.

tural hierarchy.”²⁰⁷ Accordingly, copyright should be viewed as “a state measure designed to enhance the independent and pluralist character of civil society.”²⁰⁸ This interpretation is further supported by the framers of the first copyright statute, who proclaimed that “[l]iterature and [s]cience are essential to the preservation of a free Constitution”²⁰⁹

If one accepts the analysis that democratic culture is the primary goal of copyright law, then it becomes easier to justify the lack of a full performance right. The denial of a full performance right in sound recordings benefits democracy by decentralizing the music production process, which leads to the creation of more culturally significant compositions. Even if one does not accept that supporting a democratic culture is the primary goal of copyright, the benefits to democracy outweigh the equity- and incentive-based concerns outlined above.

C. *The Limited Digital Audio Transmission Right*

By 1995, there were “a small number of services” that offered digital transmissions of musical recordings to subscribers on the Internet.²¹⁰ The recording industry became concerned that these new interactive services would undermine its business model because it feared that consumers would not purchase traditional records if consumers could get the same music on-demand through a digital service.²¹¹ The industry feared that if a listener could request Coltrane’s recording of *My Favorite Things* whenever he wanted, it would eliminate the desire to purchase a hard-copy of the album.

The advent of digital music transmission increased the importance of performance rights and drew attention to the disparity in the royalties received by performers who wrote their material and those who did not. Before this technological development, performers and their labels received money when their physical records were purchased, even if the performers were not granted a public performance right. With digital downloading, the public can gain on-demand access to a performer’s material without having to purchase a hardcopy. Because these digital transmissions were considered legally equivalent to a public performance rather than to the purchase of a physical album, performers who did not compose their own songs were left entirely uncompensated. The development of digital technology es-

207. *Id.* at 288.

208. *Id.* at 291.

209. 1 ANNALS OF CONG. 972 (Joseph Gales ed., 1820); see Netanel, *supra* note 204, at 289 n.17.

210. H.R. REP. NO. 104-274, at 12 (1995).

211. *See id.* at 13.

entially created a loophole allowing consumers to purchase songs without paying any money to those performers who do not compose their own songs.

In response to this technological change and at the urging of the record industry, Congress granted a “narrowly crafted” performance right to the owners of sound recordings to ensure that they would be able to profit from the use of their albums in the new digital medium.²¹² The digital transmission right “is riddled with exceptions and benefits reflecting compromises worked out among the competing interests.”²¹³ The right is limited to:

(1) transmissions, as opposed to live performances (thereby exempting concerts, restaurants, dances, amusement parks, etc.); (2) of audio works, as opposed to audiovisual works (thereby exempting transmissions of movies); (3) that occur in digital format, as opposed to analog (thereby exempting contemporaneous AM and FM radio stations, and contemporaneous TV stations as well)²¹⁴

In 2005, the main services affected by the digital transmission right included satellite radio services XM and Sirius; webcasters like AOL, Live 365, and Yahoo!; and digital cable and satellite television music services like Music Choice, DMX, and Muzak.²¹⁵

At that time, the royalties from digital audio transmissions were still inconsequential compared to the royalties derived from traditional performing rights societies. SoundExchange is the lone organization that collects and distributes performance royalties from digital audio transmissions of sound recordings.²¹⁶ Its income is “still tiny compared with the royalties paid from traditional radio . . . but it is growing fast.”²¹⁷ Between October 2004 and October 2005, the weekday average audiences increased 177% for the three largest digital radio providers.²¹⁸ One music industry economist predicted that the revenue from satellite radio would increase to six to ten times the current re-

212. H.R. REP. NO. 104-274, at 13 (1995); see Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, amended by Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, § 405(a)(6), 112 Stat. 2860.

213. 2 NIMMER, *supra* note 35, §§ 8.21–.22.

214. *Id.* § 8.21.

215. SOUND EXCHANGE, PERFORMANCE ROYALTIES FOR RECORDING ARTISTS AND RECORD LABELS: AN INTRODUCTION TO SOUNDEXCHANGE 2 (2005) (on file with author).

216. *Id.*

217. Ben Sisario, *Old Songs Generate New Cash for Artists*, N.Y. TIMES, Dec. 28, 2004, at E1.

218. Press Release, Arbitron Inc., First Full Year of comScore Arbitron Online Radio Ratings Shows a 177% Increase in Weekday Average Quarter Hour Audience for Measured Networks (Oct. 2005), available at <http://www.arbitron.com/onlineradio/topranked.htm>.

venue over the next five years.²¹⁹ It seems fair to conclude that the digital transmission right is rapidly becoming a substantial source of revenue.

D. The Argument for Repealing the Limited Digital Audio Transmission Right

If we accept that the primary purpose of copyright is to support our democratic civil society,²²⁰ then there are ample reasons to revoke the digital transmission right granted in 1995. The denial of a general performance right in sound recordings has created incentives for performers to compose. Those creative practices, in turn, have turned popular music into a driving force behind the “free trade in ideas”²²¹ that forms the foundation of our democracy. When a performer writes his own songs, he is more likely to form the personal attachment that often leads him to create material that addresses social issues. As a result, performer-songwriters have historically played an integral role in facilitating communal discussion on such issues as the Great Depression, the Vietnam War, and race relations.

There is no reason for Congress to differentiate between the rights accorded to sound recordings in the digital and traditional marketplaces. Through songwriting, performers have developed an artistic practice that allows them to reap performance royalties on their compositions. The growth in the prevalence of digital media may increase the disparity in rewards an artist will receive if he performs another’s material. But the recording industry would not be paralyzed by the revocation of the limited performance right and the growth of digital technology. The repeal of a general performance right in sound recordings would create a net societal gain by facilitating our democratic civil society while only marginal affecting the income of most professional musicians and the functioning of the recording industry.

VI. CONCLUSION

The Introduction to this Article used John Coltrane’s first recording of the song *My Favorite Things* to illustrate how performers are, seemingly unjustly, denied a royalty when their sound recordings are played in public. Some might even argue that Coltrane contributed more to the recording of *My Favorite Things* than the songwriters, Rodgers and Hammerstein; yet, he is still not granted compensation

219. Sisario, *supra* note 217.

220. *See generally* Netanel, *supra* note 204, at 288.

221. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

when his rendition is publicly performed.²²² Under the Copyright Act, only the composers of a musical composition are granted a royalty when a sound recording is played on television, radio, or in a public venue.²²³

John Coltrane's recording of *My Favorite Things* is arguably a high point of 20th-century music. But Coltrane's pioneering rendition, for all of its brilliance, is not widely considered his masterpiece. That designation is most often reserved for his self-composed album, *A Love Supreme*,²²⁴ a "musical self-portrait"²²⁵ that details his "spiritual reawakening following his struggle with drug addiction."²²⁶ It was Coltrane's own compositions on *A Love Supreme* that provided a vehicle for the expression of his spiritual and religious ideas.²²⁷ Likewise, Coltrane's most politically forward-leaning performances were also the product of his own quill. His song *Alabama*²²⁸ is a riveting elegy for the victims of the infamous 1963 Sunday morning church bombing in Birmingham.²²⁹ It features a melody that is patterned off of the cadence of Martin Luther King's funeral oration.²³⁰ *Alabama* has been called Coltrane's "most overtly political composition"²³¹ and one of "jazz's most enduring calls for change."²³²

If *A Love Supreme* and *Alabama* are any indication, Coltrane himself composed what appear to be the most spiritually and socially significant recordings in his body of work. This suggests that the

222. See 17 U.S.C. §§ 106(4), 106(6) (2000) (granting a full public performance right for authors of "musical works" but only a partial public performance right for authors of "sound recordings").

223. See *id.*

224. JOHN COLTRANE, *A LOVE SUPREME* (Impulse! 1964); see BILL COLE, JOHN COLTRANE 158 (1976) (calling *A Love Supreme* one of Coltrane's "most dynamic and far-reaching works" and the "highest point" of his spiritual awareness); CUTHBERT ORMOND SIMPKINS, *COLTRANE: A BIOGRAPHY* 179 (1975) (calling *A Love Supreme* an "extended spiritual masterpiece"); MARTIN SMITH, *JOHN COLTRANE: JAZZ RACISM AND RESISTANCE* 73 (2001) (calling *A Love Supreme* "Coltrane's most profoundly spiritual statement" and his quartet's "musical peak").

225. Marcelle S. Fischler, *Saving a Jazz Great's Home from Oblivion*, N.Y. TIMES, Feb. 15, 2004, at L14 (quoting Ashley Kahn).

226. *Footsteps of Our Fathers*, 28 POPULAR MUSIC & SOC'Y 253, 254 (2005) (audio review).

227. Fischler, *supra* note 225, at L14; see also David Wild, *John Coltrane: The Impulse Years: Recordings 1961-1967*, in THE JOHN COLTRANE COMPANION: FIVE DECADES OF COMMENTARY 198-99 (Carl Woideck ed., 1998) ("This four-part suite is the first major work and the first and perhaps best complete expression of Coltrane's religious consciousness.").

228. JOHN COLTRANE, *Alabama*, on THE GENTLE SIDE OF JOHN COLTRANE (Impulse! 1961).

229. Strickland, *supra* note 2, at 100.

230. MARTIN SMITH, *JOHN COLTRANE: JAZZ RACISM AND RESISTANCE* 72 (Redwords 2001).

231. Peter Watrous, *John Coltrane: A Love Supreme*, in THE JOHN COLTRANE COMPANION, *supra* note 227, at 65.

232. Bill Shoemaker, *Why Jazz Has the Blues: The Market Is Driving Our Quintessential Music Overseas*, WASH. POST, June 6, 1993, at C1.

Copyright Act should not focus solely on rewarding artists for their creative efforts; rather, it can and should be a tool for focusing creative practices in a way that facilitates democratic discussion. While it may seem counterintuitive, society may be better served by an “unjust” copyright policy that pushes artists to reach deeper and write their own compositions than by laws that attempt to reward proportionally creators for their contributions.

Lord Macaulay once called copyright “a tax on readers for the purpose of giving a bounty to writers,” in a speech to the House of Commons that has become a pillar of copyright jurisprudence.²³³ Macaulay was half right. Copyright may be a tax on consumers, but, as this Article has shown, it does not have to be used exclusively for the purpose of providing a bounty to writers. Like any legal code, the Copyright Act has molded social practices. Copyright has the power to influence how musicians create their works as well as the ability to subsidize their art. Creative customs are not static. Instead, history demonstrates that musicians shift their artistic methods to maximize their pecuniary rewards.

Sociologists have long studied how music can expand the horizons of a community and allow for the sharing of experiences, interests, and identities.²³⁴ It is time for the legal community as well to recognize the contributions of performers to the functioning of democracy. A “systematic understanding of how copyright supports democratic institutions”²³⁵ demonstrates the insufficiency of the conventional wisdom regarding public performance rights. By encouraging performers to write their own compositions, the denial of a full performance right in sound recordings substantially contributes to democratic flourishing while imposing only small costs on performers.

233. Thomas Babington Macaulay, Speech Delivered in the House of Commons (Feb. 5, 1841), available at <http://yarchive.net/macaulay/copyright.html>.

234. See, e.g., MATTERN, *supra* note 177, at 23.

235. Netanel, *supra* note 204, at 289.