



SHOULD THE U.S. LEAD OR FOLLOW?

Why Other Countries' Imposition of a Tax on the Performance of Sound Recordings Does Not Justify Such a U.S. Tax

A National Association of Broadcasters White Paper
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EXECUTIVE SUMMARY

The American recording and broadcasting industries are the most successful in the world, due in no small part to the mutually beneficial relationship that exists between the two industries. For decades, record labels and performers have sought radio airplay of their music, regarding such promotion as the “holy grail” of the recording industry, and local radio broadcasters have sold advertising time when they play and promote that music for free. This reciprocal “free airplay for free promotion” relationship has served both industries well for decades, as evidenced by the fact that the U.S. is the most significant exporter of music and the largest territory for recorded music sales.

One of the reasons that American over-the-air radio has been such an effective promotional tool for music is because it is unburdened by a performance royalty on over-the-air radio broadcasts. Critics may complain that record labels and performers of sound recordings do not receive a cash royalty fee as they might in other countries, but numerous differences between the U.S. broadcasting system and those of other countries have led to the existing system of reciprocal compensation rather than a royalty fee.

For example, other countries provide less protection for sound recordings than U.S. copyright law. In many countries that have implemented a performance fee, broadcasters that pay the highest fees to record companies are, or have been, government-owned or subsidized. Government subsidized broadcasting in many countries is used to control content by promoting cultural, political and other agendas.

Additionally, sound recording performance rights in other countries apply to all businesses that use recordings, not just to radio stations.

Further, layering a new payment requirement onto the compensation system that already exists would do nothing to advance the economic policy behind copyright law, which is not to reward the labor of authors, but rather to promote the progress of science and useful arts for the good of the public. There is no reason to believe that the grant of a new performance right would provide incentives to record labels or artists to produce more – or better – sound recordings.

Although the recording industry has seen declines in sales and revenues over the past several years, this loss in revenue has been experienced worldwide, including in countries that have implemented a performance fee. Further, since none of the causes for those declines can be attributed to radio broadcasters, funds should not be siphoned from broadcasters to the recording industry via a new copyright royalty scheme.

The law and the current system of reciprocal compensation, as they stand today, work. Imposing a new performance tax on local radio broadcasters and upsetting the careful balance that has evolved over the years and been repeatedly recognized by Congress would be a dramatic shift that would be unnecessary and unfair to broadcasters.

Nothing in the way other countries subsidize their recording industries justifies such a change here in the U.S.

Should the U.S. Lead or Follow?

Why Other Countries' Imposition of a Tax on the Performance of Sound Recordings Does Not Justify Such a U.S. Tax

The United States proudly claims the strongest, most prolific recording industry in the world. From its talent development mechanisms to its production, manufacturing, and distribution systems to its incomparable promotion strategies that create international recording stars, the U.S. music system has been the envy of the world since the inception of recorded music. At the center of its promotion strategies are local radio stations, which have been the primary marketing vehicle for music for decades. So much so, in fact, that radio airplay is considered the “holy grail” of the recording industry.¹ From Sinatra to Elvis to Madonna to Beyoncé, local radio broadcasters have been essential in creating hit after hit for artists and their record labels.

Many unique strengths of the American commercial broadcasting system contribute to its role as the heart and soul of music promotion in the U.S., including the fact that it is unburdened by a performance royalty on over-the-air radio broadcasts. This has allowed the market to develop a mutually beneficial compensatory mechanism – essentially, free radio airplay for free music promotion. Critics may complain that record labels and performers of sound recordings do not receive a cash royalty fee as they might in other countries, but numerous differences between the U.S. broadcasting

¹ On behalf of the Recording Artists' Coalition, Don Henley candidly admitted in his 2003 testimony before the Senate that getting a song played on the radio is “the holy grail” for performers and record labels. Transportation Committee Hearing on Media Ownership: Radio Industry, January 30, 2003.

system and those of other countries have led to the existing system of reciprocal compensation. To compare just one feature of American and foreign copyright laws, without taking into account how that feature figures into the countries' respective legal schemes, business structures and cultural development, would be misleading.² Simply put, the notion that "other countries do it" does not justify imposing a new performance fee – what may be called a "tariff" or a "levy" in other countries and what U.S. broadcasters refer to as a "performance tax" – on sound recordings in this country.

A sound recording performance fee is merely one facet of other countries' business and legal structures that are significantly different from those of the U.S. For example, other countries provide less protection for sound recordings than U.S. copyright law. In many countries that have implemented a performance fee, broadcasters that pay the highest fees to record companies are, or have been, government-owned or subsidized. Government subsidized broadcasting in many countries is used to promote cultural, political and other agendas. Additionally, sound recording performance rights in other countries apply to all businesses that use recordings, not just to radio stations.

² Attempting to draw analogies or comparisons between different sets of national approaches to performance fees often results in difficulties. For example, the U.K. Copyright Tribunal concluded that the structure and functions of the sound broadcasting industry in other European countries were so different that no useful comparison could be made. Moreover, the Tribunal held that even if there were similarities in the conditions, it would be difficult to see how royalty rates could be adapted where such different legal regimes applied. *Association of Independent Radio Companies Ltd. and Another (AIRC) v. PPL*, CT 9/91 [1993].

While it is certainly true that the recording industry has seen declines in sales and revenues over the past several years, this loss in revenue has been experienced worldwide, including in countries that have implemented a performance fee. Further, none of the causes for those declines can be ascribed to radio broadcasters. Accordingly, broadcasters should not be looked to for a “bailout” of the recording industry through the imposition of a new copyright royalty scheme.

Further, layering a new payment requirement onto the compensation system that already exists would do nothing to advance the economic policy behind copyright law. As the Supreme Court noted, “The primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.”³ “The “immediate effect” of the copyright law is that authors receive a “fair return for [their] creative labor”; however, the “ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”⁴ There is no evidence that the grant of a new performance right would provide incentives to record labels or artists to produce more, or better, sound recordings.

The existing U.S. system of “free airplay for free promotion” has served both the broadcasting and recording industries well for decades. As a result, the U.S. is the most

³ *Feist Publication, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991) (citations omitted).

⁴ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

significant exporter of music and the largest territory for recorded music sales.⁵

Operating without a sound recording performance fee on the over-the-air broadcasting, the U.S. recording industry is larger than that of the U.K, France, Germany, Canada, Australia, Italy, Spain, and Mexico *combined*, all of which have performance fee regimes.⁶

The law and the current system of reciprocal compensation, as they stand today, work. Imposing a new performance tax on local radio broadcasters and upsetting the careful balance that has evolved over the years and been repeatedly recognized by Congress would be a shift of seismic proportions. There is nothing in the way other countries subsidize their recording industries that can justify such a shift here in the U.S.

A. Other Countries Provide Less Protection For Sound Recordings Than the U.S.

Under U.S. law, copyright owners of sound recordings enjoy the status of “authors.” In contrast, most foreign legal systems deny protection to sound recordings as works of copyright “authorship,” but instead afford producers and performers a measure of protection under so-called “neighboring rights” schemes.⁷ While that protection may be

⁵ Warner Music Group Annual Report 2007 at 16.

⁶ Adopted from IFPI Market Research available at www.ifpi.org.

⁷ Stephen M. Stewart, *International Copyright and Neighboring Rights*, 190 (1989). Most countries distinguish between, and provide different schemes of protection for, works of “high authorship” such as novels and sculptures and the rights provided to performers, producers of sound recordings, and broadcasters whose activities are described by some as less “highly creative exercises.” The rights afforded to these groups are referred to as “neighboring rights.” *Nimmer on Copyright*, § 8 E.01[A].

more generous in some respects than sound recording copyright in the United States (such as the right to collect royalties in connection with public performances) it is distinctly less generous in others.

For example, in many “neighboring rights” jurisdictions, the number of years sound recordings are protected for a significantly shorter period than under U.S. law. Under U.S. copyright law, a sound recording is generally protected for 95 years. Canada, and many other countries in Europe and Asia, however, provide only 50 years of protection.⁸ Indeed, Article 17 of the WIPO Performance and Phonograms Treaty of 1996 (WPPT) specifies only a 50-year term of protection. In the U.K., the British Government recently considered but then declined to extend the term of protection past its current 50 years, despite fierce lobbying by the recording industry. In other words, in countries that provide protection for sound recordings for only 50 years, the recordings of artists such as Elvis Presley, Buddy Holly and many other stars of the 1950s and 1960s either are, or soon will be, no longer protected. By contrast, in the United States, copyright in these sound recordings will protect these works for an additional 45 years.

⁸ The term of neighboring rights protection in Member States of the European Union, which was harmonized by Council Directive 93/98/EEC of 29 October 1993 (as amended by Council directive 2001/29/EC of 22 May 2001), required all E.U. Member States to adopt provisions in their domestic legislation which provide for 50-year terms for neighboring rights in sound recordings. See Canadian Copyright Act § 23(1); Copyright Law of Japan, Article 101; New Zealand Copyright Act of 1994, Sec. 23(1)(a); International Intellectual Property Alliance of 2008 Special 301 Report (www.iipa.com) (“IIPA 2008 Report”).

Perhaps more importantly, many countries that have adopted performance fees for sound recordings provide few or no anti-circumvention measures for copyright protection or copyright management information – protection the U.S. provides.⁹ As a result, although many countries that have adopted performance rights for sound recordings have done little or nothing to protect sound recordings against illegal copying and other forms of piracy. The toll this piracy takes on the record industry no doubt far exceeds whatever is earned in performance royalties.¹⁰

B. Other Countries' Broadcasting Systems Are or Were Government Subsidized

In sharp contrast to the U.S. commercial radio broadcasting industry, which was built by private commercial entrepreneurs who did not receive any subsidy from the government or the listening public, broadcast systems in many other countries were built and owned, or heavily subsidized, by the government and by tax dollars.

In the U.K., for example, performance fees were adopted when the BBC was the sole broadcaster on the air and the only entity paying the performance fee.¹¹ When non-

⁹ Countries that have neglected to implement anti-circumvention measures include Argentina, Canada, Chile, Egypt, India, Israel, Indonesia, Malaysia, Mexico, New Zealand, Philippines, Poland, Romania, South Korea, Sweden, Switzerland and Thailand. IIPA 2008 Report.

¹⁰ For example, tens of billions of illegal files were swapped in 2007. The recording industry estimates that the ratio of unlicensed tracks downloaded to legal tracks sold is about 20 to 1. International Federation of the Phonographic Industry. IFPI Digital Music Report 2008.

¹¹ The BBC operates under a Royal Charter and license obtained from the Home Secretary which includes clauses relating to finances and programming. The BBC cannot express its own editorial opinion. Its U.K. radio service is financed, in large part, by a television license fee which all owners of television sets in the U.K. must pay. See www.bbc.co.uk/worldservice.

government, commercial radio stations were launched in the U.K. in the 1960s, the Independent Broadcasting Authority first negotiated those stations performing licenses. This would be comparable to the Federal Communications Commission negotiating music licenses on behalf of U.S. radio stations.

Germany and France have a similar broadcasting history. At the time Germany adopted a sound recording performance fee in 1965, radio stations were government-owned and operated. It was not until the late 1980s that the German radio industry was privatized.¹² When France introduced its performance fee in 1985, the French radio industry was still working through changes that would allow for some private ownership of radio stations.¹³

Even more dramatically, until the end of the 1980s, the *entire continent* of Africa had only two radio stations that were not state-owned.¹⁴

Significantly, when parts of the broadcasting systems in those countries were ultimately privatized, performance fees for recordings had already been institutionalized. Thus unable to negotiate a market-based reciprocal “airplay for promotion” arrangement like

¹² Stephen M. Stewart, *International Copyright and Neighboring Rights* (1989); Putze, Jens, *Special Report on Germany (1): Can the press stay on top as TV gears up for growth? – Television and radio are going private in Germany, posing a very serious threat to the dominant print media*, Haymarket Publishing Services Ltd. Campaign, March 11, 1988.

¹³ *Id.*

¹⁴ *Washington Post*, October 7, 2007 at A.29.

in the U.S., private broadcasters entering the business were forced to accept the existing payment regimes as part of the cost of doing business.

A comparison of governmental funding for radio (*e.g.*, public broadcasting) also demonstrates the vast differences in political and cultural philosophies between the U.S. and other countries. The 2005 report of the Digital Future Initiative Panel noted the following wide disparity between the annual funding per capita provided for public broadcasting in the U.S. versus other countries around the world:¹⁵

- United States \$1.70
- United Kingdom \$83.00
- Germany \$85.00
- Canada \$28.00
- Japan \$49.00
- Australia \$28.00

In Canada, the federally-funded public broadcaster Canadian Broadcasting Corporation (CBC) – which includes radio, television, specialty (cable) services, a pay audio service, an international service, an interest in Sirius Canada and Internet programming – received federal government funding in 2006 that exceeded \$1 billion.¹⁶

¹⁵ “Digital Future Initiative: Challenges and Opportunities for Public Service Media in the Digital Age,” http://www.freepress.net/docs/dfi_report.pdf.

¹⁶ This consists of an annual appropriation of \$946 million plus an additional \$60 million in non-recurring funding of which \$348 million was for radio at http://www.cbc.radio_canada.ca/annualreports/2005-2006/pdf/financials-e.pdf.

The Australian government recently announced an allocation of an “additional” AU\$2.4 million to distribute CDs to community radio stations in order to provide exposure and airplay for the musical works of local artists.¹⁷

The fact that some governments choose to subsidize their own national recording industries by granting performance fees and paying royalties from government-owned or subsidized stations clearly indicates how inappropriate such a system would be for the U.S.

Moreover, the absence of a performance fee in the U.S. has not hurt the recording industry. The U.S. recording industry – which operates under a regime with no performance fee – is larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico *combined*, all of which have performance fee regimes.¹⁸

C. Foreign Governments Exercise Control Over Broadcasting Content

Governments in foreign countries often adopt policies to promote national culture through a variety of means, including imposing performance royalties on recordings and exercising control over broadcasting content. In contrast, the U.S. does not utilize its broadcasting system to advocate cultural or national agendas. The U.S. radio system is

¹⁷ The Australian Media, May 17, 2008, at <http://www.theaustralian.news.com.au>. An additional AU\$1.5 million previously had been provided by the government for this project. See <http://www.amrap.org>.

¹⁸ Adopted from IFPI Market Research available at www.ifpi.org.

primarily structured as privately-held and commercial in nature and enjoys all of the First Amendment rights of freedom of the press. Of course, FCC-licensed stations have obligations to serve their local communities, but U.S. national policy has consistently exercised little control over the content of broadcasts. Rather, content is marketplace-driven, not quota-driven: what gets played is based upon what American listeners want to hear. The diversity on the airwaves comes from the high quantity of stations and market-driven differences in programming and program formats, not from government-mandated playlists, as in other countries.

- For example, the stated purpose of the Canadian broadcast system is to provide “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,”¹⁹ and that it should “serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.”²⁰ Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.²¹ French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.²²

¹⁹ Canadian Broadcasting Act, § 3(1)(b).

²⁰ *Id.* at § 3(1)(d)(i).

²¹ <https://www.cab-acr.ca/english/keyissues/primer.shtm>.

²² <https://www.cab-acr.ca/english/keyissues/primer.shtm>; see also http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm.

- In Mexico, both government-owned and private radio stations are financed by advertising (both public and private) but must provide 12 percent of broadcasting time for government use. Additionally, all “cultural” stations in Mexico are operated by government agencies or by educational institutions.²³
- The 1992 Poland Broadcasting Act as amended in 2000 and 2004 requires broadcasters to dedicate at least 50 percent of their air time to European productions and 10 percent to independent productions. Moreover, at least 33 percent of broadcasts each quarter must be produced in Poland.²⁴
- Radio broadcast quotas in France specify that 40 percent of songs on nearly all private and public radio stations must be Francophone.²⁵

D. Without a Performance Fee, the U.S. Is More Creative and Culturally Prolific Than Countries That Have Imposed One

The U.S. is the most prolific producer of sound recordings in the world, and there is no evidence that the absence of a performance fee for record labels and artists has had any adverse effect on creativity, innovation or has in any other way decreased the incentives to create music and the performance of recorded music.

²³ Library of Congress Country Studies, Mexico at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+mx0095\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+mx0095)).

²⁴ IIPA 2008 Report (Poland at p. 322).

²⁵ 2008 National Trade Estimate Report on Foreign Trade Barriers at 225 (www.ustr.gov).

The recording industry in the U.S. – with no performance fee – is twice the size of that of next-largest Japan, and larger than most major European countries combined.²⁶

There is no reason to believe that more recorded music, or better recorded music, would be created if Congress were to impose performance fees on recordings aired and promoted on radio stations.

A 2003 New Zealand Cabinet Paper made this precise observation. It noted a lack of evidence to support the claim that the absence of an expanded regime of performance fees had led to any reduction of New Zealand’s cultural and intellectual diversity.

Rather, “the creation of a successful performance is more dependent on other factors like the performers’ motivation, the reputation and appeal of the performer and the director, and the power of the story being told.”²⁷

The recording industry has experienced worldwide revenue declines in recent years, and not just in countries without performance fees. Most countries have experienced a decline in recorded music sales, with 2006 being the seventh consecutive year in which the recording industry has experienced declining revenues.²⁸ The causes of such declines may be attributed to a variety of causes, such as online music piracy, online file sharing, expenditures on other forms of entertainment or the quality of newly recorded

²⁶ Adopted from IFPI Market Research available at www.ifpi.org.

²⁷ Office of the Associate Minister of Commerce, Cabinet Economic Development Committee, Performers Rights Review, paras. 41-45 (NZ).

²⁸ Adopted from IFPI Market Research available at www.ifpi.org.

music.²⁹ But there is no evidence or data suggesting that radio broadcasters (who already pay hundreds of millions of dollars in copyright royalties to music composers and publishers) are to blame for these revenue declines, or that the revenue declines would not have occurred had U.S. broadcasters paid record labels and performers for promoting their music on the air. Accordingly, there is no justification for imposing a performance fee on local radio broadcasters to “make up” for these revenue declines.

Further, while radio stations do not pay a cash performance fee to the recording industry, the promotional value derived from radio airplay, on air interviews with artists and promotions of concerts and merchandise provides reciprocal compensation to record labels and recording artists. In fact, a recent study shows that the promotional benefit provided to the recording industry from free radio airplay ranges from \$1.5 to \$2.4 billion annually, which does not include the promotional benefit provided to concert ticket and merchandising sales.³⁰

²⁹ The use of online file sharing and consumer expenditure on other entertainment have been some of the causes. *New York Times*, January 4, 2008. The quality of newly recorded music may also be a cause. The best-selling album in 2007 was a collection of Christmas songs. *Id.* See All Access Music Groups, www.allaccess.com, October 8, 2007 (retailers bemoaning fact that “rock schedule is beyond a disaster”).

³⁰ Radio Airplay and the Record Industry: An Economic Analysis, Dr. James N. Dertouzos, June 2008, available at www.nab.org.

E. Foreign Performance Fee Revenues From Radio Are Disproportionately Allocated to Record Labels and Highly-Successful Artists

The distribution of revenues generated from radio by performance fees in many foreign countries end up mostly in the hands of the record labels and a small minority of highly-successful artists.³¹

In most European countries, including the Czech Republic, Croatia, France, Germany and the Netherlands, between 77 percent and 89.5 percent of the total fees are distributed to only 20 percent of the top earning performers. In those countries, 80 percent of performers receive no more than 10 to 23 percent of the total remuneration and at least 20 percent of performers do not receive any noteworthy remuneration.³²

Moreover, record companies often benefit far more than the performers they represent. For example, in France, record producers receive an average of 13,545 Euros a year in royalties for music broadcast on radio, while artists receive an average of 329 Euros.³³

³¹ See, e.g., Gowers Review of Intellectual Property, December 2006 (Gowers Review) at 51 (arguing that a proposed extension of U.K. copyright term would not benefit all artists, but only the few highlight successful artists whose work is still commercially available after 50 years, and proposing that “perhaps a more sensible starting point [for increasing compensation to artists] would be to review the contractual arrangements for the percentages artists receive [from CD sales].”) AEPO-ARTIS, Performers’ Rights in European Legislation: Situation and Elements for Improvement, June 2007, II.1.5.a.

³² AEPO-ARTIS, Performers’ Rights in European Legislation: Situation and Elements for Improvement, June 2007, II.1.5.a.

³³ See Danish Ministry of Culture, International Tariff Analysis on License Fee to Administration Companies for Transmission of Music, Capacent, April 2006, at 3-31. (Data reflect average yearly payments as of September 2005).

F. The Performance Royalty in Other Countries Is Imposed Broadly and Not Targeted at Just the Radio Industry

Unlike the performance royalty legislation that has been introduced in the U.S. Congress,³⁴ countries that have imposed a performance royalty have not limited its application to only radio stations but rather have applied it broadly to require payments from any business establishments and public places where recorded music is aired – from restaurants to hotels to taxi cabs.³⁵ This results in hundreds of millions of dollars in costs to these businesses, but it is consumers who inevitably bear the burden in the end, by paying higher prices for products and services available from those who are burdened with this additional cost of doing business.³⁶ No explanation has been provided as to why the proposed U.S. performance fee should apply only to broadcasters. In fact, during a 2007 House of Representatives hearing on the subject, the U.S. Register of Copyrights Marybeth Peters argued that the fee should be broadened to include all commercial transmissions. When asked if royalties should be

³⁴ Performance Rights Act of 2007, S. 2500; H.R. 4789.

³⁵ Article 12 of The Rome Convention states that: “if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both.” Although countries have the ability to limit the applicability of this provision to broadcasting only under Article 16 of the Rome Convention, practically speaking, we are not aware of any countries that have instituted such limitations.

³⁶ See, e.g., Gowers Review at 56. Albeit in the context of a contemplated extension of copyright, Gowers argues that such extension would “increase costs for all businesses that play music” including hairdressers and retirement centers, for example. “The impact of extension would therefore be felt throughout the economy.” The same holds true for the proposed imposition of a performance fee in the United States.

paid in cases where music is played in restaurants, bars, retail shops, shopping centers, and sporting events, and her answer was “ultimately, yes.”³⁷

The logical and fair conclusion to be drawn from the proposal that a performance tax should be imposed for publicly playing sound recordings is that *if* such a proposal were to be adopted, everyone who engages in this activity should pay. Indeed, those who perform sound recordings and provide little or no promotional value, such as retail establishments, restaurants, bars, and entertainment venues, should pay more. There is nothing in schemes by which other countries subsidize their recording industries that would justify such a massive redistribution of wealth in favor of the recording industry.

G. Congress Has Correctly Considered and Rejected Being Influenced by Foreign Performance Royalty Legislation

The general rule, still in effect today, is that the vast majority of public performances of sound recordings are not subject to a performance fee. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (DPRSA) which created an exception to this general rule and provided a limited performance royalty in digital audio transmissions, but specifically did not include over-the-air broadcasts.

In the deliberations over DPRSA, those advocating a much broader performance royalty argued then, as they do now, that the fee should apply to broadcasters because of the existence of the royalty in other countries. Indeed, those pressing for a broader fee were

³⁷ Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary, “Ensuring Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century,” 110th Congress, July 31, 2007, p. 115.

seeking to have it included as a mandatory provision of an international treaty being negotiated at the World Intellectual Property Organization (WIPO).

Congress was aware of those efforts, but was unpersuaded that the existence of a performance fee applied to broadcasters in many other countries provided adequate justification for its application in the U.S.

The Committee is well aware of ongoing discussions and attempts to greater international harmonization of copyright and neighboring rights at the World Intellectual Property Organization (WIPO), in discussions within the G-7, and other forums. This legislation reflects a careful balancing of interests, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers, and the recognition of the potential impact of new technologies on the recording industry. The purpose and scope of this new right are clearly laid out in the bill and this report. The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services – but not by broadcasting and related transmissions.³⁸

Accordingly, Congress has long been aware of the fact that other countries impose a fee for the public performance of sound recordings. Indeed, Congress has specifically considered these foreign regimes and, after a “careful balancing of interests reflecting the statutory and regulatory requirements imposed on U.S. broadcasters recording interests composers and publishers . . .”³⁹ has decided the U.S. is just fine the way it is.

³⁸ S. Rep. No. 104-274, 104th Cong. 1st Session at 17.

³⁹ *Id.* (emphasis supplied)

H. Conclusion

This paper illustrates some of the key differences between the business, legal and cultural structures surrounding the recording industry in the United States and those of many foreign jurisdictions. The U.S. radio industry differs from those in other countries, most of which rely on heavy subsidies from their governments and where content is heavily influenced by the government. The U.S. model is unique and it works.

The fact that the laws of some foreign jurisdictions provides for a performance fee in sound recordings does not justify imposition of such a tax in the U.S., where the proliferation and dissemination of music far exceeds other countries.

The existing U.S. model of “free airplay for free promotion” has served the recording and broadcast industries well for decades. The vast majority of listeners identify FM radio as the place they first heard music they purchased. With an audience of 235 million listeners a week, there is no better way to expose and promote sound recordings. A new performance tax would take this mutually beneficial system and transform it into an unfair, one-sided scheme that financially benefits only the recording industry – to the detriment of local radio stations and their listeners. There is nothing in the way that other countries subsidize their recording industries that can justify such a result.