

iHeartgeo-Fencing?: The Section 114 Exemption That Illustrates Why Full Sound Recording Rights Are the Sine Qua Non For a Vibrant Music Industry

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iHEARTGEO-FENCING?:
THE SECTION 114 EXEMPTION THAT
ILLUSTRATES WHY FULL SOUND
RECORDING RIGHTS ARE THE SINE QUA NON
FOR A VIBRANT MUSIC INDUSTRY

BRADLEY RYBA*

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I. INTRODUCTION

“If you let me I could, I’d show you how to build your fences, set restrictions, separate from the world.”¹ Principally, all types of radio should pay royalties for all uses of sound recordings.² By statute, digital radio broadcasters must pay copyright owners for the use of sound recordings produced on or after February 15, 1972.³ Moreover, recent court decisions against Sirius XM Radio, Inc., regarding pre-1972 sound recordings, could make this statutory license even more profitable for sound recording owners.⁴

However, a statutory exemption may allow some Internet radio services to avoid paying for sound recordings entirely.⁵ This exemption allows services that transmit content only within a 150-mile radius to avoid paying digital sound recording royalties.⁶

Recently, a radio broadcaster, VerStandig Broadcasting (“VerStandig”), claimed that its use of geo-fencing technology would allow it to take advantage of this exemption.⁷ While one service’s use of this exemption may be nominal, the aggregate use from many broadcasters could lead to the deterioration of digital recording royalties.

This Article will introduce geo-fencing technology and the applicable law. It will propose simple regulations to strike the appropriate balance for geographical technology and recording artists’ rights.

II. BACKGROUND

This section will introduce the pertinent law and explain geo-fencing. It will then explain the music business’ interest in geo-fencing.

A. Recording Artists’ Digital Royalties

The Copyright Act gives copyright owners the exclusive right to publically perform and reproduce their work.⁸ While musical compositions have received

1. PARAMORE, *Fences, on RIOT* (Fueled by Ramen 2007).

2. See generally Jonathan Franklin, *Pay to Play: Enacting a Performance Right in Sound Recordings in the Age of Digital Audio Broadcasting*, 10 U. MIAMI ENT. & SPORTS L. REV. 83, 89–90 (1993).

3. See *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. 13–5693, 2014 WL 4725382, at *3 (C.D. Cal. Sept. 22, 2014).

4. *Id.*

5. See 17 U.S.C. § 114(d)(1)(B)(i) (2012).

6. *Id.*

7. See Report and Recommendation at 7, *WTGD 105.1 FM v. SoundExchange*, No. 5:14-cv-00015 (W.D. Va. Sept. 12, 2014), available at <http://www.vawd.uscourts.gov/OPINIONS/HOPPE/wtdg%20v%20soundexchange%20-%20rr%20on%20mtd%2012b1.pdf>.

8. 17 U.S.C. § 106 (2012).

protection for public performances since about the early 1900s, recording artists did not have such rights until recently.⁹ In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (“DPRA”).¹⁰ The DPRA amended the § 114 license to give recording artists rights for digital public performances by requiring digital radio services to pay recording artists for playing their music.¹¹ However, the language of the DPRA, and in turn the language of § 114, applies only to digital performances and not to performances over terrestrial radio.¹²

SoundExchange is the sole organization authorized to collect royalties under the § 114 license.¹³ SoundExchange collects royalties from all digital music services and from terrestrial radio stations that simulcast their content over the Internet.¹⁴ Thus, radio stations do not pay for over-the-air content, but must pay if they choose to distribute this same content over the Internet.¹⁵

The DPRA also created an exemption in § 114(d)(1)(B)(i) that states that the compulsory license does not apply to a “retransmission of a nonsubscription broadcast transmission” if “the radio station’s broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter.”¹⁶ Previously, broadcasters gave this exemption limited attention; however, a new technology, geo-fencing, may make broadcasters’ use of this exemption widespread.¹⁷

B. The Geo-Fencing Technology

Geo-fencing technology creates a perimeter around a pre-determined area and prompts a mobile device, through a mobile application (“app”), to take an action when it is inside or outside that area.¹⁸ Individuals and businesses can utilize this virtual fence in a multitude of ways.¹⁹ Individual users can set up

9. See *Herbert v. Shanley Co.*, 242 U.S. 591, 594–95 (1917); see 17 U.S.C. § 106(6) (2012).

10. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

11. *Id.*

12. *Id.* Still, federal copyright law does not provide protection for public performances of sound recordings by means other than digital transmission. See, e.g., *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148, 152–53 (2d Cir. 2009).

13. See *About SoundExchange*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/> (last visited Oct. 12, 2015).

14. *Id.*

15. See *id.*

16. See 17 U.S.C. § 114(d)(1)(B)(i) (2012).

17. See *id.*

18. Barry Moltz, *Geofencing: The Latest Tool to Attract Mobile Customers*, AMERICAN EXPRESS (Oct. 8, 2013), <https://www.americanexpress.com/us/small-business/openforum/articles/geofencing-the-latest-tool-to-attract-mobile-customers/>.

19. See *id.*

geo-fencing with their offices or home devices to do such things as turn off lights, adjust room temperature, or lock doors.²⁰ Musicians can use geo-fencing at concerts to greet fans, help locate seats, and offer discounts on merchandise.²¹ Most commonly, geo-fencing allows retailers to give customers the option to sign up to receive discounts or other personalized experiences when they enter a retail store.²²

Importantly, geo-fencing technology can allow broadcasters to distribute their simultaneous webcasts to users only within a certain pre-determined area, pertinently a 150-mile radius.²³ Thus, a subscriber to a station's webcast could only receive that webcast if the subscriber's device using the station's app is within that 150-mile radius of the station.²⁴

Geo-fencing can work quite effectively, potentially with relatively small fees for businesses.²⁵ Geo-fencing can pinpoint devices for accuracy ranging from a few inches to about three miles, depending on a variety of factors.²⁶ Depending on the service or application provider, setup and maintenance of geo-fencing can cost upwards of several thousand dollars for businesses, however, network-based options, which eliminate the need for app development, can cost significantly less.²⁷

20. Tom Mighell, *The "Internet of Things" in Law Practice*, LAW PRAC., 28, 29 (May/June 2014).

21. See Alex Pham, *Behind Matchbox Twenty's Techy Tour – One of the First Uses of 'Geofencing.'* BILLBOARD (Aug. 9, 2013), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5638342/matchbox-twenty-sets-up-geofence-on-tour>. Additionally, some music streaming services have used geo-fencing to avoid international copyright royalties. See David Oxenford, *Why Is a US Radio Station Getting a Notice About Webcasting Royalties in Canada? – Why Webcasters Geo-Block Their Streams to Avoid International Music Royalties*, BROADCAST L. BLOG (Oct. 8, 2014), <http://www.broadcastlawblog.com/2014/10/articles/why-is-a-us-radio-station-getting-a-notice-about-webcasting-royalties-in-canada-why-webcasters-geo-block-their-streams-to-avoid-international-music-royalties/>.

22. See Andrew Gazdecki, *What Is Geofencing and How Will It Help My Small Business*, BUSINESSAPPS (Mar. 14, 2014), <http://www.businessapps.com/blog/2014/03/14/what-is-geofencing-and-how-will-it-help-my-small-business/>.

23. See *id.*

24. See *id.*

25. See Derek Johnson, *Top 10 Most Commonly Asked Location Based Mobile Marketing Questions*, TATANGO (May 8, 2013), <http://www.tatango.com/blog/top-10-most-commonly-asked-location-based-mobile-marketing-questions/> (noting the ease of creating a network-based geo-fence for an existing SMS campaign and its ability to reach all SMS subscribers regardless of carrier or phone type).

26. *Id.* (noting factors such as wireless network strength and topography of an area).

27. Compare Mark Stetler, *How Much Does It Cost To Develop a Mobile App?*, APPMUSE <http://appmuse.com/appmusing/how-much-does-it-cost-to-develop-a-mobile-app/> (last visited Oct. 15, 2015) (stating that app development can range from \$3,000 to over \$150,000), with *Applied SoLoMo: App-Based vs. Network-Based Geofencing (and Beyond)*, DIGITAL MARKETING RESOURCE CENTER <http://dmresourcecenter.com/unit-3/geofencing/> (last visited Oct. 13, 2016) (noting network-

C. VerStandig Up for What You Believe In

Plausibly, radio stations may be able to utilize geo-fencing technology to receive the benefits of the § 114 exemption.²⁸ Indeed, in February 2014, VerStandig announced in a letter to SoundExchange that it intended to geo-fence its simulcasts in Virginia.²⁹ After SoundExchange demurred, VerStandig sought a declaratory judgment against SoundExchange.³⁰ Magistrate Judge Hoppe issued an advisory opinion that recommended dismissal of the action for lack of standing because SoundExchange did not cause a concrete, traceable, and redressable injury to VerStandig.³¹ Presiding Judge Michael Urbanski subsequently adopted the recommendation and dismissed VerStandig's lawsuit.³² As such, the courts have not yet had occasion to address the legal validity of VerStandig's claim.

VerStandig contended that the clear language of the statute created an exemption for digital transmissions within 150 miles of the transmitter.³³ VerStandig asserted that its simultaneous broadcasts would be geo-fenced to users within a 150-mile radius and, thus, would "not [be] willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter."³⁴ Finally, VerStandig contended that SoundExchange was the proper party to name in the lawsuit because SoundExchange and the owners of the copyrights in sound recordings had the same interest in whether such transmissions are exempt from royalties.³⁵

Aside from standing, SoundExchange asserted two main arguments regarding the merits of VerStandig's claim.³⁶ First, SoundExchange argued that this exemption applies only to cable systems and broadcast networks and does not apply when broadcasters simulcast their own programming over the Internet.³⁷ Second, SoundExchange also noted that an unlicensed live stream of broadcasts would infringe sound recording owners' reproduction rights.³⁸

based geo-fencing's fewer upfront costs and manageable running costs).

28. See Report and Recommendation, *supra* note 7, at 15.

29. See *id.* at 7.

30. See *id.* at 26.

31. *Id.* at 26.

32. WTGD 105.1 FM v. SoundExchange, Inc., No. 5:14CV00015, 2015 WL 631255, at *7 (W.D. Va. Feb. 13, 2015).

33. See Complaint at 13, WTGD 105.1 FM v. SoundExchange, No. 5:14-cv-00015 at 15 (W.D. Va. Apr. 30, 2014), available at <http://www.fhhlaw.com/VerStandig%20v.%20SXE%20complaint.PDF>.

34. *Id.* at 10.

35. *Id.* at 7.

36. *Id.* at 10.

37. *Id.*

38. See *id.*; see generally Complaint, *supra* note 33, at 8.

D. The 150-Mile Exemption Could Have Far Reaching Implications

As listeners shift away from terrestrial radio, digital performance royalties have become increasingly profitable for sound recording owners.³⁹ Indeed, SoundExchange collected almost 600 million dollars in royalties in 2013.⁴⁰ A small amount of these royalties came from the stations that transmit simultaneous broadcasts of their content.⁴¹

However, a substantial amount of royalties come from the digital compilation of terrestrial radio, in the form of iHeartRadio.⁴² iHeartMedia, the distributor of iHeartRadio, currently pays recording artists through SoundExchange for its Internet transmissions.⁴³ Some stations also stream their music independently of iHeartRadio and, thus, pay their own royalties for those purposes.⁴⁴

However, a station's successful use of this exemption may lead stations to forgo participation in iHeartRadio so that they can only transmit their broadcasts within 150 miles.⁴⁵ Thus, geo-fencing could cost the owners of sound recordings significant revenue from iHeartRadio and radio stations.⁴⁶

39. Alex Pham, *Streaming Made Up One-Fifth of U.S. Recorded Music Revenue in 2013*, BILLBOARD (Mar. 18, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5937634/streaming-made-up-one-fifth-of-us-recorded-music>; Jeffrey A. Eisenach, *The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail?*, 22 COMMLAW CONSPECTUS 1, 40 (2014) ("Tens of thousands of new listeners are signing up to services like Pandora and Spotify every week, and existing listeners are using the services more and more intensely every year.").

40. Andy Gensler, *SoundExchange Pays Out Record-Setting \$162M in Q1*, BILLBOARD (June 19, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6128526/soundexchange-pays-out-record-setting-162m-in-q1>.

41. *See Services That Have Paid SoundExchange Through Q3 2014*, SOUNDEXCHANGE (Oct. 10, 2014), <http://www.soundexchange.com/wp-content/uploads/2014/11/2014-Q3-Licensee-Count-10-05-2014.pdf>; Angus MacDonald, *Pandora Is Now Over 50% SoundExchange's Royalty Collections; Implications for Webcasting IV*, RAINNEWS (Apr. 10, 2014), <http://rainnews.com/pandora-is-now-over-50-soundexchanges-royalty-collections-implications-for-webcasting-iv/>.

42. *About Us*, IHEARTRADIO, <http://news.heart.com/articles/about-iheartradio-390884/welcome-to-iheartradio-6906244/> (last visited Oct. 4, 2015). iHeartRadio streams over 1,500 live radio stations across the United States on its digital radio service. *Id.*

43. *SoundExchange Answers We Have Received About Direct License Offers*, SOUNDEXCHANGE (Sept. 30, 2014), <http://www.soundexchange.com/pr/statement-soundexchange-answers-to-questions-we-have-received-about-direct-license-offers/>. Additionally, iHeartMedia has negotiated directly with some labels to pay performance fees for terrestrial broadcasts in exchange for lower digital royalty rates. *See* Ben Sisario, *Clear Channel-Warner Music Deal Rewrites the Rules on Royalties*, N.Y. TIMES (Sept. 12, 2013), <http://www.nytimes.com/2013/09/13/business/media/clear-channel-warner-music-deal-rewrites-the-rules-on-royalties.html>.

44. *Services That Have Paid SoundExchange Through Q3 2014*, *supra* note 41.

45. *See* Complaint, *supra* note 33, at 13.

46. *See generally id.*

III. COURTS PROBABLY SHOULD ALLOW BROADCASTERS TO USE GEO-FENCING TO AVOID COPYRIGHT ROYALTIES, BUT WILL PROBABLY FIND THEM TO BE GEO-INFRINGING

This section will examine the legal arguments for and against geo-fencing.⁴⁷ It will also analogize geo-fencing to a “technology” that the Supreme Court recently found inadequate to avoid licensing fees in the television industry.

A. *The Plain Language of the Statute Seems to Support Geo-Fencing to Avoid Royalties*

The language of the DPRA seems to support broadcasters’ use of the 150-mile exemption.⁴⁸ The language of the statute—“the radio station’s broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcast transmitter”—only addresses the distance of the broadcast and the means that the broadcast is transmitted.⁴⁹ It seems illogical to distinguish between a station that broadcasts within 150 miles, because the station’s signals only extend that far, and a station that chooses to broadcast within 150 miles by using geo-fencing.⁵⁰ Thus, so long

47. This Article will primarily address the legal merits of geo-fencing and not standing. Briefly, the advisory opinion found that an injury to VerStandig could be speculative and that SoundExchange was most likely not the proper party in the lawsuit. *See* Report and Recommendation, *supra* note 7, at 25–26. First, VerStandig did not simulcast its programming at the time of the lawsuit, but rather only received estimates as to setup and cost. The advisory opinion found that, despite its substantial financial investment, VerStandig should have actually utilized geo-fencing to have a concrete injury. *Id.* at 19. Furthermore, even if VerStandig did use geo-fencing, it may have a weak argument regarding causation. Nonetheless, it appears the court based its decision primarily on SoundExchange not being the proper party to the lawsuit. *Id.* at 20. The opinion noted that SoundExchange did not have apparent authority to compel broadcasters to take statutory licenses or enforce copyrights generally. *Id.* at 21. Additionally, SoundExchange can only sue a broadcaster to collect royalties when a broadcaster has elected to operate under the § 112 or § 114 statutory license and has either not complied with the terms of their license or if the copyright owners have authorized SoundExchange to enforce their rights of public performance and reproduction. *Id.* However, two of VerStandig’s stations were paying royalties to SoundExchange, and a decision against SoundExchange could possibly bind copyright holders in other courts through *res judicata* and full faith and credit. *See* Complaint, *supra* note 33, at 3. Thus, SoundExchange could possibly be the proper party in this lawsuit. However, taking the questionable causation and redressability together, it appears that the court came to the best conclusion to dismiss this lawsuit.

48. *See* 17 U.S.C. § 114(d)(1)(B)(i) (2012).

49. *Id.*

50. *See id.* In 2002, the Copyright Office issued a ruling that this exemption should not apply to Internet retransmissions if only the terrestrial broadcast does not reach beyond 150 miles. *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45240, 45256 (July 8, 2002) (codified at 37 C.F.R. pt. 261) [hereinafter CRB Determination]. The Copyright Office examined this exemption’s relationship with the § 112(e) license on ephemeral recordings to reach its conclusion. *Id.* Considering that geo-fencing was in its developmental stages at the time of this ruling, no one really could have imagined that both a terrestrial broadcast and an Internet broadcast could both be transmitted within 150 miles. *See id.*

as a service is operating on a non-interactive and non-subscription basis, its transmissions should be exempt from royalties.⁵¹

B. The Purpose and Legislative History of the DPRA Probably Support Geo-Fencing to Avoid Royalties

The legislative history of the DPRA also seems to suggest that Congress would have wanted this exemption to apply to radio broadcasters' Internet simulcasts. The legislative history states "[t]he Committee has created the section 114(d)(1)(B) exemption because it is aware that cable systems and other multichannel programming distributors often offer retransmissions of non-subscription broadcast transmissions to their customers."⁵² Thus, initially, there seems to be merit to SoundExchange's argument that this exemption applies only to satellite and cable systems.⁵³

However, when Congress adopted the DPRA, global positioning system technology was in its early stages and geo-fencing technology was largely unforeseen. Consequently, Congress could not have imagined that terrestrial broadcasters would have an extensive use for the 150-mile exemption.

However, Congress intended this new sound recording right to specifically address the problem with Internet radio, which could primarily act as a substitute for purchased music.⁵⁴ Accordingly, Congress still intended to protect terrestrial radio at the time it passed the DPRA.⁵⁵ While Congress did not explicitly address terrestrial radio's Internet transmissions, it seems that this overarching purpose supports the inclusion of these simultaneous transmissions

The Third Circuit subsequently adopted this reasoning. *See Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 499–500 (3d Cir. 2003). However, now with geo-fencing, stations can limit both streams, and it does not seem clear whether courts should still construe the §112 and §114 licenses as one aggregate license. *See id.* Thus, the Copyright Office or a court should address the §114 exemption squarely. *See id.*

51. *See* 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:87 (4th ed. 2014).

52. *See* Digital Performance Right in Sound Recording Act of 1995, S. REP. NO. 104-128, at 19 (1995) (emphasis added).

53. *See id.*

54. *See* 2 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 8.21(A) (2nd ed. 2014).

55. *See* Digital Performance Right in Sound Recordings Act of 1995, H.R. REP. NO. 104-274, at 14 (1995). The House Report states:

[i]t is the intent of this legislation to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.

Id. Indeed, Congress found a "mutually beneficial economic relationship between the recording and traditional broadcasting industries." *Id.* at 13.

in the exemption.⁵⁶

Nonetheless, a broad statutory construction of the language of this exemption and the legislative history can lead to absurd results. For instance, the legislative history states that “[p]ursuant to section 114(d)(1)(B)(i)(I), the 150-mile limitation does not apply when a nonsubscription broadcast transmission by an FCC-licensed station is retransmitted on a nonsubscription basis by an FCC-licensed terrestrial broadcast station, terrestrial translator, or terrestrial repeater.”⁵⁷ Thus, if this exemption does include simultaneous Internet transmissions, it could reach aggregators of that content as well.⁵⁸ Hence, although the clear language of the exemption and legislative history probably support the use of geo-fencing to avoid sound recording royalties, only legislative action can provide the clearest application.⁵⁹

C. Disruptive Innovators Threaten Copyright Rights but Also Move Industries Ahead

This geo-fencing dilemma is similar to a statutory conflict recently faced by the television broadcast industry.⁶⁰ In June 2014, the Supreme Court addressed Aereo, a service that collected and retransmitted over-the-air television content to its subscribers.⁶¹ Aereo relied on a perceived public performance loophole to avoid the retransmission fees that cable providers pay

56. *See id.*

57. *Id.* (emphasis added).

58. *Id.*

59. *See id.* SoundExchange’s reproduction argument also presents an interesting legal ambiguity. *See* 17 U.S.C. § 106(1) (2012). While copyright owners have an exclusive right to reproduce their work, a nonsubscription radio station can make one copy of a transmission without paying royalties if:

(A) the copy or phonorecord is retained and used solely by the transmitting organization that made it, and no further copies or phonorecords are reproduced from it; and (B) the copy or phonorecord is used solely for the transmitting organization’s own transmissions within its local service area, or for purposes of archival preservation or security; and (C) unless preserved exclusively for archival purposes, the copy or phonorecord is destroyed within six months from the date the transmission program was first transmitted to the public.

See 17 U.S.C. § 112(a)(1) (2012). However, Congress did not mention services operating under the §114(d)(1)(B) exemption, thus inferring that such a service must pay royalties for making copies of the sound recording. *See* CRB Determination, *supra* note 50. Yet, it seems illogical that Congress would exempt a service from public performance royalties, while still requiring the service to pay royalties for copies. Thus, for the 150-mile exemption to have sufficient meaning, broadcasters should not need a license to reproduce the work, so long as they meet the criteria in (A), (B), and (C) of § 112(a)(1). Such a conclusion is consistent with the legislative history and purpose of the Digital Performance Right in Sound Recordings Act of 1995. *See* S. REP. NO. 104-128, at 19 (1995); H.R. REP. NO. 104-274, at 14 (1995).

60. *See* ABC, Inc. v. Aereo, Inc., 134 S. Ct. 2498, 2503 (2014).

61. *Id.* Aereo used thousands of little antennas to capture over-the-air content that it then stored in a cloud DVR and transmitted to its subscribers on an individual basis. *Id.*

to content owners.⁶² Perhaps perceiving Aereo as an anomaly, the Court set up a “looks like a cable company” standard to find that Aereo was not exempt from these retransmission fees.⁶³ Thus, the broadcast networks successfully defeated Aereo in the courts, and preserved some control of their copyrighted content.⁶⁴

Analogizing geo-fencing technology to Aereo’s technology, the courts should certainly find geo-fencing insufficient to avoid broadcast royalties, as both technologies can unnecessarily threaten copyright rights.⁶⁵ Yet, both results may go against the clear language of the Copyright Act.⁶⁶ Thus, for the clearest long-term results, the courts should not save Congress from addressing conflicts between new technology and copyright law.⁶⁷

Additionally, disruptive innovations allow content owners to see flaws in current business models and use these new threats as a vehicle for more secure future rights.⁶⁸ While the Court’s decision in Aereo may have been the best solution for broadcast networks’ ownership rights now, it permitted networks to avoid changing their business models for a more sustainable and profitable future.⁶⁹

Certainly, the music recording industry should not change the way it does business merely because of geo-fencing. However, it could be prudent for the music recording industry to use geo-fencing as an additional platform for a universal public performance right.⁷⁰

62. *Id.* Aereo argued that it was merely creating a service that consumers could lawfully do on their own. *Id.*

63. *Id.* at 2511.

64. *Id.* Aereo filed for bankruptcy in November 2014. Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html>.

65. *See ABC, Inc.*, 134 S. Ct. at 2511. Geo-fencing, like Aereo’s technology, would allow its user to avoid copyright fees that they would have unquestionably needed to pay if that technology did not exist. *See id.* Additionally, while both technologies offer more convenience for subscribers, the main purpose of the technologies appears to be copyright avoidance. *See id.*

66. *See id.* at 2515 (Scalia, J., dissenting).

67. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (noting that Congress, not the courts, should provide copyright protection to cover new technologies as they develop).

68. *See* Miles Raymer, *Album Sales Are Down, but Vinyl Sales and Digital Streaming Are Booming*, ENTERTAINMENT WEEKLY (Jan. 2, 2015), <http://music-mix.ew.com/2015/01/02/album-sales-are-down-but-vinyl-sales-and-digital-streams-are-booming/>; *see generally* Emily Steel, *Research Confirms the Crowd: Netflix and Others Are Upending the TV Business*, N.Y. TIMES (Dec. 8, 2014), <http://www.nytimes.com/2014/12/09/business/media/at-a-conference-research-shows-netflix-is-upending-tv-business.html?r=0>.

69. *See generally* Mark Berman, *Internet Ad Revenue Outpaced Broadcast TV Ad Revenue for the First Time*, WASH. POST (Apr. 10, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/04/10/internet-ad-revenue-outpaced-broadcast-tv-ad-revenue-for-the-first-time/>.

70. *See* Hayden W. Gregory, *The Next Great Copyright Act?*, 7 LANDSLIDE 2, 3 (2014) (reporting Register Maria Pallante’s congressional testimony that a general public performance right

IV. SWING FOR THE FENCES AND CREATE EQUAL PUBLIC PERFORMANCE RIGHTS

Although the legal arguments seem to favor radio stations here, policy probably favors SoundExchange and sound recording owners.⁷¹ Still, a victory for radio stations here may give way to a much greater objective for sound recording owners.

Radio stations' use of geo-fencing would cost copyright owners future royalties, thus, providing copyright owners with an additional argument that the law is treating them unfairly.⁷² Importantly, although geo-fencing itself may only cause a small loss of revenue, geo-fencing illustrates the continuous threat of future technologies to copyright rights.

Certainly, Congress can merely amend this exemption to make clear that it either applies or does not apply to terrestrial radio broadcasters.⁷³ Yet, this solution may not deter future unknown threats to recorded music that patchwork legislation may leave open. Thus, Congress must act to eliminate future legal loopholes that threaten copyright rights.⁷⁴

Accordingly, it is best for Congress to amend the Copyright Act to provide a full public performance right in sound recordings.⁷⁵ Congress should declare that any public performance, no matter what means, conceivable or inconceivable, requires the user to pay royalties to the sound recording owner.⁷⁶

for sound recordings is the Copyright Office's top issue for legislative reform and noting over a decade of congressional work on that issue). As this public performance right is continually debated, it seems creators need additional arguments to overcome terrestrial broadcasters' concerns. *Id.*

71. See *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2515 (2014). It seems that courts should readily see geo-fencing's potential to cause disruption in radio licensing, and, thus, analogizing Aereo to geo-fencing, it seems plausible that courts would find geo-fencing as infringing on sound recording rights (albeit in an policy-driven manner). See *id.*

72. See 17 U.S.C. § 114(d)(1)(B)(i) (2012). Certainly, there are several viable arguments for a public performance sound recording right such as the decrease in physical and digital sales, the increase in streaming, and international reciprocity. See, e.g., John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1041, 1087 (2002). Such a right is also supported by commonsensical equitable considerations. See, e.g., Jeffery A. Abrahamson, *Tuning Up for a New Musical Age: Sound Recording Copyright Protection in A Digital Environment*, 25 *AIPLA Q.J.* 181, 186 (1997) ("If a sound recording is an expression of creativity deemed to be worthy of copyright protection, then there is economic justification for giving it the full panoply of exclusive rights provided to other creative works.").

73. See 17 U.S.C. § 114(d)(1)(B)(i) (2012).

74. See Kettle, *supra* note 72.

75. See Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015).

76. While the law should not hinder technology, the law must foremost encourage behavior that boosts content owners' rights. See David Harrison, *The P2P File Sharing War After Grokster: It Feels Like Belgium Over Here*, 32 *J.C. & U.L.* 681, 683–84 (2006) (noting how even after the demise of Napster, an estimated 90% of materials on peer-to-peer file sharing were infringing). But see Gaia Bernstein, *In the Shadow of Innovation*, 31 *CARDOZO L. REV.* 2257, 2305–07 (2010) (discussing how

Congress must also make clear that music users cannot use any technology or perceived legal loophole to circumvent paying royalties.⁷⁷

However, Congress must still balance the content owners' rights with the public's interest in terrestrial and digital radio services.⁷⁸ When this new license is granted, the royalty rate for simultaneous online distribution should be much lower than the rate for terrestrial radio.⁷⁹ This could make it profitable for radio broadcasters to experiment with these simultaneous transmissions. Thus, not only will these changes provide clear legal rules and fair copyright rights, they will also hopefully create a more competitive future for radio broadcasters.⁸⁰

V. CONCLUSION

Geo-fencing illustrates the continual problem with new technology and copyright law. As music moves from an ownership model to an access model, any threat to public performance licensing fees can be damaging to the industry. When taken with the age-old arguments for a universal public performance right, it appears essential that Congress must finally take action. Congress must declare that recording artists have rights to royalties whenever their music is publically performed. Considering that this public performance right is broad, licensing fees should be set at rates that will encourage the use of new technology and entrepreneurial innovation. Ultimately, while copyright owners and broadcasters have long debated the general performance right in sound recordings, it could be a new technology that finally gets the copyright owners over the fence.

copyright enforcement campaigns delayed the “diffusion of digital music technology”).

77. See, e.g., Dan L. Burk, *Inventing Around Copyright*, 109 NW. U.L. REV. ONLINE 547, 549–50 (2014) (discussing how Grokster and Kazaa attempted to design systems to circumvent copyright law, specifically the Ninth Circuit's decision in the Napster case).

78. See LaVonda N. Reed-Huff, *Radio Regulation: The Effect of a Pro-Localism Agenda on Black Radio*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 97, 117–19 (2006) (discussing the public's interest in quality local radio).

79. See Bob Lefsetz, *Radio Digs Its Own Grave as Cultural Currents Shift*, VARIETY (June 21, 2013), <http://variety.com/2013/music/news/radio-digs-its-own-grave-as-cultural-currents-shift-1200500285/>. Considering that listening habits are trending away from terrestrial radio formats, as a policy matter, the law should encourage broadcasters to experiment with digital means of transmission. See *id.*

80. See William Henslee, *What's Wrong with U.S.?: Why the United States Should Have a Public Performance Right for Sound Recordings*, 13 VAND. J. ENT. & TECH. L. 739, 762–64 (2011).