FAIR PLAY FAIR PAY: THE NEED FOR A TERRESTRIAL PUBLIC PERFORMANCE RIGHT AND GENERAL COPYRIGHT REFORM

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INTRODUCTION

Copyright is a unique species of the law, tethered in a very tangible way to what is largely an intangible: intellectual property. It should be no surprise then that any collection of laws governing property that can be literally created in a moment out of nothing but the mind of the creator, will ultimately have an eternal struggle keeping pace with that very thing it purports to govern. Historically, copyright law has been relegated to being the horse that is second to cross the finish line at the Kentucky Derby. The horse is indeed world class; however, it is simply not fast enough to keep up with the leader of the pack—creative minds. Copyright law inherently runs behind the creations of the mind that come under its purview.[1]

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1. *See, e.g.*, THORVALD SOLBERG, U.S. COPYRIGHT OFFICE, REPORT OF REGISTERS OF COPYRIGHTS ON COPYRIGHT LEGISLATION (1903) (stating that the report, presented six years in advance of the comprehensive 1909 Act, was "prepared with a view to bringing out the discrepancies in the text of these various statutes and the contradictory provisions contained in them which result not only in practical difficulties in the administration of the Copyright Office but in the frequent misunderstandings as to the nature and scope of the protection

Historically, changes in technology have regularly led to a need for amendments to copyright law. That is nothing new. But in recent years, the blur that is the development of new technology has outpaced the law at a such a speed that even the ordinary observer can see that it is time for significant changes to the law.[2] This article argues that the time has arrived for three significant changes to federal copyright law through adoption of the Fair Play Fair Pay Act, the AMP Act, and the Songwriter's Equity Act. In support of this conclusion, section I of this article provides context by addressing the historical and global evolution of musical exhibition and copyright law in the United States. Section II explains the Fair Play Fair Pay Act and makes the case for its adoption. Section III and section IV do the same for the AMP Act and Songwriter's Equity Act, respectively.

I. BACKGROUND

Music is defined as "sounds that are sung by voices or played on musical instruments; written or printed symbols showing how music should be played or sung; the art or skill of creating or performing music."[3] Like language, music has always been a fundamental part of human society.[4] While music's precise origin eludes scholars—any attempt to define its evolutionary function or purpose is relegated to conjecture and speculation—there is little doubt that mankind has been creating music since ancient times.[5]

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afforded by copyright."); *see also* COPYRIGHT OFFICE, COPYRIGHT LAW REVISION REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961) ("It seems unnecessary to dwell at length upon the changes in technology during the last half century that have affected the operation of the copyright law . . . . These and other technical advances have brought in new industries and new methods for the reproduction and dissemination of the literary, musical, pictorial, and artistic works that comprise the subject matter of copyright . . . A large body of judicial interpretation and business practice has grown up around the present statute. This has done much to adapt the law to changing conditions, but its adaptability is limited. In many respects, the statute is uncertain, inconsistent, or inadequate in its application to present-day conditions.").

2. *See, e.g.*, Aja Romano, *How U.S. Copyright Law is Holding Back Tech Researchers*, THE DAILY DOT (Apr. 2, 2013, 10:28 AM), http://www.dailydot.com/society/us-copyright-dmca-hurting-tech-research/ [https://perma.cc/8WHT-Z5P7].

3. *Music*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/music [https://perma.cc/C9J5-3WH8] (last visited Sept. 9, 2016).

4. *See* CLASSICAL MUSIC AND ITS ORIGINS, 1, 13 (Raeburn, Michael & Kendall, Alan eds., 1989); *see also,* PHILLIP BALL, THE MUSIC INSTINCT: HOW MUSIC WORKS AND WHY WE CAN'T DO WITHOUT IT 2 (Oxford University Press 2010) (observing that music exists even in societies without writing or visual art).

5. CLASSICAL MUSIC AND ITS ORIGINS, *supra* note 4, at *13*; BALL, *supra* note 4, at 18-19.

The most basic element of musical presentation—from the prehistoric, ancient, and biblical times, through to the Medieval, Renaissance, Baroque, Classical, and Romantic eras of music and even up to the twentieth and twenty-first centuries—has always been, and presumably always will be, the public performance. In biblical times, culture was filled with music: singing and playing music was a part of people's daily lives.[6] In the Old Testament, for example, ancient people were devoted to the study and practice of music, which held a unique place in the historical and prophetic books.[7] David was as renowned for his skillful singing, playing, and composing as he was for slaying the giant Goliath and ultimately leading Israel as one of its most formidable kings. In fact, David is widely recognized as being the first to use music as a major element of religious services.[8] King Solomon's Temple, which has been referred to as the great school of music, was filled with musical performances as he employed a host of musicians and 24 choral groups consisting of 288 musicians who took part in 21 weekly services.[9]

Medieval music was dominated by the plainsong liturgical music of the Roman Catholic Church,[10] largely consisting of Gregorian chant, which was named for Pope Gregory I.[11] Renaissance music emphasized the emotional qualities of the lyrics through melody and harmony and was performed primarily in churches and courts.[12] During the seventeenth century, the public opera came to prominence as an additional venue for music performance.[13] The symphony became dominant in the Classical Era, as compositions took on an elegant sound and structure.[14] The Romantic Era came at a time of great social upheaval as the aristocracy lost much of their power and wealth.[15] Those previously employed in the grand courts brought musical education to the rising middle class.[16]

Throughout each of these periods, music was always delivered by way of live performance, whether in churches, concert halls, or other public

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6. THEODORE W. BURGH, LISTENING TO THE ARTIFACTS: MUSIC CULTURE IN ANCIENT PALESTINE 1 (2006).

7. HERBERT LOCKYER, JR., ALL THE MUSIC OF THE BIBLE 6 (2006).

8. LAROUSSE ENCYCLOPEDIA OF MUSIC 58 (Geoffrey Hindley et al. eds., 1971).

9. ABRAHAM A. SCHWADRON, MUSIC OF MANY CULTURES: AN INTRODUCTION 286 (Elizabeth May et al. eds., new ed. 1983).

10. MARGOT FASSLER, MUSIC IN THE MEDIEVAL WEST 10 (2014).

11. CLASSICAL MUSIC AND ITS ORIGINS, *supra* note 4, at 27.

12. *Id.* at 53–55.

13. Tim Carter, *Performance in the Seventeenth Century*, THE CAMBRIDGE HISTORY OF MUSICAL PERFORMANCE, 381 (Colin Lawson & Robin Stowell, eds., 2012).

14. CLASSICAL MUSIC AND ITS ORIGINS, *supra* note 4, at 211.

15. Otto Biba & Denis Matthews, *The Age of Beethoven and Schubert*, THE ROMANTIC ERA, Heritage of Music, Vol. II, 7 (Michael Raeburn & Alan Kendall, eds. 1989).

16. *Id.* at 8-11.

spaces. By the twentieth century, public performance gained a new conduit as radio broadcasts, and eventually television broadcasts, were used to distribute performances to the listening audience.[17] As the broadcast industry began to have a greater impact on public performance a need for licensing schemes became more essential, and copyright law evolved to provide for these licensing needs.[18]

To understand the foundations of and justifications for copyright protection it is helpful to consider how natural law and utilitarian concepts influence intellectual property law. "Natural rights" or "inherent entitlement" in such a context is based on the rights of authors to reap the fruits of their creations, obtain rewards for their contributions to society, and protect the integrity of their creations as an entitlement based on their individual efforts or as extensions of their personalities. Under John Locke and the Labor Model, in owning their bodies people also own the labor of their bodies and, by extension, the fruits of their labor.[19] With this model, the creator of music or art should have the right to control its use and be compensated for its sale—similar to a farmer reaping the benefits of his crops or a fisherman being remunerated from sales of his bounty.

Under utilitarianism or an economic rationale, a limited monopoly is granted to the author through copyright law, giving the author a private property right over the author's creation, but with the market ultimately determining its value.[20] This theory parallels the accepted premise that copyright law exists to provide a marketable right for the creators and distributors of copyrighted works, thus incentivizing production and dissemination of new works.[21] The government could have encouraged production of works by giving government subsidies or awards to creators. Instead, our system provides for this limited monopoly. If the Constitution empowers Congress to confer limited monopolies on writings and inventions, then by implication, the Constitution recognizes that copyright law plays an important role in our market economy.[22] Early copyright cases

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17. *See* COLIN LAWSON & ROBIN STOWELL, THE HISTORICAL PERFORMANCE OF MUSIC: AN INTRODUCTION (2003).

18. *E.g.*, Congress passed the Sound Recording Amendment Act of 1971, which, for the first time, provided federal protection for sound recordings. *See* Pub. L. No. 92-140, 85 Stat. 391 (1971) (effective Feb. 15, 1973).

19. JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI, MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, 12-13, Wolters Kluwer (2015).

20. Utilitarianism was a theory first popularized by British classical economist Jeremy Bentham. Julia Driver, *The History of Utilitarianism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Winter 2014 Ed.), http://plato.stanford.edu/archives/win2014/entries/utilitarianism-history.

21. JULIE E. COHEN, LYDIA PALLAS LOREN, RUTH L. OKEDIJI, MAUREEN A. O'ROURKE, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY, 7 (2015).

22. MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 21 (5th ed. 2010).

supported the theory that "encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in science and the useful arts."[23]

Copyright law in the United States was birthed from the English laws, including the "mother of copyright law," the Statute of Anne. This statute gave exclusive right to publish for 14 years; had a renewal term of 14 years if the author was alive at the end of the first term; included a registration requirement; provided for penalties for non-conformance; and, most importantly, the statute shifted rights to authors instead of printers and booksellers.[24] After the close of the American Revolution, all of the colonies except Delaware passed laws to protect authors.[25] That was the good news. The bad news was that each colony only afforded protection in that colony, thus highlighting the need for a federal statute.[26]

The first federal Copyright Act, enacted May 31, 1790, provided protection to maps, charts, and books and included a 14-year term.[27] Over the years, as technology advanced, the copyright laws adjusted to include prints,[28] musical compositions,[29] dramatic compositions,[30] photographs,[31] and paintings, drawings, sculpture, models or designs.[32] The copyright statute was rewritten in 1909,[33] and again in 1976.[34] Congress and the

23. Mazer v. Stein, 347 U.S. 201, 219 (1954).

24. 8 Statute of Anne, c. 19 (1710).

25. *See* Copyright Enactments of the United States 1783-1906 11-31 (2d ed. 1906).

26. *Id.*

27. Act of May 31, 1790, ch. 15, §1, 1 Stat. 124, 124 (repealed 1831) *available at* http://copyright.gov/history/1790act.pdf [https://perma.cc/EC5P-9LXG].

28. Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (1802) (repealed 1831), *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1802 [https://perma.cc/H8RY-XDYB].

29. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436, 436 (1831) (repealed 1870) (also in 1831, the copyright term was extended to 28 years by way of a 14-year renewal term), *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1831. See Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481 (public performance rights added in 1897), *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1897.

30. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139, *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1856 [https://perma.cc/RZV2-QNJA] (included public performance rights).

31. Act of Mar. 3, 1865, ch. 126, § 2-3, 13 Stat. 540, 540, *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1865.

32. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (1870), *available at* http://www.copyrighthistory.org/cam/tools/request/showRepresentation?id=representation_us_1870.

33. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (amended 1976), *available at* http://copyright.gov/history/1909act.pdf.

Copyright Office are currently evaluating proposals for necessary changes as we embark on the process of drafting the next copyright act.[35] Undoubtedly, technological changes that have affected how music is delivered and consumed will play a major role in the next copyright statute.

Section 106 of the Copyright Act of 1976 enumerates the exclusive rights of an author in copyrighted works.[36] Subject to sections 107 through 122, the owner of a copyright has the exclusive rights to do and to authorize any of the following:

> **(1)** to reproduce the copyrighted work in copies or phonorecords;
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> **(2)** to prepare derivative works based upon the copyrighted work;
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> **(3)** to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
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> **(4)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> **(5)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
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> **(6)** in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[37]

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34. Copyright Act of 1976, Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended at 17 U.S.C. § 101–810 (2012)) (the Copyright Act of 1976 became effective on January 1, 1978).

35. *See, e.g.*, *Legislative Developments*, UNITED STATES COPYRIGHT OFFICE, http://www.copyright.gov/legislation/ [https://perma.cc/5JTA-N9SZ] (listing the Fair Play Fair Pay Act and Songwriter Equity Act as pending legislation).

36. Copyright Act of 1976, 17 U.S.C. § 106 (2012).

37. *Id.*

Section 106(4), which refers to the public performance right, triggers the licensing scheme operated by the performing rights organizations,[38] whose responsibilities include monitoring public performances in live venues and on broadcast radio and television, collecting licensing fees, and paying the songwriters for the public performance of their songs.[39] Unlike most industrialized countries, U.S. copyright law under sections 106(4) and 114(a) does not include a performance right in sound recordings.[40] Therefore, in the United States, these public performance royalties are paid only to songwriters, composers and publishers. Virtually every other nation pays performing rights royalties, not only to the copyright owners of the songs, but also to the actual performers on the recordings.[41]

Consider for example, the popular song "Unbreak My Heart," penned by Diane Warren and recorded and made famous by performer Toni Braxton. In the U.S., only Warren and her publisher are paid when that song is publicly performed (i.e., terrestrial broadcast use, clubs, venues, etc.)—not Toni Braxton. However, if you happened to hear the same performance on Sirius XM, via a webcast, or on a cable music station—even on that terrestrial radio station's webcast—both Diane Warren and

38. ASCAP (the American Society of Composers Authors and Publishers), formed in 1914, BMI (Broadcast Music Incorporated), formed in 1939, and SESAC (originally, but no longer known as the Society of European Stage Authors and Composers), formed in 1930, are the major performing rights organizations in the U.S. AL KOHN, BOB KOHN, KOHN ON MUSIC LICENSING, 9, 1249, 1250, 1251, 4th ed. (2010). Other countries have equivalent organizations. *All About ASCAP*, THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, http://www.ascap.com/about/legislation/advocacy-resources/all-about-ascap.aspx [https://perma.cc/4CMR-UE74] (last visited Aug. 9, 2016). *About*, BROADCAST MUSIC, INC., http://www.bmi.com/about [https://perma.cc/TY6R-TT45] (last visited Aug. 9, 2016). *Our History*, SESAC, http://www.sesac.com/About/History.aspx (last visited Aug. 9, 2016).

39. *E.g., BMI Royalty Policy Manual*, BROADCAST MUSIC, INC., http://www.bmi.com/creators/royalty_print [https://perma.cc/W8ME-LQS8] (last visited Aug. 9, 2016).

40. *See* 17 U.S.C. § 106(4), 114(a). Performance rights in sound recordings are subject to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 46, 52, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%20496/volume-496-I-7247-English.pdf. Called the "Rome Convention" and signed at Rome in 1961, some 23 countries are members. *Id.* at 44. The convention is based on national treatment setting forth minimum terms of protection for contracting states. *Id.*

41. Jennifer Leigh Pridgeon, *The Performance Rights Act & Am. Participation in Int'l Copyright Prot.*, 17 J. INTELL. PROP. L. 417, 438 (2010) (quoting The Performance Rights Act: Hearing on H.R. 848 Before the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association of America)).

Toni Braxton would be compensated. This is because of the Digital Audio Performance Right in Sound Recordings Act of 1995, which recognizes a performance in sound recordings for certain digital audio transmissions.[42] With this exception, performances of sound recordings are still excluded from protection. Accordingly, when a radio station plays a sound recording, the songwriter and publisher get paid, but the owners of rights in the sound recording—the artist, musicians, and record company, among others—do not have a claim. Copyright proponents and artists have argued against the imbalance in this system for many years.[43]

Powerful lobbying groups such as the National Association of Broadcasters have vigorously opposed new legislation.[44] They have called performance rights a "tax" for playing a record on the air and have claimed that these fees would drive marginal stations out of business. This is because broadcasters would have to buy a license from a performing rights society for the right to perform a musical work and would also have to negotiate a license to play the sound recording.[45] Naturally, the challenge of drafting an adequate and effective statute is a difficult task because of the political pressures inherent in such an undertaking. Legislative proposals have provided for a compulsory license, administered by the Copyright Royalty Board, to use a sound recording.[46] With the proposed performance right legislation, the Fair Play Fair Pay Act, performers and record companies would equally share the royalties obtained from broadcasters, jukebox owners, and anyone else performing a work.[47] As evidenced by the continuous and ongoing debate, legislation of this kind, revising and restructuring industry practices and expectations, is not easily accomplished.

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42. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 338-343 (1995).

43. *See, e.g.*, Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV. 168, 168-169 (1981).

44. *See* Dennis Wharton, *NAB Runs New Ad Opposing Performance Tax*, NATIONAL ASSOCIATION OF BROADCASTERS (June 25, 2008), http://www.nab.org/documents/newsroom/pressRelease.asp?id=1631 [https://perma.cc/8DAL-6TAA]. The National Association of Broadcasters is the primary trade organization representing terrestrial radio and television stations in the United States. *Id.* More than 8,300 terrestrial radio, television and broadcast networks are represented by the NAB. *Id.*

45. *Id.*

46. *See* Section 115 Reform Act of 1996, H.R. 5553 109th Cong. (2006).

47. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 9(a) (2015).

II. THE FAIR PLAY FAIR PAY ACT

The Fair Play Fair Pay Act (FPFPA) is bipartisan legislation that would reform music licensing for sound recordings.[48] The bill modernizes music licensing in a logical, comprehensive manner. It would ensure that all music services play by the same rules so that music creators receive fair market value for their work,[49] and it would also protect small broadcasters.[50] The bill was introduced in April 2015 during the Recording Academy's Grammys On The Hill advocacy event.[51] FPFPA does three specific things: (1) creates a performing right for artists for terrestrial radio;[52] (2) provides protection for pre-1972 music played by digital services;[53] and (3) establishes rate parity for radio services to pay artists.[54]

A. Performing Rights Royalties for Artists

The need for legislation in this area is substantial. Terrestrial radio, i.e., AM/FM radio in the United States, has never been required to pay for the use of sound recordings. While these stations do pay songwriters, a loophole in copyright law allows the stations to avoid paying the actual performing artists for the use of the artist's sound recordings.[55] In fact, the broadcast industry is the only industry in America allowed to use intellectual property they do not own, without permission and without compensation.[56] Not only is this inherently unfair, but it also puts the United States out of step with the rest of the world, as the United States,

48. *Id.*

49. *Id.* § 4(a)(1)(B) (requiring that "Copyright Royalty Judges . . . establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller").

50. *Id.* § 5 (limiting the royalty rate for small broadcasters to $500 a year).

51. *Id.* The bill was introduced by Jerrold Nadler (D-NY) and Marsha Blackburn (R-TN). *Id.*

52. *See id.*, § 2.

53. *See* Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 7 (2015).

54. *See id.* § 4 (eliminating 17 U.S.C. § 801(a)'s reference to § 114(f)(B)(1) for the purposes of rate setting).

55. *Id.*

56. *Music Licensing Under Title 17 Part One, Before the Subcommittee on Courts, Intellectual Property and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 2 (2014) (Statement of Neil Portnow, President/CEO of The Recording Academy), http://judiciary.house.gov/_cache/files/6c3d319a-670a-4909-90f8-a6ccaa869fe5/portnow-naras-music-licensing-testimony.pdf [https://perma.cc/T7Z2-4KJV].

China, the Republic of North Korea, and Iraq are among the very few nations that do not pay performance royalties to recording artists.[57]

Meanwhile, foreign broadcasters pay royalties to both songwriters and performers.[58] The foreign performance royalties for U.S. musicians, however, have never been distributed because the United States does not reciprocate by paying performance royalties to foreign artists played domestically.[59] As a result, U.S. artists have lost out on tens of millions of dollars of royalties annually.[60] Not only does this have a dramatic negative affect on U.S. artists, but it also hurts the U.S. economy as a whole and limits international growth of one of our most profitable industries. The U.S. media and entertainment industry represents one third of the global industry and is the largest media and entertainment market worldwide with an economic impact of approximately $546 billion in 2014.[61] As the music marketplace continues to expand globally, the need for a broad-based performance royalty is more important than ever. It is estimated that our current policies cost the American economy and artists $100 million or more each year.[62]

Terrestrial broadcasters, as well as broadcasters of digital performances such as webcasters, satellite radio providers and cable subscriber channels, are required to obtain licenses for the use of songs in their programs.[63] These licenses, however, only compensate the songwriters and publishers of the music.[64] Because of the Digital Performance in Sound Recording Act of 1995 (DPRA), digital broadcasters, but not terrestrial broadcasters, also pay royalties to the performers on these sound

57. *Fair Pay for All Music on All Platforms*, MUSICFIRST, http://musicfirstcoalition.org/fairplay_for_fairpay [https://perma.cc/S72L-F8L6] (last visited Aug. 9, 2016).

58. *Public Performance Right for Sound Recordings,* FUTURE OF MUSIC COALITION, (Nov. 5, 2013), https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings [https://perma.cc/Q25W-TVT8].

59. *Id.*

60. *Id.*

61. *The Media & Entertainment Industry in the United States,* SELECT USA, http://selectusa.commerce.gov/industry-snapshots/media-entertainment-industry-united-states.html [https://perma.cc/XJG4-VGA7] (last visited Aug. 9, 2016).

62. *Public Performance Right for Sound Recordings*, *supra* note 58.

63. *See* SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220, 1222 (D.C. Cir. 2009) ("The broadcast of a song (whether recorded or performed live) over terrestrial or satellite radio is a performance of the musical work and therefore requires a license from the copyright owner.").

64. *See* 17 U.S.C. § 114(a) (excluding copyright owner of sound recording from right of performance).

recordings.[65] SoundExchange distributes the royalty payments directly to performers and to the sound recording copyright owner, most often the record label.[66] Non-featured performers also receive a portion of the royalties, via a royalty pool managed by the American Federation of Musicians[67] and the American Federation of Television and Radio Artists.[68] This means that terrestrial radio is the only medium that broadcasts music but does not compensate artists or labels for the performance.

Music in our everyday lives is more ubiquitous now than it has ever been before. Consumers enjoy music not just in their cars and homes, but also on their dedicated music listening devices, their phones, laptop computers, tablets, and of course, in live music settings. Unfortunately, changes in technology and consumer habits have seen the consumption of music moving further away from the purchase of CDs and toward "listens" via digital streaming, satellite radio and webcasting.[69] With this major sea change from a purchase model to a streaming model, the likelihood of performers being compensated based on traditional retail sales has seen a steep decline even as revenue from performances continues to increase.[70] Everyone, it seems, is benefitting from the increased consumption of music except for the performers themselves. The Fair Play Fair Pay Act would

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65. *See* Digital Performance Right in Sound Recordings Act of 1995, PL 104-39 (1995), *available at* https://www.gpo.gov/fdsys/pkg/PLAW-104publ39/pdf/PLAW-104publ39.pdf [https://perma.cc/M3QU-Q8JD].

66. *About Digital Royalties*, SOUNDEXCHANGE, http://www.soundexchange.com/artist-copyright-owner/digital-royalties/ [https://perma.cc/64YN-GDWL] (last visited Aug. 30, 2016). SoundExchange is the independent non-profit performance rights organization established by the DPRA that is responsible for collecting and distributing digital performance royalties to music creators and copyright holders. *About*, SOUNDEXCHANGE, http://www.soundexchange.com/about/ [https://perma.cc/G2U6-2LXR] (last visited Aug. 30, 2016).

67. MARK HALLORAN, THE MUSICIAN'S BUSINESS AND LEGAL GUIDE, 4th ed., 258 (2008). The American Federation of Musicians is the primary union that represents the interests of musicians who play on commercial recordings. *Why Join?* AMERICAN FEDERATION OF MUSICIANS, http://www.afm.org/why-join [https://perma.cc/5YNG-EVRP] (last visited Aug. 30, 2016).

68. *Id.* The American Federation of Television and Radio Artists is the primary union that represents vocalists who perform on commercial recordings and television commercials. *About Us*, SAG-AFTRA, http://www.sagaftra.org/content/about-us [https://perma.cc/8X3T-49BY] (last visited Aug. 30, 2016).

69. THE NIELSON COMPANY, 2015 U.S. MUSIC YEAR-END REPORT 5, 7 (2016), http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2016-reports/2015-year-end-music-report.pdf.pdf [https://perma.cc/8FCH-H7X4] (reporting that total CD sales dropped by 10.8% in 2015 while on-demand music streams increased by 83.1%).

70. *Id.* at 8, 26 (reporting that physical album sales by mass merchants decreased by 18.6% and that live music performance attendance increased from 2014 with "one half of Americans stating they've been to a live music event").

remedy this problem and allow artists, our greatest creative export, to reap the benefits of their labors.

The National Association of Broadcasters (NAB) is the most formidable organization lobbying against the FPFPA.[71] This should be no surprise since NAB would not want their terrestrial broadcasting members to have to pay for the programming that has been provided for free for all of these years due to the copyright loophole. However, economic and social concerns arise from building an entire industry on the backs of uncompensated workers.

As a point of comparison, let's look at the television model. Typical broadcasting networks, such as ABC, NBC, CBS, and Fox fill their airwaves with twenty-four hours of programming daily—three hours of which is considered primetime programming (e.g., 8:00–11:00 p.m. or 7:00–10:00 p.m., depending on the time zone).[72] The networks reap the majority of their income from advertising revenue generated during these primetime hours, as well as during the broadcasting of major sporting events that may be aired during primetime or non-primetime hours.[73] Independent studios produce the majority of primetime shows.[74] The shows are then optioned to the networks, which usually pick up a limited run or a

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71. Although the NAB is naturally a business partner with other music industry constituents, it understandably opposes the creation of a performance royalty for terrestrial radio. *See* Nate Rau, *'All about that Bass' Writer Decries Streaming Revenue*, THE TENNESSEAN (Sept. 22, 2015), http://www.tennessean.com/story/money/industries/music/2015/09/22/all-bass-writerdecries-streaming-revenue/72570464/. [https://perma.cc/NAP9-T3ZE] (reporting that representatives from the radio broadcast industry voiced their opposition to the *Fair Play Fair Pay Act* at a House Judiciary Committee roundtable).

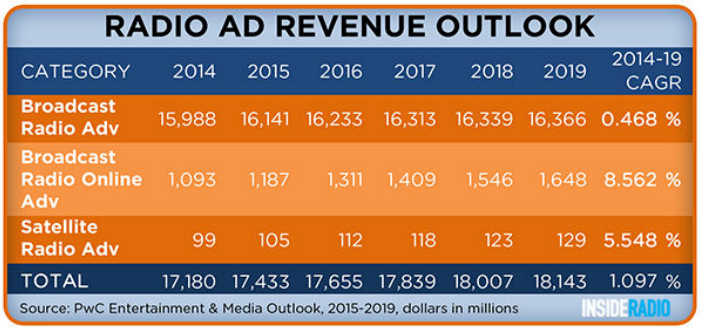
72. *Programming*, MUSEUM OF BROADCAST COMMUNICATIONS, http://www.museum.tv/eotv/programming.htm [https://perma.cc/U7ZV-VBPD](last visited Aug. 19, 2016).

73. *Genre breakdown of primetime TV advertising expenditure in the United States in 2011*, STATISTA, http://www.statista.com/statistics/223207/genre-breakdown-of-primetime-tv-ad-spend-in-the-us/ [https://perma.cc/UAB7-R566] (last visited Aug. 19, 2016).

74. Bruckheimer Productions, Castlerock Entertainment, and Dick Clark Productions, are some examples. Michael B. Kassel, *Independent Production Companies*, MUSEUM OF BROADCAST COMMUNICATIONS, http://www.museum.tv/eotv/independentp.htm [https://perma.cc/4JKQ-TTHB] (last visited Aug. 30, 2016). While networks still license, schedule and help fund independently produced programming—as well as maintain liaisons that may monitor and/or censor weekly episodes—the casting, writing and directing remain the responsibility of the independent producer. *Id.* Since the mid-to-late 1950s, when television switched from live to filmed shows, independent production companies have accounted for the majority of television programming. *Id. But see* Writers Guild of America, West, Inc., Comments Before the Federal Communications Commission (Aug. 6, 2014), http://www.wga.org/uploadedFiles/news_and_events/public_policy/Broadcast-Ownership-Rules-Review.pdf [https://perma.cc/N8GB-ZWWR] (reporting that the percentage of independently produced fall primetime programs has fallen from 76% in 1989 to 10% in 2012).

full season of the show for an agreed upon price.[75] As the show gains success, the yearly fees increase and the production company, actors, and other talent surrounding the show reap the benefits.[76] The networks are happy because they enjoy great financial gains based on advertising revenue when they can deliver a large audience share to their corporate advertisers.[77] In other words, the television stations pay for their programming and then sell advertising spots to generate revenue for the networks. In turn, television viewers watch a network or a show because that network or that show speaks to them and entertains them.[78]

Likewise, radio stations generate income from selling advertising, as is indicated in the following chart:[79]



RADIO AD REVENUE OUTLOOK

CATEGORY	2014	2015	2016	2017	2018	2019	2014-19 CAGR
Broadcast Radio Adv	15,988	16,141	16,233	16,313	16,339	16,366	0.468 %
Broadcast Radio Online Adv	1,093	1,187	1,311	1,409	1,546	1,648	8.562 %
Satellite Radio Adv	99	105	112	118	123	129	5.548 %
TOTAL	17,180	17,433	17,655	17,839	18,007	18,143	1.097 %

Source: PwC Entertainment & Media Outlook, 2015-2019, dollars in millions INSIDERADIO

As the chart reflects, broadcast radio advertising brought in nearly $16 billion in 2014 and that number is projected to grow consistently over the next five years to more than $16.3 billion in 2019.[80] Advertising

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75. Winifred Fordham Metz, *How Getting Your Show on TV Works*, HOW STUFF WORKS (Nov. 12, 2007), http://entertainment.howstuffworks.com/tv-pitching.htm [https://perma.cc/SH4W-9E5A].

76. ABC News, *Prime-Time Salary Wars*, ABC NEWS, http://abcnews.go.com/2020/story?id=123651&page=1 [https://perma.cc/6632-L56S] (last visited Aug. 19, 2016).

77. This is why ratings, a measure of the size of a network's audience share (often broken down by demographic group), are so important. *FHM Commercial*, THE AGENCY PARTNER, http://theagencypartner.com/portfolio/fhm/ [https://perma.cc/6KYL-EGS7] (last visited Aug. 19, 2016).

78. *See* Douglas A. Ferguson, *The Broadcast Television Networks*, *in* MEDIA ECONOMICS: THEORY AND PRACTICE 149 (Alison Alexander et al., eds. 2004) (explaining the economic model of broadcast television).

79. *Online Radio Ad Dollars to Grow 8.6%,* INSIDE RADIO, (June 3, 2015, 2:22 AM), http://www.insideradio.com/online-radio-ad-dollars-to-grow/article_3eff15f0-09c1-11e5-9bc3-eb0a7a7b4a6f.html [https://perma.cc/5AHU-LLX4] (last visited Aug. 22, 2016).

80. *See id.*

revenue increases based on the ratings of the stations.[81] The radio stations' ratings are based on their ability to attract a large and consistent listening audience during the key parts of the day, the most important of which are morning drive time and afternoon drive time.[82] The ability to attract a large and consistent listening audience is due to the programming that the stations provide.[83] In other words, if the audience enjoys the songs or musical format played on the station, it is likely that they will listen more frequently and for longer periods of time, thereby generating higher ratings and subsequently translating to higher advertising revenue for the station. But unlike the television example, radio stations do not pay for their programming.[84] This is a gap in the law that should be closed. FPFPA would close this gap by creating a fee schedule for radio stations to pay annual licensing fees to the performers, presumably by way of performing rights organizations, for the songs that provide the programming for these very profitable stations—some of which are valued in the billions of dollars.[85]

One of NAB's loudest cries has been that small independent radio stations would not be able to afford to pay for these rights.[86] NAB object to the performance right on behalf of these stations, claiming that the stations provide promotional value and that paying royalties will cripple their

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81. *See, e.g.*, Katy Bachman, *CBS Radio's Ratings and Revenue Suffer Sans Stern*, 16 MEDIAWEEK 6 (May 1, 2006) (reporting that revenue had fallen six percent after a decline in morning-drive ratings).

82. *See* PETE SCHULBERG & BOB SCHULBERG, RADIO ADVERTISING: THE AUTHORITATIVE HANDBOOK 111–13 (1989) (describing how advertising rates are dependent on audience size and time of day).

83. PROGRAMMING FOR TV, RADIO, AND THE INTERNET : STRATEGY, DEVELOPMENT, AND EVALUATION 198 (Philippe Perebinossoff et al., eds. 2005).

84. Nate Rau, *Congress To Consider Radio Royalties for Artists*, USA TODAY, (Sept. 17, 2013), http://www.usatoday.com/story/money/business/2013/09/17/musicians-radio-royalties/2829099 [https://perma.cc/N49Z-SCZG].

85. iHeart Media, Inc. (formerly known as Clear Channel), based in San Antonio, Texas, generated $6.318 billion dollars in revenue in 2014. *iHeartMedia, Inc. Reports Results for 2014 Fourth Quarter and Full Year*, IHEARTMEDIA, INC. (Feb. 19, 2015), http://www.iheartmedia.com/Pages/iHeartMedia,-Inc--Reports-Results-for-2014-Fourth-Quarter-and-Full-Year_copy(1).aspx [https://perma.cc/Z7PL-E63F]. Cumulus Media, based in Atlanta, Georgia, reported revenue of $1.026 billion in 2013. *Cumulus Reports Operating Results for Fourth Quarter and Full Year 2013*, CUMULUS MEDIA INC., (Feb. 18, 2014), http://globenewswire.com/news-release/2014/02/18/611075/10068676/en/Cumulus-Reports-Operating-Results-for-Fourth-Quarter-and-Full-Year-2013.html [https://perma.cc/T64K-PQW2].

86. *See, e.g.*, *NAB Statement on Rep. Watt's Introduction of Radio Performance Tax Legislation*, NATIONAL ASSOCIATION OF BROADCASTERS (Sept. 30, 2013), https://www.nab.org/documents/newsroom/pressRelease.asp?id=3236 [https://perma.cc/97UE-X2CL].

businesses, particularly harming smaller stations.[87] This claim is not true. In fact, in an effort to avoid creating undue hardship on small stations, the language of the Act includes a provision that allows stations with revenue of less than $1 million annually to pay a flat fee of $500 for all the music that is used.[88] Stations that are public non-profit radio stations would only be required to pay a flat fee of $100 annually for all the music that is used.[89] Clearly, no radio station's economic stability would be jeopardized by such a licensing fee, which is hardly oppressive. With this provision, nearly seventy-five percent of all music stations would pay the special $500 rate.[90] Radio giants like iHeart Media and Cumulus would pay fair market value for the music that fuels their billion-dollar corporations.[91] Small broadcasters, small businesses, public broadcasters, stations owned by educational institutions, and, frankly, any economically challenged company would be protected under the language of the FPFPA.

That FPFPA is the right and equitable thing to do does not mean that it will in fact be passed—or even voted upon. In recent years, Congress has fairly earned the dubious distinction of being terribly unproductive, as indicated in the following chart:[92]

87. *Congressionally-Mandated Performance Tax Puts Local Jobs at Risk,* NATIONAL ASSOCIATION OF BROADCASTERS (), http://www.nab.org/advocacy/issue.asp?id=1889&issueid=1002 [https://perma.cc/7US6-WEAN] (last visited, Aug. 19, 2016).

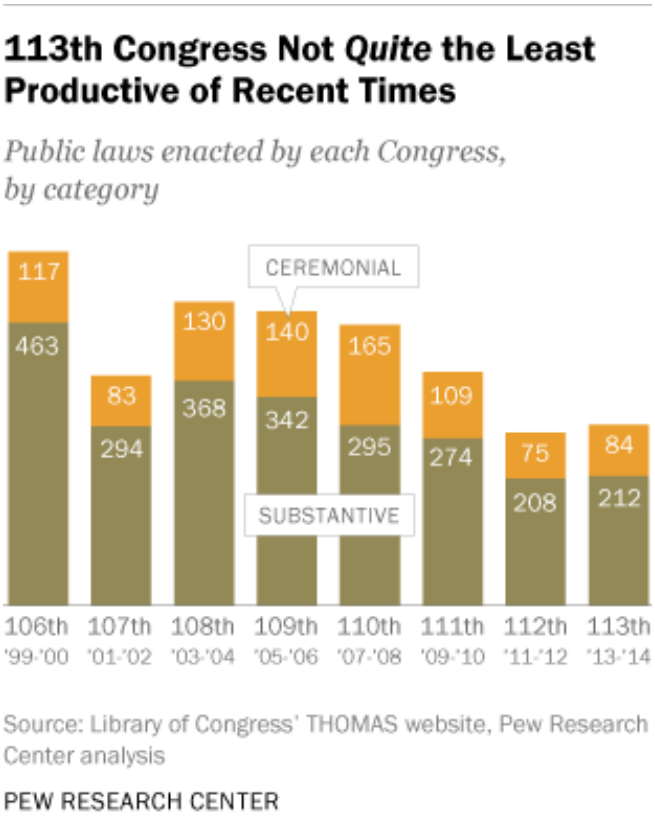
88. H.R. 1733 114th Cong. § 5(a) (2015).

89. *Id.*

90. MusicFIRST Coalition, *Can Radio Afford to Pay for the Music They Play? Big Radio Cries Poor to Congress*, MUSICFIRST (Feb. 24, 2014), http://musicfirstcoalition.org/blog_index&postid=1554592 [https://perma.cc/5H3N-MWN5].

91. *See* H.R. 1733, § 4.

92. Drew DeSilver, *In Late Spurt of Activity, Congress Avoids 'Least Productive' Title*, PEW RESEARCH CENTER (Dec. 29, 2014), http://www.pewresearch.org/fact-tank/2014/12/29/in-late-spurt-of-activity-congress-avoids-least-productive-title/ [https://perma.cc/EVC4-G8GK].



Extensive lobbying and debate on music and copyright law reform has been occurring for well over a decade with discernible movement taking place in the halls of Congress since at least 2008 when the 110th Congress made some inroads with the Performance Rights Act.[93] Although the House Judiciary Committee passed the bill 21–9 and the Senate Judiciary Committee passed its own version, the bill failed to come to a full vote in the House or the Senate.[94] There were additional efforts in 2010 and 2013, which saw Clear Channel striking direct deals with Big Machine Records,[95] Warner Bros.,[96] the band Fleetwood Mac,[97] and a few others to

93. Representative John Conyers (D-MI) and Senator Patrick Leahy (D-VT) introduced the Performance Rights Act in 2009. Performance Rights Act, H.R. 848, 111th Cong. (2009); S. 397, 111th Cong. (2009).

94. *Public Performance Right for Sound Recordings*, FUTURE OF MUSIC COALITION, (Nov. 5, 2013), https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings [https://perma.cc/6VGG-H6BR].

95. Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties To Label, Artists*, BILLBOARD MAGAZINE, (June 5, 2012),

pay a terrestrial performance royalty when those artists' or label's songs were played. This piecemeal approach to the problem is unsustainable and inequitable, as it leaves the vast majority of artists and copyright owners without compensation when their music is played on terrestrial radio.

Both the creative community and the corporations involved in getting music to the public—record companies, radio stations, and the like—deserve a level of certainty that can best be achieved through legislative reform. While legislative progress has traditionally moved very slowly, there is hope that an increased interest in music licensing issues, led by the Copyright Office and House Judiciary Committee, foreshadow legislative solutions in the near future.

B. Pre-1972 Sound Recordings

The Fair Play Fair Pay Act would also bring pre-1972 sound recordings under the purview of federal copyright law. As far back as 1897, the federal copyright law was amended to protect public performance rights in musical compositions.[98] This coverage affected bars, nightclubs, venues, and other places where songs were publicly performed.[99] These venues had to acquire licenses in order for the songs to be publicly performed there.[100] Sound recordings did not yet exist.[101]

Prior to 1972, there was no mention of sound recordings in the federal copyright laws.[102] A copyright law amendment that became effective February 15, 1972, created federal protection for sound recordings, but only on a prospective basis, meaning the amendment did not

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http://www.billboard.com/biz/articles/news/1094776/exclusive-clear-channel-big-machine-strike-deal-to-pay-sound-recording [https://perma.cc/7Z58-9M88].

96. Paul Maloney, *Clear Channel strikes major royalty deal with Warner Music Group*, RADIO AND INTERNET NEWSLETTER, (Sept. 12, 2013), http://drupal.kurthanson.com/category/issue-title/91213-clear-channel-strikes-major-royalty-deal-warner-music-group [https://perma.cc/H8MA-NHBS].

97. Cody Duncan, *Clear Channel Strikes Deal With Fleetwood Mac: But What About The Rest Of Us?* FUTURE OF MUSIC COALITION (June 30, 2013), https://futureofmusic.org/blog/2013/06/30/clear-channel-strikes-deal-fleetwood-mac-what-about-rest-us [https://perma.cc/5PU3-A2K4].

98. Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York against Sirius XM Have Broader Implications than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 N.Y.U. J. INTELL. PROP. & ENT. L., 336, 339 (Spring 2015).

99. *Id.*

100. *Id.*

101. *Id.*

102. Federal copyright law only applies to sound recordings fixed on or after February 15, 1972. 17 U.S.C. § 301(c).

affect sound recordings that were fixed prior to the date of the legislation.[103] Digital music services such as SiriusXM and Pandora refuse to compensate artists for songs recorded before 1972 due to this perceived loophole in the law.[104] The failure to have federal law in place creates a huge gap in the law and uncertainty with regard to whether and which radio stations (internet, satellite, and terrestrial) must pay royalties for recordings that were created prior to 1972. Because no federal copyright act addressed sound recordings until 1972, courts in varied jurisdictions have interpreted their own statutory and common law to determine whether royalties are payable.[105] This is an untenable solution in an industry that otherwise has no discernible state boundaries. There is a great need for the legislative certainty that can only be provided by establishing a federal law on this issue. The Fair Play Fair Pay Act would close the loophole so that services pay royalties for all the music they play. The legacy artists that paved the way for today's music deserve to be paid for their intellectual property.

In a December 2011 report by the U.S. Copyright Office, Register of Copyrights Maria Pallante reported on the desirability for federal copyright law to cover pre-1972 sound recordings.[106] In her cover letter to President Obama introducing the report, Ms. Pallante said:

> As directed by Congress, the Report considers the desirability of and means for bringing sound recordings fixed before February 15, 1972, under federal jurisdiction, with consideration given to the effect of federal coverage on the preservation of such sound recordings, the effect on public access to those recordings, and the economic impact of federal coverage on rights holders. It also examines the means for accomplishing such coverage . . . .
>
> The Report recommends that federal copyright protection should apply to sound recordings fixed before February 15, 1972. It proposes special provisions to address issues such

103. OFFICE OF THE GENERAL COUNSEL, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 5 (Dec. 2011) [hereinafter COPYRIGHT OFFICE REPORT], http://www.copyright.gov/docs/sound/pre-72-report.pdf [https://perma.cc/G9ZW-AMNA].

104. Dave McNary, *Record Labels Win Key Ruling Over Sirius XM's Airplay of Pre-1972 Songs*, VARIETY, (Oct. 15, 2012), http://variety.com/2014/music/news/record-labels-win-key-ruling-over-sirius-xms-airplay-of-pre-1972-songs-1201331348/ [https://perma.cc/9Q48-FN8L].

105. *See* COPYRIGHT OFFICE REPORT, *supra* note 103, at 30–41.

106. *See id.* at 1.

> as copyright ownership, term of protection, termination of transfers and copyright registration.
>
> In reaching the recommendations contained in the Report, the Copyright Office engaged with many stakeholders, including representatives of libraries and archives, the recording industry, performers and musicians, the broadcast, cable and satellite industries, and other interested parties.[107]

The Copyright Office concluded that bringing pre-1972 sound recordings into the federal copyright system completes the work Congress began in 1976 when it brought most works protected by state common law copyright into the federal statutory scheme.[108] Until this is actually approved by Congress, artists will be forced to make legal arguments on a case-by-case, state-by-state basis. As you might imagine, state law varies dramatically on this issue.[109]

The myriad of legal approaches, invoked by both state statutes and common law underlines the glaring reality that uniformity is needed. The litigation saga of *Flo & Eddie, Inc. v. Sirius XM Radio* illustrates why the current legal reality is an inefficient and ineffective approach to the problem of protecting pre-1972 sound recordings.

Over the past few years, three heavily followed cases, each featuring the same plaintiff and defendant, dealt with this issue of pre-1972 sound recordings. The plaintiff was Flo & Eddie, Inc., a corporation formed in 1971 by Howard Kaylan and Mark Volman, two of the original members of the rock band known as the Turtles.[110] Flo & Eddie owns all of the rights to the master recordings of the Turtles and licenses those rights to all forms

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107. *Id.* at intro.

108. *Id.* at 120–22.

109. *Compare* CAL. CIV. CODE § 980(b) (West 2007) (recognizing an author's ownership rights in pre-1972 sound recordings), *and* CAL. PENAL CODE § 653h(a)(1) (West 2011) (providing for criminal penalties for any person who "[k]nowingly and willfully transfers or causes to be transferred any sounds that have been recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell or cause to be sold, or to use or cause to be used for commercial advantage or private financial gain through public performance, the article on which the sounds are so transferred, without the consent of the owner."), *with* H.R. 2187, 108th Gen. Assemb., Reg. Sess. (Tenn. 2014) (suggesting an amendment to the Tennessee Code that would provide a civil cause of action for an owner of a copyright in a sound recording fixed prior to Feb. 15, 1972 against infringers).

110. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. CV 13-5693 PSG RZX, 2014 WL 4725382 at *1 (C.D. Cal. Sept. 22, 2014).

of media.[111] Its digital distribution rights are licensed through a deal it has with the Orchard, a leading music distributor.[112] The defendant was Sirius XM Radio, which is the largest and most successful satellite radio provider in the United States, operating a nationwide broadcasting system that includes over 135 channels of various forms of entertainment content.[113] Sirius XM delivers its broadcasts via satellite radio and by streaming over the internet.[114] Flo & Eddie, Inc. filed separate lawsuits in California, New York, and Florida, and between September 2014 and June 2015, the courts came back with a mixed bag of results.[115]

The first case, heard in California,[116] proceeded on the grounds that for more than seven years Sirius XM had publicly performed 15 separate pre-1972 sound recordings exclusively owned by Flo & Eddie without paying royalties. On September 22, 2014, the United States District Court for the Central District of California found in favor of Flo & Eddie, holding Sirius XM liable for two distinct unauthorized uses: (1) publicly performing the recordings by broadcasting and streaming them; and (2) reproducing the recordings in the process of operating its satellite and internet radio services.[117] Moreover, the court's ruling was buttressed by the fact that California common law is particularly well-developed in this area.[118] The California Civil Code specifically addresses the copyright protection of sound recordings:

> The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972,

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111. *Id.*

112. Flo & Eddie, Inc., v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692 at *2 (S.D. Fla. June 22, 2015) ("The Orchard collects rights to thousands of recordings and sells them in bundles. These bundles contain both pre and post 1972 recordings and users must buy the entire bundle from The Orchard.").

113. *Flo & Eddie,* 2014 WL 4725382 at *1.

114. Due to licenses with the FCC and technological restraints, Sirius XM broadcasts identical programming in every state. *Sirius XM Radio Does Not Infringe Copyrighted Sound Recordings: S.D. Fla.*, PRACTICAL LAW: A THOMPSON REUTERS LEGAL SOLUTION (June 23, 2015), http://us.practicallaw.com/1-616-6866?q=&qp=&qo=&qe= [https://perma.cc/2TU3-C65H]. Due to technological necessity, Sirius makes "buffer copies" of every song when they are broadcast, so every time Sirius XM broadcasts a recording, it creates two buffer copies—one is made as a part of its terrestrial repeater system and one is made in the receiver of its subscriber. *Flo & Eddie*, 2015 WL 3852692, at *1. These copies are discarded as new data flows into the buffer, and subscribers do not have access to the buffer copies. *Id.*

115. *See* Flo & Eddie, Inc., 2014 WL 4725382; Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325 (S.D.N.Y. 2014); Flo & Eddie, Inc., 2015 WL 3852692.

116. *Flo & Eddie, Inc.*, 2014 WL 4725382 at *1.

117. *Id.* at *8.

118. *Id.*

> has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.[119]

The key and disputed language in the statute was "exclusive ownership."[120] The court determined that the plain meaning of having "exclusive ownership" in a sound recording was to have the right to use and possess the recording to the exclusion of others.[121] Nothing in that phrase suggested that the legislature intended to exclude any right or use of the sound recording from the concept of "exclusive ownership."[122] Rather, the court found that the legislature intended ownership of a sound recording in California to include all rights that can attach to intellectual property, except that the owner does not have the exclusive right to record and duplicate covers.[123] Thus, the court found for Flo & Eddie with regards to California's unfair competition law, conversion and misappropriation.[124]

The second case involving Flo & Eddie and Sirius XM was heard in New York.[125] Again, because of the well-developed New York common law in this area, the United States District Court for the Southern District of New York held in favor of Flo & Eddie on November 14, 2014.[126] The court held that under New York common law, holders of common law copyrights in pre-1972 recordings have exclusive rights to public performance.[127] New York chose to "fill the void" Congress left by enforcing copyrights for pre-1972 sound recordings through its common law, which "protects against unauthorized reproduction of copies or phonorecords, unauthorized distribution by publishing or vending, and unauthorized performances."[128] While the bulk of New York case law dealt

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119. CAL. CIV. CODE § 980(a)(2).

120. *Flo & Eddie*, 2014 WL 4725382, at *5.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 10-11

125. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 338 (S.D.N.Y. 2014).

126. *Id.*

127. *Id.*

128. *See* Palmer v. DeWitt, 47 N.Y. 532, 535–36, 540–41 (1872); Roberts v. Petrova, 213 N.Y.S. 434, 434–37 (Sup. Ct. 1925); French v. Maguire, 55 How. Pr. 471, 472–73

with theater and film, the court ruled, "New York has always protected public performance rights in works other than sound recordings that enjoy the protection of common law copyright. Sirius suggests no reason why New York—a state traditionally protective of performers and performance rights—would treat sound recordings differently."[129]

Sirius XM, however, defended by asserting that Flo & Eddie did not satisfy the competitive injury requirement,[130] that its use constituted fair use,[131] and that New York's copyright protections are violative of constitutional protections related to dormant commerce.[132] In response to the first argument, the court noted that Flo & Eddie's claim was for unfair competition based on misappropriation, which "usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property."[133] While a showing of actual competition is not required for a common law unfair competition claim, the court recognized that the plaintiff still must show some "competitive injury."[134] Regardless, the court found that by publically performing sound recordings owned by Flo & Eddie without a license, it was "a matter of economic sense that Sirius harm[ed] Flo and Eddie's sales and potential licensing fees."[135]

Next, with regards to Sirius XM's fair use argument, the court found that the use of the recordings did not fall within the defense.[136] It applied the federal fair use standard,[137] under which courts consider the following factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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(N.Y., 1878); Brandon Films, Inc. v. Arjay Enter., 453 F. Supp. 852, 855 (D. Me. 1978); Roy Exp. Co. v. Columbia Broad. Sys., Inc., 672 F. 2d 1095, 1097–99, 1101–04 (1982).

129. *Flo & Eddie*, 62 F. Supp. 3d at 355.

130. *Id.* at 349.

131. *Id.* at 336.

132. *Id.*

133. *Id.* at 348 (quoting Roy Exp. Co. v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1105 (2d Cir. 1982)).

134. *Id.* at 349.

135. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 349 (S.D.N.Y. 2014).

136. *Id.* at 346.

137. *Id.* at 346–48.

> (4) the effect of the use upon the potential market for or value of the copyrighted work.[138]

In doing so, the court found that Sirius XM's use failed to satisfy all four factors.[139] The creation of unauthorized copies failed to qualify as fair use under the first factor because Sirius XM was a for-profit entity, it was using the recordings for commercial purposes, and its use was not transformative.[140] The second and third factors were found to weigh in Flo & Eddie's favor, as the protected works were deemed creative and Sirius XM "copied and performed several Turtles recordings in their entirety."[141] Additionally, despite Sirius XM's arguments pointing to a lack of evidence of lost sales or licensing fees and the lack of a market for pre-1972 sound recordings, the court found the fourth factor did not weigh in Sirius XM's favor.[142] It reasoned that it was common sense that exploiting Flo & Eddie's recordings "unchanged and for a profit" would result in market harm.[143]

Finally, the court also rejected Sirius XM's argument that New York's copyright protections run afoul of the Dormant Commerce Clause by directly regulating commerce in other states.[144] Despite holding that New York law could protect the rights of Flo & Eddie under the Dormant Commerce Clause, the court rejected the finding of the Central District of California in the first case filed by Flo & Eddie that Congress expressly authorized the states to regulate pre-1972 sound recordings in 17 U.S.C. § 301(c),[145] which reads:

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138. 17 U.S.C. § 107 (2012).

139. *Flo & Eddie*, 62 F. Supp. 3d at 346.

140. *Id.* ("Moreover, Sirius's use is not transformative. Sirius does not add anything new or change the Turtles recordings by copying and performing them. Publicly performing a recording adds no 'new expression, meaning, or message,' to the recording.").

141. *Id.* at 347.

142. *Id.* at 347–48.

143. *Id.* at 348.

144. *Id.* at 352–53. Article I, section 8 of the U.S. Constitution affirmatively grants Congress power to regulate commerce among the several states. U.S. CONST. art. I, § 8, cl. 3. However, the Supreme Court has held that this impliedly includes a "dormant" or negative implication prohibiting states from passing legislation that discriminates against or excessively burdens interstate commerce. Peter Felmly, *Comment, Beyond the Reach of the States: The Dormant Commerce Clause, Extraterritorial State Legislation, and the Concerns of Federalism*, 55 ME. L. REV. 467, 468, 475–78 (2003). The Constitution does not explicitly provide that states are limited in their capacity to legislate matters involving interstate commerce. *Id.* at 469. Instead, the concept that the Commerce Clause may contain within it a "silent" restriction on how far the states may go in regulating interstate commerce surfaced in the early years of our country. *Id.* at 471. It was first mentioned by Chief Justice Marshall in dicta in *Gibbons v. Ogden*, 22 U.S. 1, 209-10 (1824) and embraced by the Court in the mid to late nineteenth century. *Id.*

145. *Flo & Eddie*, 62 F. Supp. 3d at 350; Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. CV 13-5693 PSG RZX, 2014 WL 4725382 at *9, n.1 (C.D. Cal. Sept. 22, 2014).

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067 . . . .

The Southern District of New York noted, however, that it is plausible that this statutory provision could be interpreted to "shield[] state regulation only from statutory preemption, not from Commerce Clause scrutiny."[146] Instead, the court rejected the Dormant Commerce Clause argument on the grounds that "New York does not 'regulate' anything by recognizing common law copyright."[147] It explained that only state action that can be characterized as "regulation" is subject to the Dormant Commerce Clause and that courts have typically rejected similar claims when a state law establishing liability "may affect persons engaged in foreign or [interstate] commerce."[148]

The third *Flo & Eddie, Inc. v. Sirius XM* case was heard in Florida and was decided on June 22, 2015.[149] Flo & Eddie filed the purported class action in the United States District Court for the Southern District of Florida, claiming copyright infringement, unfair competition, conversion, and civil theft of sound recordings.[150] Flo & Eddie asserted that Sirius XM violated its property rights in the sound recordings both by publicly performing the recordings and by reproducing the recordings via the backup and buffer copies.[151] In response, Sirius XM moved for summary judgment, arguing that Flo & Eddie did not have public performance rights in the Turtles' pre-1972 sound recordings and that Sirius XM's backup and buffer copies did not violate any of Flo & Eddie's rights.[152] The court granted summary judgment to SiriusXM Radio.[153] The court further held that the backup and buffer copies did not constitute copyright infringement.[154]

In reaching the opposite conclusion of the previous California and New York courts, the Florida court delved into the historical progression of

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146. *Flo & Eddie*, 62 F. Supp. 3d at 350.

147. *Id.* at 351.

148. *Id.* (quoting Sherlock v. Alling, 93 U.S. 99, 103 (1876)).

149. Flo & Eddie, Inc., v. Sirius XM Radio, Inc. 2015 WL 3852692, at *1 (S.D. Fla. June 22, 2015).

150. *Id.* at 2.

151. *Id.*

152. *Id.*

153. *Id.* at *6.

154. *Id.* (*citing* Cartoon Network, LP v. CSC Holdings, Inc., 536 F.3d 121, 123–24 (2d Cir. 2008); Authors Guild v. Hathi Trust, 755 F. 3d 87, 96 (2014)).

copyright protection. Specifically, it noted that federal copyright law has protected musical compositions since 1831, but under the Copyright Act of 1909, common law copyright only lasted through the publication of the composition.[155] Following publication the owner had to convert the common law copyright into a federal statutory copyright.[156] Additionally, the court noted that the 1909 Act protected musical compositions but not sound recordings, though Congress did provide that individual states' common law or statutory law may still protect such sound recordings. [157] In 1971, Congress amended the copyright act to include sound recordings but only with regard to recordings created after February 15, 1972.[158] So as a result, only state statutes or common law, but no federal law, govern pre-1972 sound recordings.[159]

Because Flo & Eddie sought damages for Sirius XM's copying, distribution, and public performance of the Turtles' sound recordings and all of the sound recordings at issue were recorded before 1972, the court looked to Florida statutory and common law to determine Flo & Eddie's property rights in the state.[160] Florida statutory law did not directly address this issue, so Florida common law was used to determine the plaintiff's rights.[161] The problem for Flo & Eddie was that no Florida court had ever squarely addressed the issue.[162] Flo & Eddie, as the plaintiff, bore the burden of showing that Florida common law copyright extended to such performances.[163] Unlike in California, where there was a specific statute in place, and in New York, where several court decisions discussed the issue, no Florida court had ever considered the question of whether common law copyright in a sound recording extended to the public performance of that sound recording.[164] Thus, there was no such proof available to Flo & Eddie.

The court recognized that to adopt Flo & Eddie's position, it would have to create a new property right in Florida.[165] The court declined to do this, stating: "[I]t is not the Court's place to expand Florida common law by

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155. *Id.* at *3.

156. *Id.* If he failed to do so, all copyright protection was extinguished. *Id.* (*citing* Estate of Martin Luther King, Jr. v. CBS, Inc., 194 F.3d 1211, 1214 (11th Cir. 1999)).

157. *Id.*

158. *Id.* (citing Sound Recording Act of 1971, Pub. L. 92-140, 85 Stat. 391).

159. *Id.*

160. *Flo & Eddie*, 2015 WL 3852692, at *3.

161. *Id.*

162. *Id.* at *4. Flo & Eddie only pointed to "New York common law and one district court case arising out of the Middle District of Florida, which also relied extensively on New York law." *Id.*; *see* CBS, Inc. v. Garrod, 622 F.Supp. 532, 534–35 (M.D.Fla.1985).

163. *See Flo & Eddie*, 2015 WL 3852692, at *4–5.

164. *Id.* at *4.

165. *Id.* at *5.

creating new causes of action."[166] In a nutshell, the Florida court held that the issue was best decided by the legislature.[167] Ultimately, because all of Flo & Eddie's claims were based on alleged common law copyright, and the Florida common law did not speak on this issue, summary judgment was granted for Sirius XM.[168]

The disparate holdings in Flo & Eddie's California, New York, and Florida cases serve as a spotlight on the tremendous need for a federal law that speaks to the issue of pre-1972 sound recordings. The disparity between the states' different approaches to protection of pre-1972 sound recordings harms songwriters, composers, artists, and labels because these parties are unable to predict how a court will likely rule on a copyright infringement dispute.[169] Thus, it is possible that businesses may consider public performances of pre-1972 sound recordings to be too risky.[170] Because "the scope of protection for pre-1972 sound recordings is inconsistent from state to state, often vague, and sometimes difficult to discern," there is uncertainty and confusion among those who publicly perform them, such as online radio stations, documentary filmmakers, archivists, and others.[171]

The Fair Play Fair Pay Act would resolve these issues by eliminating "the distinction between terrestrial and digital radio transmissions in such a manner that all broadcasters would be required to pay for their public performance of sound recordings."[172] Additionally, "[t]he uniformity, consistency, and predictability of federal copyright law would allow companies going forward to adjust certain costs, expenses, and subscription prices for users to accommodate the new pre-1972 royalties."[173] FPFPA accomplishes its goal by redefining "audio transmission" to include "the transmission of any sound recording, regardless of its audio format."[174] The Act also "strikes references to 'digital audio transmissions' found in §§ 106(6) and 114(d)(1) of the Act,

166. *Id.*

167. *Id.*

168. *Id.* at *6.

169. *See* Noah Drake, Comment, Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*: Public Performance Rights for Pre-1972 Sound Recordings*, 6 CAL. L. REV. CIRCUIT 61, 68 ("New businesses that publicly perform sound recordings, whether broadcasters, satellite radio providers, or nightclubs, may now be dissuaded from entering the market given the uncertainty in the law.").

170. *Id.*

171. Michael I. Rudell and Neil J. Rosini, *Pre-1972 Sound Recordings-A Legal Breed Apart*, 82 N.Y. L. J. 1, 3 (2013).

172. Jeffrey S. Becker, et al., *The Fair Play, Fair Pay Act of 2015: What's At Stake and For Whom?*, 32 ENT. & SPORTS LAW. 5, 11 (Fall 2015).

173. Noah Drake, *supra* note 169 at 68.

174. Jeffrey S. Becker, *supra* note 172 at 11.

so as to provide for a much broader and unlimited right in the public performance of sound recordings by means of any 'audio transmission.'"[175] Finally, FPFPA would preempt state law claims for use of pre-1972 sound recordings and establish "a civil right of action that may be pursued by those whose recordings are used without compensation."[176]

C. Rate Parity

Lastly, the FPFPA would ensure that all radio formats play by the same rules.[177] Under current copyright law, there are different standards for paying artists for different kinds of services. Pandora radio, as an internet service, pays public performance licensing fees under a specific set of rules known as the "willing buyer, willing seller" standard.[178] Meanwhile, a service such as Sirius XM pays under a totally different rate standard because it is considered satellite radio.[179] Satellite radio prospers due to a government-mandated below-market royalty rate for the music that it plays.[180] Finally, an FM radio station pays nothing at all to the performers of sound recordings.[181]

FPFPA would do away with these differences and would create rate parity: one common rate standard that applies to all services.[182] Creating rate parity through the willing-buyer, willing-seller standard would level the playing field by bringing all forms of radio under the same basic rules that internet radio has dealt while managing remarkable innovation and growth.[183] Indeed, according to the language of the Act, copyright royalty judges would "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[184] By encouraging a willing buyer to

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175. *Id.*

176. *Id.* However, the Fair Play Fair Pay Act would not confer copyright protection upon sound recordings fixed before February 15, 1972. *Id.* Rather, consistent with the Copyright Act, the bill would reaffirm the right to pursue state law claims to pursue all other rights beyond royalty payments. *Id.*; *see* H.R. 1733, 114th Cong. § 7 (2015).

177. *See* H.R. 1733, § 4.

178. *Fair Pay for All Music on All Platforms*, *supra* note 57.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*; *see* H.R. 1733.

183. *Fair Pay for All Music on All Platforms*, *supra* note 57. However, the Fair Play Fair Pay Act would provide special protection for small, local radio stations and for public, college, and other noncommercial radio stations. H.R. 1733, § 5(a)–(b). These stations would pay a small, yearly fee. *Id.* Additionally, stations would not be required to pay royalties for religious services or incidental uses of sound recordings under the Act. *Id.* § 5(c).

184. H.R. 1733, § 4(a)(1)(B).

pay to a willing seller in the open market under a uniform fair market value royalty standard, performers would be paid for their music no matter which platform it appears on, whether it is traditional radio, streaming services, or something not yet created. Thus, under the Fair Play Fair Pay Act's rate parity, the platform broadcasting the music would essentially be irrelevant.

III. FAIR PAY FOR PRODUCERS—THE AMP ACT

The second piece of legislation that should be adopted is the Allocation for Music Producers Act (The AMP Act), which was introduced by Congressmen Joe Crowley and Tom Rooney.[185] The AMP Act has been incorporated into the Fair Play Fair Pay Act but has also been introduced independently.[186] The AMP Act would add producers and engineers to copyright law.[187] It would also establish that where a producer has a letter of direction from an artist, SoundExchange would have to pay the producer directly for all moneys owed to the producer for their sales.[188] SoundExchange currently does this as a courtesy but is not required to do so. This Act is not controversial, as it is endorsed by all of the stakeholders that would be affected by its passage.[189] Producers and engineers are an integral part of the creative process for a sound recording.[190] A music producer is analogous to the director of a film, providing the overall creative direction for the project, as well as the overall sound of the recording.[191] While most everyone in the music industry likely recognizes the indispensability of producers, they have never been mentioned in any part of federal copyright law.

The following pie chart illustrates how SoundExchange payments are divided:[192]

185. Joe Crowley (D-NY) and Tom Rooney (R-FL). *See* Allocation for Music Producers Act, H.R. 1457, 114th Cong. (2015).

186. *See* H.R. 1733, § 9; H.R. 1457.

187. H.R. 1457, § 9(a). In this regard, producers would be treated like artists, songwriters and composers, who are already subjects of copyright law. *See id.*

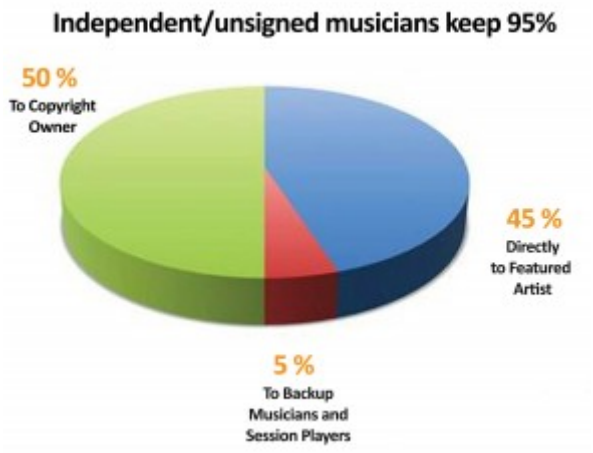
188. *Id.*

189. *The AMP Act*, GRAMMY.ORG, https://www.grammy.org/the-amp-act [https://perma.cc/CYJ3-PTU6] (last visited Aug. 29, 2016).

190. *Id.*

191. *Id.*

192. *About Digital Royalties*, *supra* note 66.



Under the law, 45% of performance royalties are paid directly to the featured artists on a recording, and 5% are paid to a fund for non-featured artists, typically session musicians and background singers.[193] The remaining 50% of the performance royalties are paid to the owner of the sound recording, or the "master," which can be a record label or an artist who owns their own masters.[194]

Because they were not given a statutory right in the 1995 law, producers typically collect royalties from the 45% that is paid to artists by SoundExchange subject to their contracts with the artist.[195] This mirrors the manner in which producers are paid royalties from the sales of sound recordings, where producers' royalties are deducted from the royalties that are payable to recording artists.[196] SoundExchange voluntarily agrees to process these payments to the producer. The AMP Act would codify into law a producer's right to collect royalties due, and formalize SoundExchange's current, voluntary policy.[197] SoundExchange, upon receiving a letter of direction from the artist, would provide direct payment

193. *Id.*

194. *Id.*

195. Ryan Middleton, *Producers, Mixers and Engineers to Get Digital Royalties in New House Bill,* MUSIC TIMES (Mar. 19, 2015), http://www.musictimes.com/articles/32472/20150319/producers-mixers-engineers-digital-royalties-new-house-bill.htm [https://perma.cc/2XKT-9P8B].

196. This practice of deducting producer royalties from the royalties payable to the featured artist is known as an "all-in" royalty. JOHN P. KELLOG, TAKING CARE OF YOUR MUSIC BUSINESS, (TAKING THE LEGAL AND BUSINESS ASPECTS YOU NEED TO KNOW TO 3.0), 2nd ed., 97 (2014). The "recording funds" that are used to pay for the production of artist's recordings are also paid on an "all-in" basis, with the producer's fee being deducted from this recording fund. *Id.*

197. H.R. 1457, 114th Cong. § 2(a) (2015).

of royalties owed to producers and engineers. For sound recordings older than 1995, the AMP Act would establish a procedure for producers and engineers to seek permission from featured artists or their heirs to receive appropriate royalty payments.[198]

The AMP Act is supported and endorsed by the Recording Academy[199] and by SoundExchange.[200] The U.S. Copyright Office, in a music licensing study released on February 5, 2015, agreed that formalizing producer payments through statute merits consideration as part of music licensing reform.[201] The Fair Play Fair Pay Act also incorporates the AMP Act to affirm its inclusion in comprehensive reform.[202]

IV. THE SONGWRITER EQUITY ACT

The third piece of legislation that should be adopted is the Songwriter Equity Act (SEA). As the Fair Play Fair Pay Act works on behalf of artists who have been shackled by the lack of a performance royalty for public performance of sound recordings, SEA would work on behalf of songwriters who need bold reform to address a myriad of issues that prevent them from receiving fair compensation.[203] Introduced as a bipartisan, bicameral bill,[204] SEA seeks to remove a restriction on the rate courts that set performance royalty rates for musical compositions because, as the law currently exists, the Copyright Royalty Board is not able to look

198. *Id.* § 2(b).

199. The Recording Academy (formerly known as the National Academy of Recording Arts and Sciences) represents more than 24,000 producers, engineers, artists, songwriters, and other individual music creators. *The AMP Act*, *supra* note 189.

200. *With the AMP Act, Congress Adopts SoundExchange System for Efficiency in Payments to Producers*, SOUNDEXCHANGE (Mar. 23, 2015), http://www.soundexchange.com/with-the-amp-act-congress-adopts-soundexchange-system-for-efficiency-in-payments-to-producers/ [https://perma.cc/N8QQ-6DYW].

201. OFFICE OF THE GENERAL COUNSEL, U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS (Feb. 2015), http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/3WLC-9SMQ].

202. *See* H.R. 1733, 114th Cong. § 9 (2015).

203. Songwriter Equity Act of 2015, H.R. 1283, 114th Cong. (2015); Songwriter Equity Act of 2015, S. 662, 114th Cong. (2015). Efforts to reform the Department of Justice Consent Degrees would also work on behalf of songwriters by allowing for an interim rate setting process that would require songwriters to be paid immediately following the exploitation of their work. In addition to immediate payment, songwriters would be benefitted by allowing performing rights organizations to bundle performance rights with other song rights and allowing music publishers to partially withdraw their catalogs from performing rights organizations to remove the current perverse incentive for publishers to completely withdraw.

204. This bill was introduced by Doug Collins (R-GA), Hakeem Jeffries (D-NY), Orrin Hatch (R-UT), Lamar Alexander (R-TN), and Bob Corker (R-TN). *See* S. 662.

at all the market evidence that may influence the rates payable to songwriters.[205] SEA would also establish a fair market standard for mechanical licensing.[206]

Currently, federal rate courts set performance royalty rates for songwriters.[207] However, section 114(i) of the Copyright Act prevents those courts from considering the royalty rates for sound recordings when setting performance royalty rates.[208] As a result, there is an uneven playing field—the royalties that songwriters receive for performances are substantially lower than for sound recordings.[209] Thus, section 114(i) should be amended so that rate court judges can consider all of the relevant evidence for determining the fair value of musical works.

Section 115 of the Copyright Act has regulated musical compositions since 1909—before recorded music existed in the form of records, tapes, CDs, and the like.[210] Section 115 allows anyone to seek a compulsory license in order to reproduce a song in exchange for paying a statutory rate.[211] Congress initially set the rate at two cents per song in 1909,[212] and that rate remained in effect for over 60 years. Today the statutory rate is set at 9.1 cents per song.[213] This minimal increase arises from a rate standard that does not reflect fair market value.[214] Section 115 should be amended to apply the free market willing-buyer, willing-seller standard to mechanical licensing. Under this new standard, judges would be asked to consider what the rate would in a competitive marketplace. Although songwriter royalties do not have a set, real marketplace, judges can use other benchmarks and evidence to make this determination rather than relying on a set statutory rate. SEA effectively addresses these issues with sections 114 and 115 by allowing judges to consider extrinsic evidence.[215] Any comprehensive music legislation considered by Congress should include this language.

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205. *See* H.R. 1283, § 5.

206. *Id.*

207. Casey Ray, *BMI Scores Higher Royalities in Court, But What Does this Mean for Rate-Setting Overall?,* FUTURE OF MUSIC COALITION (June 2, 2015), https://futureofmusic.org/blog/2015/06/02/bmi-scores-higher-royalties-court-what-does-mean-rate-setting-overall [https://perma.cc/7B8W-BJN2].

208. Copyright Act of 1976, 17 U.S.C. § 114(i) (2012).

209. *The Songwriter Equity Act of 2015 (SEA)*, CONGRESSMAN DOUG COLLINS, https://dougcollins.house.gov/uploads/SEA%202015%20one%20pager.pdf (last visited Apr. 11, 2016).

210. 17 U.S.C. § 115.

211. 17 U.S.C. § 115(a).

212. *The Songwriter Equity Act of 2015 (SEA)*, *supra* note 209.

213. *Id.*

214. *Id.*

215. *See* H.R. 1283, 114th Cong. § 5 (2015).

CONCLUSION

It is the most basic foundation of copyright law: The author, as the creator of the work, has the exclusive right to exploit or refrain from exploiting his work. That exclusive right, as codified in section 106 of the Copyright Act, carries with it the right of the author to be compensated when his work is used by others. There is no legally sound justification for the public performance royalties payable under copyright laws of the United States to be in line with Iraq and North Korea in failing to compensate artists for public performance of their songs on terrestrial radio. The Fair Play Fair Pay Act is a comprehensive bi-partisan bill that would rectify this glaring oversight. The other issues included in the omnibus Fair Play Fair Pay Act are also urgent matters that are calling for a timely response by Congress. Federal copyright protection for pre-1972 sound recordings, rate parity, fair pay for producers, and the updating of consent decrees that are nearly 75 years old, are issues that we must address if we are indeed a society that values the progress of science and useful arts. Isn't that the point of the express grant of power given to the Congress in the Constitution?[216]

216. *See* U.S. CONST. art. I, § 8, cl. 8. ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").