ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE ABA FORUM ON THE ENTERTAINMENT AND SPORTS INDUSTRIES

Forum on the Entertainment & Sports Industries
AMERICAN BAR ASSOCIATION

The Fair Play, Fair Pay Act of 2015: What's At Stake and For Whom?

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The United States Copyright Act is primed to take center stage during this current legislative session, as several members of Congress introduced comprehensive legislation earlier this year known as the Fair Play, Fair Pay Act of 2015 (FPFPA). This bill seeks to modify the Copyright Act in three key ways. First, it would create a terrestrial public performance right for recording artists and owners of master sound recordings. Second, it would eliminate the Copyright Act's exemption against federal copyright protection for sound recordings fixed prior to February 15, 1972. Third, it would establish a process designed to allow for the setting of consistent fair market royalty rates paid in consideration of the public performance of all sound recordings.

The FPFPA was introduced in April 2015 by four members of Congress: House Democrats Jerrold Nadler, John Conyers Jr., and Ted Deutch, and Republican House member Marsha Blackburn. According to Nadler, ranking member of the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, the bill was created to fix the "antiquated and broken" broadcast systems allowing certain radio companies to avoid paying any fee to music rights holders.[1]

There is no question that this bill will create a great deal of debate, as have all prior legislative attempts to rectify areas of inequity within the Copyright Act. Regardless of which side of the argument you may find yourself on, it is essential to understand the fundamental ways in which the FPFPA would alter the current musical landscape.

THE CURRENT MUSICAL LANDSCAPE

About ESL

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In order to appreciate the impact the FPFPA would have on the music industry, one should understand the industry's present state. Thus, as a preliminary matter, we must distinguish between the two distinct copyrights created when one writes and performs a new song.

First, there is the musical composition, which is comprised of a composer's music and a lyricist's accompanying words, if any. Separate and apart from the composition is the sound recording, which is the fixation of a performance of the composition into a material and audible format. Simply put, the composition is what you see when you purchase sheet music for the song, and the sound recording is what you listen to when you hear that same song on the radio.

Take, for example, the song "White Christmas," which was written by Irving Berlin around 1940. The first public performance and recording of that song was by Bing Crosby in 1941. When you listen to "White Christmas" as performed by Bing Crosby, the sounds you hear—the voices and instruments—emanate from the sound recording, which is owned by Bing Crosby's estate. The musical composition underlying that sound recording (the lyrics and composed music), however, remains a separate asset owned instead by Irving Berlin's estate. To date, there have been more than 500 different versions of "White Christmas" recorded, and each of them constitutes a new and distinct sound recording owned by the performer(s), whereas Irving Berlin remains the sole author and owner of the composition itself.

No Right to a Terrestrial Public Performance in Sound Recordings

Section 106 of the Copyright Act provides owners of compositions with an unrestricted right to "perform the copyrighted work publicly."[2] This "performance right" includes the public broadcast of compositions on the radio. To administer these public performance rights[3] throughout the United States, nationally based performance rights organizations (PROs), including ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Inc.), and SESAC (Society of European Stage Authors and Composers), issue blanket license agreements to terrestrial radio stations in exchange for payment of standard licensing fees, which allow the stations to publicly broadcast any compositions in the PRO's catalogue.[4]

There exists a long history in the United States of paying the authors of compositions for the public performance of their works on the radio, which has generated hundreds of millions of dollars in public performance royalties for songwriters and publishers. Yet, there has never been a corresponding terrestrial public performance right for owners of the sound recordings in which

these compositions are embodied, nor the recording artists that perform on the sound recordings, when used by radio companies. Many countries around the world (at least 75 of them) do provide laws enabling payment to sound recording copyright owners and recording artists for the public performance of sound recordings by radio (as well as television, clubs, venues, and a variety of other public businesses). Other than the United States, only a handful of countries, including China, Iran, and North Korea, refuse to pay performers for the public performance of their sound recordings.

In 1995, the Digital Performance Right in Sound Recordings Act (DPRA) amended § 106 of the Copyright Act to provide a right of public performance in sound recordings, but limited that right to "non-interactive *digital* audio" transmissions.[5] The Digital Millennium Copyright Act (DMCA) thereafter modified the DPRA by incorporating a list of specific types of services that are required to pay for the public performance of sound recordings. Thus, satellite radio broadcasters such as SiriusXM and Internet radio providers like Pandora are now required to pay a public performance royalty in connection with their public broadcast of sound recordings. It remains the case, however, that when these same songs are played on terrestrial radio, neither the record label that owns the recording nor the artists who performed the song receive any compensation in conjunction with that public performance.[6]

According to the musicFIRST Coalition—comprised of music industry members including the RIAA (Recording Industry Association of America), the Recording Academy (National Academy of Recording Arts and Sciences), and SAG-AFTRA, the lack of a reciprocal performance right in the United States leads most countries who do have such a right to withhold performance royalty payments to United States creators for their international airplay. This lack of reciprocal payment is estimated to cost the United States economy over $100 million a year.[7]

"There is no doubt that the lack of terrestrial performance rights for sound recordings in the United States badly hurts American performers and labels," says Emmanuel Legrand, the United States editor of British trade magazine, *Music Week*, who co-penned, with former SoundExchange CEO John Simson, a study on the global market for neighboring rights. According to Legrand:

[O]nly 1 percent of SoundExchange's revenues come from sister societies around the world, which does not reflect the real strength of the United States repertoire. It is over 20 percent for the United Kingdom's Phonographic Performance Limited (PPL). The simple reason is that societies tell SoundExchange: "join the club first, give us terrestrial rights, and *then* we'll discuss." Meanwhile, they all go to SoundExchange to collect the rights for their local performers and labels.

No Federal Copyright Protection in Pre-1972 Sound Recordings

As discussed above, the DPRA and DMCA provide both performers and labels a public performance right in digital audio transmissions. As a result, music services like SiriusXM, Pandora, and Spotify have generated significant revenue for the recording industry. There remains one notable group, however, who has been deprived this revenue stream—our musical forefathers.

Sound recordings fixed before February 15, 1972 (pre-1972 sound recordings) are not protected under current federal copyright laws that compel those who digitally transmit sound recordings to pay performance royalties for such use. Rather, when Congress passed the Sound Recording Act of 1971, which first provided copyright protection over sound recordings, it did so only with respect to recordings fixed on or after February 15, 1972.[8] According to § 301 of the Copyright Act, pre-1972 sound recordings are afforded no protection under the federal statute and are protected only by state common law. Digital radio services have thus refused to pay performers and owners of these recordings for their public performance.

In February 2015, the United States Copyright Office issued its report on *Copyright and the Music Marketplace*, which highlights the aim of federal copyright laws to provide stability for markets and eliminate uncertainty in the law for businesses, new and old. [9] The Copyright Office reaffirmed its position with respect to the federalization of pre-1972 sound recordings, and its belief that the patchwork legal system of state laws confronted by broadcasters and artists is unsustainable.[10]

This issue highlighted in the Copyright Office report is best exemplified in a series of lawsuits filed throughout the country by owners of copyrights in pre-1972 sound recordings. In these cases, the copyright owners allege state law claims as the basis for the right to be compensated for the public transmission of their recordings. These lawsuits have resulted in a variety of rulings and settlements, highlighting the need for consistent federal regulation. Among these cases are those initiated by Flo & Eddie Inc., which controls music belonging to former members of the American rock group, the Turtles.[11]

Flo & Eddie first filed class action lawsuits against SiriusXM satellite radio in Florida, California, and New York. According to its court filings, SiriusXM is "the largest radio broadcaster in the United States, measured by revenue, [with] over 27.3 million paying subscribers." It features decade-specific channels such as "60s on 6," where the Turtles' songs are frequently aired.[12] Flo & Eddie filed these lawsuits on behalf of themselves and all other "owners of sound recordings fixed prior to February 15, 1972," alleging that

by failing to license or otherwise compensate artists for the right to "perform" digitally broadcast pre-1972 sound recordings, SiriusXM infringed their public performance rights in violation of pertinent state copyright and misappropriation laws.[13] SiriusXM denied that the respective state statutes provided for, or otherwise allowed the inference of, a public performance right in pre-1972 sound recordings.

The United States District Court for the Central District of California granted summary judgment in favor of Flo & Eddie, rejecting SiriusXM's argument that "the bundle of rights that attaches to copyright ownership of a pre-1972 sound recording does not include the exclusive right to publicly perform the recording."[14] The court held that, pursuant to California statute,[15] copyright ownership of a pre-1972 sound recording includes the exclusive right to publicly perform the recording. Accordingly, if anyone wishes to publicly perform such a recording, he or she must first seek authorization from the recording's owner.

In a corresponding case, the United States District Court for the Southern District of New York also held that Flo & Eddie do have the right to exclusively perform their sound recordings, and denied SiriusXM's motion for summary judgment on the issue.[16] In February 2015, however, the court granted SiriusXM's motion to certify an interlocutory appeal, and that lawsuit is now stayed pending a decision by the Second Circuit as to whether, under New York law, the holders of common law copyrights in pre-1972 sound recordings have an exclusive right of public performance in their recordings.[17]

The United States District Court for the Southern District of Florida, however, held that Florida common law does *not* provide Flo & Eddie with an exclusive right to the public performance of their sound recordings. In granting summary judgment for SiriusXM,[18] the court recognized that another Florida federal court held that the state does recognize common law copyrights in sound recordings,[19] but it had not decided whether these common law rights in sound recordings extended to their public performance. The court noted that while California maintains a statute that provides artists with exclusive ownership interests in their sound recordings, and New York has binding precedent addressing these issues, Florida does not. It declined to be the first to rule on the issue, stating: "whether copyright protection for pre-1972 recordings should include the exclusive right to public performance is for the Florida legislature."[20]

Of note, several major record labels, including Sony, Warner, UMG, Capitol, and ABKCO, filed a similar lawsuit against SiriusXM in California. In July 2015, SiriusXM reached a settlement with the labels, in which SiriusXM agreed to pay the labels $210 million to resolve all claims, and to allow the continued transmitting of music owned or controlled by the labels through 2017, at which time

SiriusXM and the labels will renegotiate licenses for use of this music.[21]

The Legendary Soul Man, Sam Moore of Sam & Dave fame, who turns 80 on October 12 of this year, was one of the first artist witnesses to testify in Congress about the still unresolved terrestrial radio issue. He has also been outspoken on digital and satellite radio's unwillingness to pay any of the legacy artists for broadcast of their pre-1972 recordings. Moore noted:

The hits I recorded such as "Soul Man" are still enjoyed daily by radio listeners around the world. There's no excuse for any business which makes millions and billions of dollars annually to skirt paying royalties to legacy artists such as myself. Aren't we entitled and shouldn't we be able to enjoy that important income from the fruits of our souls, especially as we reach our twilights?

Lack of Parity in Standards Applied in Determining Fair Market Royalty Rates for Public Performance of Sound Recordings

The Copyright Act is comprised of a complex web of statutory provisions and rules that determine what must be paid, and to whom, when a sound recording is publicly broadcast. Upon careful dissection of these provisions, we find that four considerably different outcomes result from public consumption of the same sound recording.

On one end of the spectrum is terrestrial radio, otherwise referred to as AM/FM, or the radio your grandfather listens to in the car. As discussed above, no right to a terrestrial public performance in sound recordings currently exists. Consequently, terrestrial radio broadcasters are permitted to publicly transmit sound recordings without any obligation to pay the performer or owner of these recordings. Thus, the standard applied in determining the royalty rates and payments to be made in exchange for use of sound recordings on terrestrial radio is therefore rather simple: $0.00.

At the other end of the spectrum are interactive music services like Spotify, TIDAL, or Apple Music. These service providers generally allow consumers to choose the music they want to listen to on demand, and negotiate directly with owners of the sound recordings they wish to broadcast.[22] In the event the service provider and the copyright owner cannot reach an agreement, the artist can refuse to license his or her recordings to the service provider, which will then be unable to broadcast that music. This is precisely what occurred this past year when Taylor Swift refused to allow Spotify to play her music for its consumers after discussions broke down between the parties concerning the terms of use for Swift's newest album, *1989*.[23] A few months later, Swift famously wrote an open letter to tech giant, Apple, announcing her

intent to withhold *1989* from Apple's new streaming service because it did not plan to pay writers, producers, or artists any royalties for music streamed during the three-month free trial it offered to consumers.[24] Within hours, Apple quickly changed course and responded via Twitter that it would indeed pay artists for streaming their music, even during the customer's free trial period.[25] Examples like this demonstrate the significant control artists maintain over the use of their music during negotiations with even the largest interactive streaming services.

Somewhere in the middle of the spectrum we find noninteractive digital music services, like SiriusXM and Pandora. Unlike terrestrial radio, these platforms must pay a public performance royalty to the owners of sound recordings they publicly broadcast. And unlike interactive music services, these platforms *may* negotiate directly with owners of the sound recordings, but they *need not* do so. Rather, noninteractive digital music services may take advantage of the compulsory license mechanism provided for in §§ 114 and 801 of the Copyright Act, which allows broadcasters to legally play an artist's music without his or her permission so long as the service pays a reasonable royalty rate as determined by the Copyright Royalty Board (CRB). In determining this "reasonable royalty rate," however, the CRB does not treat all platforms equally.

Generally speaking, the CRB sets rates every five years as required by the Copyright Act.[26] Of note, the Copyright Act requires the CRB to apply a different set of standards when establishing rates for subscription services and satellite digital audio radio services that were in existence as of July 31, 1998 (pre-1998 services)[27] as compared to those services that came into existence after July 31, 1998.[28]

For example, proceedings instituted to establish royalty rates for pre-1998 services are conducted in accordance with the standards set forth in § 801(b) of the Copyright Act (801(b) rate-setting standard).[29] In these proceedings, the CRB is required to consider the following primary objectives in its rate-setting proceedings:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. [30]

These four objectives are intended to provide the CRB a variety of factors to consider in establishing a royalty rate that emulates what a copyright owner and service provider would agree to in direct free-market negotiations. The objectives have been criticized, however, as causing suppression of royalty rates such that owners of sound recordings are prevented from receiving a truly fair market royalty payment in consideration for the use of their music.

In particular, critics of the 801(b) rate-setting standard have pointed to the CRB's consideration of the "disruptive impact" factor as unfairly suppressing implementation of a truly fair market royalty rate. In one such proceeding, for example, the CRB determined that a fair market royalty rate for noninteractive subscription services would be approximately "13% on a percentage of subscriber revenue basis," but ultimately ordered payment of between 6 and 8 percent of revenue because payment of a royalty rate at the 13 percent market rate would be too "disruptive" given SiriusXM's current financial condition.[31] As a result, the recording industry has taken issue with the CRB implementing a royalty rate that is approximately half of what was acknowledged to be the fair market rate.

In contrast, proceedings instituted to establish royalty rates for all other services are conducted in accordance with a willing buyer/willing seller standard, which imposes upon the CRB an obligation to set rates "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[32] This standard (willing buyer/willing seller standard) requires the CRB to base its determinations on "economic, competitive and programming information presented by the parties," including:

(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

(ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.[33]

Because most digital music services have come into existence after July 31, 1998, the willing buyer/willing seller standard is utilized in

rate-setting proceedings for most digital platforms in existence today, including Pandora.[34]

Advocates of this standard argue that it most accurately replicates the royalty rate that would be agreed to in the open market. Others argue, however, that this standard is flawed, but for wholly different reasons. For example, music services subject to the willing buyer/willing seller standard argue that it results in unreasonably high royalty rates and should be replaced with the 801(b) rate-setting standard.[35]

Many on the recording industry side of this coin, however, argue that even the willing buyer/willing seller standard does not go far enough in allowing for a truly fair market royalty rate, and advocate for complete eradication of the compulsory license scheme so that every service platform is required to engage in direct negotiations with the artists and labels in the same manner as interactive music services. Jay Rosenthal, a partner at Mitchell Silberberg & Knupp and a former general counsel for the National Music Publishers' Association and the Recording Artists' Coalition, says:

In hindsight, there might never have been any need for establishing rate-setting preferences like the 801(b) rate-setting standards. And in any event, at this point, the Googles and other online services are doing fine. They don't need any more help. In today's online environment, it is the author and owner of music that is the aggrieved party. And there is no longer any justification to allow their property rights to be devalued in a way that threatens their professional existence.

For the time being, however, substantially different rate-setting standards are applied when determining what amount of royalties, if any, will be paid to the performers and owners of sound recordings when their music is publicly transmitted.

PRIOR LEGISLATIVE ATTEMPTS TO ESTABLISH PLATFORM PARITY

The FPFPA is not the first congressional attempt to bring parity to the treatment of sound recordings. Prior iterations of the bill were submitted to the House, but never became law. In 2009, for example, the Performance Rights Act was introduced with music industry support in an attempt to secure terrestrial radio royalties.[36] The bill recognized the need to properly compensate creators of sound recordings under a direct licensing mechanism for the public performance of their music.[37] In hearings held before the Senate Judiciary Committee concerning the Performance Rights Act, a number of artists voiced their support for the bill. Among

them was Grammy-nominated artist Sheila E., a former national trustee of the Recording Academy, who testified that "being paid for one's work is a basic American right. Whether your workplace is an office, a classroom, a factory, or a recording studio, every American worker deserves to be compensated for his or her labor. And any business that profits from another's work should share some of that profit."[38] In 2013, the Free Market Royalty Act was presented in a similar attempt to provide a public performance right for all audio transmissions of sound recordings, which would have required terrestrial radio stations to pay royalties for nondigital audio transmissions.[39]

If either of the above bills had passed, a statutory mechanism would exist to compensate recording artists, while simultaneously allowing broadcasters to negotiate rates with rights holders in the open market, outside of the statutory rate-setting process.[40] Both bills received heavy criticism from broadcasters, who argued that direct licensing would arbitrarily increase operating costs, thereby resulting in the destruction of small public radio stations. The broadcasters also argued that a performance right in sound recordings was unnecessary because private market deals are sufficient to resolve this issue.[41]

Most recently, the RESPECT Act of 2014 sought to provide royalty payments with respect to pre-1972 sound recordings, but without providing them full copyright protection.[42] This bill was referred to the House Subcommittee on Courts, Intellectual Property, and the Internet in July 2014. No further activity has taken place with respect to this bill since that time.

THE FPFPA SEEKS TO IMPLEMENT COMPREHENSIVE REFORM

The FPFPA adopts several features of the bills that came before it, while incorporating additional provisions intended to avoid much of the criticism suffered by its predecessors. If passed, the FPFPA will resolve several parity issues affecting the public performance of sound recordings in one comprehensive act.

Establish a Terrestrial Public Performance Right for Sound Recordings

One of the primary objectives of the FPFPA is to eliminate 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. As discussed above, satellite, cable, and Internet radio services are currently required to pay a public performance royalty for their use of sound recordings, while traditional terrestrial radio broadcasters pay nothing.

Section 2 of the bill, aptly titled "Equitable Treatment for Terrestrial Broadcasts and Internet Services," amends the Copyright Act to eliminate language contained within § 106 limiting this right to digital audio transmissions. Specifically, the bill does so by redefining "audio transmission" to include the transmission of any sound recording, regardless of its audio format. The bill also strikes references to "digital audio transmissions" found in §§ 106 (6) and 114(d)(1) of the Act, so as to provide for a much broader and unlimited right in the public performance of sound recordings by means of *any* "audio transmission." Thus, if the FPFPA is passed, terrestrial broadcast radio stations will be required to pay royalties for both digital and nondigital transmissions of copyrighted sound recordings.

Provide Payment for the Public Performance Royalties of Pre-1972 Sound Recordings

Another purpose behind the FPFPA is to create an avenue by which owners of pre-1972 sound recordings are compensated for the public performance of their recordings. Section 7 of the FPFPA, titled "Equitable Treatment of Legacy Sound Recordings," would amend § 114(f)(3) of the Copyright Act by adding the following language at the end of the provision:

Any person publicly performing sound recordings protected under this title by means of transmissions under a statutory license under this section, or making reproductions of such sound recordings under section 112(e), shall make royalty payments for transmissions that person makes of sound recordings that were fixed before February 15, 1972, and reproductions that person makes of those sound recordings under the circumstances described in section 112(e)(1), in the same manner as such person does for sound recordings that are protected under this title.

The bill also preempts equivalent state law claims emanating from the use of pre-1972 sound recordings in ephemeral recordings establishes a civil right of action that may be pursued by those whose recordings are used without compensation. This provides a substantial benefit to the owners of some of the most prolific and valuable recordings of the twenty-first century, including Elvis Presley, the Rolling Stones, and the Beatles. In addition, this amendment would help subsidize income for many legacy acts that are otherwise receiving very little income presently.

The FPFPA stops short, however, of conferring actual copyright protection over pre-1972 sound recordings. Consistent with § 301 of the Copyright Act, the bill reaffirms the rights of recording artists and record labels to maintain state law claims in order to protect all other rights to their sound recordings.

Establish Consistent Rate-Setting Standards for the Public Performance of Sound Recordings

Central to the FPFPA is the elimination of the disparate standards applied by the CRB when setting royalty rates. To level the playing field across various music platforms, section 4 of the FPFPA removes the § 801(b) rate-setting standard currently used to determine royalty rates for pre-1998 services, and replaces this standard with the willing buyer/willing seller standard.[43] When considered alongside its implementation of a terrestrial public performance right, the FPFPA would amend the Copyright Act to allow the CRB to apply the willing buyer/willing seller standard in all proceedings where a compulsory rate is being established for a public performance of sound recordings, regardless of the platform in which the performance is being transmitted.[44]

The FPFPA would also extend the practice of "minimum fees," which digital music services pay for all broadcast services. Under the current statutory requirements, an annual minimum fee—$500 per station or channel and with a maximum of $50,000 per year—is paid by digital audio services like SiriusXM and iHeart Radio to record labels and recording artists for public performance rights.[45] These minimum fees would be determined "based on criteria including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of [records] by consumers."[46]

Provide for Direct Royalty Payments to Producers and Others

Another component of the FPFPA is to secure payment rights for producers, mixers, engineers, and those who participate in production of sound recordings, but who do not themselves hold an ownership interest in the recording's copyright. Section 9 of the bill requires implementation of a policy that will allow producers and others involved in the creative process to submit letters of direction to third-party collection societies (e.g., Sound Exchange) that would entitle these individuals to receive their royalty payments directly from the collection society.

This amendment would make it unnecessary for producers to continually monitor receipt of payments from the artists and labels, and provide an alternative revenue stream while production imbursement continues to sink, a problem faced by music producers just as much as recording artists and labels. According to Andrew Brightman, whose Brightman Music management company represents a number of producers and engineers, "as producer fees decline and record sale royalties become almost nonexistent, the payment of master performance income is more

vital than ever. For American producers to stay competitive with their foreign contemporaries and to continue to attract top talent to their ranks—this income is a necessity."

Protect Small Broadcasters, Public and Educational Radio

A primary argument raised in opposition to the Free Market Royalty Act was that requiring terrestrial broadcasters to pay a public performance royalty for use of sound recordings would be cost-prohibitive for local, public radio stations, which would be unable to afford this additional, substantial operating expense, and could be forced to shut down.[47]

The FPFPA seeks to address this issue by placing specific limits on the royalty rate charged to small broadcasters, public and educational radio, and religious services. Specifically, section 5 of the bill incorporates the following protections into § 114(f)(1) of the Copyright Act:

Notwithstanding the provisions of subparagraphs (A) through (C), the royalty rate for nonsubscription broadcast transmissions by each individual terrestrial broadcast station licensed as such by the Federal Communications Commission that is not a public broadcasting entity as defined in section 118(f) and that has revenues in any calendar year of less than $1,000,000 shall be $500 per year for any such year. For purposes of such determination, such revenues shall include all revenues from the operation of the station, calculated in accordance with generally accepted accounting principles in the United States. In the case of affiliated broadcast stations, revenues shall be allocated reasonably to individual stations associated with those revenues.

Similarly, the royalty rate charged to college radio stations and public broadcasters would be set at $100 per year, and religious services would be completely exempt from paying any royalty whatsoever.

According to the bill's sponsor, this clause is intended to prevent "large radio conglomerates" from hiding behind "truly smaller and public stations."[48] Indeed, this is a step toward striking a balance between the interests of recording artists being paid for use of their content and small broadcasters being able to remain in business.

Preclude Harmful Impact on Songwriter Royalties

Finally, the FPFPA prohibits parties from using newly designated license fees paid on account of sound recordings as a basis to

lower public performance royalties payable to songwriters for use of their compositions. Section 8 of the bill states:

License fees payable for the public performance of sound recordings . . . shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding . . . to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of *reducing or adversely affecting such license fees*.[49]

ADVOCACY IN SUPPORT OF THE FPFPA

Supporters of the FPFPA believe that the bill addresses longstanding equity issues that broadcasters have circumvented for decades. SAG-AFTRA President Ken Howard has said that the FPFPA

brings music licensing for sound recordings into the 21st century. AM/FM stations will finally pay royalties on the sound recordings they broadcast. Right now, performers receive nothing—no royalties at all—for use of their recordings on AM/FM radio. This is something our members, including the late and great "Chairman of the Board" Frank Sinatra, have fought for decades to establish.[50]

"Performers like Bing Crosby and Frank Sinatra pushed for artist compensation from radio in the '40s and '50s," noted Daryl P. Friedman of the Recording Academy. "More attention has been focused on the issue recently because digital delivery systems, such as streaming services, do compensate performers, leaving AM/FM radio as the only holdout, and the U.S. the only remaining country in the developed world without this right."[51]

Neil Portnow, president and CEO of the Recording Academy, sees the bill as a remedy to the age-old property issues resulting from a lack of performance rights by artists. According to Portnow, "terrestrial radio is the only industry in America that is built on using another's intellectual property without permission or compensation."[52] Portnow believes that opponents of the FPFPA, including the National Association of Broadcasters (NAB), have crafted a number of myths in an effort to promote broadcasters' interests—the greatest of myths being that the promotional support provided to artists by radio broadcasters creates a "symbiotic relationship" between the artists and the radio industry.

Mike Mowery, a manager with Outerloop Management, agrees:

As a manager of many international recording artists, it is always a bit mind-boggling to me how the United States has abstained from paying our artists for the airplay of their masters. In 2015, artist survival is about capturing revenue from any and every possible stream of income. I have spent a lot of time, energy, and effort getting creative on behalf of our artists to provide them with a chance of generating revenue from emerging technologies and income streams, which would be immensely assisted by the receipt of public performance royalties from terrestrial radio airplay.

According to Portnow:

Even by the NAB's own (dubious) study, the benefit to radio outpaces the benefit to artists by 10 to 1. And any promotional effect would be taken into account by the rate-setting body. Internet and satellite radio also provide promotion, but pay a royalty. Further, a GAO study found "no consistent pattern between the cumulative broadcast radio airplay and the cumulative number of digital single sales." Even Clear Channel CEO Bob Pittman admitted that, "clearly [promotion] is not enough, or there wouldn't be a decades-long battle over [performance royalties]."[53]

ADVOCACY IN OPPOSITION TO THE FPFPA

Although its sponsors sought to preempt a number of arguments in opposition to the bill, the FPFPA is not without its challengers. Opponents of the FPFPA continue to take issue with the financial burden the law would have on the broadcasting industry, arguing that payment of a "performance" fee or tax will detrimentally impact local and public radio stations.[54] Dennis Wharton, executive vice president of communications at the NAB, has made clear: "Radio stations, especially in mid-to-smaller markets, operate with very thin profit margins. Imposing a performance fee on them could force them to lay off employees or otherwise downsize their operations in order to afford paying new fees."[55] According to Wharton, "Policymakers are smart enough to know that assessing hundreds of millions of dollars in new fees against radio stations would kill jobs, hurt local commerce, and force music-playing radio stations to consider switching to all-talk formats."[56]

In response to the FPFPA's specific attempt to cap the royalties that would be paid by small and local radio stations, the bill's opponents argue that the bill draws an "arbitrary line" between "small" and "not-small" broadcasters "at $1 million in annual revenues [that] . . . disincentive[s] these stations to grow and earn annual revenues that would trigger higher performance taxes."[57] Thus, these small stations remain at risk—perhaps not a risk of

being shut down, but rather a risk of being prevented from growing.

Generally speaking, opponents view the FPFPA and bills that preceded it as an effort to recoup earnings lost due to a decline in music sales. "Record labels have seen a steep drop in their revenues since their heyday and they want to make that up by instituting a performance fee on broadcasters," said Wharton. "What the record labels are failing to grasp is that imposing a performance royalty on radio stations will make it harder for the public to hear artists," he added. "The Fair Play, Fair Pay Act would do little to help the musicians that are truly struggling. Under the bill, 50% of royalties from radio stations would go to the records labels, 45% would go to millionaire artists like Katy Perry and Justin Timberlake, and the scraps would go to the 'struggling artists.'"[58]

Thus, broadcasters contend that a performance royalty fee would effectively force them to subsidize the recording industry.[59] In response, representatives of recording artists and record labels argue that they are the ones that have been subsidizing the broadcast radio industry for years, because they have been prohibited from exercising their property rights.[60]

Opponents of the bill also point to differences between terrestrial radio and digital radio: (1) terrestrial radio has a longstanding relationship with the recording industry spanning decades, while digital audio services do not; (2) sound quality of terrestrial radio is worse than digital audio services; and (3) interactivity with terrestrial radio does not exist. Because of the lack of options, terrestrial audio supporters argue they should not have to pay a premium "performance tax."[61]

What is the answer? According to Wharton:

We believe the private marketplace should be where a solution is found. Broadcasters are already working towards that. In the past few years, some broadcasters such as iHeartMedia, Entercom and Beasley have reached agreements with record labels to pay a performance royalty in exchange for reduced streaming rates. This is a solution that we believe works best rather than impose government intervention. A better rate structure would make streaming profitable and encourage more radio stations to stream, which in turn would help expose more artists to more listeners, and generate more revenues for the record industry.[62]

WHAT DOES THE FUTURE HOLD FOR THE FPFPA IN CONGRESS?

Jay Rosenthal explains that

while efforts to pass the FPFPA, the Songwriter Equity Act (which is strongly supported by the songwriter and music publishing community, and the National Music Publishers Association), or any of the numerous bills aimed at enhancing the value of the property owned by the authors or their distribution companies, may seem misplaced in the era of big government gridlock, these efforts are essential as placeholders and constant reminders that there is no longer any justification to offer special assistance to online or wireless distributors of music.

Nevertheless, Congress has steadfastly refused to implement a system of parity to protect those who create and perform music, and do away with antiquated distinctions in the treatment of digital and terrestrial transmissions. When first confronted with this issue in the 1990s,[63] the Senate reasoned that analog over-the-air stations should be excluded from protection because "the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting."[64] The "symbiotic relationship" between terrestrial radio and recording industries is something to be preserved in its current state.[65] Thus, in passing the DMCA, Congress required *only* digital radio, and not analog transmissions, to pay a public performance royalty.[66]

Of course, the robust and resilient lobbying efforts of the broadcasting industry help assure that their interests are protected on Capitol Hill. According to the Center for Responsive Politics, last year alone, the NAB spent $18.4 million in lobbying efforts, compared with less than $500,000 by the Recording Academy.[67] Even in considering the lobbying efforts of other music industry groups (in 2014, the RIAA spent $4.14 million, UMG spent nearly $3 million, and Sony spent $1.2 million), the NAB alone outspent the combined efforts of the recording industry by a ratio of more than 2 to 1. And this does not account for substantial lobbying efforts of other broadcasting groups, including CBS ($4.97 million in 2014) and iHeartMedia ($4.4 million in 2014).[68]

As part of the broadcast industry's lobbying efforts, the Local Radio Freedom Act[69] was introduced in February 2013. This bill calls for Congress to refrain from imposing "any new performance fee, tax, royalty, or other charge related to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for such public performance of sound recordings."[70] This blanket resolution to eliminate broadcast fees has been defeated in the past but it currently has over 200 cosponsors.

The FPFPA was introduced in April 2015. Given the substantial support received thus far in Congress for the Local Radio Freedom Act, which is essentially the antithesis of the FPFPA, expect that

the FPFPA will have an uphill battle in its journey through the legislature. Says Rosenthal:

The powers lined up against the authors and owners of copyright are immense, but slowly these bills gain more sponsors and supporters on Capitol Hill. And that is the important thing. It might still take many years—and it is certainly doubtful that any of the bills will pass in an election year. But the effort should still continue, and full support should be given to those organizations and authors who commit their time and resources to this incredibly important fight for copyright.

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ENDNOTES

[1]. Ed Christman, *"Fair Play, Fair Pay Act" Introduced, Seeks Cash from Radio Stations*, Billboard (Apr. 13, 2015), http://www.billboard.com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio.

[2]. 17 U.S.C. § 106.

[3]. *Id.* § 101 (defining public performance as "perform[ing] . . . at a place open to the public or at any place where a substantial number of persons . . . is gathered; or . . . transmit[ting] or otherwise communicat[ing] a performance . . . of the work to . . . the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times").

[4]. A "blanket license" is a license that allows the music user to perform any or all of the millions of songs in the PRO's repertory in exchange for payment of an annual fee. *See, e.g.*, *Common Music Licensing Terms*, ASCAP, http://www.ascap.com/licensing/termsdefined.aspx (last visited Sept. 14, 2015).

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[6]. *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.

[7]. *Fair Pay for All Music on All Platforms*, musicFirst, http://musicfirstcoalition.org/fairplay_for_fairpay (last visited Sept. 14, 2015).

[8]. *See* Sound Recording Act of 1971 §§ 1, 3, 17 U.S.C. § 301(c).

[9]. *Available at* http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

[10]. *See* U.S. Copyright Office, Federal Copyright Protection for Pre-1972 Sounds Recordings 5 (2011), *available at* http://www.copyright.gov/docs/sound/pre-72-report.pdf.

[11]. The Turtles rose to fame with their cover version of Bob Dylan's "It Ain't Me Babe" and the 1967 hit "Happy Together."

[12]. Press Release, SiriusXM, Sirius XM Radio Inc. Intends to Offer $750 Million of Senior Notes Due 2025 (Mar. 3, 2015), http://investor.siriusxm.com/releasedetail.cfm?ReleaseID=899519.

[13]. 17 U.S.C. §§ 101 *et seq.* do not apply to pre-1972 sound recordings. In particular, the U.S. Copyright Act carves out certain areas of copyright law for state regulation, including rights related to sound recordings fixed before February 15, 1972. *Id.* § 301(c).

[14]. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. 2:13-cv-05693, 2014 WL 4725382, at *3 (C.D. Cal. Sept. 22, 2014).

[15]. Cal. Civ. Code § 980(a)(2) (recognizing an author's "exclusive ownership" interest in pre-1972 recordings).

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

[17]. Flo & Eddie, Inc. v. Sirius XM Radio Inc., No. 13 Civ. 5784, 2015 WL 585641 (S.D.N.Y. Feb. 10, 2015).

[18]. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692 (S.D. Fla. June 22, 2015).

[19]. CBS Inc. v. Garrod, 622 F. Supp. 532 (M.D. Fla. 1985).

[20]. *Flo & Eddie*, 2015 WL 3852692, at *5.

[21]. Kevin Goldberg, *Sirius Waves a $210 Million White Flag*, Above the L. (July 9, 2015), http://abovethelaw.com/2015/07/sirius-waves-a-210-million-white-flag/.

[22]. *See* 17 U.S.C. § 114(d).

[23]. *See* Hugh McIntyre, *Taylor Swift vs. Spotify: Should Artists Be Allowed to Opt Out of Free Streaming?*, Forbes Media & Ent. (Aug. 8, 2015), http://www.forbes.com/sites/hughmcintyre/2015/08/08/taylor-swift-vs-spotify-should-artists-be-allowed-to-opt-out-of-free-streaming/. Swift had requested that Spotify stagger the release of her *1989* album so that only paying subscribers to Spotify's premium service would initially have the ability to stream it, with access being made available to nonpaying consumers of Spotify's "freemium" model being provided sometime thereafter. Spotify refused to window Swift's content in this manner, and Swift therefore refused to allow Spotify to broadcast any of her music.

[24]. *See* Taylor Swift, *To Apple, Love Taylor*, Tumblr (June 21, 2015), http://taylorswift.tumblr.com/post/122071902085/to-apple-love-taylor.

[25]. *See* Lauren Zupkus, *Apple Responds to Taylor Swift's Rallying Cry, Agrees to Compensate Artists for Apple Music*, Huff Post Ent. (June 21, 2015), http://www.huffingtonpost.com/2015/06/21/taylor-swift-apple-music_n_7631054.html.

[26]. 17 U.S.C. § 801(b)(1), (2).

[27]. These pre-1998 services generally include "satellite digital audio radio services" (SDARS) such as SiriusXM, "business establishment services" (BES) such as Muzak, "cable/satellite services" (CABSAT) such as Music Choice, and preexisting subscription services in existence prior to July 31, 1998 (PES).

[28]. If we dig even deeper on this issue, rates will also vary depending on the service provider.

[29]. 17 U.S.C. § 114(f)(1)(A).

[30]. *Id.* § 801(b)(1); *see also id.* § 114(f)(1)(B) (specifying that Copyright Royalty Judges (CRJs) shall consider factors set forth in § 801(b)(1) in establishing rates for PES and SDARS).

[31]. Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4094–98 (Jan. 24, 2008).

[32]. 17 U.S.C. § 114(f)(2)(B).

[33]. *Id.*

[34]. To complicate matters ever so slightly, Congress also passed the Webcaster Settlement Act in 2008, which allows for the private negotiation of rates for webcasting. Thus, industry groups have been able to opt for the rates set by the CRB *or* the rates negotiated under the Webcaster Settlement Act.

[35]. *See* SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220 (D.C. Cir. 2009); Jeffrey A. Eisenach, *The Sound Recording Performance Rights at a Crossroads: Will Market Rates Prevail?*, 22 CommLaw Conspectus 1 (2014).

[36]. *See* H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

[37]. "Direct licensing" refers to a license to use music that is secured directly from the owner of that song or music recording.

[38]. *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5 (2009) (testimony of Sheila Escovedo (Sheila E.)).

[39]. *See* H.R. 3219, 113th Cong. (2013).

[40]. Sunny Noh, *Better Late Than Never: The Legal Theoretical Reasons Supporting the Performance Rights Act of 2009*, 6 Buff. Intell. Prop. L.J. 83, 83–84 (2009).

[41]. *A Performance Tax Puts Local Jobs at Risk*, Nat'l Assn. of Broadcasters, http://nab.org/advocacy/issue.asp?id=1889&issueid=1002 (last visited Sept. 14, 2015) ("[R]ecent private deals between radio companies and record labels to compensate copyright owners and performers prove there is no need for government involvement.").

[42]. *See* H.R. 4772, 113th Cong. (2014).

[43]. H.R. 1733, § 4(a)(1), *amending* 17 U.S.C. § 114(f)(1).

[44]. This would, however, not include royalties established for the use of sound recordings through interactive music services, which would remain obligated to directly negotiate rates with owners of the sound recordings.

[45]. John Villasenor, *Digital Music Broadcast Royalties: The Case for a Level Playing Field*, Issues in Tech. Innovation (Ctr. for Tech. Innovation at Brookings), Aug. 2012, http://www.brookings.edu/~/media/research/files/papers/2012/8/

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[46]. H.R. 1733, § 4(a)(1), *amending* 17 U.S.C. § 114(f)(1).

[47]. Press Release, Nat'l Ass'n of Broadcasters, NAB Statement on Rep. Watt's Introduction of Radio Performance Tax Legislation (Sept. 30, 2013), https://www.nab.org/documents/newsroom/pressRelease.asp?id=3236; *Performance Tax Bill Introduced to Congress*, Va. Ass'n of Broadcasters, http://www.vabonline.com/news/performance-tax-bill-introduced-in-congress/ (last visited Sept. 14, 2015).

[48]. Kaveh Waddell, *Radio Stations May Have to Pay to Play*, Nat'l J. (Apr. 13, 2015), http://www.nationaljournal.com/tech/2015/04/13/Radio-Stations-May-Have-Pay-Play.

[49]. H.R. 1733, § 8(a), *amending* 17 U.S.C. § 114(i) (emphasis added).

[50]. *SAG-AFTRA President Ken Howard Comments on Fair Play Fair Pay Act of 2015*, Broadway World (Apr. 13, 2015), http://www.broadwayworld.com/bwwmovies/article/SAG-AFTRA-President-Ken-Howard-Comments-on-Fair-Play-Fair-Pay-Act-of-2015-20150413.

[51]. Kyle O'Brien, *Here We Go Again: The Latest Round in the Fight for Music Royalties*, Advertising Wk. Soc. Club Blog (June 6, 2015), http://www.theawsc.com/2015/06/06/here-we-go-again-the-latest-round-in-the-fight-for-music-royalties/.

[52]. *Music Licensing under Title 17 (Part I and II): Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 8 (statement of Neil Portnow, president & CEO, Recording Academy).

[53]. *And Then Turns His Attention to the NAB*, Radio Ink (June 10, 2014), http://www.radioink.com/Article.asp?id=2801497 (alterations in original).

[54]. In opposition to this argument, the recording industry has sought to make clear that the payments that would result from this performance right do not constitute a "tax," as they are not payments made to the government, but rather constitute royalties paid to the owners of the music being transmitted.

[55]. O'Brien, *supra* note 51.

[56]. Josh Peterson, *Lawmakers Spar over Radio Music Royalties*, Watchdog.org (Apr. 29, 2015), http://watchdog.org/214415/radio-music-royalties/.

[57]. *Radio Broadcasters Should Stand Together: Oppose Any New Performance Tax*, Md. DC Del. Broadcasters Ass'n, http://www.mdcd.com/aws/MDCD/asset_manager/get_file/103821 (last visited Sept. 14, 2015).

[58]. O'Brien, *supra* note 51.

[59]. *A Performance Tax Puts Local Jobs at Risk*, *supra* note 41.

[60]. *The Truth about Performance Rights*, musicFIRST, http://musicfirstcoalition.org/performancerights (last visited Sept. 14, 2015).

[61]. Chloe Albanesius, *Bono: Radio Should Pay for Songs, Like Web Does*, PCMag (Apr. 21, 2009), http://www.pcmag.com/article2/0,2817,2345688,00.asp.

[62]. O'Brien, *supra* note 51.

[63]. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

[64]. S. Rep. No. 104-128, at 14–15 (1995).

[65]. Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 487–88 (3d Cir. 2003) (footnote omitted).

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[68]. *NAB's Lobbying Budget Soars*, InsideRadio (Mar. 23, 2015), http://www.insideradio.com/free/nab-s-lobbying-budget-soars/article_bad10d90-d128-11e4-91c3-7befb9a1c4c4.html.

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[70]. *See* Peterson, *supra* note 56.