

The Fair Pay Fair Play Act of 2015: Does Congress Spot-ify a Solution for the Music Market?

Stephen E. Demos

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jbtl>

Recommended Citation

Stephen E. Demos, *The Fair Pay Fair Play Act of 2015: Does Congress Spot-ify a Solution for the Music Market?*, 12 J. Bus. & Tech. L. 73 (2016)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol12/iss1/5>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

STEPHEN E. DEMOS*

The Fair Pay Fair Play Act of 2015: Does Congress Spot-ify a Solution for the Music Market?

I. INTRODUCTION

In today's music marketplace, a growing number of consumers are turning toward digital streaming services for their musical listening needs.¹ According to the latest Nielsen music consumer report, in 2015, on-demand audio streams increased by 83.1%, while total album and digital track sales decreased by 6.1% and 12.5% respectively.² One reason for this trend is the overall improvement in Internet speeds, cellular networks, and smart phones.³ With faster devices and wireless/cellular networks, consumers no longer have to carry hardware solely devoted to music storage and playback, such as CD players and iPods.⁴ Instead, they can simply play or stream a song directly on their device over their Internet or cellular network.⁵

Generally, digital streaming music services can be separated into two sub-categories: interactive on-demand services and noninteractive services.⁶ Interactive on-demand services such as Spotify and Apple Music allow the user to choose specific songs, albums, and playlists to listen to within a vast catalog of offerings.⁷ Noninteractive services such as Pandora play music based on user preferences, but do not allow the user to select particular songs or albums at will.⁸ In both instances,

© 2016 Stephen E. Demos

* J.D. Candidate, University of Maryland Francis King Carey School of Law, 2017.

1. THE NIELSEN COMPANY, 2015 NIELSEN MUSIC U.S. REPORT 7–8 (2016), <http://www.nielsen.com/us/en/insights/reports/2016/2015-music-us-year-end-report.html>.

2. *Id.*

3. See INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, MUSIC CONSUMER INSIGHT REPORT 2016 8–9 (2016), <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>.

4. *Id.*

5. See *id.*

6. Madi Alexander & Ben Sisario, *Apple Music, Spotify and a Guide to Music Streaming Services*, N.Y. TIMES (April 5, 2016), http://www.nytimes.com/interactive/2015/06/30/business/media/music-streaming-guide.html?_r=0.

7. *Id.*

8. *Id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

the consumer usually has a choice between purchasing a subscription for premium content and ad-free listening or to use a free version that has less features and more advertisements.⁹

Despite the obvious benefits of convenience and accessibility provided by online streaming, not all market participants have benefitted from these shifts in music consumption and distribution patterns.¹⁰ One reason for this is that the existing copyright regulatory scheme does not fully take into account how music is packaged and consumed in the Internet and music streaming age. As a result, market participants, from top to bottom, are experiencing various disincentives and incurring unnecessary transaction costs.¹¹

Specifically, under the existing system, musicians and songwriters do not feel that they are receiving fair consideration for their music.¹² For example, “if you were one of the 6.5 million people who listened to Bon Jovi’s ‘Livin’ on a Prayer’ on Pandora during a three-month span in 2012, you helped him, and his two co-writers, split a grand total of \$110.”¹³

Furthermore, as the musical work or recording passes through the production and sales process, market participants do not have the accurate song ownership and royalty distribution data necessary to facilitate the smooth exchange of intellectual property rights and payment.¹⁴ This, in turn, prevents artists from receiving compensation for their works and also results in otherwise avoidable infringement suits for music providers.¹⁵

To make matters worse, even when music providers can properly identify the correct rights holders, the outdated licensing and rate-setting procedures set rates unevenly across fundamentally similar music distribution services and are particularly burdensome for all involved.¹⁶ Since 2009, the American Society of Composers, Authors, and Publishers (“ASCAP”) has reported that it and several other applicants have collectively spent more than one hundred million dollars on litigation expenses related to rate court proceedings.¹⁷

9. *Id.*

10. The various market participants that will be discussed in Part II of this Comment are songwriters, music publishers, performing rights organizations, mechanical rights administrators, recording artists, producers, record companies, music providers, and consumers.

11. *See infra* Part III.

12. *See* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 68 (2015) [hereinafter MUSIC MARKETPLACE].

13. Doug Gross, *Songwriters: Spotify Doesn’t Pay Off. . . Unless You’re a Taylor Swift*, CNN (Nov. 13, 2014), <http://www.cnn.com/2014/11/12/tech/web/spotify-pay-musicians>.

14. *See* MUSIC MARKETPLACE, *supra* note 12, at 68.

15. *See id.* at 107.

16. *See id.* at 1.

17. *Id.* at 93.

STEPHEN E. DEMOS

In an effort to address these issues, on April 13, 2015, Congressman Jerrold Nadler introduced the bi-partisan-sponsored House Resolution 1733, the Fair Play Fair Pay Act of 2015 (“FPFPA”), to the House Floor.¹⁸ The legislation is currently pending in the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet, however, momentum on the FPFPA has appeared to have stalled.

This Comment aims to examine the strengths and weaknesses of the existing regulatory scheme and its impact on market participants. It draws on this analysis and the relevant literature to develop policy recommendations that more directly address the issues affecting the music market. These recommendations propose: (1) eliminating the differential statutory pricing treatment for sound recordings and musical works; (2) removing the terrestrial radio exemption to royalty obligations; (3) incorporating pre-1972 recordings into the federal regulatory scheme; (4) establishing a consistent fair market value standard for licenses across the entire market; and (5) creating incentives that foster the public availability of accurate song ownership data and accounting.

This Comment begins by examining the history of music copyright law in this nation and how it has evolved in response to past technological advances that have similarly impacted the music marketplace.¹⁹ It then explains the role each industry participant plays in the market and how they interact with one another.²⁰ Next, the Comment highlights the underlying inefficiencies plaguing the music market today.²¹ It then explains how the general policy recommendations enumerated above would appropriately address these issues.²² It concludes by showing how these general policy recommendations manifest themselves within the context of the FPFPA and maintains that, if passed, the FPFPA would meaningfully address many of the issues surrounding the market and regulatory scheme.²³

II. THE MUSIC MARKET, TECHNOLOGY, AND THE REGULATORY SCHEME

Since its inception, the Copyright Act has governed musical licensing.²⁴ Its history, which is outlined in Subsection A, is marked by fluid revisions and amendments that attempt to address the effects of emerging technologies in the market while simultaneously balancing both anti-trust and free-market considerations.²⁵ In these

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

19. See *infra* Part II.B.

20. See *infra* Part II.A.

21. See *infra* Part III.

22. See *infra* Part IV.

23. See *infra* Part V.

24. See *United States Copyright Law*, HISTORY OF COPYRIGHT, http://www.historyofcopyright.org/pb/wp_fe548a29/wp_fe548a29.html (last visited Nov. 14, 2016); Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

25. See *United States Copyright Law*, *supra* note 24.

THE FAIR PAY FAIR PLAY ACT OF 2015

attempts, Congress has had to consider the interests of numerous industry participants including: songwriters, music publishers, performing rights organizations, mechanical rights administrators, recording artists, producers, record companies, music providers, and consumers.

Subsection B plots the lifecycle of a musical work and sound recording as they pass through the various stages of production and also tracks the distinct copyrights associated with the work. Due to the fact that not all songwriters and recording artists are born wealthy or make good sales people, manufacturers, accountants, and lawyers, the music industry utilizes economies of scale and specialization to facilitate output. Consequently, unless the artist handles every stage of production and distribution independently, by the time a song ultimately reaches the consumer, numerous industry participants have handled the product in some form or another.

A. Technological Advances and the Evolution of Copyright Law

Congress passed the first federal Copyright Act in 1790 “for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.”²⁶ The law granted “the author and authors . . . the sole right and liberty of printing, reprinting, publishing and vending such map, chart, book or books, for the like term of fourteen years” and a renewal term of fourteen years, for a total of twenty eight years.²⁷ It also required compliance with certain procedural formalities which included notice, deposits, publication in the U.S., and recordation in the federal district court where the author resided.²⁸ If any of these formalities were not followed, the work was not protected and consequently free to be copied.²⁹ Even though this Act did not expressly recognize musical works, such works were simply treated as “books” and were afforded the necessary copyright protections.³⁰ At the time of the Act’s passage, music could only be consumed by reading the actual sheet music and lyrics or by listening to it being performed live.³¹

Forty one years later, in an effort to mimic the protections offered by European countries,³² Congress amended the Copyright Act in 1831 and established a new

26. Copyright Act of 1790, ch. 15, 1 Stat. 124 (1790).

27. *Id.*

28. *Id.* at 125.

29. *Id.*

30. See Clayton v. Stone, 5 F. Cas. 999, 1000 (C.C.S.D.N.Y. 1829); I. Trotter Hardy, *Copyright and New Use Technologies*, 23 NOVA. L. REV. 659, 664 (1999).

31. See Dann Albright, *The Evolution of Music Consumption: How We Got Here*, MAKEUSEOF, at 5 (April 2015), <http://cdn.makeuseof.com/wp-content/uploads/2015/04/The-Evolution-of-Music-Consumption-How-We-Got-Here.pdf>; Callie Taintor, *Chronology: Technology and the Music Industry*, PBS (May 27, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/music/inside/cron.html>.

32. See *United States Copyright Law*, *supra* note 24 (quoting the House Judiciary’s report from December 17, 1829).

STEPHEN E. DEMOS

category of protection exclusively for musical works.³³ While this amendment did not establish public performance rights, it did establish the owner's right to reproduce and distribute their compositions.³⁴

Unsurprisingly, the conspicuous absence of a protected public performance right created an avenue for exploitation in the music and drama industries.³⁵ Without an established public performance right, pirate musicians and play companies were able to profit off others' musical works without ever having to pay the writer more than the cost of purchasing the sheet music or script.³⁶ After some time and debate, Congress finally addressed this performance right deficiency in 1897 and expanded the scope of copyright protections to include the right to perform the work publicly.³⁷

While this debate was ongoing, in 1877, Thomas Edison invented the phonograph.³⁸ On that day and for the first time in history, sound was transcribed onto an audible medium.³⁹ By 1885, rival inventors Chichester Bell and Charles Taintor invented the graphophone.⁴⁰ The graphophone, like Edison's phonograph, recorded sound on an engraved wax cylinder which would rotate against a stylus.⁴¹ Two years later, Edison responded with improvements to his original phonograph incorporating a battery powered motor which produced a constant pitch.⁴² Then, in 1888, Emile Berliner invented the gramophone, which used a disc rather than a cylinder as the recording medium.⁴³ "The discs [were] flat, measure[d] seven inches in diameter, and [could] hold up to two minutes of recorded sound."⁴⁴ By the turn of the century, developments in the materials and production techniques of both the disc and the cylinder improved both the sound quality and overall accessibility of recordings.⁴⁵

As a result of these technological advances, Congress once again had to revise the copyright scheme.⁴⁶ The revision that followed expanded copyright protections by recognizing an exclusive right to make mechanical reproductions of songs in

33. Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831).

34. *Id.*; See Maria A. Pallante, *ASCAP at 100*, 61 J. COPYRIGHT SOC'Y 545, 545–46 (2014).

35. See Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L. J. 1157, 1168–69 (2007).

36. *Id.*

37. Act of Mar. 3, 1897, ch. 392, 29 Stat. 694, 694–95 (1897).

38. Taintor, *supra* note 31.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. Taintor, *supra* note 31.

44. *Id.*

45. *Id.*

46. *Id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

“phonorecords.”⁴⁷ In doing so, Congress established a compulsory licensing scheme which set a royalty rate of two cents per mechanical reproduction and required that manufacturers provide honest monthly accounting statements.⁴⁸ This statutory licensing scheme was largely motivated by antitrust considerations intending to prevent music publishers from creating a monopoly by buying up all music rights and then setting their own prices.⁴⁹

In the decades that followed the Copyright Act of 1909, technological advances continued to improve music quality and accessibility.⁵⁰ As this was occurring, Congress began to recognize that artists’ sound recordings were themselves deserving of their own distinct copyright protections.⁵¹ While the Sound Recording Act of 1971 was a step in the right direction, these protections were limited only to sound recordings fixed on or after February 15, 1972, and, until more recently, protected only the exclusive rights of reproduction, distribution, and preparation of derivative works.⁵² For sound recordings created before 1972, the copyright owners had to rely on state law protections, if they existed.⁵³

Like the Copyright Act of 1831, the Sound Recording Act of 1971 did not grant an exclusive right of public performance.⁵⁴ This changed in 1995 when Congress passed the Digital Performance Right in Sound Recordings Act (“DPRA”)⁵⁵ in response to the emergence of music streaming which threatened to displace sales of physical records and leave artists and their labels uncompensated for the widespread enjoyment of their work.⁵⁶ The DPRA created a limited digital performance right for sound recordings by way of a three-tiered licensing scheme.⁵⁷ Under this scheme,

47. Copyright Act of 1909, Pub. L. No. 60 349, §1(e), 35 Stat. 1075, 1075 76 (1909). In those days, “phonorecords” were mainly piano rolls and phonograph cylinders, but, in the modern era, this term has been applied to vinyl records and CDs. *MUSIC MARKETPLACE*, *supra* note 12, at 17.

48. Copyright Act of 1909, Pub. L. No. 60 349, §1(e), 35 Stat. 1075, 1076 (1909) (“That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof”).

49. *MUSIC MARKETPLACE*, *supra* note 12, at 26.

50. See generally Taintor, *supra* note 31.

51. Sound Recording Act of 1971, Pub. L. No. 92 140, 85 Stat. 391 (1971).

52. *Id.* at 392.

53. See 17 U.S.C. § 301 (2012); The Copyright Act expressly permits states to continue state law protection for pre 1972 sound recordings until February 15, 2067, at which time all state protection will be preempted by federal law and pre 1972 sound recordings will enter the public domain. *Id.*

54. See Sound Recording Act of 1971, Pub. L. No. 92 140, 85 Stat. 391.

55. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.).

56. See *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 488 (3d Cir. 2003).

57. See 17 U.S.C. § 106(6) (2012). The public-performance right for sound recordings is limited in that it entitles the holder to royalties only for public performances “by means of a digital audio transmission.”

STEPHEN E. DEMOS

sound recording copyright owners maintain full exclusive rights when dealing with interactive music providers, are subject to a compulsory licensing scheme when dealing with certain noninteractive music providers, and are not entitled to any royalties from nonsubscription broadcast music providers (terrestrial radio).⁵⁸ In addition, the DPRA clarified that digital files could be considered musical works for purposes of copyright protection.⁵⁹

B. The Musical Work and the Sound Recording

When a consumer listens to a song on Spotify, Pandora, or the radio, what they are ultimately consuming is two distinct copyrighted products: (1) the musical work as written and composed by the songwriter(s), and (2) the sound recording of the musical work that has been fixed in a recording medium such as a vinyl or digital file.⁶⁰ Despite the fundamental similarities between these two products, the rates for the various licenses associated with them are established by different entities and standards.

Today, authors of musical works and sound recordings possess exclusive alienable rights under 17 U.S.C. § 106.⁶¹ These include: the mechanical right to make and distribute copies of the work;⁶² the right to create derivative works;⁶³ the right to display the work publicly;⁶⁴ and the right to perform the work publicly.⁶⁵ In addition to these rights, the music industry along with certain judicial circuits have also acknowledged that owners maintain the exclusive right to pair the music with a video.⁶⁶ This right is commonly referred to as the synchronization (or “synch”) right and is a hybrid of the reproduction and derivative work rights.⁶⁷

58. 17 U.S.C. § 114 (2012).

59. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104 39, § 4, 109 Stat. 336, 345 (1995) (“A compulsory license under this section includes the right of the compulsory licensee to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission . . .”); *see also* 17 U.S.C. § 115(c)(3)(A) (2012).

60. *See* 17 U.S.C. § 101 (2012).

61. *See id.*

62. 17 U.S.C. §§ 106(1), (3). This may be sheet music, records, tapes, CDs and digital audio files.

63. 17 U.S.C. § 106(2). This may be a new work based on an existing composition.

64. 17 U.S.C. § 106(5). This may be by posting lyrics on a website.

65. 17 U.S.C. § 106(4). This may be in a live venue or broadcast.

66. *See* *Agee v. Paramount Commc'ns, Inc.*, 59 F.3d 317, 321 (2d Cir. 1995) (observing that a defendant “might have infringed [plaintiff’s] exclusive right to prepare derivative works” by synchronizing music to an audiovisual work); *Buffalo Broad. Co., Inc., v. ASCAP*, 744 F.2d 917, 920 (2d Cir. 1984) (“The ‘synch’ right is a form of the reproduction right also created by statute as one of the exclusive rights enjoyed by the copyright owner”).

67. *See id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

i. The Musical Work

The creative process generally begins with the songwriter authoring the lyrics and composition that go into a musical work.⁶⁸ In some instances, a musical work will have multiple songwriters.⁶⁹ Regardless, in order to focus their efforts on making music, many songwriters enter into publishing agreements with music publishers to finance their writing, promote their works, and administer their copyrights for them.⁷⁰ Under such arrangements, the publisher usually pays an advance to the songwriter against future royalty collections.⁷¹

Although songwriters and publishers may sell the right to perform their musical work publicly to music providers such as radio stations, concert halls, and similar venues directly, usually, songwriters and publishers will enlist Performing Rights Organizations (“PROs”) to administer and distribute these performing rights for them.⁷² Under this arrangement, the PRO works with the publishers and songwriters to manage and license the performing rights of their musical works to music providers in a blanket licensing scheme that allows the providers to pay one fee for the rights to the entire PRO’s catalog.⁷³ Upon receiving the fee, the PRO keeps a portion for itself and sends the rest back to the songwriter and publisher.⁷⁴ The amount sent to the songwriter and publisher is dependent upon how many times a particular musical work is played.⁷⁵

Rates for public performance licenses purchased from the two largest PROs, ASCAP and Broadcast Music, Inc. (“BMI”), are overseen by rate courts which sit in the Southern District of New York.⁷⁶ In 1941 and 1966, the United States brought antitrust actions against ASCAP and BMI respectively.⁷⁷ Both suits resulted in consent decrees that provided certain protections for prospective music licensees.⁷⁸ These consent decrees are largely still in place today.⁷⁹ Where ASCAP or BMI and a

68. MUSIC MARKETPLACE, *supra* note 12, at 18.

69. See, e.g., THE BEATLES, *I Want to Hold Your Hand*, on MEET THE BEATLES! (Capitol Records 1964) (written by John Lennon and Paul McCartney).

70. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 219–20 (8th ed. 2012).

71. *Id.*

72. MUSIC MARKETPLACE, *supra* note 12, at 32–33. The two largest PROs: the American Society of Composers, Authors and Publishers (“ASCAP”) and Broadcast Music, Inc. (“BMI”) together represent close to ninety percent of the songs available for licensing in the United States. Ben Sisario, *Pandora Suit May Upend Century Old Royalty Plan*, N.Y. TIMES (Feb. 13, 2014), <http://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html>.

73. PASSMAN, *supra* note 70, at 239.

74. *Id.*

75. *Id.*

76. See *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32 (2d Cir. 2012).

77. *Id.* at 35.

78. *Id.*

79. See *id.*

STEPHEN E. DEMOS

prospective licensee have reached an impasse over fees, under the consent decree, either party may petition the United States District Court for the Southern District of New York to set a “reasonable” licensing fee.⁸⁰ “Fundamental to the concept of ‘reasonableness’ is a determination of what an applicant would pay in a competitive market, taking into account the fact that [the PRO], as a monopolist, ‘exercise[s] disproportionate power over the market for music rights.’”⁸¹ Agreements reached after arms’ length negotiation between other similar parties in the industry, serve as benchmarks and are often used by the rate court in determining the reasonable value of the music.⁸² In assessing whether another agreement provides a valid benchmark, the district court must consider whether the other agreement dealt with a comparable right, whether it involved similar parties in similar economic circumstances, and whether it arose in a sufficiently competitive market.⁸³

Similarly, publishers may also choose to work with mechanical rights administrators to manage the rights to reproduce the musical works.⁸⁴ These administrators issue mechanical licenses for the publisher, police them, and ultimately account to the publisher.⁸⁵ For their services, the administrators usually keep some percent of the gross monies collected.⁸⁶

Though it has been amended and expanded several times, the 1909 compulsory licensing scheme for the mechanical reproduction of musical works, originally set forth in section 1(e) of the Copyright Act of 1909, largely remains today in what is now 17 U.S.C. § 115.⁸⁷ Under this scheme, anyone wishing to make and distribute mechanical reproductions of a musical work can negotiate directly with the copyright owner to determine a royalty rate.⁸⁸ If the parties are unable to come to an agreement, then the music provider may still secure the reproduction rights by: (1) paying the requisite amount set forth by the compulsory licensing and rate setting provisions of the Act and the Copyright Royalty Board (“CRB”),⁸⁹ and (2) serving a notice of intent

80. *Id.* at 44.

81. *United States v. ASCAP*, 627 F.3d 64, 76 (2d Cir. 2010) (quoting *United States v. BMI*, 426 F.3d 91 (2d Cir. 2005)).

82. *Id.*

83. *See BMI*, 426 F.3d at 95.

84. *MUSIC MARKETPLACE*, *supra* note 12, at 21.

85. *PASSMAN*, *supra* note 70, at 225.

86. *Id.*

87. *Compare* Copyright Act of 1909, Pub. L. No. 60 349, §1(e), 35 Stat. 1075 (YEAR), *with* 17 U.S.C. § 115 (2012).

88. 17 U.S.C. § 115(c)(3)(E)(i) (“License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress and Copyright Royalty Judges.”).

89. 17 U.S.C. § 115(c)(2) (“With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.”).

THE FAIR PAY FAIR PLAY ACT OF 2015

(“NOI”) on the copyright owner no later than thirty days after making and before distributing any phonorecords.⁹⁰ After securing these rights, the licensee must provide statements of account and pay the statutorily prescribed or negotiated royalties on a monthly basis.⁹¹

The CRB is composed of three administrative judges who reexamine the licensing rates and set a new schedule as required.⁹² Rates for licenses are established in accordance with the guidelines set forth in 17 U.S.C. § 801(b)(1) of the Copyright Act.⁹³ Under this section, the CRB calculates adjustments to royalty rates with the following objectives in mind:

*(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, and (d) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.*⁹⁴

The rates currently applicable under § 115 are the result of an industry-wide negotiated agreement that was submitted to the CRB as a settlement of the most recent rate-setting proceeding.⁹⁵

90. 17 U.S.C. § 115(b)(1).

91. 17 U.S.C. § 115(c)(5) states:

Royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under this section. The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

92. 17 U.S.C. § 801.

93. *Id.* at § 801(b)(1) (“[T]he functions of the Copyright Royalty Judges shall be as follows: (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004.”).

94. *Id.*

95. *See* 37 C.F.R. 385 (2015).

STEPHEN E. DEMOS

ii. The Sound Recording

In order to become a sound recording, the musical work must be affixed to an audible medium.⁹⁶ In the music business, unless they choose to remain independent, recording artists often sign with record labels.⁹⁷ Much like the publisher, a record label's typical role is to finance the production of the sound recordings, promote them, and distribute them to music providers.⁹⁸ In some instances, the recording artists are not the same people as the songwriters.⁹⁹ Regardless, both record labels and recording artists usually maintain distinct ownership interests in the sound recordings depending upon the contractual agreement.¹⁰⁰

Rates for the mechanical reproduction rights of sound recordings are negotiated in the free market with the recording artists and record labels directly.¹⁰¹ Rates for the public performance rights of sound recordings are set according to the three tiered scheme in the DPRA as codified in 17 U.S.C. § 114.¹⁰²

III. ISSUES IN TODAY'S MUSIC MARKET AND REGULATORY SCHEME

There are numerous inefficiencies plaguing the music market and its participants. First, songwriters and recording artists do not feel as if they are being compensated fairly for their works and recordings.¹⁰³ Second, inconsistent rate-setting standards provide competitive advantages to select music providers.¹⁰⁴ Third, no federal protections are offered for pre-1972 sound recordings, forcing providers and owners to navigate the differing copyright laws of each state.¹⁰⁵ Fourth, terrestrial radio stations benefit from favorable protections that preclude them from having to pay public performance royalties for sound recordings.¹⁰⁶ Last, market participants are often unable to access the information necessary to correctly identify the rights holders, which causes uncertainty and avoidable copyright infringement.¹⁰⁷

96. 17 U.S.C. § 101 (2012).

97. MUSIC MARKETPLACE, *supra* note 12, at 22.

98. PASSMAN, *supra* note 70, at 63.

99. *See, e.g.,* LIL WAYNE, *A Milli*, on THE CARTER III (Cash Money 2008).

100. PASSMAN, *supra* note 70, at 74.

101. MUSIC MARKETPLACE, *supra* note 12, at 43.

102. *See* 17 U.S.C. § 114. *See also supra* notes 55–59 and accompanying text.

103. *See infra* Part III.A.

104. *See infra* Part III.B.

105. *See infra* Part III.C.

106. *See infra* Part III.D.

107. *See infra* Part III.E.

THE FAIR PAY FAIR PLAY ACT OF 2015

A. *Shift in Artists' Income Streams*

Over the past ten years, many songwriters have experienced a significant decline in their income.¹⁰⁸ As has been stated, many attribute this decline to the shift in how music is consumed.¹⁰⁹ In recent years, music consumption has shifted from purchasing physical albums and digital tracks to Internet streaming and radio services.¹¹⁰ This is problematic for several reasons. Typically, songwriters rely on three sources of income: mechanical reproduction royalties from the distribution of their musical work, synchronization royalties, and performance royalties.¹¹¹ Because consumers are not purchasing as many mechanical reproductions of musical works as they used to, artists are now more reliant upon performance royalties to make a living.¹¹² And, while this reliance has greatly affected artists across the board, it has disproportionately impacted the smaller independent artists who are less capable of financing the lucrative tours and promotion necessary to make up for the loss in album and track sales.¹¹³ Unlike Taylor Swift who can withhold her music from interactive music provider giants such as Apple,¹¹⁴ many smaller artists do not maintain the same negotiating position.¹¹⁵

Digital music providers, on the other hand, do not believe that they are entirely to blame for this trend.¹¹⁶ Many of these services assert that they provide copyright owners with entirely new revenue streams by paying performance royalties to both sound recording and musical work owners.¹¹⁷ In addition, digital music providers also ascribe blame to the general decrease in consumer discretionary spending and the poor accounting practices of intermediaries that receive and distribute the royalty payments.¹¹⁸

108. See MUSIC MARKETPLACE, *supra* note 12, at 69.

109. *Id.*

110. See NIELSEN, *supra* note 1, at 7–8.

111. See MUSIC MARKETPLACE, *supra* note 12, at 69.

112. *Id.* at 70.

113. Nate Rau, *Nashville's Musical Middle Class Collapses*, THE TENNESSEAN (Jan. 28, 2015), <http://www.tennessean.com/story/entertainment/music/2015/01/04/nashville-musical-middle-class-collapses-new-dylans/21236245/> (observing that industry trends have led to “the collapse of Nashville’s music middle class”).

114. See Taylor Swift, *To Apple, Love Taylor*, TUMBLR (June 21, 2015), <http://taylorswift.tumblr.com/post/122071902085/to-apple-love-taylor>;

115. See Annie Lowry, *The Music Middle-Class is Getting Squeezed*, N.Y. MAGAZINE (Dec. 1, 2014), <http://nymag.com/daily/intelligencer/2014/11/music-middle-class-is-getting-squeezed.html>.

116. MUSIC MARKETPLACE, *supra* note 12, at 73–74.

117. *Id.* at 76.

118. *Id.* at 72, 77.

STEPHEN E. DEMOS

B. Inconsistent Rate Setting Standards

Stakeholders have also found that inconsistent rate setting standards which favor older music providers and differ for musical works and sound recordings have inhibited fair competition between fundamentally similar services and products.¹¹⁹ In an age where choosing between Spotify, Pandora, SiriusXM, or the radio requires moving a finger an inch between apps, consumers are able to shop between music providers more frequently than ever before. Given that these services are all directly vying for the consumer's ear, it should follow that they are all competing on even ground. This is not the case, however.

Under 17 U.S.C. § 115, music providers have the option to either negotiate the rates for the mechanical reproduction rights for the musical work or use the compulsory licensing scheme established by the CRB using the four-factor, industry-conscious standard from section 801(b)(1).¹²⁰ As stated earlier, this test balances the interests of the artist, licensee, and the music industry as a whole in an effort to maximize the availability of the creative work and adequately compensate each party for their relative input in the revenue making process.¹²¹ Meanwhile, sound recording owners may negotiate their mechanical reproduction rates directly with music providers in the free market.¹²²

For public performance rights, rates for the public performance rights of musical works are set according to the “reasonable” standard as dictated by the Southern District of New York.¹²³ Whereas, under the three-tiered scheme of 17 U.S.C. § 114, rates for the public performance of sound recordings vary depending upon the music provider.¹²⁴ Interactive music providers negotiate their rates in the free market.¹²⁵ A limited set of older noninteractive music services such as Sirius XM, Music Choice, and Muzak are subject to the more favorable compulsory royalty rates established by the same four-factor, industry-preserving section 801(b)(1).¹²⁶ Internet radio and newer noninteractive subscription services are subject to compulsory royalty rates set using the “willing buyer/willing seller” standard.¹²⁷ And, lastly, terrestrial radio broadcasters are not required to pay royalties at all.¹²⁸

Many believe that the free market or willing buyer/willing seller standard yields more market-oriented rates than those established under section 801(b)(1) and as a

119. *Id.* at 81.

120. *See supra* notes 81–87.

121. 17 U.S.C. § 801.

122. *See MUSIC MARKETPLACE, supra* note 12, at 43.

123. *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 44 (2d Cir. 2012).

124. *See* 17 U.S.C. § 114.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

result generates higher payouts to artists to the detriment of newer services.¹²⁹ Naturally, copyright owners prefer this standard while those protected music services prefer section 801(b)(1)'s industry conscious approach to rate setting.¹³⁰ Despite this disagreement, most stakeholders recognize the problematic nature of a licensing system that maintains different rate setting standards amongst similar competitors in the market.¹³¹

C. Pre-1972 Recordings

Because the Copyright Act does not govern pre-1972 recordings, copyright owners, rights managers, and music providers are forced to navigate the varying state law requirements and protections for these recordings.¹³² In an extensive report that examined the necessity of full federalization of pre-1972 recordings, the U.S. Copyright Office found that “the protections that state law provides for pre-1972 sound recordings are inconsistent and sometimes vague and difficult to discern.”¹³³ This uncertainty has led music providers to take different approaches with regard to royalty payments for these works with some opting to assume the risk of nonpayment.¹³⁴

The issue is best illustrated by a series of lawsuits filed throughout the country by Flo & Eddie Inc., owners of the pre-1972 sound recordings of the American rock group, the Turtles.¹³⁵ 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.¹³⁶

As part of its service, SiriusXM broadcasts decade-specific stations such as “60s on 6,” where the Turtles’ songs can be heard.¹³⁷ Flo & Eddie filed these lawsuits on behalf of itself and all other “owners of sound recordings . . . ‘fixed’ (*i.e.*, recorded) prior to February 15, 1972” alleging that by failing to license or otherwise compensate artists for the right to “perform” their pre-1972 sound recordings, SiriusXM infringed their public performance rights in violation of pertinent state copyright and

129. MUSIC MARKETPLACE, *supra* note 12, at 81.

130. *Id.* at 82.

131. *Id.* at 81.

132. See *Goldstein v. California*, 412 U.S. 546, 571 (1973) (“Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972.”).

133. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTIONS FOR PRE-1972 SOUND RECORDINGS 48 (2011).

134. MUSIC MARKETPLACE, *supra* note 12, at 85.

135. See, e.g., *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692 (S.D. Fla. June 22, 2015); *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 2:13-cv-05693, 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

136. E.g., *Flo & Eddie, Inc.*, 62 F. Supp. 3d at 335.

137. *Id.* at 331.

STEPHEN E. DEMOS

misappropriation laws.¹³⁸ In response, SiriusXM denied that the respective state statutes provided for, or otherwise allowed the inference of, a public performance right in pre-1972 sound recordings.¹³⁹

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."¹⁴⁰ The court held that, pursuant to California statute, copyright ownership of a pre-1972 sound recording includes the exclusive right to publicly perform the recording.¹⁴¹ Accordingly, if anyone wishes to publicly perform such a recording in Florida, they must seek authorization from the recording's owner.¹⁴²

In the New York case, the United States District Court for the Southern District of New York similarly held that Flo & Eddie maintains the exclusive right to perform the sound recordings, and denied SiriusXM's motion for summary judgment on the issue.¹⁴³ 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 Court of Appeals in New York 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.¹⁴⁴

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 the sound recordings.¹⁴⁵ In granting summary judgment for SiriusXM,¹⁴⁶ the court recognized that another Florida federal court held that the state does recognize common law copyrights in sound recordings,¹⁴⁷ but it did not decide whether these common law rights in sound recordings extended to their public performance.¹⁴⁸ The court noted that while California maintains a statute that provides artists with exclusive ownership interests in their sound recordings, and

138. Complaint at 1, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014) (No. 13 CIV 5784).

139. *E.g., Flo & Eddie, Inc.*, 62 F. Supp. 3d at 336.

140. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 2:13-cv-05693, 2014 WL 4725382, at *3, *10 (C.D. Cal. Sept. 22, 2014).

141. *Id.* at *4–*5.

142. *See id.* *9–*10.

143. *Flo & Eddie, Inc.*, 62 F. Supp. 3d at 344, 353.

144. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 272 (2d Cir. 2016), *certifying questions to* 52 N.E.3d 240 (N.Y. 2016).

145. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at *5 (S.D. Fla. June 22, 2015).

146. *Id.*

147. *Id.* at *4.

148. *Id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

New York has binding precedent addressing these issues, Florida does not.¹⁴⁹ 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.”¹⁵⁰

As has been demonstrated, some states have statutes that address the unauthorized use of pre-1972 sound recordings.¹⁵¹ Others offer varying degrees of protection through the common law tort claims of unfair competition or misappropriation.¹⁵² Nonetheless, as a general matter, many stakeholders support at least some form of federalization of protections for these sound recordings.¹⁵³ And, while digital music services would ultimately prefer not to pay royalties for these recordings, there is at least some consensus that a federalized licensing scheme would be preferable and more efficient as opposed to the current method of obtaining licenses over scattered state laws.¹⁵⁴

D. The Terrestrial Radio Exemption

Current law does not require traditional terrestrial or AM/FM radio broadcasters to compensate sound recording owners for the public performance of their recordings.¹⁵⁵ Recording artists and record labels argue that they should be compensated by terrestrial radio stations in the same way that they are by Internet streaming services.¹⁵⁶ In response, terrestrial radio broadcasters argue that they are providing free promotion for these recordings which ultimately translate to record sales.¹⁵⁷ Despite this consideration, recording owners maintain that the promotional

149. *Id.*

150. *Id.*

151. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 2:13-cv-05693, 2014 WL 4725382, * (C.D. Cal. Sept. 22, 2014). The case cites CAL. CIV. CODE § 980(a)(2) which provides:

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

Id.

152. *See, e.g., Flo & Eddie, Inc.*, 62 F. Supp. 3d at 338 (citing *Capitol Records, Inc. v. Naxos of Am., Inc.* (Naxos), 830 N.E.2d 250 (N.Y. 2005)).

153. *See MUSIC MARKETPLACE*, *supra* note 12, at 85.

154. *Id.*

155. 17 U.S.C. § 114.

156. *MUSIC MARKETPLACE*, *supra* note 12, at 87–88.

157. *Id.* at 89.

STEPHEN E. DEMOS

effect of radio airplay is overstated, and that they should not be forced to forgo compensation in exchange for promotion they believe is over-valued.¹⁵⁸

In addition, copyright owners and digital streaming services together urge that the current law gives terrestrial radio an unwarranted market protection and competitive advantage over newer, innovative services in the market which are providing the same product.¹⁵⁹ Like the argument against market protections for older satellite radio broadcasters stated *supra*, they note that wireless communications technologies (*i.e.* cellphones) have developed to the point where newer services are competing directly with traditional terrestrial radio in that consumers are now able to freely choose between whether to stream music through their phone or listen to a terrestrial broadcast providing the same music.¹⁶⁰

E. A Lack of Reliable Copyright Ownership Information

Information asymmetry is also a significant inefficiency plaguing the music market. Licensees complain that the lack of readily available data concerning musical work ownership proves to be quite costly for the industry.¹⁶¹ Many digital services have asserted that the inaccessibility of ownership information leads to costly efforts to identify the rights holders and, in some instances, has resulted in incomplete or incorrect licenses, which, in turn, exposes the licensee to potential statutory infringement damages.¹⁶² This lack of accurate ownership information also affects accounting practices and hinders the efficient distribution of royalties.

To make matters worse, there is a distinct lack of trust among various industry participants. The Digital Media Association (DiMa), a national trade organization that represents the interests of online audio and video industries, has stated that “there is little transparency about what happens to the significant royalties generated from digital music services after they are paid to record labels, music publishers, and PROs, and processed under the financial terms of recording artists’ and songwriters’ own private arrangements with rights owners.”¹⁶³ This sentiment is shared by content creators as well.¹⁶⁴ Both the Screen Actors Guild (SAG-AFTRA) and the American Federation of Musicians (AFM) have also expressed a similar worry that direct licensing deals “can create uncertainty regarding which benefits of the deal are subject to being shared with artists at all.”¹⁶⁵

158. *Id.* at 88.

159. *Id.*

160. *Id.*

161. *Id.* at 107.

162. MUSIC MARKETPLACE, *supra* note 12, at 107.

163. *Id.* at 77.

164. *Id.*

165. *Id.*

THE FAIR PAY FAIR PLAY ACT OF 2015

IV. ANALYSIS AND RECOMMENDATIONS

As has been demonstrated, many of the inefficiencies affecting the music market are interrelated. Consequently, in order to meaningfully address these issues, Congress must enact comprehensive legislation that together: (1) eliminates the differential treatment of sound recordings and musical works, (2) eliminates the terrestrial radio exemption to royalty obligations, (3) incorporates pre-1972 recordings into the federal regulatory scheme, (4) establishes a consistent fair market value standard for licenses across the entire market, and (5) creates incentives that foster the public availability of accurate song ownership data and accounting.

A. Eliminate the Differential Treatment of Sound Recordings and Musical Works

As illustrated above, inconsistent rate setting standards result in significantly higher rates being paid for sound recordings than for musical works.¹⁶⁶ This can be explained by the fact that, apart from noninteractive streaming uses, sound recording owners are able to negotiate their royalty rates in the free market while owners of musical works are subject to the compulsory federal rate-setting entities that price their mechanical reproduction rights with an industry-preserving consideration.¹⁶⁷

In order to solve this discrepancy, Congress must establish uniformity in how rates are set for both. This would mean that where sound recording owners have the ability to negotiate digital rates in the open market, so should owners of musical works. Further, where sound recording owners are subject to compulsory licensing and rate setting procedures, rates for musical works should remain similarly regulated.

Although implementation of this system is complicated by the differing licensing frameworks, simply establishing a free-market rate-setting standard for the licensing of musical works to interactive services would significantly address the issue. Ultimately, treating analogous uses alike in the digital environment is more likely to yield equitable rates between sound recordings and musical works without necessarily requiring that these products be priced equivalently.

B. Eliminate the Terrestrial Radio Exemption to Royalty Obligations

As has been explained, the federal government does not require terrestrial radio broadcasters, a multi-billion dollar industry, to pay sound recording royalties to those who contribute the sound recordings they play daily.¹⁶⁸ Apart from being inequitable to rights holders, the terrestrial radio exemption from paying royalties harms competing satellite and Internet radio providers who must pay for the use of those

166. See *supra* Part III.B.

167. *Id.*

168. See *supra* Part III.D.

STEPHEN E. DEMOS

same sound recordings.¹⁶⁹ In a market where artists rely more heavily on income from public performances rather than record sales, the inability to collect from terrestrial radio increases the pressure on paying sources and hurts the artist.¹⁷⁰ Furthermore, as consumption patterns move away from music ownership, the potential for sales is becoming less relevant, and the promotional value of radio less useful.¹⁷¹

Nonetheless, the creation of a terrestrial sound recording performance right need not overlook or negate the question of promotional value. Instead, this factor can be taken into account by a rate setting authority, or in private negotiations, to arrive at an appropriate royalty rate. Such an approach would appear to be a logical solution as it allows for all of these considerations to be taken into account.

C. Incorporate Pre-1972 Recordings into the Regulatory Scheme

Since 2011, there have been significant developments in Florida, California, and New York state case law which demonstrate the need for a unified federal approach for all sound recordings.¹⁷² In these jurisdictions, trial courts have ruled unevenly on whether performances of the plaintiffs' pre-1972 sound recordings are protected under applicable state law.¹⁷³ This means that, in certain states, music providers must obtain licenses from sound recording owners to perform the recordings while in others they do not.¹⁷⁴ Even though several states have recognized these rights, the copyright protections are not necessarily identical across different jurisdictions and interested licensees may not rely upon the predictable procedures of sections 112 and 114 to obtain licenses.¹⁷⁵

In 2014, SoundExchange¹⁷⁶ and several other major players in the music industry lobbied for legislation known as the RESPECT Act to "provide for the payment of royalties for the performance of sound recordings fixed before February 15, 1972, and for other purposes."¹⁷⁷ The Act would require digital music services to pay royalties for sound recordings fixed before February 15, 1972 in the same manner as they pay royalties for sound recordings protected by federal copyright that are fixed after such date.¹⁷⁸ It also provides a remedy by establishing a private right of action in

169. *Id.*

170. *See supra* Part III.A.

171. *See supra* Part III.A.

172. *See supra* notes 114–31.

173. *See supra* notes 114–31.

174. *See supra* notes 114–31.

175. *See supra* notes 114–31.

176. SoundExchange is the independent nonprofit organization that collects and distributes digital performance royalties to featured artists and copyright holders.

177. *See* RESPECT Act, H.R. 4772, 113th Cong. (2014).

178. *Id.* at § 2.

THE FAIR PAY FAIR PLAY ACT OF 2015

federal court if a digital music service fails to make such payments.¹⁷⁹ While this proposed legislation represents a step in the right direction, it still fails to confer the full federal copyright protections to pre-1972 rights owners that modern music artists enjoy. This disproportionate treatment makes little sense in an era where pre-1972 music is easily re-mastered and distributed widely in digital form. For these reasons, full federalization remains the best alternative.

D. Establish a Consistent Fair Market Standard for All Music Distribution Services

As has been demonstrated, where the government has stepped in to establish rates for the use of music, it has acted in an inconsistent fashion.¹⁸⁰ In some cases, the law provides that the rate setting authority should attempt to emulate the free market.¹⁸¹ In others, the law imposes a more policy-oriented industry conscious approach.¹⁸²

There is little reason for the inconsistency in how rates are set across fundamentally similar services like SiriusXM and Pandora. There is no longer a threatened piano roll monopoly and satellite radio is a mature business that no longer needs the protection that it once did. Furthermore, the notion that music creators subsidize those who seek to profit from their works is fundamentally unfair. For these reasons, Congress should establish a uniform fair market standard across the board for these fundamentally similar services.

E. Create Incentives that Promote Accurate Song Ownership Data and Accounting

There appears to be unanimous agreement among industry participants that accurate, and accessible licensing information and data are essential to an efficient music licensing system and market.¹⁸³ Some stakeholders have suggested that the government undertake the task of creating and maintaining a comprehensive database.¹⁸⁴ As simple as that solution may seem, having the government start from scratch and mine/constantly monitor millions of data points would take years and millions of dollars to accomplish. Not only would such a service be incredibly costly for the American taxpayers, but these functions are largely already performed by existing private organizations in collaboration with individual stakeholders. For this reason, the government should instead establish incentives through the statutory licensing regime that encourage private actors to coordinate their efforts and contribute to a publicly accessible and authoritative database. The benefits of administrative efficiency and ensuring that the correct rights-holders are

179. *Id.*

180. *See supra* Part III.B.

181. *See supra* Part III.B.

182. *See supra* Part III.B.

183. *See supra* Part III.E.

184. MUSIC MARKETPLACE, *supra* note 12, at 183.

STEPHEN E. DEMOS

compensated would likely outweigh any additional costs to the rights holders and licensees that may result.

V. THE FAIR PLAY FAIR PAY ACT

The Fair Play Fair Pay Act, if passed, would result in extensive changes to the music licensing system. Its provisions establishing (1) equitable treatment for terrestrial broadcasts and Internet services, (2) uniform rate setting procedures, (3) protections for pre-1972 recordings, and (4) mechanisms to track ownership and ensure royalties are properly distributed would significantly address many of the problems outlined above.

A. Equitable Treatment for Terrestrial Broadcasts and Internet Services

One of the main objectives of the FPFPA is to eliminate the differential treatment between terrestrial and digital-radio transmissions so that that all broadcasters would be required to pay for their public performance of sound recordings.¹⁸⁵ As discussed above, the fact that 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 are not is problematic.

Section 2 of the bill would amend the Copyright Act to eliminate language contained within § 106 limiting this right to digital audio transmissions.¹⁸⁶ Specifically, the bill does so by redefining “audio transmission” to include the transmission of any sound recording, regardless of its audio format.¹⁸⁷ 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.”¹⁸⁸ Thus, if the FPFPA is passed, terrestrial radio stations will no longer enjoy the same protections that they do now and would be required to pay royalties.

B. Ensuring Platform Parity: Uniform Rate Standard

Also 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.¹⁸⁹ When considered alongside its implementation of a terrestrial public performance right, the FPFPA would amend

185. The Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 2 (2015).

186. *Id.*

187. *Id.*

188. *Id.*

189. H.R. 1733 § 4.

THE FAIR PAY FAIR PLAY ACT OF 2015

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.¹⁹⁰ This leveling of the playing field would undoubtedly address several of the issues affecting artists and newer noninteractive services under the current scheme.

C. Equitable Treatment of Legacy 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.¹⁹¹ Section 7 of the FPFPA 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.¹⁹²

Similar to the RESPECT Act, this section provides a substantial benefit to the owners of some of the most prolific and valuable recordings of the twenty-first century, but it still does not provide the full federal protections enjoyed by modern artists.

D. Allocation of Payments to Music Producers: Letters of Direction

Another component of the FPFPA is to secure payment rights for producers, mixers, engineers, and those who participate in the production of sound recordings, but who do not themselves hold an ownership interest in the recording's copyright.¹⁹³ Section 9 of the bill would implement a policy that would allow producers and others involved in the creative process to submit letters of direction to third-party collection societies (such as SoundExchange) that would entitle these individuals to receive their royalty payments directly from the collection society.¹⁹⁴ This would significantly address issues surrounding uncertain song ownership data and royalty payment information without placing a costly burden on rights holders.

190. *Id.*

191. *See* H.R. 1733 § 7.

192. *Id.*

193. *See* H.R. 1733 § 9.

194. *Id.*

STEPHEN E. DEMOS

VI. CONCLUSION

In summary, in order to meaningfully and fully address the issues facing the music marketplace, Congress must enact comprehensive legislation that together: (1) eliminates the differential treatment of sound recordings and musical works, (2) eliminates the terrestrial radio exemption to royalty obligations, (3) incorporates pre-1972 recordings into the federal regulatory scheme, (4) establishes a consistent fair market value standard for licenses across the entire market, and (5) creates incentives that foster the public availability of accurate song ownership data and accounting. The Fair Play Fair Pay Act embodies many of these policy objectives and represents common sense legislation that could meaningfully address the issues facing the music market today.

