AN INTERNATIONAL PERSPECTIVE: WHY THE UNITED STATES SHOULD PROVIDE A PUBLIC PERFORMANCE RIGHT FOR NON-DIGITAL AUDIO TRANSMISSIONS

*By: Miranda Bullard**

I. INTRODUCTION

Musical works contain two distinct copyrights: (1) the underlying composition or the musical work, including the lyrics, and (2) the sound recording, or master recording.[1] Both the songwriter and recording artist hold a distinct copyright for any given recorded musical performance.[2] Music publishers often manage and control the copyright in the composition[3] and record labels often fully or partially own the copyright to the sound recording.[4] While musical compositions initially received federal protection under the Copyright Act of 1909,[5] sound recordings did not receive federal protection until 1972.[6]

Ever since radio stations began broadcasting recorded music, recording artists and the commercial radio stations broadcasting their works have disagreed about whether stations should be able to broadcast recorded works without paying a royalty to the recording artist.[7] Since the Digital Performance Right in Sound Recordings Act (DPRA) was passed in 1995,[8] there have been disputes between

---

* J.D. Candidate, Temple University James E. Beasley School of Law, 2017; B.M., Music Business, New York University Steinhardt School of Culture, Education, and Human Development, 2014. I would like to thank Professor Donald Harris for his guidance and support during the writing of this comment. I would also like to thank my friends and family for their unwavering and continuing support throughout all of my academic endeavors.

1. Copyright Act of 1976, 17 U.S.C. § 102 (2012) (indicating the categories of copyrightable works).

2. *See id*. (granting copyright protection for both musical works, including accompanying lyrics, and sound recordings).

3. *See* Paul Renikoff, *Now You Know Everything About Music Publishing*, DIGITAL MUSIC NEWS (Feb. 28, 2014), http://www.digitalmusicnews.com/2014/02/28/understandpublishing/ (indicating that songwriters often get a music publisher to control and manage their songs and in exchange the publisher receives a cut of the royalty streams generated from the composition).

4. *See id*. (indicating that recording artists typically transfer ownership of the sound recording copyright to the record label in exchange for future royalty payments).

5. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101–810.

6. *See* Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 39 (1971) (establishing federal copyright protection for sound recordings beginning in 1972); *see also infra* note 22 and accompanying text.

7. Melanie Jolson, *Business and Technology: Congress Killed the Radio Star: Revisiting the Terrestrial Radio Recording Exemption in 2015*, 2015 Colum. Bus. L. Rev. 764, 772–73 (2015). For a detailed discussion of the history of the adoption of the public performance right in sound recordings, see *id*. at 770–79.

8. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109

the copyright holders of sound recordings and the terrestrial AM or FM radio broadcasters who exploit these works.[9] These disputes have been about whether copyright holders should receive royalties for audio transmissions of their works. While broadcasters argue that terrestrial radio provides an essential and valuable service to artists by providing free marketing and wide-scale promotion of recorded works,[10] recording artists have responded by noting the unequal treatment accorded to songwriters.[11] Songwriters are compensated for their compositions' performance over terrestrial radio, while the recording artists are not.[12]

Because of the current legal scheme, several other situations exist that allow someone to publicly perform a sound recording without permission from the copyright holder of the recording.[13] For example, since sound recordings do not receive a general public performance right,[14] a disc jockey (DJ) performing in a nightclub or a contractor playing a jukebox on the sidewalk does not need a license from the sound recording rightsholder.[15] The limited performance rights for sound recordings are identified in section 106(6) of the Copyright Act and are further qualified by several exemptions codified in section 114.[16]

In its enactment of the DPRA in 1995, Congress attempted to address industry concerns that consumers would not purchase songs if they had access to any song they wanted at any time, without "upsetting the longstanding [sic] business and contractual relationships"[17] among the different entities and parties in the industry by exempting "nonsubscription broadcast transmission[s]."[18] However, this longstanding arrangement has enabled terrestrial broadcasters to take advantage of recording artists.[19] As such, Congress should pass legislation, such as the Fair Play

---

Stat. 336 (2012) (codified at 17 U.S.C. § 106(6)).

9. *See* Steven V. Podolsky, *Chasing the Future: Has the Digital Performance in Sound Recordings Act of 1995 Kept Pace with Technological Advances in Musical Performance, or is Copyright Law Lagging Behind?*, 21 HASTINGS COMM. & ENT. L.J. 651, 674 (1999) (indicating that both performers' rights agencies and radio station owners lobbied Congress during its consideration of the DPRA).

10. *See infra* Section II.A.

11. *See infra* Section II.B.

12. *Compare* Copyright Act of 1976, 17 U.S.C. § 106(1) (2012) *with* 17 U.S.C. § 106(6) (distinguishing the author's exclusive right to reproduce the copyrighted work in phonorecords and with respect to sound recordings only, to perform the copyrighted work publicly by means of a digital audio transmission).

13. However, permission would be needed from the songwriter of the underlying work. *See* Copyright Act of 1976, 17 U.S.C. § 106(4) (giving the copyright owner of musical works the exclusive right to perform the work publicly).

14. *See* Copyright Act of 1976, 17 U.S.C. § 106(6) (2012) (limiting the author's exclusive rights with respect to sound recordings).

15. JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 432 (4th ed. 2015).

16. *See* 17 U.S.C. § 106(6) (identifying a limited performance right for sound recordings and providing exemptions to this right).

17. COHEN, ET AL., *supra* note 15, at 432 (quoting S. Rep. No. 104-128 at 17 (1995)).

18. *Id*. (quoting 17 U.S.C. § 114(d)(1)(A)–(B)).

19. *See* Steven Koff, *Recording Artists and Radio Stations Fight over Royalties, Air Play and Spin*, CLEVELAND.COM, (June 13, 2010), http://www.cleveland.com/open/index.ssf/2010/06

Fair Pay Act,[20] that would eliminate the long-standing limitation on performers' public performance rights.[21]

II. AN OVERVIEW OF COPYRIGHT PROTECTION FOR SOUND RECORDINGS

In the United States (U.S.), sound recordings were not protected under federal copyright law until 1972.[22] Passed in 1971, the Sound Recordings Act granted federal copyright protection to sound recordings made on and after February 15, 1972.[23] One of the reasons that it took so long for sound recordings to receive federal copyright protection was because under the Copyright Act of 1909,[24] new technologies were not automatically protected and amendments had to be passed to provide for new technologies.[25] Although pre-1972 sound recordings received protection under state copyright laws, Congress did not provide copyright protection for sound recordings until cassette tapes made copying easier than ever before.[26] In addition, the U.S. and other countries, as a matter of policy, were hesitant to give producers and performers formal protections for sound recordings under copyright law.[27] This hesitancy resulted mostly from the belief that because sound recordings are often recordings of other copyrighted works, such as musical compositions, the recordings are therefore "the result of a mechanical process" as opposed to "creative authorship."[28]

Many other countries, such as Japan, solved this problem by protecting sound recordings under neighboring, or related, rights as opposed to traditional copyright

---

/recording_artists_and_radio_st.html (documenting Sam Moore, a musician whose song was played daily on the radio but who did not receive compensation for his work.).

20. *See* Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015) (protecting musicians by requiring radio stations to pay them royalties at fair market value for playing their music).

21. *See* 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 ("Because the U.S. doesn't pay artists when their songs are played on the radio, they also do not receive compensation when their songs are played in other countries. The only other countries other than the U.S. which do not pay a master recordings royalty on terrestrial radio broadcasts are North Korea, Iran and China.").

22. Sound Recordings Act, Pub. L. No. 92-140, 85 Stat. 39 (1971), amended by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102).

23. *Id*.; Steven Seidenberg, *Pay to Play, State Copyright Law Now Gives Musicians Performance Rights,* ABA Journal, April 2015, at 17, 17.

24. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 *repealed by* Copyright Act of 1976, 17 U.S.C. §§ 101-810.

25. Jonathan Bailey, *What's the Deal With Pre-1972 Sound Recordings?*, PLAGIARISM TODAY (Aug. 29, 2013), https://www.plagiarismtoday.com/2013/08/29/whats-the-deal-with-pre-1972-sound-recordings/.

26. *Id*.

27. *See* DAVID J. MOSER & CHERYL L. SLAY, MUSIC COPYRIGHT LAW 240 (2012) (indicating a hesitance for countries to give traditional author's rights to sound recordings).

28. *See id*. (indicating that creative authorship consists of artistic expression and technical skill).

law.[29] Neighboring rights acknowledge that "even if sound recordings are not the type of creation that merits protection under copyright law, they are closely related, and their creators contribute [to the] distribution or transmission . . . of copyrighted works."[30] However, as a general rule, common law countries protect under copyright law "at least some of the subject matter that civil law countries usually protect under . . . neighboring rights."[31] As such, the U.S. elected to adopt protection for sound recordings under its traditional copyright laws as opposed to doing so by creating a neighboring rights regime.[32]

One of the exclusive rights a copyright holder receives under the U.S. Copyright Act of 1976 (Copyright Act) is the right to publicly perform his or her work.[33] However, public performance rights did not exist for sound recording copyright holders until 1995, when Congress amended section 106 of the Copyright Act.[34] For the first time, Congress provided that performances of a sound recording would receive royalties for their public performance, but this right was limited to digital public performances.[35] Congress defined "digital transmission" as "a transmission in whole or in part in a digital or other non-analog format."[36]

Unlike other works of authorship, in the case of sound recordings specifically, the copyright owner has the exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[37] However, because this exclusive right only extends to *digital* audio transmissions, an exemption is carved out for when terrestrial radio broadcasters exploit copyrighted works.[38] Under the current Copyright Act, copyright holders of sound recordings do not receive any compensation for their recordings' transmissions on traditional AM or FM radio.[39] Although "[t]he purpose of the DPRA was to ensure that performing artists, record companies and others 'whose livelihood depends upon effective copyright protection for sound recordings, [would] be protected as new technologies affect

29. *See* Chosakukenhō [Copyright Act Japan], Act No. 65 of 2010, art. 89 para. 6, translated in (Copyright Research and Information Center [CRIC]), http://www.cric.or.jp/english/clj/cl4.html (Japan) ("The rights referred to in paragraphs (1) to (4) . . . shall be called "neighboring rights.").

30. MOSER & SLAY, *supra* note 27, at 240.

31. PAUL GOLDSTEIN & BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 234 (3d ed., 2012).

32. *See* Copyright Act of 1976, 17 U.S.C. § 106(6), 114 (2012) (incorporating protections for sound recording with the exclusive rights of all types of copyrighted works).

33. *Id*. § 106(4).

34. *See* Digital Performance Right in Sound Recordings Act of 1995, 109 Stat. 336 (amending the Copyright Act of 1976); *see also* Donald S. Passman, All You Need to Know About the Music Business 176, 345 (9th ed. 2015) (indicating that master recordings did not receive any public performance rights under U.S. law until 1995).

35. Copyright Act of 1976 § 106(6).

36. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 347 (codified at 17 U.S.C. § 101 (2012)).

37. *Id*.

38. *Id*.

39. *See id*. (explaining that traditional AM or FM radio uses analog instead of digital transmissions.).

the ways in which their creative works are used,'"[40] the failure to enact a full public performance right for sound recordings seriously limited protections for performing artists and record companies.[41]

Another amendment enacted in October 1998,[42] the 1998 Digital Millennium Copyright Act (DMCA),[43] included webcasting as a category of the performance right.[44] This inclusion was made largely due to the fact that webcasting did not seem to clearly fall under the language of any of the three transmission categories laid out in the DPRA.[45] However, the limited webcasting right applied specifically to satellite radio, Internet radio, and cable television music channels, while terrestrial broadcast radio continued to be exempt.[46] As early as 2004, the U.S. Copyright Office's position was that Congress should grant a full performance right in sound recordings to labels and artists due to the increased use of high-definition (HD) radio.[47] Even though many over-the-air radio stations converted their signals to digital in order to provide HD radio, broadcasters again lobbied Congress to exclude digital over-the-air broadcasts from the definition of digital performances.[48] The only time broadcasters must pay a royalty to a recording artist "is when an HD radio station simulcasts its signal over the Internet," meaning it streams the signal on the Internet at the same time that it broadcasts over the air.[49] This requirement was promulgated, in part, by a Copyright Office regulation[50]

---

40. Jessica L. Bagdanov, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14 CAP. L. REV. 135, 141 (2010) (quoting S. Rep. No. 104-128, at 10).

41. *See* Copyright Act of 1976, 17 U.S.C. § 106(6) (2012) (limiting the author's exclusive rights for sound recordings).

42. Copyright Act of 1976, 17 U.S.C § 114.

43. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2861 (1998) (codified at 17 U.S.C. § 114 (2012)).

44. Todd Brabec, *The Performance Right—A World in Transition*, 41 MITCHELL HAMLINE L. REV. 16, 34–35 (2016). Webcasting is the transmission of "radio broadcasts over the Internet, whether the public at large or directly to individuals upon request." Bagdanov, *supra* note 40, at 136 (quoting Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery*, 20 ENT. L. REP. 4, 4 (1998)).

45. Brett Keller, *Full Summary of the Digital Millennium Copyright Act*, FUTURE OF MUSIC COALITION (Aug. 2, 2004), http://futureofmusic.org/article/full-summary-digital-millennium-copyright-act.

46. Brabec, *supra* note 44, at 35. Although this amendment prompted the payment of royalties to recording artists when their sound recording was broadcast through popular sources including SiriusXM, Pandora, and MTV, it did nothing to change the DPRA's language exempting terrestrial radio broadcast transmissions. *Id*.

47. *Copyright Office Seeks Performance Right for HD Radio*, BILLBOARD (July 26, 2004, 12:00 AM), http://www.billboard.com/biz/articles/news/1431828/copyright-office-seeks-performance-right-for-hd-radio.

48. Passman, *supra* note 34, at 346; *see also* 17 U.S.C. § 114(d)(A) (indicating a non-subscription broadcast transmission is exempt and does not constitute infringement under the exclusive rights of authors laid out in § 106(6)).

49. Passman, *supra* note 34, at 322.

50. *See* Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77292 (Dec. 11, 2000) (describing the Copyright Office's interpretation of nonsubscription

stating that the broadcaster must obtain a compulsory statutory license or a negotiated license for the sound recordings to be transmitted over the Internet.[51]

A persuasive circuit court opinion, issued five years after the DMCA was enacted, accepted the Copyright Office's position that Internet streaming of AM or FM broadcast signals would not be given the same non-subscription broadcast transmission exemption provided to over-the-air terrestrial radio broadcasts.[52] Although the NAB challenged the Copyright Office's authority to issue the federal regulation codifying its position,[53] the regulation was approved in the widely accepted circuit court opinion, *Bonneville Int'l Corp. v. Peters*.[54] The court held that neither the DPRA[55] nor the DMCA[56] extended the Copyright Act's section 114(d)(1)(A) non-subscription broadcast transmission exemption to cover the Internet streaming of AM or FM broadcast signals.[57] Due to the holding in this case and the codified federal regulation, a radio station simulcasting a terrestrial broadcast submission pays a public performance royalty is "for the Internet streaming portion (but not the over-the-air part)."[58]

A. History of the Terrestrial Broadcast Exemption

The terrestrial broadcast exemption that gave authors rights only for "digital audio transmissions" came primarily from the lobbying efforts of broadcasters.[59] One of the lobbyists, the National Association of Broadcasters (NAB), maintains that the exemption is warranted for several reasons.[60] After the Performance Rights

---

broadcast transmissions).

51. MOSER & SLAY, *supra* note 27, at 121; *see also* COHEN, ET AL., *supra* note 15, at 432 (indicating that an Internet radio broadcaster must obtain a compulsory statutory license or negotiate a license to comply with the Copyright Act). The requirements for obtaining a compulsory statutory license under the Copyright Act are contained in § 114. Copyright Act of 1976, 17 U.S.C. § 114 (2012).

52. *See Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 499–500 (3d Cir. 2003) (indicating that the Copyright Act's § 114(d)(1)(A) exemption covers only over-the-air radio broadcast transmissions).

53. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77292 (2000).

54. *Bonneville Int'l Corp.*, 347 F.3d at 499–500.

55. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. § 106(6) (2012)).

56. Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2860 (1998) (codified at 17 U.S.C. § 114 (2012)).

57. *See Bonneville Int'l Corp.*, 347 F.3d at 499–500 ("The legislative history shows that DRPA §114(d)(1)(A)(iii) created a nonsubscription broadcast transmission exemption for traditional over-the-air broadcasting in order to preserve the symbiotic relationship between broadcasters and the recording industry. And the DMCA's amendments to § 114(d) were 'not intended to affect the exemption for nonsubscription broadcast transmissions.'").

58. Passman, *supra* note 34, at 346 (emphasis omitted).

59. *See generally* Jane Mago, Benjamin Ivins & Suzanne Head, *Should the U.S. Lead or Follow?*, Nat'l Assoc. of Broadcasters, (Mar. 2009), https://www.nab.org/documents/advocacy/performanceTax/032009_Should_the_US_Lead_or_Follow.pdf.

60. *Id.*

Act was introduced in 2007,[61] and after it was reintroduced in 2009,[62] the NAB lobbied heavily against its passage and "gained strong support in the House of Representatives to stop it from passing."[63] The Performance Rights Act would have eliminated the terrestrial broadcast exemption, but the NAB argued that the promotional value of radio makes the payment of royalties to recording artists inappropriate.[64] The organization also stated that radio promotion drives record sales and ticket sales for live performances.[65]

However, whether terrestrial transmissions are promotional has little to do with whether recording artists should receive the same protections and compensation as the songwriters for the underlying composition being played. Performances on Internet radio,[66] satellite radio, and television programs are also promotional.[67] None of these types of performances receive exemptions under the Copyright Act.[68] Performers receive royalty payments from Internet and satellite radio providers[69] and receive negotiated payments for synchronization licenses for

61. Performance Rights Act, H.R. 4789, 110th Cong. (2007); Performance Rights Act, S. 2500 110th Cong. (2007).

62. Performance Rights Act, H.R. 848 111th Cong. (2009); Performance Rights Act, S. 379 111th Cong. (2009).

63. Jolson, *supra* note 7, at 786.

64. *See id*. at 786–87 ("The NAB's central argument was that radio's promotional value is worth millions and that the additional cost of sound recording royalties would be destructive to its business.").

65. *See* MOSER & SLAY, *supra* note 27, at 121 (providing that broadcasters do not want to have to pay more than they already do to play copyrighted songs when the artists are already benefitting from increased sales for records and live performance); *see also* Ann Sanner, *Musicians Want Radio Stations to Pay to Play Tunes*, ABC NEWS, http://abcnews.go.com/Business/story?id=6952903 (last visited Oct. 21, 2016) (finding that in addition to radio play increasing record and concert sales for artists, the payment of royalties to recording artists would put thousands of radio jobs at risk). However, the same sort of argument that free play increases record and concert ticket sales is also sometimes cited in reference to the effects of the illegal downloading of music from peer-to-peer networks. *See Digital Piracy not Harming Entertainment Industries: Study*, CBC NEWS (Oct. 3, 2013, 5:33 PM), http://www.cbc.ca/news/business/digital-piracy-not-harming-entertainment-industries-study-1.1894729 (indicating that file sharers tend to spend more on content than those who only consume legal content). Yet, "court decisions in cases involving filesharing companies such as Napster, Aimster, Grokster, Limewire, and The Pirate Bay have all agreed that people who use filesharing software to download copyrighted works without permission are committing direct copyright infringement." MOSER & SLAY, *supra* note 27, at 273.

66. *See* Bagdanov, *supra* note 40, at 136–37 ("Internet radio may also be a significant way for record companies to *increase* record sales.").

67. *See* Keith Caulfield, *The Power of Placements*, BILLBOARD, Feb. 10, 2007, at 20 (describing how digital sales of The Fray's song "How to Save a Life" increased 283% the week after it was first heard on an episode of the TV series, "Grey's Anatomy").

68. *See* Copyright Act of 1976, 17 U.S.C. § 106(6), § 114 (2012) (providing an exemption for "digital" and "nonsubscription" terrestrial radio performances, but not for Internet, satellite or audiovisual performances).

69. *See* Copyright Act of 1976, 17 U.S.C. § 114 (2012) (providing the requirements to obtain statutory licenses for certain types of audio transmissions).

audiovisual performances of master recordings.[70] In addition, with so many new media outlets, such as social media, taking an important role in artist promotion strategies, broadcasters' "publicity-as-payment" justification loses its efficacy.[71]

The NAB has also argued that the additional cost of sound recording royalties would force some terrestrial stations into bankruptcy and put thousands of radio jobs at risk.[72] However, a 2015 proposed amendment, the Fair Play Fair Pay Act, would amend the Copyright Act to provide "protections for small broadcasters, public broadcasters, and non-commercial and college radio."[73] The Future of Music Coalition, an advocacy group for musicians and a proponent of the Fair Play Fair Pay Act, states:

> This means that [these types of broadcasters] wouldn't be overly burdened by the enactment of an AM/FM performance right. Small commercial radio stations would pay a royalty rate of $500 per year if their annual revenue amounts to less than [$]1,000,000. An individual, FCC-designated public broadcasting station would pay $100 per year. These limits are welcome—after all, it's the smaller and noncommercial broadcasters who are the most adventurous in terms of playlists.[74]

This approach is more broadcaster-friendly than the Performance Rights Act because the Fair Play Fair Play Act includes a flat annual fee that applies to broadcasters with $1 million in revenues,[75] as opposed to the $1.25 million in yearly revenues proposed under the Performance Rights Act.[76]

Another concern for the NAB is whether any new royalties would adversely affect struggling radio stations to provide important information including local news, weather, and public service announcements.[77] However, the protections of a

---

70. *See* Steve Gordon, *A Simple Guide to Signing the Best Sync Deal Possible,* DIGITAL MUSIC NEWS (May 25, 2015), http://www.digitalmusicnews.com/2015/05/25/a-simple-guide-to-signing-the-best-sync-deal-possible/ (describing the process for artists to receive royalty income for synchronization or "sync" licenses in audiovisual works such as movies, television, TV commercials and video games).

71. *See* Laura E. Johannes, *Hitting the Right Notes: The Need for a General Public Performance Right in Sound Recordings to Create Harmony in American Copyright Law*, 35 WASH. U. J.L. & POL'Y 445, 465 (2011) (explaining how generating publicity in the music industry has changed with the increase of media outlets).

72. *See* Jolson, *supra* note 7, at 786–87 (stating the NAB's argument that the additional cost of sound recording royalties could destroy the terrestrial radio industry); *see also* Sanner, *supra* note 65 and accompanying text (stating that the NAB foresees thousands of radio jobs at risk if radio stations pay musicians royalties).

73. Casey Rae, *A Look Inside the Fair Play Fair Pay Act*, FUTURE OF MUSIC COALITION (Apr. 12, 2015, 3:12 PM), http://www.futureofmusic.org/blog/2015/04/12/look-inside-fair-play-fair-pay-act.

74. *Id*. This tiered approach counters the NAB's argument that the Fair Play Fair Pay Act would pose a threat to smaller stations. *See* Linda George, *Fair Play and American Exceptionalism*, MUSIC BUS. J. (Oct. 2015), http://www.thembj.org/2015/10/fair-play-and-american-exceptionalism/ ("This tiered system is in response to the assertion of large radio conglomerates that neighboring rights pose a potential threat to smaller stations.").

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

76. Performance Rights Act of 2009, H.R. 848, 111th Cong. § 379 (2009).

77. *See* Rae, *supra* note 73 (discussing how the courts have contemplated the important role

tiered royalty structure would largely address this issue as well, protecting smaller stations that provide important public service announcements.[78] In the past, Congress has found persuasive the broadcasters' argument that removing this long-standing exemption from copyright law could lead to less copyrighted music being performed over the air.[79] This would supposedly be caused by radio stations incorporating more talk radio or increasing the number of advertisements to make up for the expense of paying additional royalties.[80]

However, budgetary constraints apply to other copyright industries as well, including all entertainment companies. High licensing costs for music should not be a valid reason for exempting terrestrial radio from paying recording artists for their contributions. This is especially true when radio stations depend on these contributions to produce advertising revenue, and therefore depend on recording artists' copyrighted contributions for their own profits.[81] For example, although music clearances might cost filmmakers up to 10–15% of a film's budget, the NAB does not seem to be arguing that filmmakers should not have to pay licensing fees to use the copyrighted music in their films.[82] However, this example is analogous to broadcast radio because while these costs could be prohibitive to some filmmakers, a better music repertoire can help lead to higher profitability for the film.[83] After all, copyright gives the holder the exclusive rights codified in section 106 of the Copyright Act, and if someone other than the copyright holder wants to take advantage of that exclusive right, the user must ordinarily compensate the copyright holder.[84] Thus far, one of the most inexplicable exceptions has been concerning terrestrial radio broadcasting. In the same way filmmakers are benefiting from the sale of the final audiovisual work, terrestrial radio broadcasters are benefiting directly from the transmission of these sound recordings, in the form

---

of small stations in providing essential local news and weather information during national emergencies and disasters).

78. *See id*. (indicating that a public broadcasting station might pay as little as $100 per year in royalties if the Fair Play Fair Pay Act of 2015 is passed).

79. BRIAN T. YEH, CONG. RESEARCH SERV., EXPANDING THE SCOPE OF PUBLIC PERFORMANCE RIGHT FOR SOUND RECORDINGS: A LEGAL ANALYSIS OF THE PERFORMANCE RIGHTS ACT (H.R. 848 AND S. 279) 6 (2009).

80. *Id*.

81. *See* Artemis Black, *You Have to Fight for Your Right, Performance Rights That Is: Terrestrial Radio's Over-the-Air Exemption for Sound Recordings*, DIGITAL MUSIC L. BLOG (Apr. 4, 2014), http://www.digitalmusiclaw.org/tag/international-copyright/ (indicating that terrestrial broadcasters depend on recording artists for advertising revenue).

82. *See Budgeting Considerations When Using Music in Films*, THINKSYNC MUSIC, http://thinksyncmusic.com/about/guides/music-in-films-budgeting/ (last visited Oct.21, 2016) (stating that while setting aside 10–15% of a film's overall budget for music is reasonable, better music requires filmmakers be willing to pay for it and better music can mean higher costs).

83. *See* JEFFREY BRABEC & TODD BRABEC, MUSIC, MONEY, SUCCESS AND THE MOVIES: THE BASICS OF "MUSIC IN FILM" DEALS 2 (2008), https://www.ascap.com/~/media/Files/Pdf/career-development/m_m_s_m.pdf.

84. *See* Copyright Act of 1976, 17 U.S.C. § 106 (2012) (codifying the exclusive rights of authors).

of advertising revenues.[85] The NAB's argument that radio play has promotional value, and therefore, radio stations should not have to pay, should be criticized because the argument also applies to several other types of public performances where there are no similar exemptions in the copyright law for the copyright holder's public performance right.

B. Recording Artists Maintain the Exemption is Unfair

From the artists' perspective, such exemptions are particularly harmful. Artists who do not have songwriting credits on their most successful songs go largely uncompensated for their sound recordings.[86] Consider, for example, "Umbrella," the popular radio hit released by Rihanna in 2007.[87] Each time the song is played on terrestrial radio, the co-writers of the underlying composition, Shawn Carter (Jay Z), Christopher "Tricky" Stewart, Terius Nash (The-Dream), and Thaddis "Kuk" Harrell each receive a royalty through the American Society of Composers, Authors, and Publishers (ASCAP).[88] ASCAP is one of three performing rights organizations in the U.S. that collect public performance royalties for their members.[89] The issue becomes more problematic when cover songs are involved. "Artists often wish to perform a popular song . . . written and previously released by another artist, commonly known as a cover," to place on their album.[90] If a band covers a song,[91] such as when the band All Time Low

85. *See* Black, *supra* note 81 ("Terrestrial radio, and its $17 billion advertising market, relies just as heavily on performing artists as it does songwriters.").

86. Jeffrey S. Becker, William W. Shields & Stephen Hutton, *The Fair Play, Fair Pay Act of 2015: What's at Stake and for Whom?*, ENT. & SPORTS LAW, Fall 2015, at 5, 7.

87. RIHANNA, *Umbrella*, *on* GOOD GIRL GONE BAD (Def Jam Recordings 2007).

88. *The-Dream, Co-Author, Rihanna's 'Umbrella'*, Rolling Stone (Jan. 19, 2012), http://www.rollingstone.com/music/pictures/how-10-major-songwriters-make-big-money-20120119/the-dream-co-author-rihannas-umbrella-0110533; *Umbrella*, ASCAP, https://mobile.ascap.com/aceclient/AceWeb/#ace/search/workID/510507570.

89. MARK HALLORAN, THE MUSICIAN'S BUSINESS AND LEGAL GUIDE 126 (George Glassman ed., 4th ed. 2008). Songwriters, composers, lyricists, and publishers will generally belong to one of these three performing rights organizations, which will then authorize licenses for public performances of its members' compositions. *Id*. at 126, 129. The organizations collect royalty payments and also sue broadcasters, clubs and others that publicly perform songs without a license. *Id*. at 127.

90. X.M. FRASCOGNA, JR., SHAWNASSEY B. HOWELL & H. LEE HETHERINGTON, ENTERTAINMENT LAW FOR THE GENERAL PRACTITIONER 108 (Am. Bar Ass'n 2011). "The presence of a cover on an album can significantly increase sales." *Id*.

91. The compulsory license for mechanical reproductions of musical works, codified at 17 U.S.C. §115 within the Copyright Act, allows recording artists to cover songs, even without obtaining permission from the songwriter, or a music publishing company, as long as the artist complies with the requirements required to obtain a compulsory license. COHEN, ET AL., *supra* note 15, at 413; *see also* Copyright Act of 1976, 17 U.S.C. § 115 (2012) (providing a compulsory license for mechanical reproductions of musical works). The Harry Fox Agency (HFA) has agreements with a majority of music publishers, who often control the rights to musical compositions, and so the HFA is often the entity licensing the right to record and reproduce musical works in phonorecords. COHEN, ET AL., *supra* note 15, at 411. The HFA currently represents "over 48,000 music publishers, who collectively own millions of copyrighted musical works." *Id*. at 414. Article 13 of the Berne Convention similarly "allows countries to permit the

covered "Umbrella" on "Punk Goes Crunk" in 2008,[92] the songwriters again receive a royalty when it is played on terrestrial radio, whereas All Time Low does not.[93]

To provide songwriters royalties while not doing so for recording artists, even while the artists' works appears on terrestrial radio, undervalues the recording artists' contribution to the song.[94] Recording artist and songwriter David Lowery reported that he was paid $1,373.78 for 18,797 spins on radio, amounting to 7.3 cents per spin.[95] While this is not a substantial amount per spin, Rihanna's "Umbrella" received at least 100,000 spins in a single month in June 2007.[96] Rihanna could have received about $7,300 in terrestrial radio royalties during that month if the copyright legislation did not exempt terrestrial broadcasts.[97]

Determining which artist will record a particular song often requires deliberation, as the recording artist can make a significant difference as to whether the song will be commercially successful.[98] Many artists claim it is unfair that broadcasters compensate only the songwriter for their contribution and not the

---

recording of musical works that have already been recorded with permission of the copyright owner." *See id*. at 413 (citing Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, 1972 U.N.T.S. 223, art. 13(3)).

92. All Time Low, *Umbrella*, *on* Punk Goes Crunk (Fearless Records 2008). The Punk Goes. . . compilation series is currently in its twelfth series and includes compilations of alternative bands covering various genres of music. *Punk Goes*, FEARLESS RECORDS, http://www.fearlessrecords.com/artist/22 (last visited Oct. 21, 2016).

93. This is, again, due to the language of § 106(6). Authors of sound recordings only receive an exclusive copyright to "digital" audio transmissions. Copyright Act of 1976, 17 U.S.C. § 106(6) (2012).

94. *See* Glenn Peoples, *Business Matters: Are Radio Royalties Fair?*, BILLBOARD (Sept. 27, 2013), http://www.billboard.com/biz/articles/news/digital-and-mobile/5740609/business-matters-are-radio-royalties-fair (estimating that on behalf of songwriters and composers, ASCAP collects about 18 cents in royalties per 1,000 impressions on broadcast radio). ASCAP and the other performing rights organizations, BMI and SESAC, issue licenses to radio stations in exchange for licensing fees, which are then distributed to songwriters, publishers and other copyright holders of musical compositions. Becker, Shields & Hutton, *supra* note 86, at 6.

95. Michael DeGusta, *Pandora Paid Over $1,300 for 1 Million Plays, Not $16.89*, THE UNDERSTATEMENT (June 25, 2013), http://theunderstatement.com/post/53867665082/pandora-pays-far-more-than-16-dollars.

96. BDS Certified Spin Awards June 2007 Recipients, BILLBOARD, July 21, 2007, at 36.

97. *Id*. Although $7,300 may not seem like much money for an artist like Rihanna, it is important to note that recording artists receive revenue from many different sources. Considering this income was received over the course of a single month, and considering how many other artists could receive a similar royalty payment, the totals would add up to substantial revenues for recording artists. However, it is also clear that the revenue would not be so substantial as to overly burden most radio stations, especially with the proposed flat rate fee for small radio stations laid out in recent legislation. *See* Fair Play Fair Pay Act of 2015, 114 H.R. 1733, 114th Cong. (2015) (including a flat rate fee for the smallest radio stations).

98. Interestingly, "like many an artist's signature song, Rihanna's breakout single, 'Umbrella', was actually written for someone else." *How Rihanna's 'Umbrella' Changed Her Career Forever*, SPIN (Oct. 5, 2015), http://www.spin.com/2015/10/the-song-machine-john-seabrook-rihanna-excerpt-premiere-umbrella/ (citing JOHN SEABROOK, THE SONG MACHINE 171 (2015)).

recording artists.[99] Rihanna's version of "Umbrella" was nominated for Record of the Year at the 2008 Grammy Awards,[100] yet from a compensatory standpoint she was valued less for her contributions to the song. This notable public recognition of Rihanna's sound recording validates her contribution as valuable to broadcasters, and deserves to be compensated.[101]

Many music industry organizations are involved in the fight to establish a performance right, including SoundExchange,[102] the Recording Industry Association of America (RIAA), [103] and artist advocacy groups such as the Future of Music Coalition[104] and the musicFIRST Coalition.[105] Advocates' strongest argument is that terrestrial radio, and its $17 billion revenue in advertising, relies upon performing artists just as much as songwriters.[106]

C. The Ongoing Relevance of Terrestrial Radio

While many artist-advocates claim that recording artists should be paid for their contributions, advocates for the exemption often point out that the record label owns the copyright for the sound recording.[107] The owner of a sound recording may be either the author, such as a performer and/or producer, or another party if the copyright interest has been assigned.[108] For example, "[t]ypically, the recording artist will assign all copyright interest in the sound recording to the recording company in exchange for royalties or other compensation."[109] In this instance, some royalties for use of the sound recording would be diverted to the

---

99. *See* Black, *supra* note 81 ("Terrestrial radio . . . relies just as heavily on performing artists as it does songwriters.").

100. *2008 Grammy Award Winners and Nominees*, N.Y. Times (Feb. 9, 2008), http://www.nytimes.com/2008/02/09/arts/music/10grammylist.html.

101. *Id.*

102. *See General FAQ*, SOUNDEXCHANGE, http://www.soundexchange.com/generalfaq/ (last visited Oct. 21, 2016) ("SoundExchange has been at the forefront in the fight for performance royalties for traditional terrestrial radio.").

103. *Copyright Office Seeks Performance Right for HD Radio*, *supra* note 47.

104. *See 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 ("[I]t's important for artists and artist advocates to support the expansion of the public performance royalty.").

105. *See Mission Statement,* MUSICFIRST, http://musicfirstcoalition.org/mission (last visited Oct. 21, 2016) ("We rally people and organizations who make and love music to end the broken status quo that allows AM/FM to use any song ever recorded without paying its performers a dime."). The musicFIRST Coalition's founding members include the American Association of Independent Music, the American Federation of Musicians (AFM), SAG-AFTRA, The Recording Academy, and SoundExchange. *See Coalition*, MUSICFIRST, http://musicfirstcoalition.org/coalition (last visited Oct. 21, 2016) (indicating musicFIRST's founding members and its support of a performance right). FIRST is an acronym for Fairness in Radio Starting Today. Bagdanov, *supra* note 40, at 157 n. 178.

106. Black, *supra* note 81.

107. *See* Renikoff, *supra* note 3 (indicating that record labels are often assigned the copyright to the sound recording).

108. COHEN, ET AL., *supra* note 15, at 411.

109. *Id*.

copyright holder, the record label.

Music is an audience-based industry—in other words, copyrighted works are "experience product[s]."[110] While it is difficult to know whether a consumer will enjoy a book, film or song until after reading, seeing, or hearing it,[111] radio still drives the music people listen to and ultimately, what music they decide to purchase or listen to on paid streaming services.[112] Since record companies sell records, they still aim to play songs on broadcast radio to generate a demand for the same product, but with a higher option value.[113] The record companies also use radio plays as a promotional tool to sell digital downloads on iTunes or physical albums. As such, radio is still relevant. For example, 91% of Americans over twelve years old still listen to radio on at least a weekly basis.[114] Furthermore, 81% of this audience is still listening to radio broadcasts by AM/FM radio stations.[115] In addition, 85% of music discovery still takes place while listening to radio.[116] According to the U.S. Central Intelligence Agency (CIA), as of 2004, there were 4,854 AM and 8,950 FM broadcast stations in the U.S.[117] Thus, whether terrestrial radio stations should be paying royalties to sound recording owners is as important as ever.

D. Does Evidence of Payola Indicate the Exemption is Fair?

Radio is a useful promotional avenue for record labels and many labels still use radio play to "break" new artists.[118] Most major record labels have an entire promotional department whose primary goal is to secure radio play for the label's

---

110. Patrick Wikström, The Music Industry: Music in the Cloud 21 (2d ed. 2013).

111. *Id*.

112. Because a radio play lasts for a short period of time and it can be unpredictable when the song will be played again, record companies hope that listeners will purchase a copy of the song or album, which will provide revenues to the record company that will compensate for the free plays on radio. *Id*.

113. *Id.*

114. John McDuling, *The Remarkable Resilience of Old-Fashioned Radio in the US*, Quartz (Apr. 4, 2014), http://qz.com/195349/the-remarkable-resilience-of-old-fashioned-radio-in-the-us/.

115. This may be, in large part, due to the fact that 44% of radio listening is done in the car. *Id*. Considering that between 2001 and 2013, although there have been many technological changes and there has been only a 5% decline in Americans over 12 years old listening to radio at least weekly, it is not likely that radio is disappearing from the daily lives of Americans. Zac Estrada, *AM/FM Radio Is Still Popular Thanks To Cars*, JALOPNIK, (Apr. 4, 2014, 7:00 PM), http://jalopnik.com/am-fm-radio-is-still-popular-thanks-to-cars-1558692811.

116. Victor Nava, *The 'Fair Play Fair Pay Act' Is a Corporate Music Label Cash Grab*, DAILY CALLER (Sept. 10, 2015, 11:23 AM), http://dailycaller.com/2015/09/10/the-fair-play-fair-pay-act-is-a-corporate-music-label-cash-grab/.

117. Ted Lathrop, This Business of Global Music Marketing 128 (2007).

118. In 2010, IFPI estimated that it cost about $1 million for a record label to "break" an artist, which is to "generate buzz" in order to build his or her recognition with the goal in garnering a tour investment, including about $300,000 in promotion and marketing costs. Andre Paine, *IFPI: $1 Million to Break an Act*, BILLBOARD (Mar. 9, 2010), http://www.billboard.com/biz/articles/news/global/1210148/ifpi-1-million-to-break-an-act.

new releases.[119] Oftentimes, labels will also hire independent promoters.[120] However, federal law imposes limitations on the promotion tactics that record labels can use.[121] For example, usually paying a radio station to play a song without disclosing that payment is illegal.[122] Such non-disclosure is referred to as "payola," a contraction of "pay" and "Victrola" (record players).[123] The term arose during the 1959 payola scandal, which was uncovered when the Federal Communications Commission was investigating television quiz show scandals[124] and discovered that famed disc jockey Alan Freed had been taking bribes to spin songs.[125] By the late 1950s, it was clear that payola was common practice in the broadcast industry.[126] In 1960, Congress responded by making it illegal for a radio station to accept "money, service or other valuable consideration" for playing a song without announcing and publicly disclosing such payment or consideration.[127] The amended Communications Act of 1934 made payola a crime punishable by a $10,000 fine and up to a year in prison.[128]

Despite this congressional effort, record companies continued to engage in payola.[129] In 2004, the New York Attorney General investigated Sony BMG Music Entertainment (Sony BMG) for payola activities.[130] The label agreed to settle the investigation for $10 million.[131] Sony BMG also hired a compliance officer to monitor its future promotion practices.[132] According to Bloomberg News, "[m]odern payola is a strong economic signal that tells us that radio airplay is still

---

119. Christopher Knab, *Inside Record Labels: Organizing Things*, Music Biz Academy (Apr. 2010), http://www.musicbizacademy.com/knab/articles/insidelabels.htm.

120. *Payola Scandal Again Rocking, Roiling Radio*, WASH. TIMES (Sept. 19, 2005), http://www.washingtontimes.com/news/2005/sep/19/20050919-123610-9552r/.

121. *See id*. (describing restrictions and how the restrictions came about).

122. Nathan Hanks, *Payola Laws & The Greatest Music You've Never Heard,* MAX (Nov. 22, 2014), http://www.musicaudienceexchange.com/blog/payola-laws-and-the-greatest-music-youve-never-heard/ (describing the illegality of payment to radio stations to play certain songs without disclosure to listeners).

123. *Id*.

124. *The Quiz Show Scandal* (PBS television broadcast 2000).

125. *Payola Scandal Again Rocking, Roiling Radio*, *supra* note 120*; see also The Aftermath of the Quiz Show Scandal*, PBS (1999), http://www.pbs.org/wgbh/amex/quizshow/peopleevents/pande07.html (detailing examples of quiz show scandals from *The $64,000 Question* and *Twenty-One*).

126. *Id*.; *see also* Lydia Hutchinson, *Alan Freed and the Radio Payola Scandal*, PERFORMING SONGWRITER (Aug. 20, 2015), http://performingsongwriter.com/alan-freed-payola-scandal/ (discussing the numerous payola scandals and congressional investigations which took place in the 1950s).

127. Communications Act of 1934, 47 U.S.C. § 317 (2012); Melanie Andorfer, *$10M 'Payola' Settlement*, CBS NEWS (July 25, 2005, 11:54 AM), http://www.cbsnews.com/news/10m-payola-settlement/.

128. Andorfer, *supra* note 127.

129. *See id*. (indicating that payola is still a problem today).

130. *Id*.

131. *Id*.

132. *Id*.

worth more to the record companies than records are worth to the radio stations."[133] After all, if record labels were being swindled by radio broadcasters' refusal to pay the recording artists, the labels would not be paying them in order to play records.[134]

This might indicate that as Congress reconsiders the public performance exemption for terrestrial broadcasters, it might also reconsider the current payola restrictions imposed on record labels as well. Perhaps if both the terrestrial radio exemption and the payola restriction were removed, an efficient market could indicate whether broadcasters should be paying record labels or whether record labels should be paying broadcasters. Due to broadcasting lobbyists' arguments that terrestrial broadcasts promote record sales for recording artists, this might be a compromise that would facilitate the passage of legislation enacting a full public performance right for sound recordings.

III. INTERNATIONAL APPROACHES TO THE ISSUE

Almost all other countries with modern copyright legislation require royalty payments by broadcasters to recording artists when a sound recording is played on terrestrial radio.[135] In fact, countries that *do not* currently provide royalty payments to recording artists for their sound recordings include China, Iran, and North Korea.[136]

A. Foreign Policy: Is the U.S. Copyright Act Out of Date?

Because copyright goals differ among countries, consideration of the copyright goals of the U.S. is important to examine why it does not have a full public performance right for sound recordings. Congress derives the right to enact copyright laws from the Copyright Clause of the U.S. Constitution.[137] This congressional power is granted to "promote the progress of science and the useful arts."[138] While this constitutional clause governs the goals and principles of U.S. copyright law, several countries have differing views on the goals of copyright law, which is reflected in their laws. Although the U.S. primarily holds an economic view of copyright protection,[139] many countries within the European

133. Christopher Sprigman, *Fair Play or Foul?*, Bloomberg News (May 1, 2015, 10:45 AM), http://www.bloomberg.com/news/articles/2015-05-01/fair-play-or-foul-.

134. *See id*. ("Modern payola is a strong economic signal that tells us that radio airplay is still worth more to the record companies than records are worth to the radio stations.").

135. The Recording Academy, *Terrestrial Sound Recording Right*, https://www.grammy.org/terrestrial-sound-recording-right (last visited Oct. 21, 2016).

136. Although the U.S. has criticized China for not adequately enforcing its copyright laws and for letting infringement go unchecked within its borders, the two countries have similar legislation regarding performance rights for terrestrial radio broadcasts. *Id*.

137. U.S. CONST. art. I, § 8, cl. 8.

138. *Id*.

139. *See* SUSAN TIEFENBRUN, DECODING INTERNATIONAL LAW: SEMIOTICS AND THE HUMANITIES 536 (2010) (indicating that in Great Britain and the U.S., the purpose of enacting copyright law was to protect the economic rights of publishers and authors).

Union hold a natural rights view of copyright.[140] Under this view, the author, as the creator of a work, has a natural right to the ownership of the work,[141] regardless of any economic incentives, financial incentives or other goals of the author.[142] Several European countries, including France and the United Kingdom, have advocated for a full public performance right and have criticized the U.S. for failing to implement one.[143] Most other countries have also implemented more protections for sound recordings than the U.S., under both fairly similar and dissimilar copyright regimes.[144] Many other countries have growing copyright industries and they should be examined to understand how the copyright legislation in other countries have addressed artist royalties.

1. An Example of Copyright Law in Europe: Denmark

European countries, and in particular Scandinavian countries have recently shown the potential of the streaming model, and have seen an increase of revenues in the music industry in recent years.[145] In 2014, Denmark grew its recorded music industry by 1.8%.[146] This may be due in part to the fact that Denmark's copyright law provides significant protections to both songwriters and recording artists.[147]

Denmark employs traditional copyright laws to protect several rights of creators, protecting works such as literature, music, theatre, film and visual arts

---

140. *See id*. at 537 (indicating that Europe largely follows a natural rights approach to copyright protection). The natural rights view approaches copyright as something authors are entitled to as the creators of works, as opposed to a statutory privilege that allows authors to reap economic and financial benefits. *See generally*, PETER K. YU, INTELLECTUAL PROPERTY AND INFORMATION WEALTH: ISSUES AND PRACTICES IN THE DIGITAL AGE 135 (2007).

141. TIEFENBRUN, *supra* note 139, at 537.

142. *See id*. ("In Europe, under the natural rights approach, authors always retain their personal or moral rights even if they sell their economic rights to publishers."). This type of copyright legislation tends to be more favorable to authors than countries that adopt copyright for economic reasons instead. *See id*. ("[T]he copyright laws in European *droit d'auteur* countries have been viewed to be more favorable to authors than the laws of Anglo-American countries.").

143. *See* Johannes, *supra* note 71, at 467 n.136 (stating France and the United Kingdom both have strong domestic recording industries and long histories of recognizing a public performance right in sound recordings).

144. *Id*. ("Canada has made several advances in copyright law in the past few years, particularly in their recognition of a public performance right in sound recordings.").

145. *IFPI Digital Music Report 2014*, IFPI 10 (2014), http://www.ifpi.org/downloads /Digital-Music-Report-2014.pdf ("Scandinavian countries Denmark, Norway and Sweden are a showcase of music industry revival, demonstrating the regenerating potential of the streaming model."). Sweden saw a 5.7% digital market growth in 2013, while Denmark saw a 4.7% growth and Norway saw a 2.4% growth. *Id*.

146. Tim Ingham, *Denmark's Recorded Music Industry Grows 1.8%*, MUSIC BUSINESS WORLDWIDE (Feb. 25, 2015), http://www.musicbusinessworldwide.com/denmarks-recorded-music-industry-grows-1-8/.

147. *See* Peter Dueland et al., *Denmark Copyright Provisions*, COMPENDIUM OF CULTURAL POLICIES & TRENDS IN EUROPE (Apr. 10, 2012), http://www.culturalpolicies.net/web/denmark. php?aid=517 ("[C]opyright laws must primarily protect the rights of the creator and, ideally, serve as the undisputed guarantor of aesthetic freedom and financial revenue to the artists.").

under a traditional copyright regime.[148] It employs separate provisions aiming to protect neighboring rights, including performing artists, audio producers, photographers and radio and television companies.[149] Traditional copyright terms run for seventy years following the death of the author, while neighboring rights terms provide protection for fifty years from the time of production.[150] These protections fulfill Denmark's international obligations under several international copyright treaties, including the Agreement on Trade Aspects of Intellectual Property (TRIPS),[151] the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),[152] and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention).[153]

Article 68 of the Denmark Copyright Act governs remuneration for the use of sound recordings in broadcasts on radio and television.[154] Article 68 states:

> (1) . . . [P]ublished sound recordings may be used in broadcasts on radio and television and for other public performances. The provision of the first sentence shall not apply to public performance in the form of the making available to the public of published sound recordings in such a way that members of the public may access them from a place and at a time individually chosen by them . . .
>
> (2) Performing artists and producers of sound recordings shall be entitled to remuneration. The claim for remuneration may be made only through a joint organisation approved by the Minister for Culture, which comprises performers as well as producers of sound recordings. If agreement cannot be made on the size of remuneration, each party is entitled to bring the dispute before the Copyright License Tribunal, cf. § 47.[155]

The Denmark Copyright Act closely follows the structure of parts of the U.S. Copyright Act in its provisions defining what constitutes a public performance[156]

---

148. *Id*.

149. *Id*.

150. *Id*.

151. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr.15,1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197.

152. Berne Convention for the Protection of Literary and Artistic Works, Sept. 28, 1979, 1972 U.N.T.S. 223 (entered into force for the U.S. on Mar. 1, 1989) [hereinafter Berne Convention].

153. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 (entered into force May 18, 1964) [hereinafter Rome Convention].

154. Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 68 (Den.).

155. *Id*.

156. The U.S. Copyright Act defines what it means to perform a work "publicly:"

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

and providing for a Copyright License Tribunal.[157] However, what is notable is that the Denmark copyright law has no language differentiating between terrestrial and digital audio transmissions.[158] Article 68 simply uses the word "broadcasts," which broadly includes both terrestrial and digital broadcasts by its inclusion of both wired and wireless transmissions.[159] Although the U.S. continues to protect only "digital audio transmissions,"[160] the Denmark Copyright Act makes no such distinction, including full protections for public performances of works by both wire and wireless means.[161]

2. An Example of Copyright Law in South America: Chile

Another country with a growing copyright industry is Chile.[162] Chile's digital recording industry revenues increased in 2014, despite widespread piracy in the industry over the past several years.[163] Chile is also becoming an important trade partner with the U.S. and a more prominent trading power within the world generally.[164] In 2015, the U.S. entered into a formal trade agreement, the Trans-Pacific Partnership (TPP), with Chile and several other Pacific Rim countries.[165] This will make Chile's current domestic copyright legislation and enforcement mechanisms even more important within the global context.

---

or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Copyright Act of 1976, 17 U.S.C. § 101 (2012).

157. Instead of a "Copyright License Tribunal," the U.S. Copyright Act provides for a Copyright Royalty Board. *See* Copyright Act of 1976, 17 U.S.C. § 801 (2012) (indicating that the Copyright Royalty Board will step in where royalties cannot be successfully negotiated directly by the parties).

158. The definition of a public performance is provided in article 2(4):

Public performance . . . shall include communication to the public of works, by wire and wireless means, including broadcasting by radio or television and the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 2(4) (Den.).

159. Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 68 (Den.).

160. 17 U.S.C. § 106(6) (2012).

161. Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 2(4) (Den.).

162. *See* International Intellectual Property Alliance (IIPA), 2015 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT 12 (Feb. 6, 2015), http://www.iipawebsite.com/rbc/2015/2015SPEC301CHILE.pdf [hereinafter IIPA Special 301 Report] ("The recording industry saw an increase in its digital sales in 2014, but it continues to be heavily affected by piracy via P2P exchanges and links posted on blogs and social websites.").

163. *Id*.

164. *See* Jackie Calmes, *Trans-Pacific Partnership Text Released, Waving a Green Flag for the Debate*, N.Y. TIMES (Nov. 5, 2015), http://www.nytimes.com/2015/11/06/business/international/trans-pacific-trade-deal-tpp-vietnam-labor-rights.html (describing Chile's rising power and its trade relationship with the U.S.).

165. *Id*. However, even prior to the countries entering into the TPP, the U.S. and Chile had already negotiated a trade agreement, the United States-Chile Free Trade Agreement. *See* IIPA Special 301 Report, *supra* note 162, at 11.

Although Chile is facing criticism for failing to adequately enforce its copyright laws,[166] the copyright legislation in Chile provides a full public performance right[167] to both domestic and foreign authors, producers, and performers.[168] Unlike U.S. legislation which includes the word "digital" in its copyright legislation,[169] Chile's legislation contains the language "wireless" in its definition of what constitutes a protected public performance of a phonogram.[170] This seemingly simple difference allows copyright owners of sound recordings to collect royalties for both analog and digital transmissions of their works.[171] Traditional radio waves are included in the Chilean legislation's definition of broadcasting, along with satellite and other wireless broadcasts.[172] Defining a

166. *See id*. at 13 (indicating that although copyright industries report good cooperation with Chilean authorities, additional resources and increased judicial attention are needed to follow through on the positive efforts of police).

167. *See* Law No. 17336, Intellectual Property, art. 67, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile) ("Anyone who uses phonograms or reproductions thereof for broadcasting on radio or television or any other form of communication to the public, shall be obligated to remunerate the performers and phonogram producers.")

168. Law No. 17336, Intellectual Property, art. 2, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile) ("This Law shall cover the rights of all Chilean authors, performers, producers of phonograms and Chilean and foreign broadcasting organizations domiciled in Chile. The rights of foreign authors, performers, producers of phonograms and broadcasting organizations who/which are not domiciled in the country shall enjoy the protection afforded under the international conventions that Chile has signed and ratified."). Chile happens to be a signatory to the Rome Convention. WIPO, *Contracting Parties > Rome Convention*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), http://www.wipo.int/treaties/en/ShowResults.jsp ?lang=en&treaty_id= 17 (last visited Oct. 21, 2016). Because of this, Article 2 allows other signatory foreign performers to take advantage of the Chilean copyright laws requiring remuneration for performers and phonogram producers when their sound recording is publicly broadcast. Law No. 17336, Intellectual Property, art. 67, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile).

169. Copyright Act of 1976, 17 U.S.C. § 106(6) (2012).

170. Law No. 17336, Intellectual Property, art. 5(m *bis*), Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile). Article 5(m *bis*) states:

> For the purposes of copyright for performers and producers of phonograms, [broadcasting] shall mean the wireless transmission of sounds or images and sounds or representations thereof, for reception to the public; such transmission via satellite shall also constitute "broadcasting'; the transmission of encoded signals shall constitute "broadcasting" if the means for decoding are made available to the public by the broadcasting organization or with its consent.

Id.

171. *See* Kenneth Reginald Sturley, *Radio Technology*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/technology/radio-technology (explaining that radio technology is the transmission and detection of communication signals consisting of electromagnetic waves travelling through the air).

172. Law No. 17336, Intellectual Property, art. 5(m *bis*), mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile). Article 5(m *bis*) states:

> For the purposes of copyright for performers and producers of phonograms, [broadcasting] shall mean the wireless transmission of sounds or images and sounds or representations thereof, for reception to the public; such transmission via satellite shall also constitute "broadcasting'; the transmission of encoded signals shall constitute "broadcasting" if the

broadcast as a "wireless broadcast" or a "digital broadcast" is significant because terrestrial radio is broadcast wirelessly but not digitally.[173] Like Denmark's copyright law,[174] the Chilean copyright legislation makes no distinction between terrestrial and digital broadcasts.[175]

3. An Example of Copyright Law in Asia: Japan

Japan has a thriving entertainment industry, producing popular music, film, manga, anime, and computer games.[176] According to the International Federation of the Phonographic Industry (IFPI), Japan is currently the second-largest global music market with almost $3 billion in sales in 2014, trailing only the U.S.[177]

Article 23 of the Japanese Copyright Act addresses the public performance protections given to copyrightable material other than sound recordings.[178] It states:

> (1) The author shall have the exclusive right to make the public transmission of his work (including the making transmittable of his work in the case of the interactive transmission).
>
> (2) The author shall have the exclusive right to communicate publicly, by means of a receiving apparatus, his work of which the public transmission has been made.[179]

In Japan, sound recordings are protected under the related doctrine of neighboring rights.[180] As such, a separate article deals with similar rights for sound recordings. Article 92 of the Japanese Copyright Act addresses the public performance neighboring rights applicable to sound recordings and protects authors' rights of broadcasting and wire diffusions.[181] Article 92(1) states: "Performers shall have the exclusive rights to broadcast and to diffuse by wire their performances."[182] Article 92(2) provides certain exemptions, such as "where

---

means for decoding are made available to the public by the broadcasting organization or with its consent.

Id.

173. Sturley, *supra* note 171.

174. *See* Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 2(4), 68 (Den.) (providing a full public performance right for sound recordings for both wire and wireless broadcasts).

175. *See* Law No. 17336 Intellectual Property, art. 5(m *bis*), mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile) (defining a broadcast as a wireless transmission).

176. Manga is a Japanese form of comic creations. Anime, short for animation, is hand drawn or computer animation. MOSER & SLAY, *supra* note 27, at 148.

177. Ben Sisario, *Music Streaming Service Aims at Japan, Where CD Is Still King*, N.Y.Times, June 11, 2015, http://www.nytimes.com/2015/06/12/business/media/line-music-a-new-streaming-service-aims-at-japanese-market.html.

178. Chosakukenhō [Copyright Act], Law No. 65 of 2010, art. 23, translated in (Copyright Research and Information Center [CRIC]), http://www.cric.or.jp/english/clj/cl2.html (Japan).

179. *Id*.

180. *Id*. at art. 92.

181. *Id*. A wire diffusion is "the public transmission of wire-telecommunication intended for simultaneous reception by the public of the transmission having the same contents." *Id*. at art. 2, para. 1.

182. *Id*. at art. 92 para. 1.

the wire diffusion is made of performances already broadcast," or "where the broadcasting takes place of, or the wire diffusion is made of" performances "with the authorization of the owner" or incorporated in cinematographic works with the authorization of the rights owner.[183]

Japan does not discriminate against sound recordings by exempting terrestrial broadcasts from the performers' rights.[184] In Article 92, Japan's Copyright Act gives the performer the exclusive right to broadcast.[185] There is no exemption for non-digital transmissions contained in the Japanese Copyright Act.[186] Like Japan, most countries that have adopted neighboring rights also adopted a full public performance right.[187] Although the U.S. adopted protection for sound recordings into its traditional author's rights within its copyright law, Congress did not give sound recordings the same full performance rights other countries gave to their artists within their copyright laws covering neighboring rights.[188]

4. Potential Changes to Copyright Law in China

China has been one of the last economically advanced countries to adopt modern copyright legislation.[189] As such, its copyright legislation was recently updated. China had to inform consumers that music and other media are no longer free,[190] and that they are now protected under copyright law.[191] China remains one

---

183. Chosakukenhō [Copyright Act], Law No. 65 of 2010, art. 92 para. 2, translated in (Copyright Research and Information Center [CRIC]), http://www.cric.or.jp/english/clj/cl2.html (Japan). This section provides:

(2) The provision of the preceding paragraph shall not apply in the following cases:

(i) where the wire diffusion is made of performances already broadcast;

(ii) where the broadcasting takes place of, or the wire diffusion is made of the following:

(a) performances incorporated in sound or visual recordings with the authorization of the owner of the right mentioned in paragraph (1) of the preceding Article;

(b) performances mentioned in paragraph (2) of the preceding Article and incorporated in recordings other than those mentioned in that paragraph.

184. *See id*. (noting that Japanese copyright law uses the language "diffuse by wire" to include both terrestrial and digital broadcasts).

185. *Id*. at para. 1.

186. *See id*. at para 1 ("Performers shall have the exclusive rights to broadcast and to diffuse by wire their performances.").

187. *See*, *e.g*., Law No. 17336, on Intellectual Property, art. 67, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile); *see also* Law No. 17336, on Intellectual Property, art. 5, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile) (including singer in its list of individuals protected under the copyright law).

188. *Compare* Copyright Act of 1976, 17 U.S.C. § 106(6) (2012) (narrowly construing a performance as one *digitally* broadcasted), *with* Chosakukenhō [Copyright Act], Act No. 65 of 2010, art. 92, *translated in* (Copyright Research and Information Center [CRIC]), http://www.cric.or.jp/english/clj/cl2.html (Japan) (broadly construing a performance to include terrestrial and digital broadcasts).

189. *See* PAUL R. PARADISE, TRADEMARK COUNTERFEITING, PRODUCT PIRACY, AND THE BILLION DOLLAR THREAT TO THE U.S. ECONOMY 50 (1999) (indicating that China adopted its first, modern copyright law on September 7, 1990).

190. *See id*. ("China's first domestic copyright law, effective June 1, 1991 was adopted by

of the few countries that exclude terrestrial radio broadcasts from the exclusive rights of sound recording copyright holders.[192] However, the National Copyright Administration of China (NCAC) is advocating for a change.[193] The NCAC is currently drafting a proposed amendment to the Copyright Law of the People's Republic of China (Copyright Law of China), which it hopes to submit to the National's People's Congress.[194] In a recording industry that has faced widespread piracy,[195] a full public performance right in China could help incentivize recording artists to enter the industry.

The Copyright Law of China has been in its current form since 2010.[196] Although China acceded to the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty (WPPT)[197] in 2007,[198] China opted out of Article 15(1), filing a reservation pursuant to Article 15(3), which would have provided a full public performance right to performers.[199] However, the NCAC's drafted amendment to the current Copyright Law of China would provide performers with remuneration when their sound recordings are transmitted to the public.[200] Under Article 40 of the new draft, broadcasters would have to pay

---

the standing committee of the Seventh National People's Congress on September 7, 1990 in Bejing.").

191. *See generally* Zhùzuòquán fǎ (著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 159, *translated in* World Intellectual Property Organization [WIPO], http://www.wipo.int/wipolex/en/text.jsp?file_id=186569.

192. *Terrestrial Sound Recording Right*, THE RECORDING ACADEMY, https://www.grammy.org/terrestrial-sound-recording-right (last visited Oct. 21, 2016).

193. *See* Mathew Alderson, *China Music Copyrights*, CHINA L. BLOG (Jan. 12, 2015), http://www.chinalawblog.com/2015/01/china-music-copyrights.html (indicating NCAC is working on an amendment to the current copyright legislation).

194. *See id*. (indicating that the fourth draft of the new Copyright Law of China, as drafted by the NCAC, will go to the Legislative Affairs Office of the State Council, which will then prepare its own draft for submission to the National People's Congress).

195. *See* TIEFENBRUN, *supra* note 139, at 534 (noting that the U.S. almost instituted a trade war with China in 1995 because of China's continued piracy of U.S. intellectual property).

196. *See generally* Zhùzuòquán fǎ (著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. of the Nat'l People's Cong., Feb. 26, 2010, effective Apr. 1, 2010), 2010 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 159, *translated in* World Intellectual Property Organization [WIPO], http://www.wipo.int/wipolex/en/text.jsp?file_id=186569.

197. World Intellectual Property Organization [WIPO] Performances and Phonograms Treaty (WPPT), Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76 (1997).

198. *Contracting Parties > WIPO Performances and Phonograms Treaty*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20 (last visited Oct. 21, 2016).

199. WIPO, *WIPO Performances and Phonograms Treaty Actions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), http://www.wipo.int/wipolex/en/wipo_treaties/details_notes.jsp?treaty_id=20 (last visited Oct. 21, 2016).

200. *See* Mathew Alderson, *Will Chinese Broadcasters Pay Public Performance Royalties to Record Companies?*, CHINA L. BLOG (Feb. 10, 2015), http://www.chinalawblog.com/2015/02/will-chinese-broadcasters-pay-public-performance-royalties-to-record-companies.html (indicating

"reasonable remuneration" when sound recordings are transmitted to the public.[201] As China looks toward further modernizing its copyright laws and implementing more rights for its recording artists, the U.S. should do the same.

B. The U.S. Copyright Act is in Discord with International Copyright Laws

After analyzing the copyright laws spanning several different continents, the U.S. copyright law appears out of date and is inconsistent with many other countries' copyright laws. Countries such as Denmark, Chile, and Japan all have legislation that puts songwriters and performing artists on a level playing field when it comes to royalties for broadcasted transmissions of their works.[202]

Although China has only had modern copyright legislation for the past twenty-five years,[203] it is moving towards adopting a full public performance right for its recording artists. However, the royalties Chinese nationals will receive will be much smaller than the international royalty payments that U.S. artists could receive if the U.S. adopted a similar right for its own recording artists. As such, the U.S. should update its own copyright legislation to better conform with modern international copyright legislation for the sake of U.S. artists.

The language of the aforementioned countries' copyright laws shows just a few of the ways that Congress could effectuate change within the language of the domestic Copyright Act to provide a full public performance right for authors and owners of sound recordings. One of the easiest ways would be to simply remove the "digital audio transmission" language from § 106(6) and replace it with "audio transmission," as the Fair Play Fair Pay Act seeks to do.[204] Alternatively, other countries have used the language "wireless audio transmission" to achieve the same effect.[205]

C. U.S. Recording Artists Are Losing Money: Why a Change is Needed

In almost all other countries outside of the U.S., the record company, which is usually the copyright owner of the sound recording, is "paid a royalty every time a recording is played on the radio."[206] Unfortunately, since the U.S. does not pay foreign artists when their masters are performed in the U.S., American artists

---

that under Article 40 of the new draft, broadcasters would have to pay "reasonable remuneration" when sound recordings are transmitted to the public).

201. *Id*.

202. *See e.g*., Consolidated Act on Copyright 2014, Consolidated Act No. 1144, art. 68 (Den.); Law No. 17336 on Intellectual Property, art. 5(m *bis*), mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile); Chosakukenhō [Copyright Act Japan], Act No. 65 of 2010, art. 89 para. 6, translated in (Copyright Research and Information Center [CRIC]), http://www.cric.or.jp/english/clj/cl4.html (Japan).

203. *See* PARADISE, *supra* note 189, at 50 (indicating China's modern copyright legislation became effective in 1990).

204. *See, e.g*., Fair Play Fair Pay Act of 2015, 114 H.R. 1733, 114th Cong. (2015).

205. *See, e.g*., Law No. 17336, art. 5m *bis*, Mayo 4, 2010, DIARIO OFICIAL [D.O.] (Chile).

206. PASSMAN, *supra* note 34, at 176.

generally are not entitled to collect foreign performance royalties either.[207] According to Donald Passman, an influential attorney in the music industry, "[f]or years, the record companies have been pushing Congress to establish a similar right in the U.S., and for years the broadcasters have pushed Congress to make sure that does not happen."[208]

When the Performing Rights Act[209] was first introduced in 2007, Rep. Howard Berman (D-Cal.) addressed Congress and spoke of the lack of parity in having this public performance exemption for terrestrial radio broadcasters.[210] Rep. Berman considered that with so many technological platforms offering music to consumers, "it becomes harder to justify an exemption for any one platform."[211] Although the radio station and performer both benefit from the performer's music being transmitted over radio, only the station gets to keep the revenue generated from this transmission.[212] Because the U.S. does not secure artists with a full performance right, U.S. artists abroad cannot receive royalties when their music is played on foreign radio stations either.[213]

Since the U.S. is a net exporter of recorded music, eliminating the public performance exemption for terrestrial broadcasters would seemingly benefit the overall U.S. economy. It is recognized that "U.S. recordings are performed on an international scale to a much greater degree than recordings from any other country."[214] For example, as of 2004, "U.S. copyright holders held an estimated 50% or more of all recordings publicly performed within Canada."[215]

In many countries, between 20–50% of the music played is imported from the U.S. and the lack of reciprocity with those countries is denying U.S. artists millions of dollars in revenues.[216] In fact, in 2007, the U.S. export of all intellectual property products, including music, films, and computer software, totaled $125.6 billion.[217] This amounted to more than any other major industry sector, including agriculture and automobiles.[218] In 2013, the U.S. had foreign sales and exports

---

207. *See id*. (explaining that American performers usually receive little money for their work because American copyright laws usually control their music).

208. PASSMAN, *supra* note 34, at 165.

209. Performing Rights Act, H.R. 4789, 110th Cong. (2007).

210. *See* 153 CONG. REC. E2606 (daily ed. Dec. 19, 2007) (statement of Rep. Berman) ("This narrowly tailored bill amends a glaring inequity in America's copyright law—the provision in section 114 that exempts over-the-air broadcasters from paying those who perform the music that we listen to on AM and FM radio.").

211. *Id*.

212. *Id*. at E2607.

213. *Id*.

214. MOSER & SLAY, *supra* note 27, at 121.

215. Matthew S. DelNero, *Long Overdue?: An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, 6 VAND. J. ENT. L. & PRAC. 181, 192 (2004).

216. 153 CONG. REC. E2606 (daily ed. Dec. 19, 2007) (statement of Rep. Berman).

217. MOSER & SLAY, *supra* note 27, at 235.

218. *Id*.; *see also* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2003–2007 Report*, INT'L INTELLECTUAL PROPERTY ALLIANCE (IIPA) 1, 11 (2009), http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf (finding that non-U.S. sales of the

totaling $156.3 billion within the core copyright industries, including the motion pictures, television, video, recorded music, newspapers, books, periodicals and software publishing industries.[219] The growth of U.S. intellectual property exports highlights the increased importance of obtaining reciprocity for U.S. authors and artists abroad.[220] The large number of exports can be compared to the total sales of traditional copyrighted works, including books, recorded music, motion pictures, and magazines, which likely totals over $220 billion.[221]

Although many millennials know that the song "Breakaway"[222] is recorded by Kelly Clarkson, few know that Avril Lavigne actually wrote the song.[223] Yet, due to the Copyright Act, Avril Lavigne is paid when "Breakaway" is played on terrestrial radio and Kelly Clarkson is not.[224] As recording artists receive fewer royalties from record sales, this disparity impacts recording artists more and more.[225] The total value of the recorded music industry has been declining and went from $14.5 billion in 1999 to $11.5 billion in 2006.[226] Radio should no longer get a free ride based on the argument that "free airplay" contributes to record sales because record sales have fallen 18% since 2000.[227]

In addition to these economic concerns, recording artists in other countries, for the most part, do not face the same problem. President George W. Bush previously reported that he thought the U.S. kept "interesting company" when he heard that broadcasters in every country in the world except for China, Iran, North Korea, and Rwanda pay a performance royalty.[228] This failure to provide a performance royalty to artists seems particularly strange because although songwriters are compensated when their songs are played on the radio, "just as

---

copyright industries significantly exceeded several total U.S. exports).

219. Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2014 Report*, INT'L INTELLECTUAL PROPERTY ALLIANCE (IIPA) 2 (2014), http://www.iipa.com/pdf/2014CpyrtRpt Full.PDF.

220. *See id*. at 1 (stating that "[d]espite the robust achievements of the copyright industries during the period covered in this *Report*, significant challenges remain. Problems such as . . . discriminatory challenges, inhibit the growth of these markets in the U.S. and abroad.").

221. *See* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1365 (2013) ("American sales of more traditional copyrighted works, 'such as books, recorded music, motion pictures, and magazines' likely amount to over $220 billion.").

222. KELLY CLARKSON, *Breakaway*, *on* BREAKAWAY (RCA Records 2004). In fact, even when citing to commercial audio recordings, the citation is given to the artist and album title and not to the songwriter. BLUEBOOK 188 (20th ed. 2015). This tends to indicate that songs are better known by the recording artist performing the song than the songwriters who composed it.

223. 153 CONG. REC. E2606, E2607 (daily ed. Dec. 19, 2007) (statement of Rep. Berman).

224. *See* Copyright Act of 1976, 17 U.S.C. § 106(6) (noting that only digitally audio transmitted work is protected).

225. *See* Kristin Thompson, *Are Musicians Making More or Less Money?*, FUTURE OF MUSIC COALITION (July 2, 2012), http://money.futureofmusic.org/are-musicians-making-more-or-less-money/ (discussing the measures that could account for whether musicians are making less).

226. 153 CONG. REC. E2606, E2607 (daily ed. Dec. 19, 2007) (statement of Rep. Berman).

227. *Id*.

228. *Id*.

there would be nothing for musicians to play without notes, and nothing for the artist to sing without words, there is also nothing for a DJ to play without a recorded song."[229]

D. Other Negative Effects on the Recording Industry

There are other potentially negative effects of having this public performance exemption for terrestrial broadcasters. Because performance royalties are often a substantial source of income, many artists and producers are eager to record songs which they have written, even if their songs are not as well written as other songs that they have been offered to record by other songwriters.[230] This can have a negative impact on the recorded music available for consumer consumption. Furthermore, promoting authorship is one of the main goals of U.S. copyright law.[231] Some artists, especially ones with successful careers who have an advantage in negotiations, can insist on songwriting credits, or co-ownership of the underlying composition as a condition to recording someone else's song.[232] While this seems unethical, particularly when the recording artist truly was not involved in the songwriting process, this practice, called a "cut-in," happens frequently.[233] Eliminating the terrestrial broadcast exemption could largely eliminate this practice.

E. Does the Exemption Discourage Technological Advancement?

Although record companies were reluctant to consider technological changes that could jeopardize their CD sales profits, illegal digital downloads became rampant long before record labels were releasing digital music for sale.[234] Whether the record labels like it or not, technological advancements have occurred rapidly throughout the last two decades.[235] If technological advancements, such as Internet radio and streaming services, are not embraced, performers may fail to benefit

---

229. *See* 153 CONG. REC. E2606, E2607 (daily ed. Dec. 19, 2007) (statement of Rep. Berman) ("During a recent meeting in Nashville President Bush was asked about this issue. When he was told that broadcasters in every country in the world except for China, Iran, North Korea, and Rwanda pay a performance right, he rightfully observed, ''it sounds like we're keeping interesting company.'').

230. *See* MOSER & SLAY, *supra* note 27, at 121 (outlining problems with our current copyright model).

231. *See* U.S. CONST. art. I, § 8, cl. 8 (including a constitutional aim of promoting progress).

232. MOSER & SLAY, *supra* note 27, at 121–22.

233. *Id*. at 122.

234. *See* Jeff Leeds, *Music Industry Is Trying Out Digital-Only Releases*, N.Y. TIMES (Nov. 22, 2004), http://www.nytimes.com/2004/11/22/business/media/music-industry-is-tryingout-digitalonly-releases.html (outlining record labels' attempts to grapple with the Internet); *see also* Ben Sisario, *He Pushed a Reluctant Industry Toward Digital Music*, N.Y. TIMES (Oct. 5, 2011), http://mediadecoder.blogs.nytimes.com/2011/10/05/he-pushed-a-reluctant-industry-toward-digital-music/ (outlining Steve Jobs' changes to the music industry).

235. *See* Dorian Lynskey, *How the Compact Disc Lost Its Shine*, THE GUARDIAN (May 28, 2015, 6:39 PM), http://www.theguardian.com/music/2015/may/28/how-the-compact-disc-lost-its-shine (recounting the rise and fall of the compact disc).

from new technologies while older revenue streams collapse.[236] It seems inconsistent that webcasters are required to pay a public performance royalty to both songwriters and performers,[237] while terrestrial broadcasters are not,[238] especially since Internet radio functions much like traditional terrestrial radio, with a user choosing a "station" and sitting back to listen.[239] This terrestrial broadcast exemption is particularly unsatisfying for recording artists, record labels, and those who feel the government should not impede new technologies.[240] While Pandora leads the Internet radio platform market, many other platforms exist, including iHeartRadio, 8tracks, Google Play Music and Slacker.[241] These platforms may not have a chance to grow, and become sustainable, if the government forces them to pay higher royalties than their competition.[242]

Some artists and record labels started looking to private agreements to establish a public performance right for sound recordings. In 2013, Clear Channel, at the time the nation's largest broadcasting organization,[243] announced several "private deals with several independent record labels," and also one of the largest record labels, Warner Music Group.[244] These deals constituted an agreement by broadcasters "to pay monies for over-the-air performance of masters in exchange for a reduced rate on digital performances."[245] The Clear Channel deals

236. *See* Derek Thompson, *The Death of Music Sales*, THE ATLANTIC (Jan. 25, 2015), http://www.theatlantic.com/business/archive/2015/01/buying-music-is-so-over/384790/ ("Digital track sales are falling at nearly the same rate as CD sales, as music fans are turning to streaming.").

237. *See* Copyright Act, 17 U.S.C. §114 (2010) (explaining the scope of exclusive rights in sound recording); *see also* 37 C.F.R. §380.3 (2006) (enacting the law on delivering statements of accounts).

238. *See* 17 U.S.C. § 106(6) (2002) (explaining the exclusive rights in copyrighted sound recordings); *see also* 17 U.S.C. § 114(d)(1)(A) (2010) (explaining the exclusive rights of the owner of a copyright in sound recording).

239. David Porter, *Spotify vs Pandora: Which Market is Bigger?*, FORBES (Apr. 24, 2015, 1:26 PM), http://www.forbes.com/sites/davidporter/2015/04/24/spotify-vs-pandora-which-market-is-bigger/.

240. John Villasenor, *Why Artists Should Always Get Paid By Broadcasters Who Play Their Songs*, FORBES (July 2, 2012, 8:38 PM), http://www.forbes.com/sites/johnvillasenor/2012/07/02/why-artists-should-always-get-paid-by-broadcasters-who-play-their-songs/.

241. Porter, *supra* note 239. Google purchased Songza and officially merged it with Google Play Music on January 31, 2016. Tim Moynihan, *Songza is Dead, But it Lives on Within Google Play Music*, WIRED (Dec. 2, 2015, 3:01 PM), http://www.wired.com/2015/12/songza-is-dead-but-it-lives-on-within-google-play-music/.

242. *See* Eriq Gardner, *Rdio Was Losing $2 Million Each Month Before Bankruptcy*, HOLLYWOOD REPORTER (Nov. 17, 2015, 8:24 AM), http://www.hollywoodreporter.com/thr-esq/rdio-was-losing-2-million-840977 (indicating that before Rdio filed for bankruptcy, it was paying nearly $4 million in monthly operating expenses, including payroll for its 140 employees, royalty payments to copyright holders and service maintenance).

243. Jolson, *supra* note 7, at 766.

244. *Id*.

245. Passman, *supra* note 34, at 165. Clear Channel owns many of the radio stations in the U.S. *Id*.

demonstrate that broadcasters consider the digital royalties quite high, while the terrestrial royalties for sound recordings remain nonexistent.[246]

According to U.S. Representative Jerrold Nadler, "the existing landscape is marred by inconsistent rules that place new technologies at a disadvantage against their competitors, and inequalities that deny fair compensation to music creators."[247] Instead of overburdening new technologies, Congress should promote their adoption. However, Internet radio is currently at a disadvantage to terrestrial radio due to webcasting royalty requirements being more stringent than terrestrial radio royalty requirements.[248] On April 24, 2013, the House Judiciary Committee began "a comprehensive review of U.S. copyright law."[249] At a roundtable discussion held at Belmont University in September of 2015, the House Judiciary Committee heard from stakeholders in Nashville affected by current copyright legislation.[250]

> The House Judiciary Committee's copyright review is focused on determining whether our copyright laws are still working in the digital age to reward creativity and innovation in order to ensure these crucial industries can thrive. In the coming weeks the House Judiciary Committee will conduct several roundtable discussions to hear directly from the creators and innovators about the challenges they face in their creative field and what changes are needed to ensure U.S. copyright law keeps pace with technological advances."[251]

On April 26, 2016, Bob Goodlatte announced that over a three-year period, the House Judiciary Committee had conducted twenty formal hearings and three public roundtable discussions, such as the one that occurred at Belmont

---

246. Because Clear Channel is attempting to cut a deal on their digital performance royalties, this indicates that Clear Channel believes the rate is too high, and is willing to pay a small terrestrial performance rate if it means decreasing the digital performance rate. Clear Channel changed its name to iHeartMedia in 2014. Ryan Faughnder, *Clear Channel flips its name to iHeartMedia*, L.A. TIMES (Sep. 16, 2014, 5:45 AM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-clear-channel-iheart-20140910-story.html.

247. Press Release, Representative Jerrold Nadler, *Rep. Nadler Calls for Comprehensive Update of Music Copyright Laws* (June 10, 2014), http://nadler.house.gov/press-release/rep-nadler-calls-comprehensive-update-music-copyright-laws. Rep. Nadler references the disadvantage to online radio stations and online streaming services within the current system, because terrestrial broadcasters currently do not have to pay a royalty to recording artists, while these newer technologies do. *Id*.

248. *Id*.

249. *US Copyright Review*, H.R. JUDICIARY COMM., https://judiciary.house.gov/issue/us-copyright-law-review/ (last visited Oct. 21, 2016).

250. Nate Rau, *'All About That Bass' Writer Decries Streaming Revenue*, TENNESSEAN (Sept. 22, 2015, 7:03 PM), http://www.tennessean.com/story/money/industries/music/2015/09/22/all-bass-writer-decries-streaming-revenue/72570464/. Key members of Congress were present for the panel after holding 20 hearings with over 100 witnesses on the issue over the past two years in Washington, D.C. *Id*.

251. *See Belmont Hosts Copyright Review Listening Tour*, BELMONT U. (Sept. 23, 2015), http://news.belmont.edu/belmont-hosts-copyright-review-listening-tour/ (quoting a joint statement released by Judiciary Committee Chairman Bob Goodlatte (R-Va.) and Ranking Member John Conyers (D-Mich.) prior to the roundtable).

University.[252] Although the record has not been made public yet, these hearings will likely reveal how terrestrial broadcasters are taking advantage of recording artists and how innovative digital streaming services and Internet radio services are paying more than their fair share in comparison with how terrestrial broadcasters are getting away with not paying royalties to the copyright holders of sound recordings.[253]

IV. POTENTIAL SOLUTIONS

There are several potential solutions to addressing the non-existence of a terrestrial broadcast right for sound recordings, including: (1) advocating for protection under state copyright law, primarily in states with entertainment hubs, such as New York and California; (2) amending international intellectual property treaties in the hopes that the U.S. would adopt a full public performance right by implementing domestic legislation; and (3) amending the current Copyright Act to replace the "digital audio transmission" language with "audio transmission" in the exclusive rights for authors of sound recordings currently located at 17 U.S.C. § 106.

A. Broadcast Rights Under State Copyright Law

Court rulings in California and New York held that state law supplies the copyright owners of sound recordings with the public performance rights currently missing from federal copyright law.[254] *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* has been one of the most influential recent rulings on pre-1972 sound recording protection.[255] Members of the Turtles, a popular band in the 1960s,[256] do not receive federal copyright protection for their pre-1972 sound recordings.[257] Two members of the group, Mark "Flo" Volman and Howard "Eddie" Kaylan, filed suit against

252. Press Release, House of Representatives Judiciary Committee, Chairman Goodlatte Remarks at World IP Day Event (Apr. 26, 2016), https://judiciary.house.gov/press-release/chairman-goodlatte-remarks-world-ip-day-event/.

253. Villasenor, *supra* note 240. For example, Sirius XM currently pays 8% gross revenue and Internet broadcasters pay as much as 50% or more of revenue toward public performance royalties. *Id*.

254. Seidenberg, *supra* note 23, at 17.

255. 62 F. Supp. 3d 325 (S.D.N.Y. 2014), *appeal filed*, 821 F.3d 265 (2d Cir.), *certifying questions to*, 52 N.E.3d 240 (N.Y. 2016) The New York case accepted a certification of question by the United States Circuit Court of Appeals for the Second Circuit. *See* 52 N.E.3d 240 ("Certification of question . . . accepted and the issues presented are to be considered after briefing and argument.").

256. *See* Eriq Gardner, *After SiriusXM Success, The Turtles Take on Pandora in $25 Million Lawsuit (Exclusive)*, THE HOLLYWOOD REPORTER (Oct. 2, 2014, 1:18 PM), http://www.hollywoodreporter.com/thr-esq/siriusxm-success-turtles-take-pandora-737673 (explaining The Turles' $25 million lawsuit against Pandora).

257. *See* Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 39 (1971), amended by Pub. L. No. 93-573, 88 Stat. 1873 (1974) (codified as amended at 17 U.S.C. § 102) (only providing federal copyright protection to sound recordings after February 15, 1972).

SiriusXM, a for-profit satellite radio company,[258] alleging that under California state law, exclusive ownership of a pre-1972 sound recording includes the right to publicly perform the work.[259] The United States District Court for the Central District of California[260] held "that copyright ownership of a sound recording under California statute includes the right to publicly perform the recording."[261] The court also determined that SiriusXM violated that right by streaming the Turtles' pre-1972 recordings without authorization and without compensation, which amounted to copyright infringement.[262] Consequently, cases relating to royalties payable to recording artists from satellite radio broadcasters could play a role in future state court determination that artists are entitled to royalties for the audio transmissions of their works under state copyright law.[263]

B. Amending International Intellectual Property Law to Effectuate Domestic Change

Almost all countries have copyright statutes in effect, although each country varies on the amount of protection provided.[264] International treaties such as the Berne Convention[265] attempt to guarantee at least minimal copyright protections across foreign nations.[266] The Berne Convention employs a national treatment principle, whereby "each country agrees to give citizens of foreign countries the same degree of copyright protection that it gives its own citizens."[267]

One other way to get around Congressional failure to enact domestic legislation is to look to international treaties like the Berne Convention. Since most, if not all, industrialized countries already have legislation providing a full public performance right,[268] if an international treaty was adopted and the U.S. was

---

258. SIRIUSXM RADIO, http://www.siriusxm.com/whatissiriusxm (last visited Oct. 21, 2016). For a monthly subscription fee, SiriusXM users can listen to commercial-free music, live sports, news and more from a car, computer, smartphone or tablet. *Id*.

259. *See* Gardner, *supra* note 256; *see also* Ryan Book, *The Turtles Members Flo & Eddie on Litigation Streak Against SiriusXM and Pandora Regarding Pre-1972 Recording Rights*, MUSIC TIMES (Oct. 3, 2014, 9:59 AM), http://www.musictimes.com/articles/11250/20141003/turtles-members-flo-eddie-litigation-streak-against-siriusxm-pandora-regarding.htm (explaining the suits brought by the band against Pandora and SiriusXM).

260. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at *9 (C.D. Cal. Sept. 22, 2014).

261. Brabec, *supra* note 44, at 40.

262. *Id*.

263. *See id*. ("These cases and their appeals, as well as similar pending cases regarding the same or similar issues, need to be watched, as they will have a very significant impact on future sound recording license fees as well as royalties to labels and artists.").

264. MOSER & SLAY, *supra* note 27, at 20.

265. Berne Convention, *supra* note 152.

266. *See id*. (describing the Berne Convention as an international agreement which governs the law of copyright and was accepted in Berne, Switzerland).

267. MOSER & SLAY, *supra* note 27, at 238.

268. *See Public Performance Right for Sound Recording*, FUTURE OF MUSIC COALITION (Nov. 5, 2013), https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings (explaining that the U.S. is one of the industrialized countries that does not have a

pressured to sign it, the process could essentially be a backdoor to enacting a domestic full public performance right. If a treaty was agreed to by the executive branch, and Congress ratified it under their Article II powers, it would have a result comparable to Congress introducing its own legislation.[269]

This ratification process does pose some potential problems. Although the U.S. joined the Berne Convention in 1988,[270] it is criticized for allegedly failing to fully comply with it.[271] As such, it is unclear whether signing an international intellectual property treaty would be enough to change domestic copyright legislation. In fact, the Berne Convention already requires a public performance right for authors, although it is unclear to what extent this right must be provided and what exemptions are appropriate.[272] It is also important to note that even where the U.S. has become a signatory to an international treaty, the Berne Convention is not self-executing.[273] U.S. courts have proven that they are unwilling to comply with international copyright treaties when they would have to override clear congressional intent within the Copyright Act.[274]

Another important international treaty, the Rome Convention, employs national treatment as well, but it includes important exceptions that limit this treatment.[275] Because there is an opt out provision under Article 16,[276] countries

---

performance right).

269. *See* U.S. CONST. art. II, § 2 ("The President . . . shall have the power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators concur . . .").

270. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988).

271. *See* David E. Shipley, *The Empty Promise of VARA: The Restrictive Application of a Narrow Statute*, 83 MISS. L.J. 985, 988 (2014) ("[I]t is now reasonable to conclude that VARA [the Visual Artists Rights Act] has not come close to fulfilling our obligations under Article 6*bis* [of the Berne Convention].").

272. MOSER & SLAY, *supra* note 27, at 238; Berne Convention, art. 11.

273. *See* Berne Convention Implementation Act of 1988, 102 Stat. 2853, § 2 (codified at 17 U.S.C. § 101).

> The Congress makes the following declarations:
>
> (1) The Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto (hereafter in this Act referred to as the "Berne Convention") are not self-executing under the Constitution and laws of the United States.
>
> (2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.
>
> (3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

274. *See*, *e.g.*, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1226 (D. Minn. 2008) (discussing "concern for U.S. compliance with the WIPO treaties and the FTAs cannot override the clear congressional intent in § 106(3)."). The WIPO treaties refer to two treaties which the U.S. is a party to, the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty. *Id*. at 1225. The FTAs refer to Free Trade Agreements that the U.S. has entered into. *Id*.

275. *See* Ulrich Loewenheim, *The Principle of National Treatment in the International*

who currently agree to provide the same treatment to other members of the Rome Convention as its own nationals may stop providing this treatment if the U.S. joined the Rome Convention.[277] This is because, since the U.S. is a large exporter of music, suddenly having to provide public performance royalties for U.S. artists' radio play could be very expensive for many countries.[278]

Despite the problematic opt out provision, the Rome Convention does establish international minimum standards for the protection of neighboring rights,[279] such as, "minimum protection for performers (Article 7), a right of reproduction for producers of phonograms (Article 10), and minimum rights for broadcasting organizations (Article 13)."[280] Although there are currently ninety-two member countries to the Rome Convention, the U.S. is not one of them.[281] If the terrestrial public performance exemption was eliminated, the U.S. could then become a signatory to the Rome Convention, which could provide many benefits to U.S. artists abroad.[282] Although some countries may opt out of providing U.S. artists the performance royalties provided in Article 12,[283] most other countries with prosperous recording and entertainment industries would likely pay royalties to U.S. artists in exchange for the United States finally compensating foreign performers in the U.S.[284]

C. Amending the Copyright Act

Two recently proposed amendments to the Copyright Act, most recently in 2015, and prior to that in 2009, aim to fix the unequal treatment between

---

Conventions Protecting Intellectual Property 6 PATENTS & TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 593, 594 (2009) (describing how contracting parties can carve out exceptions using art. 15 for domestic laws or art. 16 by notifying the U.N. Secretary-General that the contracting party will not be apply certain articles).

276. Rome Convention, *supra* note 153, art. 16.

277. *See* Johannes, *supra* note 71, at 467 ("[I]n the past, Canadian legislators have sought to avoid the major outflow of cash that would surely follow if the United States were to enforce neighboring rights.").

278. *See id*. at 467–68 ("[I]n some countries, American-made sound recordings constitute more than 90 percent of broadcast public performances."). If the U.S. were to finally join the Rome Convention, many of these countries might choose to exercise Article 16 to opt out of providing U.S. artists performance royalties required by Article 12. *See generally* Rome Convention, *supra* note 153, arts. 12, 16.

279. COHEN, ET AL., *supra* note 15, at 480.

280. *Id*.

281. *Id*; *see also* WIPO, *WIPO-Administered Treaties,* WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), http://www.wipo.int/treaties/en/ip/rome/ (last visited Oct. 21, 2016) (listing the current contracting parties to the Rome Convention).

282. Owen J. Sloane & Rachel M. Stilwell, *The Case for the Performing Rights Act*, 32 L.A. Lawyer 52, (May 2009).

283. *See* Rome Convention, *supra* note 153, at art. 16 (allowing countries to opt out of Article 12 compliance if they notify the U.N. Secretary-General).

284. *See* Johannes, *supra* note 71, at 467. ("Some nations, like the United Kingdom and France, might adhere to Article 12 and agree to pay the royalties."). This is likely due in part to the fact that the United Kingdom and France "have strong domestic recording industries and long histories of recognizing a public performance right in sound recordings." *Id*. at 467 n.136.

songwriters and recording artists in regards to sound recordings.[285] In 2009, the Performance Rights Act was introduced with the goal of "[granting] performers of sound recordings equal rights to compensation from terrestrial broadcasters."[286] However, the amendment did not pass due to the lobbying efforts of the broadcast industry.[287] On April 13, 2015, a similar bill, the Fair Play Fair Pay Act was proposed.[288] Among other things, the legislation seeks to remove the protection for digital audio transmissions and modify section 106(6) of the Copyright Act to read as follows: "in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission."[289] The bill is a bipartisan effort and is still being considered as Congress explores reformations to current copyright law.[290] If passed, it would provide fair treatment for both songwriters and recording artists.[291] The change would also put the performance rights aspects of U.S. copyright law in line with the rest of the world, which could greatly benefit U.S. recording artists.[292]

On October 14, 2015, Rep. Marsha Blackburn met with songwriters and producers at the Barn Studio in Nashville to talk about the Fair Play Fair Pay Act and other copyright issues before Congress.[293] Although there was no apparent opposition to the Fair Play Fair Pay Act at the gathering, radio broadcast industry representatives voiced their opposition to the legislation at a roundtable discussion in September 2015, hosted by the House Judiciary Committee at Belmont University.[294] Although Congress never enacted the Performance Rights Act of 2009,[295] discussion continues about how to best adopt a full public performance

285. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (2015); Performance Rights Act, H.R. 848, 111th Cong. (2009). Historically, amendments regarding terrestrial radio royalties have not made it through both the House of Representatives and the Senate, hence the "digital audio transmission" language that has remained in effect since the DPRA was passed in 1995. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 343 (codified at 17 U.S.C. § 106(6)).

286. Performance Rights Act, H.R. 848, 111th Cong. (2009); *see also* Sloane & Stilwell, *supra* note 282, at 52 ("The passage of the [Performance Rights Act] would . . . provide parity and fairness among music broadcasting platforms.").

287. MOSER & SLAY, *supra* note 27, at 123.

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

289. *Id.* at § 2; Copyright Act, 17 U.S.C. § 106(6) (2012).

290. Sprigman, *supra* note 133.

291. *Id*.

292. *See* Christman, *supra* note 21 (noting that U.S. artists also do not receive compensation when their songs are played in other countries).

293. *See* Holly Meyer, *Blackburn, Music Creators Push Copyright Issues*, TENNESSEAN (Oct. 14, 2015, 7:11 PM), http://www.tennessean.com/story/news/2015/10/14/blackburn-music-creators-push-copyright-issues/73838404/ (explaining that Rep. Marsha Blackburn met with songwriters and music producers to discuss copyright issue before Congress).

294. *Id*. This discussion was conducted in contemplation of changing some of the aspects of the copyright laws due to the Copyright Act's current effects on the music industry. *Id*.

295. Christman, *supra* note 21 (explaining how lobbying efforts have severely hindered the effort to secure a terrestrial royalty).

right for sound recordings by legislative action.[296]

V. CONCLUSION

The most efficient way to change the current exemption would be to amend the Copyright Act to remove the "digital audio transmission" language from section 106(6)[297] and to replace it with, simply, "audio transmission."[298] However, it is unclear whether the Fair Play Fair Pay Act,[299] which aims to do just that, will pass into law. This uncertainty arises largely out of the lobbying effects that defeated the Performance Rights Act only seven years ago.[300]

If the Fair Play Fair Pay Act is passed, it would relieve the recording industry and copyright law of an irreconcilable difference between the public performance rights of songwriters and performers. The non-digital transmission exemption,[301] if there was ever a justification for it, is no longer compatible with modern copyright law and foreign policies.[302] It is time for Congress to adopt a change that will remove the "digital audio transmission" language from the Copyright Act[303] and include terrestrial broadcasts in the exclusive public performance rights of sound recording copyright holders.

296. *See* Press Release, House of Representatives Judiciary Committee, *supra* note 252 (describing the discussion still taking place on how Congress might consider overhauling the current copyright laws).

297. Copyright Act of 1976, 17 U.S.C. § 106(6) (2012).

298. *See* H.R. 1733 at § 2 (proposing to amend the language of the Copyright Act in this way).

299. *Id*.

300. MOSER & SLAY, *supra* note 27, at 123.

301. *See* 17 U.S.C. § 106(6) (providing public performance rights to sound recordings only for a "digital audio transmission").

302. *Id*.

303. *Id*.