Why Congress Should Pass The Fair Play Fair Pay Act

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As recording artists, songwriters, producers, engineers, and music professionals return from meetings with lawmakers on Capitol Hill this Spring, now is a great time to review important issues challenging music creators. This article is intended to provide music advocates with information that will be helpful when preparing for meetings or correspondence with lawmakers. Music creators' are now requesting of federal lawmakers: "Update copyright laws to ensure fair pay for music creators." A key piece of legislation, the Fair Play Fair Pay Act of 2015, H.R. 1733, if enacted, would further this goal tremendously.

MEET THE FAIR PLAY FAIR PAY ACT: SHORT SUMMARY

The "Fair Play Fair Pay Act of 2015," H.R. 1733, a bill introduced last year by Jerrold Nadler (D-NY) and Marsha Blackburn (R-TN), and now being considered by members of the House Judiciary Committee, would help recording artists as well as record labels big & small, by making certain changes in woefully outdated copyright laws. This bill, if enacted, will:

- Create a right for recording artists and copyright owners to be paid royalties to for the use of sound recordings at AM/FM "terrestrial" radio.
- Provide protection under federal copyright law for sound recordings that were made prior to 1972; and
- Update royalty rates for the use of sound recordings at satellite radio, Internet radio and cable radio so that they all pay consistent and fair rates.
- Make mandatory certain mechanics affecting producers of sound recordings who have negotiated with their clients for future royalty payments, how such producers will get paid those royalties.
    - This result would be a product of the Allocation For Music Producers Act of 2015 ("AMP Act"), H.R. 1457, which is incorporated into the Fair Play Fair Pay Act, but also exists as a stand-alone bill that could get its own vote by Members of Congress.
    - For a list of Members of Congress who have already co-sponsored the AMP Act as a stand-alone bill, click here.

For a list of Members of Congress who have already co-sponsored the Fair Play Fair Pay Act, click here.

THE FAIR PLAY FAIR PAY ACT AND "AMP ACT" WOULD HELP RECORDING ARTISTS AND MUSIC PRODUCERS GET PAID FAIRLY FOR THE USE OF THEIR WORK

The Fair Play Fair Pay Act would create a right for recording artists and copyright owners to be paid for the use of sound recordings on AM/FM radio.

Artists and record labels, large and small, do not get paid for the use of their recordings on AM/FM "terrestrial" radio. Recording artists would like this to change so that working musicians (not just superstars) can receive compensation for the use of their work across all radio technology platforms. AM/FM radio stations already pay for the privilege of broadcasting *musical compositions*, although they do not pay for the use of *sound recordings*.

Among those hardest hit by current unfair music licensing laws are heritage artists who made popular recordings decades ago. Although these artists created often-played hits used by radio conglomerates to entice listeners, AM/FM radio does not pay for the use of this important content due to an outdated loophole in copyright laws. As a result, many working musicians who were fortunate enough to create popular songs many years ago have no choice but to go on grueling performance tours, even when sick or exhausted, because they just can't pay their bills if they do not perform live on an ongoing basis.

These are among the very types of professionals who will join forces on Capitol Hill this week to advocate their long-held position that artists and record labels must be paid performance royalties in sound recordings for airplay on terrestrial radio.

When the current copyright laws were written decades ago, AM/FM radio was able to heavily promote new releases by playing new recordings, driving consumers into record stores to purchase albums by artists that enjoyed airplay on diverse radio playlists. However, since both the record industry and radio industry have consolidated heavily in the last 20 years, artists and labels can no longer depend on AM/FM airplay to drive commensurate sales of the recordings that are broadcast. The promotional value of airplay on AM/FM radio can still be substantial for newer hit artists, but far fewer recordings are sold as a result of AM/FM airplay than were sold years ago. This is especially true for a vast body of older familiar recordings, which collectively provide an enormous percentage of radio stations' content. For the most part, these recordings are not available for sale on the counter of your local Starbucks.

In the 1980's and 1990's, the promotional value that came from AM/FM airplay sold *albums*—not just singles. However, in the last decade, piracy and interactive streaming platforms have substantially cannibalized record sales. Broadcasters argue that

the music industry's financial woes are not attributable to the terrestrial radio industry, and that broadcasters should not be tasked with the burden of making up for decreased revenue suffered by the record industry. However, this view ignores the fact that the marketplace for sound recordings has changed drastically such that the promotional value of radio airplay simply does not drive record sales the way it once did.

Some critics of the Fair Play Fair Pay Act claim that the long and recurring history of payola in the United States provides evidence of the enduring promotional value of airplay as applied to music sales. The theory goes like this: if airplay has so much promotional value such that some record labels would pay for getting airplay, then the promotional value of radio airplay must be so great that it should substitute for payments of royalties that would be payable if AM/FM radio had not been exempted from copyright laws related to licensing of sound recordings.[1] But this view ignores two facts:

- There are two different supply and demand schemes for hit catalog music versus new sound recordings by lesser-known artists. Since the 1950's, payola has been an intermittent and recurring problem, harming what would otherwise have been a fairly pure form of meritocracy. The goal of payola, to the extent that it has been prevalent at various times, has always been to break new music that otherwise would not have had a shot at getting substantial airplay on radio stations.[2] In other words, payola, an unlawful form of corruption, is about sound recordings that radio *does not want to play unless they get paid to play them*. Performance royalties, on the other hand, should be paid because there is an enormous body of sound recordings that radio stations *want to play* in order to attract audiences.

- The promotional value of airplay has diminished greatly in recent years as album sales declined due to piracy, consumers switching from buying albums to instead purchasing digital downloads of "singles," and consumers using on-demand streaming platforms like Spotify as a substitute for buying records. Broadcasters argue that these changes in the marketplace are not the fault of radio station owners, and instead should be the record industry's problem to tackle alone. However, the fact remains that in modern times, just because songs are played on the radio does not mean that those spins will necessarily generate substantial record sales. This is particularly true with respect to catalog music (*i.e.*, sound recordings of familiar older songs) upon which radio programmers rely heavily.

Many individuals in the music community believe that it is no longer fair that media conglomerates pay nothing for the use of sound recordings on commercial music-driven radio stations, while many of those same companies generate enormous revenues from the exploitation of that content. On the other hand, many radio conglomerates

complain of decreasing revenue and heavy debt burdens,[3] arguing that they simply cannot afford additional royalty payments to recording artists. However, most of these major radio conglomerates acquired such debt by buying a substantial number of radio stations they could not actually afford between 1996 and 2006.[4]

According to Michael Harrison, publisher of trade publication *RadioInfo*, "Radio stations aren't a bad business…. They are only a bad business if the companies that own them are burdened by debt."[5] According to the Radio Advertising Bureau, the United States radio industry "still commands about $17 Billion in annual advertising revenue."[6] In other words, radio conglomerates generate plenty of revenue. But many of them are struggling to service debt acquired from buying and consolidating radio stations. Why should conglomerates that voluntarily took on such deep debt be exempted from compensating creators of the main content that is broadcast?

Parity Among Technological Platforms.

Streaming services pay for the use of sound recordings (albeit not nearly at rates that most music creators would deem to be fair). Satellite radio and cable radio also pay for the use of sound recordings, albeit at a lesser rate than non-interactive streaming services like Pandora. Why do other radio platforms pay royalties for the use of sound recording, but their competitors at AM/FM radio stations do not have to bear any financial burden at all for the same privilege? The carve-out in current federal copyright law, whereby AM/FM radio is not required to pay such royalties is an antiquated notion that has outlived its purpose and creates disparity among the financial obligations of competing music-playing services.

But what about smaller, independently owned radio stations and public radio stations that lack the resources enjoyed by the vertically integrated media conglomerates? Artist groups and label communities have always been willing, and still remain willing, to negotiate favorable deals with smaller broadcasters, particularly public radio; we do not want to unduly burden those independent and public radio stations who barely squeak by themselves, financially speaking. Under the Fair Play Fair Pay Act, AM/FM stations with annual revenues below one million dollars would pay just $500 in royalties annually. Noncommercial stations, including public and college radio stations, would pay only $100 per year in royalties.

Artists and record labels have long argued that the passage of legislation granting them a right to royalties for the broadcast of sound recordings would provide parity and "level the playing field" among music services, while helping to compensate artists and labels for the use of the sound recordings in which they invest substantial resources. Artists and digital music services like Pandora, Sirius/XM and cable radio providers disagree with each other about whether those services compensate artists fairly, but they

all agree on one point: it is unfair to both artists and competing digital music services that terrestrial broadcasters pay *absolutely nothing* for the use of sound recordings.

Parity Among Nations.

The United States is one of few industrialized countries that do not recognize performance rights for sound recordings used on AM/FM radio. In most countries, over-the-air radio broadcasters pay royalties to artists and owners of sound recordings. Almost all such countries adhere to treaties that grant rights to royalties for their broadcast of sound recordings, even if those recordings were created by artists and labels in other countries. However, this system is only applicable to sound recordings created in countries that also adhere to the same treaties, on a reciprocal basis. Since the United States does not have a law that grants the right to performance royalties in sound recordings for use on terrestrial radio, we cannot collect vast sums of foreign performance royalties that would otherwise be available to U.S.-based artists and record labels. In other words, since we do not pay our own recording artists, we cannot take advantage of treaties that would otherwise allow American artists to collect substantial royalties from abroad.

In this way, the United States' failure to take advantage of reciprocal arrangements with other countries collectively costs American performers and labels a massive amount of money annually. The American Association of Independent Music estimates that this loophole causes American recording artists and copyright owners to collectively lose 100 million annually.[7] Other estimates put this number at around $70 million.[8]

The Fair Play Fair Pay Act would establish a right for music creators to receive royalties for the use of sound recordings by AM/FM radio, such that terrestrial radio stations would be required to compensate artists, with royalty rates set to reflect what a "willing buyer and willing seller" would have reasonably negotiated—*e.g.*, fair market value. Passage of the bill would also guarantee that artists retain a "fair share" of royalties collected (so that the royalties don't all just go to the record labels). The bill would ensure that featured artists are paid directly through SoundExchange. In turn, SoundExchange would pay forty-five percent of all royalties directly to featured performers. Five percent would be distributed to sidemen and background singers. The other fifty percent would go to the owners of the copyright in the sound recordings. Some of those labels are huge conglomerates, but many are independent, privately owned labels.

It is time for music-driven commercial terrestrial radio stations to pay something for the use of the sound recordings upon which they build their listenership. It is also time for recording artists and record labels, big and small, to get compensated for the use of their work on radio stations here and abroad.

The Fair Play Fair Pay Act would provide protection under federal copyright law for sound recordings that were made prior to 1972.

The Fair Play Fair Pay Act would provide federal protection of sound recordings made prior to 1972. Federal copyright law currently protects sound recordings made during and after the year 1972, but sound recordings made before 1972 are protected only by state law rather than federal law. What this means, from a practical standpoint, is that if a pre-192 sound recording is infringed (played or distributed without a license), the owner of that sound recording who wants to sue for infringer has an extraordinarily heavy burden in state court to prove how much monetary damage the applicable infringement caused. If federal copyright law becomes applicable to sound recordings made prior to 1972, then owners of such works could sue infringers in federal court for statutorily-set ranges of damages. Furthermore, the infringed party could also ask the applicable judge to make the infringer pay for at least some portion of the copyright owner's legal fees. Although pre-1972 sound recordings are protected by state law, those laws are very weak compared to federal copyright law and, accordingly, this reform would result in more equitable awards of damages.

Because of this weak level of protection of pre-1972 recordings, Sirius XM and Pandora have both claimed in the past couple of years that it did not need to license for – or pay for—the use of these particular recordings. Courts have disagreed with Sirius XM and Pandora. However, those radio platforms' preposterous claims have made it clear to the music industry, as well as to the United States Copyright Office, that Congress must settle what can otherwise be expected to be a recurring infringement problem and expensive litigation. Congress can settle this issue by granting federal protection of pre-1972 recordings.

The Fair Play Fair Pay Act would update royalty rates for the use of sound recordings at satellite radio, Internet radio and cable radio so that they are all paying at the same rates.

Currently, non-interactive streaming platforms (like Pandora), satellite radio (Sirius XM) and cable radio stations all pay different rates for the use of sound recordings. The rates that Pandora currently pays are, in the view of the music industry, well below fair market value. Nevertheless, those rates are higher than the dirt-cheap rates paid by satellite radio and cable radio. The Fair Play Fair Pay Act would establish a uniform royalty standard based on fair market value, for all music services including AM/FM, satellite, cable and Internet radio. This would create a system in which each radio platform will compete on equal footing, while recording artists and record labels (big and small) would receive fair market value for the use of their sound recordings, regardless of the type of radio platform on which they are played.

The Fair Play Fair Pay Act would simplify and codify the process by which producers get paid for work on records, when they have negotiated with their clients for future royalty payments.

The Fair Play Fair Pay Act also includes a provision that would create a right for producers, mixers and engineers to receive royalties directly from the nonprofit collection agency SoundExchange when they have a letter of direction from a featured artist that instructs SoundExchange to pay those royalties. The provision will also codify a new, process by which producers can request two percent of royalties due from SoundExchange to the applicable featured artist for recordings made prior to 1995, even when no letter of direction is in place, if the artist has made reasonable attempts to obtain a letter of direction and if the applicable artist does not object for four months after having been contacted by SoundExchange with notification of the request by the producer, mixer or engineer. If there is more than one person requesting the royalty, that 2 percent would be split pro rata between those making the request.

This provision of the Fair Play Fair Pay Act is also a stand-alone bill called the Allocation For Music Producers Act of 2015 (also known as the AMP Act) that was introduced prior to the introduction of the Fair Play Fair Pay Act. So, if the Fair Play Fair Pay Act does not get enacted for whatever reason, the AMP Act could still be made law if Congress passes it as a stand-alone law.

What happens if the Fair Play Fair Pay Act is not enacted during this Congressional session?

The Fair Play Fair Pay Act has garnered an impressive list of co-sponsors thus far, demonstrating enthusiasm by many lawmakers for reforming copyright laws in favor of music creators. Quite a few of these lawmakers were, until relatively recently, unfamiliar with the concerns that are addressed in the bill. But as Members of Congress turn their attention squarely to elections in the coming months, there is always the possibility that the Fair Play Fair Pay Act will not get enacted during this Congressional session. Nonetheless, the momentum of support by Members of Congress for the copyright law reforms proposed by this bill can surely be expected to pay dividends in future years. In January of 2017, Congress will start a new legislative session. At that time, we will have an opportunity to introduce a new bill, or bills, to federal lawmakers who are now much better informed about the importance of compensating music creators, compared to just two years ago.

Moreover, with a better-informed House of Representatives, moving forward we will be in a much better position to help combat tactics by well-funded lobbying organizations who are intent on maintaining their free ride with respect to exploiting our content for free, or nearly free. For example, we can expect that in the new

Congressional session, lobbyists for broadcasters will re-introduce a new version of an anti-musician nonbinding resolution that they have heretofore misnamed the "Local Radio Freedom Act" ("LRFA"). As much as we all love local radio stations and we all love freedom, this bill is actually a misleading product of lobbyists representing large vertically integrated media companies that generate a collective $17 billion each year in terrestrial radio revenue. These platforms simply do not want to pay for the privilege of playing for the musical content upon which they depend for generating ad revenue.

Because LRFA is a nonbinding resolution that would not actually create law even if enacted, lawmakers who co-sponsor it do not have much at stake when determining the merits of the purported policy behind it. Lawmakers have little reason to be rigorous when vetting this bill, since, as a non-binding resolution, it has no legal effect. This nonbinding resolution, which states that its co-sponsors oppose "any new performance fee, tax, royalty or other charge" on AM/FM radio stations, was introduced well prior to rigorous hearings that have been part of Congress' comprehensive review of the Copyright Act in the past couple of years. The bill was also introduced prior to grass roots events at which hundreds of music creators met with their elected leaders to discuss these issues in person. So while the current iteration of LRFA has a majority of the Members of the House of Representatives signed on as co-sponsors, we can predict that the next version of this bill, which will again inevitably refer misleadingly to artist compensation as a "tax," will have lost a substantial amount of support in the House of Representatives as we continue our work educating lawmakers about realities related to compensating music creators for the use of sound recordings.

For a list of Members of Congress who have co-sponsored the current nonbinding resolution referred to as the Local Radio Freedom Act, click here.

CONCLUSION

- The Fair Play Fair Pay Act would benefit recording artists, record labels and music producers who deserve to be paid fairly for the use of their work. To contact your Member of Congress in support of the Fair Play Fair Pay Act, click here.

- The AMP Act, if passed as a stand-alone law, would help simplify and codify how music producers and engineers get paid.

- The so-called "Local Radio Freedom Act," which is aimed squarely at preventing music creators from being paid for the use of their sound recordings, is a bill that recording artists should continue to argue against vociferously.

[1] See, e.g., Christopher Sprigman, "Fair Play or Foul?," Bloomberg, May 1, 2015, available at http://www.bloomberg.com/news/articles/2015-05-01/fair-play-or-foul-.

[2] See generally, Stilwell, supra.

[3] See, e.g., Russell Grantham, "Radio Giant Cumulus Tumbles After Flying High," the *Atlanta Journal-Constitution*, Jan. 9, 2016, available at http://tinyurl.com/j9beznf. See also Laura J. Keller, "The Largest Radio Operator Is Saddled With $20 Billion in Debt," Bloomberg, Feb. 3, 2016, available at http://tinyurl.com/jdqu78e.

[4] See Rachel M. Stilwell, "Which Public? Whose Interest? How the FCC's Deregulation of Radio Station Ownership Harmed the Public Interest, and How We Can Escape From The Swamp," 26 Loyola of Los Angeles Entertainment Law Review 369, 417, 419, available at: http://tinyurl.com/hjd64nb.: "By 2001, industry mergers had fully shifted the balance of power to radio groups, which today have the power to launch a song [onto the airwaves] simultaneously in scores of markets around the country,--or consign it to oblivion. As the power of radio groups increased, so did their debt."

[5] See Meg James, "End of an Era: CBS to Sell Its Historic Radio Division," *Los Angeles Times*, March 15, 2016, available at: http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-cbs-announces-cbs-radio-sale-20160315-story.html.

[6] See id.

[7] See Aaron Stanley, "Performers Step Up Pressure for U.S. Royalties, Financial Times, April 13, 2015, available at http://www.ft.com/cms/s/0/aae9fce2-dfc5-11e4-a6c4-00144feab7de.html#axzz454pUBUNx.

[8] See, e.g. Comments of the Copyright Alliance to the United States Copyright Office re: Music Licensing Study (2014), available at: http://tinyurl.com/jd25oge.