

The Clash between Terrestrial and Digital Radio: Pinned by the Music Modernization Act

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ABSTRACT

Copyright law, specifically music licensing, has long been outdated due to changes in the way people listen to music. With the proliferation of technology, listeners can now enjoy music via channels that did not exist just a few decades ago. As a consequence, music creators have faced years of economic inequality.¹ Songwriters, artists, and musicians have fought a long, and often fruitless, battle for justice—legislation that would change music law for the better has continuously been struck down.² However, in 2018, the Music Modernization Act (MMA) was signed into law, representing a battle won for music creators.³ This Comment will explore the new and updated laws that make up the MMA, with a specific focus on the difference in treatment of terrestrial radio and digital radio under modern music law and how this division has caused tension in the making of the MMA.

INTRODUCTION

Until recently, owners of pre-1972 sound recordings did not receive royalties for their musical creations; however, a change arose when the Orrin G. Hatch–Bob Goodlatte Music Modernization Act, commonly

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1. Scott Timberg, *How Music has Responded to a Decade of Economic Inequality*, VOX (July 30, 2018), <https://www.vox.com/culture/2018/7/30/17561470/music-of-inequality> [https://perma.cc/Z9E9-MP2Y].

2. See generally Paula Parisi, 'Fair Play, Fair Pay' Radio-Royalty Act Gains Momentum, *But Faces Uphill Climb*, VARIETY (June 12, 2017), <https://variety.com/2017/biz/news/fair-play-fair-pay-radio-royalty-act-gains-momentum-1202462359/> [https://perma.cc/QK96-9BJ4].

3. See Patrick H.J. Hughes, *Trump Updates U.S. Copyright Law with Music Modernization Act*, WESTLAW INTELL. PROP. DAILY BRIEFINGS, Oct. 15, 2018, 2018 WL 4955957.

referred to as the Music Modernization Act (MMA or the Act), was signed into law on October 11, 2018.⁴ The MMA, comprised of three previously separate bills, has made a ground-sweeping change in music copyright law.⁵ The Act amended the U.S. Copyright Act, making the law more inclusive of everyone who takes part in the creation of music and encompassing the rights needed to “modernize copyright law.”⁶

One of the most important issues that the MMA addresses—and that this Comment will explore—is federal copyright protection for pre-1972 sound recordings.⁷ In 1971, Congress granted federal copyright protection to sound recordings.⁸ Therefore, prior to the MMA, pre-1972 sound recordings (made on or after February 15, 1972) did not have federal copyright protection; instead, the recordings were protected under state law.⁹ Because no uniform law governing the protection of pre-1972 sound recordings existed, the scope of protection, exceptions, and limitations given to the pre-1972 sound recordings was unclear.¹⁰ This ambiguity has resulted in numerous lawsuits with a variety of rulings and settlements depending on the jurisdiction.¹¹

The discrepancy in protection between pre-1972 sound recordings and post-1972 sound recordings has had a long-lasting effect on the way recording artists and songwriters are paid—particularly as the digital

4. 17 U.S.C. § 114 (2018); see Hughes, *supra* note 3.

5. The three separated bills are the original MMA, the CLASSICS (Classics Protection and Access) Act, and the AMP (Allocation for Music Producers) Act. Stinson LLP et al., *Music Modernization Act Update* (Aug. 12, 2019), <https://www.jdsupra.com/legalnews/music-modernization-act-update-58835/> [<https://perma.cc/CUD8-LZMK>]; see generally Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.) (2018) [hereinafter Hatch–Goodlatte MMA].

6. Mark H. Wittow et al., *A Modern Melody for the Music Industry: The Music Modernization Act Is Now the Law of the Land*, K&L GATES HUB (Oct. 11, 2018), <http://www.klgateshub.com/details/?pub=A-Modern-Melody-for-the-Music-Industry-The-Music-Modernization-Act-Is-Now-the-Law-of-the-Land-10-11-2018> [<https://perma.cc/DS22-5UDK>].

7. See generally 17 U.S.C. § 1401 (2018).

8. Sound Recording Act of 1971, Pub. L. No. 92-140, § 17, 85 Stat. 391, 392 (superseded and codified as amended by Copyright Act of 1976, 17 U.S.C. §§ 101–810) (2018).

9. Timothy McMahon, *Could Pre-1972 Sound Recordings Finally Attain Federal Copyright Protection?*, RUTGERS INST. FOR INFO. POL’Y & L. (Apr. 19, 2018), <https://riipl.rutgers.edu/could-pre-1972-sound-recordings-finally-attain-federal-copyright-protection/> [<https://perma.cc/YR74-DQAW>].

10. *A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdiction*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/docs/sound/> [<https://perma.cc/YAJ3-PP9N>].

11. One of the most famous lawsuits in this context was initiated by Flo & Eddie, Inc., which controls the music from the 60s rock band the Turtles. Flo & Eddie filed a class action lawsuit against SiriusXM satellite radio for failing to license/compensate artists for their pre-1972 sound recordings; the lawsuits were filed in Florida, California, and New York, and all resulted in different rulings. Jeffrey S. Becker et al., *The Fair Play, Fair Pay Act of 2015: What’s at Stake and for Whom?*, 32 ENT. & SPORTS LAW. 5, 7–8 (2015).

world has expanded.¹² For almost five decades, artists and record labels who made a record before 1972 were not paid royalties when their music was streamed via digital music services, such as SiriusXM and Pandora.¹³

The MMA's grant of federal copyright protection to pre-1972 sound recordings aims to close the gap between digital music providers and copyright owners.¹⁴ Specifically, the federal copyright for pre-1972 recordings allows songwriters and recording artists to receive their fair share of their work.¹⁵ However, the movement toward giving songwriters and recording artists their rights has caused conflict between terrestrial radio (over-the-air radio broadcast stations, e.g., AM/FM) and digital radio.¹⁶

While Congress granted terrestrial radio a license to play sound recordings without cost¹⁷ under § 114(d)(1) of the Copyright Act,¹⁸ digital radio was not granted the same license.¹⁹ In 1995, Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 (DPRA) that established a performance right²⁰ in sound recordings played via digital audio transmission.²¹ This Act additionally created a licensing system for

12. Adam Gorgoni, *Come Together: Why Songwriters Should Support the Music Modernization Act (Guest Column)*, BILLBOARD (Apr. 2, 2018), <https://www.billboard.com/articles/business/8280631/music-modernization-act-songwriters-should-support-congress-sona> [https://perma.cc/4D9T-QWRY].

13. BRIAN T. YEH, CONG. RESEARCH SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 19 (2015).

14. *See* Hatch–Goodlatte MMA, 17 U.S.C. § 114(1)–(2) (2018); *see generally* Wittow et al., *supra* note 6.

15. Gorgoni, *supra* note 12.

16. Jim Meyer, Opinion, *SiriusXM CEO Jim Meyer Explains the Trouble with the Music Modernization Act*, BILLBOARD (Aug. 23, 2018), <https://www.billboard.com/articles/business/8471802/siriusxm-ceo-jim-meyer-music-modernization-act-op-ed> [https://perma.cc/D3GP-WT72].

17. “Unlike terrestrial radio, digital radio must pay for this license through the SoundExchange.” McMahon, *supra* note 9.

18. *See* 17 U.S.C. § 114(d)(1) (2018).

19. Congress exempted terrestrial radio, whereas copyright owners of digital audio transmission were given exclusive rights to publicly perform. *See* 17 U.S.C. § 106(6) (2018); *see generally* McMahon, *supra* note 9.

20. “The performance right refers to the copyright doctrine which allows those who license compositions and sound recordings to “perform” those licensed works in return for royalties paid to copyright owners.” Luke Evans et al., *What Is Public Performance License?*, EXPLORATION (Sept. 9, 2018), <https://exploration.io/what-is-performance-licensing/#theperformanceright> [https://perma.cc/LW6Z-M356]. *See generally* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C. (2018)) [hereinafter DPRA].

21. *See* 17 U.S.C. § 106(6) (2018).

satellite radio and noninteractive²² subscription providers.²³ Essentially, under the DPRA, digital radio, unlike terrestrial radio, must pay for this license through the SoundExchange.²⁴

The MMA is heavily concentrated on digital radio and ensuring that it pays its dues while leaving out terrestrial radio; the focus on digital radio, in turn, led to SiriusXM lobbying against the MMA in an attempt to kill the bill.²⁵ Although the MMA prevailed—the House of Representatives passed the bill unanimously,²⁶ and the MMA went into effect on October 11, 2018²⁷—this Comment will explore the reasons why terrestrial radio gets a free pass and whether Congress should have included it. In this Comment, I will argue that the MMA is a significant step toward equality in the music industry and that the bill almost certainly would not have passed if it required terrestrial radio to pay royalties. I will contend that, at the moment, the MMA structure is the best and only choice to thoroughly protect artists, songwriters, and all those involved in the creation of music. The MMA is a triumph in the long battle to reform copyright law and bring justice to music creators, although there is still room for improvement because the bill leaves terrestrial radio behind. Nevertheless, the MMA is a tremendous achievement for the music industry because of the widespread improvements it has made on various areas of the music industry.

Part I of this Comment provides a brief explanation of copyright and royalties law—in particular, how their interplay has led to the state of the law. Part II of this Comment further analyzes the MMA and what led to its creation, including the issues the Act seeks to resolve. Part III of this Comment focuses on a particular critique to the MMA: its unequal

22. Generally defined as those in which the user experience mimics a radio broadcast. That is, the users may not choose the specific track or artist they wish to hear, but are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener (i.e., no pre-published playlist). *Licensing 101*, SOUNDEXCHANGE, <https://www.soundexchange.com/service-provider/licensing-101/> [https://perma.cc/4JDA-542V].

23. See generally DPRA, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.) (2018).

24. McMahon, *supra* note 9. SoundExchange is the U.S. chosen non-profit collective rights management organization that is designed to collect and distribute digital performance royalties for sound recordings.

25. Paul Resnikoff, *The Music Modernization Act Faces Brand-New Threats from Sirius XM & Music Choice*, DIG. MUSIC NEWS (Aug. 6, 2018), <https://www.digitalmusicnews.com/2018/08/06/music-modernization-act-sirius-xm-music-choice/> [https://perma.cc/53MB-UBRY] [hereinafter Resnikoff, *Brand-New Threats*].

26. Dani Deahl, *Senate Passes Music Modernization Act*, VERGE (Sep. 18, 2018), <https://www.theverge.com/2018/9/18/17876660/senate-passes-music-modernization-act> [https://perma.cc/L6U7-3S66].

27. See Hughes, *supra* note 3.

treatment of digital radio and terrestrial radio because while one pays for royalties, the other does not. The MMA is a monumental change for the music industry. In order to push toward equality and to conform with societal change, the laws that comprise the MMA are essential. An attempt to incorporate everything at once, such as implementing a law for terrestrial radio to pay performance royalties, would have most likely been unsuccessful.

I. COPYRIGHT AND ROYALTIES BASICS

A copyright is the protection of original works of authorship fixed in any tangible medium of expression.²⁸ The protection includes sound recordings; the definition of a sound recording can be found in 17 U.S.C. § 101:

“Sound recordings” are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.²⁹

Authors of copyrights hold the exclusive right to do what he or she wants with the work and to authorize the reproduction of the copyrighted work in copies or phonorecords.³⁰ Phonorecords are material objects in which sounds are fixed and from which the sounds can be perceived, reproduced, or otherwise communicated directly, or with the aid of a machine or device.³¹

A song has two types of copyrights attached to it: one right is for the musical composition and the other right is for the sound recording.³² The composition copyright covers payment for the songwriter and publisher.³³ The sound recording copyright covers payment for the artist (the person performing the song; sometimes the artist and the songwriter are the same person) and the copyright owner (usually the record label).³⁴ In the music industry, a portion of what an artist gets paid from his or her song comes from royalties. Royalties are the division of proceeds between the artist and their record company.³⁵ Among other things, a record company

28. 17 U.S.C. § 102 (2018).

29. 17 U.S.C. § 101 (2018).

30. 17 U.S.C. § 106 (2018).

31. 17 U.S.C. § 101 (2018).

32. *What Are Neighboring Rights?*, ROYALTY EXCHANGE (Feb. 2, 2017), <https://www.royaltyexchange.com/learn/what-are-neighboring-rights> [https://perma.cc/QA28-WK8K].

33. *Id.*

34. *Id.*

35. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 76 (9th ed. 2015).

provides the master recording³⁶ to a distributor who then sells the records physically and digitally.³⁷ Once an artist has a copyright of his or her song, the copyright also includes the exclusive right to perform the work publicly—this is how performance royalties are determined—such as playing the song at a concert venue, on the radio, via streaming services, or in any other setting in which music can be heard publicly.³⁸

After a song is recorded and released to the public, the copyright owner must license it—known as a compulsory mechanical license—before anyone may use it.³⁹ Therefore, whenever someone seeks to use a song, they need permission from the owner.⁴⁰ Instead of providing a separate license for every use, blanket licenses are issued.⁴¹ In the United States, performing rights organizations (PROs) negotiate with publishers of songs (e.g., songwriters assign their rights to their song to a publishing company, who then ensures that they receive payment when the songs are used commercially) for a right to license performance rights to all their songs and then distribute that right to people who want to use them.⁴² Essentially, PROs collect rights from publishers of all their songs and provide a license that will give that licensee a right to use every song that the PROs have collected. In return, the PROs provide the publishers with a share of the fees.⁴³ In the United States, the major PROs are as follows: ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.), and SESAC (Society of European Stage Authors and Composers).⁴⁴

However, under terrestrial radio broadcasting, the artist or sound recording copyright owners are not paid performance royalties; only songwriters and publishers are paid royalties.⁴⁵ Prior to the MMA, performance royalties were distributed under a system of mechanical royalty rates that used an outdated four-part formula as seen in 17 U.S.C.

36. The original recording made in the studio. *Id.* at 74.

37. *Id.* at 65.

38. *Id.* at 227.

39. *Id.* at 229.

40. *Id.* at 241.

41. *Id.*

42. *Id.*

43. *Id.* at 76, 240–42. Although convenient, blanket licenses are subject to antitrust criticism. See generally U.S. Dep't of Just., Statement of the Department of Justice on the Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (Aug. 4, 2016).

44. See generally *About SESAC*, SESAC, <https://www.sesac.com/#!/our-history> [<https://perma.cc/3JQN-KUMU>] (describing SESAC's current licenses); *Music Licensing History*, NAT'L RELIGIOUS BROADCASTERS MUSIC LICENSE COMM., <http://www.nrbmlc.com/music-licensing/music-licensing-history/> [<https://perma.cc/6HT9-WL7M>] (noting the history of ASCAP, BMI, and SESAC).

45. Ken Consor, *What You Didn't Know About Radio Royalties*, SONGTRUST (Apr. 2, 2019), <https://blog.songtrust.com/publishing-tips-2/what-you-didnt-know-about-radio-royalties> [<https://perma.cc/ZRZ2-FAHV>].

§ 801(b)(2)(A)–(D).⁴⁶ Section 801(b) provided general factors that the Copyright Royalty Board (CRB) used to determine royalties.⁴⁷ Furthermore, the § 801(b) standard took into account non-market-based criteria when determining royalty rates, “including specifically [protecting against] . . . ‘disruptive’ effects that might be caused by paying royalties—no matter how market oriented they may be.”⁴⁸ Therefore, § 801(b) allows “licensees a *de facto* right to perpetual profitability,”⁴⁹ which has led to below-market rates.

A. The Law of Terrestrial and Digital Performance Royalties

In 1972, Congress granted special copyright protection to sound recordings; however, in doing so, Congress failed to protect the right to publicly perform sound recordings.⁵⁰ To “publicly perform” can mean two things: (1) to perform in an open space (open to the general public) or any place where there is a substantial amount of people; or (2) to transmit or communicate a performance to a place specified above by means of any device or process, whether or not members of the public capable of receiving the performance receive it in the same place and time or from a different place at the same time or at different times.⁵¹ However, when Congress incorporated protection to publicly perform sound recordings, it led to the issue faced today between digital and terrestrial radio.

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act (DPRA).⁵² According to the DPRA, owners of

46. 17 U.S.C. § 801(b)(2)(A)–(D) (2018); see Ari Herstand, *What is the Music Modernization Act and Why Should it Pass*, DIGITAL MUSIC NEWS (Aug. 1, 2018), <https://www.digitalmusicnews.com/2018/08/01/music-modernization-act/> (last visited Jan. 28, 2020) (citing DINA LAPOLT & SONA (SONGWRITERS OF NORTH AMERICA), MUSIC MODERNIZATION ACT: A BREAKDOWN (2018), <https://static1.squarespace.com/static/5caa7f768155126b207885ed/t/5cb35877eef1a1633f65a21b/155257465307/Music%2BModernization%2BAct-%2BA%2BBreakdown.pdf> [<https://perma.cc/UFB8-M6HV>] [hereinafter MMA BREAKDOWN]); see also Letter from Michael J. Huppe, President & CEO, SoundExchange, to Chuck Grassley, Chairman, and Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary (May 14, 2018), <https://www.soundexccrbhange.com/wpcontent/uploads/2016/09/SoundExchange-Letter-to-Senate-Judiciary-801b-May-2018.pdf> [<https://perma.cc/N9SS-WJSC>].

47. 17 U.S.C. § 801(b)(2)(A)–(D) (2018); see Lauren E. Kilgore, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 565 (2010).

48. Jeffrey A. Eisenach, *The Sound Recording Performance Right at a Crossroads: Will Market Rates Prevail?*, 22 COMMLAW CONSPECTUS: J. OF COMM. L. AND TECH. POL’Y 1, 3 (2014), https://www.nera.com/content/dam/nera/publications/archive2/PUB_Eisenach_0114.pdf [<https://perma.cc/9U9E-KQHZ>].

49. *Id.* at 4.

50. McMahon, *supra* note 9.

51. 17 U.S.C. § 101 (2018).

52. See generally DPRA, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.) (2018).

copyrighted works had the exclusive right to perform or authorize the copyrighted work publicly by means of digital audio transmission.⁵³ This excluded terrestrial radio and caused a rift between terrestrial radio and digital radio. Unlike terrestrial radio providers that may negotiate with owners of sound recordings, digital platforms such as SiriusXM, Pandora, and Spotify must pay a public performance royalty to the owners of sound recordings that it publicly broadcasts.⁵⁴ Therefore, digital platforms must comply with the compulsory license mechanism set out in §§ 114 and 801 of the Copyright Act, which provides broadcasters the legal right to play an artist's music without his or her permission so long as they pay a reasonable royalty rate to the artist.⁵⁵ The "reasonable royalty rates" are determined by the CRB.⁵⁶ However seemingly reasonable the royalty rate set out by the CRB may be, the rate does not treat all platforms equally.⁵⁷

II. THE MUSIC MODERNIZATION ACT

A. *The Basics*

The MMA transforms the law to conform to the modernization of music licensing in the twenty-first century.⁵⁸ The MMA created a non-profit, centralized, mechanical coalition that administers, collects, distributes, and audits mechanical royalties paid by digital service providers (DSPs).⁵⁹ This improved upon a previous procedure that created a loophole for DSPs when it was unclear who the owner of the work was.⁶⁰ Previously, DSPs could avoid making payments for works not registered with the Copyright Office by sending a Notice of Intent to the Copyright Office.⁶¹ In the meantime, this work-around allowed the DSPs to play music while avoiding paying the songwriter and publisher.⁶² Now, DSPs can no longer avoid payments despite not knowing who to make the payment to.⁶³ Additionally, under the MMA, royalty rates are based on

53. 17 U.S.C. § 106(6) (2018).

54. Becker et al., *supra* note 11, at 6–8.

55. *Id.* at 9.

56. To make determinations and adjustments to reasonable rates, the standards are set out in 17 U.S.C. § 801, where rates are adjusted by determined factors. *Id.*

57. *Id.*

58. See generally Hatch–Goodlatte MMA, Pub. L. No. 115-264 (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.) (2018)

59. Isaac Shepard, *Complete List of Digital Service Providers*, THE MUSIC MAZE (July 17, 2018), <https://jazzpromoservices.com/jazz-news/complete-list-of-digital-service-providers-the-music-maze/> [<https://perma.cc/9N8T-GCC9>] (“[DSPs] are online platforms where users can stream, download, or interact with your music.”); MMA BREAKDOWN, *supra* note 46.

60. MMA BREAKDOWN, *supra* note 46.

61. *Id.*

62. *Id.*

63. *Id.*

what a willing buyer and seller agree reflects market negotiations.⁶⁴ This process fixes the issue of below-market rates that came from the outdated four-part formula in § 801(b) of the U.S. copyright laws.⁶⁵

Overall, the MMA ensures that all individuals involved in creating music are reasonably compensated for their work.⁶⁶ The original MMA, known as the Musical Works Modernization Act, is one of three bills incorporated into the MMA; it focuses on providing a blanket license for digital music companies and guaranteeing songwriters receive their compensation.⁶⁷ The second bill incorporated into the MMA—the Allocation for Music Producers Act—enables SoundExchange (the Performance Rights Organization in charge of the distribution of royalties to the artists and master recording owners) “to directly compensate music producers and engineers.”⁶⁸ Lastly, the Compensating Legacy Artists for their Songs, Service, and Important Contributions to Society Act (also known as the Classics Act) is the third bill incorporated into the MMA, which provides compensation to the copyright owners of pre-1972 sound recordings.⁶⁹ Now, as a result of the MMA, royalties are given to artists who have been exploited by digital and satellite radio for their sound recordings prior to 1972.⁷⁰

B. Focusing on The Viable (Digital)

The ways one can listen to music have evolved substantially throughout the years: from paying a nickel to listen on a phonograph; to purchasing a vinyl at a record store; to hearing songs on the radio; to buying cassettes and compact discs (CDs); and now, to streaming on the internet and listening to digital radio.⁷¹ Music has come a long way, and because of the variety of ways one can enjoy music, it has become

64. *Id.*

65. *See generally id.*

66. 17 U.S.C. § 114(g)(5)(A) (2018).

67. Patrick H.J. Hughes, *Music Modernization Act Gets Senate Approval*, WESTLAW INTELL. PROP. DAILY BRIEFINGS, Sept. 21, 2018, 2018 WL 4956224.

68. *Id.*

69. *Id.*

70. *See* Eriq Gardner, *Record Labels Sue Pandora over Pre-1972 Recordings*, HOLLYWOOD REPORTER (Apr. 17, 2014), <https://www.hollywoodreporter.com/thr-esq/record-labels-sue-pandora-pre-697327> [<https://perma.cc/NHA8-J9RU>]. “Owners and artists of sound recordings recorded prior to 2/15/1972 do not enjoy any protection or compensation with respect to digital performances.” Ari Herstand, *What is the Music Modernization Act and Why Should it Pass*, DIGITAL MUSIC NEWS (Aug. 1, 2018), <https://www.digitalmusicnews.com/2018/08/01/music-modernization-act/> (last visited Jan. 28, 2020). *See generally* MMA BREAKDOWN, *supra* note 46.

71. Amanda Zantal-Wiener, *From the Phonograph to Spotify: The History of Streaming Music*, HUBSPOT: MARKETING (Aug. 26, 2017), <https://blog.hubspot.com/marketing/history-of-internetradio> [<https://perma.cc/A6QL-4PX9>].

increasingly convenient for a consumer to listen to music.⁷² On the other hand, it has become increasingly complex for those involved in the creation of music because of the issue of prolific illegal downloading.⁷³ Below-market rates for royalties, DSP-created loopholes, and exploitation of pre-1972 unprotected sound recordings have also become issues for music creators.⁷⁴ The law has not always kept current with how music creators should be paid, thus resulting in longstanding years of unequal treatment to songwriters, composers, and recording artists.⁷⁵

Currently, streaming leads the way in how people are consuming music today—streaming is 75% of the revenue of the United States music industry as of 2018.⁷⁶ This has been an increase of 28% year-to-year, encompassing revenues from subscription services “(such as paid versions of Spotify, Apple Music, Pandora, and others), digital and customized radio services (such as Pandora, SiriusXM, and other Internet radio), and ad-supported on-demand streaming services (such as YouTube, Vevo, and ad-supported Spotify).”⁷⁷ The expansion of the industry has affected songwriters and publishers because they have not been fairly compensated; outdated copyright laws prevented these individuals from getting their rightful share of the fair market value of the work that they created.⁷⁸

Over the years, streaming companies have exploited these laws to pay songwriters less for what their work is actually worth.⁷⁹ Streaming services have caused a detrimental effect on the music industry as it “led to tremendous declines in revenue paid to songwriters.”⁸⁰ Additionally, for pre-1972 sound recordings, artists were not getting paid at all.⁸¹ Therefore, it was crucial that a new law be implemented, primarily for songwriters (who are not always the artists under a record label) because songwriting

72. See generally *id.*

73. See Laura Sydell, *Why Taylor Swift Is Asking Congress to Update Copyright Laws*, NPR: ALL TECH CONSIDERED, (Aug. 8, 2016), <https://www.npr.org/sections/alltechconsidered/2016/08/08/487291905/why-taylor-swift-is-asking-congress-to-update-copyright-laws> [https://perma.cc/H473-FFWW].

74. MMA BREAKDOWN, *supra* note 46.

75. See *Video: Why Top Songwriters Are Asking Congress to #StandWithSongwriters*, ASCAP, <https://www.ascap.com/about-us/songwriter-equity-act> [https://perma.cc/SX6D-LNKM] [hereinafter *StandWithSongwriters*].

76. RECORDING INDUSTRY ASS'N OF AM., MID-YEAR 2018 RIAA MUSIC REVENUES REPORT, <https://www.riaa.com/wp-content/uploads/2018/09/RIAA-Mid-Year-2018-Revenue-Report-News-Notes.pdf> [https://perma.cc/9TWC-TJK2].

77. *Id.*

78. See *StandWithSongwriters*, *supra* note 75.

79. *Id.*

80. Scott Hanus, *Deregulating the Music Industry: A Push to Give Power Back to the Songwriters*, 16 DEPAUL BUS. & COM. L.J. 129, 129 (2018).

81. MMA BREAKDOWN, *supra* note 46, at 5.

as a profession may become a dying business if songwriters are not compensated correctly.⁸²

As a response to the “antiquated music licensing laws that poorly serve creators,”⁸³ the MMA was introduced and incorporated several pieces of “consensus legislation.”⁸⁴ It took several years in the making, but now music creators have finally won their battle.⁸⁵ The MMA has updated the law to better suit the shift towards streaming and digital services. Major digital music services such as Spotify are often battling million-dollar lawsuits for “using artists’ music ‘without a license and without compensation.’”⁸⁶ These lawsuits are a way of ensuring compensation for songwriters and copyright holders who have in the past been susceptible to the shift from physical album sales to streaming albums.⁸⁷ Under the DPRA, digital music services must comply with the compulsory license mechanisms.⁸⁸ The DPRA “specifically *exempted* traditional over-the-air radio broadcasts from the newly created right to control digital public performances of sound recordings.”⁸⁹ Therefore, unlike terrestrial radio, which is not required to pay for public performance royalties, digital music services ran the risk of lawsuits prior to the MMA.⁹⁰

Due to the increasing number of lawsuits against Spotify, Spotify and similar companies had an incentive to agree to pay royalties for pre-1972

82. See Lucas Shaw, *Songwriters Sing Blues over Diminished Royalties from Streaming*, MORNING CALL (Mar. 8, 2017), <https://www.mcall.com/business/mc-songwriters-royalties-streaming-20170307-story.html> [<https://perma.cc/A5VW-GW5V>]; *StandWithSongwriters*, *supra* note 75.

83. *Music Modernization Act Approved by House Judiciary Committee*; Steven Tyler, *Execs Weigh In*, VARIETY (Apr. 11, 2018), <https://variety.com/2018/biz/news/music-modernization-act-approved-by-house-judiciary-committee-1202750409/> [<https://perma.cc/6UQM-8Z9Q>].

84. *The Music Modernization Act*, SOUNDEXCHANGE, <https://www.soundexchange.com/advocacy/music-modernization-act/> [<https://perma.cc/7FUC-NC8N>].

85. See *musicFIRST Coalition Celebrates as Music Modernization Act Becomes Law of the Land*, MUSICFIRST (Oct. 11, 2018), <https://musicfirstcoalition.org/musicfirst-coalition-celebrates-as-music-modernization-action-becomes-law-of-the-land/> [<https://perma.cc/8QTX-57RL>].

86. See Sherisse Pham, *Spotify Sued for \$1.6 Billion over Tom Petty, Doors Songs*, CNN: BUS. (Jan. 3, 2018), <https://money.cnn.com/2018/01/03/technology/spotify-lawsuit-wixen-songs/index.html> [<https://perma.cc/LC5B-KE3Q>].

87. Ilya Mirov, *Spotify & the Music Modernization Act*, JOLT (Feb. 12, 2018), <https://jolt.richmond.edu/2018/02/12/spotify-the-music-modernization-act/> [<https://perma.cc/P3GZ-RW86>].

88. PASSMAN, *supra* note 35, at 345–47.

89. CONG. RESEARCH SERV., RL33631, COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 1 (2015).

90. Paul Resnikoff, *Spotify Is About to Receive a Giant Gift from Congress. Which Might Explain Their Latest Acquisition*, DIGITAL MUSIC NEWS (Apr. 12, 2018), <https://www.digitalmusicnews.com/2018/04/12/spotify-loudr-music-modernization-act/> [<https://perma.cc/MW89-NFWV>] [hereinafter Resnikoff, *Spotify*]; see also Paul Resnikoff, *Surprise! The ‘Music Modernization Act’ Prohibits Litigation Against Streaming Services*, DIGITAL MUSIC NEWS, (Jan. 9, 2018), <https://www.digitalmusicnews.com/2018/01/09/music-modernization-act-spotify/> [<https://perma.cc/S8E5-ZFVS>] [hereinafter Resnikoff, *Music Modernization Act*].

sound recordings under the MMA.⁹¹ A reason for that is because under the MMA, digital music services that obtain a blanket license will be exempt from liability of statutory damages, which are the leading cause of multimillion-dollar class action lawsuits.⁹² Additionally, potential legal claims are disregarded if the lawsuit was not filed by January 1, 2018, which is a massive incentive for digital music services to comply with the MMA.⁹³ In a sense, companies like Spotify would get a “get-out-of-jail-free-card.”⁹⁴

The MMA is truly committed to modernizing copyright law for the digital-era and resolving digital-era royalties; however, the MMA omits terrestrial radio in the Act.⁹⁵ Performance royalties do not exist for terrestrial radio, and this issue was addressed by the Fair Play Fair Pay Act (FPFPA) of 2015.⁹⁶ The purpose of the Act was to amend federal copyright law, which requires terrestrial radio to pay royalties.⁹⁷ However, the National Association of Broadcasters (the NAB) opposed the legislation.⁹⁸ The NAB is a trade organization established to protect the rights of individuals in the broadcasting industry and was a direct response to the American Society for Composers, Authors and Publishers’ (ASCAP) actions toward performance royalties.⁹⁹

Ever since the FPFPA was introduced, broadcasters have “pushed back ferociously about a government-mandated performance royalty for AM/FM radio.”¹⁰⁰ Due to the NAB’s large following, the FPFPA was never passed.¹⁰¹ Consequently, because of the NAB’s strong opposition

91. See generally Resnikoff, *Music Modernization Act*, *supra* note 90.

92. MMA BREAKDOWN, *supra* note 46, at 3 (“Digital music services risk legal liability for high statutory damages if they use songs on their services where the copyright owner(s) cannot be found.”).

93. Resnikoff, *Music Modernization Act*, *supra* note 90.

94. *Id.*

95. *What the Music Modernization Act Means for Radio*, INSIDERADIO (June 29, 2018), http://www.insideradio.com/what-the-music-modernization-act-means-for-radio/article_bd460db8-7b62-11e8-bca5-6b726ba70551.html [https://perma.cc/Q3BG-PE44].

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

97. *Id.*

98. Nate Rau, *Fair Play Fair Pay Act Reintroduced in Congress, Would Make Radio Pay Artists*, TENNESSEAN (Mar. 30, 2017), <https://www.tennessean.com/story/money/2017/03/30/fair-play-fair-pay-act-reintroduced-congress-would-make-radio-pay-artist-labels/99823798/> [https://perma.cc/E4B5-8NHZ].

99. William Renkus, *National Association of Broadcasters*, ENCYCLOPEDIA BRITANNICA (Oct. 11, 2019), <https://www.britannica.com/topic/National-Association-of-Broadcasters> [https://perma.cc/FL82-53PK].

100. Rau, *supra* note 98.

101. Zvi S. Rosen, *Common-Law Copyright*, 85 U. CIN. L. REV. 1055, 1084–85 (Apr. 2018) (stating that from the beginning, the NAB has been opposed to performance royalties for radio. The NAB went as far as to “[launch] an aggressive legal campaign against ASCAP to annihilate the performance royalty and the organization as a whole”); see also Dina LaPolt, Response to Request for Comments: Music Licensing Study to United States Copyright Office (May 23, 2014),

for terrestrial radio to start paying for performance royalties, it was not incorporated into the MMA.¹⁰² The NAB has instilled the belief “that composers were indebted to the broadcasters for publicizing their composition via the airwaves.”¹⁰³ Therefore, the idea of free promotion compensates for the lack of payment for performance royalties.¹⁰⁴

C. SiriusXM Lobbying the MMA

For years, terrestrial radio has been on a different footing compared to its counterparts, such as digital and satellite radio.¹⁰⁵ When the DPRA was passed, it did not affect terrestrial radio, therefore allowing terrestrial radio to proceed without paying performance royalties. This unequal treatment did not proceed without notice.¹⁰⁶ SiriusXM CEO, Jim Meyer, contributed an op-ed to *Billboard Magazine*, stating that it is “bad policy to make a royalty obligation distinction between terrestrial radio and satellite radio.”¹⁰⁷ Therefore, if SiriusXM and other digital audio services, such as satellite and digital radio, must pay royalties for pre-1972 sound recordings, terrestrial radio ought to pay as well.

SiriusXM was the main industry holdout protesting the proposed MMA legislation.¹⁰⁸ In its argument, “SiriusXM was protesting about four elements of the MMA.”¹⁰⁹ SiriusXM primarily opposed the Classics Act, the component in the MMA requiring digital radio to pay for performance royalties.¹¹⁰ Additionally, SiriusXM raised three other objections: (1) the MMA eliminates a carve-out granted to SiriusXM by the Digital Millennium Copyright Act, which allowed special status through the § 801(b) standard that allowed rate courts to determine royalties; (2) the MMA sets another limitation on rate settings that rate courts previously could not take into consideration: royalties paid to master recordings right holders when setting publishing rates;¹¹¹ and (3) the MMA has “no policy

https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/Dina_LaPolt_MLS_2014.pdf [<https://perma.cc/KE23-TKF9>].

102. *What the Music Modernization Act Means for Radio*, *supra* note 95.

103. Rosen, *supra* note 101, at 1084.

104. *Id.*

105. Meyer, *supra* note 16.

106. *Id.*

107. *Id.*

108. Ed Christman, *Music Modernization Act Passed Thanks to Last-Minute SiriusXM Compromise: Sources*, BILLBOARD (Sept. 18, 2018), <https://www.billboard.com/articles/business/8475890/music-modernization-act-passed-siriusxm-compromise> [<https://perma.cc/44LQ-BM87>].

109. *Id.*; *see also* Meyer, *supra* note 16.

110. Christman, *supra* note 108.

111. Ed Christman, *Music Modernization Act Faces Verbal Vote in Senate, But One ‘No’ Could Be Fatal*, BILLBOARD (Sept. 16, 2018), <https://www.billboard.com/articles/business/8475347/music-modernization-act-faces-verbal-vote-senate-monday> [<https://perma.cc/2EMU-UPT4>].

rationale” to change the rate court evidence standard for musical compositions under § 114(i).¹¹²

Because SiriusXM became involved during the final stages of the MMA, the music industry became concerned as the move toward change was halted.¹¹³ Artists and executives stood united, showcasing their solidarity through a letter addressed to the board members of Liberty Media, the corporate parent of SiriusXM.¹¹⁴ The letter expressed their understanding that the group and SiriusXM had a difference of opinion and conveyed an opportunity for SiriusXM to take part in a leadership position—thereby inviting SiriusXM to cooperate instead of fight.¹¹⁵ The letter also expressed the group’s willingness to boycott SiriusXM if necessary.¹¹⁶ Dina LaPolt, an attorney-advocate and major player behind the MMA, said in a statement to *Variety*:

As we continue to move from a product based business to a service based business, bringing the antiquated copyright act into the digital realm, SiriusXM’s unwillingness to support songwriters and artists is [a] complete travesty given that every other group in the music industry has endorsed the bill. This shows their disgusting corporate greed at the expense of America’s greatest treasures . . . our legacy artists.¹¹⁷

The MMA had a consensus of support from the music industry, with the only exception being SiriusXM.¹¹⁸ Therefore, the possibility of the MMA’s failure to pass in the Senate and become law would have been another setback that instilled fear among those in the music industry.

112. Lars Brandle, *SiriusXM Responds to ‘Stinging’ Artist Attacks Over Music Modernization Act Objections: ‘There Is Nothing Hidden or Underhanded’*, BILLBOARD (Sept. 18, 2018), <https://www.billboard.com/articles/news/8475724/siriusxm-responds-to-stinging-artist-attacks-over-music-modernization-act> [<https://perma.cc/7ASA-KZBF>]; see also Becker et al., *supra* note 11, at 8 (“[Prior to the MMA,] non-interactive digital music services may take advantage of the compulsory license mechanism provided for in §§ 114 and 801 of the Copyright Act, which allows broadcasters to legally play an artist’s music without his or her permission so long as the service pays a reasonable royalty rate as determined by the Copyright Royalty Board (CRB).”).

113. Shirley Halperin, *Paul McCartney, Don Henley, Katy Perry, More Pen Letter to SiriusXM: ‘We Will Boycott’ (EXCLUSIVE)*, VARIETY (Sept. 17, 2018), <https://variety.com/2018/music/news/katy-perry-pink-max-martin-artist-letter-siriusxm-boycott-music-modernization-act-1202944141/> [<https://perma.cc/9WYX-BX3P>].

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

III. WHERE THIS LEADS US

A. Should Terrestrial Radio Pay for Performance Royalties?

According to Neil Portnow, President and CEO of the Grammy award-winning Recording Academy, “[T]errestrial radio is the only industry in America that is built on using another’s intellectual property without permission or compensation.”¹¹⁹ Alongside China, Iran, and North Korea, the United States is one of only a handful of countries that does not pay performance royalties when a song is played on terrestrial radio.¹²⁰ As a result, music creators from the United States have been denied performance royalties when their music is played internationally.¹²¹

American music is the most popular music in the world;¹²² however, “American artists and record labels are denied the estimated \$200 million in performance royalties annually that would be paid to them in nearly every other nation.”¹²³ Terrestrial radio, on the other hand, generates billions of dollars selling ads to people who tune in for music without paying the sound recording creators,¹²⁴ which adversely affects the U.S. music industry—specifically, American performers and record labels.¹²⁵

119. *Music Licensing Under Title 17 (Part I and II): Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 8 (2014) (quoting Neil Portnow, President & CEO, Recording Academy).

120. Randy Lewis, *Fair Play, Fair Pay Act of 2015 Would Require Radio to Pay for Music*, L.A. TIMES (Apr. 13, 2015), <http://www.latimes.com/entertainment/music/posts/la-et-ms-fair-play-fair-pay-act-congress-radio-royalties-20150413-story.html> [<https://perma.cc/U8XC-NL5X>]; see also 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, 446 (2011) (discussing the domestic and international importance of recognizing public performance rights in sound recordings); Kara M. Wolke, *Some Catching Up to Do: How the United States, in Refusing to Fully Sign on to the WPPT’s Public Performance Right in Sound Recordings, Fell Behind the Protections of Artists’ Rights Recognized Elsewhere in this Increasingly Global Music Community*, 7 VAND. J. ENT. L. & PRAC. 411, 413 (2005).

121. Lewis, *supra* note 120.

122. *Closing the AM/FM Radio Royalty Loophole*, SOUNDEXCHANGE, <https://www.soundexchange.com/advocacy/closing-the-amfm-radio-royalty-loophole/> [<https://perma.cc/PXG3-DWSW>] [hereinafter *Closing the AM/FM Radio Royalty Loophole*].

123. *Id.*

124. Richard Bengloff, Response to Request for Comments: Music Licensing Study to United States Copyright Office (May 23, 2014), https://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf (last visited Jan. 28, 2020).

125. Paul Fakler & Jane E. Mago, Response to Request for Comments: Music Licensing Study to United States Copyright Office (May 23, 2014), https://www.copyright.gov/policy/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf [<https://perma.cc/5C6P-UNQ3>] (“... [T]he United States recording industry has developed into the strongest, most prolific recording industry in the world. . . . The absence of any performance fee from broadcasters clearly has not impeded the growth or supremacy of the United States recording industry, nor has the existence of such a tariff in foreign countries led to additional industry growth in those countries.”).

As there are pros to terrestrial radio paying royalties, there are cons as well. Imposing a performance fee on terrestrial radio providers, such as radio stations, would harm smaller service providers operating on limited budgets.¹²⁶ Paying performance royalties would be costly and could lead to layoffs or downsizing of operations to meet the requirement of paying royalty fees.¹²⁷ This concern appears to have been contemplated by the FPFPA of 2015.¹²⁸ The amendment to the initial FPFPA of 2009 addresses specific fees for designated major radio stations and ensures more affordable rates for smaller and local radio stations.¹²⁹

For a while, terrestrial radio has justified not paying performance royalties by providing free advertisements on the air.¹³⁰ The NAB's main argument is that this is mutually beneficial for both broadcasters and record labels:¹³¹ terrestrial radio's exploitation of sound recordings attracts "listener pools" that create advertising dollars, while record labels receive exposure that promotes the record and other sales.¹³² A research study conducted by the Free Radio Alliance, a group of people and organizations with the mission to keep local radio free and accessible to communities in the United States, estimated terrestrial radio's promotional value of radio play to be \$2.4 billion.¹³³ However, other platforms such as digital/satellite radio, television appearances, and sponsorships also provide promotional value for artists while still paying the artists for their work.¹³⁴

The NAB's argument for the justification of payment through free advertisement loses its strength with the growth of new media outlets for artists to self-promote.¹³⁵ Nevertheless, there have been decades-long

126. See generally *id.*

127. *Id.* at 9.

128. Lydia George, *Fair Play and American Exceptionalism*, 11 BERKLEE C. OF MUSIC: MUSIC BUS. J. 10, 12 (2015).

129. *Id.*

130. Rosen, *supra* note 101, at 1084.

131. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 87–88 (2015).

132. *Id.* at 44.

133. *The Issue*, FREE RADIO ALLIANCE, <https://www.freeradioalliance.org/the-issue/> [<https://perma.cc/WQ6X-JN64>].

134. LaPolt, *supra* note 101, at 5.

135. Johannes, *supra* note 120, at 465; see also Jem Aswad, *How Shawn Mendes Is Turning Vine Fame into a Music Career*, BILLBOARD (July 18, 2014), <https://www.billboard.com/articles/news/6165603/shawn-mendes-vine-magazine-story> [<https://perma.cc/J3U7-N57Z>]; *Shawn Mendes, RECORDING ACADEMY GRAMMY AWARDS*, <https://www.grammy.com/grammys/artists/shawn-mendes> [<https://perma.cc/HA38-AR3W>]; *Shawn Mendes on Leap from Vine Star to Major Label Target: 'It Was Absolutely Insane'*, BILLBOARD (July 23, 2014), <https://www.billboard.com/articles/columns/pop-shop/6176073/shawn-mendes-on-leap-from-vine-star-to-major-label-target-it-was> [<https://perma.cc/6TEA-ZCQT>]. Shawn Mendes rose to fame through Vine (a social media platform on which users can produce six-second videos), and within just four years he transformed from a Vine sensation to a Grammy-nominated pop star touring worldwide. *Shawn Mendes on Leap from Vine Star to Major Label Target: 'It Was Absolutely Insane'*, BILLBOARD (July 23, 2014), <https://www.billboard.com>

battles over performance royalties,¹³⁶ which raises the question: if free advertisement and promotion is sufficient, then why is there an issue? Sure enough, older songs that are already popular do not benefit from promotional value.¹³⁷ Radio stations exist that are devoted solely to playing classic hits and other oldies.¹³⁸ Just as the MMA fought for rights of legacy artists for their pre-1972 sound recordings, it should follow that they get fully compensated through terrestrial radio because the mutual benefit scheme is no longer existent. Specifically, “artists who created pre-1972 recordings are especially dependent on digital revenue streams, because they are often less likely than more current artists to be able to generate significant income from touring, product sales and other sources.”¹³⁹ Furthermore, artists who want to pay tribute to their favorite classic song by making a cover are discouraged from doing so because they would not be paid performance royalties and its promotional value diminishes because the song is already well-established.¹⁴⁰ For these reasons, it should only be right to compensate artists through terrestrial radio because performance royalties are the primary source of income through their music.

The music industry’s shift toward digital services could potentially lead to the demise of terrestrial radio. On the contrary, streaming is not necessarily overpowering terrestrial radio.¹⁴¹ According to the Pew Research Center’s analysis of Nielsen Media Research, more than 90% of U.S. consumers tune into traditional AM/FM radio, while leading streaming radio station Pandora reaches 15% of its American listeners and Spotify reaches only 5%.¹⁴² Given these statistics, it is just as important to have terrestrial radio pay for performance royalties as it is for digital radio.

Sometimes, the success of a song is significantly influenced by the contribution of the recording artist,¹⁴³ who continues to sacrifice because

/articles/columns/pop-shop/6176073/shawn-mendes-on-leap-from-vine-star-to-major-label-target-it-was [https://perma.cc/6TEA-ZCQT].

136. Becker et al., *supra* note 11, at 6.

137. Johannes, *supra* note 120, at 464.

138. 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, 198 (2004).

139. SoundExchange, Inc., Response to Request for Comments: Music Licensing Study to United States Copyright Office, at 11–12 (May 23, 2014), https://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SoundExchange_Inc_MLS_2014.pdf [https://perma.cc/AM36-W4BS].

140. Johannes, *supra* note 120, at 464.

141. Nancy Vogt, *Audio Fact Sheet*, in STATE OF THE NEWS MEDIA 2015, at 52 (Pew. Res. Ctr. 2015), <https://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/30142603/state-of-the-news-media-report-2015-final.pdf> [https://perma.cc/R3HL-2Z4Z].

142. *Id.*

143. John Seabrook, *How Rihanna’s ‘Umbrella’ Changed Her Career Forever*, By John Seabrook, SPIN (Oct. 5, 2015), <https://www.spin.com/2015/10/the-song-machine-john-seabrook->

terrestrial radio plays their music without payment for performance royalties.¹⁴⁴ Therefore, terrestrial radio's efforts to differentiate between paying performance royalties to the songwriters, composers, and recording artists unfairly undermines the recording artist's contribution to that specific song.¹⁴⁵ After all, the recording artist is the voice that people are listening to on the song. The artist is involved in the creation of the song just as much as the songwriter and composer.¹⁴⁶ From the artist's standpoint, achieving "hit" status for a song is undercut by the absence of fair compensation. Hence, from an artist's standpoint, not being compensated for having a hit song is hurtful to their sense of recognition.¹⁴⁷

Singer-songwriter Taylor Swift is one of the biggest names in the music industry today. In an op-ed for the *Wall Street Journal*, Swift shared her thoughts on music as a form of art that should be recognized for its value and should never be given up for free.¹⁴⁸ Back in 2014, if a person were to turn to Spotify, you would see that Taylor Swift's catalog was non-existent.¹⁴⁹ The reason is that two days before Swift's release of her album *1989* in 2014, the singer-songwriter's record label pulled her catalog from Spotify to cater to her honest belief that music is a form of art that should not be free.¹⁵⁰ Although Swift's decision was a response to free online streaming and concerns about piracy,¹⁵¹ the sentiment is just the same for artists who do not get paid for the hard work they put in to produce a song. Not only do performance royalties in sound recordings affect the artist and

rihanna-excerpt-premiere-umbrella/ [https://perma.cc/93SC-MQLT] (quoting JOHN SEABROOK, *THE SONG MACHINE: INSIDE THE HIT FACTORY* (2015)).

144. *Closing the AM/FM Radio Royalty Loophole*, *supra* note 122.

145. Miranda Bullard, *An International Perspective: Why the United States Should Provide a Public Performance Right for Non-Digital Audio Transmissions*, 30 *TEMP. INT'L & COMP. L.J.* 225, 234–235 (2016).

146. *Id.*

147. *Id.*

148. Taylor Swift, *For Taylor Swift, the Future of Music Is a Love Story*, *WALL ST. J.* (July 7, 2014), <https://www.wsj.com/articles/for-taylor-swift-the-future-of-music-is-a-love-story-1404763219> [https://perma.cc/A4AE-9XXH].

149. *Id.*; see also Rachel England, *Taylor Swift Ensures UMG Artists Will Profit from Spotify Shares*, *ENGADGET* (Nov. 20, 2018), <https://www.engadget.com/2018/11/20/taylor-swift-umg-artists-profit-spotify-shares/> [https://perma.cc/RB8J-GM2K]. Taylor Swift is adamant about not letting her music go for free; she switched labels and negotiated a new deal that states any sale of shares through Spotify will result in a distribution of money to the artist, non-recoupable. See Anne Steele, *Taylor Swift to Streaming Services: Look What You Made Me Do*, *WALL ST. J.* (Aug. 23, 2019), <https://www.wsj.com/articles/taylor-swift-to-streaming-services-look-what-you-made-me-do-11566554484> [https://perma.cc/DJ5Z-HT2E]. As of August 23, 2019, Taylor Swift has made her seventh studio album, "Lover," available directly on Spotify and other streaming services.

150. Andrew Flanagan, *Taylor Swift Catalog Removed from Spotify*, *BILLBOARD* (Nov. 3, 2014), <https://www.billboard.com/articles/business/6304382/taylor-swift-catalog-removed-from-spotify> [https://perma.cc/VC9B-8XGZ].

151. *Id.*

the copyright owner but also the session musicians and background vocalists.¹⁵² As CEO of Big Machine Label Group (Swift's former record label and owner of Swift's music catalog prior to her latest album *Lover*) Scott Borchetta said, "It takes a lot of time and effort and money and talent to [make music], and if we start giving it all away for fractions of pennies, we're not going to be able to do it anymore."¹⁵³

Artists today receive only 12% of over \$43 billion a year that U.S. listeners spend on music,¹⁵⁴ which includes radio play, CD sales, on-demand streams, and more.¹⁵⁵ Therefore, young artists are losing out on vital compensation essential to continue creating music, with performance royalties from terrestrial radio being one such case.¹⁵⁶ The reason behind this is "[b]ecause of all the 'value leakage' involved in producing and distributing music,"¹⁵⁷ which leaves the artist with very little compensation.¹⁵⁸

B. The Powers of the National Association of Broadcasters

In the past, there has been a legislative push to require terrestrial radio providers to begin paying performance royalties, first introduced in the Performance Rights Act in 2007¹⁵⁹ and most recently in the FPFPA of 2015.¹⁶⁰ Terrestrial radio should be included to pay for performance royalties; although it would be "a tough hill to climb,"¹⁶¹ it is worth fighting for.

Apart from being a trade organization, the NAB is a powerful lobbying group that has long been opposed to paying performance royalties for terrestrial radio.¹⁶² This group is committed to supporting

152. See LaPolt, *supra* note 101, at 3–4.

153. Flanagan, *supra* note 150.

154. Amy X. Wang, *Musicians Get Only 12 Percent of the Money the Music Industry Makes*, ROLLING STONE (Aug. 7, 2018), <https://www.rollingstone.com/music/music-news/music-artists-make-12-percent-from-music-sales-706746/> [<https://perma.cc/YT7V-ZGJU>].

155. *Id.*

156. See Amy X. Wang, *How Musicians Make Money—or Don't at All—in 2018*, ROLLING STONE (Aug. 8, 2018), <https://www.rollingstone.com/music/music-features/how-musicians-make-money-or-dont-at-all-in-2018-706745/> [<https://perma.cc/P62Y-YC94>].

157. Wang, *supra* note 154.

158. *Id.*

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

160. *What the Music Modernization Act Means for Radio*, *supra* note 95.

161. Paula Parisi, 'Fair Play, Fair Pay' Radio-Royalty Act Gains Momentum, But Faces Uphill Climb, VARIETY (June 12, 2017), <https://variety.com/2017/biz/news/fair-play-fair-pay-radio-royalty-act-gains-momentum-1202462359/> [<https://perma.cc/L6PP-CQAH>].

162. Marc D. Ostrow, *Will the Fair Play Fair Pay Act Get a Fair Hearing This Time?*, L. OFF. OF MARC D. OSTROW: BLOG (Apr. 6, 2017), <https://ostrowesq.com/will-the-fair-play-fair-pay-act-get-a-fair-hearing/> [<https://perma.cc/88XT-3N7M>]; see also Paul Resnikoff, *Sirius XM's CEO: 'We Simply Cannot Support the MMA in Its Current Form'*, DIGITAL NEWS MUSIC (Aug. 23, 2018),

candidates running for U.S. Congress who support their viewpoint; in 2018 alone, it contributed \$1.3 million to its endorsed candidates' campaigns.¹⁶³ And with at least one radio station in every congressional district, these candidates turn to radio stations as part of their campaign strategy during elections.¹⁶⁴ Politicians are aware of the NAB's power in Washington, D.C., and are therefore reluctant to oppose the group in fear of losing support from their local radio stations.¹⁶⁵

As Congress contemplates the FPFPA, the NAB proposed their own bill, the Local Radio Freedom Act, which is a non-binding resolution that suggests that no new performance fees should be imposed.¹⁶⁶ The Local Radio Freedom Act has garnered two hundred-seventeen congressional supporters, compared to the twenty-one that the FPFPA has received.¹⁶⁷

C. Support from the National Association of Broadcasters

The NAB's neutrality to the MMA would be to the advantage of music creators; if the NAB were to oppose the MMA as it did the FPFPA, it would hinder the efforts put into updating copyright law to conform to the current music industry.¹⁶⁸ The musicFIRST Coalition is an organization that advocates for fair pay for music creators' work on digital radio by fighting to end AM/FM radio from using songs without paying performance royalties.¹⁶⁹ MusicFIRST has kept ongoing conversations with the NAB "over a potential compromise for an AM/FM performance royalty"; as the discussion is still ongoing, it has excluded that particular issue from inclusion in the MMA.¹⁷⁰ As a result and seemingly for the better, it has kept the NAB neutral by providing it with the perspective that the MMA is a "'consensus solution' to music licensing issues facing songwriters, music publishers, and on-demand streaming services."¹⁷¹

While the NAB does not oppose the MMA because of terrestrial radio's potential to someday pay performance royalties, it does support the

<https://www.digitalmusicnews.com/2018/08/23/sirius-xm-mma-music-modernization-act/> [<https://perma.cc/A8T9-R95Y>]. NAB continues to fight against any type of performance payment for radio. See also *No Performance Tax: Keep Radio Free for Listeners*, NAT'L BROADCASTERS ASS'N (2018), <http://www.noperformancetax.org/default.asp> [<https://perma.cc/MW73-MYLN>].

163. *Our Impact*, NAT'L ASS'N OF BROADCASTERS POL. ACTION COMMITTEE, <http://www.nabpac.com/ourImpact.asp> [<https://perma.cc/AED9-759D>].

164. Ostrow, *supra* note 162.

165. See LaPolt, *supra* note 101.

166. Parisi, *supra* note 161.

167. *Id.*

168. *What the Music Modernization Act Means for Radio*, *supra* note 95; see also Parisi, *supra* note 161.

169. *How MusicFIRST Is Making a Difference*, MUSICFIRST, <http://musicfirstcoalition.org/the-coalition/> [<https://perma.cc/NLL8-6P9V>].

170. *What the Music Modernization Act Means for Radio*, *supra* note 95.

171. *Id.*

MMA for other reasons. The NAB essentially supports the MMA because it “brings certainty to music licensing”¹⁷² that would otherwise bring havoc once the consent decrees¹⁷³ are terminated. If that were to happen without establishing a new framework, availability of music to consumers on every platform would be threatened.¹⁷⁴ This would raise the NAB’s concern because it would affect music licensing for broadcasting purposes.¹⁷⁵

CONCLUSION

The MMA is a prime example of the unlikelihood of a law receiving consensus support. However, the amount of support the MMA has received is remarkable. This type of reform has been long-awaited and fought for in the music industry. The MMA’s impact has been extraordinary: legacy artists are no longer being exploited, songwriters are getting the justice they deserve, music licensing for the digital era is being addressed, and the list goes on. However, a major component that should have been included in the MMA has been left behind: for terrestrial radio to begin paying for performance royalties. That is not to say the MMA fails—because nevertheless, the MMA is still a monumental victory. Besides, given the long history and power the NAB has established in Washington, D.C.,¹⁷⁶ it seems aspirational and doubtful that artists will collect performance royalties from terrestrial radio anytime soon. However, negotiations with the NAB seem to be the only option for continued change to emerge in the future as the music industry continues to push toward performance royalties.

172. *Music Modernization Act Brings Certainty to Music Licensing*, NAT’L ASS’N OF BROADCASTERS, <https://www.nab.org/advocacy/issue.asp?id=4577&issueid=1087> [<https://perma.cc/Q3HG-NJ7V>] [hereinafter Nab].

173. *Antitrust Consent Decree Review - ASCAP and BMI 2014*, U.S. DEP’T OF JUST. (Dec. 16, 2015), <https://www.justice.gov/atr/ascap-bmi-decree-review> [<https://perma.cc/CV77-MR76>] (“The Consent Decrees, originally entered in 1941, are the products of lawsuits brought by the United States against ASCAP and BMI under Section 1 of the Sherman Act, 15 U.S.C. § 1, to address competitive concerns arising from the market power each organization acquired through the aggregation of public performance rights held by their member songwriters and music publishers.”).

174. Nab, *supra* note 172. To ensure that PROs “operate consistent with antitrust laws, DOJ entered into consent decrees that provide these organizations the ability to conduct business in a fair, efficient and equitable manner to benefit both songwriters and licensees.” *Id.*

175. *Id.*

176. See Ostrow, *supra* note 162.