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Save Rock and Roll: A Look at Rights Afforded to Pre-1972 Sound Recordings and Why Federalization Should Be Granted

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SAVE ROCK AND ROLL: A LOOK AT RIGHTS AFFORDED TO PRE-1972 SOUND RECORDINGS AND WHY FEDERALIZATION SHOULD BE GRANTED

Introduction

February 15, 1972––an important date in United States copyright protection history, especially as it pertains to sound recordings.[1] When Congress rewrote the Copyright Act of 1909,[2] it only included under federal protection those sound recordings "fixed" after February 15, 1972.[3] This left those recordings fixed before this date, affectionately known as "pre-1972s," outside the scope of federal copyright protection and without a public performance right, an exclusive right of federal copyright protection.[4] Due to this lack of federal protection, pre-1972 sound recordings are subject to state laws, if any, which leads to vague and inconsistent standards regarding the rights that are afforded to these recordings.[5]

Unlike its predecessor, the Federal Copyright Act of 1976[6] provides rights to both the composition[7] and sound recording[8] of original musical works. Section 102(a)(2) of the Copyright Act of 1976 provides protections for "original works of authorship fixed in any tangible medium of expression" in several categories, among them "musical works, including any accompanying words."[9] Section 101 defines "sound recordings" as works that are the result of "the fixation of a series of musical, spoken, or other sounds."[10] This definition does not include sounds that accompany audiovisual works, such as motion pic-

1. Brian G. Shaffer, Comment, *Sirius XM Radio, Inc., Defendant: The Case for a Unified Federal Copyright System for Sound Recordings*, 35 Pace L. Rev. 1016 (2015).

2. Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075.

3. Shaffer, *supra* note 1, at 1016.

4. *Id.*; *see* 17 U.S.C. § 106(6) (2012).

5. Shaffer, *supra* note 1, at 1016.

6. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

7. 17 U.S.C. § 102(a)(2) (2012).

8. *Id.* § 101.

9. *Id.* § 102(a)(2).

10. *Id.* § 101.

tures.[11] The nature of how the sound recording is embodied is irrelevant to protection under the Act.[12]

Historically, due to the lack of a public performance right, radio broadcasters have used this loophole within the Copyright Act of 1976 to broadcast these recordings without the obligation of paying the owners of the recordings.[13] Pre-1972 recordings include some of the most iconic musicians and recordings to date, including *A Hard Day's Night* by The Beatles,[14] *You Can't Always Get What You Want* by the Rolling Stones,[15] *Can't Help Falling in Love* by Elvis Presley,[16] and *My Girl* by The Temptations.[17] Until recently, the royalty free performance of these sound recordings was an unchanged and even welcomed standard, as the artists and record labels that owned pre-1972 sound recordings saw these free broadcasts as a form of free advertisement.[18]

In 2014, The Turtles—most famously known for their song *Happy Together*—under the band's incorporation name of Flo & Eddie, Inc., filed suits against SiriusXM in New York, California, and Florida, and also against Pandora in California, two digital broadcasters.[19] These lawsuits challenged this long-established standard, which enables broadcasters, especially digital and satellite broadcasters, not to pay for playing pre-1972 sound recordings.[20] Due to recent decisions in favor of Flo & Eddie, Inc. in both New York and California, the recording industry, led by Capitol Records, has also filed suit against SiriusXM and Pandora, in California and New York, respectively.[21] If the opinions in New York and California are upheld on appeal, it could change the face of copyright law, requiring not only digital

11. *Id.*

12. *Id.*

13. Noah Drake, Comment, Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*: Public Performance Rights for Pre-1972 Sound Recordings*, 6 CALIF. L. REV. CIR. 61, 61–62 (2015).

14. THE BEATLES, A HARD DAY'S NIGHT (Capitol Records 1964).

15. THE ROLLING STONES, YOU CAN'T ALWAYS GET WHAT YOU WANT (London Records 1969).

16. ELVIS PRESLEY, CAN'T HELP FALLING IN LOVE (RCA Victor 1961).

17. THE TEMPTATIONS, MY GIRL (Motown Records 1964).

18. Drake, *supra* note 13, at 61–62.

19. *See* Steve Gordon & Anjana Puri, *The Current State of Pre-1972 Sound Recordings: Recent Federal Court Decisions in California and New York Against Sirius XM Have Broader Implications than Just Whether Satellite and Internet Radio Stations Must Pay for Pre-1972 Sound Recordings*, 4 N.Y.U. J. INTELL. PROP. & ENT. L. 336, 344 (2015); *see also* Stephen Carlisle, Flo and Eddie v. Sirius XM Radio*: Have Two Hippies from the 60's Just Changed the Course of Broadcast Music?*, NOVA SE. U. (Oct. 2, 2014), http://copyright.nova.edu/flo-and-eddie-v-sirius-xm-radio/.

20. Gordon & Puri, *supra* note 19, at 344.

21. *Id.* at 344–45.

broadcasters, but also terrestrial AM/FM radio broadcasters to both ask permission and pay a fee to play pre-1972 sound recordings.[22] This would change the landscape of the music industry in California and New York. This would also build a foundation for national protection of sound recordings under the federal Copyright Act of 1976.[23]

Following the lawsuits against SiriusXM and Pandora, the Fair Play Fair Pay Act (FPFPA) of 2015 was introduced before Congress on April 13, 2015.[24] The FPFPA sought to establish a public performance right for all sound recordings that are played on terrestrial AM/FM radio, allowing performers of sound recordings and labels to receive compensation for airplay.[25] The FPFPA also encompassed what the previously introduced RESPECT Act wished to protect, a public performance right for pre-1972 sound recordings.[26] The FPFPA would have ensured that the creators of pre-1972 sound recordings are fairly compensated and would also create a uniform fair market royalty standard.[27]

This Comment advocates for the inclusion of pre-1972 sound recordings under the Copyright Act of 1976 through the FPFPA, allowing for all recording artists, including those of pre-1972 sound recordings, to be paid for the public performance of their works. Part II of this Comment provides a general history of copyright law,[28] covering the original 1790 Act,[29] the 1909 Act,[30] and the modern 1976 Act,[31] along with a discussion of the pre-1972 provision of the 1976 Act.[32] Part II looks at past acts by the Copyright Office and Congress to bring pre-1972 sound recordings under federal protection,[33] including: (1) the Copyright Office Report on Pre-1972 Sound Recordings;[34] (2) the Digital Performance Right in Sound Recordings Act of 1995;[35] (3) the Digital Millennium Copyright Act of 1998;[36] (4) the Perform-

22. *Id.* at 345.

23. *Id.* at 358.

24. Fair Play Fair Pay Act, H.R. 1733, 114th Cong. (1st Sess. 2015).

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

26. *Id.*

27. *Id.*

28. *See infra* notes 48–145 and accompanying text.

29. *See infra* notes 59–72 and accompanying text.

30. *See infra* notes 73–90 and accompanying text.

31. *See infra* notes 91–127 and accompanying text.

32. *See infra* notes 128–45 and accompanying text.

33. *See infra* notes 146–217 and accompanying text.

34. *See infra* notes 151–64 and accompanying text.

35. *See infra* notes 165–71 and accompanying text.

36. *See infra* notes 172–82 and accompanying text.

ance Rights Act of 2009;[37] (5) the RESPECT Act of 2014;[38] and (6) the Fair Play Fair Pay Act of 2015.[39] Part II concludes with descriptions of SiriusXM and Pandora,[40] an introduction of the *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.* cases,[41] and other cases pertaining to pre-1972 sound recordings.[42] Part III analyzes the impacts of the *Flo & Eddie* cases,[43] how terrestrial AM/FM radio could be affected,[44] and ends with an analysis of the FPFPA.[45] Part IV discusses the impact federalization of pre-1972 sound recordings would have on broadcasters and consumers, as well as the impact on the musicians and performers of these recordings.[46] Part V concludes that pre-1972 sound recordings should be brought under federal protection and Congress should pass legislation similar to the FPFPA of 2015.[47]

II. Background

In order to understand the magnitude and importance of the *Flo & Eddie* cases and the FPFPA, it is important to have a background understanding of copyright law, specifically how it pertains to music, the multiple changes throughout the life of the Copyright Act,[48] and the holdings in *Flo & Eddie*.[49]

A. Early Copyright Protection

Copyright law has changed drastically, starting with the 1790 Act,[50] moving to the 1909 Act,[51] and ending with the "modern" 1976 Act.[52] There have been multiple attempts to amend the Copyright Act of 1976 as it pertains to pre-1972 sound recordings, including a report by the Copyright Office,[53] the Digital Performance Right in Sound Re-

37. *See infra* notes 184–88 and accompanying text.
38. *See infra* notes 189–200 and accompanying text.
39. *See infra* notes 202–17 and accompanying text.
40. *See infra* notes 234–43 and accompanying text.
41. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 827 F.3d 1016 (11th Cir. 2016); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 821 F.3d 265 (2d Cir. 2016); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325 (S.D.N.Y. 2014).
42. *See infra* notes 218–303 and accompanying text.
43. *See infra* notes 327–34 and accompanying text.
44. *See infra* notes 335–68 and accompanying text.
45. *See infra* notes 369–427 and accompanying text.
46. *See infra* notes 428–64 and accompanying text.
47. *See infra* notes 465–71 and accompanying text.
48. *See infra* notes 50–271 and accompanying text.
49. *See infra* notes 218–303 and accompanying text.
50. *See infra* notes 59–72 and accompanying text.
51. *See infra* notes 73–90 and accompanying text.
52. *See infra* notes 91–145 and accompanying text.
53. *See infra* notes 151–64 and accompanying text.

cording Act of 1995,[54] the Digital Millennium Copyright Act of 1998,[55] the Performance Rights Act of 2009,[56] the RESPECT Act of 2014,[57] and the FPFPA of 2015.[58]

1. The Copyright Act of 1790

The Constitution states, "Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[59] In 1790, Congress enacted the first Copyright Act protecting works such as maps, charts, and books.[60] The authors of these works were granted reproduction and distribution rights.[61] Over time, as other types of works like literary and artistic works were considered comparable to those originally protected, the Act was expanded.[62] For example, dramatic compositions were granted "public performance" rights through this expansion in 1856.[63] This meant the authors and copyright owners of these works had the "exclusive right to 'act, perform, or represent the same, or cause it to be acted, performed, or represented, on any stage or public place during the whole period for which the copyright [wa]s obtained.'"[64] The right of public performance was then extended to musical compositions in 1897.[65] Because of this right, music composers were able to make money from the sale of their sheet music as well as from any public performance of their music.[66] Any venue that wished to publicly perform these songs had to first acquire a license to these compositions.[67] This public performance right was enacted largely due to the murky common law that governed printed sheet music and the grow-

54. *See infra* notes 165–71 and accompanying text.

55. *See infra* notes 172–82 and accompanying text.

56. *See infra* notes 184–88 and accompanying text.

57. *See infra* notes 189–200 and accompanying text.

58. *See infra* notes 202–17 and accompanying text.

59. U.S. CONST. art. I, § 8, cl. 8.

60. 1 Stat. 124 (1790) (repealed 1909); Gary Pulsinelli, *Happy Together? The Uneasy Coexistence of Federal and State Protection for Sound Recordings*, 82 TENN. L. REV. 167, 172 (2014).

61. Melanie Jolson, Note, *Congress Killed the Radio Star: Revising the Terrestrial Radio Sound Recording Exemption in 2015*, 2015 COLUM. BUS. L. REV. 764, 770 (2015).

62. Pulsinelli, *supra* note 60, at 172.

63. Jolson, *supra* note 61, at 770–71.

64. *Id.* at 771 (quoting Act of Aug. 18, 1856, 11 Stat. 138, 138–39).

65. *Id*. (citing Act of Jan. 6, 1897, 29 Stat. 481).

66. *Id*.

67. Gordon & Puri, *supra* note 19, at 339.

ing opposition of songwriters.[68] Under the common law at the time, copyright was similar to property,[69] and as long as a work remained in manuscript form, the writer or creator would retain all rights in the work.[70] The right retained by the writer or creator included the public performance right and, therefore, could not be infringed.[71] If the work was published, however, the work lost all rights (except those protected by statute) and the work became public property, allowing free public performance.[72] Due to the Copyright Act of 1909, this is no longer the case.

2. The Copyright Act of 1909

The first major overhaul of the Copyright Act took place in 1909.[73] The 1909 Act implemented "a dual state/federal protection" system for sound recordings.[74] The critical date for sound recordings under this Act is the "date of publishing."[75] State common law protected sound recordings until their date of publishing, at which time they became then protected under the 1909 Federal Copyright Act.[76] Under the 1909 Act, an author had to observe a "notice" formality to properly obtain federal copyright protection of their work.[77] Copyright notice includes the copyright symbol (©), followed by the year of the copyright[78] and the name of the owner.[79] Whether the author and publisher observed the rules of formality in the Act dictated whether

68. *See generally* Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157 (2006).

69. *Id.* at 1168.

70. *Id.*

71. *Id.*

72. *Id.*

73. Jolson, *supra* note 61, at 771 (citing Act of Mar. 4, 1909, Pub. L. No. 60-349, 35 Stat. 1075 (repealed 1976)).

74. Pulsinelli, *supra* note 60, at 172.

75. *See id*. According to the Copyright Office, publication of a musical composition is defined as "the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending." U.S. COPYRIGHT OFF., COPYRIGHT REGISTRATION FOR MUSICAL COMPOSITIONS 1 (2012), http://copyright.gov/circs/circ50.pdf. It goes on to add that a public performance of a work, a submission to the Copyright Office, or preparing any copies or phonorecrods of the work alone does not constitute publication. *Id.* However, the distribution of copies or phonorecords to a group of people for further distribution or public performance does constitute a publication. *Id.*

76. Pulsinelli, *supra* note 60, at 172.

77. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 337 (8th ed. 2013).

78. This is the year in which the work was fixed in a tangible form. *Id.*

79. U.S. COPYRIGHT OFF., COPYRIGHT NOTICE 2 (2013), http://copyright.gov/circs/circ03.pdf. An example of what copyright notice would look like is: © 2015 John Doe.

the work was federally protected after publication.[80] If recording artists conformed to the rules, specifically whether proper notice was posted on the work, federal protection applied.[81] If they did not conform, then the work fell into the public domain.[82]

A way to collect and distribute royalties to the writers became necessary when writers were, for the first time, able to collect royalties[83] for the public performance of their compositions. A way to collect and distribute that money to the writers then needed to be formed.[84] In 1914, prominent writers, and their music publishers created the American Society of Composers, Authors, and Publishers (ASCAP) in an effort to collect the royalties from the venues that publicly played their songs.[85] Once commercial radio emerged in the 1920's, ASCAP started to offer blanket licenses, allowing radio stations to play any musical composition that was in the ASCAP catalog.[86] ASCAP would collect the licensing fees and distribute them to the songwriter and publisher for their share.[87] After ASCAP increased fees to radio stations for blanket licenses, the National Association of Broadcasters created Broadcast Music, Inc. (BMI), a performance rights organization (PRO) designed to provide competitive pricing.[88] Later, the Society for European Stage Authors and Composers (SESAC) was formed in the United States to collect public performance royalties of contemporary classical composers.[89] It is important to remem-

80. Pulsinelli, *supra* note 60, at 172.

81. *Id.*

82. *Id.* Authors of compositions have exclusive rights in their works. *Copyright and the Public Domain*, PUB. DOMAIN INFO. PROJECT, http://www.pdinfo.com/copyright-law/copyright-and-public-domain.php (last visited Aug. 10, 2016). These rights can be transferred to another person who is not the author of the work. *Id.* When the copyright period of that work expires, the owner's exclusive rights also expire and the work will then enter the public domain. *Id.* As long as a work is absent ownership and in the public domain, a work can be used for any reason without permission. *Id.* This includes reproduction, performance, recording, or publication of the work. *Id.* Practically all sound recordings will be under copyright protection until 2067, including pre-1972 sound recordings. *Id.* Compositions that were published with a valid copyright notice in 1922 and earlier are within the public domain. *Id.*

83. Royalties are the money that is paid to the record companies, recording artists, writers, and publishers for the sale of their sound recordings. Lee Ann Obringer, *How Music Royalties Work*, HOW STUFF WORKS: ENT., http://entertainment.howstuffworks.com/music-royalties6.htm (last visited Aug. 10, 2016).

84. *See* Gordon & Puri, *supra* note 19, at 339–40.

85. *Id.*

86. *Id.* at 340.

87. *Id.*

88. *Id.*

89. *Id*.

ber, this public performance right was only for the musical composition and not the sound recording.[90]

3. The Copyright Act of 1976 and Sound Recordings

Finally, in 1971, Congress passed the Sound Recording Amendment Act[91] and brought sound recordings under federal copyright protection.[92] This Act amended the 1909 Copyright Act to add a subsection of section 1.[93] The subsection added the exclusive right to reproduce and distribute reproductions of sound recordings to the public by sale, transfer of ownership, rental, lease, or lending.[94] The exclusive right to the copyright owner to reproduce was limited to the right to "duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording."[95]

The catch, however, was that this applied only to sound recordings made after February 15, 1972, and left sound recordings made before this date protected under state law.[96] Due to ever advancing technology and the threat of piracy, Congress enacted the Copyright Act of 1976,[97] which completely reformed and replaced copyright law at the time.[98] Congress did not change the scheme of the Sound Recording Amendment Act, continuing to allow federal protection to only apply to sound recordings created after February 15, 1972.[99] Under the 1976 Act, pre-1972 sound recordings could only be protected under the various state laws until February 16, 2067, at which point they would then enter the public domain.[100]

The Copyright Act of 1976 differentiates between "musical works" and "sound recordings."[101] Musical works are typically considered to be the sheet music, the underlying arrangement and "any accompanying words."[102] Sound recordings are considered to be what is heard,

90. *See supra* notes 63–67 and accompanying text.

91. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 1, 5, 19, 20, 26, 101 (1976)).

92. Pulsinelli, *supra* note 60, at 173.

93. Act of Oct. 15, 1971, Pub. L. No. 92-140, § 1(a), 85 Stat. 391, 391 (codified as amended 17 U.S.C. § 1(f) (1976)).

94. *Id.*

95. *Id.*

96. *Id*. § 3, 85 Stat. at 391–92; *see* Drake, *supra* note 13, at 63 (citing 17 U.S.C. § 301(c) (2012)).

97. Act of Oct. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

98. Pulsinelli, *supra* note 60, at 173.

99. Drake, *supra* note 13, at 63.

100. *Id.*

101. Shaffer, *supra* note 1, at 1023 (quoting 17 U.S.C. § 102(a) (2012)).

102. *Id.* (quoting 17 U.S.C. § 102(a)(2)).

the result from fixation of sounds, so long as they do not accompany motion pictures or other audiovisual works.[103] These provisions make the distinction between compositions and performances.[104]

An example to demonstrate the difference between "composition" and "performance" is Irving Berlin's song *White Christmas*.[105] Written around 1940, *White Christmas* was first publicly performed and recorded in 1941 by Bing Crosby.[106] When a person listens to Bing Crosby's recording of *White Christmas*, the voices and instruments he/she is listening to make up the sound recording.[107] The Crosby estate owns the rights to this particular sound recording, while the musical composition (the lyrics and composed music at the core of the sound recording) remains separate and owned by the Berlin estate.[108] No matter how many sound recordings are made of *White Christmas*, Irving Berlin will remain the sole author and beneficiary of the musical composition itself.[109] Meanwhile, each version of *White Christmas* that is recorded "constitutes a new and distinct sound recording."[110] The performers of these new versions own the rights to their individual sound recordings of the song.[111]

Compositions and recordings are separate legal concepts, so they receive different legal protections.[112] For example, section 115 provides a compulsory license for "cover" versions of a composition.[113] Accordingly, once a composition is recorded and distributed, others are able to record and distribute their own versions of the composition.[114] As a sound recording under federal law, only reproduction rights are afforded to the original recording.[115]

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103. *See supra* notes 7–10 and accompanying text; *see also* Shaffer, *supra* note 1, at 1023 (quoting § 101). Examples of other audiovisual works include television shows and video games. *See Help: Type of Work*, U.S. COPYRIGHT OFF. (Jan. 23, 2015), www.copyright.gov/eco/help-type.html. Audiovisual works are those works were images are intended to be seen together with accompanying sounds. *Id.*

104. Pulsinelli, *supra* note 60, at 177 (citing §§ 102(a)(2), (a)(7)).

105. Jeffrey S. Becker et al., *The Fair Play, Fair Pay Act of 2015: What's at Stake and for Whom?*, A.B.A. ENT. & SPORTS L., Fall 2015, http://www.americanbar.org/publications/entertainment-sports-lawyer/2015/firstedition/Becker_Shields_Hutton.html.

106. BING CROSBY, WHITE CHRISTMAS (Decca Record 1942); *see* Becker et al., *supra* note 105.

107. Becker et al., *supra* note 105.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id*.

112. Pulsinelli, *supra* note 60, at 177.

113. 17 U.S.C. § 115(a)(1) (2012); Pulsinelli, *supra* note 60, at 177.

114. Pulsinelli, *supra* note 60, at 177–78.

115. *Id.*

Due to online availability of digital sound recordings, section 106(6) of the Copyright Act of 1976 has granted post-1972 sound recordings a limited public performance right.[116] This public performance right is limited to digital audio transmissions and not terrestrial AM/FM radio.[117] Due to this limited public performance right, if a digital music provider is non-interactive,[118] such as SiriusXM, it must obtain a license for the broadcast of post-1972 sound recordings.[119] The royalties collected from the license for these broadcasts are to be split 50/45 between the owner of the sound recording and the featured artists, respectively.[120] The remaining five percent is distributed to nonfeatured artists, such as back-up vocalists.[121] If a digital music provider is interactive,[122] the user has control over the specific song played, the provider must individually negotiate a license with each performer.[123]

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116. 17 U.S.C. § 106(6) (2012); Pulsinelli, *supra* note 60, at 175. Section 106 provides a list of exclusive rights to copyright holders. 17 U.S.C. § 106. These exclusive rights include the right:

> (1) to reproduce the copyrighted work . . . ; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies [of the work] . . . ; (4) . . . to perform the copyrighted work publicly; (5) . . . to display the copyrighted work publicly; and (6) . . . to perform the copyrighted work publicly by means of digital audio transmission.

Id.; Pulsinelli, *supra* note 60, at 175.

117. Drake, *supra* note 13, at 64. Section 106(6) provides copyright owners the exclusive rights to do or authorize public performance of their copyrighted work through digital audio transmission in the case of sound recordings. 17 U.S.C. § 106(6).

118. A non-interactive service is where the user will experience and listen to music as if listening to a traditional radio broadcast. *Licensing 101*, SoundExchange, http://www.soundexchange.com/service-provider/licensing-101/ (last visited Aug. 14, 2016). This means that the user is not able to choose and listen to a specific song or artist. *Id.* Instead, the user will listen to pre-programmed and semi-random tracks, not knowing which song will be played before hand. *Id.* An example of this is Sirius XM and Pandora. You are able to pick the radio station you wish to listen to, but are unable to pick the specific artists and song that you are listening to at any given time.

119. Drake, *supra* note 13, at 64.

120. Pulsinelli, *supra* note 60, at 180 (citing 17 U.S.C. § 114(g)(2) (2012)).

121. *Id*. at 180 n.78 (citing § 114(g)(2)).

122. An "interactive service" is defined by the Digital Performance Right in Sound Recordings Act of 1995 as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat 336 (codified as amended at 17 U.S.C. §§ 106, 114–115 (2012)); *see* Mary Ann Lane, Note, *"Interactive Services" and the Future of Internet Radio Broadcasts*, 62 Ala. L. Rev. 459, 463 (2011). A service is not made interactive just because an individual is able to request a particular sound recording for performance and reception by the public at large. *Id.* If and when a service is both interactive and non-interactive, whether concurrently or at different times, the non-interactive components will be treated separately from the interactive service. *Id.* A service such as Spotify is likely to be considered an interactive service because a Spotify user is able to request a particular sound recording on demand. *Id.*; Spotify, https://www.spotify.com/us/about-us/contact/ (last visited Aug. 11, 2016).

123. Pulsinelli, *supra* note 60, at 180.

While the Copyright Act of 1976 preempts all state laws pertaining to general copyright, it does not begin to preempt state laws concerning pre-1972 sound recordings until February 16, 2067.[124] On this date, copyright protection under state law will terminate and pre-1972 sound recordings will enter the public domain.[125] Under this rule, pre-1972 works are afforded protection for a duration of 95 years.[126] This is the equivalent to what the duration of protection would have been if these sound recordings were protected under the Copyright Act of 1976 and had been initially fixed on February 15, 1972.[127]

4. The Pre-1972 Provision of the Copyright Act of 1976

Sound recordings did not have a public performance right until November 15, 1971, when the Sound Recording Amendment to the 1909 Act was passed by Congress.[128] This made sound recordings eligible for federal copyright protection for the first time.[129] This amendment was passed in response to the alarming rate at which music piracy was increasing, which makes it easier for unauthorized distribution of recordings on a wider scale.[130] Under the Sound Recording Amendment, sound recordings fixed on or after February 15, 1972 were afforded federal protection.[131] The main purpose behind this amendment was to grant a reproduction right to sound recordings.[132] This right would allow producers to "combat outright duplication" of sound recordings, but did not protect against imitations of the work, as "the right to reproduce was 'limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording.'"[133] However, the amendment did not contain a public performance right for sound recordings.[134]

124. Shaffer, *supra* note 1, at 1023–24.

125. *Id.*

126. *Id.* at 1024.

127. *Id.*

128. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 10 (2011), http://copyright.gov/docs/sound/pre-72-report.pdf; *see* S. 543, 91st Cong. §§ 205–206 (1st Sess. 1969); H.R. 2512, 90th Cong. § 112 (1st Sess. 1967); S. 597, 90th Cong. (1st Sess. 1967).

129. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 10.

130. *Id.* at 10–11.

131. *Id.* at 12.

132. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 12.

133. *Id.* (quoting Pub. L. No. 92-140, § 1(a), 85 Stat. 391, 391 (1971)).

134. *Id.*

The Copyright Revision Act of 1976 originally included sound recordings as protectable works of art;[135] however, this protection only included a right to limit reproduction by third parties.[136] The Copyright Act of 1976 keeps the date of February 15, 1972, as a threshold date, after which copyright protections apply.[137] Congress requires the 1976 Act to preempt state law in order to create a unitary system of copyright.[138] Congress specifically exempted pre-1972 sound recordings from:

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.[139]

This exemption created two separate systems of protection for sound recordings, as opposed to a single, uniform system for all.[140] As stated by the Copyright Office in their report, "Congress did not articulate grounds for leaving pre-1972 sound recordings outside the federal scheme and there is very little information as to why it did so."[141] Public performance rights were not afforded to sound recordings at this time, meaning songs could be played to the public without having to pay the owner of the copyrights.[142] This was the result of Congress being unable to resolve the ongoing dilemma between performance rights to the musician and the right of radio broadcasters to play songs on the radio.[143] Radio broadcasters argued that radio airplay was free promotion of artists and their songs.[144] According to the radio broadcasters, this significant benefit to the artists would be economically burdened if radio broadcasters were required to pay in order to play songs.[145]

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135. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 13.
136. *Id.*; *see* 17 U.S.C. § 114(b) (2012).
137. *See* U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 14.
138. *Id.*
139. 17 U.S.C. § 301(c) (2012).
140. U. S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 14.
141. *Id.* at viii.
142. *Id.* at 104.
143. *Id.* at 9–10.
144. *Id.* at 341.
145. Stephen Carlisle, Flo and Eddie v. Sirius XM Radio*: Have Two Hippies from the 60's Just Changed the Course of Broadcast Music?*, NOVA SE. U. (Oct. 2, 2014), http://copyright.no.edu/flo-and-eddie-v-sirius-xm-radio/.

B. Past Actions by the Copyright Office and Music Industry for Federalization

The FPFPA is not the first time that the federalization of sound recordings, specifically those made prior to February 15, 1972, has been brought in front of Congress. Past instances include a report by the Copyright Office on pre-1972 sound recordings,[146] the Digital Performance Rights in Sound Recordings Act of 1995,[147] the Digital Millennium Copyright Act of 1998,[148] the Performance Rights Act of 2009,[149] and the RESPECT Act of 2014.[150]

1. The Copyright Office Report on Pre-1972 Sound Recordings

How copyright laws should treat pre-1972 sound recordings has been of increasing interest in recent years.[151] In 2009, Congress commissioned the Copyright Office to perform a study on whether pre-1972 sound recordings should be brought under federal protection.[152] In 2011, after receiving written and oral input from various stakeholders, including musicians and representatives of the recording, broadcast cable, and satellite industries, the Copyright Office recommended that Congress bring pre-1972 sound recordings under federal copyright protection.[153] The main policy concerns regarding the federalization of pre-1972 sound recordings are the interests of consistency and certainty for sound recording right holders and the preservation of these works.[154] The Copyright Office wrote,

> In the 21st Century, the preservation of sound recordings means, . . . *digital* preservation – specifically, copying a work from its native format to a digital medium. . . . It is this initial reproduction, and the related downstream potential of distributing multiple perfect copies via the Internet, that invites copyright law into the discussion.[155]

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146. *See infra* notes 151–64 and accompanying text (discussing the 2011 report brought in front of Congress by the Copyright Office on pre-1972 sound recordings).

147. *See infra* notes 165–71 and accompanying text (reviewing the Digital Performance Right in Sound Recording Act of 1995).

148. *See infra* notes 172–82 and accompanying text (providing an overview of the Digital Millennium Copyright Act of 1998 and its modifications to the Digital Performance Right Act).

149. *See infra* notes 184–88 and accompanying text (discussing the Performance Right Act of 2009, which did not pass).

150. *See infra* notes 189–200 and accompanying text (describing the 2014 RESPECT Act and its tremendous support, yet minimal activity, since its introduction to Congress).

151. Pulsinelli, *supra* note 60, at 181.

152. *Id.*

153. U. S. Copyright Off., Federal Copyright Protection, *supra* note 128, at viii.

154. *Id.* at 82.

155. *Id.* at 59; *see* Pulsinelli, *supra* note 60, at 182.

It further stated, "If preservation were nothing more than carefully cleaning and storing the original media, copyright would be irrelevant to preservation. But because reproduction onto digital media is becoming the most common means of preserving [media], . . . copyright issues cannot be avoided."[156]

The report focused on the preservation of noncommercial pre-1972 sound recordings, considering the economic value of commercial sound recordings should, in its own right, provide enough incentive for preservation.[157] In order to implement copyright protection for pre-1972 sound recordings, the Copyright Office made suggestions regarding the length of time and other provisions,[158] and it ultimately recommended that pre-1972 sound recordings should be protected under federal copyright law.[159] The Copyright Office continued that many decisions needed to be made with regard to "issues involving ownership, term of protection, and registration" for pre-1972 sound recordings to be brought under federal copyright protection.[160] According to the Copyright Office, "an understanding of how these issues are to be addressed is crucial not only to determining whether it is feasible to federalize protection, but also to determining how to do so."[161]

The Copyright Office suggested that "[t]he term of protection for sound recordings fixed prior to February 15, 1972, should be 95 years from publication . . . or, if the work had not been published prior to the effective date of legislation federalizing protection, 120 years from fixation."[162] In no case would the protection extend past February 15, 2067.[163] Moreover, concerning cases in which the terms would expire before 2067, a rights holder may obtain extended protection for any pre-1972 sound recording by making that recording available to the public at a reasonable price and then notifying the Copyright Office of its intention to secure extended protection.[164] The Copyright Office Report came after several attempts by Congress to bring pre-1972 sound recordings under federal protection.

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156. U. S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 59; *see* Pulsinelli, *supra* note 60, at 182.

157. Pulsinelli, *supra* note 60, at 183.

158. U. S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 175–78.

159. *Id.* at 139; *see* Pulsinelli, *supra* note 60, at 183–84.

160. U. S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION, *supra* note 128, at 139.

161. *Id.*

162. *Id.* at 176.

163. *Id.*

164. *Id.* at 176–77.

2. The Digital Performance Right in Sound Recordings Act of 1995

A public performance right for digital performances was achieved through the Digital Performance Right in Sound Recordings Act of 1995.[165] This Act sought to obtain an exclusive right "to perform the copyrighted work publicly by means of a digital audio transmission."[166] With a song, the right to publicly perform a work means playing the song in nightclubs, over the radio, on television, and any other place that music is able to be heard by the public.[167] Section 106 of the 1976 Act was modified to allow a public performance right for sound recordings, but only those made through "'non-interactive *digital* audio' transmissions."[168] The recording industry lobbied Congress and persuaded them that the recording business would be threatened by the progression of digital technology and piracy.[169] For example, digital technology allows people to make perfect copies of sound recordings, eliminating record sales.[170] The 1995 Act received no significant opposition because it did not impact normal, terrestrial AM/FM broadcasters.[171] This Act was soon amended to include the technological advances of the new millennium.

3. The Digital Millennium Copyright Act of 1998

Under the Digital Millennium Copyright Act (DMCA),[172] certain digital streaming services are able to use recordings without permission.[173] This Act modified the Digital Performance Right Act (DPRA) by including specific services[174] that would be "required to pay for the public performance of sound recordings."[175] Satellite radio broadcasters and digital streaming services must qualify for a license in order to play any sound recording.[176] Through the Digital Millennium Copyright Act and section 114 of the Copyright Act of

165. Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. §§ 106, 114–115 (2012)); *see* Gordon & Puri, *supra* note 19, at 343.

166. Gordon & Puri, *supra* note 19, at 343 (quoting 17 U.S.C. § 106(6) (2012)).

167. PASSMAN, *supra* note 77, at 211.

168. Becker et al., *supra* note 105 (quoting 17 U.S.C. § 106).

169. Gordon & Puri, *supra* note 19, at 343.

170. *Id.*

171. *Id.*

172. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

173. Gordon & Puri, *supra* note 19, at 343–44.

174. These services include an archived program, a continuous program, an eligible nonsubscription transmission, an interactive service, a new subscription service, a preexisting satellite digital audio radio service, and a preexisting subscription service. *See* Pub. L. No. 105-304, 112 Stat. 2898–99 (1998).

175. Becker et al., *supra* note 105.

176. Gordon & Puri, *supra* note 19, at 343–44.

1976, services that are non-interactive and pay the required royalty rate fall under this system.[177] In order for a service to be non-interactive—such as Pandora and SiriusXM—listeners cannot be able to pick specific songs that they wish to hear.[178] Non-interactive broadcasters pay their royalties to SoundExchange, a not-for-profit organization that collects royalty money from services that are statutorily covered.[179] Once the royalties are collected, SoundExchange distributes the money: 50% to the artist and 50% to the record companies.[180] Pandora and SiriusXM contend that they are not legally required to pay to play pre-1972 sound recordings because pre-1972 sound recordings are not protected under the DPRA or the DMCA.[181] Under the current law, sound recordings have a digital public performance right, while terrestrial AM/FM radio is still able to play the same sound recordings, and neither the performing artist nor the record company receive compensation.[182] This was a reality that was again challenged in 2009.

4. The Performance Rights Act of 2009

In 2009, H.R. 848—the Performance Rights Act[183]—was introduced before Congress in an effort "to provide fair compensation to artists for use of their sound recordings."[184] The Act proposed changing section 106's language pertaining to copyright holders' exclusive right to public performance by removing the word "digital" from the clause, thereby expanding the right to all audio transmissions.[185] Naturally, the National Association of Broadcasters largely opposed the Per-

177. *Id.* at 344.

178. *Id.*

179. *Id.* As stated, the Digital Performance Right in Sound Recordings Act granted a performance right to digital broadcasts. Kristin Thomson, *SoundExchange: A Digital Primer*, FUTURE OF MUSIC COAL. (Oct. 13, 2004), http://www.futureofmusic.org/article/soundexchange-digital-primer. There was, however, no way to collect these performance royalties and distribute them to the artists. *Id.* SoundExchange was created in 2000 as an unincorporated division of the Recording Industry Association of America (RIAA). It is the only organization that is designated to collect and distribute the statutory royalties to the copyright owners and performers of sound recordings by the United States Copyright Office. 17 U.S.C. § 114(g)(2) (2012); *see* Shari Lacy, *Internet Broadcast Royalties Available to Bluegrass Artists & Labels, What Is SoundExchange & How Can They Help You?*, INT'L BLUEGRASS MUSIC ASS'N, https://www.ibma.org/press/archives/internet-broadcast-royalties-available-bluegrass-artists-labels-what-soundexchange (last visited Nov. 14, 2016); *see also* Gordon & Puri, *supra* note 19, at 344.

180. Gordon & Puri, *supra* note 19, at 344.

181. *Id.*

182. Becker et al., *supra* note 105.

183. H.R. 848, 111th Cong. (2d Sess. 2009).

184. Jolson, *supra* note 61, at 785 (quoting H.R. 848).

185. 17 U.S.C. § 106(6) (2012); Jolson, *supra* note 61, at 785–86 (quoting S. 379, 111th Cong. (2009)).

formance Rights Act and argued that the promotional value of radio is worth millions of dollars, but the additional cost of having to pay for sound recordings would financially destroy radio broadcasters.[186] The National Association of Broadcasters referred to the Act as a "performance tax" because record labels and musicians already received free promotions due to the radio stations free airplay.[187] Ultimately, the Performance Rights Act did not pass.[188]

5. The RESPECT Act of 2014

In 2014, the RESPECT Act was introduced to Congress.[189] The goal of the RESPECT Act was to require digital radio broadcasters to pay royalties to musicians in order to play pre-1972 sound recordings to ensure "fairness and equity."[190] Both music industry executives and musicians supported the RESPECT Act.[191] One of the artists in support of the RESPECT Act is Sam Moore, of Sam and Dave, famous for the award-winning song *Soul Man*, which was recorded in 1967.[192] Moore stated that the "deliberate refusal of digital radio to compensate artists with recordings made before 1972 is an injustice."[193] He went on to state that throughout his career, he has been fortunate to have recorded some songs after 1972 and knows the "value and the life changing impact" that the payments for these recordings have on post-1972 musicians.[194] Moore pledged to continue raising his voice and asking that all artists get paid for digital radio airplay regardless of whether their songs were recorded before or after February 1972.[195] He stated, "It's only fair that all artists are compensated for their work, regardless of the date of the recording or the delivery platform."[196] Michael Huppe, the CEO and President of SoundExchange, has also largely supported the RESPECT Act and the payment of pre-1972 sound recordings.[197] Huppe and

186. Jolson, *supra* note 61, at 786–87.
187. *Id.* at 787.
188. *Id.* at 786.
189. Respecting Senior Performers as Essential Cultural Treasures Act (RESPECT Act), H.R. 4772, 113th Cong. (2014); *see Artists, Legislators Announce Introduction of RESPECT Act*, SoundExchange Blog (June 4, 2014) [hereinafter *Artists*], http://www.soundexchange.com/artists-legislators-announce-introduction-of-respect-act/.
190. *Artists*, *supra* note 189.
191. *Id.*
192. Sam & Dave, Soul Man (Stax/Atlantic Records 1967); *see Artists*, *supra* note 189.
193. *Artists*, *supra* note 189.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*

SoundExhange applauded Congressional Representatives that took the step forward in "righting a wrong being done to pre-1972 artists whose music has inspired all of us."[198] Huppe continued, "It's time we show respect for the legends of Motown, Jazz and Blues, and those who gave birth to Rock n' Roll. Their work is still a massive force on radio and is the foundation of the music we listen to today."[199] While the RESPECT Act had a tremendous amount of support from those within the music industry, 114th Congress never passed the Bill.[200]

6. The Fair Play Fair Pay Act of 2015

In April 2015, the FPFPA[201] was introduced before Congress in order to "fix the 'antiquated and broken' broadcast systems allowing certain radio companies to avoid paying any fee to music rights holders" and bring much needed improvements to the music industry and copyright law.[202] Michael Huppe, who adamantly supported the RESPECT Act, similarly supported the FPFPA.[203] According to Huppe, "The Fair Play Fair Pay Act . . . will bring much needed reform to the music industry and addresses many of the issues that plague the . . . music industry."[204] In further support, Huppe stated, "It is time that we properly pay the artists who put so much hard work into creating the music at the core of these services. If it weren't for them, these stations would be broadcasting little more than static."[205]

On May 11, 2016, a group of forty artists, including Rosanne Cash and T Bone Burnett, gathered at Capitol Hill in support of the Fair Play Fair Pay Act, for an event organized by musicFIRST,[206] aptly named "Fair Play Fair Pay Day."[207] Rosanne Cash emphasized that fairness is one of the top priorities, and she used the example of Percy

198. *Id.*

199. *Artists*, *supra* note 189.

200. H.R. 4772–*RESPECT Act*, CONGRESS.GOV, https://www.congress.gov/bill/113th-congress/house-bill/4772/all-actions (last visited Aug. 17, 2016).

201. 17 U.S.C. § 106(6) (2012); H.R. 1733, 114th Cong. (1st Sess. 2015).

202. Becker et al., *supra* note 105; 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.

203. Lewis, *supra* note 202.

204. *Id.*

205. *Id.*

206. musicFIRST is a coalition of organizations that represent musicians, managers, recording artists, record labels, and other organization such as The Recording Academy. *Artists Press Congress to Pass the Fair Play Fair Pay Act*, MUSIC WEEK (May 12, 2016) [hereinafter *Artists Press Congress*], http://www.musicweek.com/news/read/artists-press-congress-to-pass-the-fair-play-fair-pay-act/064758.

207. *Id.*; *see* Anna Washenko, *Artists Mobilize in Support of Fair Play Fair Pay Act*, RAIN NEWS (May 12, 2016), http://rainnews.com/artists-mobilize-in-support-of-fair-play-fair-pay-act/.

Sledge, whose hit *When A Man Loves A Woman* was at the center of millions of dollars of advertising; despite this, Sledge never received any royalties made by selling advertising around his music.[208] "This dishonor to our legacy artists is unspeakable," Cash emphasized.[209] Artists present in Washington D.C. emphasized that American artists and musicians are at a disadvantage to the rest of the world because they are unable to collect royalties from foreign performances of their music because there are no reciprocal agreements abroad, stating that millions of dollars would be able to come from overseas.[210]

The FPFPA encompassed what the RESPECT Act and Performance Rights Act wished to accomplish.[211] The Act was designed to change the way internet, streaming, and satellite broadcasting services pay for the music they play.[212] The FPFPA sought to establish a public performance right for sound recordings played on terrestrial AM/FM radio[213] by amending section 106 to strike the word "digital" and give a performance right to any audio transmission.[214] One of the purposes of the FPFPA, just like the RESPECT Act, is to establish a way for owners of pre-1972 sound recordings to be compensated for public performances.[215] This Act would preempt pre-1972 sound recording state law claims and create a federal right of action for those who have not been compensated for the use of their recordings.[216] While the Act does not grant actual copyright protection for pre-1972 sound recordings, it would provide a benefit to legacy acts such as Elvis.[217]

C. Flo & Eddie, Inc. v. Sirius XM Radio, Inc. and Other Pre-1972 Cases

Sound recordings made prior to February 15, 1972, do not have a public performance right under federal law,[218] as such, they are only protected under state property law.[219] Due to this gap in copyright law, if the state provides any protections at all, radio broadcasters

208. PERCY SLEDGE, WHEN A MAN LOVES A WOMAN (Atlantic Records 1966); *see Artists Press Congress*, *supra* note 206.
209. *Artists Press Congress*, *supra* note 206.
210. *Id.*
211. Becker et al., *supra* note 105.
212. Lewis, *supra* note 202.
213. Fair Play Fair Pay Act, H.R. 1733, 114th Cong. (1st Sess. 2015).
214. 17 U.S.C. § 106 (2012).
215. Lewis, *supra* note 202.
216. *Id.*
217. Becker et al., *supra* note 105.
218. Drake, *supra* note 13, at 61.
219. *Id.* at 62.

have traditionally been able to play pre-1972 sound recordings without ever paying royalties.[220] Originally, artists and labels welcomed this arrangement because broadcasts were treated as free promotion for artists and their sound recordings.[221] Members of the recording group, The Turtles, recently challenged this typically accepted norm, under their incorporated name Flo & Eddie, Inc.[222] Flo & Eddie, Inc. owns the copyright in the sound recordings of many of The Turtles' musical works,[223] some of which were recorded prior to February 15, 1972, including the famous hit, *Happy Together.*[224] Flo & Eddie, Inc. owns its recordings, so it is able to actively license the right to reproduce and distribute copies of these sound recordings to distributors of its choosing.[225] Nevertheless, SiriusXM, a digital radio broadcaster, has broadcasted multiple songs owned by Flo & Eddie, Inc. without permission.[226] In light of this, and lacking a federal remedy, Flo & Eddie Inc., filed class action suits[227] against SiriusXM in California,[228] New York,[229] and Florida,[230] claiming entitlement to compensation for its songs that have been played over satellite radio.[231] The *Flo & Eddie, Inc. v. Sirius XM* cases have led to subsequent suits against SiriusXM by companies such as SoundExchange[232] and Capitol Records.[233]

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220. *Id.* at 61–62.

221. *Id.* at 62.

222. *Id.*

223. *Id.*

224. THE TURTLES, HAPPY TOGETHER (White Whale Records 1967); *see* Drake, *supra* note 13, at 62; Pulsinelli, *supra* note 60, at 168.

225. Drake, *supra* note 13, at 62.

226. *Id.* Sirius XM has several stations that are dedicated to playing sound recordings that were made prior to 1972. Carlisle, *supra* note 19. In fact, channels 4, 5, and 6 on Sirius XM exclusively play songs from the '40s, '50s, and '60s. *Id.* On top of this, these stations operate seven days a week, 24 hours a day, and Sirius XM has never had to pay any royalties to play any of these songs. *Id.* It is estimated that 10–15% of all the songs that are played on Sirius XM were made prior to 1972. *Id.* In royalties, this would amount to about $2.72 million to $4.08 million per year. *Id.*

227. The class consists of "owners of Pre-1972 Recordings reproduced, performed, distributed, or otherwise exploited by Defendants . . . without a license or authorization to do so during the period from August 1, 2009 to the present." Complaint, Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 12-CIV-5693, 2014 WL 4725382 (C.D. Cal. Aug. 1, 2013).

228. *See infra* notes 246–59 and accompanying text.

229. *See infra* notes 260–70 and accompanying text.

230. *See infra* notes 270–75 and accompanying text.

231. Pulsinelli, *supra* note 60, at 168; *see* Carlisle, *supra* note 19.

232. *See infra* notes 280–91 and accompanying text; *see also* Pulsinelli, *supra* note 60, at 1033.

233. *See infra* notes 292–303 and accompanying text; *see also* Shaffer, *supra* note 1, at 1040.

1. What Are Pandora and SiriusXM?

"Pandora is free personalized internet radio."[234] Pandora allows a user to type in a song or artist that he/she would like to listen to, and from there the system builds a playlist built on other music that may fit the user's tastes.[235] Pandora relies on the Music Genome Project, an analysis consisting of 400 musical attributes covering qualities of melody, harmony, composition, lyrics, and the like,[236] which allows Pandora to play songs for its users that have similar musical traits to those songs users are already listening to.[237] While Pandora is free, there is an optional subscription service which allows for ad-free listening.[238] Although users can base the playlist they are listening to on a specific song, Pandora will never play a specific song on demand.[239]

SiriusXM is a satellite radio provider, which offers uninterrupted, high-quality music to a user's device.[240] Similar to satellite TV, satellite radio requires its users to purchase a receiver and pay a monthly subscription fee for a designated number of channels.[241] Currently, for $19.99 per month, a subscriber to SiriusXM Radio is able to get over 150 channels and internet listening.[242] With this specific "All Access" package, subscribers are able to listen to every game of the NFL and MLB, other sports coverage, and subscribers access to music channels such as those specifically for '50s, '60s, and '70s.[243]

2. Flo & Eddie, Inc. v. Sirius XM Radio, Inc.

In 2013, Flo & Eddie, Inc. filed suit in California, New York, and Florida against Sirius XM Radio, Inc. for the use of their pre-1972 sounds recordings without the bands permission, seeking compensation for the use of the songs and ultimately establish a public performance right for their pre-1972 songs.[244] Each state took its own

234. *What Is Pandora?*, PANDORA, https://help.pandora.com/customer/portal/articles/182180-what-is-pandora- (last visited Aug. 11, 2016).

235. Julia Layton, *How Pandora Radio Works*, HOW STUFF WORKS: TECH, http://computer.howstuffworks.com/internet/basics/pandora.htm (last visited Aug. 11, 2016).

236. *Id.*

237. *Id.*

238. PANDORA ONE, www.pandora.com/one (last visited Oct. 14, 2016).

239. Layton, *supra* note 235.

240. Kevin Bonsor, *How Satellite Radio Works*, HOW STUFF WORKS: TECH, http://electronics.howstuffworks.com/satellite-radio.htm (last visited Aug. 11, 2016).

241. *Id.*

242. *Our Most Popular Packages*, SIRIUSXM SATELLITE RADIO, http://www.siriusxm.com/ourmostpopularpackages (last visited on Aug. 11, 2016).

243. *Sirius All Access*, SIRIUSXM, http://www.siriusxm.com/packages/siriusallaccess (last visited on Aug. 11, 2016).

244. *See infra* notes 256–63 and accompanying text.

approach to grant—or in the case of Florida, not grant—a public performance right to these sound recordings.[245]

a. California

On August 1, 2013, Flo & Eddie, Inc. filed a complaint against SiriusXM alleging violations of California state law.[246] On September 22, 2014, the United States District Court for the Central District of California granted Flo & Eddie, Inc.'s motion for summary judgment.[247] The court found that SiriusXM had violated Flo & Eddie, Inc.'s and granted The Turtle's, exclusive right to publicly perform their proprietary recordings.[248] Additionally, the court determined its holding based on its reading of section 980 of the California Civil Code.[249] The court's reading of this statute held that the state of California unambiguously granted the exclusive right to publicly perform pre-1972 sound recordings' to owners.[250] According to the court, public performance rights were not an express exemption in Section 980, so the legislature must have intended to afford "the entire bundle of rights to the rights holder."[251]

While the court relied on the plain language meaning of section 980, it also looked to caselaw, including *Capitol Records, LLC v. BlueBeat, Inc*.[252] In this case, the court found that a website violated the exclusive rights of a record company who owned those recordings by allowing its users to download and stream pre-1972 sound recordings.[253] A public performance right for these recordings was implied under section 980, because the website was held liable for streaming pre-1972 sound recordings.[254] In California, this public performance right is equally protected for both digital and terrestrial AM/FM broadcasts.[255] Considering case was brought as a class action, SiriusXM

245. *See infra* notes 264–73 and accompanying text.

246. Drake, *supra* note 1313, at 65.

247. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. CV-12-5693, 2014 WL 4725382, at *15 (C.D. Cal. Sept. 22, 2014); Drake, *supra* note 13, at 65.

248. *Flo & Eddie Inc.*, 2014 WL 4725382, at *5; Drake, *supra* note 13, at 65.

249. Drake, *supra* note 13, at 65. Section 980(a)(2) states. "The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 17, 2047." CAL. CIV. CODE § 980(a)(2) (West 2016).

250. Drake, *supra* note 13, at 65.

251. *Id.*

252. 765 F. Supp. 2d 1198 (C.D. Cal. 2010); Drake, *supra* note 13, at 65.

253. *Capitol Records*, 765 F. Supp. 2d at 1206; Drake, *supra* note 13, at 65.

254. Drake, *supra* note 13, at 65.

255. Jolson, *supra* note 61, at 793.

may have to pay for all pre-1972 sound recordings that it has broadcasted to date, not just those owned by Flo & Eddie, Inc.[256]

In November 2016, on the eve of trial, attorneys for Flo & Eddie, Inc. and SiriusXM filed a joint notice of settlement.[257] The settlement is at least $25 million, which includes future royalties for a ten-year license.[258] However, it is possible that the settlement could extend to $99 million.[259]

b. New York

Unlike California, New York does not have a truly equivalent statute granting a public performance right to pre-1972 sound recordings.[260] Over time, however, New York has been able to develop a "common law" with regard to sound recordings.[261] While the court found that pre-1972 sounds recordings and their public performances do not have an explicit recognition in New York statutes, it held that there was support to the premise that a public performance right is a part of the "bundle of rights" that come with copyright ownership in any creative work.[262] A copyright holder typically holds the entire bundle of rights under state law, so without some form of statutory or state law exception, a public performance right is afforded to pre-1972 sounds recordings under New York state law.[263]

In April of 2016, the Second Circuit Court of Appeals certified a question to the New York Court of Appeals, avoiding making a definitive decision as to whether owners of pre-1972 sound recordings have

256. *Id.* at 793–94.

257. Proposed Settlement, Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-cv-05693 PSG (GJSx) (C.D. Cal. Nov. 28, 2016), https://www.scribd.com/documents/332615992/Flo-Eddie-Sirius-Proposed-Settlement; *see* Ashley Cullins, *Flo & Eddie Settle with SiriusXM on Eve of California Trial*, HOLLYWOOD REP. (Nov. 14, 2016, 6:69 PM), http://www.hollywoodreporter.com/thr-esq/flo-eddie-settle-siriusxm-eve-california-trial-947313.

258. Proposed Settlement, *supra* note 257. $25 million represents approximately $15.69 per play.

259. Ashley Cullins, *Sirius XM Could Pay up to $99M as Part of Flo & Eddie Settlement*, HOLLYWOOD REP. (Nov. 28, 2016 7:59 PM), http://www.hollywoodreporter.com/thr-esq/siriusxm-could-pay-up-99m-as-part-flo-eddie-settlement-950914. The past misappropriation part of the claim can raise $25–$40 million depending on any appeals. *Id.* The ten-year licensing portion is estimated to cost between $45–$59 million. *Id.* However, the exact amount depends on the outcomes in the Second, Ninth, and Eleventh Circuits. *Id.*

260. *See* Kevin Goldberg, *Flo and Eddie Take Their Siriusly Winning Ways to the East Coast*, COMMLAWBLOG (Nov. 23, 2014), http://www.commlawblog.com/2014/11/articles/broadcast/flo-and-eddie-take-their-siriusly-winning-ways-to-the-east-coast/.

261. *Id.*

262. *Id.* A public performance right has been afforded and protected by the New York courts for other creative works, such as plays and film clip compilations. *Id.*

263. *Id.*

a performance right.[264] The certified question was whether there is "a right of public performance for creators of sound recordings under New York law and, if so, what is the nature and scope of that right."[265] In December 2016, the New York Court of Appeals drew the first major blow to Flo & Eddie, Inc. when it concluded that New York common law does not protect the public performance of pre-1972 sound recordings, meaning that broadcasters do not need to pay.[266] Judge Leslie Stein stated in the opinion that concluding that a right of public performance existed for decades without courts recognizing such a right until now would be illogical.[267] Stein stated that "while changing technology may have rendered it more challenging for the record companies and performing artists to profit from the sale of recordings, these changes, alone, do not now warrant the precipitous creation of a common-law right that has not previously existed."[268] However, Judge Jenny Rivera rejected the "parochialism that justifies turning a blind eye to the exploitative practices of today's music industry" which is made possible by the technological advances which excludes a property interest in sound recordings from common-law copyright.[269]

c. Florida

Flo & Eddie, Inc. did not have the same success against SiriusXM in Florida as in California and New York.[270] The District Court for the Southern District of Florida entered summary judgment in favor of SiriusXM on June 22, 2015.[271] The court noted that while California relied on a statute and New York interpreted case law in order to find a public performance right for pre-1972 sound recordings, Florida was

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264. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 821 F.3d 272 (2d Cir. 2016); Eriq Gardner, *Controversy over Pre-1972 Sound Recordings Certified to New York Appeals Court*, HOLLYWOOD REP. (Apr. 13, 2016), http://www.hollywoodreporter.com/thr-esq/controversy-pre-1972-sound-recordings-883470.

265. *Flo & Eddie*, 821 F.3d at 267; Gardner, *Controversy*, *supra* note 264.

266. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-CV-05784, 2016 WL 7349183 (N.Y. Dec. 20, 2016).

267. *Id.*

268. *Id.*

269. *Id.*

270. Eriq Gardner, *SiriusXM Wins Florida Lawsuit over Performance of Pre-1972 Music*, HOLLYWOOD REP. (June 22, 2015), http://www.hollywoodreporter.com/thr-esq/siriusxm-wins-florida-lawsuit-performance-804185.

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

unable to reciprocate.[272] Lacking such authority, the court had to decide whether to honor an implicit public performance right for pre-1972 sound recordings.[273] The judge stated, "If this Court adopts Flo & Eddie's position, it would be creating a new property right in Florida as opposed to interpreting the law."[274] The court, however, declined to adopt Flo & Eddie position, stating that it is the job of the Florida legislature to address such an issue.[275]

On June 29, 2016, the Eleventh Circuit Court of Appeals directed to the Supreme Court of Florida several questions regarding common law copyright rights afforded to sound recordings,[276] because the Eleventh Circuit "has never had opportunity to address either the existence vel non of common law copyright protection for sound recordings or the doctrine of publication in the context of sound recordings."[277] The four questions certified are (1) "whether Florida recognizes a common law copyright in sound recordings" and whether the exclusive rights of reproduction and public performance are included; (2) "whether the sale and distribution of phonorecords to the public or the public performance [of those phonorecords] constitutes a 'publication' for the purpose of divesting the common law copyright protections" and whether that divestment terminates the exclusive rights of public performance and/or reproduction; (3) whether the "back-up or buffer copies [of the sound recordings that are in SiriusXM's possession] infringe Flo & Eddie's common law copyright exclusive right of reproduction"; and (4) if "Florida does not recognize a common law copyright in sound recordings, . . . whether Flo & Eddie nevertheless has a cause of action for common law unfair competition/misappropriation, common law conversion, or statutory civil theft under FLA. STAT. § 772.11 and FLA. STAT. § 812.014."[278]

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272. *Id.* at *4. The court states that this is because "California and New York are the creative centers of the Nation's art world." *Id.* at *3. Considering this, both states were able to rely on precedent. *Id.* at *3; *see* Gardner, *Controversy*, *supra* note 264.

273. *Flo & Eddie*, 2015 WL 3852692, at *4; Gardner, *SiriusXM*, *supra* note 270.

274. *Flo & Eddie*, 2015 WL 3852692, at *4.

275. *Id*.

276. *See 4 Questions Certified to Florida Supreme Court in Sirius Copyright Case*, LEXIS LEGAL NEWS (July 1, 2016, 9:38 AM), http://www.lexislegalnews.com/articles/9540/4-questions-certified-to-florida-supreme-court-in-sirius-copyright-case; *see also* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 827 F.3d 1016, 1018 (11th Cir. 2016).

277. *Flo & Eddie*, 827 F.3d at 1021; *see 4 Questions Certified*, *supra* note 276.

278. *Flo & Eddie*, 827 F.3d at 1024.

3. SoundExchange, Inc. v. Sirius XM Radio, Inc.[279]

SoundExchange, the organization that has been appointed by the Copyright Royalty Board[280] (the "Board") to collect digital performance royalties from statutory license users and distribute those royalties to the artists and copyright holders, filed a complaint against Sirius XM for underpayment of royalties, among other things.[281] Count one alleged a "[v]iolation of 37 C.F.R. § 382.13(a) and 17 U.S.C. § 114(f)(1)(B) – Underpayment Based on Reduction of Revenue Purportedly Corresponding to Use of Pre-1972 Sound Recording."[282] Holders of a statutory license "are required to pay royalties to copyright owners" at a rate that has been set by the Board.[283] SiriusXM has a "statutory license and does not negotiate individual license agreements."[284] Therefore, SiriusXM is required to pay royalties directly to SoundExchange at the Board rate for all covered sound recordings that SiriusXM has used.[285] The court considered whether SiriusXM was required to pay royalties for pre-1972 sounds recordings and, if so, whether SiriusXM may reduce the royalty payments for these recordings.[286] On August 26, 2014, the court granted SiriusXM's motion and stayed the action until a decision by the Board as to whether SiriusXM's incorrect method of calculation had resulted in an underpayment of royalties.[287] The Board has already found that the method of calculations used by SiriusXM were improper.[288] However, if the Board finds that SiriusXM improperly calculated royalties, SoundExchange will be able to seek damages.[289] If pre-1972 sounds recordings were to be included under the Copyright Act, any public

279. SoundExchange v. Sirius XM Radio, Inc., 65 F. Supp. 3d 150 (D.D.C. 2014).

280. The Copyright Royalty Board is a board of three appointed copyright royalty judges that serve six-year terms. *Copyright Royalty Judges*, U.S. COPYRIGHT ROYALTY BD. (Oct. 24, 2016), http://www.loc.gov/crb/background/. The judges appointed to the Board oversee the statutory licenses provided by copyright law. *Id.* These licenses allow those that are qualified to use various copyrighted works without having to obtain separate licenses from each individual copyright owner. *Id.* The "Judges are responsible for determining and adjusting the rates and terms of the statutory licenses and determining the distribution of royalties from the statutory license royalty pools that the Library of Congress administers." *Id.*

281. Complaint, SoundExchange, Inc. v. Sirius XM Radio, Inc., 65 F. Supp. 3d 150 (D.D.C. 2014) (No. 13-CV-01290), 2013 WL 4521902 [hereinafter SoundExchange Complaint]; Shaffer, *supra* note 1, at 1033.

282. Shaffer, *supra* note 1, at 1033; *see* SoundExchange Complaint, *supra* note 281, ¶¶ 42–47.

283. Shaffer, *supra* note 1, at 1033–34.

284. *Id.* at 1034.

285. *Id.*

286. SoundExchange, 65 F. Supp. 3d at 156.

287. *Id.*; Shaffer, *supra* note 1, at 1039.

288. *SoundExchange*, 65 F. Supp. 3d at 155.

289. *Id*. at 156–57; Shaffer, *supra* note 1, at 1039.

performance of such a recording would be subject to a statutory license and SiriusXM would not be able to seek a royalty reduction.[290] There have been no current legal developments.[291]

4. Capitol Records, LLC v. Sirius XM Radio, Inc.

Capitol Records, along with Sony Music Entertainment, UMG Recordings, Warner Music Group, and ABKCO Music & Records collectively filed suit against SiriusXM alleging that it publicly performed, and continues to do so, without authorization, an abundance of the pre-1972 sound recordings owned by these companies.[292] The first count of the complaint filed with the Los Angeles Superior Court alleges a violation of section 980(a)(2) of the California Civil Code.[293] Section 980(a)(2) provides "exclusive ownership" for pre-1972 sound recordings,[294] under which Capitol Records claims it has the exclusive right to exploit these recordings.[295] This includes, among other things, the right to publicly perform their pre-1972 sound recordings by digital transmission.[296] Under this "exclusive rights" theory, Capitol Records claimed that SiriusXM does not have the right to reproduce or publicly perform these pre-1972 sound recordings.[297] Capitol Records also claimed that it had never been compensated by SiriusXM for its exploitation of Capitol's pre-1972 sound recordings.[298]

On October 14, 2014, the court, taking into account the summary judgment order of *Flo & Eddie,* ruled that section 980 does afford the sound recording owners exclusive public performance rights.[299] The court noted the significance of only one exception to a sound recordings exclusive ownership.[300] This exception is specifically for "record-

290. Shaffer, *supra* note 1, at 1035. If pre-1972 sound recordings were already under federal copyright protection, it is highly likely that this litigation would have been avoided. *Id.* at 1027.

291. *See* Bill Donahue, *Copyright Board Should Hear Pre-72 Sirius Case, Judge Rules*, Law360 (Aug. 26, 2014, 3:26 PM), http://www.law360.com/articles/571179.

292. Complaint ¶¶ 19–20, Capitol Records, LLC v. Sirius XM Radio Inc., No. BC520981 (Cal. Super. Ct. Sept. 11, 2013), 2013 WL 4834441, at *1 [hereinafter Capitol Records Complaint].

293. Capitol Records Complaint, *supra* note 292, ¶¶ 29–56.

294. Cal. Civ. Code § 980 (West 1982).

295. Capitol Records Complaint, *supra* note 292, ¶ 8.

296. *Id.* Capitol Records also claimed the exclusive right to exploit these recordings by manufacturing, copying, selling, distributing, and broadcasting. *Id.*

297. *Id.* ¶ 31.

298. *Id.*

299. Capitol Records, LLC v. Sirius XM Radio Inc., No. BC520981, 2014 WL 7387972, at *4–5 (Cal. Super. Ct. Oct. 14, 2014), *supplemented on reconsideration*, 2014 WL 7150014 (Cal. Super. Ct. Dec. 5, 2014).

300. *Id*. at *5.

ing covers," which is also found in federal copyright law.[301] While the California legislature adopted this exception, it did not adopt the exception for public performance rights.[302] The court held that since a public performance right was not specifically excluded from section 980, that right is included within the pre-1972 sound recordings' exclusive ownership rights.[303]

5. ABS Entertainment, Inc. v. CBS Corporation et al.

In August of 2015, a class action suit was filed by ABS Entertainment, Inc. against the CBS Corporation for the public performance of pre-1972 sound recordings owned by the plaintiffs[304] in violation of California state copyright law.[305] In its defense, CBS Corporation argued that it was not performing the pre-1972 sound recordings in their original format, but digitally remastered versions that came out after 1972.[306] According to this reasoning, the works that CBS Corporation played were not protected under state law, and, therefore, CBS Corporation does not have to pay.[307] ABS Entertainment, Inc., the plaintiff, argued that these remastered versions are accomplished by tweaking timbre, and volume and loudness are not sufficiently original to entitle copyright protection to a work as they are merely mechanical.[308] ABS Entertainment, Inc. also argued that finding otherwise would allow owners of sound recordings to enjoy an everlasting copyright over those works.[309]

Central District of California Judge Percy Anderson accepted CBS Corporation's argument, using a remastered version of *Tuff*, a 1961 recording of Ace Cannon, as an example.[310] Dr. Durand Begault, an

301. *Id.*

302. *Id.*

303. *Id.*

304. At the time of publication, the plaintiffs include: ABS Entertainment, Inc., which owns sound recordings of Al Green, Willie Mitchell, and Otis Clay; Baraby Records, Inc., which owns sound recordings made by Andy Williams, The Everly Brothers, and Ray Stevens; Brunswick Record Corporation, which owns sound recordings made by Jackie Wilson, and Tyrone Davis; and Malaco, Inc., which owns sound recordings made by King Floyd and Mahalia Jackson. *See* ABS Entm't, Inc. v. CBS Corp., No. 15-cv-6257 PA (AGRx), 2016 U.S. Dist. LEXIS 71470, at *1 (C.D. Cal. May 30, 2016).

305. *Id.*; *see* Eriq Gardner, *CBS Beats Lawsuit over Pre-1972 Songs with Bold Copyright Argument*, HOLLYWOOD REP. (June 1, 2016, 6:43 AM), http://www.hollywoodreporter.com/thr-esq/cbs-beats-lawsuit-pre-1972-898633.

306. *ABS Entm't*, 2016 U.S. Dist. LEXIS 71470, at *4.

307. Gardner, *CBS*, *supra* note 305.

308. *ABS Entm't*, 2016 U.S. Dist. LEXIS 71470, at *6.

309. *Id.* at *11.

310. *Id*. at *12; *see* Gardner, *CBS*, *supra* note 305; *see also* ACE CANNON, TUFF (Hi Records 1962).

acoustic engineer and research scientist with a specialization in forensic investigation of audio evidence, served as one of CBS Corporation's experts[311] and found that the remastered version of *Tuff* had additional reverberation, was in a different key, and had a faster tempo.[312] Judge Anderson accepted that these "changes reflect multiple kinds of creative authorship, such as adjustments of equalization, sound editing, and channel assignment," and the changes were not merely mechanical or trivial.[313] Under this reasoning, Judge Anderson decided that the pre-1972 sound recordings owned by the plaintiffs and used by the defendants had "undergone sufficient changes during the remastering process to qualify for federal copyright protection."[314] This decision has given radio broadcasters a roadmap on how to publicly perform pre-1972 sound recordings without liability, an issue now before the appellate courts in the *Flo & Eddie* cases.[315]

Upon receiving this judgment in California, CBS Corporation brought the decision to New York, where it is currently defending similar litigation.[316] In response, the Recording Industries Association of America (RIAA)[317] wrote a letter requesting the opportunity for an amicus brief siding with ABS Entertainment, Inc.[318] The RIAA asserted that the court should not "compromise state law rights in the underlying sound recordings," but it did not take a position on whether digital remastering adds sufficient originality in order to constitute a copyrightable work.[319] It further argued that the Central District of California's conclusion in *Flo & Eddie* "exonerates" exploitation of works protected under state law.[320] ABS Entertainment, Inc. has made similar arguments in its brief to Judge Koeltl, and urged New York to make a different decision than California.[321]

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311. Gardner, *CBS*, *supra* note 305.

312. *ABS Entm't*, 2016 U.S. Dist. LEXIS 71470, at *12.

313. *Id.*

314. *Id.*

315. Gardner, *CBS*, *supra* note 305.

316. Eriq Gardner, *The RIAA Writes to Judge About Controversial Ruling over Remastered Sound Recordings*, HOLLYWOOD REP. (June 14, 2016), http://www.hollywoodreporter.com/thr-esq/riaa-writes-judge-controversial-ruling-902801.

317. *About RIAA*, RIAA, http://www.riaa.com/about-riaa/ (last visited Oct. 19, 2016).

318. Letter Motion to File Amicus Brief, ABS Entertainment, Inc. v. CBS Corp., No. 15-CV-06801-JGK, 2016 U.S. Dist. LEXIS 71470 (S.D.N.Y. June 14, 2016) [hereinafter Letter Motion], https://www.documentcloud.org/documents/-ABS-RIAA.html; Gardner, *The RIAA*, *supra* note 316.

319. *See* Gardner, *The RIAA*, *supra* note 316; *see also* Letter Motion, *supra* note 318, at 2.

320. Letter Motion, *supra* note 318 at 2; *see* Gardner, *The RIAA*, *supra* note 316.

321. Letter Response, ABS Entertainment, Inc. v. CBS Corp., No. 15-cv-06801-JGK, 2016 U.S. Dist. LEXIS 71470 (S.D.N.Y. June 13, 2016), https://www.documentcloud.org/documents/2861113-ABS-Brief.html; Gardner, *The RIAA*, *supra* note 316.

It has been a long journey for sound recordings to get the rights they are afforded in the modern era; however, there is still a loophole that deprives many artists of payment for the work that they have done. With all of the pending litigation regarding pre-1972 sound recordings, scattered across multiple jurisdictions, federal protection would be of the utmost benefit to all parties involved. Federal legislation, such as the FPFPA, would allow a remedy to all parties.

III. Analysis

If upheld on appeal, the *Flo & Eddie* decisions in New York and California could widely impact the foundation of the music industry as the modern consumer knows it. If pre-1972 sound recordings are not brought under federal protection, there will be an open floodgate of litigation regarding these recordings,[322] which would affect terrestrial AM/FM broadcasters.[323] The FPFPA attempts to remedy the situation by seeking to implement several provisions that will make the music industry more favorable to recording musicians, including a public performance right to pre-1972 sound recordings.[324] The *Flo & Eddie* cases may have wide ranging implications for all broadcasters, and future litigation.[325] The FPFPA is an attempt to remedy varying aspects of unfairness in the music business, ultimately allowing for all musicians to be paid when their song is played on the radio, whether terrestrial AM/FM or digital.[326]

A. The Implications of Flo & Eddie, Inc. v. Sirius XM Radio

Both *Flo & Eddie* decisions in California and New York in the could have broad implications beyond requiring digital broadcasters to pay royalties in order play pre-1972 sound recordings.[327] Due to the open language of the *Flo & Eddie* decisions, a legal basis for copyright owners of pre-1972 sound recordings has presented itself against terrestrial AM/FM broadcasters and venues in New York and Califor-

322. *See infra* notes 327–34 and accompanying text (considering the implications of Flo & Eddie, Inc. v. Sirius XM Radio).

323. *See infra* notes 335–68 and accompanying text (analyzing the exemption for terrestrial AM/FM radio broadcasters).

324. *See infra* notes 369–427 and accompanying text (exploring the benefits and consequences of the Fair Play Fair Pay Act).

325. *See infra* notes 327–68 and accompanying text (applying the Flo & Eddie cases to terrestrial radio broadcasters).

326. *See infra* notes 369–446 (interpreting the Fair Play Fair Pay Act and its future implications).

327. Gordon, *supra* note 17, at 339.

nia.[328] In fact, a number of cases have already presented themselves in these federal district courts since the *Flo & Eddie* decisions; the floodgates of litigation have already been opened.[329] As one article notes, Judge Colleen McMahon of the Southern District of New York has essentially invited these suits with the language used in her opinion:

> the conspicuous lack of any jurisprudential history confirms that not paying royalties for public performances of sound recordings was an accepted fact of life in the broadcasting industry for the last century. So does certain testimony cited by Sirius from record industry executives, artists and others, who argued vociferously before Congress that it was unfair for them to operate in an environment in which they were paid nothing when their sound recordings were publicly performed. That they were paid no royalties was a matter of statutory exemption under federal law; that they demanded no royalties under the common law when their product [was] ineligible for federal copyright protection is, in many ways, inexplicable.[330]

The Copyright Office has already advocated for bringing pre-1972 sound recordings under federal copyright protection and expanding the public performance right for digital broadcasts to all of radio.[331] Now that there is a possibility that a general public performance right exists for pre-1972 sound recordings through these decisions and the FPFPA, it makes sense to bring these sound recordings under federal protection.[332] If not, litigation will be subject to rule of law on a state-by-state basis,[333] assuming that the state even offers a common-law foundation for protection. Federalization is the only way to close the floodgates caused by litigating on a state-by-state basis. Under the current state-by-state regime for pre-1972 recordings, it is possible for multiple parties to be sued in multiple jurisdictions at the same time, just as Flo & Eddie, Inc. sued SiriusXM in New York, California, and Florida, causing an increase in litigation costs and even more congestion in the courts. In light of the success in the *Flo & Eddie, Inc.*

328. *Id.* at 356.

329. *See Pre-1972 Sound Recordings State Law Copyright Litigation*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/cases/pre-1972-sound-recordings-state-law-copyright-litigation (last updated Sept. 10, 2015).

330. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 62 F. Supp. 3d 325, 340 (S.D.N.Y. 2014) (citation omitted); Gordon, *supra* note 17, at 356.

331. *See supra* notes 151–164 and accompanying text (discussing the Copyright Office's opinion on Pre–1972 Sound Recordings); *see also* Tyler Ochoa, *A Seismic Ruling on Pre-1972 Sound Recordings and State Copyright Law*—Flo & Eddie v. Sirius XM Radio *(Guest Blog Post)*, TECH. & MKT. L. BLOG (Oct. 1, 2014), http://blog.ericgoldman.org/archives/2014/10/a-seismic-ruling-on-pre-1972-sound-recordings-and-state-copyright-law-flo-eddie-v-sirius-xm-radio-guest-blog-post.htm.

332. Ochoa, *supra* note 331.

333. *Id.*

cases, more entities, such as recording companies, have been suing broadcasters for more that they are owed for the playing of pre-1972 sound recordings.[334] By being subject to a state-by-state basis, owners of pre-1972 sound recordings are less able to predict the outcome in each state. Federal protection of pre-1972 sound recordings will allow a universal jurisdictional and legal standard in the courts, just as for recordings made after 1972. This will allow for greater predictability in the courts, as well as cut down on litigation costs for those parties that can currently sue and be sued in multiple jurisdictions at the same time.

B. Terrestrial AM/FM Radio

Federal copyright law did not grant protection to sounds recordings until the 1971 Sound Recording Act.[335] Any work that was published before 1972 is protected only under state law.[336] Accordingly, any work published after 1972 is protected under federal copyright law.[337] Currently, the Copyright Act of 1976, does not afford a public performance right to sound recordings played by terrestrial broadcasters.[338] When a song is broadcast over traditional AM/FM radio stations, only the copyright owners of the musical composition are required to be paid.[339] For many years, the Copyright Office has been advocating for a public performance right for sound recordings with regards to terrestrial radio, but no right exists at this time.[340] This is shocking, as the United States is the only industrialized democracy that does not afford a public performance right to sound recordings over terrestrial radio.[341]

In order to understand how the exemption for terrestrial AM/FM broadcasters' functions, it is important to understand, again, that the musical composition and the sound recording are two separate entities

334. *See supra* notes 280–321 and accompanying text (providing an overview of cases involving pre-1972 recordings, including *SoundExchange*, *Capitol Records*, and *ABS Entertainment*).

335. Jolson, *supra* note 61, at 792.

336. *Id.*

337. *Id.*

338. *Id*. at 766. "Terrestrial radio" is simply AM/FM radio. *See generally* Seth Stevenson, *Don't Count AM/FM Radio Out Just Yet*, SLATE (Dec. 14, 2014), http://www.slate.com/articles/arts/ten_years_in_your_ears/2014/12/the_future_of_terrestrial_radio_in_the_age_of_podcasts.html.

339. Jolson, *supra* note 61, at 766. Conversely, if the same song is digitally broadcasted, royalties must be paid to the copyright owners of the musical composition and to those of the sound recording. *Id.*

340. *Id.*

341. *Id.* at 767.

with separate rights.[342] The songwriter has exclusive rights to the composition.[343] Frequently, the songwriter will join a Performance Rights Organization (PRO).[344] The PRO will then collect the royalties on the composition and pay the songwriter and her publisher for the licenses that the songwriter sells for the use of the songs.[345] On the other hand, SoundExchange collects the royalties on sound recordings.[346] In order for services such as television stations, online music services, and radio stations to play songs, they are required to obtain a license for the use of the sound recording and the underlying musical composition, which can be obtained through a PRO (such as ASCAP, BMI or SESAC).[347] Billy Joel's *New York State of Mind* is an example of how royalties work with regard to digital and terrestrial AM/FM broadcasts.[348] For this song, Billy Joel wrote the music and lyrics, as well as published the song himself.[349] Joel owns the exclusive right to the musical composition.[350] When a version of *New York State of Mind* plays digitally—whether on Pandora or SiriusXM—Joel's PRO pays him for the royalties it collects for the public performance of the musical composition.[351] SoundExchange collects and distributes to Joel any royalties for his own sound recordings.[352] When another musician's version of *New York State of Mind* is played by a digital broadcaster, Joel will still receive any royalties for the musical composition, but any SoundExchange royalties will be distributed to the musician performing the song.[353] However, when either of these versions of *New York State of Mind* are played on terrestrial AM/FM radio, only Joel will be paid royalties for the musical composition.[354] No royalties will be paid to the musician for the sound recording.[355] Musicians should be compensated fairly for creating a sound recording through a royalty payment whenever a sound record-

342. *Id.* at 782–83.

343. *Id.* at 783; *see supra* notes 61–67 and accompanying text (providing the history of the Copyright Act of 1790).

344. Jolson, *supra* note 61, at 783.

345. *Id.*

346. *Id.* at 784.

347. *Id.* at 783–84.

348. BILLY JOEL, NEW YORK STATE OF MIND (Columbia 1976); *see* Jolson, *supra* note 61, at 784.

349. Jolson, *supra* note 61, at 784.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 784–85.

354. *Id*. at 785.

355. Jolson, *supra* note 61, at 785.

ing is played; however, under the current system this is not what happens. This is fundamentally unfair.

How do the decisions in the *Flo & Eddie* cases affect terrestrial AM/FM radio? There is a possibility that the recent decisions in California and New York created a full public performance right for pre-1972 sound recordings.[356] Although it is likely that these decisions will be appealed several times, if upheld, they will be a significant victory for owners of sound recording copyrights.[357] Creating a full public performance right for pre-1972 sound recordings would enable owners of pre-1972 works to negotiate higher royalty rates from broadcasters.[358] With pre-1972 sound recordings receiving royalties, post-1972 works could be able to use these royalties to negotiate even higher royalty rates.[359] In California, the decision in *Flo & Eddie v. Sirius XM* does not limit the scope of violations to only digital audio transmissions.[360] The California court did not create a limit, so a general public performance right was effectively granted in sound recordings.[361] This means that although traditional AM/FM broadcasters are expressly exempt from paying royalties for playing post-1972 recordings, it is possible that they are next in line to be sued with respect to pre-1972 recordings.[362] Without a federal standard, these terrestrial AM/FM broadcasters could be sued in various venues at the same time, just as SiriusXM and Pandora Radio were, leading to high litigation costs and unpredictable and inconsistent legal standards.

Both the industry and the judicial system look favorably upon the economic advantages inherent in American copyright law.[363] Justice John Paul Stevens stated, "The purpose of copyright is to create incentives for creative effort."[364] Justice Oliver Wendell Holmes stated, "If music did not pay it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."[365] Justice Holmes also recognized that musicians play music as part of their profession and that laws are there to create a financial incentive for artists to create while retaining artistic

356. *Id.* at 792.
357. *Id.* at 795.
358. *Id.*
359. *Id.*
360. *Id*.
361. Jolson, *supra* note 61, at 795.
362. *Id.*
363. *Id.* at 767.
364. *Id.* (quoting Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1974)).
365. *Id.* (quoting Herbert v. Shanley Co., 242 U.S. 591, 595 (1917)). It is significant to note that the issue in *Herbert* was whether a public performance right was to be afforded to composers whose compositions were played in restaurants. *Id*. at 769 n.19.

control.[366] In order to create a proper incentive for creators, copyright law should evolve just as the market does.[367] The music industry has changed drastically since the implementation of the Copyright Act in 1978 such as the invention of the internet and digital radio, which allows more people than ever to listen to and download music, copyright law has barely kept up with those changes.[368] The FPFPA aimed to eliminate loopholes and bring the Copyright Act into a modern era.

C. The Fair Play Fair Pay Act of 2015

The FPFPA attempted to implement an all-inclusive reform by adopting several features of various bills that came before it, while also incorporating additional provisions in order to avoid the criticisms of its predecessors.[369] The FPFPA sought to: (1) establish a terrestrial AM/FM public performance right for all sound recordings;[370] (2) provide payment for the public performance of pre-1972 sound recordings;[371] (3) establish a consistent rate-setting standard for public performances of sound recordings;[372] (4) provide royalty payments directly to producers and other people who work on a song;[373] (5) protect small broadcasters, as well as public and educational radio;[374] and (6) prevent any harmful impact on royalties for songwriters.[375]

1. Establishing a Terrestrial AM/FM Public Performance Right

In order to accomplish a public performance right for sound recordings on terrestrial AM/FM radio, the FPFPA sought to amend section 106(6) of the Copyright Act of 1976.[376] As one of the Act's main objectives, it eliminated the distinction between terrestrial AM/FM broadcasts and digital radio broadcasts so that all broadcasters would

366. *Id*. at 769–70.
367. Jolson, *supra* note 61, at 768.
368. *Id.*
369. Becker et al., *supra* note 105.
370. *See infra* notes 376–88 and accompanying text.
371. *See infra* notes 389–99 and accompanying text.
372. *See infra* notes 400–06 and accompanying text.
373. *See infra* notes 407–14 and accompanying text.
374. *See infra* notes 415–22 and accompanying text.
375. *See infra* notes 423–27 and accompanying text; *see also* Becker et al., *supra* note 105 ("[T]he FPFPA prohibits parties from using newly designated license fees paid on account of sound recordings as basis to lower public performance royalties to songwriters for use of their compositions."); Rae, *supra* note 25 (discussing the lack of federal copyright protection for pre-1972 recordings and how songwriters are only paid when music is "performed" on AM/FM radios).
376. *See* 17 U.S.C. § 106(6) (2012); Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. (1st Sess. 2015); Rae, *supra* note 25.

be required to pay in order to play sound recordings.[377] The FPFPA eliminated the language within section 106(6) that limits royalty payments for only digital broadcasts because only digital audio transmissions are required to pay for the public performance of sound recordings.[378] By redefining "digital audio transmission" to simply "audio transmission," the FPFPA created a broad and unlimited right to the public performance of sound recordings.[379] This redefinition of the term would encompass any audio transmission, not just digital audio transmissions.[380] This provision would have required both terrestrial AM/FM and digital broadcasters to pay royalties for the public performance of sound recordings, finally allowing all performers to be compensated for their work.[381] By requiring all radio broadcasters to pay in order to play any sound recording, the "broken and unjust system" will be fixed and all artists will be able to be fairly compensated for their work.[382] Properly compensating artists for their work will likely prompt new artists to enter the music industry.[383] Critics of the FPFPA asserted that radio play provides musicians exposure and promotion, which they can then later monetize through sales of their music or concert tickets.[384] According to this theory, although revenues to record labels have plummeted, proof that the industry and artists are finding financial success can be found in the "glitz and glamor at the MTV Video Music Awards."[385] The reality is that the "glitz and glamor" do not pay the bills, and few musicians actually enjoy the "rock star lifestyle."[386] Radio, even with the introduction of the Internet, is still a profitable business that relies on music to appeal to listeners.[387] As most radio stations are still making a profit, there is no reason why they should not have to share some of that profit with

377. *See* Becker et al., *supra* note 105.

378. *See* H.R. 1733; Becker et al., *supra* note 105.

379. H.R. 1733; Becker et al., *supra* note 105; Rae, *supra* note 25.

380. Becker et al., *supra* note 105.

381. *Id.*

382. Anna Washenko, *Fair Play Fair Pay Act Proposes New Performance Royalty Rules for Radio*, RADIO & INTERNET NEWS (Apr. 13, 2015), http://rainnews.com/fair-play-fair-pay-act-proposes-new-performance-royalty-rules-for-radio/.

383. *See* Tino Gagliardi, *Support Fair Play, Fair Pay*, INT'L MUSICIAN (July 19, 2015), https://www.internationalmusician.org/support-fair-play-fair-pay/.

384. *See* Jeffrey Toobin, *Congress's Chance to Be Fair to Musicians*, NEW YORKER (May 18, 2016), http://www.newyorker.com/news/daily-comment/congresss-chance-to-be-fair-to-musicians.

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

386. Toobin, *supra* note 384.

387. *Id.*

those whose work is essential to the final product which produces that wealth.[388]

2. *Providing Payment for Public Performances of Pre-1972 Sound Recordings*

The FPFPA encompassed the RESPECT Act insofar as its goal in establishing a public performance right for pre-1972 sound recordings.[389] Considering the absence of federal copyright protection for sound recordings published before February 15, 1972, the FPFPA, section 7, titled "Equitable Treatment of Legacy Sound Recordings," sought to establish a method of compensation for public performances for owners of pre-1972 sound recordings.[390] This section would have amended the Copyright Act of 1976, section 114(f)(3)[391] by adding the following:

> Any person publicly performing sound recordings protected under this title by means of transmissions under a statutory license under this section, or making reproductions of such sound recordings under section 112(e), shall make royalty payments for transmissions that person makes of sound recordings that were fixed before February 15, 1972, and reproduction that person makes of those sound recordings under the circumstances described in section 112(e)(1), in the same manner as such person does for sound recordings that are protected under this title.[392]

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388. *Id.*

389. Rae, *supra* note 25.

390. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 7 (1st Sess. 2015); Becker et al., *supra* note 105.

391. 17 U.S.C. § 114(f)(3) (2012) (establishing licenses for certain nonexempt transmissions). Section 114(f)(3) states:

> License agreements voluntarily negotiated at any time between 1 or more copyright owners of sound recordings and 1 or more entities performing sound recordings shall be given effect in lieu of any decision by the Librarian of Congress or determination by the Copyright Royalty Judges.

Id.

392. H.R. 1733, § 7. Section 112(e)(1) sets out the provisions for a statutory license. 17 U.S.C. § 112(e)(1) (2012). A section 112 statutory license encompasses ephemeral reproductions, for example, temporary server copies. *See Licensing 101*, SOUNDEXCHANGE, http://www.soundexchange.com/service-provider/licensing-101/ (last visited Aug. 10, 2016). These reproductions are made by all digital services that are covered by under section 114 of the Copyright Act. *Id.* Under section 114, business establishment services, such as those services that stream background music into restaurants and retail stores, are currently exempt from paying public performance royalties; however, these services must otherwise be eligible under section 114 and operate under section 112 in order to be covered under a statutory license that is administered by SoundExchange. *Id.*

The Fair Play Fair Pay Act would have preempted any state law claims and establish a civil action arising from claims of pre-1972 sound recordings being used without a license.[393]

This specific provision quoted above would provide a great benefit to those who own some of the most valuable sound recordings, including The Beatles, Elvis Presley, and the Rolling Stones, allowing these artists to be compensated for their work.[394] This provision would allow pre-1972 sound recordings to be subject to only federal protection, as opposed to various state laws (if the state even offers protection), and allow for a universal standard regarding these sound recordings, leading to greater predictability in the courts.[395] This provision would close the litigation floodgates, allowing for federal jurisdiction, as opposed to the current system where parties can sue or be sued in multiple state jurisdictions at the same time. The current system causes high litigation costs for both parties when lawsuits are in multiple jurisdictions. As seen with the *Flo & Eddie, Inc.* cases, different jurisdictions are able to come down with different opinions, impacting both parties in different ways.[396] Federal jurisdiction would provide a universal standard, leading to less expensive litigation.

While the Fair Play Fair Pay Act conferred a public performance right on pre-1972 sounds recordings, it did not confer actual federal copyright protection.[397] The Act was consistent with section 301 of the Copyright Act of 1976 so that pre-1972 recording artists and their record labels rely on state protections for all other rights regarding sound recordings, such as the ability to recapture the copyright in a work after a set term.[398] While full federalization, as endorsed by the Future of Music Coalition and the United States Copyright Office, would be ideal, this provision would still be a "partial fix" to the problem of pre-1972 recording compensation.[399]

3. Establishing Consistent Rate-Setting Standards for Public Performances

The FPFPA also sought to eliminate the unrelated standards that are applied by the Copyright Royalty Board when royalty rates are

393. H.R. 1733, § 7; Becker et al., *supra* note 105.

394. Becker et al., *supra* note 105.

395. *Id.*

396. *See supra* notes 218–303 and accompanying text (outlining differences between the jurisdictions of California, New York, and Florida).

397. Becker et al., *supra* note 105.

398. *Id.*; Rae, *supra* note 25.

399. Rae, *supra* note 25.

being set.[400] Section 4 of the Act removed the rate-setting standard encompassed in section 801(b) of the Copyright Act of 1976.[401] This standard is used to determine the royalty rates for services prior to 1998.[402] In place of this standard, the FPFPA looked to implement a willing buyer/willing seller standard, establishing a free market system and allowing that system to determine the rates at which sounds recordings should be compensated.[403] The Copyright Royalty Board would be able to apply this new willing buyer/willing seller standard in every proceeding where compulsory rates for a sound recording's public performance right are being established.[404] The royalty rate would not depend on the platform of the transmission, whether terrestrial AM/FM or digital;[405] however, royalties for sound recordings on interactive services must still be directly negotiated with the owners of those sound recordings.[406]

4. Providing Royalties Directly to Producers and Other Participants

The FPFPA also would have secured royalty rights for those who participate in a sound recording's production, such as producers, mixers, and engineers.[407] Currently, these parties must continually monitor the artist and label's receipt of payments in order to receive their royalties.[408] The Act sought to establish a policy allowing the parties involved in the process of creating a sound recording to receive their royalty payments directly from third party collection agencies, such as SoundExchange, so long as a Letter of Direction from the artist has been received.[409] A protocol for recordings prior to 1995 would be established such that two percent of the performance royalties for those recordings would be assigned to the audio-workers, as long as a reasonable attempt was made to obtain a Letter of Direction from the artist.[410] This policy provides an alternate revenue stream to these parties, as one problem in today's industry is the continuing plummet

400. H.R. 1733, 114th Cong. § 4 (1st Sess. 2015); Becker et al., *supra* note 105.
401. H.R. 1733, § 4; Becker et al., *supra* note 105.
402. Becker et al., *supra* note 105.
403. H.R. 1733, § 4(a)(1); Becker et al., *supra* note 105. *See generally* Glenn Peoples, *'Free' & 'Market' Often Repeated at Music Licensing Hearing*, BILLBOARD (June 10, 2014), http://www.billboard.com/biz/articles/news/digital-and-mobile/6114165/free-market-often-repeated-at-music-licensing-hearing.
404. Becker et al., *supra* note 105.
405. *Id.*
406. *Id.* at n.44.
407. H.R. 1733, § 9; Becker et al., *supra* note 105.
408. Becker et al., *supra* note 105.
409. *Id.*; Rae, *supra* note 25.
410. H.R. 1733, § 9; Rae, *supra* note 25.

of production imbursement.[411] This problem is caused by the rapid decline of record-sale royalties and producer fees.[412] According to Andrew Brightman of Brightman Music, a company who represents many of these parties, "the payment of master performance income is more vital than ever" in order for American producers to remain competitive in the market due to the decline in producer fees and record-sale royalties.[413] This provision would make it unnecessary for producers to monitor payment receipts from the artist and labels in order to pay for the costs of production and allow for additional revenue to come in.[414]

5. Protecting Small Broadcasters, Public, and Education Radio

An important provision concerning small broadcasters and public and educational radio stations was included within the FPFPA.[415] This provision, specifically section 5, limited the royalty rates that will be charged to these broadcasters.[416] This section established that the royalty rate for nonsubscription broadcast transmissions at $500.00 per year, so long as it is (1) not defined as a public broadcasting entity within section 118(f)[417] of the Copyright Act of 1976, and (2) has a calendar year revenue less than one million dollars.[418] Likewise, a $100.00 royalty rate would be charged to college radio stations and public broadcasters.[419] Religious services would be completely exempt from any royalty rate.[420] This provision can be seen as balancing act recording artists' interest in being paid for the use of their songs with the small broadcasters' interest of remaining profitable.[421] The industry welcomes these limitations, as many of the smaller, noncom-

411. Becker et al., *supra* note 105.
412. *Id.*
413. *Id.*
414. *Id.*
415. *Id.*; Rae, *supra* note 25.
416. Fair Play Fair Pay Act, H.R. 1733, 114th Cong. § 5 (1st Sess. 2015); Becker et al., *supra* note 105.
417. Section 118(f) defines "public broadcasting entity" as "a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in paragraph (2) of subsection (c)." 17 U.S.C. § 118(f) (2012). A "noncommercial educational broadcast station" is a radio broad cast which (a) is able to be licensed as a noncommercial education radio station that is "owned and operated by a public agency or nonprofit private foundation, corporation, or association" or (b) is owned and operated by a municipality and only transmits educational noncommercial programs. 47 U.S.C. § 397(6) (2012).
418. H.R. 1733, § 5.
419. *Id.*
420. *Id.*
421. Becker et al., *supra* note 105.

mercial broadcasters are more adventitious with their playlists than the larger corporations, allowing for lesser known artists to still receive radio time.[422] If lesser known artists do not receive airtime, there would be less incentive for new acts to attempt to enter the business.

6. Preventing Harmful Impacts on Songwriting Royalties

Music publishers are currently requesting that evidence from a sound recording's rate-setting be allowed in their own proceedings.[423] This is largely due to the rates for sound recordings being considerably higher than the rates for compositions.[424] Section 8 of the FPFPA did not allow parties to use a sound recording's newly designated licensing fee as a foundation for lowering a songwriter's royalties based on the public performance of their composition.[425] Relevantly, this section stated:

> License fees payable for the public performance of sound recordings . . . shall not be cited, taken into account, or otherwise used in any administrative judicial, or other governmental forum or proceeding . . . to set or adjust the license fees payable to copyright owners of musical works . . . for the public performance of their works, for the purpose of reducing or adversely affecting such license fees.[426]

With this provision in place, the royalties that are afforded to songwriters would not be affected in a negative way.[427]

Overall, the FPFPA sought to remedy many of the pitfalls and loopholes that exist in the industry, which allowed for more artists to be compensated for their work and make a sustainable living while limiting the impact on smaller organizations and broadcasters, all while allowing smaller, lesser known acts more opportunity for radio play. If reintroduced and passed, both the broadcasters and musicians will see a huge impact.

IV. IMPACT

The *Flo & Eddie, Inc. v. Sirius XM* decisions are monumental for sound recording copyright owners.[428] If they are upheld in the California and New York courts on appeal, and if legislation similar to the

422. *See* Rae, *supra* note 25.
423. *Id.*
424. *Id.*
425. H.R. 1733, § 8.
426. H.R. 1733, § 8(a).
427. Becker et al., *supra* note 105.
428. *Id.*

FPFPA is passed, there would be widespread implications affecting the music industry, the consumer,[429] and the musicians themselves.[430]

A. The Economic Impact on Broadcasters and Consumers

In the *Flo & Eddie* cases, California and New York courts did not limit their language to public performance rights in sound recordings broadcast digitally.[431] The FPFPA distinctly created a performance right in all sound recordings for transmissions over terrestrial AM/FM broadcasts.[432] Due to this language, radio and television stations, as well as any establishment that plays music (e.g., bars, retail stores, amusement parks, etc.), will have to pay royalties in order to play a sound recording.[433]

This is important for many services, specifically Pandora and SiriusXM, as pre-1972 sound recordings account for five percent and fifteen percent of plays on the stations, respectively.[434] Due to this large and sudden cost on broadcasters, it is reasonable to believe that consumers will be unable to hear the "oldies" for much longer.[435] However, this is unlikely, because pre-1972 sound recordings account for a large majority of radio play for broadcasters.[436] Pandora reached a settlement in October 2015, in which it agreed to pay the RIAA $90 million in order play pre-1972 sound recordings.[437] This settlement with the RIAA covers past and future plays of pre-1972 sound recordings, but it only extends to cover future plays through the end of 2016.[438] At that point, Pandora will have to renegotiate another licensing deal with the RIAA if it wishes to continue playing pre-1972 recordings.[439] The RIAA also reached a settlement with SiriusXM for $210 million, allowing a license to for SiriusXM to play pre-1972

429. *See infra* notes 431–46 and accompanying text (discussing the possibility of music providers implementing changes that would affect consumers).

430. *See infra* notes 447–64 and accompanying text (discussing how the Fair Play Fair Pay Act would have altered many musicians' relationship with the music industry); *see also* Gordon & Puri, *supra* note 19, at 353.

431. Gordon & Puri, *supra* note 19, at 353.

432. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 2 (1st Sess. 2015).

433. Gordon & Puri, *supra* note 19, at 354.

434. Paul Resnikoff, *What the Pre-1972 Decision Really Means for the Future of Radio . . .* , DIGITAL MUSIC NEWS (Oct. 13, 2014), www.digitalmusicnews.com/2014/10/13/pre-1972-decision-really-means-future-radio-2/.

435. Ochoa, *supra* note 331.

436. *See supra* note 217 and accompanying text.

437. Joe Mullin, *Pandora Will Pay RIAA $90 Million for Playing Pre-1972 Songs*, ARSTECHNICA (Oct. 22, 2015), www.arstechnica.com/tech-policy/2015/10/pandora-will-pay-riaa-90-million-for-playing-pre1972-songs/.

438. *Id.*

439. *Id.*

sound recordings through 2017.[440] This will also be renegotiated if SiriusXM wishes to continue playing these sound recordings.[441] If digital broadcasters wish to continue playing pre-1972 sound recordings, it is possible that they would require listeners to pay a subscription fee to their services in order to cover the new costs. Broadcasters may also simply cease playing pre-1972 sound recordings to avoid paying the added cost. However, these sound recordings are seemingly a significant portion of the music offered by these radio stations, so these songs are likely to drive a significant amount of these stations' revenue.[442]

Another criticism of the FPFPA is that forcing terrestrial AM/FM radio stations to pay for all sound recordings they wish to play would lead radio stations to focus only on the well–established, "popular" artists.[443] The increased cost that terrestrial radio broadcasters will have to pay will lead to a focus on the "big name" acts, while entirely ignoring those up and coming artists.[444] Dennis Wharton, Executive Vice President of Communication at the National Association of Broadcasters, argues that "under [the Fair Play Fair Pay Act], 50% of royalties from radio stations would go to record labels, 45% would go to millionaire artists like Katy Perry and Justin Timberlake, and the scraps would go to the 'struggling artists.'"[445] According to the broadcasting industry, allowing this to happen will discourage new talent from entering the industry, leading to consumers being unable to hear new music.[446] This argument is invalid. Music played on major radio stations is by artists who are already considered to be popular, causing most music by new artists to remain unheard by the general public, at least on terrestrial radio. This monopoly of airtime on major radio stations leads new, or less popular, artists unable to reap the advertising "benefits" that terrestrial AM/FM radio claim in the first place.

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440. Eriq Gardner, *Record Giants Win $210M Settlement from SiriusXM Over Pre-1972 Music*, HOLLYWOOD REP. (June 26, 2015), http://www.hollywoodreporter.com/thr-esq/record-giants-win-210m-settlement-805313.

441. *Id.*

442. Resnikoff, *supra* note 434.

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

444. *Id.*

445. Becker et al., *supra* note 105.

446. *Id.*

B. The Impact on the Musician

The FPFPA sought to compensate and benefit all performing musicians, not just performers of pre-1972 sound recordings.[447] While the FPFPA and the *Flo & Eddie* decisions have been met with great opposition from broadcasters, the spirit of the Act was truly about long-standing equity issues within the music industry.[448] Performers do not receive royalties for the use of their songs over terrestrial AM/FM radio.[449] Performers of songs that were created prior to February 15, 1972, do not even receive royalties for digital broadcasts.[450] The language set out by *Flo & Eddie* and the FPFPA requiring all broadcasting services to pay to play music provides a means of respecting "classic" music.[451] Both digital and terrestrial AM/FM radio broadcasts have stations that are dedicated exclusively to pre-1972 sound recordings.[452] These broadcasters earn millions of dollars per year by playing these iconic sound recordings, but they have refused to pay the performers who created them.[453] Creators and copyright owners of pre-1972 sound recordings have been shortchanged more than $60 million a year for digital broadcasts alone.[454] The fact that these songs, such as *A Hard Day's Night* by the Beatles, are still played on multiple formats, shows that pre-1972 sound recordings have value and the performers of these works should be fairly compensated.[455] *Flo & Eddie* and the FPFPA remedy this wrongdoing.[456]

One of the concerns about the FPFPA was its potential to push struggling, new artists out of the industry. The FPFPA does the opposite[457] by ensuring musicians and other performers on sound recordings are compensated for their work and creativity.[458] Currently, musicians are not compensated in the manner that they should be, leaving many to quit the business because they are not able to financially support themselves. Singer and songwriter Rosanne Cash, the daughter of the late Johnny Cash, when speaking at the introduction of the FPFPA, spoke on the next generation of musicians: "If they can

447. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. §§ 2, 7 (1st Sess. 2015).
448. *See* Becker et al., *supra* note 105.
449. *Id.*
450. Shaffer, *supra* note 1, at 1016.
451. *Fair Pay for All Music on All Platforms*, MUSICFIRST COAL., www.musicfirstcoalition.org/fairplay_for_fairpay (last visited Feb. 3, 2016).
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *See* Gagliardi, *supra* note 383.
458. *Id.*

get paid, they can continue to create music. I don't want that generation to disappear because they can't pay rent."[459] New artists are more likely to be forced out of the industry because they are not paid for the performance of their recordings. The FPFPA sought to put more money in the pocket of the performer, not only domestically, but internationally.[460] The United States is one of a handful of countries[461] that does not pay performers for terrestrial AM/FM radio airplay.[462] As a right that is not recognized domestically, recording artists within the United States are also denied royalties for their performances via international terrestrial AM/FM radio broadcasts,[463] resulting in an estimated loss of more than $100 million per year.[464] While there are concerns regarding the FPFPA, the many benefits outweigh those concerns.

V. Conclusion

The Copyright Act of 1976 has not kept pace with the rapidly changing pace of technology.[465] Consumers demand to hear more music than ever before, and digital technology provides new and a variety of ways of listening to meet that demand.[466] More consumers now listen to music through digital radio channels, as opposed to purchasing the music in a store or even through iTunes.[467] These changes are what necessitate the greater protection of pre-1972 sound recordings.

The *Flo & Eddie* decisions in California and New York, if upheld, will have a wide impact on digital and terrestrial AM/FM broadcasters, and performers alike.[468] For pre-1972 sound recordings, this means an unlimited right to compensation for all public performances, not just those through a digital broadcast.[469] This is a right that has

459. *Id.*; *Roseanne Cash*, Biography, http://www.biography.com/people/roseanne-cash-253679 (last updated Feb. 9, 2015).

460. *Fair Pay for All Music*, *supra* note 451.

461. China, Iran, and North Korea are other countries that do not pay performers for terrestrial radio airplay. *Id.*

462. *Id.*

463. *Id.*

464. *Id.*

465. *See* Patrick Koncel, *Did Copyright Kill the Radio Star? Why the Recorded Music Industry and Copyright Act Should Welcome Webcasters into the Fold*, 14 J. Marshall Rev. Intell. Prop. L. 292, 293 (2015).

466. *Id.* at 293–94.

467. Jareen Imam, *Young Listeners Opting to Stream, Not Own Music*, CNN (June 16, 2012), http://www.cnn.com/2012/06/15/tech/web/music-streaming/.

468. Gordon & Puri, *supra* note 19, at 339.

469. Drake, *supra* note 13–, at 67.

not yet been granted to pre-1972 sound recordings by the Copyright Act of 1976, leaving the individual states to decide whether they wish to protect these recordings and to what extent.[470] Legislation similar to the Fair Play Fair Pay Act should continue to be introduced before Congress to create a public performance right for pre-1972 sound recordings, as well as a performance right for post-1972 sound recordings played on terrestrial AM/FM radio.[471] While there may be an economic hit to all forms of broadcasters, bringing pre-1972 sound recordings under federal protection is ultimately what is right and fair.

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470. *Id.* at 63.

471. Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. §§ 2, 7 (1st Sess. 2015).

* J.D. Candidate, DePaul University College of Law, 2017; B.A., Indiana University, 2014. To the Volume 65 and Volume 66 Editorial Boards: Thank you for your utmost dedication and hard work. It does not go unnoticed, and I could not ask for better people to dig through the trenches with. To my attorney mentors, Michelle M. Wahl, Travis Life, Jeffrey S. Becker, and Brian A. Rosenblatt: Thank you for your endless advice and for fueling my passion in this field. Without you, this article would not exist. To Scott J. Larsen: Thank you for always believing in me and having my back when I need it most. I could not ask for a better professional and life mentor. Finally, to my parents, Anita and Terry Alasauskas: Thank you for your endless support in this long adventure, I wouldn't be here without you. I love you.