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**Congress Should Secure Full Copyright Protections for Music Sound  
Recordings**

by

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**I. Introduction and Summary**

The U.S. Constitution expressly grants Congress authority to secure copyrights. But existing law denies full copyright protections to owners of sound recordings, costing them millions in foregone royalties each year. A bill called the American Music Fairness Act (H.R. 4130) would recognize full public performance copyrights in sound recordings, and Congress should pass it.

The existing law's exemption for terrestrial AM/FM radio stations unjustly deprives copyright owners of financial returns for the use of their property, while enriching commercial radio stations that play their music to attract listeners and generate ad revenues. And the harm is multiplied because the exemption effectively prevents copyright owners from receiving millions in royalties from radio stations in foreign countries. Music artists are increasingly dependent on proceeds from public performances, and the American Music Fairness Act would help ensure that they receive compensation for commercial uses of their works.

U.S. copyright law has long secured to owners of creative works such as movies, TV shows, musical compositions, and sound recordings a "public performance" right to receive royalties when their works are transmitted to the public or performed before audiences. In 1971, Congress generally recognized public performance rights in sound recordings. And today, satellite radio and Internet streaming services annually pay royalties to sound recording owners. But the law presently *exempts* terrestrial radio stations from having to pay royalties for broadcasting sound recordings.

As a matter of first principles, federal copyright law's conferral of a special privilege on terrestrial broadcast stations to play sound recordings over the air without paying is wrong because it deprives sound recording owners of their property rights. When the Constitution of 1787 was drafted and ratified, it reflected a background understanding of the Founding Fathers that copyrights are property rights grounded in a person's right to the fruits of his or her labors. Sound recording owners labor to create sound recordings or they at least pay money to acquire the copyrights in existing sound recordings.

The obligation to pay public performance royalties to sound recordings is particularly compelling when terrestrial radio broadcasts are made for commercial profit-making purposes. According to the FCC's *2020 Communications Marketplace Report*, AM/FM broadcast stations generated \$17 billion in advertising revenues every year between 2010 and 2019. By playing copyrighted sound recordings over the air to attract audiences and then generating revenues from running ads, commercial terrestrial radio stations are reaping where they have not sown.

Aside from unjustly depriving copyright owners of substantial royalties from terrestrial radio stations in the U.S., federal copyright law's special carve-out for AM/FM broadcasters effectively deprives copyright owners of royalties from foreign countries. In most countries, radio broadcasters pay royalties to recording artists and producers. But the lack of a full public performance right for sound recordings relieves foreign broadcasters of any international obligation to pay royalties to U.S. copyright owners. Because of the terrestrial radio exemption, U.S. copyright owners annually lose tens of millions – and perhaps as much as \$200 million – in royalties from foreign nations.

Although broadcasters have claimed that publicity from terrestrial radio broadcasts provides an in-kind compensation to sound recording owners, it's unlikely that terrestrial radio drives significant sales volumes for the copyright owners. According to a Recording Industry Association of American (RIAA) report, sales of physical copies such as CDs amounted to only 9% of industry revenues in 2020, and only 6% of industry revenues came from purchases of digital download copies. CD sales declined 23% in 2020 and generated only \$483 million, far below \$13.2 billion in CD sales in 2000. Consumers have shifted to music subscription services, as paid music subscriptions in the U.S. grew to 75.5 million in 2020 and streaming accounted for 83% of industry revenues last year. Monetization of public performances is increasingly important to the financial viability of sound recording owners, and royalty-free terrestrial radio broadcasts of sound recordings undermines their financial viability.

The American Music Fairness Act (H.R. 4130) was introduced by Rep. Ted Deutch on June 24 of this year. Its lead co-sponsor is Rep. Darrell Issa. If passed by Congress, the Act would make terrestrial radio broadcasts of copyright sound recordings subject to the same public

performance right and statutory licensing system that applies to satellite radio and Internet streaming services. The bill would provide terrestrial radio stations with a statutory license to broadcast copyrighted sound recordings, provided that such broadcasters pay royalties based on the rate set by the Copyright Royalty Board.

Additionally, the American Music Fairness Act accommodates small broadcasters as well as public and education stations by significantly reducing royalty payments for those stations. Under the bill, for instance, terrestrial radio stations that generate less than \$100,000 in revenue the prior year pay an annual royalty rate of \$10. For terrestrial radio stations that generate more than \$100,000 but less than \$1.5 million, the rate is \$500.

By passing the American Music Fairness Act, Congress can finally put an end to an unjustified glaring omission in copyright protections for sound recording owners. Consistent with the Constitution's Copyright Clause's premise, this reform is needed to help ensure copyright owners of sound recordings receive the proceeds that are due to them and upon which their livelihoods depend.

## **II. On Public Performances, Copyright Law Falls Short of Constitutional Aspirations**

The Constitution's Article I, Section 8 Copyright Clause grants Congress the power to secure to copyright owners exclusive rights to the proceeds of their creative works. Federal law has long recognized that creative owners have a right to produce, distribute, and sell copies of their creative works. But it also recognizes the right of copyright owners in public displays, transmissions, and performances of their creative works. In general, federal copyright law secures to owners of creative works such as movies, TV shows, musical compositions, and sound recordings a "public performance" right to receive royalties when their works are transmitted to the public or performed before audiences. As recounted in our book, *Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform* (2020), public performance rights were first recognized for dramatic and musical performances of creative works by an unnamed act of Congress passed in 1856. Over the years that followed, public performance rights were also secured to copyright owners of motion pictures and to songwriters. In 1971, Congress recognized public performance rights in sound recordings – but it *exempted* AM/FM radio stations from having to pay royalties for broadcasting copyrighted sound recordings over the air.

In the Digital Performance Right in Sound Recordings Act of 1995, Congress also secured digital public performance rights for sound recordings that are transmitted for public consumption via digital *satellite* radio as well as Internet streaming services. Thus, under federal copyright law, satellite radio provider SiriusXM and popular streaming services like Spotify must pay royalties to copyright owners for transmitting their sound recordings to subscribers. But the special exemption or carve-out remains for terrestrial AM/FM radio stations. The unjust result is that those copyright owners must annually forego substantial royalties when other parties make public use of their sound recordings. This carve-out in the law's protections falls short of the responsibility placed by the Constitution in Congress to fully secure copyrights to sound recording owners.

### **III. Lack of Full Public Performance Rights Deprives U.S. Copyright Owners of Royalties from Foreign Nations**

Federal copyright law's special carve-out for terrestrial AM/FM radio stations has ramifications that go far beyond loss of domestic revenues for sound recording owners. In most countries, radio broadcasters pay royalties to recording artists and producers. But the lack of a full public performance right for sound recordings effectively denies U.S. copyright owners revenues from radio broadcasting of their creative works in foreign countries.

Full public performance rights in sound recordings are recognized in the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations (the "Rome Convention"). However, the U.S. is not a signatory to the Rome Convention. As a result, foreign nations that are members of the Rome Convention generally have no legal obligation to enforce payment of royalties to U.S. copyright owners when their sound recordings are broadcast on terrestrial radio in those foreign nations.

Moreover, Article 15 of the WIPO Performances and Phonograms Treaty (WPPT) recognizes a right to equitable remuneration to performers and producers for broadcasting of sound recordings. However, that Article 15(1) of the WPPT permits a member nation to declare it will apply that right only in specified circumstances or not at all. When the Senate ratified the WPPT in October 1998, its resolution included a reservation clause stating that the U.S. would apply Article 15(1) "only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries." The Senate thereby reaffirmed that the U.S. does not secure copyright protections for sound recordings when they are broadcast over the air by terrestrial radio stations. As a result, U.S. copyright owners do not receive copyright royalties for radio broadcasts of their creative works in foreign nations that are members of the WPPT.

Thus, whereas broadcasters in most countries pay royalties for terrestrial radio transmissions of sound recordings, U.S. copyright owners do not generally receive such royalties from overseas due to federal copyright policy. A U.S. Department of Commerce Green Paper released in July 2013 acknowledged that "U.S. sound recording owners and performers have been unable to collect remuneration for the broadcasting of their works in those countries, due to the lack of reciprocal protection here." And as the Green Paper also observed: "For over thirty years, the Administration and Copyright Office have made repeated calls to create a public performance right for the broadcasting of sound recordings."

Congressional testimony in 2007 by then-Register of Copyrights Marybeth Peters cited industry studies showing annual royalty losses from foreign nations of about \$27 million in 1990, and of about \$70 million before 2007. According to the Recording Academy, foreign nations now collect about \$200 million annually in royalties for U.S. copyright owners of sound recordings but do not pay those royalties out because the U.S. does not have a reciprocal public performance right for terrestrial radio broadcasts. Regardless of the precise amount, the foregone royalties for U.S. copyright owners are substantial and reform legislation is needed to unlock those revenues from foreign nations.

#### **IV. Sound Recordings Are Property Rights Deserving Full Protection Under the Law**

As a matter of first principles, federal copyright law's conferral of a special privilege on terrestrial broadcast stations to play sound recordings over the air without permission is wrong because it deprives sound recording owners of their property rights. Our book, the *Constitutional Foundations of Intellectual Property: A Natural Rights Foundations* (2015) demonstrates that, in the political philosophy of the Founding Fathers, copyrights are property rights that are grounded in a person's right to the fruits of his or her labors. This view served as a philosophical backdrop to the drafting and ratifying of the Constitution of 1787. Sound recording owners labor to create sound recordings or they at least pay money to acquire the copyrights in existing sound recordings. As property owners, they should have the exclusive right to proceeds when other parties are publicly performing their sound recordings, particularly when those performances are made for commercial profit-making purposes.

The mere existence of an old industrial policy favoring "free" terrestrial radio stations for American audiences is, by itself, insufficient reason for continuing to allow one set of commercial actors to use the private property of others without permission and for commercial gain. According to data cited in the FCC's *2020 Communications Marketplace Report*, terrestrial broadcast stations have generated annual advertising revenues of approximately \$17 billion every year between 2010 and 2019. By playing copyrighted sound recordings over the air to attract audiences and then generating revenues from running advertisements to music-listening audiences, commercial terrestrial radio stations are reaping where they have not sown. Current copyright law's departure from this inequitable principle should be remedied by securing full public performance rights in sound recordings.

The property rights basis for copyrights also is important because it explodes the claim that eliminating the copyright exemption for terrestrial radio broadcasters would amount to imposing a tax or tariff on stations broadcasting sound recordings. The claim that enforcement of copyrights is equivalent to a tax or a tariff fails upon any cursory examination. Copyright enforcement is not meant to collect revenues for the government and it does not do so. Rather, copyright protects the rights of private property owners. Here, reform of copyright law to secure full public performance rights would ensure that the owners of sound recordings receive proceeds for the terrestrial radio broadcasters' commercial use of their creative works.

#### **V. The Claim That Royalty Free Public Performances of Sound Recordings Benefits Copyright Owners Is Not Credible**

Congress should not be persuaded that the copyright exemption for terrestrial AM/FM radio broadcasters benefits sound recording owners. Broadcasters sometimes claim that publicity and promotional benefits provided by terrestrial radio broadcasts of music provides an in-kind compensation to sound recording owners. Even assuming that claim once had merit, today it does not. Based on consumer trends seen over recent years, there is ample reason to doubt that terrestrial radio broadcasts of sound recordings drive significant sales volumes for the copyright owners.

Sound recording owners and music artists currently generate far less revenue from selling copies of their music than in previous years. RIAA's "2020 Year-End Music Industry Revenue Report" found that 83% of U.S. music industry revenues from last year came from

Internet streaming services, compared to only 9% from sales of physical copies such as CDs and vinyl records, and just 6% from purchases of digital download copies. According to the report "[p]aid subscriptions to on-demand streaming services have contributed the majority of recorded music revenues each year since 2018, as full service paid subscriptions generated \$7.0 billion in 2020 and total streaming industry revenues totaled \$10.1 billion last year. Meanwhile, CD sales declined 23% in 2020 and generated only \$483 million. This decline in CD sales is part of an unmistakable long-term phenomena. RIAA data indicates that CD sales generated \$13.2 billion in 2000.

Consumer preferences have shifted from a purchase model to a subscription access model. Indeed, paid music subscriptions in the U.S. grew from 22.7 million in 2016 to 75.5 million in 2020.

Monetization of public performances increasingly is important to the financial viability of sound recording owners, and royalty-free terrestrial radio broadcasts of sound recordings undermines their financial viability. This monumental shift by consumers away from buying physical or digital copies to buying subscription access also heightens the unfairness of federal copyright law's privileging of terrestrial radio stations over their cross-platform rivals when it comes to royalty payment obligations for public performances of sound recordings.

And even if it could somehow be demonstrated that sound recording owners in today's market receive a net financial benefit from terrestrial radio airplay, that would not justify the law preventing copyright owners from deciding for themselves whether to grant permission for terrestrial radio stations to play their sound recordings. The property rights of copyright owners ought to be respected and federal law should respect their perceived value judgments about whether to forego royalty payments.

## **VI. The Copyright Exemption for Terrestrial Broadcasters Confers an Unfair Advantage Over Their Competitors**

There is no justification for federal copyright law to treat terrestrial radio differently than other technology platforms when it comes to obligations to pay royalties to sound recording owners for public performances or transmissions of their creative works. Nothing in the underlying technological makeup of terrestrial radio, satellite radio, and online streaming warrant unequal treatment in the law – or preferential treatment for terrestrial radio. Indeed, copyright law's carve-out for terrestrial broadcasters amounts to bad competition policy because it gives those stations an unfair legal advantage over satellite radio service providers and by online streaming service providers like Spotify that pay public performance royalties to sound recording owners. According to RIAA's "2020 Year-End Music Industry Revenue Report," SoundExchange collected from satellite radio and customized Internet radio services subject to statutory licenses \$947 million in royalties for distribution to sound recording owners. While these are substantial costs of doing business for those music services, the copyright exemption gives the upper hand to competing terrestrial radio broadcasters by allowing them to avoid those costs entirely.

## **VII. The American Music Fairness Act Would Fully Secure Public Performance Rights in Sound Recordings**

The American Music Fairness Act (H.R. 4130) would eliminate the special exemption for terrestrial AM/FM broadcasters and secure copyright owners' rights to receive public performance royalties regardless of the technological platform being utilized. The bill was introduced in the 117th Congress by Rep. Ted Deutch on June 24 of this year. Its lead co-sponsor is Rep. Darrell Issa. The bill has been referred to the House Judiciary Committee. As Reps. Deutch and Issa state in their press releases for the legislation, the bill would level the playing field by "requiring terrestrial radio stations to compensate all artists for their property."

If passed by Congress, the American Music Fairness Act would make terrestrial radio broadcasts of copyright sound recordings subject to the same public performance right and statutory licensing system that applies to satellite radio and Internet streaming services. The bill would provide terrestrial radio stations with a statutory license to broadcast copyrighted sound recordings, provided that such broadcasters pay royalties based on the rate set by the Copyright Royalty Board. Section 114(f) of the Copyright Act authorizes the Board to "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." According to the bill, royalties for public performances of sound recordings by terrestrial broadcast stations would be determined according to that "willing buyer/willing seller" rate formula, which seeks to approximate market exchange values. Additionally, the bill also directs the Board to consider "whether use of the station's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings." Thus, the bill meets the broadcasters claim about in-kind benefits of radio airplay head on by allowing it to be evaluated and factored into the Board's royalty rate decisions. Under the bill, terrestrial broadcasters would pay the prescribed public performance royalties to a designated collective entity – presumably SoundExchange – for distribution to sound recording owners.

Additionally, the American Music Fairness Act provides accommodation to small broadcasters as well as public and education stations by reducing the compensation that sound recording owners may annually receive from those stations. Under the bill, terrestrial radio stations that generate less than \$100,000 in annual revenue from the preceding year pay an annual statutory royalty rate of only \$10. For terrestrial radio stations that generate more than \$100,000 but less than \$1.5 million, the rate is \$500. And public broadcast stations generating more than \$100,000 but less than \$1.5 million pay only \$100 annually. These provisions in the bill effectively rebut any terrestrial radio broadcaster claims that payment of royalties to sound recording owners would sink small stations.

## **VIII. Conclusion**

Existing federal copyright law's exemption for terrestrial AM/FM radio stations unjustly deprives copyright owners of financial returns for the use of their property, while enriching commercial radio stations that play their music to attract listeners and generate ad revenues. And the harm is multiplied because the exemption effectively prevents copyright owners from receiving millions in royalties from radio stations in foreign countries. Sound recording

owners are increasingly dependent on proceeds from public performances. The exemption for terrestrial radio broadcasters not only undermines copyright owners' ability to generate returns from their sound recordings, but also unfairly privileges terrestrial radio broadcasters over competing satellite radio and online streaming services. The American Music Fairness Act (H.R. 4130) would recognize full public performance copyrights in sound recordings and help ensure that sound recording owners receive compensation for uses of their works.

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### **Further Readings**

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