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**American Music Fairness Act Would Secure Copyrights in Sound  
Recordings**

by

**Seth L. Cooper \***

On February 2, the House Judiciary Committee held a hearing titled "Respecting Artists with the American Music Fairness Act." Federal law currently exempts terrestrial AM/FM radio stations that broadcast copyrighted music from having to pay royalties to owners of sound recordings. As a result, sound recording artists are denied millions of dollars annually for commercial use of their intellectual property by others. The hearing focused on a bill that would remedy this problem.

If enacted by Congress, the American Music Fairness Act – H.R. 4130 – would secure full public performance rights for owners of copyrighted sound recordings. By ending the terrestrial radio exemption, the bill would put commercial radio stations on the same legal footing as satellite radio and Internet streaming services that already pay royalties. Music has long been a draw for radio audiences and ad revenues, and the bill would enable sound recording owners, finally, to receive some compensation for use of their property.

Under copyright law, copyright owners generally possess a "public performance" right to receive royalties when their copyrighted movies, TV shows, and sound recordings are performed before audiences or transmitted to the public. For over fifty years, public

performance rights have been recognized in sound recordings. But for all of that time AM/FM radio stations have been exempted from any obligation to pay royalties to owners of copyrighted sound recordings.

Current copyright law is defective in at least two major respects. First, the law specially privileges radio stations over alternative technology platforms by exempting AM/FM stations from paying royalties for use of copyrighted sound recordings. For example, satellite radio and Internet streaming service providers pay royalties to sound recording owners – but AM/FM stations do not. Second, and far more serious, the law deprives sound recording owners of their rights to seek returns from the AM/FM radio stations that make use of their copyrighted property for commercial gain.

As I explained in my August 2021 *Perspectives from FSF Scholars*, "[Congress Should Secure Full Copyright Protections for Music Sound Recordings](#)," legislation securing public performance rights in AM/FM radio broadcasts is supported by basic principles of property rights. When creative artists invest their labor and material resources into making sound recordings, they ought to reap the financial proceeds. Current law's deprivation of those rights is all the more glaring when AM/FM radio stations make commercial use of sound recordings. BIA Advisory Services [estimated](#) that local AM/FM stations generated \$10.9 billion in ad revenues from over-the-air broadcasts in 2021, and BIA projected that those revenues would rise to nearly \$11.4 billion in 2022. For thousands of those stations, broadcasting copyrighted sound recordings is the primary means for attracting audiences and generating ad revenues.

Owners of copyrighted sound recordings incur substantial financial losses from foregone royalties as a result of the exemption enjoyed by terrestrial radio stations in America. But the harm is compounded by the loss of royalties from foreign radio stations. Nearly every industrialized country in the world recognizes public performance rights in radio broadcasts of copyrighted sound recordings. But the failure of U.S. copyright law to secure reciprocal protections causes American copyright owners to forfeit annually tens of millions of dollars – conservatively estimated – in royalty payments from foreign terrestrial radio stations.

The American Music Fairness Act would rectify the disparities in current copyright law by securing sound recording owners' rights to receive royalties regardless of the media platform being used to transmit or publicly perform copyrighted music. The Act would confer on terrestrial radio stations a statutory license to broadcast copyrighted sound recordings. In exchange, AM/FM stations would pay royalties according to rates set by the Copyright Royalty Board. Under the bill, the Board would set rates "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." But the Board's decisions on rates also would consider the extent to which on-air play of copyrighted sound recordings promotes sales of physical copies of their works or interferes with their streaming revenues from rival Internet-based platforms.

Also, the bill provides a low flat annual royalty amount for small commercial stations as well as for public and education stations. For example, commercial stations that generate less than \$100,000 in revenue in the prior year pay an annual royalty of \$10, and stations that generate more than \$100,000 but less than \$1.5 million are required to pay \$500. Also, public broadcast stations that generate more than \$100,000 but less than \$1.5 million pay \$100 annually.

At the House Judiciary Committee's [hearing](#), one of the main objections to the American Music Fairness Act offered by the National Association of Broadcasters (NAB) was that it would disrupt the legacy framework for the music marketplace as well as business relationships that have relied on that framework. And in his [written testimony](#), NAB President and CEO Curtis LeGeyt stated: "Whether it was the emergence of player piano rolls, copy machines, VHS recordings, streaming services or search engines, Congress has consistently focused its major copyright reforms on updates to law that are needed to account for new or emerging technologies – not mediums that have existed for more than 100 years."

But continuation of the legacy regime cannot be justified because it comes at the expense of equal treatment before the law and it deprives copyright owners of individual rights that the Constitution charges Congress to secure. The terrestrial radio exemption is hardly sacrosanct. Indeed, it has been a source of controversy for over four decades. Since at least [1978](#), the U.S. Department of Commerce has supported full public performance rights for radio broadcasts of sound recordings. And for years, the Copyright Office has shared that position.

There is no unwritten implied rule that changes to copyright law – major or otherwise – must be direct responses to emergent technologies. In any event, the historical record is mixed. On some occasions, including the Digital Millennium Copyright Act of 1998, the impact of technological developments in the market appears to have been a primary motivator in Congress amending copyright law. But on other occasions, regard for the property rights of copyright owners appears to have prompted Congress to amend the law.

The printing press was not a new technology when the First Congress passed the Copyright Act of 1790. But the law was widely understood to secure property rights to authors and other creative artists in the fruits of their labors. Nor was new tech at the forefront when the Centennial Congress passed the International Copyright Act of 1891. As Free State Foundation President Randolph May and I explained in our book, [Modernizing Copyright Law for the Digital Age: Constitutional Foundations for Reform](#) (Carolina Academic Press, 2020), the 1891 Act was justified primarily on the natural property rights of authors. Concern for the just claims of playwrights – and not new tech – appears to have driven Congress's initial recognition of public performance rights in stage plays in 1856. Those same underlying considerations of justice for property owners support the American Music Fairness Act.

In his written testimony before the House Judiciary Committee, NAB's Mr. LeGeyt stated that "the imposition of a new performance royalty is simply economically untenable for local radio broadcasters." But that amounts to saying that a person or entity should be able to make free use of someone else's property for their own economic benefit. To require owners of sound recordings to implicitly subsidize the commercial ventures of third parties is antithetical to the Founding Fathers' understanding of copyrights as property that should be secured.

Moreover, the claim that the American Music Fairness Act would make things uneconomical for radio stations received some deserved pushback at the hearing. For instance, Rep. Hank Johnson – Chairman of the Subcommittee on Courts, Intellectual Property and the Internet – asked the pertinent question of how the Act's royalty requirements could be considered

"oppressive" given that the bill would require only \$10, \$100, and \$500 in annually from qualifying smaller commercial and public radio stations.

For too long, artists have been denied public performance rights in their sound recordings. Congress should rectify this gap in copyright law's protection by passing the American Music Fairness Act.

\* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

### **Further Readings**

Seth L. Cooper, "[D.C. Circuit Should Affirm the Constitutionality of Anti-Circumvention Rights](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 8 (February 2, 2021).

Seth L. Cooper, "[States Should Not Take Intellectual Property Without Just Compensation: The Constitution's Fifth and Fourteenth Amendments Protect Copyrights](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 65 (December 13, 2021).

Seth L. Cooper, "[Court Rejects Section 230 Immunity From State Intellectual Property Law Claims](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 55 (October 8, 2021).

Randolph J. May and Seth L. Cooper, "[Considering Copyright on Constitution Day](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 50 (September 18, 2021).

Seth L. Cooper, "[Online Ads Supporting Copyright Piracy Need to be Stopped](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 46 (August 32, 2021).

Randolph J. May, "[Congress and the President Should Act to Combat Online Piracy](#)," *FSF Blog* (August 26, 2021).

Seth L. Cooper, "[Congress Should Secure Fully Copyright Protections for Music Sound Recordings](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 43 (August 11, 2021).

Seth L. Cooper, "[Fighting Online Piracy Will Boost American Economy and Jobs](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 33 (June 29, 2021).

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Seth L. Cooper, "[The Property Rights View of Copyrights Beats Bogus Monopoly Talk](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 17 (April 7, 2021).

Seth L. Cooper, "[Copyright Law Needs a Modernization, Not a Restatement](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 12 (March 5, 2021).

Seth L. Cooper, "[Congress Should Hold Big Tech Accountable for Copyright Violations](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 2 (January 11, 2021).