

# The RESPECT Act & Co.:

## Showing Some, but Not Enough, Respect to American Heritage Artists

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## I. INTRODUCTION

Some of the most popular and influential music of the twentieth century, including more than 80% of the recordings inducted into the GRAMMY Hall of Fame and over 300 of Rolling Stone's 500 Greatest Songs of All Time, was recorded before February 15, 1972 (pre-1972 sound recordings).<sup>1</sup> Yet, Congress denied unified federal protection to pre-1972 recordings when it passed the Sound Recording Amendment to the 1909 Copyright Act in 1971 (the 1971 Amendment).<sup>2</sup> Even today, some sound recordings that compose the heart of America's musical heritage do not qualify for federal protection under the Copyright Act of 1976 (the 1976 Copyright Act or the current act).<sup>3</sup> A patchwork of state laws remains the only recourse for artists who recorded works before 1972 (heritage artists) and other copyright owners of pre-1972 sound recordings.<sup>4</sup>

This paradoxical situation only worsened with the ascent of digital radio. While the Digital Performance Right in Sound Recordings Act of 1995 (the DPRA) and the Digital Millennium Copyright Act (the DMCA) added another layer of protection to the sound recordings

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1. George Holding, *Valuing Our Musical Heritage*, HILL (May 30, 2014, 8:00 AM), <http://thehill.com/blogs/congress-blog/labor/207627-valuing-our-musical-heritage>; *see also Grammy Hall of Fame*, GRAMMY.ORG, <http://www.grammy.org/recording-academy/awards/hall-of-fame> (last visited Dec. 23, 2014).

2. *See* 17 U.S.C. § 301(c) (1976).

3. *See* MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS 5 (2011).

4. *See id.*

already under federal purview, Congress yet again ignored pre-1972 recordings.<sup>5</sup> Heritage artists cannot assert the exclusive right of digital performance under § 106(6) of the 1976 Copyright Act or take advantage of the licensing scheme under § 114 of the 1976 Copyright Act.<sup>6</sup>

At the same time, the majority of state laws—tailored to a pay-per-copy rather than a per-performance model—proved useless.<sup>7</sup> As a result, until 2014, digital radio stations consistently denied performance royalties to heritage artists, despite their earning millions through subscriptions and advertisements.<sup>8</sup>

Four notable developments in 2014 and 2015, however, reassured heritage artists that the phrase “digital performance royalties for pre-1972 sound recordings” is not an oxymoron after all. First, California and New York district courts held the Internet radio station Sirius XM Radio (Sirius XM) liable for digital royalties under the respective states’ laws for digitally performing pre-1972 sound recordings by the Turtles, an American rock band.<sup>9</sup>

Second, Congressman George Holding introduced the Respecting Senior Performers as Essential Cultural Treasures Act (the RESPECT Act).<sup>10</sup> If enacted, the RESPECT Act will extend § 114 of the 1976 Copyright Act’s federal licensing scheme to pre-1972 sound recordings, without preempting state laws in other respects.<sup>11</sup>

Third, Congressman Jerrold Nadler, the ranking member of the House Judiciary Subcommittee on Intellectual Property, announced plans to create a comprehensive, platform-neutral licensing scheme that would

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5. See Frank Mastropolo, *Byrds Legend Roger McGuinn on the Fight To Close a \$60,000,000 Royalty Loophole*, ULTIMATE CLASSIC ROCK (June 8, 2014, 8:00 AM), [www.ultimateclassicrock.com/roger-mcguinn-respect-act/?trackback=tsmclip](http://www.ultimateclassicrock.com/roger-mcguinn-respect-act/?trackback=tsmclip); see also Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, § 3(d), 109 Stat. 336, 343 (codified at 17 U.S.C. § 114(d) (2012)) (creating a three-tier licensing scheme that exempts traditional analog radio stations from compulsory license fees even if they switch to digital broadcasting).

6. See Mastropolo, *supra* note 5.

7. See James Vincent, *Digital Music Revenue Overtakes CD Sales for the First Time Globally*, VERGE (Apr. 15, 2015), <http://www.theverge.com/2015/4/15/8419567/digital-physical-music-sales-overtake-globally>; see also Kristin Thomson, *Music and How the Money Flows*, FUTURE MUSIC COAL. (Mar. 10, 2015), <http://www.futureofmusic.org/article/article/music-and-how-money-flows>.

8. See Mastropolo, *supra* note 5 (“SoundExchange estimates that heritage artists and record companies have lost out on \$60 million in royalties in the last 12 months.”).

9. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at \*9 (C.D. Cal. Sept. 22, 2014); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 339 (S.D.N.Y. Nov. 14, 2014).

10. See Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2d Sess. 2014).

11. H.R. 4772 § 2.

essentially overturn the DPRA and DMCA.<sup>12</sup> Nadler's bill was introduced in April 2015 as the Fair Play Fair Pay Act (the FFPF Act).<sup>13</sup> Fourth, taking a lead from the United States Copyright Office (the Copyright Office), a number of public interest organizations have called for extending full federal protection to copyright in pre-1972 sound recordings (full federalization).<sup>14</sup>

Heritage artists have spoken in support of all four developments.<sup>15</sup> However, even a cursory review of the press shows that they favor the enactment of the RESPECT Act over the other three avenues to secure their digital performance royalties.<sup>16</sup> Their preference is understandable: reliance on notoriously vague and inconsistent state laws seems imprudent, while the FFPF Act and the extension of federal copyright protection to pre-1972 sound recordings seems too drastic. The RESPECT Act, on the other hand, promises a quick fix without disturbing the status quo, including the settled property rights.<sup>17</sup> This Article, however, argues that heritage artists are unwise in their support of the RESPECT Act. It also shows that of the four alternatives, full federalization of copyright in pre-1972 works will best serve heritage artists' interests.

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12. Kate Tummarello, *Is It Time for Digital Radio To Pay Up?*, HILL (June 17, 2014, 6:00 AM), <http://thehill.com/policy/technology/technology/209539-is-it-time-for-digital-radio-to-pay-up>.

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

14. See, e.g., John Eggerton, *RESPECT Bill Would Require Pay for Internet Play of Pre-1972 Music*, BROADCASTING & CABLE (May 30, 2014, 2:15 PM), <http://www.broadcastingcable.com/news/washington/respect-bill-would-require-pay-internet-play-pre-1972-music/131475>.

15. See, e.g., Ben Sisario, *Sirius XM Loses Lawsuit on Royalties for Oldies*, N.Y. TIMES (Sept. 23, 2014), [http://www.nytimes.com/2014/09/24/business/media/sirius-xm-loses-suit-on-royalties-for-oldies.html?\\_r=0](http://www.nytimes.com/2014/09/24/business/media/sirius-xm-loses-suit-on-royalties-for-oldies.html?_r=0) (regarding Sirius XM holdings); Christine Conetta, *Musical Legends Push Respect Act for Unpaid Digital Royalties*, HUFFINGTON POST (May 29, 2014, 5:31 PM), [http://www.huffingtonpost.com/2014/05/29/musicians-digital-royalties\\_n\\_5413124.html](http://www.huffingtonpost.com/2014/05/29/musicians-digital-royalties_n_5413124.html) (regarding the RESPECT Act); *Artists, Legislators Announce Introduction of Respect Act*, SOUNDEXCHANGE: BLOG (June 4, 2014), <http://www.soundexchange.com/artists-legislators-announce-introduction-of-respect-act/> (regarding the RESPECT Act); Daryl P. Friedman, *MusicBus Gaining Speed as Members of Congress Climb on*, GRAMMY.ORG (June 18, 2014, 11:10 AM), <http://www.grammy.com/blogs/musicbus-gaining-speed-as-members-of-congress-climb-on> (regarding the FFPF Act); Avonne Bell, *Federalization of Pre-1972 Sound Recordings: A Debate About Uncertainty and Public Access*, PUB. KNOWLEDGE (June 22, 2011), <https://www.publicknowledge.org/news-blog/blogs/federalization-pre-1972-sound-recordings-deba> (regarding full federalization).

16. See, e.g., Conetta, *supra* note 15. The Respect Act had heavy-hitters behind it, like Roger McGuinn of The Byrds; Richie Furay of Buffalo Springfield; Gene Chandler, "The Duke of Earl"; and Karla Redding, daughter of the late Otis Redding. See *id.*

17. See *id.*; see also Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2d Sess. 2014).

Part II of this Article establishes the background for the discussion of the alternative ways to secure digital performance royalties. Part III describes those alternatives. Part IV sets forth an evaluation model, compares the alternatives, and explains why heritage artists should demand full federalization. Part V provides closing remarks.

## II. BACKGROUND

### A. *Sound Recording, a Step-Child of Federal Copyright*

Sound recordings<sup>18</sup> are the least protected category of copyrighted works.<sup>19</sup> Despite numerous attempts by recording companies to secure copyright in sound recordings, Congress ignored the existence of these works for almost a century, from the invention of the phonograph in 1878 to the enactment of the 1971 Amendment.<sup>20</sup> Even phonorecords, material objects in which sounds are fixed,<sup>21</sup> were not recognized as an eligible medium of expression until 1909.<sup>22</sup>

In 1901, the Court of Appeals for the District of Columbia decided the first case involving sound recordings, *Stern v. Rosey*.<sup>23</sup> The *Stern* court held that the reproduction of musical works by means of a double phonograph was not “copying” or “publishing” within the meaning of the Copyright Act of 1790.<sup>24</sup> Similarly, in 1908, the United States Supreme Court held in *White-Smith Music Publishing Co. v. Apollo Co.* that perforated rolls of music for mechanical pianos were not copies of

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18. The basics of music copyright may be summarized as follows:

Every musical recording consists of two separate copyrightable works: a musical composition and a sound recording. The musical composition is the arrangement of notes and/or lyrics put together by the composer or songwriter. The sound recording is the fixation of sounds, including a recording of someone playing or singing a musical composition.

Andrew Stockment, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2134 (2009).

19. Compare 17 U.S.C. § 106(6)(2012) (granting exclusive rights only to digital audio transmission in respect to sound recording copyright owners), with 17 U.S.C. § 106(1-5) (granting exclusive rights in numerous other aspects to other types of copyright owners).

20. See Patrick Inouye, *R-E-S-P-E-C-T*, SEATTLE IP BLOG (June 24, 2014), <http://www.seattleipblog.com/2014/06/r-e-s-p-e-c-t/> (describing Thomas Edison’s mechanical phonograph cylinder patented in 1878 as “the first practical sound recording and reproduction device”); PALLANTE, *supra* note 3, at 7-8 (noting the Victor Talking Machine Co. urged Congress to grant copyright to sound recordings as early as 1906).

21. To be eligible for federal copyright protection, original works of authorship must be fixed in a copy or a phonorecord. 17 U.S.C. § 101 (2012).

22. See Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed 1976).

23. See *Stern v. Rosey*, 17 App. D.C. 562, 563 (D.C. Cir. 1901).

24. *Id.* at 564-65.

musical compositions because the perforated rolls were unintelligible to the naked eye.<sup>25</sup>

The Copyright Act of 1909 brought musical works fixed on phonorecords under federal protection (subject to a compulsory mechanical license) and gave them a number of exclusive rights, including the right of public performance.<sup>26</sup> However, the Copyright Act of 1909 did not include “explicit protection for sound recordings *per se*.”<sup>27</sup> In the absence of federal protection, authors and producers of sound recordings turned to state statutes and the common law for any recognition of their rights.<sup>28</sup> Unfortunately, “[c]onflicting and [often] irreconcilable” state laws provided a notoriously uneven protection from unauthorized copying of sound recordings, resulting in rampant music piracy.<sup>29</sup>

Between the 1920s and late 1960s, bills proposing to apply federal laws to sound recordings—some only prospectively—were introduced to and rejected by Congress on a fairly regular basis.<sup>30</sup> Staunch opposition to such bills came from two groups: radio broadcasters and copyright holders of musical works.<sup>31</sup> Both groups argued that “records are not works of authorship and hence are not constitutionally copyrightable.”<sup>32</sup> Copyright holders of musical works also averred “that records are not writings, that manufacturers are not authors, and that records are

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25. *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908).

26. *See* Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909) (repealed 1976).

27. PALLANTE, *supra* note 3, at 8.

28. *See id.* at 9 (explaining that artists and producers of sound recordings brought causes of action under state common law copyright, various statutory provisions, and common law theories of misappropriation and conversion).

29. BARBARA A. RINGER, COPYRIGHT LAW REVISION, STUDY NO. 26: THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS 11 (1957). Barbara A. Ringer, who later became the Register of Copyrights, reported that in 1957

[t]here [were] *no State statutes recognizing rights in sound recordings* or recorded performances. On the contrary, three States [—North Carolina, South Carolina, and Florida—] have enacted statutes which may deny a musical performer or record producer any rights against unauthorized [copying] after the recording has been placed on sale. The statutes . . . were obviously aimed at preventing the collection of performance royalties from broadcasters, cafe owners, and similar secondary users. Nevertheless, the language of the statutes may well be broad enough to prevent a common law action for [unauthorized copying].

*Id.* at 8-9 (emphasis added). Irving Lowens, *Broadside at the Pirates: Law Protecting Recordings Takes Effect This Month*, 58 MUSIC EDUCATORS J. 67, 67 (Feb. 1972).

30. RINGER, *supra* note 29, at 21-37.

31. *Id.*

32. *Id.* at 33.

adequately protected at common law.”<sup>33</sup> “They contended that copyright in records would be unfair and prejudicial since manufacturers would not be subject to a compulsory [mechanical] license,” resulting in multiplication of licenses.<sup>34</sup>

Considering “the serious losses [radio broadcasters] would incur if records were made copyrightable,” it is not surprising that broadcasters opposed federal copyright protection for sound recordings.<sup>35</sup> On the other hand, what motivated the stance of copyright holders of musical works is not so obvious. Recall, however, that under the 1909 Act this group received the exclusive right to perform their works in public for profit, which entitled them to performance royalties from broadcasters.<sup>36</sup> If broadcasters had to pay additional royalties for sound recordings from their finite profits, they would have less money to pay performance royalties for musical works. Thus, the constitutional argument advanced by copyright holders of musical works, albeit colorable, was in reality “dictated by economic self-interest.”<sup>37</sup>

#### *B. Dual Protection Regime: Gives in an Inch, Takes Away a Yard*

When the comprehensive revision of the 1909 Copyright Act began in the late 1950s, the possibility of bringing sound recordings under federal purview was yet again brought to Congress’s attention, along with the shocking statistics that approximately 25% of all sound recordings sold in the United States were pirated.<sup>38</sup> Deferring to the Copyright Office’s opinion that federalization of copyright in sound recordings was necessary to stop music piracy, Congress decided not to wait until all provisions of the future 1976 Copyright Act were finalized and enacted an intermediary measure, the 1971 Amendment.<sup>39</sup>

The 1971 Amendment conferred federal copyright protection only to sound recordings fixed on or after February 15, 1972,<sup>40</sup> and gave no performance rights to sound recordings.<sup>41</sup> Originally, this piece of legislation would have ceased to have effect on January 1, 1975, but

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33. *Id.* at 33-34.

34. *Id.* at 34.

35. *Id.* at 33.

36. Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (1909) (repealed 1976).

37. RINGER, *supra* note 29, at 37.

38. See H.R. REP. NO. 92-487, at 2 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1566, 1567.

39. PALLANTE, *supra* note 3, at 10.

40. Sound Recording Amendment of 1971, Pub. L. No. 92-140, § 3, 85 Stat. 391, 392 (1971) (amended 1974).

41. *Id.*

this “sunset” provision was repealed in 1974.<sup>42</sup> The reasons behind the arbitrary prospective application of the 1971 Amendment and lack of performance rights are unknown.<sup>43</sup> Some commentators argue that the powerful radio lobby interfered again.<sup>44</sup> Legislative materials provide inferential support to the theory that copyright holders were planning to push for more rights under the 1976 Copyright Act.<sup>45</sup> Other commentators point out, however, that holders of copyright in sound recordings may have accepted this imperfect bargain either because they believed state laws provided adequate protection<sup>46</sup> or because they were content with receiving “free advertising.”<sup>47</sup> The truth probably lies in the

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42. Pub. L. 93-573 (1974) (“Section 3 of the Act of October 15, 1971 (85 Stat. 391), is amended by striking out ‘and before January 1, 1975.’”).

43. See PALLANTE, *supra* note 3, at 17.

44. One commentator commented that lobbying rather than legislative intent seem to govern the contents of the 1976 Copyright Act:

The legislative history of the 1976 Copyright Act is, at the very least, a troublesome aid in determining the statute's meaning. One can choose a statutory provision almost at random; a review of the provision's legislative history will show that credit for its substance belongs more to the representatives of interested parties negotiating among themselves than to the members of Congress who sponsored, reported, or debated the bill. The congressional sponsors may have given almost no thought to the meaning of the provision.

Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 870 (1987).

45. The Report of the House Judiciary Committee from 1976 rejected arguments in favor of any right to performance:

Subsection (a) of Section 114 specifies that the exclusive rights of the owner of copyright in a sound recording are limited to the rights to reproduce the sound recording in copies or phonorecords, to prepare derivative works based on the copyrighted sound recording, and to distribute copies or phonorecords of the sound recording to the public. Subsection (a) states explicitly that the owner's rights “do not include any right of performance under section 106(4).” The Committee considered at length *the arguments in favor of establishing a limited performance right, in the form of a compulsory license, for copyrighted sound recordings*, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyrights to submit to Congress, on January 3, 1978, “a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners . . . any performance rights” in copyrighted sound recordings.

H.R. Rep. No. 1476, 94th Cong., 2d Sess. 106 (1976) (emphasis added).

46. Cf. Tim Brooks, *Only in America: The Unique Status of Sound Recordings Under U.S. Copyright Law and How It Threatens Our Audio Heritage*, 27 AM. MUSIC 125, 126-27 (2009) (discussing the “draconian” holding in *Capitol Records, Inc. v. Naxos of America, Inc.*, under which “[t]he [common copyright] rights holders have all rights, forever, and the public has none.”).

47. Howard Cockrill, *Tuning the Dial on Internet Radio: The DPRA, the DMCA & the General Public Performance Right in Sound Recordings*, 9 INTELL. PROP. L. BULL. 103, 105 (2005).

middle: facing the choice between limited protection and no protection, sound recording copyright holders accepted the former.

The 1976 Copyright Act preserved the division between pre- and post-1972 sound recordings, thereby making the disparate dual regime permanent.<sup>48</sup> The patchwork of state laws continued to govern copyright protection for sound recordings fixed before February 15, 1972, in all respects except for copyright duration.<sup>49</sup>

The duration provision in the 1976 Copyright Act struck another blow against sound recordings, curtailing the potentially perpetual copyright under common law. Before the 1976 Copyright Act went into effect, copyright under common law and state statutory law could potentially last forever.<sup>50</sup> The 1976 Copyright Act, however, explicitly prohibits copyright in pre-1972 sound recordings from enduring beyond February 15, 2067.<sup>51</sup> On that date, the dual regime will cease to exist, and all pre-1972 sound recordings will enter the public domain.<sup>52</sup>

Subsequent expansions of federally protectable subject matter did not apply to pre-1972 sound recordings. For instance, the legal status of unpublished pre-1972 sound recordings remained unchanged<sup>53</sup> when Congress folded protection of copyright in unpublished works into the 1976 Copyright Act.<sup>54</sup> Similarly, reinstatement of federal copyright in certain foreign sound recordings, which had lapsed into the public domain for failure to comply with formalities, had no effect on American heritage sound recordings.<sup>55</sup>

### C. *Digital Performance Right Under Section 106(6)*

The 1976 Copyright Act conferred on holders of copyright in musical works the exclusive rights to (1) reproduce their works; (2) prepare derivative works; (3) distribute copies or phonorecords of

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48. *Cf.* 17 U.S.C. § 301(c) (1976).

49. *Cf. id.* (stating that with respect to sound recordings, no preemption until Feb. 15, 2067). *See, e.g.,* Brooks, *supra* note 46, at 126; *see also* 17 U.S.C. § 301(a) (noting immediate preemption with respect to unfixed works).

50. MARK S. LEE, ENTERTAINMENT AND INTELLECTUAL PROPERTY LAW § 5:33 (2016) (“A historically important aspect of common law copyright was that it provided protection of indefinite duration. An author or author’s heirs theoretically could maintain protection forever so long as they did not publish a work, register it, or otherwise subject it to federal copyright law.”).

51. 17 U.S.C. § 301(c) (1976) *amended by* the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

52. PALLANTE, *supra* note 3, at 5.

53. 17 U.S.C. § 301(c) (1976).

54. *See* 17 U.S.C. § 102(a) (1976) (stating that a copyright work is protected from fixation rather than publication).

55. *See* 17 U.S.C. § 104A (2012).

their works to the public; (4) perform their works publicly; and (5) display their works publicly.<sup>56</sup> The public performance right in musical works allowed performance rights societies (PRS) to collect performance royalties on behalf of copyright owners.<sup>57</sup> Owners of copyright in post-1972 sound recordings lacked the latter two rights, the right to perform their works publicly and the right to display their works publicly. The right to display a work of authorship does not apply to sound recordings by definition. However, the lack of the performance right caused increasing hardships to owners of copyright in sound recordings when digital audio became the default format in the music recording and distribution industry.<sup>58</sup>

The digital encoding of audio works (digitization) offers a number of advantages over analog processing methods, including ease of storage and transmission without loss or distortion of audio data.<sup>59</sup> At the same time, precisely because of its technological advantages, digitization threatened copyright holders' interests.<sup>60</sup>

First, digitization of music caused users to view sound recordings as public goods that could be freely consumed and redistributed.<sup>61</sup> The proliferation of unauthorized peer-to-peer networks, such as Napster, would not have been possible otherwise.<sup>62</sup> Second, digitization created a new medium of digital radio, which encompasses Internet radio, digital

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56. 17 U.S.C. § 106(1)-(5) (1976). These rights are subject to various licenses, including the compulsory mechanical license to make copies of musical works. *See, e.g.*, 17 U.S.C. § 115 (2012).

57. The three American PRS are ASCAP, BMI, and SESAC. For more information, *see, e.g.*, *Get an ASCAP License*, ASCAP.COM, <http://www.ascap.com/licensing/licensefinder> (last visited Apr. 12, 2015).

58. *See, e.g.*, William Fisher, *Digital Music: Problems and Possibilities*, LAW.HARVARD.EDU, <http://www.law.harvard.edu/faculty/TFisher/Music.html> (last revised Oct. 10, 2000) (“Almost all music is distributed today in digital, rather than analog, form.”).

59. *See generally* J. Robert Stuart, *Coding High Quality Digital Audio*, MERIDIAN, <https://www.meridian-audio.com/meridian-uploads/ara/coding2.pdf> (last visited Apr. 12, 2015) (noting advantages also include elimination of background sounds).

60. *See* Stuart Talley, *Performance Rights in Sound Recordings: Is There Justification in the Age of Digital Broadcasting?*, 28 BEVERLY HILLS B. ASS'N J. 79, 83 (1994) (predicting digitization's effect on the music industry).

61. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L.R. 1613, 1620-26 (2001); *but see* Mark Neumann & Timothy A. Simpson, *Smuggled Sound: Bootleg Recording and the Pursuit of Popular Memory*, 20 SYMBOLIC INTERACTION 319, 324 (1997) (“Technology democratized works of art for the desire of ‘contemporary masses to bring things closer spatially and humanly. . . .’”) (quoting Walter Benjamin).

62. *See In re Napster, Inc. Copyright Litig.*, No. C 00-1369 MHP, 2001 WL 36593841, at \*1 (N.D. Cal. July 9, 2001).

cable radio, satellite radio, and simulcasting.<sup>63</sup> Digital broadcasters, webcasters, and simulcasters made profits either by selling radio subscriptions to listeners or through advertisement.<sup>64</sup> They, however, refused to share their profits with copyright holders.<sup>65</sup> These new businesses also drove down sales of compact discs (CDs) and other physical sound recording carriers by making high-quality audio content available to the public via streaming and download.<sup>66</sup>

To remedy the threat to the copyright holders' interests, Congress enacted the DPRA in 1995<sup>67</sup> and DMCA in 1998.<sup>68</sup> These two acts created a new, exclusive—but limited—right to *perform digitally* post-1972 sound recordings under § 106(6).<sup>69</sup> They also established a licensing scheme which requires broadcasters performing a song via a digital audio transmission to obtain (1) a license for the public performance of the musical composition under § 115; (2) a license for the public performance of the sound recording via digital audio transmissions under § 114; and (3) a license for the creation of so-called ephemeral copies of the sound recording used in the transmission process under § 112.<sup>70</sup> Ultimately, that cemented the change in the music retail model from pay-per-copy to pay-per-performance.<sup>71</sup>

The new digital performance right is not absolute. Essentially, § 114 excuses AM/FM broadcasters and educational radio programs aired by public broadcasters from paying royalties and implements a compulsory licensing scheme for certain nonexempt, noninteractive

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63. The term “digital radio” applies to broadcasters that use a digital, as opposed to the traditional analog, signal to transmit audio content. See Stockment, *supra* note 18, at 2132-33 (defining digital broadcasting, digital satellite broadcasting, web-casting, and simulcasting).

64. See Steven Loeb, *How Does Pandora Make Money?*, VATORNEWS (Dec. 21, 2013), <http://vator.tv/news/2013-12-21-how-does-pandora-make-money>.

65. See generally Stockment, *supra* note 18.

66. See Talley, *supra* note 60, at 85 (“Spurred by recording industry concerns that new broadcasting technology may adversely impact CD sales, law makers have recently introduced [the DPRA] . . .”).

67. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended in scattered sections of 17 U.S.C.) [hereinafter DPRA].

68. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.) [hereinafter DMCA].

69. See DPRA § 2 (codified as amended in 17 U.S.C. § 106(6)).

70. DPRA § 3 (codified as amended in 17 U.S.C. § 114 (2012)), § 4 (codified as amended in 17 U.S.C. § 115 (2012)); DMCA § 402 (codified as amended in 17 U.S.C. § 112 (2012)); see also generally James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, 80 N.Y. St. B.J. 23 (2008) (providing practical advice on obtaining licenses).

71. See PALLANTE, *supra* note 3, at 113-15 (discussing the post-DPRA and post-DMCA Section 114).

digital subscription transmissions.<sup>72</sup> Nevertheless, the role of the DPRA and DMCA in protecting sound recordings cannot be underestimated. The International Federation of the Phonographic Industry (the IFPI) reports that 28 million people around the world received their music through digital subscription radio in 2013.<sup>73</sup> “Revenue from performance rights—generated from broadcast, internet radio stations and venues—saw strong growth. Performance rights income was US \$1.1 billion globally in 2013, increasing by an estimated 19[%] in 2013, more than double the growth rate in 2012, and accounting for 7.4[%] of total record industry revenue.”<sup>74</sup> Revenues from streaming and subscription services grew by 51.3% globally,<sup>75</sup> and revenues from streaming crossed the \$1 billion threshold mark for the first time.<sup>76</sup> Digital downloads remained a key revenue source, accounting for two-thirds of total digital revenue.<sup>77</sup>

As usual, these positive changes did not affect pre-1972 sound recordings. Pre-1972 sound recordings were still governed by state laws, often narrowly tailored to the pay-per-copy model.<sup>78</sup> Since the digital performance right under the DPRA or DMCA does not extend protection to these works, digital broadcasters continued to refuse digital royalties to their owners.<sup>79</sup>

### III. SECURING DIGITAL PERFORMANCE ROYALTIES IN PRE-1972 WORKS

As mentioned above, the Turtles’ victories against Sirius XM in California and New York, the introduction of the RESPECT Act and the PFPF Act, and the renewed call for federalization shook up the

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72. See 17 U.S.C. § 114(b), (d) (2012). As the Copyright Office explained, [t]he result is that sound recordings are subject to a compulsory license for public performances by means of certain nonexempt, noninteractive digital subscription digital audio transmissions. All other public performances of sound recordings by means of certain digital audio transmissions, including interactive digital transmissions, are subject to an *unfettered* exclusive right.

PALLANTE, *supra* note 3, at 114 (emphasis added). See also generally Stockment, *supra* note 18 (noting licensing fee calculations).

73. IFPI, IFPI DIGITAL MUSIC REPORT 2014: LIGHTING UP NEW MARKETS 7 (2014).

74. *Id.*

75. *Id.* (reporting more than 28 million people worldwide paid for a music subscription in 2013, up from 20 million in 2012 and just 8 million in 2010).

76. *Id.*

77. *Id.* (stating revenues from sales of CDs dropped by almost 5% and accounted only for 51.4% of sales globally). See also Stockment, *supra* note 18, at 2133 (“More than 69 million Americans listen to internet radio every month . . .”).

78. See PALLANTE, *supra* note 3, at 21 (“Many [states] have express exceptions for activities such as broadcasting, archiving, and personal use.”).

79. See Mastropolo, *supra* note 5.

paradoxical situation that had existed in the copyright law prior to 2014. These four developments drew public attention to the disparate treatment of pre-1972 sound recordings compared to other copyrighted works and held a promise that American heritage artists would soon receive digital radio royalties.

At the same time, these developments put heritage artists and the copyright community at large at a crossroad. In exploring which path best serves heritage artists' interests, this Article will discuss state law regimes, partial federalization under the RESPECT Act, partial federalization under the FFP Act, full federalization, as well as the unexpected "private" public performance right created by contracts between broadcasters and record labels.

A. *State Law: Not "So Happy Together"*<sup>80</sup>

The first alternative is to preserve the status quo and allow state laws to continue governing copyright protection for pre-1972 sound recordings until 2067, when all pre-1972 sound recordings must lapse into the public domain.<sup>81</sup> Before 2014, this seemed like a ridiculous proposition: the DPRA and DMCA afford the digital performance right only to federally protected sound recordings, while state protections are notoriously uneven.<sup>82</sup> To find a cause for relief under state law, copyright owners must plow through common law copyright, unfair competition, conversion and misappropriation theories, and civil and criminal statutes. In many states, copyright holders are unable to obtain relief because of a broadcasting exemption or a requirement that the parties to a law suit be in the same business.<sup>83</sup> Other states, such as South Carolina and North Carolina, expressly deny copyright owners of recorded performances any "common-law rights to . . . restrict or to collect royalties on the commercial use."<sup>84</sup>

In 2011, the Copyright Office aptly described the multitude of state regimes as a "patchwork of state protection" and criticized them as "vague and inconsistent, with the scope of rights and of permissible

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80. THE TURTLES, HAPPY TOGETHER (White Whale 1967).

81. See PALLANTE, *supra* note 3, at 28; see also, e.g., CAL. CIV. CODE § 980 ("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 15, 2047 . . .").

82. See *supra* Section III.A.

83. See PALLANTE, *supra* note 3, at 21-26; see also IOWA CODE ANN. § 714.15(4) (West 2016) (noting a carve-out for sound transfers "intended for or in connection with radio or television broadcast transmission or related uses").

84. N.C. GEN. STAT. ANN. § 66-28 (West 2016); S.C. CODE ANN. § 39-3-510 (West 2016).

activities often difficult to discern.”<sup>85</sup> However, two recent cases decided under California and New York state laws show that vague, and thus flexible, laws may actually work to copyright holders’ advantage.

#### 1. Flo & Eddie in California

Flo & Eddie Inc. (Flo & Eddie or the plaintiff) is a California corporation that owns the copyright in the Turtles’ sound recordings.<sup>86</sup> The corporation is owned by two of the Turtles’ original members, Mark Volman and Howard Kaylan.<sup>87</sup> Master recordings of the Turtles’ performances were made prior to February 15, 1972, and thus do not qualify for federal protection.<sup>88</sup> In August 2013, Flo & Eddie filed a complaint in the Central District of California against Sirius XM, “a company that operates both a subscription based nationwide satellite radio service [and] a subscription based internet radio service.”<sup>89</sup> At the time, Sirius XM made over seventy of Flo & Eddie’s works available through satellite radio and streaming to computers and mobile phones.<sup>90</sup>

Since every second of the sound recordings transmitted by Sirius XM was cached in the buffer, Sirius XM essentially made temporary partial copies of recordings during its broadcast process.<sup>91</sup> Thus, Flo & Eddie alleged that Sirius XM performed those copies without its authorization.<sup>92</sup> Flo & Eddie also alleged Sirius XM infringed its copyright under California law because it both *publicly performed* and *reproduced* the plaintiff’s sound recordings.<sup>93</sup>

Sirius XM did not deny performing the sound recordings in question but argued that the right to public performance did not attach to copyright in sound recordings under California law.<sup>94</sup> The court disagreed, explaining that “sound recording ownership is inclusive of all ownership rights that can attach to intellectual property, including the right of public performance, excepting only the limited right expressly

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85. See PALLANTE, *supra* note 3, at 6.

86. Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at \*1 (C.D. Cal. Sept. 22, 2014), *reh’g denied*, 2015 WL 9690320, at \*4 (C.D. Cal. Feb. 19, 2015).

87. *Id.*

88. *Id.* at \*3.

89. *Id.* at \*1.

90. See *id.*

91. See Flo & Eddie Inc. v. Sirius XM Radio Inc., No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at \*10 (C.D. Cal. Sept. 22, 2014), *reh’g denied*, 2015 WL 9690320, at \*4 (C.D. Cal. Feb. 19, 2015).

92. *Id.* at \*9.

93. *Id.* at \*3.

94. *Id.*

stated in the law.”<sup>95</sup> The court granted summary judgement to Flo & Eddie on the issues of infringement by *performance*, unfair competition, conversion, and misappropriation.<sup>96</sup> However, the court also held that an issue of material fact remained as to Sirius XM’s *reproduction* of Flo & Eddie’s sound recordings.<sup>97</sup>

## 2. Flo & Eddie Take on New York

In August 2014, Flo & Eddie commenced a related “putative” class action against Sirius XM in the Southern District of New York.<sup>98</sup> Sirius XM again admitted that it had broadcasted the plaintiff’s works but averred it was not prevented from doing so because Flo & Eddie did not have a right to public performance under New York state law.<sup>99</sup>

Sirius XM also advanced an argument steeped in public policy. Namely, it argued that the recognition of a new digital performance right under New York common law would be too broad a ruling, entail a “radical expansion” of intellectual property rights and expose AM/FM radio stations, retail stores, bars, and restaurants to liability for playing music in public.<sup>100</sup>

The court denied Sirius XM’s motion to dismiss. It held the plaintiff stated a claim that Sirius XM violated the plaintiff’s common law copyright by *reproducing* the Turtles’ sound recordings without authorization and by engaging in unfair competition.<sup>101</sup> The court also explained that the plaintiff had the right to perform its works because *performance* may be a form of *distribution*.<sup>102</sup> It reasoned that the public sale of a sound recording did not constitute publication under New York state law.<sup>103</sup> Sirius XM’s fair use and laches defenses, the argument that finding for Flo & Eddie would implicate the dormant Commerce

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95. *Id.* at \*7; *see id.* at \*6 (illustrating how the 1976 Copyright Act “narrow[ed]” protections for sound recordings).

96. *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at \*9, \*11 (C.D. Cal. Sept. 22, 2014), *reh’g denied*, 2015 WL 9690320, at \*4 (C.D. Cal. Feb. 19, 2015).

97. *Id.* at \*10.

98. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 330 (S.D.N.Y. 2014), *reh’g denied*, No. 13 Civ. 5784 (CM), 2014 WL 7178134 (S.D.N.Y. Dec. 12, 2014), *appeal granted*, No. 13 Civ. 5784 (CM), 2015 WL 585641 (S.D.N.Y. Feb. 10, 2015).

99. *See* Reply Mem. of Law in Further Supp. of Sirius XM’s Mot. for Summ. J. at 1-2, *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F.Supp. 3d 325 (S.D.N.Y. 2014) (No. 13-CV-5784), 2014 WL 4184946, at \*1 (arguing copying that is incidental to broadcasting does not violate New York law).

100. *See id.* at 1.

101. *Flo & Eddie*, 62 F. Supp. 3d, at 345, 348-49, 353.

102. *See id.* at 345.

103. *See id.* at 345-46.

Clause,<sup>104</sup> and its policy argument<sup>105</sup> were rejected.<sup>106</sup> Subsequently, the court denied Sirius XM's motion for summary judgement and motion for reconsideration as well.<sup>107</sup>

The litigation in New York is not over: in February 2015, the New York District Court for the Southern District of New York granted Sirius XM's motion to certify the summary judgement decision for interlocutory appeal and stayed the matter.<sup>108</sup> According to that court, it was unclear if the bundle of rights under New York law included the right to public performance after all.<sup>109</sup> The court also stressed that Flo & Eddie had tolerated both digital and terrestrial performance of its works for decades before commencing the action in 2014.<sup>110</sup> The court expressed doubt that Flo & Eddie would be able to establish class certification.<sup>111</sup>

On April 13, 2016, the United States Court of Appeals for the Second Circuit reserved decision and certified the following question for the New York Court of Appeals: "Is there 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?"<sup>112</sup> The New York Court of Appeals, New York's highest court, accepted certification on May 3, 2016.<sup>113</sup>

### 3. Flo & Eddie in Florida

The musical community was swift to declare the California and New York holdings in the Flo & Eddie matters "an industrywide

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104. *Id.* at 351 (stating it did not regulate interstate commerce by recognizing common copyright of its constituent).

105. The court explained:

Sirius is correct that this holding is unprecedented . . . , and will have significant economic consequences. . . . But in the end, all this case presents me with is a suit between private parties seeking to vindicate private property rights—not a challenge to state regulation. . . . The broader policy problems are not for me to consider. They are the province of Congress, the New York Legislature, and perhaps the New York Court of Appeals.

*Id.* at 352-53.

106. *Id.* at 351-53.

107. *Id.* at 353.

108. *See Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, No. 13 Civ. 5784 (CM), 2015 WL 585641, at \*4 (S.D.N.Y. Feb. 10, 2015).

109. *See id.* at \*2.

110. *Id.* at \*3.

111. *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 80 F. Supp. 3d 535, 544 (S.D.N.Y. 2015) (ordering the plaintiff to notify the court if it wishes to conduct class discovery).

112. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 821 F.3d 265, 272 (2d Cir. 2016), *cert. granted*, 52 N.E.3d 240 (N.Y. May 3, 2016).

113. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 52 N.E.3d 240 (N.Y. 2016).

victory,”<sup>114</sup> even though the New York litigation is not over. In 2015, the Turtles lost on all claims in a companion case brought in the Southern District of Florida.<sup>115</sup> The district court there found that Florida common law copyright does not expressly grant an exclusive public performance right to pre-1972 sound recordings, nor does it encompass this right implicitly.<sup>116</sup> The court also found that buffer copies, i.e., partial copies of recordings “created [by Sirius XM] to aid in the transmission of the recording,” did not constitute unlawful reproductions and held Sirius XM not liable for unfair competition, conversion, or civil theft under Florida common law.<sup>117</sup>

*B. The RESPECT Act: “And all I’m askin’ in return, honey / Is to give me my profits . . . .”<sup>118</sup>*

The RESPECT Act falls into the category of bills that propose partial federalization of copyright in pre-1972 sound recordings. If enacted, it will qualify pre-1972 sound recordings for the public performance royalties that are already available to post-1972 sound recordings.<sup>119</sup> To clarify, this bill would amend § 114 of the 1976 Copyright Act to encompass pre-1972 sound recordings but would not alter the existing licensing scheme under that section.<sup>120</sup> It would not amend other provisions of the 1976 Copyright Act or preempt state copyright laws.<sup>121</sup> The division between pre- and post-1972 sound recordings and the exemption for AM/FM broadcasters under § 114 would remain intact.<sup>122</sup>

Statements made by Congressman Holding, the main sponsor of the RESPECT Act, indicate that he believes this bill is narrow in scope and will only fix a discreet inequity.<sup>123</sup> It is also apparent from his statements

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114. Sisario, *supra* note 15.

115. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. 13-23182-CIV, 2015 WL 3852692, at \*6 (S.D. Fla. June 22, 2015), *questions certified*, 827 F.3d 1016 (11th Cir. 2016).

116. *Id.* at \*5.

117. *Id.* at \*6.

118. OTIS REDDING, *RESPECT* (Volt/Atco Records 1965).

119. Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. § 2(D)(iv) (2d sess. 2014).

120. *Id.*

121. *Id.*

122. *Id.*

123. For instance, Holding stated that

[t]he RESPECT Act addresses [a] quirk of history and law by requiring digital music services that use the federal compulsory licenses to pay royalties for the pre-72 music that they play. It does not pre-empt state laws or fully federalize all pre-72 recordings, a more complicated issue that has already been referred by the Copyright Office to the

and from the text of the RESPECT Act that he drafted the bill with the assumption that no digital royalties were available for pre-1972 sound recordings under state laws.<sup>124</sup> The bill, however, safeguards against a potential windfall in the form of double royalties as it prohibits simultaneous collection of royalties under federal and state laws.<sup>125</sup>

The RESPECT Act was introduced to the House of Representatives in May 2014 and is currently pending review before the House Judiciary Subcommittee on Intellectual Property.<sup>126</sup> It received immediate approval from copyright law scholars who hailed the Act as a quick and relatively painless fix for the problem at hand.<sup>127</sup> A number of heritage artists—including Sam Moore of Sam & Dave, Roger McGuinn of The Byrds, Richie Furay of Buffalo Springfield, Mark Farner of Grand Funk Railroad, Gene Chandler, and Martha Reeves—have pledged their support for this bill.<sup>128</sup> SoundExchange, the organization that collects digital royalties for post-1972 sound recordings, created a public platform called Project 72 to raise awareness of the fact that heritage artists are “not getting the digital [royalties] they rightfully deserve.”<sup>129</sup>

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Judiciary Committee for review. It does not create any new federal copyright claims or prejudice non-commercial users of music in any way.

Press Release, Congressman Holding Introduces the RESPECT Act (May 29, 2014), <http://holding.house.gov/news/documentsingle.aspx?DocumentID=133>.

124. *Id.* (“[Broadcasters] also refuse to pay royalties under state law—claiming that state laws don’t cover digital services at all.”); see Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2d Sess. 2014); see also Tummarello, *supra* note 12.

125. See Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772 § 2(D)(iii), 113th Cong. (2d Sess. 2014).

126. *Action Overview: H.R.4772—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4772/actions?q=%7B%22search%22%3A%5B%22H.R.+4772%22%5D%7D> (last visited Apr. 15, 2015).

127. See Tummarello, *supra* note 12 (reporting that Holding called his bill “a rifle shot solution in an issue where I think that Congress’s intent isn’t being carried out”).

128. *Artists, Legislators Announce Introduction of Respect Act*, SOUNDEXCHANGE: BLOG (June 4, 2014), <http://www.soundexchange.com/artists-legislators-announce-introduction-of-respect-act/>.

129. Michael Huppe, *Why Rock Hall Inductees Are Not Getting the Royalties They Deserve*, BILLBOARDBIZ (Apr. 10, 2014, 9:30 AM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6042278/why-rock-hall-inductees-are-not-getting-the-royalties> (stressing unlike heritage artists, musicians who made covers of their works after 1972 receive payments). See also *SoundExchange Launches “Project72” Campaign in Support of the Respect Act*, SOUNDEXCHANGE (May 29, 2014), <http://www.soundexchange.com/pr/soundexchange-launches-project72-campaign-in-support-of-the-respect-act/#sthash.hPaGTFVY.dpuf>.

C. *The FFPF Act: “But much to my surprise / When I opened my eyes . . . / I was a victim of the great compromise”*<sup>30</sup>

While the RESPECT Act was pending review before the House Judiciary Subcommittee on Intellectual Property, Congressman Nadler, the ranking member of that subcommittee, announced his plans to introduce a comprehensive platform-neutral licensing bill dubbed the Music Bus Act.<sup>131</sup> In Nadler’s view, the existing licensing scheme under federal law is “unethical, immoral, and simply un-American” because it allows AM/FM radio stations to avoid payment of licensing fees.<sup>132</sup> He urged Congress to eliminate these “glaring inconsistencies and injustices” and “to make sure that the songwriters get adequately paid, the performers get adequately paid and that there’s a rational structure, . . . and then everybody can fit their business models to it.”<sup>133</sup>

Given the timing of Nadler’s announcement, his condemnation of the “piecemeal approach with stand-alone bills” was probably meant as a criticism of the RESPECT Act.<sup>134</sup> Interestingly, when asked about the possibility of merging the RESPECT Act and the Music Bus Act (subsequently renamed the FFPF Act), Holding said his bill “should move on its own.”<sup>135</sup> Regardless of Nadler and Holding’s views on each other’s’ legislative efforts, Nadler intended to “incorporate multiple proposals from other lawmakers” into his bill.<sup>136</sup>

True to his pledge, on April 13, 2015, Nadler introduced the FFPF Act.<sup>137</sup> The bill seeks to confer a wide exclusive performance right to sound recordings and “eliminate the distinctions between different kinds of radio—Internet, satellite or over-the-air—with regard to who they pay.”<sup>138</sup> To accomplish this goal, the bill proposes numerous changes to the current act. Most notable changes would include (1) the deletion of the word “digital” in reference to sound recordings throughout the 1976

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130. JOHN PRINE, *THE GREAT COMPROMISE* (Atlantic Records 1971).

131. John M. Deboer, *All on Board for the “Music-Bus” Ride?*, AUTHOREYEZ.COM (July 16, 2014, 4:20 PM), <http://www.authoreyez.com/2014/07/all-on-board-for-music-bus-ride.html>.

132. Tummarello, *supra* note 12.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. The FFPF Act was cosponsored by Rep. Marsha Blackburn who had previously co-introduced a bill requiring traditional AM/FM radio stations to pay licensing fees. See Tummarello, *supra* note 12.

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

Copyright Act;<sup>139</sup> (2) the elimination of § 114(d)'s royalty exemption for noninteractive, preexisting digital satellite broadcasters and simulcasters; (3) the elimination of the royalty exemption for public and educational programming; and (4) the addition of a new "equal treatment for heritage artists" provision that would create the right to performance royalties for pre-1972 sound recordings and a federal cause of action for their nonpayment.<sup>140</sup>

At the same time, this bill does not preclude copyright holders from entering into private royalty deals.<sup>141</sup> Smaller radio operations (with annual revenues not exceeding \$1 million per year) and public and college radio stations would be subject only to flat fees.<sup>142</sup> Interestingly, broadcasts of religious services would be completely exempt from paying royalty fees.<sup>143</sup> The bill also expressly prohibits the lowering of royalty rates for the performance of musical works.<sup>144</sup>

For all its promise to eliminate inconsistencies and injustices, the FPPF Act does not change the dual regime. To begin, the bill would not affect § 301 of the current act,<sup>145</sup> which curtails the duration of the common law copyright in pre-1972 sound recordings.<sup>146</sup> Despite platform neutrality, the FPPF still singles out sound recordings among other copyrightable works, as is evident from the changes in royalty calculations that it proposes.

To clarify, § 114 of the current act sets forth two standards for calculating royalties for public performance of sound recordings.<sup>147</sup> Subsection 114(f)(1) prescribes that copyright royalty judges apply § 801's multi-factor standard to "subscription transmissions by preexisting subscription services and transmissions by preexisting satellite digital audio radio services."<sup>148</sup> By contrast, rates for certain "eligible non-subscription transmissions services and new subscription

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139. Thus, phrases like "digital audio" and "digital audio transmission" will be substituted by "audio" and "audio transmission."

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

141. See H.R. 1733 § 4(a)(1)(B)(ii) ("[The Copyright Royalty Judges] may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under *voluntary license agreements*." (emphasis added)).

142. H.R. 1733 § 5(a), (b).

143. H.R. 1733 § 5(c).

144. See H.R. 1733 § 8.

145. See H.R. 1733.

146. See 17 U.S.C. § 301(C) (2012).

147. See 17 U.S.C. § 114 (f)(1)-(2) (2012).

148. 17 U.S.C. § 114 (f)(1)(A).

services” are calculated using § 114(f)(2)’s “willing buyer, willing seller” standard.<sup>149</sup>

The FFPF Act would apply the “willing buyer, willing seller” standard to all platforms.<sup>150</sup> However, § 801’s standard would still govern other royalty types, including rates for mechanical licenses in musical works. Thus, instead of creating a more unified and just system, the FFPF Act would yet again pit owners of sound recordings and musical works against each other.<sup>151</sup> Despite these shortcomings, the FFPF Act has many supporters in the public interest sector, including the Grammy Foundation.<sup>152</sup>

*D. Full Federalization: “United We Stand, Divided We Fall”<sup>453</sup>*

The last option is to extend full federal copyright protection to pre-1972 sound recordings. This would confer the digital performance right under § 106(6)—and the rest of the rights under the 1976 Copyright Act—to pre-1972 sound recordings, eliminate the dual regime, and bring uniformity to U.S. copyright law. This could also make pre-1972 sound recordings subject to all the limitations of the 1976 Copyright Act, including the exemptions in § 114 and the fair use doctrine as codified in § 107.

The Copyright Office has repeatedly requested that Congress provide federal copyright protection for sound recordings since the 1950s.<sup>154</sup> As recently as 2011 and 2014, the Copyright Office recommended that Congress bring pre-1972 sound recordings entirely under federal purview.<sup>155</sup> The Copyright Office also outlined counterbalancing measures that would ensure a smooth transition from a dual to a single federal copyright regime and addressed such thorny questions as ownership, work-for-hire status, termination, and recordation of pre-1972 recordings.<sup>156</sup> The Future of Music Coalition, Public Knowledge, and other public interest organizations have campaigned for full federalization of copyright in pre-1972 sound recordings as well.<sup>157</sup>

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149. 17 U.S.C. § 114 (f)(2)(A)-(B).

150. Compare H.R. 1733, § 4(a)(B), with 17 U.S.C. § 114(f)(2)(B) (2010).

151. See *supra* Section II.A-B.

152. See Friedman, *supra* note 15.

153. THE BROTHERHOOD OF MAN, UNITED WE STAND (Dream Records 1970).

154. See RINGER, *supra* note 29.

155. See, e.g., PALLANTE, *supra* note 3.

156. See *generally id.* (reporting results of comprehensive study of pre-1972 sound recordings).

157. See, e.g., Bell, *supra* note 15.

*E. “Private” Public Performance Right: AM/FM Deals*

“Private” performance right is currently available only to the latest music stars and is not an option for heritage artists. However, this Article would be incomplete without mentioning that labels and radio stations have been quietly using contracts to create new private platform-neutral performance rights in today’s most popular sound recordings.<sup>158</sup> For example, in 2012, the Big Machine, a country music label, and Cox Media Group (Cox) announced plans to create a direct licensing deal that will pay the Big Machine for plays of its music on both terrestrial and Internet-radio platforms.<sup>159</sup> The deal was finalized in 2014 on undisclosed terms, but it is known that its structure is analogous to performance royalties given to copyright holders in musical works.<sup>160</sup> The payments will bypass SoundExchange and will be made directly to the label.<sup>161</sup>

The BillboardBiz reports the deal between the Big Machine and Cox “marks the latest in a growing list of agreements between labels and broadcasters that cover broadcast and Internet performances.”<sup>162</sup> Radio executives are willing to enter into such contracts because they allow them to approach “the radio business ‘holistically,’ meaning that [they set] a percentage rate based on advertising revenue brought in against music airplay [as opposed to the number of plays], regardless of whether the broadcast is transmitted via radio, mobile phone or . . . a computer.”<sup>163</sup>

#### IV. EVALUATION OF THE ALTERNATIVE METHODS TO SECURE PUBLIC PERFORMANCE ROYALTIES

The four alternatives introduced between 2014 and 2015 have the common goal of ensuring heritage artists receive the protection and

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158. Glenn Peoples, *Big Machine, Cox Media Group Sign Direct Licensing Deal*, BILLBOARDBIZ (June 12, 2014, 11:44 AM), <http://www.billboard.com/biz/articles/news/legal-and-management/6121112/big-machine-cox-media-group-sign-direct-licensing>.

159. *Id.* (“Cox . . . owns numerous country stations, including the KKBQ in Houston, in its 57-station portfolio that reaches 14 million listeners weekly.”).

160. *Id.*

161. Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal To Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARDBIZ (June 5, 2012, 7:00 AM), <http://www.billboard.com/biz/articles/news/1094776/exclusive-clear-channel-big-machine-strike-deal-to-pay-sound-recording>.

162. Peoples, *supra* note 158; *see also id.* (reporting Big Machine had signed similar contracts with Clear Channel and Entercom in 2012, and Beasley Broadcasting Group in 2013; independent labels Glassnote and BBR Music Group signed performance royalties contracts with Clear Channel in 2013, but the 2013 deal between Warner Music Group and Clear Channel remains “the first and only deal of its kind by a major label”).

163. Christman, *supra* note 161.

compensation they deserve. At the same time, the proponents of each alternative talk past one another, without recognizing that they advance some of the same arguments. This Part evaluates the arguments in favor of each proposal and illustrates how the interests of heritage artists would be best served by all parties putting their resources behind full federalization of copyright in pre-1972 sound recordings.

To examine the alternative methods to secure digital royalties, this Article proposes to adopt an evaluation model that considers the following factors: (1) the alternative's effectiveness in securing the public performance royalties; (2) the alternative's availability to heritage artists; (3) preservation of the existing property and contractual rights; (4) its adaptability; and (5) compatibility with federal public policy.<sup>164</sup>

Before evaluating the effectiveness of the four alternatives, however, it is necessary to clarify this author's view on performance rights in sound recordings. First, there are no substantive differences between pre-1972 and post-1972 sound recordings. The only differences appear to be the timing and the medium of fixation; however, these are more or less accidental and do not justify disparate treatment.<sup>165</sup>

Second, while the *Flo & Eddie* cases show that the precise scope of the performance right in sound recordings is yet to be determined, sound recordings (as a category of copyrighted works) are not inherently incompatible with a broad performance right under common law. The reasoning of the court for the Central District of California seems persuasive: every time a new type of work is folded into the federal subject matter, the copyright holder's rights are curtailed in exchange for a narrower—albeit a more effective—form of federal protection.<sup>166</sup> In this sense, Congress may have narrowed sound recordings' common law performance rights when it gave some of them federal protection.<sup>167</sup>

Third, neither pre-1972 nor post-1972 sound recordings are *per se* entitled to a broad performance right under federal law. As will be discussed below, Congress and the judiciary reserve the right to adjust

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164. Some of these factors stem from 17 U.S.C. § 301 (federal preemption with respect to other laws).

165. See Huppe, *supra* note 129 (“Hall & Oates, who released their first tracks just months after the arbitrary date of February 15, 1972, . . . are paid for all their hits. If [they] had recorded their album just nine months prior to their November 1972 release, they [would not be paid].”).

166. See *Flo & Eddie Inc. v. Sirius XM Radio Inc.*, No. CV 13-5693 PSG (RZx), 2014 WL 4725382, at \*6 (C.D. Cal. Sept. 22, 2014) (explaining how the DMCA narrowed down California common law); see also *supra* Section II.A (explaining that the federal statutes curtailed the potentially perpetual duration of copyright and imposed the fixation requirement).

167. In addition, the Copyright Office studies concluded that the use of explicit carve-outs in many state statutes is indicative of broad common law rights in sound recordings. See, e.g., RINGER, *supra* note 29, at 8-9 (reporting the results of a comprehensive study of state statutes).

the bundle of rights attached to federally-protected copyrighted works based on considerations of public policy.<sup>168</sup>

*A. The Effectiveness in Securing Digital Performance Royalties*

This factor addresses the “wants” of heritage artists. Their greatest short-term concern is securing the right to digital royalties.<sup>169</sup> Given the topic of this Article, this claim is obvious enough to be stated rather than defended. Accordingly, the RESPECT Act and full federalization are presumed effective because they will secure the same digital royalties that are currently enjoyed by the post-1972 sound recordings. Since the PFPF Act reaches further and seeks to enlarge performance rights in all sound recordings, it is presumed effective to the extent it confers digital performance rights to heritage artists, without deciding its effectiveness in securing a broader bundle of rights.

Because states have created several protection regimes, it is impossible to draw simple conclusions about the effectiveness of this alternative in securing public performance royalties. Obviously, it is ineffective where state statutes explicitly deny performance royalties—digital or otherwise—to sound recordings, as is the case in North Carolina and South Carolina.<sup>170</sup> Statutes of other states, such as Georgia—where it is unlawful to “transfer or cause to be transferred any sounds or visual images recorded” without the consent of the owner of the master recording<sup>171</sup>—may accommodate a digital performance right.

Where state protection is available, however, it provides heritage artists with the unique ability to secure performance royalties from AM/FM stations. Recall that the DPRA and the DMCA, as codified in § 114(d) of the Copyright Act, exempt AM/FM broadcasters from paying

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168. See *infra* Section IV.E.

169. See Steven J. Horowitz, *Copyright's Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 337 (“Although there are many who would produce expressive works irrespective of copyright protection,” compensation remains a key concern for most copyright holders.).

170. See *supra* Section III.A.

171. Under Georgia Code, it is a felony

for any person, firm, partnership, corporation, or association knowingly to . . . [t]ransfer or cause to be transferred any sounds or visual images recorded on a phonograph record, disc, wire, tape, videotape, film, or other article on which sounds or visual images are recorded onto any other phonograph record, disc, wire, tape, videotape, film, or article without the consent of the person who owns the master phonograph record, master disc, master tape, master videotape, master film, or other device or article from which the sounds or visual images are derived . . . .

GA. CODE ANN. § 16-8-60 (West 2015).

digital performance royalties.<sup>172</sup> Since pre-1972 sound recordings are not protected under these acts, they are not bound by their exemptions either.<sup>173</sup>

It is unclear what the recent *Flo & Eddie* decisions signify. New York and California seem more likely to “lend their ears” to heritage artists because these states have historically been and remain major artistic centers, yet the Turtles were successful only in California.<sup>174</sup> Despite New York’s strong and long-recognized interest in protecting performing artists’ rights,<sup>175</sup> the litigation there is not over, and the decision of the lower court may well be reversed on appeal. It is also unclear whether heritage artists will be able to persuade the courts that they are entitled to royalties after tolerating performance of their works for decades.<sup>176</sup> The Florida court that heard the *Flo & Eddie* case stated that Florida common law is different from that of New York and California and categorically refused to create a new performance right.<sup>177</sup> Lastly, the fact that heritage artists support the RESPECT Act and the PFPF Act shows the overall ineffectiveness of state protection.

### B. Availability

This factor considers whether a given alternative is currently available to heritage artists, and if not, when it may become available.<sup>178</sup> This is a purely practical consideration and does not speak to the merits of the four alternatives.<sup>179</sup> However, given that the majority of heritage artists are in their sixties and seventies,<sup>180</sup> and that traditional record sales have been dwindling since the industry-wide shift to the pay-per-performance model, it is obvious that heritage artists put a premium on the time it takes to receive compensation and are willing to forego the

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172. See 17 U.S.C. § 114(d) (detailing the limitations on the exclusive right under § 106(6)).

173. The deal between Cox and Big Machine shows an amicable compromise between heritage artists and broadcasters is also possible. See *supra* Section III.E.

174. See *supra* Section III.A.

175. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 344-45 (S.D.N.Y. 2014) (“New York has always protected public performance rights in works . . .”).

176. See *supra* text accompanying note 113 (discussing Sirius XM’s laches defense).

177. See *supra* Section III.A.3.

178. See Tummarello, *supra* note 12 (“It’s unfair for [heritage artists] to have to wait for the comprehensive review . . .”) (quoting Holding).

179. See *id.* (“[O]lder musicians should be compensated before it’s too late . . .”) (quoting Holding).

180. See, e.g., *Richie Furray*, WIKIPEDIA (last modified Oct. 8, 2016) (reporting he was born in 1944); *Gene Chandler*, WIKIPEDIA (last modified Nov. 13, 2016) (reporting he was born in 1937); *Mark Farmer*, WIKIPEDIA (last modified Oct. 29, 2016) (reporting he was born in 1948).

best solution in favor of a quick one.<sup>181</sup> In other words, not all of them can wait for a comprehensive reform of federal copyright law.

Unfortunately, none of these four alternatives (with the possible exception of state law) are truly available to heritage artists today. The Congressional docket shows the RESPECT Act is still pending review before the Subcommittee on Courts, Intellectual Property, and the Internet,<sup>182</sup> and so is the FFPF Act.<sup>183</sup> The Copyright Office's reports on full federalization are available to Congress, but the latter has been unwilling to listen.<sup>184</sup>

In addition, the fact that the RESPECT Act, the FFPF Act, and the supporters of full federalization of heritage artists' works seek changes in the payment scheme under the DPRA and DMCA means the radio lobby will attempt to prevent or at least slow down such changes. Since the FFPF Act would grant the broad performance right to sound recordings, it will probably be the slowest to be adopted of the four alternatives. Some Capitol Hill insiders have conceded the need to bring all sound recordings under the common denominator of federal copyright law but have opined that Congress is not ready for another major revision of the Copyright Act.<sup>185</sup> The wheels of the legislative machine certainly turn slowly: it took Congress over a decade to finalize the 1976 Copyright Act.<sup>186</sup>

Assuming state common and statutory laws are flexible enough to accommodate the digital performance right, protection may continue to be inaccessible to all but wealthy artists. Even if the New York decision

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181. See T. Bone Burnett, *T Bone Burnett's Plea: The Piper Must Be Paid*, L.A. TIMES (June 4, 2014, 5:41 PM), <http://www.latimes.com/opinion/op-ed/la-oe-burnett-music-royalties-20140605-story.html> ("At some point record sales wither, or touring—an expensive and arduous enterprise to begin with—becomes too hard, and then a great many of our artists find themselves in a fix.").

182. *All Actions, H.R.4772—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4772/all-actions> (last visited Apr. 13, 2015).

183. See Tummarello, *supra* note 12 ("Despite the renewed activity, one lobbyist expressed doubt that a major overhaul could make it through the House.") (commenting on Nadler's proposal).

184. See, e.g., PALLANTE, *supra* note 3.

185. *The Hill*, a publication that focuses on proposed legislation and federal policy, reports:

The lobbyist said a comprehensive bill "is the right thing to do" because it would address the inequities in the system and ensure that all musicians are treated the same. "But in D.C., what makes sense . . . and what can politically happen aren't always the same thing."

Tummarello, *supra* note 12.

186. See *supra* Part II.

in *Flo & Eddie* is affirmed on appeal, the prohibitive cost of litigating<sup>187</sup> in several jurisdictions may deter others from following the Turtles' example.<sup>188</sup> In addition, heritage artists may be unable to obtain class certification to fund the litigation collectively.<sup>189</sup>

### C. Preservation of Current Property and Contractual Rights

Preserving existing property and contractual rights in pre-1972 works is as important to heritage artists as obtaining digital performance royalties. In fact, fear of unsettling the existing rights has been one of the main arguments against full or partial federalization of copyright in pre-1972 sound recordings.<sup>190</sup> Some commentators warn that changing the dual regime will “render many deals unclear . . . , make others more difficult to interpret, and [will] likely result in financial losses.”<sup>191</sup> Likewise, unsettling the existing rights may lead to the contents of entire catalogs being “tied up in court.”<sup>192</sup> The Copyright Office even acknowledged the possibility that unsettling the existing rights may disturb “contractual arrangements, ownership, transfer, [and] termination” of rights.<sup>193</sup>

To be fair, preservation of the current property and contractual rights is not an issue under the current dual regime. Likewise, the RESPECT Act and the FFPF Act would not affect property and contractual rights of all parties involved because ownership of copyright in pre-1972 sound recordings would remain under state purview.<sup>194</sup>

If performance royalties become a matter of course, certain parties may, in hindsight, regret their decision to transfer copyrights at a depressed value, but such private transfers are beyond the scope of this Article. The RESPECT Act and the FFPF Act, as well as the *Flo & Eddie* decisions, are also likely to alter the contractual expectations of digital broadcasters and users and affect interests of other stakeholders.<sup>195</sup> Since these issues implicate public policy, they will be discussed below.<sup>196</sup>

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187. AM. INTELL. PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 50 (2013) (estimating the total cost of a copyright infringement suit may be as high as \$3.5 million).

188. *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 352 (S.D.N.Y. 2014) (expressing doubt that heritage artists would enforce their rights on a state by state basis).

189. *See id.* at 330 (describing the matter as “putative class action”).

190. PALLANTE, *supra* note 3, at 106.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See* Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2d Sess. 2014); H.R. 1733.

195. *See* PALLANTE, *supra* note 3, at 111.

196. *See infra* Section IV.E.

On the other hand, full federalization seems to be fraught with difficulties when it comes to preserving current rights and even determining who currently owns the copyright in pre-1972 sound recordings. These difficulties, however, are not insurmountable. As the Copyright Office suggested, state laws should determine the current copyright owner in all situations, including if the transfer of the object of fixation triggered transfer or divestiture pursuant to the *Pushman* doctrine.<sup>197</sup>

Additionally, § 203 of the current act should be amended to allow the termination of transfers and licenses that will be made on or after the date federal protection commences, but termination of pre-federalization transfers should be prohibited.<sup>198</sup> The term of protection for pre-1972 sound recordings should be ninety-five years from publication or, if the work had not been published prior to the effective date of legislation federalizing its protection, one hundred and twenty years from fixation.<sup>199</sup> In no case should protection continue past February 15, 2067.<sup>200</sup>

Although the Copyright Office considers identification of the current copyright owners and recordation to be the most challenging part of the transition from the dual regime to a unified federal regime,<sup>201</sup> other sources are less concerned. For example, Brooks concludes that more than 84% of sound recordings “had a current owner who controlled the recording today.”<sup>202</sup>

#### D. Adaptability

This factor evaluates the staying power of the four alternatives. If the history of copyright teaches us anything, it is that copyright law is not a proactive, but rather a reactive body of law, constantly trying to keep up with technological advances.<sup>203</sup> Today’s heritage artists are disadvantaged because of the digital radio industry’s refusal to pay royalties. Tomorrow, however, may bring a new method of fixation or a delivery system that does not share digital radio’s shortcomings, such as a digital cliff, *i.e.*,

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197. See PALLANTE, *supra* note 3, at 141, 145-46; see also *Pushman v. N.Y. Graphic Soc., Inc.*, 39 N.E.2d 249, 251 (N.Y. 1942) (holding unconditional sale of a painting triggered transfer of the right to reproduce to the buyer).

198. PALLANTE, *supra* note 3, at 177.

199. *Id.*

200. *Id.*

201. *Id.* at 173.

202. Brooks, *supra* note 46, at 128.

203. See Ginsburg, *supra* note 61, at 1614-17 (exploring the federal legislature’s reactions to new technologies); see also Salil K. Mehra, *Law and Cybercrime in the United States Today*, 58 AM. J. COMP. L. 659, 685 (2010) (concluding that reactive litigation dominates the U.S. efforts to deal with cybercrime, including copyright infringement).

sudden loss of digital reception.<sup>204</sup> If and when a new delivery system emerges, a narrowly-tailored system of copyright protection may become ineffective.<sup>205</sup>

From this standpoint, full federalization and partial federalization under the FFP Act are the most desirable options because they are the most adaptable out of the four alternatives. Federal law provides for a broad protection of sound recordings fixed in phonorecords by “any method now known or later developed.”<sup>206</sup> Thus, a new method of fixation would not invalidate copyright in subject matter already under federal purview. The FFP Act brings this idea to a new level: by removing the word “digital” in reference to sound recordings throughout the 1976 Copyright Act, it would eliminate the need to pass a new DMCA-like legislation when a new delivery system appears. By the same token, the RESPECT Act is the least adaptable. It provides only a limited solution for securing royalties from digital radio and does not contemplate an invention of a new delivery platform.

The level of adaptability of state laws varies depending on the jurisdiction. The *Flo & Eddie* decisions show that while courts may read a new, digital performance right into common law, both the New York and California courts had to push and pull to make the performance right fit.<sup>207</sup> The California court had to look at the situation from all conceivable angles, including unfair competition, conversion, and misappropriation.<sup>208</sup> The New York district court creatively decided that performance may be a form of distribution but not a divesting publication.<sup>209</sup> In addition, the circumstances surrounding the enactment of the 1971 Amendment suggest that attempting to enforce digital performance rights in several jurisdictions may lead to chaos: similar to

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204. See *Interference with Radio, TV and Telephone Signals*, FED. COMM. COMMISSION, <http://www.fcc.gov/guides/interference-defining-source> (last visited Apr. 8, 2015) (discussing digital radio’s intolerance of radio frequency noises); BEARCOM, WHITE PAPER: COMPARING AND CONTRASTING ANALOG AND DIGITAL TWO-WAY RADIOS 5 (2010).

205. See Dan Costa, *The Internet Radio Death Watch*, PCMAG (Aug. 21, 2008), <http://www.pcmag.com/article2/0,2817,2328508,00.asp> (referring to Pandora as “the canary in the coal mine”).

206. 17 U.S.C. § 101 (2010) (phonorecord definition).

207. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325 (S.D.N.Y. 2014); *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, No. CIV 13-5693 PSG(RZx), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014).

208. See *Flo & Eddie*, 2014 WL 4725382.

209. See *supra* Section III.A.

music pirates, broadcasters are likely to take advantage of the differences among state laws.<sup>210</sup>

The related jurisdictional and evidentiary questions also make this author question the wisdom of attempting to read digital performance rights into state law. To begin, it will be difficult to determine which law applies. Under *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, the law of the jurisdiction where the infringement occurred governs infringement issues.<sup>211</sup> This principle becomes difficult to apply in the digital radio context. For example, when the digital radio receiver, the server containing sound recordings, and the broadcaster's principal place of business are located in different states or countries, all three locations may be viewed as places of infringement.<sup>212</sup> Additionally, even if a court is able to determine the governing law, it may be impossible to locate infringers based on their IP addresses.<sup>213</sup>

#### *E. Compatibility with Federal Public Policy*

The proposed evaluation model requires that the four alternatives be measured in terms of their compatibility with federal public policy. This includes the juxtaposition of interests of heritage artists against the interests of other stakeholders, the public, and the U.S. government.<sup>214</sup>

By way of background, the U.S. federal copyright law exists to promote the public welfare by advancement of knowledge and promotion of learning.<sup>215</sup> Copyright holders are rewarded for their efforts in creating original works of authorship, but only to the extent that such rewards do not interfere with the Copyright Act's primary purpose.<sup>216</sup> *Quid pro quo*,

210. *See, e.g., Sheridan v. Theartmedia, Inc.*, No. 15-cv-7574 (WHW)(CLW), 2016 WL 1059268, at \*4 (D.N.J. Mar. 16, 2016) (staying claims based on New Jersey common law copyright until the Second Circuit's decision in *Flo & Eddie*).

211. *Itar-Tass Russ. News Agency v. Russ. Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998).

212. *See supra* Section III.A (Sirius XM is being sued in multiple jurisdictions).

213. *See, e.g., Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233, 237-38 (E.D.N.Y. 2012) (finding an IP address insufficient to identify a defendant because "the actual device that performed the allegedly infringing activity could have been owned by a relative or guest of the account owner, or even an interloper without the knowledge of the owner"); *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 WL 202096, at \*2 (W.D. Wash. Jan. 17, 2014) ("While it is possible that one or more of the named defendants was personally involved in the download, it is also possible that they simply failed to secure their connection against third-party interlopers. Plaintiff has failed to adequately allege a claim for direct copyright infringement.").

214. *See PALLANTE, supra* note 3, at 111 (viewing the availability of alternative ways of protection as a policy consideration).

215. The combined Copyright and Patent Clause states, "[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." U.S. CONST. art. I, § 8, cl. 8.

216. L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 48-49 (1991).

or “balanc[ing] the rights of [copyright holders] with the rights of users, present and future,” defined the U.S. copyright from its inception.<sup>217</sup> If Congress or the federal judiciary perceive copyright holders’ rewards as excessive, they may interfere to restore the balance.<sup>218</sup>

Since one of the alternatives deals exclusively with state laws, asking whether it fits within the paradigm of federal copyright may seem odd. Public policy considerations also seem out of place in this Article’s artist-centric evaluation model: unlike Congress and the judiciary, heritage artists are not charged with maintaining the quid pro quo balance and should be free to choose the solution that best serves their needs.<sup>219</sup> Put differently, copyright holders are primarily interested in “maintaining sufficient control over [sound recordings] to keep the copyright incentive meaningful.”<sup>220</sup>

Several reasons, however, justify the inclusion of this factor. By demanding fair treatment, heritage artists invite—if not force—Congress to engage in a balancing exercise.<sup>221</sup> The alternative that benefits or at least does not harm the majority of the interested parties identified above, will meet the least opposition in Congress.

In addition, heritage artists may not be immune to federal balancing, even if they choose to stay under state law protection. Although the 1976 Copyright Act explicitly provides that “no sound recording fixed before February 15, 1972 shall be subject to [federal] copyright . . . before, on, or after February 15, 2067,”<sup>222</sup> it otherwise reserves the power to limit or annul “rights [and] remedies under the common law or statutes of any [s]tate.”<sup>223</sup> It also extends general federal jurisdiction not only to the explicit causes of action arising under federal copyright law but also to matters implicating federal public policy or rights that are equivalent to the exclusive rights under § 106.<sup>224</sup> In the past, the judiciary interpreted this provision to confer jurisdiction over

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217. *Id.* at 2 (explaining that a quid pro quo, or “precarious attempt to balance the rights of [copyright holders] with the rights of users, present and future,” defined the U.S. copyright from its statutory beginnings in the early nineteenth-century England).

218. Ginsburg, *supra* note 61, at 1613.

219. *See id.*

220. *Id.*

221. This is consistent with the history of the 1976 Copyright Act. One commentator notes “[t]he negotiations over copyright revision were not merely incidental to lobbying. Indeed, Congress consistently resisted lobbying over substantive issues, insisting instead that would-be lobbyists sit down with their opponents and seek mutually acceptable solutions.” Litman, *supra* note 44, at 871.

222. 17 U.S.C. § 301(c) (2012).

223. 17 U.S.C. § 301(b).

224. 17 U.S.C. § 301(a), (b).

disputes involving foreign-made sound recordings,<sup>225</sup> thus it is plausible that they may do the same in disputes involving pre-1972 sound recordings.<sup>226</sup>

The trouble is that there is always a group whose interests are harmed by any given alternative. For example, private contracts under state laws cut SoundExchange out of the revenue stream<sup>227</sup> and may eventually displace both SoundExchange and the PRS if broadcasters enter into direct deals for consolidated royalties with labels.

Copyright issues also tend to intertwine with political ones. Introduction of sound recording bills is becoming something of a national pastime. As one commentator observed, such bills are introduced to the House of Representatives with a lot of fanfare, but interest quickly peters out.<sup>228</sup> When commenting specifically on Nadler's Music Bus Act proposal, that observer joked to "expect a 'Music Bicycle' and a rough ride."<sup>229</sup> A closer look at the congressional docket reveals a number of "respect" acts aiming to protect other groups of underprivileged professionals that went nowhere.<sup>230</sup> For these reasons, this Section will be limited to what this Article perceives as the core issues.

### 1. The United States' Interest in Clarity and Consistency of Its Copyright Laws

The issue of copyright in pre-1972 sound recordings implicates numerous concerns of the U.S. government. First and foremost, the United States is interested in avoiding economic harm to copyright holders, ensuring public access and preservation of sound recordings, and maintaining the clarity and consistency of its laws.<sup>231</sup>

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225. See generally *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013) (holding the first sale doctrine applies to foreign-made goods).

226. Ginsburg, *supra* note 61, at 1614 (noting the balance is not "immutable").

227. Christman, *supra* note 161.

228. The *AuthorEyez* blog stated that digital royalty aspects of Title 17 have been under scrutiny well before the recent hearings on music licensing, and it seems plausible, if not highly probable, that the comments and findings from the hearings will fall by the wayside, only to rise to the surface again 5-10 years from now with a new cast of [m]embers [of Committee on the Judiciary, Subcommittee on Intellectual Property].

DeBoer, *supra* note 131.

229. *Id.*

230. See, e.g., Respecting Our Leaders in Education Model Act of 2004, H.R.3975, 108th Cong. (2d Sess. 2004).

231. PALLANTE, *supra* note 3, at 83, 90, 124.

Calling for full federalization of copyright in pre-1972 sound recordings, the Copyright Office described the exclusion of pre-1972 sound recordings from federal protection as “the *single* inconsistency in what was intended to be a seamless national system of copyright protection.”<sup>232</sup> The Copyright Office also stated that the 1976 Copyright Act departed from the goals to clarify and unify the copyright law by allowing the dual regime to continue.<sup>233</sup>

After considering several alternatives, including partial federalization through changing § 114 and various schemes involving state laws, the Copyright Office concluded that full federalization would be the clearest and most consistent alternative, while state protection would be the least clear and consistent.<sup>234</sup> This author agrees: only full federalization will once and for all eliminate the dual regime and end the disparate treatment of pre-1972 sound recordings by providing them with the same bundle of rights as federally-protected sound recordings.

Clarity and consistency are necessary not only in the domestic, but also in the international context. In 1976, when Congress was considering extending the duration of federal copyright to conform to European regulations, it issued the following statement:

The need to conform the duration of U.S. copyright to that prevalent throughout the rest of the world is increasingly pressing in order to provide *certainty and simplicity* in international business dealings. Even more important, a change in the basis of our copyright term would place the United States in the forefront of the international copyright community. Without [it], the possibility of future United States adherence to the Berne Copyright Union would evaporate . . . .<sup>235</sup>

Since no other country has a dual copyright regime for sound recordings, application of this principle to sound recordings also speaks for elimination of the dual regime in the United States.<sup>236</sup>

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232. *Id.* at 83 (emphasis added).

233. *Id.* The Copyright Office wrote:

In excluding pre-1972 sound recordings from federal protection, Congress appears to have departed from those goals. Regardless of why Congress made that decision—and the record sheds little light on Congress’s reasons—sound recordings in 1976 became the single inconsistency in what was intended to be a seamless national system of copyright protection.

*Id.*

234. *Id.* at 114-16.

235. H.R. REP. NO. 94-1476, 94th Cong., at 135 (2d Sess. 1976) (emphasis added).

236. *See, e.g.*, Brooks, *supra* note 46, at 128 (“All countries except the United States recognize that recordings are derivative works . . . .”); Ed Christman, ‘Fair Play, Fair Pay Act’ Introduced, Seeks Cash from Radio Stations, BILLBOARD (Apr. 13, 2015), <http://www.billboard.com>.

The RESPECT Act is undesirable because, as the Future of Music Coalition put it, this bill “add[s] scaffolding to an already unwieldy structure” of U.S. copyright laws.<sup>237</sup> The 1976 Copyright Act began with the premise that all works are protected regardless of the medium of fixation and that the copyright holder has the exclusive right to perform his works.<sup>238</sup> However, Congress left pre-1972 sound recordings out of federal subject matter and withheld the right to perform from post-1972 works.<sup>239</sup> Later, the legislature allowed a narrow digital performance right in post-1972 sound recordings but gave exemptions to certain pre-existing digital broadcasting venues.<sup>240</sup> The RESPECT Act will effectively create an additional exemption, this time from the dual regime. This path to digital royalties is too windy.

The FFP Act is also undesirable. While it aims to provide more clarity than the RESPECT Act by substituting a larger set of provisions for a smaller one, all it does is create a bigger exemption from the dual regime instead of completely preempting state laws.

## 2. Interests of Copyright Holders in Pre-1972 Sound Recordings

Regardless of which of the four alternatives they support, heritage artists advance the same argument: their exclusion from the royalty scheme under § 114 is unfair. Their works became the soundtrack of the twentieth century and paved the way for the modern American pop culture.<sup>241</sup> Now that the retail system has changed from pay-per-copy to pay-per-performance, their performances are celebrated but not valued.<sup>242</sup>

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com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio (reporting only China, North Korea, and Iran do not pay royalties for sound recordings).

237. *FMC Statement on Respect Act*, FUTURE MUSIC COALITION (May 28, 2014), <https://futureofmusic.org/press/press-releases/fmc-statement-respect-act>.

238. This has nothing to do with duration. *See supra* Part II.

239. *See, e.g.*, PALLANTE, *supra* note 3, at 14-15.

240. *See supra* Part II.

241. *See, e.g.*, Inouye, *supra* note 20 (reporting “legacy artists from the formative days of Rock-n-Roll, performers behind the Motown Sound, ‘60s folk[,] and psychedelic rockers” are among those who do not receive digital performance royalties). As Tim Brooks emphasizes, however, the problem transcends the music industry:

Sound recordings are an irreplaceable part of the historical record. For the past 120 years musicians, actors, public figures, and members of many ethnic groups and subcultures have committed their words, thoughts, and sounds to recorded media, creating, quite literally, a soundtrack of the past century. Through recordings, the past speaks to us directly, without the filter of second-hand interpretation or inference, whether it is a march as Sousa intended it to be performed . . . or a speech as actually delivered by Theodore Roosevelt or Booker T. Washington.

Brooks, *supra* note 46, at 125.

242. Huppe, *supra* note 129.

Their opponents argue that any changes in the status quo are contrary to public policy because there is no need to incentivize heritage artists to create sound recordings because such sound recordings were made over four decades ago.<sup>243</sup> While it is true that these sound recordings have existed longer than the 1976 Copyright Act, this argument is not persuasive because Congress and the United States Supreme Court have rejected the idea that the copyright law exists only to foster future creativity.

For example, that Court upheld the constitutionality of § 104A of the 1976 Copyright Act because restoring federal copyright in certain foreign works, which had passed into the public domain for failure to comply with formalities, served the United States' interests abroad and "remed[ie]d unequal treatment of foreign authors."<sup>244</sup> If foreign authors deserve equal treatment despite their failure to comply with the U.S. laws, then pre-1972 sound recordings should be treated the same as post-1972 sound recordings despite Congress's arbitrary decision to divide them into two classes.

Heritage artists' opponents also argue that, even if Congress created an imperfect bargain, the copyright holders in pre-1972 sound recordings accepted it twice: first, when the 1971 Amendment was passed, and then by agreeing to the DPRA and the DMCA.<sup>245</sup> Even assuming that their acquiescence matters,<sup>246</sup> Congress did not live up to its end of the bargain. As David Nimmer stated in 2000, "[t]he millennial hope underlying the [DMCA] is to bring U.S. copyright law 'squarely into the digital age'. . . . [T]his law proposes to 'make digital networks safe places to disseminate and exploit copyrighted materials.'"<sup>247</sup> Twenty years later, heritage artists are still unable to exploit their works.<sup>248</sup> As the Section below will show, they also fear losing copyright protection upon sharing their works with the public.<sup>249</sup>

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243. *Flo & Eddie v. Sirius XM Radio, Inc.*, 62 F. Supp. 3d 325, 343 (S.D.N.Y. 2014) (rejecting Sirius XM's argument that copyright law focuses on "fostering future creativity, as opposed to rewarding past creativity").

244. *Golan v. Holder*, 132 S. Ct. 873, 894 (2012) (upholding 17 U.S.C. § 104A as constitutional).

245. For more information on compromises during the overhaul of copyright laws resulting in the 1976 Copyright Act, see generally Litman, *supra* note 44.

246. See generally RINGER, *supra* note 29 (detailing the radio lobby pressuring Congress).

247. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 680-81 (2000).

248. See, e.g., Tummarello, *supra* note 12 (comparing refusal to pay digital royalties to stealing) (quoting Rep. Marsha Blackburn).

249. See also *infra* Section IV.E.5 (discussing lack of access).

This Article recognizes, however, that changing the status quo may provide copyright holders with a windfall. While heritage artists decry the lack of protections afforded to post-1972 works, their quest for equality does not extend beyond obtaining digital royalties.<sup>250</sup> They do not necessarily wish to be subject to the less attractive provisions of § 114, like the educational program safe harbor provision or terrestrial radio stations' exemption from paying royalty fees.<sup>251</sup> They probably would not wish to forfeit state protection where it is available or accept fair use of their works.<sup>252</sup> Since the RESPECT and FFPF Acts do not require that pre-1972 sound recordings be subject to these limitations, they tip the copyright balance too much in heritage artists' favor and therefore are less likely to be enacted. This is yet another reason why all sound recordings should be brought under the same federal system, with a set of unambiguous rights and obligations.<sup>253</sup>

### 3. Broadcasters' Interests

Digital radio broadcasters oppose any path to digital royalties.<sup>254</sup> First and foremost, broadcasters argue they do not have money to pay additional fees.<sup>255</sup> As a general matter, this is no longer true. The IFPI reported that users are moving away from sources that pirate music and prefer to receive their music through legal channels, increasing broadcasters' bottom line.<sup>256</sup>

The situation with local radio stations, however, creates a genuine cause for concern. Local radio stations have a much lower profit margin compared to national radio chains, and payment of digital royalties may put them out of business.<sup>257</sup> In recognition of "severe economic hardship" that "many thousands of local radio stations . . . will suffer . . . if any new performance fee is imposed," the House of Representatives issued a resolution declaring, "Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public

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250. See, e.g., Tummarello, *supra* note 12 (arguing it is unfair to make heritage artists wait for a comprehensive review of the Copyright Act).

251. See 17 U.S.C. § 114 (2010).

252. See Tummarello, *supra* note 12; see also PALLANTE, *supra* note 3, at 117 (discussing the possibility of drafting a model state copyright law that would "need to *establish fair use* along the lines already established by federal case law") (emphasis added).

253. Cf. PALLANTE, *supra* note 3, at 103.

254. See Victor Luckerson, *Why Musicians Want Radio Stations To Start Paying Them*, TIME (Apr. 13, 2015), <http://time.com/3818827/music-radio-pay/#>.

255. See *id.*

256. IFPI, *supra* note 73, at 7.

257. Stockment, *supra* note 18, at 2171 ("The royalty rates . . . are so high that they have forced many webcasters out of business . . .").

performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air . . . .<sup>258</sup> This resolution was issued in support of the proposed Local Radio Freedom Act. If passed, this bill will foreclose the possibility of collecting digital royalties from local radio stations under full or partial federalization alternatives.<sup>259</sup> Moreover, this act may dissuade the legislature from changing the dual regime.<sup>260</sup>

Second, broadcasters argue that playing sound recordings functions as advertisement and that they should not be penalized for making copyright holders' works more popular.<sup>261</sup> In other words, they make listeners more likely to buy a CD or an MP3 version of the song they hear on the radio, and this inducement fairly compensates heritage artists.

What is worrisome is that the legislature is listening. For instance, the resolution in support of the Local Radio Freedom Act expressly stated that imposing fees would “upset[] the mutually beneficial relationship between local radio and the recording industry” and that local broadcasters

provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos and associated merchandise . . . .<sup>262</sup>

The resolution also declared that both commercial and noncommercial broadcasters should be treated similarly because “the sale of many sound recordings and the careers of many performers benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting.”<sup>263</sup>

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258. Supporting the Local Radio Freedom Act, H.R. Con. Res. 17, 114th Cong. (1st Sess. 2015).

259. *See id.* (“Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings.”).

260. *Compare id.* (totaling 158 cosponsors as of April 17, 2015), *with* Respecting Senior Performers as Essential Cultural Treasures Act, H.R. 4772, 113th Cong. (2d Sess. 2014) (totaling 17 cosponsors as of April 17, 2015).

261. Deboer, *supra* note 131.

262. Supporting the Local Radio Freedom Act, H.R. Con. Res. 17, 114th Cong. (1st Sess. 2015).

263. *Id.*

This “free promotion for free play” mindset<sup>264</sup> is not new. As far back as the 1950s, broadcasters made the same argument but failed to prevent the enactment of the 1971 Amendment.<sup>265</sup> In addition, courts have rejected this argument in connection with other copyrighted works. For example, derivative works may increase the popularity of the underlying work, but this typically does not prevent a finding of infringement unless the defendant is able to show fair use.<sup>266</sup> Thus, this argument does not carry much weight.

Third, broadcasters argue “the free market is resolving many of these issues as was evidenced by [the] agreement between Cox Radio and [the] Big Machine.”<sup>267</sup> This argument is not convincing because free market solutions are rare and may not be available to heritage artists. The Big Machine produces the most popular—and the most requested on the radio—modern artists who are protected by § 114 from unauthorized digital performance.<sup>268</sup> The contract between Cox and the Big Machine was a compromise that benefited both the broadcaster and the label: the label will collect royalties for the exempt AM/FM performances in exchange for allowing the broadcaster to calculate digital royalties based on the amount of advertisements and on the number of plays.<sup>269</sup> Heritage artists simply do not have such leverage because their pre-1972 works are more popular than any new songs they may record today.<sup>270</sup>

In addition, the fact that free market solutions exist contradicts the statement that broadcasters cannot afford payment of digital royalties. As the CEO of Clear Channel, another broadcaster that signed a deal with the Big Machine, explained, “the problem here is nobody wants to be first [to pay]; nobody wants to take a chance . . . [but] somebody’s got to take the first step looking to the future instead of trying to protect the

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264. DeBoer, *supra* note 131.

265. See, e.g., *A Performance Tax Threatens Local Jobs*, NAT’L ASS’N BROAD., <http://www.nab.org/advocacy/issue.asp?id=1889&issueid=1002> (last visited Nov. 4, 2016) (“For more than 80 years, record labels and performers have thrived from radio airplay—which is essentially free advertising—from local radio stations.”).

266. See, e.g., *Schrock v. Learning Curve Int’l, Inc.*, 586 F.3d 513, 522 (7th Cir. 2009) (finding promotional photographs to be derivative works).

267. Tummarello, *supra* note 12.

268. *Artists*, BIG MACHINE LABEL GRP., <http://www.bigmachinelabelgroup.com/artists/> (last visited Nov. 4, 2016) (showing the Big Machine produces Taylor Swift, Tim McGraw, Rascal Flatts, Reba, Steven Tyler, and many other popular artists).

269. Christman, *supra* note 161.

270. See Christman, *supra* note 236 (“I don’t mind being an oldie-but-goodie, . . . but it would be good to get paid.”) (quoting Martha Reeves of the Vandellas).

past.”<sup>271</sup> Clear Channel’s CEO also agreed broadcasters’ finances will benefit from “a predictable business model.”<sup>272</sup>

To summarize, since digital royalties will diminish broadcasters’ profits, broadcasters are likely to oppose all four alternatives, although it is difficult to predict which of the four will meet the most vigorous opposition.<sup>273</sup> The FFP Act will require all types of broadcasters—digital and terrestrial, subscription and nonsubscription, interactive and noninteractive—to pay royalties.<sup>274</sup> Thus, this alternative will be opposed by broadcasters exempt under § 114, like AM/FM radio. At the same time, the FFP Act will provide the most predictable model of payments and favorable terms to small radio stations and protect private deals between broadcasters and labels.

Full federalization will guarantee § 114’s exemptions, but some nonexempt digital broadcasters will still be required to pay royalties to heritage artists. The RESPECT Act will foreclose the possibility of obtaining royalties under state laws, but will require payments under the federal licensing scheme.<sup>275</sup> Where available, the right to digital performance under state laws will also threaten broadcasters’ interests, especially in the absence of § 114’s protections.

#### 4. Copyright Holders of Musical Works and Post-1972 Sound Recordings

In the past, copyright holders of musical works were the unlikely allies of broadcasters. Copyright holders of musical works were concerned that expanding protection of sound recordings would translate into reduced licensing fees for public performance of musical works, and that sealed the alliance.<sup>276</sup> There are grounds for the same concerns today because copyright royalty judges are required to set royalty rates in a manner that, *inter alia*, “minimize[s] any disruptive impact on the structure of the industries involved . . . .”<sup>277</sup> Full federalization, the RESPECT Act, and reading the digital performance right into common law will hurt the interests of this group. Thus, holders of copyright in

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271. Christman, *supra* note 161.

272. *Id.*

273. Tummarello, *supra* note 12 (“[A]ny comprehensive bill that includes fees for AM/FM radio stations is certain to draw vigorous opposition from broadcasters . . .”).

274. *See* Fair Play Fair Pay Act of 2015, H.R. 1733, 114th Cong. § 8 (1st Sess. 2015).

275. *See supra* Section III.B.

276. *See supra* Section III.A.

277. 17 U.S.C. § 801(b)(1)(D) (2006).

musical works are more likely to support the FFPF Act because it expressly prohibits reducing musical royalties.<sup>278</sup>

On the other hand, copyright holders of sound recordings made after February 15, 1972, and modern artists may benefit from digital performance royalties to heritage artists because broadcasters will stop filling the air with royalty-free pre-1972 material.<sup>279</sup> The prospect of royalties from terrestrial radio stations to all sound recordings under the FFPF Act, access to rare sound recordings, and an opportunity to include them in their own works under the federal fair use doctrine are also tempting.<sup>280</sup>

##### 5. The Interest of the Public and the United States in Access and Preservation

The Copyright Office named preservation of works and public access as two areas implicating the interest of the public at large.<sup>281</sup> Federal legislation reflects that the American society celebrates music as part of its cultural identity and values the role it plays in the formation of personhood.<sup>282</sup> The interest in public access and preservation is consistent with the interests of heritage artists because heritage artists do not seek to make their works secret or limit public access to them.<sup>283</sup>

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278. H.R. 1733 § 8.

279. *See, e.g.*, Christman, *supra* note 161 (reporting that the Clear Channel CEO acknowledged broadcasters use pre-1972 sound recordings to avoid playing digital performance royalties). As a recent Berklee graduate summed up:

the only way to go about protecting those records is to grant them parity with their underlying compositions across all media. If consumption has migrated to the digital realm, then so be it[,] but there's no reason for the government to effectively subsidize companies like Pandora and Sirius XM. Streaming companies should . . . be forced to pay better than micropennies for performance royalties rather than making artists carry these businesses operating costs based on superannuated exposure logic. The whole system is overdue for major reform.

Online Interview with James J. Taylor, CEO of Obylisk Consulting & Mgmt., in Wilmington, DE (Apr. 10, 2015) (on file with author).

280. *See* Bruce J. McGiverin, *Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds*, 87 COLUM. L. REV. 1723, 1724 (1987) (noting “widespread” digital sampling).

281. PALLANTE, *supra* note 3, at 90-100.

282. *See, e.g.*, Darwin Muir & Jeffery Field, *Newborn Infants Orient to Sounds*, 50 CHILD DEV. 431, 431 (1979) (reporting infants respond to specific sounds); *We Owe It All to You*, NAT'L ASS'N FOR MUSIC EDUC. (Apr. 7, 2015), <http://www.nafme.org/we-owe-it-all-to-you/> (explaining that the Every Child Achieves Act of 2015 proposes to add “music” to the core academic subject section of the No Child Left Behind Act).

283. *See* Randy Lewis, *Project 72 Campaign Aims for Equal Royalties in Digital Radio*, L.A. TIMES (May 29, 2014, 3:00 AM), <http://www.latimes.com/entertainment/music/posts/la-et-ms-project-72-sound-exchange-royalties-digital-radio-20140528-story.html> (“Digital

Heritage artists are also not interested in putting digital and satellite radio stations out of business, either.<sup>284</sup> Broadcasters argue that extending digital performance rights to pre-1972 sound recordings or reading the digital performance right into state laws will limit public access to copyrighted works.<sup>285</sup> They predict payment of performance fees will increase subscription fees and advertisement costs.<sup>286</sup> Indirectly, this may affect public access to sound recordings, but it is reasonable to expect that sound recordings will remain available through public libraries and traditional retail. Thus, considerations of preservation and public access do not weigh against granting digital royalties to pre-1972 sound recordings.

More importantly, a number of studies have concluded that full federalization of pre-1972 sound recordings will increase public access because federal law does not divest copyright protection due to public sharing, unlike some state laws.<sup>287</sup> In 2011, the Copyright Office reported the majority of stakeholders believed full federalization would increase access to pre-1972 sound recordings.<sup>288</sup> Eliminating the risk of inadvertent divestiture of rights would make libraries and archives less conservative about allowing public access to pre-1972 materials.<sup>289</sup> Standing alone, payment of digital royalties under other alternatives is less likely to incentivize sharing. It follows that the public interest in access and preservation of sound recordings is most directly aligned with full federalization.

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radio companies like Sirius XM and Pandora offer listeners a wide array of music. That's good for fans, and good for musicians like us. It's worth celebrating." (quoting Michael Huppe).

284. *See id.*

285. *See, e.g., A Performance Tax Threatens Local Jobs, supra* note 265 ("A performance tax could financially cripple local radio stations, harming the millions of listeners who rely on local radio for news . . . and entertainment every day.").

286. *See, e.g., H.R. Con. Res. 17, 114th Cong. (2015)* ("[T]here are many thousands of local radio stations that will suffer severe economic hardship if any new performance fee is imposed . . .").

287. *See, e.g., Tim Brooks, Copyright and Historical Sound Recordings: Recent Efforts To Change U.S. Law, in 65 NOTES 464, 466 (2009)* (reporting only 14% of historic sound recordings were made available to the public).

288. PALLANTE, *supra* note 3, at 97.

289. As the Copyright Office explained,

[n]ational uniformity and clarity are particularly important in the digital era, when libraries and archives must reproduce works . . . to preserve them and in many cases wish to make them publicly accessible by means of distribution of phonorecords or by transmissions of public performances. With a single set of applicable laws, even the most risk-averse institution can make informed decisions as to what laws and what exceptions apply to its activities.

*Id.* at 121.

## V. CONCLUSION

The issue of copyright in pre-1972 sound recordings is complex; simple answers are not always possible. However, it is clear that full federalization is the best countermeasure to the disparate treatment of heritage artists' works.

The other three alternatives—state protection, the RESPECT Act, and the FPPF Act—are inferior to full federalization of copyright in pre-1972 sound recordings under the proposed evaluation model.<sup>290</sup> While all three have some positive features and help raise awareness of heritage artists' plight, they also have significant disadvantages. State protection is undesirable because of high litigation costs and uncertainty of results.<sup>291</sup> The RESPECT Act is undesirable because it provides an imperfect, narrow solution that will not keep pace with technological innovations.<sup>292</sup> Finally, the FPPF Act is undesirable because it proposes to tip the balance too much in heritage artists' favor, and thus is contrary to federal public policy.<sup>293</sup>

This Article acknowledges that heritage artists put a premium on the time factor and are more interested in a fast solution rather than a perfect one.<sup>294</sup> However, since full federalization, the FPPF Act, and the RESPECT Act propose changes to the licensing scheme under § 114, all three are likely to meet vigorous opposition from the radio lobby.<sup>295</sup> Under these circumstances, it is best for heritage artists to demand the same federal protection enjoyed by other copyrighted works instead of extending resources to add yet another provision to the already complicated structure of the U.S. copyright law. Only full federalization of copyright in pre-1972 sound recordings will give heritage artists the respect they deserve.

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290. *See supra* Part IV (describing the evaluation model).

291. *See supra* Section IV.A.

292. *See supra* Section IV.E.1.

293. *See supra* Section IV.E.2.

294. *See supra* Section IV.B.

295. *See supra* Section IV.E.3.