

OH BROTHER, WHERE ART THOU ROYALTIES?: REFLECTING ON THE EMERGENCE OF BLUEGRASS AND APPALACHIAN FOLK MUSIC IN PROMOTING THE AMERICAN MUSIC FAIRNESS ACT

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The film Oh Brother, Where Art Thou ironically illustrates two points that are relevant in the context of copyright law within the music industry. First, it displays the strength of radio play on new artists' lives, careers, and incomes, which was crucial for bluegrass and string-band artist. Second, the film highlights the distinction between the sound-recording copyholder's exclusive right to publicly perform their copyrighted sound recording live and the absence of any such right concerning terrestrial radio broadcasts. The absence of a public-performance right for broadcasts of copyrighted sound recordings by terrestrial radio stations (and the resulting non-incurrence of royalty payments by sound-recording copyholders from terrestrial radio stations) is called the terrestrial radio exemption. And the recent Classics Protection and Access Act, which equitably reformed many aspects of the federal statutory royalty-payment scheme, preserved the exemption.

This Article demonstrates that the recently proposed American Music Fairness Act is a much-needed supplement to the Classics Protection and Access Act because it would eliminate the terrestrial radio exemption. This would promote parity with other developed nations, such as the Czech Republic and Japan, who have thriving bluegrass scenes, and would help American artists receive royalties abroad. More importantly, eliminating the terrestrial radio exemption would honor the intellectual property rights of bluegrass and Appalachian folk artists.

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INTRODUCTION

Inspired by Homer’s *Odyssey*, *O Brother, Where Art Thou* was a 2000 film that empowered the South and helped bluegrass, folk, and string-band music gain notoriety.¹ Set in 1937 rural Mississippi during the Great Depression, the movie tells the tale of three escaped convicts who are told by a blind and elderly handcar operator that they will find a fortune, but not in the way they expect.² During the midst of their escape, Ulysses Everett McGill, a man who was arrested for practicing law without a license, slow-witted Delmar, and hot-tempered Pete, pick up a young African-American hitchhiker, a guitarist named Tommy Johnson.³

Tommy, like the famous delta-blues guitarist Robert Johnson,⁴ claims that he

1. Leslie Blake Price, *Bluegrass Nation: A Historical and Cultural Analysis of America’s Truest Music* 33 (May 10, 2011) (Chancellor’s honors thesis, University of Tennessee), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=2472&context=utk_chanhonoproj [<https://perma.cc/G7AV-6PW5>].

2. *O BROTHER, WHERE ART THOU?* (Touchstone Pictures 2000) [hereinafter *O BROTHER FILM*].

3. *Id.*

4. Hugh Ruppensburg, *Oh, So Many Startlements . . .”: History, Race, and Myth in O Brother, Where Art Thou?*, *S. CULTURES*, Winter 2003, at 5, 17–18.

sold his soul to the devil in exchange for musical virtuosity.⁵ Hearing from Tommy about a local radio station that pays people to “sing into a can,” they all visit the blind disc jockey at WEZY radio station.⁶ They introduce themselves as the Soggy Bottom Boys and agree to perform “ol’ timey” music, which, according to the disc jockey, is favored more than “negro music.”⁷ After recording a version of “I Am a Man of Constant Sorrow,”⁸ Everett and the gang leave with fair compensation and little documentation.⁹ But unbeknownst to them, their record swiftly gains popularity throughout Mississippi and the identity of the Soggy Bottom Boys becomes sought after by music executives.¹⁰

Later on, after they rescue Tommy from being lynched by the Ku Klux Klan, the four men sneak into a campaign dinner for Governor-elect Pappy O’Daniel disguised as the hired band.¹¹ After Delmar and Pete sing a version of “In the Jailhouse Now,”¹² the men all launch into “I am a Man of Constant Sorrow,” where they watch in bewilderment as the entire audience rises to its feet and cheers, having recognized them as the elusive Soggy Bottom Boys.¹³ Despite their exposure as convicts at large, the group is officially pardoned by O’Daniel.¹⁴ Thus, the escaped convicts’ musical journey, in essence, led them to their salvation and to better lives, the treasure that was prophesized to them in the beginning of the film.¹⁵

What is intriguing about *O Brother, Where Art Thou* is just how central music is to the movie. In addition to adding scenes saturated with biblical allegory, the film’s directors, Joel Cohen and Ethan Coen,¹⁶ carefully selected songs of darkness, hope, and redemption well-tailored to the film’s concept. The film’s soundtrack consisted not only of string-band greats such as Alison Krauss,¹⁷ Emmylou Harris,¹⁸ John

5. O BROTHER, FILM, *supra* note 2.

6. *Id.*

7. *Id.*; Ruppensburg, *supra* note 4, at 17.

8. THE SOGGY BOTTOM BOYS, *I Am a Man of Constant Sorrow*, on O BROTHER, WHERE ART THOU? (Sound Emporium 2000) [hereinafter O BROTHER SOUNDTRACK].

9. O BROTHER FILM, *supra* note 2.

10. *Id.*; Ruppensburg, *supra* note 4, at 12.

11. O BROTHER FILM, *supra* note 2.

12. THE SOGGY BOTTOM BOYS, *In the Jailhouse Now*, on O BROTHER SOUNDTRACK, *supra* note 8.

13. O BROTHER FILM, *supra* note 2.

14. *Id.*

15. *Id.*; see also Ruppensburg, *supra* note 4, at 8, 10, 21–22.

16. *O Brother, Where Art Thou?*, IMDB, <https://www.imdb.com/title/tt0190590/> [<https://perma.cc/UN3T-LPAC>].

17. ALISON KRAUSS, *Down the River to Pray*, on O BROTHER SOUNDTRACK, *supra* note 8; ALISON KRAUSS & GILLIAN WELCH, *I’ll Fly Away*, on O BROTHER SOUNDTRACK, *supra* note 8; EMMYLOU HARRIS, ALISON KRAUSS, & GILLIAN WELCH, *Didn’t Leave Nobody but the Baby*, on O BROTHER SOUNDTRACK, *supra* note 8.

18. HARRIS, KRAUSS, & WELCH, *supra* note 17.

Hartford,¹⁹ and Ralph Stanley,²⁰ but also newcomers such as Gillian Welch.²¹ As a result, the soundtrack won a Grammy for Best Album of the Year, a Country Music Association award for Album of the Year afterward, and almost fifteen years later has sold nearly eight-million copies.²² Thus, *O Brother, Where Art Thou* helped bluegrass, folk, and string-band music garner widespread acclaim from the general music industry.²³

The film also illuminates the impact that radio play has on new artists' lives, careers, and incomes.²⁴ Furthermore, the film exposes a disconnect between radio and an artist's public-performance rights for the use of their sound recordings.²⁵ Both of these notions are crucial since the rise in digital technology, especially radio, has vastly changed copyright law and how musicians are compensated.

In response, Congress enacted the Orrin G. Hatch–Bob Goodlatte Music Modernization Act in October 2018.²⁶ But parts of the new music copyright reform such as the Classics Protection and Access Act²⁷ (“CPAA”) have raised some concerns.²⁸ Even though the passage of the CPAA was much needed, these concerns must not be ignored.

This Article discusses the roots of string-band music and analyzes how the CCPA will impact it. Part I discusses the history, roots, and evolution of bluegrass music. Part II discusses the mediums for this genre of music and how they evolved. Part III summarizes the history of copyright protections for musical compositions. Part IV examines a trio of cases that highlighted issues Congress addressed in the CPAA. Part V analyzes the CPAA and a key issue that it failed to address—namely, the

19. JOHN HARTFORD, *I Am a Man of Constant Sorrow (instrumental)*, on O BROTHER SOUNDTRACK, *supra* note 8; JOHN HARTFORD, *Indian War Whoop (instrumental)*, on O BROTHER SOUNDTRACK, *supra* note 8.

20. RALPH STANLEY, *O Death*, on O BROTHER SOUNDTRACK, *supra* note 8.

21. KRAUS & WELCH, *supra* note 17; HARRIS, KRAUS, & WELCH, *supra* note 17.

22. Price, *supra* note 1, at 33; Allison Hussey, *Fifteen Years Later, Bluegrass Is Still Reeling from O Brother, Where Art Thou?*, INDY WK. (Sept. 28, 2018, 7:00 AM), <https://indyweek.com/music/features/fifteen-years-later-bluegrass-still-reeling-o-brother-art-thou/> [<https://perma.cc/HJQ7-QK6Y>].

23. STEPHANIE P. LEDGIN, *HOMEGROWN MUSIC: DISCOVERING BLUEGRASS*, at xviii (2004).

24. *See* Ruppensburg, *supra* note 4, at 12, 24.

25. *See infra* Part III.

26. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17, 19, and 28 U.S.C.).

27. Classics Protection and Access Act, 17 U.S.C. §§ 301, 1401 (2018).

28. *What The Music Modernization Act Means For Radio.*, INSIDERADIO, http://www.insideradio.com/wh-at-the-music-modernization-act-means-for-radio/article_bd460db8-7b62-11e8-bca5-6b726ba70551.html [<https://perma.cc/Z3U7-LAXT>] (July 2, 2018); *House Leaders Introduce New “Music Modernization Act,”* RIAA (Apr. 10, 2018), <https://www.riaa.com/house-leaders-introduce-new-music-modernization-act/> [<https://perma.cc/C6UG-RBW8>]; *see also* Scott Hanus, Note, *Deregulating the Music Industry: A Push to Give Power Back to the Songwriters*, 16 DEPAUL BUS. & COMM. L.J. 129, 143–47 (2018). *See generally* Amanda Alasauskas, Note, *Save Rock and Roll: A Look at Rights Afforded to Pre-1972 Sound Recordings and Why Federalization Should Be Granted*, 66 DEPAUL L. REV. 265 (2016); Callie P. Borgmann, Note, *The Future of Streaming Music: The Music Modernization Act and New Copyright Royalties Regulations*, 21 U. DENV. SPORTS & ENT. L.J. 19, 23–24 (2018).

terrestrial radio exemption—and proposes a legislative solution to eliminate the exemption.

I. THE GREAT ESCAPE: A HISTORICAL OVERVIEW OF STRING-BAND MUSIC

A. Appalachian Folk Music

To begin, it is important to understand bluegrass and its roots in Appalachian folk music. Generally, the term *folk music* denotes music that originated from among the people of a particular nation or region and was disseminated and manipulated with some variation.²⁹ Folk music often reflects traditional culture and is useful in providing pertinent insights about societies, including their views about family and community.³⁰ Folklorists John Lomax and Alan Lomax described American folk music as “homemade hand-me-downs in words and music, songs accepted by whole communities, songs voted good by generations of singers and passed on by word of mouth to succeeding generations, a tradition quite distinct from popular song . . . and cultivated art.”³¹ A few factors were important in the evolution of Appalachian folk music.

One of these factors was immigration to the Appalachian Region. In particular, Appalachian folk music derived from folk songs, ballads, dances, and instrumental pieces with many string-band motifs and unique fiddle-playing techniques brought into the Appalachian region of the southern United States by Anglo-Celtic immigrants.³² These migrants were often poor and sought opportunity and employment in the booming agricultural industry of the South.³³ But even as other regions in the United States became more urbanized and industrialized, the Appalachian South nevertheless retained its conservative ideals, likely because of the region’s geography, economy, religion, and politics.³⁴

A second factor that was important to Appalachian folk music’s development was the movement of Scotch-Irish whites into the farmlands and their interactions with African American culture.³⁵ Poor white tenant farmers who worked for rich landowners without pay often formed connections with black slaves.³⁶ Religion also

29. Daniella Fischetti, Note, *Lost in Transcription: The Impact of Copyright Legislation on Female Folk Musicians of The Twentieth Century*, 33 WOMEN’S RTS. L. REP. 285, 287–88 (2012).

30. *Id.* at 288.

31. JOHN A. LOMAX & ALAN LOMAX, *FOLK SONG USA*, at vii (Alan Lomax et al. eds., 1947).

32. Fischetti, *supra* note 29, at 288; Price, *supra* note 1, at 10; *see also* Charles W. Perryman, *Africa, Appalachia, And Acculturation: The History of Bluegrass Music* 20 (2013) (D.M.A. research project, West Virginia University), <https://researchrepository.wvu.edu/cgi/viewcontent.cgi?article=1301&context=etd> [<https://perma.cc/CZK6-QN66>].

33. Price, *supra* note 1, at 10–11; Perryman, *supra* note 32, at 20.

34. Price, *supra* note 1, at 11; Perryman, *supra* note 32, at 20.

35. Sources cited *supra* note 33.

36. Price, *supra* note 1, at 10–11; Perryman, *supra* note 32, at 21.

brought Southern whites and African Americans together; they congregated at church, worshipped, and made music with each other.³⁷ Additionally, both groups lived in close proximity to each other, which encouraged musical interaction between them.³⁸ Through these interactions, the use of slave ballads, hymns, and blues I–IV–V progressions, the addition of the banjo (an African American invention), the proliferation of sound through minstrelsy, and the spread of Appalachian folk music during the Civil War played important roles in the development of string-band music.³⁹

Other American innovations also helped shape string-band and Appalachian folk music. For instance, the advent of the railroad in the 1800s helped expand Appalachian music up North and to the newly explored western region of the United States.⁴⁰ In addition, the arrival of the Sears Roebuck Catalog improved the availability of musical instruments to both Southern whites and blacks during the Jim Crow era.⁴¹

B. *String-Band Music: The Umbrella of Old-Time and Bluegrass*

String-band music is Appalachian folk music that encompasses the sub-genres of bluegrass and old-time music.⁴² Old-time string-band music predates the birth of bluegrass and usually consisted of banjo, fiddle, or guitar instrumentation, fast tempos, and a set form with little improvisation.⁴³ Since old-time music was mainly structured for dance, playing styles centered around downbeats, virtuosity was quite limited, and vocalization was rarely implemented.⁴⁴ In contrast, bluegrass is a mixture of both white and black music in that it is an outgrowth of country music with healthy doses of blues, jazz, and old-time flavors.⁴⁵

Bluegrass not only retained the instrumentation of old-time, but also included additional instruments like the string bass, the mandolin, and sometimes the dobro.⁴⁶

37. Price, *supra* note 1, at 10–11; Perryman, *supra* note 32, at 21–22.

38. Perryman, *supra* note 32, at 22.

39. *Id.* at 13, 26, 28–32; Price, *supra* note 1, at 9, 11–14; *see also* Matthew Bumbach, *Watching Bluegrass Grow: The Rise of Bluegrass Music in the Choral World*, CHORAL J., June–July 2017, at 8, 14 (“Occasional minor progressions are found, and there is limited use of the VI chord.”).

40. Price, *supra* note 1, at 11.

41. Perryman, *supra* note 32, at 33; *see also* Whet Moser, *How Sears Guitars Changed the Sound of American Music Twice*, CHI. MAG. (May 8, 2012, 4:11 PM), <https://www.chicagomag.com/city-life/may-2012/how-sears-changed-the-sound-of-american-music-twice/> [<https://perma.cc/WSN3-8GNS>]; Antonia Noori Farzan, *Sears’s ‘Radical’ Past: How Mail-Order Catalogs Subverted the Racial Hierarchy of Jim Crow*, WASH. POST: MORNING MIX (Oct. 16, 2018, 6:39 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2018/10/16/sears-radical-past-how-mail-order-catalogues-subverted-the-racial-hierarchy-of-jim-crow/> [<https://web.archive.org/web/20220423230331/https://www.washingtonpost.com/news/morning-mix/wp/2018/10/16/sears-radical-past-how-mail-order-catalogues-subverted-the-racial-hierarchy-of-jim-crow/>].

42. *See* Price, *supra* note 1, at 7; RICHARD CRAWFORD, *AN INTRODUCTION TO AMERICA’S MUSIC* 451 (1st ed. 2001).

43. Price, *supra* note 1, at 7–8.

44. *Id.*

45. *Id.* at 8–10; LEDGIN, *supra* note 23, at 2–3.

46. Price, *supra* note 1, at 7, 9; LEDGIN, *supra* note 23, at 3.

Bluegrass also adopted prominent lead-tenor vocals that, when blended with chorus harmonies added by a high tenor and a low baritone, produced a bleak and bluesy bend known as the “high lonesome sound.”⁴⁷ Finally, bluegrass, unlike old-time music, incorporated rhythmic syncopation, usually with the banjo emphasizing the backbeats and alternating bass lines.⁴⁸

Bluegrass music was developed in the 1940s by mandolin player and Kentucky native Bill Monroe as a means of pursuing a living.⁴⁹ Monroe’s incorporation of blues and jazz into his newly-created sound derived from his relationship with Arnold Shultz, an African-American guitarist, fiddler, and son of a former slave.⁵⁰ Yet Monroe and his high-tenor voice were not solely responsible for bluegrass’s development.

Members of Monroe’s band, The Blue Grass Boys (which included Earl Scruggs and Lester Flatt), made notable contributions as well. Scruggs’s virtuoso banjo style was unique in that it involved three-finger picking using the thumb, middle, and index fingers.⁵¹ Additionally, Flatt’s guitar playing earned its place in Monroe’s genre due to its full-sounding open chords and alternating bass-note patterns.⁵²

C. *The Progression of Bluegrass and the Relinquishment of its “Conservative” Nature*

String-band music still tends to bring a sense of nostalgia and escape. Although string-band music tried retaining its “conservative” nature, it nevertheless had growing pains that helped the genre reach new levels. One of the genre’s biggest catalysts for development was the migration of Southerners from their rural roots to industrial jobs in urban and suburban settings.⁵³ Migrants’ resulting homesickness and nostalgia, in addition to their feelings of love and death and their religiosity, became themes of bluegrass canon.⁵⁴

New urban experiences for bluegrass and Appalachian folk musicians provided them with the ability to develop a fanbase, especially through radio airwaves, and to

47. Price, *supra* note 1, at 9; LEDGIN, *supra* note 23, at 3; CRAWFORD, *supra* note 42, at 452.

48. Price, *supra* note 1, at 22; *see* Perryman, *supra* note 32, at 57–59.

49. Price, *supra* note 1, at 8; LEDGIN, *supra* note 23, at 2.

50. Price, *supra* note 1, at 8–10; Perryman, *supra* note 32, at 54–56.

51. Bumbach, *supra* note 39, at 11.

52. *Id.*

53. *See generally* Nathan McGee, *Sounds Like Home: Bluegrass Music and Appalachian Migration in American Cities, 1945-1980*, at 22 (Oct. 11, 2016) (Ph.D. dissertation, University of Cincinnati), https://etd.ohio.link.edu/apexprod/rws_etd/send_file/send?accession=ucin1479824005091132&disposition=inline [https://perma.cc/5VJ8-WEZK].

54. *Id.* at 3; Bumbach, *supra* note 39, at 14. *See generally* Richard H. Underwood & Carol J. Paris, *Crimesong: Some Murder Ballads and Poems Revisited*, 12 J. S. LEGAL HIST. 5 (2004); Christina Ruth Hastie, *This Murder Done: Misogyny, Femicide, and Modernity in 19th-Century Appalachian Murder Ballads* (Aug. 2011) (M.M. thesis, University of Tennessee, Knoxville), https://trace.tennessee.edu/cgi/viewcontent.cgi?article=2127&context=utk_gradthes [https://perma.cc/VNG8-3KVE].

find a sense of authenticity.⁵⁵ This still holds true today as contemporary artists like Mumford & Sons, The Avett Brothers, Chris Stapleton, Old Crow Medicine Show, and many others merge string-band sounds, folk, blues, R&B, and country into a distinctive roots-oriented genre called Americana, which “lives in a world apart from the pure forms of the genres upon which it may draw.”⁵⁶

II. DELIVERANCE: THE HISTORY, EVOLUTION, AND DIGITALIZATION OF RADIO

A. *Radio as a Medium for String-Band Music*

Urban cities were hubs for radio stations, which were deemed essential for musicians to make a living and offered a new means of presenting the music of the South to a broad audience.⁵⁷ And radio stations also provided a means of escape to Appalachian life for both urban listeners and homesick migrants.⁵⁸ However, monetary contributions to Southern musicians came not from contracts or performance licensing, but rather from live performances with admission charges.⁵⁹

One of the most notable figures in radio contributable to the progression of bluegrass, old-time, and country music was John R. Brinkley, who, despite his reputation as a quack doctor, proved to many broadcasters that string-band and Appalachian folk music had a place in the nation’s popular culture.⁶⁰ In addition to utilizing public relations tactics, Brinkley ironically refused to play sound recordings on his radio station; he believed in the power of live entertainment.⁶¹

Forced to close his radio station in Kansas in 1930 after losing his medical license, Brinkley afterward set up another radio station called XERA in Villa Acuna, Mexico, directly across the border from Del Rio, Texas.⁶² Brinkley’s XERA became the most powerful broadcasting station in North America due to its location being outside the zone of U.S. regulation, its ability to reach many people, and the station’s

55. McGee, *supra* note 53, at 3. Scholar Sharon Zukin notes that “a city is authentic if it can create the *experience* of origins” through the preservation of aspects of the city that might feel old. SHARON ZUKIN, *NAKED CITY: THE DEATH AND LIFE OF AUTHENTIC URBAN PLACES* 3 (2010).

56. *The Music: What is Americana Music?*, *ACMA*, https://www.americnacma.org/about_us/ [<https://perma.cc/H4UA-K88S>]; see also Andrew Dansby, *Americana Blurs the Defining Lines of Country Music*, *CHRON*, <https://m.chron.com/entertainment/music/article/Americana-blurs-the-defining-lines-of-country-12305394.php> [<https://perma.cc/L8SG-QKQN>] (Oct. 25, 2017, 10:51 PM); Justin Cox, *5 Bands That Are Reviving “Bluegrass,”* *HUFFPOST*, https://www.huffingtonpost.com/justin-cox/5-bands-that-are-reviving_b_874930.html [<https://perma.cc/9NNT-DPMD>] (Aug. 10, 2011).

57. McGee, *supra* note 53, at 27, 33.

58. *Id.*

59. *Id.* at 27.

60. ORIN FRIESEN & BUD NORMAN, *GOAT GLANDS TO RANCH HANDS: THE KFDI STORY* 39 (2013).

61. *Id.* at 26 (“Records are cheap. But full-time talent is far more valuable than its initial outlay.”); see also Jason C. Gilliland, *Dr. John Brinkley: Quack Doctor, Radio Personality, and Politician*, 13 *FAIRMOUNT FOLIO J. HIST.* 99, 103–10, 117–20 (2011).

62. R. ALTON LEE, *THE BIZARRE CAREERS OF JOHN R. BRINKLEY* 105–20 (paperback ed. 2022).

output of exceeding one-million watts of electricity.⁶³ Although radio shows such as the Grand Ole Opry on WSM Nashville, the National Barn Dance on WLS Chicago, and the Wheeling Jamboree on WWVA Wheeling, West Virginia, popularized string-band and Appalachian folk music, XERA helped those genres gain national exposure.⁶⁴

Even during the Great Depression, record companies eventually realized the power of music through the airwaves and began sending out agents in search of “exploitable talent.”⁶⁵ For bluegrass and Appalachian folk music, this was both good and bad.⁶⁶ By the 1950s and 60s, as much of its programming moved to television, radio shifted its focus to music and began playing short playlists of popular hits.⁶⁷ But the radio market grew more uncompetitive as local regulations granted telecommunications companies virtual monopolies over local markets.⁶⁸ In response, Congress passed the Telecommunications Act of 1996 “[t]o promote competition and reduce regulation” among telecommunication companies, including radio-station operators.⁶⁹ But the Act also enabled media conglomerates to subsume many smaller radio stations.⁷⁰

By the late twentieth and early twenty-first centuries, radio began to evolve with the introduction of digital and satellite radio.⁷¹ The FCC defines digital radio as the transmission and reception of sound processed into patterns of numbers, or “digits.”⁷² By contrast, satellite radio uses geostationary/geosynchronous satellites to transmit

63. See Dr. John Brinkley, DIGITALHERITAGE.ORG, <https://digitalheritage.org/2010/08/dr-john-brinkly/> [<https://perma.cc/4PVL-8WE4>].

64. *Id.*

65. McGee, *supra* note 53, at 2; Price, *supra* note 1, at 18, 32.

66. Price, *supra* note 1, at 18, 32.

67. UNDERSTANDING MEDIA AND CULTURE 323–39 (University of Minnesota Publishing ed. 2016), https://open.lib.umn.edu/mediaandculture/open/download?type=print_pdf [<https://perma.cc/Z785-TNN5>]; see SUSAN J. DOUGLAS, LISTENING IN: RADIO AND THE AMERICAN IMAGINATION 219–55 (1st ed., Univ. of Minn. Press 2004).

68. See MICHAEL C. KEITH, THE RADIO STATION: BROADCAST, SATELLITE & INTERNET 17–18 (8th ed. 2010).

69. Telecommunications Act of 1996, Pub. L. No. 104-104, pmb1., 110 Stat. 56, 56.

70. KEITH, *supra* note 68, at 18–21.

71. See generally Mihalis Kuyucu, *Digital Convergence of Radio: Effects of Digitalization on Radio Media*, in 6TH INTERNATIONAL COMMUNICATION DAYS DIGITAL TRANSFORMATION SYMPOSIUM 466–95 (Nazife Güngör ed., 2019), https://www.researchgate.net/profile/Mihalis-Kuyucu/publication/348135497_Digital_Convergence_of_Radio_Effects_of_Digitilazation_on_Radio_Media/links/5fefa26ca6fdccdb822b4e6/Digital-Convergence-of-Radio-Effects-of-Digitilazation-on-Radio-Media.pdf [<https://perma.cc/4EWB-5W94>]; Jieru Zhang, *The Development of Digital Technology in Radio Industry*, 20 ADVANCES ECON. BUS. & MGMT. RSCH. 364 (2016), <https://www.atlantis-press.com/article/25869462.pdf> [<https://perma.cc/D6AG-2TS9>]; Marko Ala-Fossi et al., *The Future of Radio Is Still Digital—but Which One? Expert Perspectives and Future Scenarios for Radio Media in 2015*, 15 J. RADIO & AUDIO MEDIA 4 (2008), <https://www.tandfonline.com/doi/abs/10.1080/19376520801971337>.

72. *Consumer Guide: Digital Radio*, FED. COMM’NS. COMM’N, https://www.fcc.gov/sites/default/files/digital_radio.pdf [<https://perma.cc/MP99-BZ8S>] (Dec. 9, 2019).

and receive sound.⁷³ Providers like Sirius XM require users to purchase a receiver and pay a monthly subscription for a certain number of channels.⁷⁴

III. COPYRIGHT LAW AND THE PUBLIC-PERFORMANCE RIGHTS FOR SOUND RECORDINGS

As radio and music technology evolved, copyright law had to do the same. This Part discusses copyright law's role in the music industry and explains the circumstances that led to the passage of the CCAA.

A. History of Copyright Protection for Sound Recordings

The Intellectual Property Clause of the U.S. Constitution grants Congress the power “to 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.”⁷⁵ Congress first exercised its power under the Intellectual Property Clause when it enacted the Copyright Act of 1790, which allowed authors to register certain works with the federal government and vested in authors of registered works “the sole right and liberty [to] print[], reprint[], publish[] and vend[]” their works.⁷⁶ Under the 1790 act, “map[s], chart[s], [and] book[s]” were registerable.⁷⁷

Congress recognized “musical composition[s]”⁷⁸ and “dramatic composition[s]”⁷⁹ as registerable works in 1831 and 1856, respectively. The 1831 and 1856 acts also extended the same statutory distribution rights to authors of registered musical and dramatic compositions that authors of registered maps, charts, and books had enjoyed under the Copyright Act of 1790.⁸⁰ The 1856 act conferred upon authors of registered dramatic works the exclusive right “to act, perform, or represent” their works “on any stage or public place,” but did *not* confer the same public-performance right to authors of musical compositions.⁸¹

In 1897, Congress enacted a statutory cause of action for damages recoverable from individuals who publicly performed copyrighted musical compositions without

73. See Jeremy Laukkonen, *What Is Satellite Radio?*, LIFEWIRE, <https://www.lifewire.com/what-is-satellit-e-radio-534582> [<https://perma.cc/JRT8-GS2Z>] (Feb. 28, 2023).

74. Alasauskas, *supra* note 28, at 285.

75. U.S. CONST. art. I, § 8, cl. 8.

76. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1831).

77. *Id.*

78. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (repealed 1870); see also *infra* note 79.

79. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139 (repealed 1870). The Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (repealed 1909), re-enacted the 1831 and 1856 acts' protections with some minor differences in language. See also 60 Rev. Stat. § 4952 (2d ed. 1878) (codification of section 86 of the Act of July 8, 1870).

80. See Act of Feb. 3, 1831 § 1; Act of Aug. 18, 1856.

81. See Act of Aug. 18, 1856.

the composition's copyholder's consent.⁸² The 1897 act created a de facto public-performance right for musical composition copyholders.⁸³ Less than a decade after the 1897 legislation, the U.S. Supreme Court considered the scope of copyholders' rights to distribute musical compositions under the 1831 legislation in *White-Smith Music Publishing Co. v. Apollo Co.*⁸⁴

In *White-Smith*, the Court held that the statutory right to distribute musical compositions under the 1831 act did not extend to mechanical rolls that reproduced musical works in mechanical pianos.⁸⁵ The Court explained that "the musical rolls consist of perforated sheets, which are passed over ducts connected with the [mechanical instrument] in such matter that the same are kept sealed until, by means of perforations in the rolls, air pressure is admitted to the ducts which operate the pneumatic devices to sound notes."⁸⁶ In the Court's view, "musical composition" under the 1831 act referred only to "a written or printed record of [a composition] in intelligible notation," and neither the perforated sheet rolls nor the musical tones they produced were reproductions that "appeal[] to the eye."⁸⁷ *White-Smith* effectively held that when authors of musical compositions registered their works, federal law conferred an exclusive right to distribute sheet music containing their work in musical notation, but not a right to distribute or profit from articles that enabled machines to reproduce their work.

White-Smith also held that aural reproductions of copyrighted musical compositions produced by mechanical pianos were not statutory public performances under federal law.⁸⁸ The Court noted that the 1897 act referred to public performances by "any person"—not by any machine.⁸⁹ The Court held that the 1897 act neither substantively applied to the mechanical reproduction of a copyrighted composition nor altered the scope of the term "musical composition" as codified from the 1831 act.⁹⁰ *White-Smith* distinguished public performances of copyrighted musical works performed by individuals, which federal law protected, from "performances" of copyrighted musical works by machines, which federal law did not protect.

After *White-Smith*, a third party could not unlawfully produce sheet music containing a copyrighted musical work or publicly perform the work. But a third party could distribute an article enabling a machine to perform a copyrighted musical work and publicly exhibit a mechanical reproduction of the work by such a machine

82. Act of Jan. 6, 1897, ch. 4, 29 Stat. 481, 481–82 (repealed 1909).

83. See Zvi S. Rosen, *The Twilight of the Opera Pirates: A Prehistory of the Exclusive Right of Public Performance for Musical Compositions*, 24 CARDOZO ARTS & ENT. L.J. 1157 (2007).

84. 209 U.S. 1 (1909).

85. *Id.*

86. *Id.* at 10.

87. *Id.* at 17–18.

88. See *id.* at 18.

89. *Id.* at 16.

90. *Id.*

without the work's copyholder's permission and without owing any royalties to the copyholder. This Article refers to articles that enable machines to reproduce musical compositions as *sound recordings* and non-mechanical public performances of musical compositions by individuals as *live performances*.

1. The Copyright Act of 1909

In response to *White-Smith*, Congress enacted the Copyright Act of 1909.⁹¹ The Act effectively abrogated *White-Smith's* construction of the 1831 act's statutory distribution rights for musical compositions by extending federal distribution rights to sound recordings and not just sheet music. Specifically, the Act allowed third parties to distribute articles that could mechanically reproduce a musical work (without the work's copyholder's permission) if they paid statutory royalties to the work's copyholder.⁹² But the Act did not recognize sound recordings as a class of registerable works—the 1909 Act only recognized that musical-work copyholders had a right to profit from the production of sound recordings containing their works.⁹³ The Act also codified Congress's intent that federal copyright law not abrogate common-law protections extended to musical compositions by the states.⁹⁴

The Act further conferred upon musical-work copyholders an exclusive right “[t]o perform [their] copyrighted work *publicly for profit*.”⁹⁵ But the Act did not define “public,” “performance,” or “for profit.”⁹⁶ Over the next few decades, courts defined the breadth of musical-work copyholders' public-performance rights as applied to their works as such and to sound recordings of their works under the 1909 Act.⁹⁷

For example, the U.S. Supreme Court in *Herbert v. Shanley Co.* confirmed that the statutory public-performance right clearly applied to live performances of musical compositions intended to generate revenue (a view expressed in dicta in *White-*

91. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1947); *see also infra* note 92. *See generally* Lauren E. Kilgore, Note, *Guerrilla Radio: Has the Time Come for a Full Performance Right in Sound Recordings?*, 12 VAND. J. ENT. & TECH. L. 549, 557–58 (2010); Danielle Ely, Note, *We Can Work It Out: Why Full Federalization of Pre-1972 Sound Recordings Is Necessary to Clarify Ambiguous and Inconsistent State Copyright Laws*, 23 GEO. MASON L. REV. 737, 740–42 (2016).

92. Copyright Act of 1909 § 1(e), 35 Stat. at 1075–76. Section 1 of the Copyright Act of 1909 was codified in section 1 of title 17 of the U.S. Code, *see* 17 U.S.C. § 1 (1946), before Congress enacted title 17 into positive law in 1947, *see* Act of July 30, 1947, ch. 391, 61 Stat. 652.

93. U.S. COPYRIGHT OFF., FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS 8 (2011), <https://www.copyright.gov/docs/sound/pre-72-report.pdf> [https://perma.cc/4NKP-RZBX].

94. Copyright Act of 1909 § 2 (codified at 17 U.S.C. § 1 (1946)).

95. *Id.* § 1(e) (emphasis added).

96. Melanie Jolson, Note, *Congress Killed the Radio Star: Revisiting the Terrestrial Radio Sound Recording Exemption in 2015*, 2015 COLUM. BUS. L. REV. 764, 771–72.

97. *See id.* at 772–75.

Smith).⁹⁸ In *Herbert*, the Court considered two consolidated cases.⁹⁹ In the first case, the defendant, a hotel operator, had hired a band to perform the plaintiff-copyholder's composition in one of its hotel's dining rooms.¹⁰⁰ In the second case, a restaurant had hired singers to perform works from the plaintiff-copyholder's opera.¹⁰¹ In an opinion by Justice Holmes, the Court held that the hotel's and the restaurant's performances of the plaintiffs' copyrighted works were statutory public performances because the defendants had exhibited the performances to generate revenue, even though the defendants had not charged guests fees to view the performances.¹⁰²

Early radio station operators paid statutory royalties when they broadcasted live performances by musicians of copyrighted musical works in operators' studios, and this practice comported with *Herbert's* construction of the 1909 Act.¹⁰³ However, as discussed, Congress had omitted sound recordings as a class of copyrightable works in the 1909 Act.¹⁰⁴ The Second Circuit's opinion in *RCA Manufacturing Co. v. Whiteman* highlights the significance of this omission.¹⁰⁵

In *Whiteman*, the plaintiff, Paul Whiteman, had composed musical works and RCA Manufacturing Co. had (with Whiteman's consent) produced sound recordings (phonograph records) of performances by Whiteman of Whiteman's works.¹⁰⁶ W.B.O. Broadcasting, a radio station operator, acquired some of the RCA-manufactured sound recordings containing Whiteman's performances of his works, placed one of them in a phonograph, and broadcasted the phonograph's mechanical reproduction of Whiteman's performance over the radio.¹⁰⁷

Whiteman and RCA sued to prevent W.B.O. from publicly broadcasting the sound recordings.¹⁰⁸ Under the Copyright Act of 1909, Whiteman had no right to control the sound recording that W.B.O. had purchased—he only had a right to be paid royalties for its manufacture.¹⁰⁹ W.B.O.'s broadcast arguably infringed on Whiteman's public-performance right in the same way as the hotel and restaurant in *Herbert* had, but the Second Circuit disagreed in an opinion authored by then-Circuit Judge Learned Hand.¹¹⁰ Judge Hand wrote that, unlike the *Herbert* defendants, W.B.O. had not broadcasted a performance of Whiteman's work—W.B.O. had broadcasted a mechanical reproduction of the RCA-manufactured sound recording

98. 242 U.S. 591 (1917).

99. *Id.* at 593.

100. *Id.* at 594.

101. *Id.*

102. *Id.* at 594–95.

103. Jolson, *supra* note 96, at 773–74.

104. *See supra* text accompanying note 93.

105. 114 F.2d 86 (2d Cir. 1940).

106. *Id.* at 87.

107. *Id.*

108. *Id.*

109. *See id.* at 87–90.

110. *See id.*

of Whiteman's work.¹¹¹ And because the 1909 Act did not protect sound recordings as such, the court held that W.B.O. had not infringed on Whiteman's federal statutory rights.¹¹²

Whiteman effectively held that federal law did not require radio operators (or anyone else, for that matter) to pay royalties to musical-work copyholders when they broadcasted sound recordings of a copyholder's copyrighted work.¹¹³ Consequently, Whiteman and RCA were left to argue that W.B.O. had infringed on property rights recognized by state common law.¹¹⁴ But state common law was unavailing, as the Second Circuit interpreted the applicable state common-law rules and dismissed the action.¹¹⁵ This Article refers to radio operators' non-payment of royalties to copyholders of musical works for their broadcasts of sound recordings containing copyholders' works as the *terrestrial radio exemption*.

Members of Congress proposed legislation to extend full copyright protections to sound recordings throughout the first half of the twentieth century, to no avail.¹¹⁶ In the absence of congressional action, state courts extended a patchwork of common-law and statutory protections to musical works.¹¹⁷

2. Sound Recording Protection and the Copyright Act of 1976

In 1971, Congress finally recognized sound recordings created after February 15, 1972, as a class of works copyrightable by their manufacturer.¹¹⁸ This Article refers to the putative owners of pre-1972 sound recordings carved out from the 1971 copyright law and the artists whose performances were memorialized on such recordings as *legacy sound recordings* and *legacy artists*, respectively. And this Article refers to sound recordings embraced by the 1971 copyright law as *post-1972 sound recordings*.

But the 1971 law limited the statutory right to control and profit from copyrighted sound recordings to the physical reproduction of a copyrighted recording, not to public performances of copyrighted sound recordings.¹¹⁹ As such, the 1971 act retained the terrestrial radio exemption recognized in *Whiteman* for both legacy and post-1972

111. *Id.* at 87.

112. *Id.* at 90.

113. See Rosen, *supra* note 83, at 774–75.

114. *Whiteman*, 114 F.2d at 87–88.

115. *Id.* at 89.

116. Rosen, *supra* note 83, at 1083.

117. See U.S. COPYRIGHT OFF., *supra* note 93, at 20–49.

118. Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971). The Act of October 15, 1971, was codified at sections 1(f) and 5(n) of title 17 of the U.S. Code, see 17 U.S.C. §§ 1(f), 5(n) (Supp. V 1975), before Congress reorganized title 17 in the Copyright Act of 1976, § 101, Pub. L. No. 94-553, 90 Stat. 2451, 2541–2598 (codified as amended at 17 U.S.C. §§ 101–810 (2018)).

(repealed 1976); see also U.S. COPYRIGHT OFF., *supra* note 93, at 12.

119. See U.S. COPYRIGHT OFF., *supra* note 93, at 12.

sound recordings. The more comprehensive Copyright Act of 1976¹²⁰ also failed to address the terrestrial radio exemption.¹²¹ As technology progressed and new modes of broadcasting emerged, courts confronted whether the terrestrial radio exemption applied to broadcasts of sound recordings by satellite-radio operators.

B. *Distribution of Digital Performance Royalties for Sound Recordings*

In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (“DPRA”),¹²² which granted sound-recording copyholders of post-1972 sound recordings an exclusive right “to perform the copyrighted work publicly *by means of a digital audio transmission.*”¹²³ This legislation was enacted in response to the absence of a public-performance right for sound recordings in the Copyright Act of 1976 and fears that digital technology would stand in for sales of physical records.¹²⁴

The DPRA granted subscription-transmission broadcasters a license to digitally broadcast sound recordings subject to their payment of mandatory royalties to sound-recording copyholders.¹²⁵ Congress vested subscription broadcasters and sound-recording copyholders with the ability to collectively negotiate the amount of the royalties that subscription broadcasters would owe to sound-recording copyholders for the former’s broadcasts of the latter’s sound recordings.¹²⁶

Congress provided that sound-recording copyholders keep no more than fifty percent of any royalties paid to them by subscription broadcasters under a statutory license.¹²⁷ The remaining 50% are allocated to musicians whose performances appear on sound recordings as follows: 45% to recording or featured artists, 2.5% to nonfeatured musicians, and 2.5% to nonfeatured vocalists.¹²⁸ But subscription

120. Copyright Revisions Act, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered titles of U.S.C.).

121. See U.S. COPYRIGHT OFF., *supra* note 93, at 13–14.

122. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (emphasis added) (codified at 17 U.S.C. § 101, 106, 111, 114, 115, 119, 801–803 (2018 & Supp. III 2022)).

123. *Id.* § 2(3) (codified at 17 U.S.C. § 106(6) (2018)); see also Gregory F. Donahue, Note, *The Sky is Not Falling: The Effect of a Performance Right on the Radio Market*, 87 IND. L.J. 1287, 1291 (2012); Dianlyn Cenidoza, Note, *The Clash Between Terrestrial and Digital Radio: Pinned by the Music Modernization Act*, 43 SEATTLE U. L. REV. 841, 843–44 (2020).

124. See generally Rebecca Martin, Note, *The Digital Performance Right in The Sound Recordings Act Of 1995: Can It Protect U.S. Sound Recording Copyright Owners in a Global Market?*, 14 CARDOZO ARTS & ENT. L.J. 733 (1996).

125. See Digital Performance Right in Sound Recordings Act of 1995 § 2(3) (codified at 17 U.S.C. § 114(d)(2) (2012) (amended 2018)); see also *id.* (defining *subscription transmission* as “a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions including the transmission”) (codified at 17 U.S.C. § 114(j)(15) (2018)).

126. *Id.* (codified at 17 U.S.C. § 114(e) (2018)).

127. *Id.* (codified at 17 U.S.C. § 114(g)(2) (2018)).

128. *Id.* (codified at 17 U.S.C. § 114(g)(2)(B)–(D) (2018)).

broadcasters do not pay musicians directly; they make royalty payments to third parties that transfer the payments to the musicians.

Featured artists receive direct payments from SoundExchange, Inc., a nonprofit organization.¹²⁹ Royalties owed to non-featured musicians and vocalists are managed by the American Federation of Musicians (“AFM”) and the Screen Actors Guild - American Federation of Televisions and Radio Artists (“SAG-AFTRA”) labor unions.¹³⁰

While the DPRA required subscription broadcasters to pay royalties to both sound-recording copyholders and musicians when they digitally broadcasted copyrighted post-1972 sound recordings, the DPRA did not require terrestrial radio broadcasters to do the same (and thus the DPRA retained the terrestrial radio exemption).¹³¹ And the DPRA also did not require *any* broadcasters, digital or terrestrial, to pay public-performance royalties to the owners of legacy sound recordings or the artists whose performances were featured on such recordings. Attempts to close the gap, including the Performance Rights Act of 2009,¹³² the RESPECT Act of 2014,¹³³ and the Fair Pay Fair Play Act of 2015,¹³⁴ all failed. The issues raised by the absence of a statutory requirement that broadcasters pay legacy artists are demonstrated by

129. 37 C.F.R. § 382.5(d)(1) (2022) (designating SoundExchange, Inc. as the official payee featured-artist royalties); *see also id.* § 201.35(b)(3)(ii) (defining *featured artist(s)* as “the featured soloist(s), featured ensemble(s), featured conductor, and any other featured performer(s)”).

130. Federal law provides that non-featured musicians and vocalists shall receive royalties from an “independent administrator” appointed by sound-recording copyholders and two labor unions: AFM for non-featured musicians and SAG-AFTRA for non-featured vocalists. 17 U.S.C. § 114(g)(2)(B)–(C) (2018)). AFM and SAG-AFTRA have appointed the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund as the independent administrator responsible for managing subscription-broadcast public-performance royalties to non-featured musicians. *See Sound Recording Distribution Guidelines* § I(A)(2), AFM & SAG-AFTRA: INTEL. PROP. RTS. DISTRIB. FUND, <https://www.afmsagafratfund.org/Funds/SRGuidelines> [<https://perma.cc/5498-B6MW>] (Mar. 11, 2019).

131. *See also* Miranda Bullard, Note, *An International Perspective: Why the United States Should Provide a Public Performance Right for Non-Digital Audio Transmissions*, 30 TEMP. INT’L & COMP. L.J. 225, 239–58 (2016). The United States is one of few nations lacking such a requirement.

For the past several years, the United States, Iran, North Korea, and China are among the countries not recognizing performance rights in sound recordings. Donahue, *supra* note 123, at 1294 n.49; Cenidzoza, *supra* note 123, at 855; Alasauskas, *supra* note 28, at 309; Bullard, *supra* note 131, at 239–58; *see also* Sean M. Assad, Note, *Harmonic Progressions to a Full Public Performance Right in Sound Recordings: Examining Recent Legislative Attempts that Could Rectify United States Non-compliance with TRIPS and a Possible Modulation of the Issue to Reach a Finale*, 18 WAKE FOREST J. BUS. & INTEL. PROP. L. 109, 123–26 (2017).

132. H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009); *see also* Bullard, *supra* note 131, at 230–31; Alasauskas, *supra* note 28, at 280–81; Jolson, *supra* note 96, at 785–88.

133. H.R. 4772, 113th Cong. (2014); *see also* Alasauskas, *supra* note 28, at 281–82; Nadiia S. Loizides, *The RESPECT Act & Co.: Showing Some, but Not Enough, Respect to American Heritage Artists*, 19 TUL. J. TECH. & INTEL. PROP. 47, 63–64 (2016).

134. H.R. 1773, 114th Cong. (2015); *see also* Nate Rau, *Fair Play Fair Pay Act Reintroduced in Congress, Would Make Radio Pay Artists*, THE TENNESSEAN, <https://www.tennessean.com/story/money/2017/03/30/fair-play-fair-pay-act-reintroduced-congress-would-make-radio-pay-artist-labels/99823798/> [<https://perma.cc/56ST-FJ6M>] (Mar. 30, 2017, 5:06 PM); Vicenç Feliú, *So Happy Together: Should the California Decision Be a Basis to Recognize a Right of Public Performance in Pre-1972 Sound Recordings?*, 58 IDEA 267, 294 (2018).

the Flo and Eddie cases.

IV. FLO & EDDIE: MEN OF CONSTANT SORROW

In 2013, the band The Turtles, under their incorporated name Flo & Eddie, Inc., filed class action suits against Sirius XM, a digital subscription broadcaster, in California,¹³⁵ New York,¹³⁶ and Florida¹³⁷ for Sirius XM's use of Flo & Eddie's legacy sound recordings (including the song "Happy Together"¹³⁸) without the band's permission. Flo & Eddie, Inc. sought compensation for Sirius XM's use of their songs and ultimately to establish a public-performance right (as applied to digital subscription broadcasts) for legacy sound recordings. Because federal law conferred no such right, Flo & Eddie argued that it existed as a matter of state statutory and common law. Each lawsuit had a different outcome due to jurisdictional differences in common-law and statutory copyright protections as well as remedies.

A. California

In the California case, Flo & Eddie, Inc. argued that California's copyright statute gave it "exclusive ownership" of its pre-1972 songs, including the right of public performance, which requires compensation whenever their copyrighted recordings are publicly performed."¹³⁹ Sirius XM countered that the statute was ambiguous and failed to convey an exclusive right of public performance.¹⁴⁰ The U.S. District Court for the Central District of California granted Flo & Eddie's summary judgment motion, finding Sirius XM had violated its exclusive right to publicly performance its sound recordings, which extended to legacy recordings.¹⁴¹ This was an initial victory for Flo & Eddie, Inc.

The Ninth Circuit reversed the district court's ruling in 2021 after looking to nineteenth-century common law and the first appearance of the phrase "exclusive ownership" in California's copyright statute.¹⁴² Until that time, no state had recognized a right of public performance for music, and even California protected only unpublished works.¹⁴³ Ultimately, the Ninth Circuit concluded that including the term "exclusive ownership" in California's 1872 copyright statute was not inconsistent with the common-law understanding of copyright protection and held that

135. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 9 F.4th 1167 (9th Cir. 2021).

136. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 849 F.3d 14 (2d Cir. 2017) (per curiam).

137. See *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 709 F.App'x 661 (11th Cir. 2018) (per curiam).

138. THE TURTLES, *Happy Together*, on HAPPY TOGETHER (White Whale Records 1967).

139. *Flo & Eddie*, 9 F.4th at 1169, rev'g No. CV 13-5693 PSG (RZX), 2014 WL 4725382 (C.D. Cal. Sept. 22, 2014); see also CAL. CIV. CODE § 980 (West 2007) (code provision cited by Flo & Eddie).

140. See *Flo & Eddie*, 2014 WL 4725382, at *6.

141. *Id.* at *9.

142. *Flo & Eddie*, 9 F.4th at 1173.

143. *Id.* at 1174.

“exclusive ownership” did not include the right of public performance.¹⁴⁴

B. New York

Unlike California, New York had no state copyright statute.¹⁴⁵ Instead, New York relied upon a copyright-related common law for sound recordings.¹⁴⁶ The U.S. District Court for the Southern District of New York denied Sirius XM’s motion for summary judgment¹⁴⁷ but certified its denial for interlocutory appeal.¹⁴⁸ The New York Court of Appeals reversed, finding that New York common law did not recognize a right of public performance for sound-recording copyholders; it only prevented unauthorized reproductions of copyrighted works.¹⁴⁹ The court reasoned that creation of such a right was properly left to the legislature.¹⁵⁰ The Second Circuit held that the New York Court of Appeals’ decision was dispositive and dismissed Flo & Eddie’s action.¹⁵¹

C. Florida

Unfortunately for Flo & Eddie, Florida lacked both legislation covering sound recording property rights and substantial caselaw interpreting common-law copyright related to the arts, which left the court to decide whether Florida recognized a public performance right for legacy sound recordings.¹⁵² The U.S. District Court for the Southern District of Florida granted Sirius XM’s motion for summary judgment, ruling that finding for Flo & Eddie would create a new property right in Florida, a task properly within the province of the Florida legislature.¹⁵³ The court stated that if it were to intervene, difficulties would arise in setting administering licensing rates, resolving ownership disputes over dead artists’ sound recordings, and determining exceptions to a public-performance right.¹⁵⁴ The Eleventh Circuit affirmed the district court’s decision.¹⁵⁵

144. *Id.* at 1169.

145. *See* Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 821 F.3d 265, 269 (2d Cir. 2016).

146. *See id.*

147. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-cv-5784, 2014 WL 7178134 (S.D.N.Y. Dec. 12, 2014).

148. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-cv-5784, 2015 WL 585641 (S.D.N.Y. Feb. 10, 2015).

149. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583, 603, 606 (N.Y. 2016); *see also* Alasauskas, *supra* note 28, at 286.

150. *Flo & Eddie*, 28 N.Y.3d at 607.

151. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 849 F.3d 14 (2d Cir. 2017) (per curiam).

152. Alasauskas, *supra* note 28, at 288–89.

153. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., No. 13-23182-CIV, 2015 WL 3852692, at *4 (S.D. Fla. June 22, 2015).

154. *Id.* at *5.

155. Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 709 F.App’x 661, 663 (11th Cir. 2018) (per curiam).

All three Flo & Eddie cases highlighted artists' fears that they would never receive compensation for their work. Amidst the growing popularity of streaming services like Spotify and Tidal¹⁵⁶ and the idiosyncrasies digital radio shares with terrestrial radio services, Congress recognized something had to be done.¹⁵⁷

V. PAY FASTER, I HEAR BANJOS: MUSIC COPYRIGHT REFORM AND ITS IMPACT ON PUBLIC-PERFORMANCE RIGHTS AND ROYALTIES

A. *The Classics Protection and Access Act*

In 2018, Congress enacted the Orrin G. Hatch–Bob Goodlatte Music Modernization Act (“MMA”),¹⁵⁸ which included the Classics Protection and Access Act (“CPAA”).¹⁵⁹ The CPAA incorporated legacy sound recordings under the DPRA’s statutory-licensing and royalty-payment scheme, which afforded to legacy sound recordings the same protections as post-1972 recordings with respect to digital subscription broadcasts.¹⁶⁰ However, the CPAA did not eliminate the terrestrial radio exemption for either legacy or post-1972 sound recordings. This is particularly concerning for musicians in collaborative genres such as bluegrass and Appalachian folk, whose traditions predate even the common presence of radios in American homes.

Before its passage, subscription digital-broadcast industry leaders highlighted the CPAA’s failure to eliminate the terrestrial radio exemption. Sirius XM CEO Jim Meyer argued that “all radio, whether AM, FM, satellite or Internet is digital,” and the CPAA’s preservation of the terrestrial radio exemption was not intended to protect family-run stations or religious or college broadcasters, but rather a handful of major terrestrial radio companies.¹⁶¹ Meyer pointed to SoundExchange CEO Michael Huppe’s observations about the growth in terrestrial radio’s revenue and number of stations.¹⁶² Meyer argued, “Rather than giving the behemoth terrestrial radio

156. See J.P. Urban, Note, *Performance Royalties for Sound Recordings on Terrestrial Radio: A Private Solution to a Public Problem*, 16 VAND. J. ENT. & TECH. L. 197, 198-99 (2013); Gabriel Zamora & Jeffrey L. Wilson, *The Best Online Music Streaming Services for 2023*, PCMAG., <https://www.pcmag.com/picks/the-best-online-music-streaming-services> [<https://perma.cc/9AZR-ET6W>] (Feb. 23, 2023).

157. See Niklas Andree, *Flo & Eddie v. Sirius: Florida Supreme Court Rejects Exclusive Performance Right in Pre-1972 Sound Recordings*, HARV. J.L. & TECH.: JOLT DIGEST (Oladeji M. Tiamiyu ed., Nov. 14, 2017), <https://jolt.law.harvard.edu/digest/flo-eddie-v-sirius-florida-supreme-court-rejects-exclusive-performance-right-in-pre-1972-sound-recordings> [<https://perma.cc/98QD-F6T9>].

158. Orrin G. Hatch–Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of U.S.C.).

159. Classics Protection and Access Act, Pub. L. No. 115-264, 132 Stat. 3792 (2018) (codified at 17 U.S.C. §§ 301, 1401 (2018)).

160. *Id.* § 202 (codified at 17 U.S.C. § 1401 (2018)).

161. Jim Meyer, Opinion, *SiriusXM CEO Jim Meyer: The CLASSICS Act Is Seriously Flawed (Guest Column)*, BILLBOARD (Feb. 26, 2018), <https://www.billboard.com/articles/business/8219673/siriusxm-ceo-jim-meyer-classics-act-guest-column> [<https://perma.cc/SJJ4-QV55>].

162. Jim Mayer, Opinion, *SiriusXM CEO Jim Meyer Explains the Trouble With The Music Modernization Act (Guest Op-Ed)*, BILLBOARD (Aug. 23, 2018), <https://www.billboard.com/pro/siriusxm-ceo-jim-meyer-musi>

industry yet another advantage at the expense of innovative technologies, artists and record labels, Congress should enable the full compensation of artists and their families.”¹⁶³ Highlighting the inequitable treatment of terrestrial and digital law under the American copyright regime, Meyer noted Sirius XM spent \$2.2 billion for its use of post-1972 recordings since the DPRA’s enactment, while terrestrial radio had paid nothing.¹⁶⁴

David Israelite, the president of the National Music Publishers’ Association, a trade association that represents sound-recording copyholders,¹⁶⁵ agreed with Meyer that terrestrial radio services should indeed pay performance royalties, but took a more cynical perspective. Israelite believed Meyer was seeking “an excuse . . . not have to pay artists a fair rate.”¹⁶⁶

The bill whose language was enacted as the MMA (which included the CPAA) had eighty co-sponsors in the Senate,¹⁶⁷ and then-Senate Majority Leader Mitch McConnell was expected to easily bring the bill to a vote, helping ensure a thriving music industry in the Senator’s home state of Kentucky, the birthplace of bluegrass.¹⁶⁸ Despite Sirius XM’s heavy lobbying against the CPAA, President Donald J. Trump signed the it into law on October 11, 2018.¹⁶⁹

The CPAA’s passage was monumental for the music industry. Though detractors such as David Israelite saw self-interest in Sirius XM’s pleas for equitable treatment of digital and terrestrial radio, the argument for parity has merit. The post-CPAA public-performance royalty scheme should be modified to eliminate the terrestrial radio exemption for the benefit of all musicians.

c-modernization-act-op-ed/ [https://web.archive.org/web/20221128062936/https://www.billboard.com/pro/siriusxm-ceo-jim-meyer-music-modernization-act-op-ed/]; see also Michael Hupp, Opinion, *Michael Huppe: Broadcast Radio Makes an Ironic Plea for Fairness (Guest Op-Ed)*, BILLBOARD (Aug. 7, 2018), https://www.billboard.com/pro/michael-huppe-broadcast-radio-fairness-pay-artists-op-ed/ [https://web.archive.org/web/20210621163348/https://www.billboard.com/articles/business/8469148/michael-huppe-broadcast-radio-fairness-pay-artists-op-ed] (Hupp’s piece quoted by Mayer).

163. Meyer, *supra* note 161.

164. *Id.*

165. See *Our Mission*, NAT’L MUSIC PUBLISHERS’ ASS’N, https://www.nmpa.org/mission/ [https://perma.cc/G99A-69FE].

166. *The Trouble with SiriusXM’s Opposition to the Music Modernization Act*, MUSIC BUS. WORLDWIDE (Aug. 27, 2018), https://www.musicbusinessworldwide.com/the-trouble-with-siriusxms-opposition-to-the-music-modernization-act/ [https://perma.cc/722A-5Q5Z].

167. S. 2823, 115th Cong. (as reported in Senate, Sept. 12, 2018) (listing co-sponsors); 146 CONG. REC. S6144 (daily ed. Sept. 12, 2018) (adding co-sponsors); *id.* S6190 (daily ed. Sept. 17, 2018) (same); *id.* S6225 (daily ed. Sept. 18, 2018) (same). The original language in House Bill 1551 was substituted with the language in Senate Bill 2823 and enacted as the MMA. See H.R. 1551, 115th Cong. (2018) (enacted).

168. David Israelite, Opinion, *NMPA CEO David Israelite Urges Music Modernization Act Passage: ‘It May Be Now Or Never’ (Guest Column)*, BILLBOARD (Sept. 1, 2018), https://www.billboard.com/articles/business/8474540/nmpa-ceo-david-israelite-music-modernization-act-passage-column [https://perma.cc/4Q4T-3DR L].

169. Statement on Signing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, 2018 DAILY COMP. PRES. DOC. (Oct. 11, 2018).

B. Post-MMA Legislative Proposals

Equitable treatment between digital and terrestrial radio broadcasters is what proponents of the American Music Fairness Act (“AMFA”) sought to add to the public performance royalty scheme in bringing the AMFA before the 117th Congress.¹⁷⁰ Florida Democratic Representative Ted Deutch and California Republican Representative Darrell Issa introduced the AMFA, and they were joined by a bipartisan group of cosponsors.¹⁷¹ But the 117th Congress failed to take up the AMFA.¹⁷²

California Democratic Senator Alex Padilla and reintroduced the AFMA in the Senate in the 118th Congress and Representative Issa reintroduced a companion bill in the House on the same day.¹⁷³ Both the Senate and the House referred the bills to their respective Judiciary Committees, neither of which have taken any action.¹⁷⁴

Congress ought to remedy this and take action on the AMFA because it is valuable legislation. As Senator Marsha Blackburn, an AMFA co-sponsor, described:

From Beale Street to Music Row to the hills of East Tennessee, Tennessee’s songwriters have undeniably made their mark However, while digital music platforms compensate music performers any copyright holders for playing their songs, AM/FM radio stations [do not] This legislation takes a long overdue step toward leveling the music industry playing field and ensuring creators are fairly compensated for their work.¹⁷⁵

The AMFA would eliminate the terrestrial radio exemption while protecting small terrestrial broadcasters. To eliminate the exemption, the AMFA would extend the DPRA’s digital-broadcast public-performance right (as extended to legacy sound recordings by the CPAA) and royalty-payment scheme to terrestrial radio broadcasts and broadcasters.¹⁷⁶

To protect small, local terrestrial radio broadcasters, the AMFA would exempt from the generally applicable royalty rates terrestrial radio stations with annual revenues below \$1.5 million whose owners, if any, have annual revenues less than \$10 million.¹⁷⁷ Exempt terrestrial radio stations with annual revenues of less than

170. See American Music Fairness Act of 2022, H.R. 4130, 117th Cong. (2021).

171. See *id.* (as reported by H. Comm. on the Judiciary, Dec. 30, 2022).

172. See also S. 4932, 117th Cong. (2022) (companion bill to the AMFA introduced in the Senate).

173. See S. 253, 118th Cong. (as introduced in Senate, Feb. 2, 2023); H.R. 791, 118th Cong. (as introduced in House, Feb. 2, 2023).

174. See S. 253, 118th Cong. (2023); H.R. 791, 118th Cong. (2023).

175. Marsha Blackburn, Senator, U.S. Senate, Blackburn, Padilla Reintroduce Bipartisan Bill to Ensure Artists Are Paid for Their Music Across All Platforms (Feb. 2, 2023), <https://www.blackburn.senate.gov/2023/2/blackburn-padilla-reintroduce-bipartisan-bill-to-ensure-artists-are-paid-for-their-music-across-all-platforms> [<https://perma.cc/SH8N-LALT>].

176. S. 253 § 2; H.R. 791 § 2.

177. S. 253 § 4(a); H.R. 791 § 4(a).

\$100,000 would owe a \$10 royalty annually for their transmissions of copyrighted sound recordings.¹⁷⁸ And exempt public and private terrestrial radio stations with annual revenues between \$100,000 and \$1.5 million would owe an \$100 and \$500 annual royalty, respectively, for their transmissions of copyrighted sound recordings, respectively.¹⁷⁹ And the AMFA also offers additional benefits to creators.

1. International Parity

String-band and Americana music is celebrated not only in America, but around the world. Each year Europe holds many bluegrass festivals, workshops, concerts, and jam sessions. Almost a decade ago, the Czech Republic was named the liveliest bluegrass scene in Europe, with more bluegrass bands per capita than any country in the world.¹⁸⁰ In 2016, the International Bluegrass Music Museum called Japan home to the world's second-largest bluegrass scene.¹⁸¹

While not specifically enumerated therein, the AMFA supports American artists when foreign stations play their music by recognizing American artists' performance rights and thereby allowing for international parity.¹⁸² Eliminating the terrestrial radio exemption will lead to royalty parity between American musicians and their foreign counterparts, enabling American musicians and their record labels to receive their airplay royalties from foreign radio stations.

178. See sources cited *supra* note 177.

179. See sources cited *supra* note 177.

180. Ruth Ellen Gruber, *Bluegrass Thrives, Far From Home*, N.Y. TIMES (Apr. 9, 2009), <https://www.nytimes.com/2009/04/10/arts/10iht-gruber.html> [<https://web.archive.org/web/20221001143814/https://www.nytimes.com/2009/04/10/arts/10iht-gruber.html>].

181. Naomi Gingold, *Meet The Musicians Behind Japan's Vibrant Bluegrass Scene*, NPR (Oct. 30, 2016, 5:00 PM), <https://www.npr.org/2016/10/30/498827939/meet-the-musicians-behind-japans-vibrant-bluegrass-scene> [<https://perma.cc/N4K7-5LUU>].

Like the United States, Japan's bluegrass scene has enjoyed peaks and valleys throughout the years. See Lee Zimmerman, *Bluegrass Beyond Borders from the Land of the Rising Sun*, BLUEGRASS TODAY (Apr. 5, 2018), <https://bluegrasstoday.com/bluegrass-beyond-borders-music-from-the-land-of-the-rising-sun/> [<https://perma.cc/S5WD-RVAL>]. Some attribute the international spread of bluegrass and Appalachian folk to post-World War II radio broadcasts, while American radio station broadcasts like the Grand Ole Opry managed to spark early Canadian interest in Bluegrass and roots music. Gingold, *supra* note 181; *Bluegrass Music in Europe*, BLUEGRASS IN LA ROCHE, <https://www.larochebluegrass.org/europe--france.html> [<https://perma.cc/9WL-ZME5>]; see also Price, *supra* note 1, at 21–22; BANJO ROMANTIKA: AMERICAN BLUEGRASS MUSIC & THE CZECH IMAGINATION (Documentary Educational Resources 2014); Lee Bidgood, *Out in the Cold World and Far Away from Home: Bluegrass Music in the Czech Republic*, CZECH RADIO (Oct. 1, 2008), <https://www.radio.cz/en/section/panorama/out-in-the-cold-world-and-far-away-from-home-bluegrass-music-in-the-czech-republic> [<https://perma.cc/N36P-DW5F>]. See Jason Schneider, *The Grass Is Always Bluer: Canadian Bluegrass Pushes Traditional Boundaries*, EXCLAIM (June 1, 2005), https://exclaim.ca/music/article/grass_is_always_bluer-canadian_bluegrass_pushes_traditional [<https://perma.cc/CNA2-ZSLE>].

182. *Why The American Music Fairness Act Will Give Music Creators What They Deserve*, RECORDING ACAD. (June 24, 2021, 06:55 PM), <https://www.recordingacademy.com/advocacy/news/why-american-music-fairness-act-will-give-music-creators-what-they-deserve> [<https://perma.cc/S78H-97EC>]; Cenidzoza, *supra* note 123, at 855; Donahue, *supra* note 123, at 1296; Assad, *supra* note 131, at 123–26, 141.

2. Marketability and Popularity

The National Association of Broadcasters (“NAB”) has lobbied for years against eliminating the terrestrial radio exemption, characterizing it as a “performance tax.”¹⁸³ Effectively, the NAB argues that having to pay royalties would be an additional tax, or cost, on each airplay, in addition to the services terrestrial radio already provides.¹⁸⁴ Traditional arguments for the value of these services (for example, that terrestrial radio drive record sales, provide advertising, and boost artist popularity) seem weak with the rise of social media, digital and satellite radio, and streaming services.¹⁸⁵

As discussed in this Article, artists and sound-recording copyholders are statutorily entitled to royalties when their sound recordings are broadcast via satellite and digital-radio and streaming services, whose use continues to grow. The monetary compensation terrestrial radio allegedly provides—increased sales of sound recordings to consumers—through building artists’ popularity is of significantly lower value to artists and copyholders, who can enjoy those same “implied” royalties while also earning *real* royalties. This is especially true in the case of bluegrass and Appalachian folk music.

“Hillbilly music” and the many genres it encompasses have risen and fallen in popularity since their birth. For many, these genres are best appreciated through live string-band performances that enable them to find meaning in the music.¹⁸⁶ Most terrestrial radio stations that play bluegrass, old-time, and Americana music are either non-commercial college radio stations or small public broadcasters. These stations would benefit from the protections the AMFA affords to small terrestrial radio stations.

3. Recalling the Purpose of Intellectual Property

The greatest hope for the CPAA is that it promotes the progress of useful arts, particularly music. This can be achieved by improving and expediting the compensation scheme for musicians. Unlike its foreign counterparts that employ a natural-rights view, the United States employs an economical view of copyright protection.¹⁸⁷ Yet for some reason, the United States remains the only developed country that does not pay royalties to musicians for broadcasting their sound recordings via terrestrial radio.¹⁸⁸

183. McGee, *supra* note 53, at 3, 225; Kilgore, *supra* note 91, at 552, 570; Alasauskas, *supra* note 28, at 300–01; Jolson, *supra* note 96, at 786–87, 800–01; Assad, *supra* note 131, at 135.

184. Sources cited *supra* note 183.

185. Jolson, *supra* note 96, at 786–87, 800–01; Kilgore *supra* note 91, at 577.

186. Sources cited *supra* note 183.

187. Bullard, *supra* note 131, at 239–40.

188. Alasauskas, *supra* note 28, at 296.

Terrestrial radio is the only medium allowed to use intellectual property without copyholders' permission or compensation, which is fundamentally unfair.¹⁸⁹ Copyright law can be a tool to promote the progress of useful arts by harnessing innovation and incentivizing individuals not only to create more music, but to harness their music career—their craft and their salvation. If Congress truly wants to promote greater respect for musicians and their art and enhance their compensation, then recognizing a public-performance right for terrestrial radio broadcasts is essential.

CONCLUSION

O Brother, Where Art Thou was renowned in pop culture for revitalizing bluegrass, old-time, and Appalachian folk music. Although bluegrass was formed by Bill Monroe as a means of making income, the film illustrates that a music career can be more to an artist than just a path to fortune and fame. For some, a music career is a means of redemption—a second chance at making a positive impact in life and illuminating darkness in the world. The film also highlights how significant a force terrestrial radio was on artists' careers and the compensation they receive. This has changed with the rise of digital radio and streaming services. And as technology evolves, copyright law must evolve with it.

In response to this technological advancement and the Flo & Eddie cases, the CPAA helped reform the nation's copyright system for the benefit of musicians both old and new. However, the CPAA retained a divide between digital and terrestrial radio in public-performance licensing.

The AMFA would fix this divide. Adopting the AMFA would benefit many artists, honor intellectual property owners' rights, and promote the progress in the arts, including those still following a rigid, traditional instrumentation. Further, adoption would promote parity and compensate musicians for their work while guaranteeing airtime for bluegrass and Appalachian folk music on small, independent terrestrial radio stations for generations to come.

189. Jolson, *supra* note 96, at 799.