Essay

Fine-Tuning: Why Extending the Public Performance Right in Sound Recordings Would Require Changes for the Copyright Royalty Board

*Samuel E. Meredith**

Abstract

Imagine yourself getting into your car and tuning in to a local radio station so you can listen to Cardi B's latest track while you drive to work. Now imagine yourself doing the same thing, only this time you choose to listen to satellite radio. From your perspective, there is likely little difference between these two scenarios. And yet, for Cardi B—an artist who has made her fondness for checks quite clear—the difference could be rather meaningful. Indeed, thanks to a gaping loophole in the Copyright Act, the satellite transmission of the sound recording in the above example would trigger a royalty obligation while the traditional broadcast transmission would not.

If you find this disparity between "digital" outlets and traditional broadcasters puzzling, you are not alone; legislators have tried multiple times to rectify the problem. As a policy matter, these proposals certainly have appeal. After all, why should the source of a transmission determine whether the copyright owner of a sound recording is entitled to a royalty?

As a practical matter, however, successfully closing the gap between digital and terrestrial outlets would require close attention to a myriad of small but important details. One such detail is how the Copyright Royalty Board ("CRB") would administer a public performance right in sound recordings that encompasses both digital and terrestrial outlets. An analysis of how the

* J.D. 2019, The George Washington University Law School; B.M. 2016, Utah State University. The author would like to thank Professor Robert Brauneis for his valuable guidance and feedback during the drafting of this Essay.

CRB has fared in administering the digital public performance right that currently exists shows that the CRB will need some fine-tuning in order to effectively administer a broader public performance right. Specifically, to properly fulfill this responsibility, the CRB would need a more robust staff and greater access to economic expertise.

Table of Contents

Introduction

The treatment of sound recordings has long been one of the most curious aspects of United States copyright law.[1] For instance, sound recordings were not even a protected category of works under the Copyright Act until the 1970s.[2] Today, the Copyright Act's scheme for regulating the public performance of sound recordings, with its nu-

1 *See* John R. Kettle III, *Dancing to the Beat of a Different Drummer: Global Harmonization – and the Need for Congress to Get in Step with a Full Public Performance Right for Sound Recordings*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1041, 1054–73 (2002) (explaining the history of copyright protection for sound recordings in the United States); *see also* Melanie Jolson, Note, *Congress Killed the Radio Star: Revisiting the Terrestrial Radio Sound Recording Exemption in 2015*, 2015 Colum. Bus. L. Rev. 764, 770–82 (same).

2 *See* Act of Oct. 15, 1971, Pub. L. 92-140, 85 Stat. 391.

merous provisos and exceptions, perpetuates our nation's traditional, awkward approach.[3]

The Copyright Act generally gives owners of copyrighted works the exclusive right to perform or display their works publicly, or receive royalties every time their works are publicly performed or displayed.[4] In the realm of sound recordings, however, the public performance right only applies to "sound recordings . . . perform[ed] . . . by means of a digital audio transmission,"[5] and is rather limited thanks to a number of provisions laid out in § 114 of the Copyright Act.[6] For example, pursuant to the limitation in § 114(d)(1)(A) of the Copyright Act, "nonsubscription broadcast transmission[s]" of sound recordings are beyond the reach of this public performance right.[7] The Copyright Act defines a "'broadcast' transmission" as one that is "made by a terrestrial broadcast station licensed as such by the Federal Communications Commission."[8] All of this means that "when a radio station plays a hit song," doing so "requires no licenses from the copyright owner of the implicated sound recording."[9] In contrast, newer, "digital" outlets rooted in internet, satellite, or cable technology are required to obtain licenses for the sound recordings they transmit.[10] This is puzzling because other kinds of copyrighted works enjoy a comparatively robust public performance right.[11] Furthermore, this dichotomy between "digital" and "terrestrial" outlets seems rather arbitrary, in part because both kinds of outlets stimulate profits for the music industry.[12] Moreover, under the Copyright Act there is

---

3 *See, e.g.*, 17 U.S.C. § 114(a)–(d) (2012).

4 *Id.* § 106; *see Public Performance Right for Sound Recordings*, FUTURE MUSIC COALITION (Mar. 5, 2018), https://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings [https://perma.cc/NK27-RJFN].

5 17 U.S.C. § 106(6).

6 *See, e.g.*, *id.* § 114(d).

7 *Id.* § 114(d)(1)(A).

8 *Id.* § 114(j)(3).

9 David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189, 190 (2000).

10 John Villasenor, *Why Artists Should Always Get Paid by Broadcasters Who Play Their Songs*, FORBES (July 2, 2012, 8:38 PM), https://www.forbes.com/sites/johnvillasenor/2012/07/02/why-artists-should-always-get-paid-by-broadcasters-who-play-their-songs/#52f67e1781e4 [https://perma.cc/7DJM-997W].

11 *Compare* 17 U.S.C. § 106(6) (granting "the owner of copyright . . . the exclusive right[] . . . to perform the copyrighted [sound recording] publicly by means of a digital audio transmission"), *and* 17 U.S.C. § 114(d) (placing "[l]imitations on [the] [e]xclusive [r]ight" granted in § 106(6)), *with* 17 U.S.C. § 106(4) (granting to "the owner of copyright . . . the exclusive right[] . . . in the case of literary, musical, dramatic, and choreographic works, . . . to perform the copyrighted work publicly" without such limitations).

12 *See* Villasenor, *supra* note 10 ("A key argument against ending the exemption for ter-

less of a difference between "digital" and "terrestrial" transmissions than one might think.[13]

Unsurprisingly, legislators have tried to address these concerns.[14] The most recent effort to this effect is the Fair Play Fair Pay Act, which has now been introduced multiple times in the House of Representatives.[15] This measure, according to its proponents, was designed to remove the "antiquated and unfair" terrestrial broadcaster loophole and establish "a modern and uniform system of rules governing music licensing."[16]

As good as legislation of this kind may sound in theory, successfully implementing it could be a challenge.[17] Specifically, effective administration of the proposed statutory scheme would require meaningful and successful involvement from the Copyright Royalty Board ("CRB").[18] Under the Fair Play Fair Pay Act, the CRB, in addition to fulfilling its existing obligations, would have to manage yet an-

---

restrial radio has been that radio play drives music sales . . . . But if airtime on traditional AM and FM stations drives sales, so, too, can exposure through cable, satellite, and Internet radio.").

13 Although there are some limitations on how terrestrial broadcasters may transmit sound recordings, their "traditional" activities do not require the payment of any sound recording performance royalty, "even if the sound recordings are broadcast wholly in digital format." 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.22[B][1][b] (Matthew Bender rev. ed. 2018); *see also* S. REP. NO. 104-128, at 19 (1995) ("[T]he Committee intends that [traditional radio or television] transmissions be exempt regardless of whether they are in a digital or nondigital format, in whole or in part."). Due to this quirk in terminology, references in this Essay to "digital performances" and the like are not references to performances achieved through digital technology. Rather, such references merely specify activities affected by the public performance right recognized in 17 U.S.C. § 106(6).

14 *See, e.g.*, Performance Rights Act, H.R. 4789, 110th Cong. (2007).

15 *See* H.R. 1836, 115th Cong. (2017); H.R. 1733, 114th Cong. (2015).

16 Press Release, Representative Jerry Nadler, Representatives Nadler, Blackburn, Conyers, Issa, Deutch and Rooney Re-Introduce Fair Play Fair Pay Act (Mar. 30, 2017), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=391702 [https://perma.cc/ZC9R-Z678]. Some parts of the Fair Play Fair Pay Act were recently passed as part of the Music Modernization Act, but the section eliminating the terrestrial broadcaster loophole was not. *See* Paula Parisi, *Music Modernization Act to be Reintroduced Tuesday*, VARIETY (Apr. 9, 2018, 2:20 PM), https://variety.com/2018/biz/news/music-modernization-act-to-be-introduced-tuesday-1202748355/ [https://perma.cc/FS5J-KMQK]; Ted Johnson, *Trump Signs Sweeping New Music Licensing Legislation*, VARIETY (Oct. 11, 2018, 9:31 AM), https://variety.com/2018/politics/news/trump-signs-music-modernization-act-1202976848/ [https://perma.cc/Z26D-DAQC]. For the purposes of this Essay, references to the Fair Play Fair Pay Act, unless otherwise noted, correspond to the unenacted portion of the bill that would eliminate the terrestrial broadcaster loophole.

17 Indeed, implementing the Fair Play Fair Pay Act would be rather complicated if the current scheme regulating digital public performances of sound recordings is any indication. *See* 17 U.S.C. § 114(f) (2018); Jeffrey Toobin, *Congress's Chance to be Fair to Musicians*, NEW YORKER (May 18, 2016), https://www.newyorker.com/news/daily-comment/congresss-chance-to-be-fair-to-musicians [https://perma.cc/7YFK-YSHM].

18 H.R. 1836, 115th Cong. § 4(a)(1)(B) (2017).

other set of public performance rights—those for sound recordings transmitted by terrestrial broadcasting outlets.[19] The question, then, is whether the CRB is up to the task. This Essay seeks to answer that question by analyzing the CRB's current responsibilities and assessing whether the CRB has successfully administered the digital public performance right in sound recordings.[20] This Essay proceeds as follows: Part I summarizes the history of the public performance right in sound recordings, discusses the CRB's current responsibilities, including the statutory licensing schemes it administers, and explains how the Fair Play Fair Pay Act could affect the CRB. Part II analyzes some of the challenges that the CRB faces and concludes that the CRB is not prepared for the increased responsibility that the Fair Play Fair Pay Act would impose.

I. Background: The Public Performance Right, the CRB's Current Responsibilities, and the Fair Play Fair Pay Act

To understand why the CRB is not well equipped to administer a public performance right in sound recordings that covers terrestrial broadcasters, one first needs to understand the current extent of the public performance right as well as the CRB's history, procedures, and responsibilities.

A. The Development of the Public Performance Right in Sound Recordings

The Copyright Act of 1909[21] recognized "the exclusive right . . . [t]o perform [a] copyrighted work publicly."[22] Works subject to this right included "drama[s]" and "musical composition[s]."[23] Sound recordings were not subject to the public performance right because the Copyright Act of 1909 did not provide them with any protection whatsoever.[24]

---

19 *See infra* notes 60–64 and accompanying text.

20 The CRB's actions in connection with its other responsibilities are beyond the scope of this Essay.

21 Pub. L. No. 60-349, 35 Stat. 1075 (1909) (codified as amended at 17 U.S.C. §§ 101–1401 (2018)).

22 *Id.* ch. 320, § 1(e), 35 Stat. at 1075.

23 *Id.* § 1(d)–(e).

24 *See id.* § 4, 35 Stat. at 1076 ("[T]he works for which copyright may be secured under this Act shall include all the *writings* of an author." (emphasis added)). It is worth noting that sound recordings were arguably still in their infancy when the Copyright Act of 1909 was passed. *See* Merrill Fabry, *What Was the First Sound Ever Recorded by a Machine?*, Time (May 1, 2018), http://time.com/5084599/first-recorded-sound/ [https://perma.cc/8DMD-HNS9].

This changed early in the 1970s when Congress awarded copyright protection to sound recordings.[25] This action, however, did not confer any public performance right in sound recordings,[26] an approach that Congress did not alter when it overhauled the U.S. copyright regime in 1976.[27]

Congress did not create any public performance right in sound recordings until 1995 when it passed the Digital Performance Right in Sound Recordings Act ("DPRA").[28] As its name suggests, the DPRA only covered public performances "by means of a digital audio transmission."[29] Congress further limited the reach of the DPRA by making a number of exceptions to the digital public performance right, including one for "nonsubscription transmission[s]."[30] According to the legislative history of the DPRA, "any transmission" by a "traditional radio or television station" was considered "the classic example of" a performance that qualified for this exception.[31] When it passed the Digital Millennium Copyright Act in 1998,[32] Congress resolved any doubt as to whether this exception applied to terrestrial broadcasters by cutting the term "nonsubscription transmission" and replacing it with "nonsubscription *broadcast* transmission."[33] This statutory scheme remains in place today.[34]

Of course, lawmakers have made attempts to eliminate this exception for terrestrial broadcasters.[35] One such attempt came when Representative Howard Berman introduced the Performance Rights Act.[36] This bill would have removed the terrestrial broadcaster excep-

---

25 *See* Act of Oct. 15, 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

26 *See id.* § 1(a), 85 Stat. at 391.

27 *See* Copyright Act of 1976, Pub. L. No. 94–553, §§ 106(4), 114(a), 90 Stat. 2541, 2546, 2560 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

28 Digital Performance Right in Sound Recordings Act (DPRA), Pub. L. No. 104-39, 109 Stat. 336 (1995).

29 *Id.* § 3, 109 Stat. at 336.

30 *Id.* § 3, 109 Stat. at 336–38.

31 S. REP. NO. 104-128, at 19 (1995).

32 Pub. L. No. 105-304, 112 Stat. 2860 (1998).

33 *Compare id.* § 405, 112 Stat. at 2890 (emphasis added), *with* DPRA § 3, 109 Stat. at 343. The DPRA defines "broadcast transmission" as a "transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission." DPRA § 3, 109 Stat. at 343.

34 *See* 17 U.S.C. § 114(d)(1)(A), (j)(6) (2012).

35 *See* H.R. REP. NO. 111-680, at 8–9 (2010) (summarizing attempts to close the terrestrial broadcaster loophole).

36 H.R. 4789, 110th Cong. (2007). Prior to introducing this bill, Representative Berman attempted "[t]o harmonize [the CRB's] rate setting standards for copyright licenses" by introducing the Platform Equality and Remedies for Rights Holders in Music Act of 2006. H.R. 5361, 109th Cong. (2006).

tion to the public performance right by, among other things, deleting the word "digital" from § 106 and other portions of the Copyright Act, thus imposing on terrestrial broadcasters the same royalty obligations that currently apply to digital outlets when they transmit copyrighted sound recordings.[37] Representative John Conyers introduced a similar piece of legislation just a few years later, but Congress did not enact it.[38]

More recently, Representative Jerry Nadler introduced the Fair Play Fair Pay Act on two occasions, once in 2015 and once in 2017.[39] This bill largely mirrored Representative Conyers's iteration of the Performance Rights Act but also made increased concessions for broadcasters by increasing the minimum amount of revenue required to trigger royalty payment responsibilities.[40] Although some portions of the Fair Play Fair Pay Act were recently enacted as part of the Music Modernization Act ("MMA"),[41] the terrestrial broadcaster loophole lives on.[42]

B. The CRB

1. History & Developments

The first iteration of what we now know as the CRB was created when Congress enacted the Copyright Act of 1976.[43] This body was called the Copyright Royalty Tribunal ("CRT").[44] Congress created this organization to perform various functions, such as disseminating royalties paid for public performances of "nondramatic musical

---

37 H.R. 4789 § 2(b)(1).

38 *See* Performance Rights Act, H.R. 848, 111th Cong. (2009); Brooks Boliek, *Performance Rights Act on Repeat*, POLITICO (Feb. 10, 2011, 4:45 AM), https://www.politico.com/story/2011/02/performance-rights-act-on-repeat-049194?o=0 [https://perma.cc/L9T4-Z2MP] (explaining the disagreements among industry groups that prevented the Performance Rights Act from being passed).

39 H.R. 1836, 115th Cong. (2017); H.R. 1733, 114th Cong. (2015).

40 *Compare* H.R. 848 § 3 (providing that "each individual terrestrial broadcast station that has gross revenues . . . of . . . less than $100,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $500 per year"), *with* H.R. 1836 § 5 (providing that "the royalty rate for . . . [an] individual terrestrial broadcast station . . . that is not a public broadcasting entity . . . and that has revenues . . . of less than $1,000,000 shall be $500 per year").

41 Pub. L. 115–264, 132 Stat. 3676 (2018).

42 Larry Miller, *Terrestrial Radio Ducks Music Modernization Act, but Still Must Face the Music*, BILLBOARD (Oct. 5, 2018), https://www.billboard.com/articles/news/politics/8478501/terrestrial-radio-music-modernization-act-essay [https://perma.cc/2XP9-AMGU]; *see* Parisi, *supra* note 16; Johnson, *supra* note 16.

43 *See* Pub. L. No. 94-553, ch. 7, sec. 701, §§ 801–810, 90 Stat. 2541, 2594–98.

44 *Id.* § 801(a), 90 Stat. at 2594.

work[s] . . . by means of a coin-operated phonorecord player."[45] Under the 1976 Act, the CRT was "composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each."[46]

Congress discarded the CRT in 1993, providing instead for the formation of "copyright arbitration royalty panels" ("CARP" or "CARPs").[47] Congress took this step because it felt that the CRT's responsibilities were "episodic," and that "ad hoc arbitration panels" were thus a better use of government resources.[48] Just a few years later, the CARPs' responsibilities grew with the passage of the DPRA, which required "the Librarian of Congress . . . [to] convene a copyright arbitration royalty panel to determine . . . a schedule of rates and terms" to govern the digital public performance right in the event that the interested stakeholders could not reach a compromise on their own.[49] Soon after the turn of the century, a CARP gathered pursuant to this directive and reached some controversial results.[50]

Soon thereafter, the CARP program was abandoned in favor of the CRB when Congress passed the Copyright Royalty and Distribution Reform Act of 2004 ("CRDA").[51] Since the passage of this act, the administrative structure of the CRB has undergone only minor statutory changes.[52] The current framework calls for "3 full-time Copyright Royalty Judges," selected by the Librarian of Congress, with "1 of the 3 as the Chief Copyright Royalty Judge."[53] The Copyright Act requires the Librarian to select an experienced adjudicator as the Chief Copyright Royalty Judge.[54] For the remaining seats on the

---

45 *Id.* §§ 116, 801, 90 Stat. at 2562, 2594.

46 *Id.* § 802(a), 90 Stat. at 2596.

47 Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, sec. 2, §§ 801–802, 107 Stat. 2304, 2304.

48 H.R. REP. NO. 103-286, at 9 (1993).

49 DPRA, Pub. L. No. 104-39, sec. 3, § 114, 109 Stat. 336, 340–41 (1995).

50 *See* Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 TEX. INTELL. PROP. L.J. 447, 449 (2003) ("The fee was 7 [cents] per 100 performances for simulcasts and 14 [cents] per 100 performances for Internet-only transmissions. The Librarian of Congress rejected the rate for Internet-only transmissions and set the rate for all webcasts at 7 [cents] per 100 performances . . . . After complaints from small webcasters . . . Congress passed the Small Webcaster Settlement Act of 2002 . . . .").

51 Copyright Royalty and Distribution Reform Act (CRDA) of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (codified as amended at 17 U.S.C. §§ 801–805, 1010 (2012)).

52 *See* Copyright Royalty Judges Program Technical Corrections Act, Pub. L. No. 109-303, 120 Stat. 1478 (2006).

53 17 U.S.C. § 801(a).

54 *Id.* § 802(a)(1) ("The Chief Copyright Royalty Judge shall have at least 5 years of experience in adjudications, arbitrations, or court trials.").

panel, the Copyright Act directs that one of the two Judges "shall have significant knowledge of copyright law," while "the other shall have significant knowledge of economics."[55] The Judges "serve staggered six-year terms" and are supported by a group of "3 full-time staff members" hired by the Chief Judge.[56]

2. Current Responsibilities & Goals

The Copyright Act and title 37 of the Code of Federal Regulations lay out the basic objectives and responsibilities of the CRB.[57] Overall, these responsibilities have grown over time,[58] and will grow even more if the Fair Play Fair Pay Act is passed.[59]

The essential responsibility of the CRB is to administer the various licensing schemes set forth in the Copyright Act.[60] This includes "mak[ing] determinations and adjustments of reasonable terms and rates of royalty payments"[61] for things such as "[s]econdary transmissions of distant television programming by satellite,"[62] "[c]ompulsory license[s] for making and distributing phonorecords,"[63] and, as relevant here, "[l]icenses for certain nonexempt [digital] transmissions" of copyrighted sound recordings.[64] When it comes to setting "reasonable rates and terms" for digital performances of sound recordings, Congress has directed the CRB to abide by "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[65]

---

55 *Id.*

56 *Id.* § 802(b)–(c); *About Us*, COPYRIGHT ROYALTY BOARD, https://www.crb.gov [https://perma.cc/657H-M8ZV].

57 *See* 17 U.S.C. § 801(b); 37 C.F.R. §§ 301.1–388.3 (2018).

58 *Compare* Copyright Act of 1976, Pub. L. No. 94-553, § 801(b), 90 Stat. 2541, 2594–96 (authorizing the CRT "to make determinations concerning . . . copyright royalty rates as provided in sections [111, 115, 116, and 118]"), *with* 17 U.S.C. § 801(b) (authorizing the CRB "to make determinations . . . of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004").

59 *See* Fair Play Fair Pay Act, H.R. 1836, 115th Cong. § 3 (2017) ("A proceeding . . . shall be commenced as soon as practicable after the date of enactment of the Fair Play Fair Pay Act of 2017 to determine royalty rates and terms for nonsubscription broadcast transmissions . . . .").

60 *See* 17 U.S.C. § 801(b).

61 *Id.* § 801(b)(1).

62 *Id.* § 119.

63 *Id.* § 115.

64 *Id.* § 114(f).

65 *Id.* § 114(f)(1)(A)–(2)(B).

3. *Potential CRB Responsibilities Under the Fair Play Fair Pay Act*

According to the Federal Communications Commission, there are over 15,000 broadcast radio stations in the United States,[66] which means that the number of entities required to pay royalties for public performances of sound recordings could skyrocket if the Fair Play Fair Pay Act is implemented.[67]

Nevertheless, the unenacted portions of the Fair Play Fair Pay Act would make few administrative changes to the CRB.[68] All of the broadcasters who would be required to pay performance royalties under the Fair Play Fair Pay Act would simply be incorporated into the procedures that currently exist for digital performance royalties.[69] The Fair Play Fair Pay Act would also retain the "willing buyer-willing seller"[70] guideline that is currently used to set digital performance royalties.[71] Notably, the Fair Play Fair Pay Act would not provide the CRB with any additional judges or staff.[72]

II. Is the CRB Capable of Administering a Public Performance Right in Sound Recordings that Involves Terrestrial Broadcasters?

Because the Fair Play Fair Pay Act would leave the CRB's current structure largely intact,[73] one has to ask whether the CRB could handle the increased responsibility that the Fair Pay Fair Play Act would impose. As the following analysis demonstrates, there are at

66 Fed. Commc'n. Comm'n, Broadcast Station Totals as of September 30, 2018 (2018), https://docs.fcc.gov/public/attachments/DOC-354386A1.pdf [https://perma.cc/NC3G-BQWV].

67 *See* Nate Rau, *Fair Play Fair Pay Act Reintroduced in Congress, Would Make Radio Pay Artists*, Tennessean (Mar. 30, 2017, 11:46 AM), 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/HGX3-HSBJ] ("The Fair Play Fair Pay Act . . . would require broadcasters to pay artists and record labels when their songs are played over the air on the radio . . . .").

68 Essentially, the only administrative change to the CRB proposed in the Fair Play Fair Pay Act was the implementation of "willing buyer-willing seller" as the "[u]niform [r]ate [s]tandard" for all CRB activities performed under 17 U.S.C. § 114(f). Fair Play Fair Pay Act, H.R. 1836, 115th Cong. § 4(a) (2017); Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 Cardozo L. Rev. 173, 245 (2012) (discussing issues related to the "willing buyer-willing seller" principle). This portion of the Fair Play Fair Pay Act was incorporated into the recently-passed Music Modernization Act. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551, 115th Cong. § 103(a)(1)(B) (2018).

69 *See* Fair Play Fair Pay Act, H.R. 1836 § 2(b).

70 DiCola & Sag, *supra* note 68, at 245.

71 Fair Play Fair Pay Act, H.R. 1836 § 4(a)(1).

72 *See id.* §§ 1–10 (containing no provision that would provide the CRB with staff).

73 *See id.*; *supra* note 68 and accompanying text.

least two issues that are likely to impede the CRB in meeting this challenge: staffing concerns and insufficient expertise.

A. The CRB Is Insufficiently Staffed to Administer the Fair Play Fair Pay Act

Understaffing is the first reason why the CRB is unprepared for the potential enactment of the Fair Play Fair Pay Act. As discussed above, the CRB is currently comprised of "[three] full-time Copyright Royalty Judges" and "[three] full-time staff members."[74] Although this construct is certainly more robust than the "ad hoc" CARPs that preceded it, it is arguably more limited than the system that existed when the Copyright Act of 1976 took effect.[75] Indeed, the original version of the CRT was "composed of five commissioners"[76] and had the authority to hire a large staff,[77] even though it had fewer responsibilities than the CRB does today.[78] This indicates that the CRB, as presently constituted, may not be sufficiently staffed to effectively carry out the additional work required by key provisions of the Fair Play Fair Pay Act.

Congress's recent approach provides additional evidence that the CRB, in its current form, is unable to take on additional responsibilities.[79] Indeed, when it enacted the MMA, Congress delegated several responsibilities that seem appropriate for the CRB to other administrative bodies.[80] In passing the MMA, Congress provided for the creation of a "mechanical licensing collective" ("MLC") to administer a new music licensing regime.[81] Under this new system, the MLC will be responsible for things such as "collect[ing] and distribut[ing] royal-

74 17 U.S.C. §§ 801(a), 802(b) (2012).

75 *See* Pub. L. No. 94-553, §§ 802(a), 805(a), 90 Stat. 2541, 2596, 2598 (1976).

76 *Id.* § 802(a), 90 Stat. at 2596.

77 *See id.* § 805(a), 90 Stat. at 2598 ("The Tribunal is authorized to appoint and fix the compensation of such employees as may be necessary to carry out the provisions of this chapter, and to prescribe their functions and duties.").

78 *See* NIMMER & NIMMER, *supra* note 13, § 7.27 (explaining the initial duties of the CRT and subsequent developments). *Compare* Copyright Act of 1976, Pub. L. No. 94-553, § 801(b)(1)–(2), 90 Stat. 2541, 2594–96 (1976) (authorizing the CRT "to make determinations concerning . . . copyright royalty rates as provided in section[s] [111, 115, 116, and 118]"), *with* 17 U.S.C. § 801(b)(1) (2018) (authorizing the CRB "to make determinations . . . of reasonable terms and rates . . . as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004").

79 *See, e.g.*, Orrin G. Hatch-Bob Goodlatte Music Modernization Act, H.R. 1551, 115th Cong. § 102(a)(1)(B)(4) (2018).

80 *See id.* § 102(d).

81 Andrew Flanagan, *A Music Industry Peace Treaty Passes Unanimously Through Congress*, NPR (Sept. 19, 2018, 5:17 PM), https://www.npr.org/2018/09/19/649611777/a-music-industry-peace-treaty-passes-unanimously-through-congress [https://perma.cc/REJ9-SLHS].

ties," "engag[ing] in efforts . . . to identify and locate the copyright owners of . . . musical works," and "[a]dminister[ing] a process by which copyright owners can claim ownership of musical works."[82]

These are the kinds of administrative and fact-finding duties that have in other contexts been assigned to the CRB.[83] For example, in the context of cable and satellite television, the CRB is charged with "conduct[ing] . . . proceeding[s] [as necessary] to determine the distribution of royalty fees"[84]—a process that involves fact-finding through trial-like hearings.[85] Congress's choice to delegate these kinds of responsibilities elsewhere when it passed the MMA suggests that the CRB has reached its capacity in terms of what it can accomplish with its current workforce. Thus, the CRB seems insufficiently staffed to handle the increased activity that would be required if the terrestrial broadcaster exception were abrogated through the Fair Play Fair Pay Act.

These staffing issues would persist even if Congress closed the terrestrial broadcaster loophole without creating a new brand of CRB proceedings. Assuming, for instance, that the rate-setting proceedings that currently exist for digital public performances of sound recordings could be adapted to include terrestrial broadcasters, it would still be a challenge for the CRB to incorporate so many new parties into the proceedings.[86] To be sure, some of these new parties could decide to submit "[j]oint petition[s]" in the proceedings.[87] Even so, if the terrestrial broadcaster loophole is eliminated, the increased volume of documents that the CRB would have to review under such circumstances should be reason enough to at least provide more support staff for the judges.[88] For these reasons, Congress should provide the CRB with a larger staff if it decides to enact the Fair Play Fair Pay Act or any other similar piece of legislation.

---

82 H.R. 1551, 115th Cong. § 102(d)(3).

83 *See, e.g.*, 17 U.S.C. § 111(d)(4) (2012).

84 *Id.* §§ 111(d)(4)(B), 119(b)(5)(B).

85 *See* 37 C.F.R. §§ 351.9–.10 (2018).

86 As noted previously, there are over 15,000 broadcast radio stations in the United States. *See* FEDERAL COMMUNICATION COMMISSION, *supra* note 66.

87 *See* 37 C.F.R. § 351.1(b)(1)(ii) (2012).

88 *See* The Hon. David R. Strickler, *Royalty Rate Setting for Sound Recordings by the United States Copyright Royalty Board: The Judicial Need for Independent Scholarly Economic Analysis*, 12 REV. ECON. RES. ON COPYRIGHT ISSUES 1, 2 (2015) ("The Web IV proceeding ran from April 2015 through closing arguments in July 2015, and the Judges considered 660 exhibits, consisting of 12,000 pages, and heard oral testimony from 47 witnesses, including 14 economists."); *Rate Proceedings*, COPYRIGHT ROYALTY BOARD, https://www.crb.gov/rate/ [https://perma.cc/M93G-68QM].

B. The CRB Suffers from an Expertise Gap that May Prevent it from Effectively Administering the Fair Play Fair Pay Act

The CRB may also lack the expertise necessary to effectively carry out the responsibilities that the Fair Play Fair Pay Act would create. When it created the CRB, Congress intended for principles of economics to play a key role in the CRB's work, as evidenced by its mandate that one member of the panel "have significant knowledge of economics."[89] Nevertheless, based on past frustration with the CRB's determination of webcasting royalties, it is not clear whether this mandate has provided sufficient economic expertise for the CRB to achieve its goals with respect to the current public performance right in sound recordings.[90]

As previously discussed, in administering the digital public performance right the CRB must "establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."[91] History suggests that the CRB has not always fulfilled this duty, as some of the CRB's rulings have led the willing buyers and willing sellers to request legislative intervention from Congress to override the CRB's determinations.[92]

Of course, Congress is likely to blame for any expertise gap at the CRB because Congress—and not the CRB—decided that one economics-focused judge was sufficient and imposed the "willing buyer-willing seller" approach[93]—a standard that some have classified as "a decision rule . . . likely to generate arbitrary results."[94] In addition, the current model for CRB proceedings arguably has "a serious defect"

---

89 17 U.S.C. § 802(a)(1) (2012).

90 *See* DiCola & Sag, *supra* note 68, at 231–40 (chronicling frustration surrounding the CRB's approach in administering digital public performance royalties).

91 17 U.S.C. § 114(f)(2)(B).

92 *See* DiCola & Sag, *supra* note 68, at 229–40 (outlining various legislative actions superseding CRB actions). For example, Congress passed the Small Webcaster Settlement Act of 2002, H.R. 5469, 107th Cong., which was "motivated by the lack of representation of small webcasters in the CARP proceedings and the assessment that such webcasters were unduly disadvantaged by the high per-performance royalty fees." DiCola & Sag, supra note 68, at 229–30. The negative impact of these rates on small webcasters and the ensuing legislative override suggest that the CRB needs greater economic expertise because it was unable to set rates that accounted for *all* willing buyers and sellers. *See id.* (emphasis added).

93 17 U.S.C. § 802(a)(1); *see also id.* § 114(f)(2)(B) ("The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller.").

94 DiCola & Sag, *supra* note 68, at 245.

because it has "left the [CRB] . . . reliant on the parties for information."[95] Past commentators have suggested that this is problematic because it "pit[s] the deep institutional expertise of the recording industry against a decentralized and emerging industry," causing "certain important interests" to refrain from participating in the proceedings.[96] The exclusion of some interests from CRB proceedings inhibits the Board's ability to have all of the facts when making its rate-setting determinations and thereby contributes to the "arbitrary results" in the Board's rulings.[97] Furthermore, if Congress decides to remove the terrestrial broadcaster loophole, this concern may become even more pronounced, as some proposals to remove the loophole have been criticized for being too harsh on smaller interests and stakeholders.[98] Thus, if Congress decides to remove the terrestrial broadcaster exemption and impose additional responsibilities on the CRB, it should give the CRB greater access to economic expertise so that the CRB can fulfill those responsibilities more thoroughly and more confidently.

Congress could perhaps achieve this goal by looking to other administrative agencies, which employ economists to "provide economic analysis on many . . . functions and policy decisions."[99] Taking such a step would actually coincide quite well with some of the comments that have been made by Judge David Strickler.[100] In an article, Judge Strickler called for more research on "the economic nuances of copyright issues," and outlined "several subjects" for researchers to examine.[101] If Congress equipped the CRB with its own economic

---

95 *Id.* Judge David Strickler, a current Copyright Royalty Judge, has also expressed some frustration with this approach. *See* Strickler, *supra* note 88, at 3 ("Judges are constrained by the adversarial nature of the process with regard to the economic evidence they receive . . . . If the parties' experts fail to address specific economic principles or facts . . . the hearing record will be incomplete at best, and economically inadequate at worst.").

96 DiCola & Sag, *supra* note 68, at 245–46.

97 *Id.*

98 *See, e.g.*, Gregory Alan Barnes, Opinion, *Fair Play Fair Pay Act Is Not What it Seems*, HILL (Apr. 13, 2017, 3:00 PM), https://thehill.com/blogs/pundits-blog/uncategorized/328687-the-music-bill-fair-play-fair-pay-act-is-ambitious-yet [https://perma.cc/PV73-9AVJ].

99 Ali Breland, *FCC Head Announces New Office Focused on Economics*, HILL (Apr. 5, 2017, 1:15 PM), https://thehill.com/policy/technology/327425-fcc-head-announces-new-economic-focus-at-agency [https://perma.cc/UWR3-5C4B].

100 *See* Strickler, *supra* note 88, at 1–4.

101 *Id.* at 4. One such subject on which Judge Strickler calls for more economic research is the proper definition of the willing buyer-willing seller standard. *Id.* at 5–6. For other subjects on which Judge Strickler calls for more economic research, see *id.* at 5–14.

researchers, the CRB could pursue those subjects on its own, without having to "'nudge' the economists who appear before [it]."[102]

Thus, providing the CRB with its own economic experts could help the CRB carry out the new responsibilities that it would have under the Fair Play Fair Pay Act. An unreformed CRB, on the other hand, would likely struggle to administer a broader public performance right under the Fair Play Fair Pay Act, given the difficulty that the CRB has had in administering the digital public performance right.

Conclusion

There are many good policy reasons why Congress should pass legislation like the Fair Play Fair Pay Act and expand the public performance right in sound recordings to include terrestrial broadcasters. Nevertheless, legislation like the Fair Play Fair Pay Act should provide assurance that the CRB is able carry out the provisions of the act equitably and effectively. Unfortunately, the CRB as it now stands does not possess the workforce and economic expertise that it needs to manage the responsibilities that such a piece of legislation would create. Thus, if Congress decides to abrogate the terrestrial broadcaster exemption and enact the Fair Play Fair Pay Act, it should do so in a way that provides the CRB with the additional staff and expertise it needs.

---

102 *Id.* at 3.