To amend title 17, United States Code, to provide fair treatment of radio stations and artists for the use of sound recordings, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 30, 2017

Mr. NADLER (for himself, Mrs. BLACKBURN, Mr. CONYERS, Mr. ISSA, Mr. DEUTCH, and Mr. THOMAS J. ROONEY of Florida) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to provide fair treatment of radio stations and artists for the use of sound recordings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “Fair Play Fair Pay Act of 2017”.

(b) Table of Contents.—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Equitable treatment for terrestrial broadcasts and Internet services.
Sec. 3. Timing of proceedings under sections 112(e) and 114(f).
Sec. 4. Ensuring platform parity.
Sec. 5. Special protection for small broadcasters, public and educational radio, religious services, and incidental use of music.
Sec. 6. Distribution of certain royalties.
Sec. 7. Equitable treatment of legacy sound recordings.
Sec. 8. No harmful effects on songwriters.
Sec. 9. Allocation of payments to music producers.
Sec. 10. Effective date.

SEC. 2. EQUITABLE TREATMENT FOR TERRESTRIAL BROADCASTS AND INTERNET SERVICES.

(a) Performance Right Applicable to Transmissions Generally.—Paragraph (6) of section 106 of title 17, United States Code, is amended to read as follows:

“(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.”.

(b) Inclusion of Terrestrial Broadcasts in Existing Performance Right and Statutory License.—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking “a digital” and inserting “an”; and
(2) in subparagraph (B)—
(A) by striking clauses (i) and (iii);
(B) by redesignating clauses (ii) and (iv) as clauses (i) and (ii), respectively;
(C) in clause (i), as so redesignated, by adding “or” after “retransmitter”; and
(D) in clause (ii), as so redesignated, by
striking “retransmission, whether or not simul-
taneous, is a” and inserting “retransmission is
a non-simultaneous.”.

(c) TECHNICAL AND CONFORMING AMENDMENTS.—

(1) DEFINITION.—Section 101 of title 17,
United States Code, is amended by inserting after
the definition of “architectural work” the following:

“An ‘audio transmission’ is a transmission of a
sound recording, whether in a digital, analog, or
other format. This term does not include the trans-
mission of any audiovisual work.”.

(2) CONFORMING REMOVAL OF DIGITAL.—Title
17, United States Code, is amended—

(A) in section 112(e)(8), by striking “a
digital audio transmission” and inserting “an
audio transmission”; and

(B) in section 114—

(i) in subsection (d)—

(I) in paragraph (2)—

(aa) in the matter preceding
subparagraph (A), by striking
“subscription digital” and insert-
ing “subscription”; and
(bb) in subparagraph (C)(viii), by striking “digital signal” and inserting “signal”; and
(II) in paragraph (4)—
   (aa) in subparagraph (A),
by striking “a digital audio transmission” and inserting “an audio transmission”; and
   (bb) in subparagraph (B)(i),
by striking “a digital audio transmission” and inserting “an audio transmission”;
(ii) in subsection (g)(2)(A), by striking “a digital” and inserting “an”; and
(iii) in subsection (j)—
   (I) in paragraph (6)—
   (aa) by striking “digital”; and
   (bb) by striking “retransmissions of broadcast transmissions” and inserting “broadcast transmissions and retransmissions of broadcast transmissions”; and
(II) in paragraph (8), by striking “subscription digital” and inserting “subscription”.

SEC. 3. TIMING OF PROCEEDINGS UNDER SECTIONS 112(e) AND 114(f).

Paragraph (3) of section 804(b) of title 17, United States Code, is amended by adding at the end the following new subparagraph:

“(D) A proceeding under this chapter shall be commenced as soon as practicable after the date of the enactment of the Fair Play Fair Pay Act of 2017 to determine royalty rates and terms for nonsubscription broadcast transmissions, to be effective for the period beginning on such date of enactment, and ending on December 31, 2022. Any payment due under section 114(f)(1)(D) shall not be due until the due date of the first royalty payments for nonsubscription broadcast transmissions that are determined, after the date of the enactment of the Fair Play Fair Pay Act of 2017, by the Copyright Royalty Judges. Thereafter, such proceeding shall be repeated in each subsequent fifth calendar year.”.
SEC. 4. ENSURING PLATFORM PARITY.

(a) UNIFORM RATE STANDARD.—Section 114(f) of title 17, United States Code, is amended—

(1) by striking paragraphs (1) and (2) and inserting the following:

“(1)(A) Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for transmissions subject to statutory licensing under subsection (d)(2) during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced pursuant to subparagraph (A) or (B) of section 804(b)(3), as the case may be, or such other period as the parties may agree. The parties to each proceeding shall bear their own costs.

“(B) The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2), be binding on all copyright owners of sound recordings and entities performing sound recordings affected by this paragraph during the 5-year period specified in subparagraph (A), or such other period as the parties may agree. Such rates and terms shall distinguish among the different types of services then in operation and shall include a minimum fee for each such type of service, such differences to be based on criteria in-
including the quantity and nature of the use of sound recordings and the degree to which use of the service may substitute for or may promote the purchase of phonorecords by consumers. 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. In determining such rates and terms, the Copyright Royalty Judges—

“(i) shall base their decision on economic, competitive, and programming information presented by the parties, including—

“(I) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner’s other streams of revenue from the copyright owner’s sound recordings; and

“(II) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological
contribution, capital investment, cost, and risk; and

“(ii) may consider the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.

“(C) The procedures under subparagraphs (A) and (B) shall also be initiated pursuant to a petition filed by any copyright owner of sound recordings or any transmitting entity indicating that a new type of service on which sound recordings are performed is or is about to become operational, for the purpose of determining reasonable terms and rates of royalty payments with respect to such new type of service for the period beginning with the inception of such new type of service and ending on the date on which the royalty rates and terms for eligible nonsubscription services and new subscription services, or pre-existing services, as the case may be, most recently determined under subparagraph (A) or (B) and chapter 8 expire, or such other period as the parties may agree.”; and

(2) by redesignating paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4), respectively.

(b) Technical and Conforming Amendments.—
(1) SECTION 114.—Section 114(f) of title 17, United States Code, as amended by subsection (a), is further amended in paragraph (4)(C), as so redesignated, by striking “under paragraph (4)” and inserting “under paragraph (3)”.

(2) SECTION 801.—Section 801(b)(1) of title 17, United States Code, is amended by striking “114(f)(1)(B), 115,” and inserting “115”.

(3) SECTION 804.—Section 804(b)(3)(C) of title 17, United States Code, is amended—

(A) in clause (i), by striking “and 114(f)(2)(C)”;

(B) in clause (iii)(II), by striking “114(f)(4)(B)(ii)” and inserting “114(f)(3)(B)(ii)”;

(C) in clause (iv), by striking “or 114(f)(2)(C), as the case may be”.

SEC. 5. SPECIAL PROTECTION FOR SMALL BROADCASTERS, PUBLIC AND EDUCATIONAL RADIO, RELIGIOUS SERVICES, AND INCIDENTAL USE OF MUSIC.

(a) SPECIAL PROTECTION FOR SMALL BROADCASTERS.—Section 114(f)(1) of title 17, United States Code, as amended by section 4(a), is further amended by inserting at the end the following new subparagraph:
“(D)(i) Notwithstanding the provisions of subparagraphs (A) through (C), the royalty rate for nonsubscription broadcast transmissions by each individual terrestrial broadcast station licensed as such by the Federal Communications Commission that is not a public broadcasting entity as defined in section 118(f) and that has revenues in any calendar year of less than $1,000,000 shall be $500 per year for any such year. For purposes of such determination, such revenues shall include all revenues from the operation of the station, calculated in accordance with generally accepted accounting principles in the United States. In the case of affiliated broadcast stations, revenues shall be allocated reasonably to individual stations associated with those revenues.”.

(b) SPECIAL PROTECTION FOR PUBLIC BROADCASTERS, COLLEGE RADIO, AND OTHER NONCOMMERCIAL STATIONS.—Subparagraph (D) of section 114(f)(1) of title 17, United States Code, as added by subsection (a), is amended by inserting at the end the following new clauses:

“(ii) Notwithstanding the provisions of subparagraphs (A) through (C), the royalty rate for nonsubscription broadcast transmissions by each individual terrestrial broadcast station licensed as such
by the Federal Communications Commission that is
a public broadcasting entity as defined in section
118(f) shall be $100 per year.

“(iii) The royalty rates specified in clauses (i) and (ii) shall not be admissible as evidence or other-
wise taken into account in determining royalty rates in a proceeding under chapter 8, or in any other ad-
ministrative, judicial, or other Federal Government proceeding involving the setting or adjustment of the
royalties payable for the public performance or re-
production in ephemeral phonorecords or copies of sound recordings, the determination of terms or con-
ditions related thereto, or the establishment of notice or recordkeeping requirements.”.

(c) NO ROYALTIES FOR RELIGIOUS SERVICES OR IN-
CIDENTAL USES OF MUSIC.—Section 114(d)(1) of title
17, United States Code, as amended by section 2(b), is
further amended by striking subparagraph (A) and insert-
ing the following:

“(A) a nonsubscription broadcast trans-
mission of—

“(i) services at a place of worship or
other religious assembly; or

“(ii) an incidental use of a sound re-
cording of a musical work;”.

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(d) **TECHNICAL CORRECTION.**—Section 118(f) of title 17, United States Code, is amended by striking “section 397 of title 47” and inserting “section 397 of the Communications Act of 1934 (47 U.S.C. 397)”.

**SEC. 6. DISTRIBUTION OF CERTAIN ROYALTIES.**

Section 114(g) of title 17, United States Code, is amended—

(1) in paragraph (1), by inserting “or in the case of a transmission to which paragraph (5) applies” after “this section”; and

(2) by adding at the end the following new paragraph:

“(5) Notwithstanding paragraph (1), to the extent that a license granted by the copyright owner of a sound recording to a transmitting entity eligible for a statutory license under subsection (d)(2) extends to such entity’s transmissions otherwise licensable under a statutory license in accordance with subsection (f), such entity shall pay to the agent designated to distribute statutory licensing receipts from the licensing of transmissions in accordance with subsection (f), 50 percent of the total royalties that such entity is required, pursuant to the applicable license agreement, to pay for such transmissions otherwise licensable under a statutory license in ac-
cordance with subsection (f). That agent shall dis-
tribute such payments in proportion to the distribu-
tions provided in subparagraphs (B) through (D) of
paragraph (2), and such payments shall be the sole
payments to which featured and nonfeatured artists
are entitled by virtue of such transmissions under
the direct license with such entity.”.

SEC. 7. EQUITABLE TREATMENT OF LEGACY SOUND RE-
CORDINGS.

(a) Payment for Use of Certain Sound Re-
cordings.—Section 114(f)(3) of title 17, United States
Code, as so redesignated, is amended by adding at the end
the following:

“(D)(i) Any person publicly performing sound
recordings protected under this title by means of
transmissions under a statutory license under this
section, or making reproductions of such sound re-
cordings under section 112(e), shall make royalty
payments for transmissions that person makes of
sound recordings that were fixed before February
15, 1972, and reproductions that person makes of
those sound recordings under the circumstances de-
scribed in section 112(e)(1), in the same manner as
such person does for sound recordings that are pro-
tected under this title.
“(ii) If a person fails to make royalty payments described in clause (i) for sound recordings fixed before February 15, 1972, there shall be available, in addition to any remedy that may be available under the laws of any State, a civil action in an appropriate United States district court for recovery limited to the payments described in clause (i), in addition to interest, costs, and attorneys’ fees. Any such recovery that is obtained shall be offset against any recovery for such violation that may be available under the laws of any State.

“(iii) No action may be brought under the laws of any State against a transmitting entity alleging infringement of a right equivalent to the right granted in section 106(6) based on a public performance of a sound recording fixed before February 15, 1972, or alleging infringement of a right equivalent to the right granted in section 106(1) based on a reproduction of such a sound recording, if—

“(I) the performance would have been subject to statutory licensing under subsection (d)(2) if the sound recording had been first fixed on or after February 15, 1972;

“(II) the reproduction would have been subject to statutory licensing under section
112(e)(1) if the sound recording had been first
fixed on or after February 15, 1972;

“(III) the transmitting entity has satisfied
the requirements for statutory licensing under
subparagraph (B) and section 112(e)(6); and

“(IV) the applicable royalty was paid and
accounted for under this subparagraph.

“(iv) This subparagraph does not confer copy-
right protection under this title upon sound record-
ings that were fixed before February 15, 1972. Such
sound recordings are subject to the protection avail-
able under the laws of the States, and except as pro-
vided in clause (iii), are not subject to any limitation
of rights or remedies, or any defense, provided under
this title.

“(v) This subparagraph shall have no effect
with respect to any public performance that is made
of a sound recording, or reproduction that is made
of a sound recording under the circumstances de-
scribed in section 112(e)(1), on or after February
15, 2067.”.

(b) EFFECTIVE DATE.—The amendments made by
this section shall apply to performances and reproductions
of sound recordings occurring on or after the date of the
enactment of this Act.
SEC. 8. NO HARMFUL EFFECTS ON SONGWRITERS.

(a) No Adverse Effect on License Fees for Underlying Musical Works; Necessity for Other Licenses.—

(1) In general.—Section 114(i) of title 17, United States Code, is amended to read as follows:

“(i) No Adverse Effect on License Fees for Underlying Musical Works; Necessity for Other Licenses.—

“(1) No adverse effect on license fees for underlying musical works.—License fees payable for the public performance of sound recordings under section 106(6) shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of reducing or adversely affecting such license fees. License fees payable to copyright owners for the public performance of their musical works shall not be reduced or adversely affected in any respect as a result of the rights granted by section 106(6).

“(2) Necessity for other licenses.—Notwithstanding the grant by an owner of copyright in
a sound recording of an exclusive or nonexclusive li-

cense of the right under section 106(6) to perform
the work publicly, a licensee of that sound recording
may not publicly perform such sound recording un-
less a license has been granted for the public per-
formance of any copyrighted musical work contained
in the sound recording. Such license to publicly per-
form the copyrighted musical work may be granted
either by a performing rights society representing
the copyright owner or by the copyright owner.”).

(2) CONFORMING AMENDMENT.—Section

114(d)(3)(C) of title 17, United States Code, is

hereby repealed.

(b) PUBLIC PERFORMANCE RIGHTS AND ROYAL-
ties.—Nothing in this Act, or the amendments made by
this Act, shall adversely affect in any respect the public
performance rights of or royalties payable to songwriters
or copyright owners of musical works.

(c) PRESERVATION OF ROYALTIES ON UNDERLYING

WORKS PUBLICLY PERFORMED BY TERRESTRIAL BROAD-
cast Stations.—Section 114(f) of title 17, United States
Code, as amended by section 4(a), is further amended by
adding at the end the following new paragraph:

“(5) Notwithstanding any other provision of
this section, under no circumstances shall the rates
established by the Copyright Royalty Judges for the public performance of sound recordings be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to reduce or adversely affect the license fees payable to copyright owners of musical works or their representatives for the public performance of their works by terrestrial broadcast stations, and such license fees for the public performance of musical works shall be independent of license fees paid for the public performance of sound recordings.”.

SEC. 9. ALLOCATION OF PAYMENTS TO MUSIC PRODUCERS.

(a) LETTER OF DIRECTION.—Section 114(g) of title 17, United States Code, as amended by section 6, is further amended by adding at the end the following new paragraph:

“(6) LETTER OF DIRECTION.—A collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for acceptance of instructions from a payee identified in subparagraph (A) or (D) of paragraph
(2) to distribute a portion of the payments to which the payee otherwise would be entitled from the licensing of transmissions of a particular sound recording to a producer, mixer, or sound engineer who was part of the creative process that created the sound recording (in this section, referred to as a 'letter of direction'). To the extent that the collective accepts a letter of direction, the person entitled to payment pursuant to such letter of direction shall, during the time such letter of direction is in effect and followed by the collective, be treated for all purposes as the owner of the right to receive such payment. This paragraph shall not be interpreted to imply that a collective cannot accept or act upon payment instructions in other circumstances.”.

(b) ADDITIONAL PROVISIONS FOR RECORDINGS FIXED BEFORE NOVEMBER 1, 1995.—Section 114(g) of title 17, United States Code, as amended by subsection (a), is further amended by adding at the end the following new paragraph:

“(7) SOUND RECORDINGS FIXED BEFORE NOVEMBER 1, 1995.—

“(A) PAYMENT ABSENT LETTER OF DIRECTION.—A collective designated by the Copyright Royalty Judges to distribute receipts from
the licensing of transmissions in accordance with subsection (f) shall adopt and reasonably implement a policy that provides, in circumstances determined by the collective to be appropriate, for deduction of 2 percent of the receipts from the licensing of transmissions of a sound recording fixed before November 1, 1995, from receipts otherwise payable to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings) pursuant to paragraph (2)(D) (which leaves the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings) 43 percent of the total receipts paid pursuant to paragraph (2)) and distribution of such amount to one or more persons described in subparagraph (B), after deduction of costs as described in paragraph (3) or (4), as applicable, if each of the following requirements is met:

“(i) Certification of Attempt to Obtain a Letter of Direction.—A person described in subparagraph (B) cer-
tified to the collective, under penalty of perjury, that—

“(I) for a period of at least 4 months, that person made reasonable efforts to contact the artist payee for such sound recording to request and obtain a letter of direction instructing the collective to pay a portion of the royalties from the featured recording artist or artists to that person; and

“(II) during the period beginning on the date that person began the reasonable efforts described in subclause (I) and ending on date of that person’s certification to the collective, the artist payee did not definitively affirm or deny the request for a letter of direction.

“(ii) COLLECTIVE ATTEMPT TO CONTACT ARTIST.—After receipt of the certification described in clause (i) and for a period of at least 4 months before the collective’s first distribution to the person described in subparagraph (B), the collective attempted to notify the artist payee of the
certification made by the person described in subparagraph (B) in a manner reason-
ably determined by the collective.

“(iii) NO OBJECTION RECEIVED.—An objection to the distribution has not been submitted to the collective by the artist payee as of the date that is 10 business days before the date on which the first dis-
tribution is made.

“(B) ELIGIBILITY FOR PAYMENT.—A per-
son shall be eligible for payment under subpara-
graph (A) if such person—

“(i) is a producer, mixer, or sound en-
gineer of the relevant sound recording;

“(ii) has entered into a written con-
tract with a record company involved in the creation or lawful exploitation of the relevant sound recording, or with the re-
cording artist or artists featured on such sound recording (or the persons conveying rights in the artists performance in the sound recordings), pursuant to which such person is entitled to participate in royalty payments based on exploitation of the rel-
evant sound recording that are payable
from royalties otherwise payable to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists performance in the sound recordings);

“(iii) made a contribution, of a nature subject to copyright protection under section 102, to the creation of the relevant sound recording; and

“(iv) submits a written certification to the collective stating, under penalty of perjury, that such person meets the requirements in clauses (i) through (iii) and includes a true copy of the contract described in clause (ii).

“(C) Multiple certifications.—Subject to subparagraph (D), in a case in which more than one person described in subparagraph (B) has met the requirements for a distribution pursuant to subparagraph (A) with respect to a sound recording as of the date that is 10 business days before the date on which a distribution is made, the collective shall divide the 2 percent distribution equally among all such persons.
“(D) Objection to Payment.—Not later than 10 days after the collective receives from the artist payee a written objection to a distribution made pursuant to subparagraph (A), the collective shall cease making any further payment related to such distribution. In any case in which the collective has made one or more distributions pursuant to subparagraph (A) to a person described in subparagraph (B) before the date that is 10 business days after the date on which the collective receives an objection by the artist payee to such distribution, the objection shall not affect that person’s entitlement to any distribution made before the collective ceases such distribution pursuant to this subparagraph.

“(E) Ownership of the Right to Receive Payments.—To the extent that the collective determines that a distribution will be made pursuant to subparagraph (A) to a person described in subparagraph (B), such person shall during the period of such distribution be treated for all purposes as the owner of the right to receive such payments.
“(F) Artist payee defined.—In this paragraph, the term ‘artist payee’ means a person, other than a person described in subparagraph (B), who owns the right to receive all or part of the receipts payable under paragraph (2)(D) with respect to a sound recording. In a case in which there are multiple artist payees with respect to a sound recording, an objection by one such payee shall apply only to that payee’s share of the receipts payable under paragraph (2)(D), and does not preclude payment under subparagraph (A) from the share of an artist payee that does not object.”.

(e) Technical and Conforming Amendments.—

Section 114(g) of title 17, United States Code, as amended by subsections (a) and (b), is further amended—

(1) in paragraph (2), by striking “An agent designated” and inserting “Except as provided for in paragraph (7), a collective designated by the Copyright Royalty Judges”;

(2) in paragraph (3)—

(A) by striking “agent designated” and inserting “collective designated by the Copyright Royalty Judges”; and
(B) by striking “agent” and inserting “collective”, each place it appears; and

(3) in paragraph (4), by striking “agent” and inserting “collective”, each place it appears.

SEC. 10. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act, and except as provided in the amendment made by section 3, shall apply to any proceeding that is pending on, or commenced on or after, such effective date.