

# SYMPOSIUM ADDRESS: U.S. REPRESENTATIVE MARSHA BLACKBURN ON FEDERAL COPYRIGHT REFORM

FEATURING: U.S. REPRESENTATIVE MARSHA BLACKBURN\*

**Representative Blackburn:** First, I want to say thank you so much for inviting me and for giving me a few minutes of your time. I am absolutely delighted to be here and spend some time with you, and I thank you for your interest in intellectual property issues..

I have to say a few words about Bart Herbison, who has just completed talking with you and trying to give you an overview of what is happening and what has transpired as we have pushed for copyright reforms and intellectual property protections for entertainment products. Bart is knowledgeable, he is skilled, and he knows how to get things done on Capitol Hill. He has worked so closely with my team in making certain that we were able to get things accomplished for the entertainment industry. I know he talked with you a little bit about capital gains and how we moved that from ordinary income tax for songwriters who wanted to finally sell their catalogue.<sup>1</sup> Bart and I started working together when I took a sabbatical from my marketing company and went in to reorganize what had been an old film office for the state of Tennessee. This was in the mid nineties—'95-'98. What we did was assemble people from the music side, from the content production on television and film, from the platforms—which are your interactive technologies and your delivery systems—and bring them together. We brought them together to say, “How do we position Nashville so that it can be a leader as we move forward in this digital revolution and as we move from analogue to digital?” And we did it. And Bart and I worked together on those components. I formed a task force of individuals from the different sides of the industry, and it has served us well. As you have seen, the cable industry and streaming and Internet, et

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\* Marsha Blackburn represents Tennessee's 7th District, founded and chairs the Congressional Songwriters Caucus, and has enjoyed strong ties to the recording and entertainment industry throughout her career in Congress. Representative Blackburn is a lead sponsor of the Fair Play Fair Pay Act of 2015, which is aimed at standardizing the rules for digital and terrestrial radio broadcasts.

1. See Tax Increase Prevention and Reconciliation Act of 2005, 26 U.S.C. § 1221 (2010).

cetera moved from being silos of voice video and data to merge technologies and merge delivery systems and ride on the spectrum together with voice video and data. So, I appreciate that you got the hear from Bart, and I hope that he is someone that you will keep on your short list of people to call when you need information about how something should be approached or a little bit of a deeper understanding because he does have a wealth of knowledge.

Turning to copyright reform, I wanted to start by talking about a couple of things in general. Were any of you at the Judiciary Committee listening session that we conducted here? We've got a couple of you who were there. It was great. Bob Goodlatte, who chairs the House Judiciary Committee is someone I've been working with now for a couple of years to accomplish copyright reform that is going to serve our content producers well. I've had him into Nashville three or four times. Recently we did a roundtable that was well attended.<sup>2</sup> We were pleased that so many people from the entertainment industry were there to talk through and work with the Judiciary Committee members—four committee members were there. Chairman Goodlatte has been quite committed. He spent two years looking at the copyright laws. These have not been updated since 1976. Those of you in this room know that, probably appreciate that, and wish something would get done. The Chairman knows that as technology brings changes that there is a responsibility of Congress to make certain that the laws are going to keep pace. So he has done now twenty hearings and has heard from over a hundred witnesses. He's continuing to look at the music licensing and the scope of copyright protection. He has taken his hearings out of D.C. and on the road. After the roundtable in Nashville, there are two more stops that he's going to do that you all will probably hear some about. In November they will be in Silicon Valley meeting with some of those that work on the delivery systems side and then there is a hearing in Los Angeles that is primarily focused on content creation. After those meetings, I think you're going to see the listening tour bring together some of this feedback, and probably next year you're going to see Congress begin to take some actions on what is going to happen with content and with copyright reform.

I have been so appreciative of the Chairman's willingness to come to Nashville—to meet with our songwriters, our innovators, and our creators—and truly have appreciated his attentiveness to the protection of content. So we will look forward to those changes, and I hope you all will stay in touch with me and with our team as we work through this process. You can always get the information that we have and the things that we are working on by our website, it is [Blackburn.house.gov](http://Blackburn.house.gov). Every Friday I do a

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2. Belmont Hosts Copyright Review Listening Tour, <http://news.belmont.edu/belmont-hosts-copyright-review-listening-tour/> (posted September 23, 2015).

newsletter—it goes out about four o’clock and it talks about what’s going on in D.C.—any hearings—when we’ve done a hearing like the field hearing here in Nashville we send a link so that you can actually thumb back through it and listen to it; or, if you want to have it transcribed or get a transcription of it, you know how to do it. So it’s our way of making certain that you all know what is happening.

A couple of bills that I want to touch on, and then I’m going to take questions, and then I’m going to get back to work! And finish out the rest of my day. Let me talk a bit about the *Fair Play Fair Pay Act*.<sup>3</sup> It’s H.R. 1733. This is a bill that Jerry Nadler—who is a member out of New York—Jerry and I have worked on this, interestingly enough, we started on this probably eight years ago, and there were two California members, Mary Bono and Howard Berman, neither of which are still in Congress, and we all started working on this issue. Our goal was to make certain that there was a terrestrial performance right that was going to be established, and that our musicians would be paid that rate for terrestrial radio play. That is specifically what H.R. 1733 does. Jerry and I have worked on this, as I said, for about eight years. The form of the bill now is the *Fair Play Fair Pay Act*, and it truly is an issue of fairness. It really is. Monday I did a roundtable with the Grammys. We met with people that are involved with so many different components of this industry to look at the fairness issue of compensation.

Now, in Congress, we say you have to have a Constitutional basis for any law or any bill that goes to the floor to make a law. The *Fair Play Fair Pay Act* is based in Article I Section 8, Clause 8.<sup>4</sup> That is where it finds its nexus for creators being compensated and protected and their having the right to seek compensation and be protected from piracy. When you read the Constitution, it tells you that there is a protection for our creators and our innovators—protection from piracy on the high seas. It’s in there! Today, that piracy comes over the airwaves. So all of this work has a constitutional basis, and, yes, entertainers deserve to be compensated.

Now, basically, what we have with terrestrial radio is a loophole: songwriters get paid, but performers don’t get paid. And as the business model has changed through the years for radio and radio play, what have we seen happen? You’ve got a lot of format radio that is out there: you’ve got oldies, you’ve got country, you’ve got gospel. You’ve got all this format radio that is taking place. You’ve got entertainers, when they hit the road they have to give away a lot of merchandise, a lot of CDs, for promotion. But when their music gets played on radio, they don’t get any

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3. Fair Play Fair Pay Act, H.R. 1733, 114th Cong. (2015).

4. U.S. CONST. art. I § 8, cl. 8.

compensation for it. So we have worked for years to make certain that musicians get that compensation.

Now let me tell you why I think this is not fair. One of my dear friends is a guy named Sam Moore. Sam Moore, was Sam of Sam & Dave. And Sam and his wife Joyce are really dear friends, and I have walked through this issue with them. Oldies radio, what do they like to play? Soul Man. It plays a lot. Sam Moore doesn't make a cent. He gets zero, nada, when it gets played. Sam Moore turns 80 this weekend. He's going to be inducted into the Memphis Music Hall of Fame. People repeat those songs, bands do covers of these Sam and Dave songs, radio stations play that music, and Sam Moore gets nothing. It made him famous. He sang it. They play it. Is that fair? No, that's not fair. It is not fair. There are three countries on the face of the earth that do not pay a performance right. Anybody know who those three countries are?

**From the Audience:** China?

**Representative Blackburn:** No, China pays!

**Audience:** North Korea?

**Representative Blackburn:** North Korea, Iran, and the United States of America.<sup>5</sup> [Laughter.] Now, how do you defend that?

**From the Audience:** You don't.

**Representative Blackburn:** You don't. That's right. That's why we are trying to close this loophole. So that there is a fair market value that is going to be paid for that music when it is played. We think it is the right thing to do. Now let me tell you what else that does. When the U.S. puts a performance right on the books—and I don't care if its a half cent. It doesn't matter. It is that we have closed that loophole, and we have recognized the rights of the creator. Now, at that point, guess what's happening? Then all these other countries that have a performance right, they will repatriate, these entertainers can repatriate that money to the U.S. They can collect the performance right that is owed them by European countries, by Asian countries, anywhere on the face of the earth. Then they can bring that money home. You're talking about tens of millions of dollars, every year, for entertainers that are no longer traveling but their music is still being played. They have the right to benefit from that music. So we are indeed pushing to get this done this year. We are pleased to have

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5. See U.S. Copyright Office, *Copyright and the Music Marketplace: a report of the register of copyrights* (February 2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

bipartisan support in both chambers, the House and Senate, in order to get this on the books. Every time we have the opportunity to talk about it, we do. Mr. Nadler and I have penned an op-ed that should run in Billboard during CMA week here,<sup>6</sup> and we look forward to continuing the bill's support and moving this legislation forward.

A couple of other things that happen in the legislation: Section five puts in place some protections for small, local, and public broadcasters by capping their royalties at an affordable rate.<sup>7</sup> Some of you may have heard from radio stations that say, "Oh, this is a tax." They've called it a "tax" as they have campaigned against the legislation in Congress, and they're saying "Don't add a tax to us." And I've said, when is paying for what you use a tax? Would you honestly go to Walmart and pick up a hammer off the shelf and walk out the door with it saying, "I don't want to pay the tax?" No, of course not. No one would think of doing that. But because entertainment product is an intangible product, sometimes it gets pushed aside. So what we've done, stations with less than a million dollars in annual revenue would pay \$500 a year. Noncommercial public radio stations would pay \$100 a year. Now, does anybody in here really think a \$500 a year payment would break somebody? No. You plan for that. You plan for that in your cost of doing business. This is why we think it is fair. We think it is appropriate that those that are utilizing the creation and the works of musicians should make that payment.

Section four of the bill creates platform parity to level the playing field among terrestrial, satellite, cable, and internet radio so that all forms of radio, regardless of the technology they use will pay fair market value for music performances.<sup>8</sup> Now, this is something we think is important to put in place because technology changes. Delivery systems change. But you look at that end utilization, whether somebody's just listening to it, whether somebody's building a playlist, whether they're using it for retransmission or re-commercialization processes. We think that that platform parity is something that we need to approach. Because, five years from now there are probably going to be all these different delivery systems. We don't even know what they're going to be yet. But that's the great thing about innovation and how creators are bringing things to the marketplace.

Section seven of the bill requires the payment of royalties for sound recordings made before February 15, 1972, making clear that pre-1972

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6. Rep. Marsha Blackburn and Rep. Jerry Nadler, *A Bipartisan Case for Fair Play Fair Pay Act*, BILLBOARD, November 6, 2015, available at <http://www.billboard.com/articles/business/6753910/fair-play-fair-act-opinion-jerrold-nadler-marsha-blackburn>

7. *Fair Play Fair Pay Act of 2015*, 114<sup>th</sup> Cong., H.R. 1733 § 5 (2015).

8. *Id.* at § 4.

recordings have value, and that those who create it should be paid for their work.<sup>9</sup> Period, end of sentence. If you're using it, pay for it.

Section eight protects the songwriters and the publishers by clearly stating that nothing in this bill can be used to lower songwriting royalties.<sup>10</sup> The reason we put that in the bill was because some people said, "Well, you know, we've got the performance in, we've got the songwriting in, let's just take that existing pie and recut the pie." No. Does anybody know what America's number two export is? And I know somebody does because we just talked about it.

**Audience Member 1:** Entertainment product.

**Representative Blackburn:** You got it! There you go! My SAG actor guy.<sup>11</sup> That's right. Entertainment product is our nation's number two export.<sup>12</sup> Now, what we want to do is to make certain that people are going to be paid for that product, and that as the importance of that product has increased, as there are new delivery systems, as you have performers and as you have creators and writers, you're not taking a pie and cutting that existing pie. You allow the pie to grow for the additional usages and that is thereby that section.

Section nine streamlines the allocation of royalty payments to music producers by codifying industry practices, ensuring artists receive their fair share from direct licensing of all performances eligible for a statutory license.<sup>13</sup> Some of you have heard about the AMP Act.<sup>14</sup> We had some members that pulled Section nine out and did a separate piece of legislation, the *AMP Act*, and it is moving along with the full FFPF bill.

While we've got all these new technologies that are bringing entertainment product to each of us at will. However, we have no uniform licensing system in place to make sure that digital satellite, AM, FM are all playing by the same rules. The law, Title 17 U.S.C., that governs royalty payments is inconsistent; it is unfair, and new technologies are placed at a disadvantage by the current licensing system, and that is shortchanging both artists and musicians. Internet broadcasters like Pandora pay royalty rates set to reflect what would have been negotiated in the free market, while cable and satellite providers pay low or below market rate under a

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9. *Id.* at § 7.

10. *Id.* at § 8.

11. Representative Blackburn is referring to Nashville attorney Andrew Caple, who in addition to his legal work also serves as the Vice President, SAG-AFTRA Nashville,

12. MICHAEL JOHN HAUPERT, *THE ENTERTAINMENT INDUSTRY* 70 (2006).

13. *Fair Play Fair Pay Act of 2015*, 114<sup>th</sup> Cong., H.R. 1733 § 9.

14. *The AMP Act*, H.R. 1457, 114<sup>th</sup> Cong. (2015).

grandfathered position. Performing artists have been unfairly treated in the law for years, and we think it is time to bring some uniformity and some clarity to this and to compensate entertainers for the work that they have created.

Let me touch on H.R. 1283, which is *Songwriter Equity Act*.<sup>15</sup> I know Bart talked with you all about this. The Judiciary Committee member that we have worked with on this for the last couple of years is Doug Collins out of Georgia. He has been into Nashville several times. What it would do is amend copyright law to remove a provision that prohibits license fees payable for the public performance of sound recordings by means of a digital audio transmission from being taken into account in any administrative, judicial, or other government proceeding. It requires copyright royalty judges when setting those royalty rates under the compulsive license available for the reproduction and distribution of musical works, or as you all know, a mechanical license, to establish the rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace. With rate courts, there has been some pushback and some disagreement, so this would bring some clarity to the CRJs [(Copyright Royalty Judges)] and require them, in establishing such rates and terms, to base their decisions on marketplace, economic, and use information.

I wanted to also touch on a couple of other points with you before the time runs out on us. I'll just say on the *Songwriter's Act*, the intellectual property of songwriters deserves that protection. It is a creative work, it is a constitutional protection, and we are so pleased to have Mr. Collins leading those efforts for us with the Judiciary Committee.

Let me touch base on the *BOTS Act*, which is HR 708.<sup>16</sup> It is bipartisan legislation. This is something that we have worked on with some of the entertainers and some of the venue operators here in Tennessee. It's done by Jim Cooper, Steve Cohen, Scott Desjarlais, and me. What it does is to address the bots and the hacking software that launch thousands of simultaneous requests for tickets when a ticketing site opens. Then in the first moments of that sale, the site is overwhelmed, the bots come in, they buy the best tickets, the site slows to a crawl, and then you've got the problem in the resale markets. These botsters resell the tickets on the secondary market site, and they're reselling them for multiple times the face value.

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15. *Songwriter Equity Act*, H.R. 1283, 114th Cong. (2015).

16. *BOTS Act*, H.R. 708, 114th Cong. (2015).

Ticketing sites spend millions of dollars on anti-bot software, but the resale of the tickets is so lucrative that it produces really kind of an arms race, if you will, between the botsters and the ticket sites. The ticket-selling websites generally have terms and conditions which limit the number of tickets that a buyer can access, and some of that helps to prohibit some of the bots. Tennessee, Maryland, California, have laws that makes it a crime to use a bot, but most botsters are, however, not here in Tennessee. The *New York Times* ran a piece back in May of 2013, which was titled, “The Concert Industry Struggles With ‘Bots’ That Siphon Off Tickets.”<sup>17</sup> The article noted ticketing bots are often inexpensive and programmed in countries beyond easy reach of American law enforcement. Ticketmaster, who we’ve talked with on the issue, feels like sometimes the bots buy more than 60% of the most desirable tickets for their shows. Ticketmaster in a lawsuit even accused one group of scalpers of using bots to request up to 200,000 tickets in a single day.

The *BOTS Act* will ensure that real fans can get access to good tickets at face value without the interference of bots. The bill does two things: It makes it an unfair and deceptive practice under the FTC to use a bot to violate the terms and conditions of a ticketing site. Very simple. It will give the FTC jurisdiction to come in and help address this issue. It also creates a private right of action under a clear federal standard to allow parties that are harmed by bots to sue the botsters under a clear federal standard. We had originally put a criminal provision in the bill, but we are taking that out because some stakeholders didn’t like that. What we want to do is get that right of action on the books and get a clear, federal standard on the books. The bill is intended to help root out the bad actors and to help consumers get access to tickets at a fair market rate.

So we’ve got those three bills that are moving through: *The BOTS Act*, and then you have the *Songwriters’ Equity Act*, and then the *Fair Play Fair Pay Act*. Each of these deals specifically with areas of concern that the entertainment industry has brought to us.

With that, we’ve got about five or ten minutes to take a couple of questions. Again, thank you so much for letting me come and spend some time with you. Yes sir?

**Audience Member 2:** So one of the things that I know staff on the Hill are talking about is whether it would be better to deal with these various copyright issues in an omnibus bill, or whether they can be addressed

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17. Ben Sisario, *The Concert Industry Struggles With ‘Bots’ That Siphon Off Tickets*, N.Y. TIMES, May 26, 2013, available at <http://www.nytimes.com/2013/05/27/business/media/bots-that-siphon-off-tickets-frustrate-concert-promoters.html>



piecemeal like the copyright office modernization and all these licensing issues. So, you're somebody who people say could and should have a say in that soon, in what comes to the floor, and I applaud that idea.

**Representative Blackburn:** Thank you.

**Audience Member 2:** So I'm wondering what's your take on it?

**Representative Blackburn:** The realm of the possible, and that is why you will see us lay out a big bill and then come back and break pieces apart, like we've done with *Fair Play Fair Pay* and breaking out the *AMP Act*. There are a couple of reasons for that. In the House of Representatives, members like single shot bills. They have a tendency, as you know, to come closer to taking an action on a single shot bill than an omnibus. In the Senate, they want an omnibus. So what you probably will see us do is take the actions separately and then put it into a format so that the Senate can then take it and move it as they do. What you will see us do is to push the Senate to get the job done. Right now the House has over 300 bills, the vast majority of those bipartisan, sitting over in the Senate, waiting for action. And what we want them to do is to pick their pace up and actually push these things to the finish. So, in the House I do think you will see us continue to talk more comprehensively but move the sections as separate bills to get them across the finish line. Thanks. Yes sir?

**Audience Member 3:** So I've got to admit that I find the logic of your justification here quite puzzling. I mean, I like Sam & Dave as much as anybody, but they wrote and performed those songs knowing that they weren't going to get these rights, and I don't really see any justification for offering them retroactively. You observed that the United States is one of the only countries that doesn't offer these rights, and yet we seem to produce more and more popular and more valuable recorded music than any other country in the world. That's suggesting that we took the right path rather than the wrong one, and I just don't see why members of the public ought to support a bill that effectively is a big giveaway to a bunch of private interests. Where's the corresponding public benefit for that? And then when it comes to the scalping bill, it just seems really quite bizarre to me. I mean, the scalpers ensure that tickets go to their best and highest use. That's normally what an economist would say that we want, and if ticket sellers are going to leave money on the table, I really don't see why Congress ought to get involved.

**Representative Blackburn:** Ok, I appreciate that. [Laughter.] 180-degree disagreement! Free country! How about it, I think that's great.

**Audience Member 1:** Sam & Dave didn't write that song, by the way.

**Representative Blackburn:** No, they did not.

**Audience Member 1:** And there's a reason radio continues to play it 45 years after it was a hit, because it still gets people's attention, which keeps people on your radio station, and allows them to sell more advertising, which they continue to make money off of, and Sam and Dave make nothing.

**Representative Blackburn:** That's exactly right. Now let me ask you this: Let's say you create a patent for a widget, and it's a great patent, but then people decide they don't want to pay you for that. They're going to reverse engineer it, or they're going to use it without paying you, so you get absolutely no benefit from that. Do you think that's fair?

**Audience Member 3:** It depends on the circumstances.

**Representative Blackburn:** It depends on the circumstances? So what you're saying is you're willing to work for free?

**Audience Member 3:** I'm saying that Congress creates intellectual property rights in order to give people an incentive to invest in innovation.

**Representative Blackburn:** Article I, Section 8 of the Constitution guarantees the creator is going to be paid.

**Audience Member 3:** Look, to the extent there needs to be an economic justification for creating intellectual property rights, you have to provide a normative assessment of whether or not the public is benefiting, by the scope of the rights that you, Congress, are choosing to grant, right?

**Representative Blackburn:** I guarantee you would have heard yes, if you had gone to Isaac Hayes's family and asked, "Does Isaac Hayes deserve to be paid for this music that he has sung that oldies radio is making a killing off of?" It is not right for those stations to make money and not compensate the creator of that money. [Applause.] Now you and I can agree to disagree. I'm going to tell you something right now. If you create it, I will fight for you to be paid for that creation, because the ability to benefit from those arts and sciences is a constitutional guarantee. It is the underpinning of the American dream. But if you want to work for free, and if you want to work pro bono all of your life, you have at it. I will defend your right to set up a business model to do that.

**Audience Member 3:** The Constitution gives Congress the option to create intellectual property should it be justified, and you chose to do it, that's

great. But I still think you ought to be analyzing whether or not it actually provides a substantial and concrete social benefit.

**Representative Blackburn:** Walk over here on music row and ask any entertainer, any producer, any songwriter, if they deserve to be paid for what they produce. Walk into a SAG actor meeting, and ask them if they deserve to be paid, and if they deserve residual income for rebroadcast. What are you going to hear? “Absolutely.”

**Audience Member 1:** I’ll say this. I just got back from a National Board meeting in L.A., and it’s a fascinating phenomenon—a lot of the leadership of the actors’ union that is based in California is *way* to the left of Bernie Sanders, and yet you will find no one spoken of more kindly than the Republican Congresswoman from the state of Tennessee, specifically for the reason that is at the heart of the discussion.

**Representative Blackburn:** Thank you. I’ve got time for one more question and then I’ve got to get to a speech.

**Audience Member 4:** I’m just curious, on the radio one that you were talking about, who distributes that? How is that going to be distributed or that maybe something I can look into.

**Representative Blackburn:** Go to Sound Exchange. Go through that. They’ve got some things up on that. And they’ll be a good source for you for staying in touch.

**Audience Member 4:** And I’m looking at your materials.

**Representative Blackburn:** You’re looking at all that? Technology’s great, isn’t it? Take you right there! [Laughter.]

**Audience Member 4:** It is.

**Representative Blackburn:** All right, I am going to head to my next set of remarks. Thank you all, thank you for the robust debate. [Laughter and applause]. We are here to help get this issue resolved so that the creative community is paid for bringing some of the most loved products and America’s number two export to the marketplace. Thank you all for doing your part.

[Applause]