

Performance Fees on Radio Stations: A Debacle Waiting To Happen

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Chances are slim that many individuals who enjoy listening to music on the radio stop to think about the web of relationships among radio stations, record labels, artists, composers, songwriters, and publishers that enable their favorite songs to be broadcast. Nor are most listeners probably aware that some of those relationships change depending on whether the music is coming from an over-the-air AM or FM broadcast station, a satellite radio service, or an Internet-based delivery platform.

Yet that arcane tangle of relationships is at the center of a growing controversy pitting the record industry against radio broadcasters. This might be only an internecine media battle, were it not for the fact that the fight revolves around creative works that implicate the Copyright Act, thus involving the federal government in questions about the rights and royalties associated with these copyrighted works.

The controversy, in short, is this: The record labels want radio broadcasters to start paying royalties to the labels for playing their recorded music. Broadcasters, who have never paid royalties to the record labels (for good reason, it turns out), oppose this idea. The dispute has spread to Congress where, since last year, dueling bills favoring

either a new royalty (“performance fee”) on sound recordings or the status quo have vied for the support of lawmakers.

The economic stakes are potentially huge, and could result in a re-ordering of one or both of these media segments.

Background

In the world of music, there are two classes of creative expression for copyright purposes: musical works and sound recordings. A “musical work” refers to the lyrics and melody of a song, and is the creative product of a composer/songwriter. A “sound recording” is a recorded arrangement of a musical work by a particular artist or group. Both musical works and sound recordings receive copyright protection.

In the case of a musical work, the copyright holder is the composer or the publisher of the composer’s work. In the case of a sound recording, the copyright holder is the performing artist or group, or the record label that records and distributes that particular recording. (Who, exactly, holds the copyright in each instance is the result of contractual agreements between the parties.)

Historically, radio broadcasters have paid royalties to composers and publishers, but not to

artists and record labels. Royalties are collected from broadcasters by three intermediary organizations: Broadcast Music, Inc. (BMI), American Society of Composers, Authors, and Publishers (ASCAP), and Society for European Stage Authors and Composers (SESAC). The payments are then distributed to the composers and publishers of the underlying “musical works.” These performance royalties are a major source of revenue for composers and songwriters. All of this functions by virtue of voluntary agreements rather than a federally legislated “compulsory license” system.¹

The economic equation is different in the case of artists and record labels. Here, all parties receive something of value without exchanging money. Radio broadcasters get the right to play recordings over the air, thereby generating an audience that attracts advertising dollars to their stations. The artists and record labels do not receive cash compensation for their music, but instead receive free airplay, which is crucial for popularizing new recordings and driving the sale of recorded music.

This exchange of sound recordings for airplay has long been characterized as a “symbiotic relationship” between broadcasters and record labels. From time to time some academics have questioned the robustness of this relationship and the extent to which airplay actually drives record sales.² However, a recent study for the National Association of Broadcasters by James N. Dertouzos, Ph.D., suggests that free radio airplay generates somewhere in the range of \$1.5 billion to \$2.4 billion in annual music sales for the record labels.³

Congress has long recognized this “mutually beneficial economic relationship” and has, at several junctures, refused to impose a royalty obligation on broadcasters for sound recordings: in 1971, when it first granted copyright protection to sound

recordings against unauthorized reproduction; and again in 1976 when it completed a comprehensive revision of the Copyright Act.

In 1995, Congress did approve legislation creating a sound recording performance right limited to certain interactive and subscription digital services (e.g., satellite radio), which required those services (but not broadcasters) to pay a royalty for playing recorded music. With the Digital Millennium Copyright Act in 1998, Congress expanded this narrow performance right to cover non-subscription digital services (e.g., Internet radio “webcasters”) — and again excluded over-the-air broadcasting.

All of these digital distributors pay royalties to the copyright holders of both sound recordings and the underlying musical works. The grant of performance rights to sound recordings for digital distribution was a sort of “preemptive strike” by

Congress to allay the record companies’ fears that consumers would download songs from on-demand “celestial jukeboxes” and genre-based digital services at the expense of record sales.

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Economic Impact

Legislation currently being considered by Congress, the “Performance Rights Act” (H.R. 848 and S. 379), would fundamentally change the relationship between traditional radio broadcasters and record labels. This proposal would create a compulsory license system under which radio stations would be compelled to pay royalties to record companies for the right to play recorded music. This would be in addition to the royalties radio stations currently pay to composers and publishers according to voluntary agreements.

Under this legislation, small radio stations would pay a flat fee on a tiered basis of no more than \$5,000 per year. Larger stations would pay a

percentage of their annual revenue at a rate to be determined by the Copyright Royalty Board. The standards by which the Copyright Royalty Board would set the rate for larger stations differ between the bills and have yet to be finalized. (For comparison, the board has set royalty rates for satellite radio of 7 percent of annual revenue in 2010, 7.5 percent in 2011, and 8 percent in 2012.)

Proponents of this legislation argue that it is only fair that radio stations pay for the music they broadcast. However, it hardly seems fair to impose an additional financial burden on broadcasters when they already provide airplay, free of charge, which has considerable economic value to the record labels. In addition, broadcasters are effectively prohibited by law from charging the record companies for this promotional benefit.

This legislative proposal comes during a recession that has dealt a serious economic blow to local radio stations, which have seen their ad revenues decrease between 10 percent and 50 percent. Radio had been in difficult straits even before the recession, losing audience share to digital audio platforms and downloaded music. More than 250 radio stations have been forced off the air altogether, according to industry figures.

Moreover, it is highly likely that a disproportionate share of the economic burden imposed by a compulsory license scheme would be borne by minority broadcasters. The Minority Media and Telecommunications Council has noted that Black and Hispanic stations already face greater challenges including weaker signals, advertising discrimination, and difficulty obtaining financing.

Paradoxically, the council notes, a system that involves a flat fee for small stations and a percentage of revenue for larger stations could have the effect of keeping small Black and Hispanic stations small. Lenders would be unwilling to finance the

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expansion of small stations if becoming large meant triggering the revenue drain of a percentage royalty.

“Almost no one invests in or lends to a business that’s about to endure an enormous (at least 6%) and unknown revenue loss,” the council said.⁴

The National Association of Media Brokers has joined the council in stating that the Performance Rights Act would force at least one-third of minority-owned stations into bankruptcy.⁵

Impact on Diversity

In addition to a severe impact on radio economics, a performance royalty on sound recordings would most likely have a strong adverse impact on diversity. The FCC has traditionally recognized three types of diversity: viewpoint diversity; source diversity (*i.e.*, a variety of owners); and outlet diversity (*i.e.*, different types of media in a market, such as radio, television, and newspapers).

To stay solvent, some stations would probably switch from music formats to talk-radio formats. Other stations would be unable to survive and would be forced off the air altogether. All three types of diversity would suffer. One could argue that viewpoint diversity would be enhanced if more stations adopted talk radio formats. However, the most likely scenario is that stations in this predicament would pick up popular syndicated talk shows that attract advertisers, or try to mimic locally such shows and their viewpoints. This might increase the quantity of viewpoints on the air, but not necessarily the diversity of those viewpoints.

Listeners of stations that went off the air entirely would lose not only music, but also the news, public affairs, and community-based programming of those stations. This would be a particularly acute loss for Black and Hispanic communities where small minority stations and their on-air personalities serve as a touchstone for those communities, and as a

primary venue for the expression of minority and ethnic viewpoints.

Of course stations that went off the air would also reduce source diversity by reducing the number of radio station owners in a market, and would reduce outlet diversity by reducing the number of radio outlets in a market vis-à-vis media outlets of other types in that market.

It is quite paradoxical that Congress is considering performance rights legislation that would most likely have the effect of reducing diversity in broadcasting; after all, this is the same Congress that has long resisted any attempts to loosen or repeal the newspaper/broadcast cross ownership rules — because Congress fears that doing away with the cross ownership rules would reduce diversity! This congressional stance is truly incongruous.

Conclusion

The current in-kind system under which radio stations play recorded music to build audiences and advertising revenue, in exchange for record companies receiving the promotional value of free airplay to boost their music sales, is fair and equitable.

Imposing a compulsory license and royalty scheme on broadcasters of the sort envisioned by the

Performance Rights Act would not only disrupt this equilibrium, but would have severe economic consequences for broadcasters already reeling from the recession. Such a scheme also would most likely reduce diversity, and thus run contrary to Congress's long-standing goal of enhancing media diversity. The economic and diversity impacts would be especially harsh on minority-owned radio stations, the outlets least able to tolerate additional burdens.

Record companies should not try to kill the “golden goose” of radio broadcasting in an effort to boost their bottom lines. Free music for free airplay has stood the test of time. It's an arrangement that is not broken, and does not need to be “fixed.”

¹ Brian T. Yeh, “Expanding the Scope of the Public Performance Right for Sound Recordings: A Legal Analysis of the Performance Rights Act (H.R. 848 and S. 379),” Congressional Research Service, May 20, 2009, p. 5 and p. 15, n. a (“No government entity is involved in setting these rates.”).

² See, e.g., Stan J. Liebowitz, “The Elusive Symbiosis: The Impact of Radio on the Record Industry” (study), University of Texas at Dallas, March 2004.

³ James N. Dertouzos, “Radio Airplay and the Record Industry: An Economic Analysis” (study for NAB), June 2008, p. 5.

⁴ Minority Media and Telecommunications Council, “Action Alert: Why We Should Oppose Public Performance Royalty Legislation,” Aug. 3, 2009, p. 1.

⁵ *Id.*

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