

Marquette Intellectual Property Law Review

Volume 15 | Issue 1

Article 6

The Performance Rights Act: A Lack of Impact on a Transitioning Music Industry

Michael C. Yeh

Follow this and additional works at: <http://scholarship.law.marquette.edu/iplr>



Part of the [Intellectual Property Commons](#)

Repository Citation

Michael C. Yeh, *The Performance Rights Act: A Lack of Impact on a Transitioning Music Industry*, 15 Intellectual Property L. Rev. 217 (2011).

Available at: <http://scholarship.law.marquette.edu/iplr/vol15/iss1/6>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Intellectual Property Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

COMMENTS

The Performance Rights Act: A Lack of Impact on a Transitioning Music Industry

INTRODUCTION	218
I. THE MUSIC INDUSTRY - A BASIC BACKGROUND.....	219
A. <i>Recording Contracts</i>	220
B. <i>Organizations</i>	220
II. THE COPYRIGHT ACT AND THE PERFORMANCE RIGHTS ACT.....	222
A. <i>The Copyright Act on the Music Industry</i>	222
B. <i>The Performance Rights Act</i>	223
1. The Great Debate	224
III. CHANGES IN THE MUSIC INDUSTRY DUE TO TECHNOLOGY	225
IV. WHY NOT FORCE ANALOG RADIO STATIONS TO PAY ROYALTIES?.....	227
A. <i>The Radio as a Medium</i>	227
B. <i>The Difference between Analog and Digital</i>	229
V. CONGRESSIONAL SILENCE IS GOLDEN: FORCE THE RECORD COMPANIES TO ADAPT.....	231
CONCLUSION.....	234

INTRODUCTION

The music industry is in a decline. Compact disc sales in the United States topped 785 million albums in 2000,¹ and dropped to only 535 million albums sold in 2008.² This sales decline is due largely to advances in digital technology, specifically the widespread integration of the Internet. “The Internet appears to be the most consequential technological shift for the business of selling music since the 1920s”³ However, major record labels have been slow to adapt to this technological shift, preferring to alienate the new digital consumer base⁴ and push for legislation that will prolong the lifespan of their archaic business models.

Music sales are not creating the same profits as before, and rather than change or adapt, record labels are petitioning the legislature to create new modes of revenue. One way the music industry is petitioning the legislature to add a new source of revenue, without changing its archaic business model, is by pushing Congress to pass the Performance Rights Act.⁵ This Act proposes that analog radio stations pay musicians and artists royalties to play their songs on the air, just like on digital radio.⁶

While the Performance Rights Act looks great on the surface, it is just a quick fix to a much larger, underlying problem—the record industry in general. For years, artists have complained that the contracts the current business model forces them to sign are unfair and monopolistic.⁷ There are many issues within a record contract to deal with, such as contract length, accounting practices, and copyright ownership.⁸ Now with the expansion of technology and the Internet, artists are free to take the role of the recording company into their own hands. Nationwide promotion and exposure, once accessible only

1. Brian Hiatt & Evan Serpick, *The Record Industry's Decline*, ROLLING STONE (Jun. 19, 2007, 2:29 PM), http://msl1.mit.edu/furdlog/docs/2007-06-19_rollingstone_industry_decline.pdf.

2. *2008 U.S. Music Purchases Exceed 1.5 Billion; Growth in Overall Music Purchases Exceeds 10%*, BUSINESS WIRE (Dec. 31, 2008, 5:03PM), <http://www.businesswire.com/news/home/20081231005304/en/2008-U.S.-Music-Purchases-Exceed-1.5-Billion>.

3. Hiatt, *supra* note 1.

4. See Brian Hiatt & Evan Serpick, *Music Tanks in '05*, ROLLING STONE, Jan. 26, 2006, at 9.

5. Performance Rights Act, H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

6. *Id.*

7. Edna Gunderson, *Rights Issue Rocks the Music World*, USA TODAY, Sept. 15, 2002, available at http://www.usatoday.com/life/music/news/2002-09-15-artists-rights_x.htm.

8. *Id.*

through record labels, is now accessible to anyone with Internet access.⁹ As the paradigm of power shifts towards the artists, record labels are stubbornly still trying to make a profit through old business models. Some congressional advocates and recording artists, who are urging the passage of the Performance Rights Act, say that this Act is equitable and will benefit artists and artists' rights.¹⁰ However, when one looks at the overall policies and practices of the record industry, any policy that prolongs the current structure of the music industry, and allows record companies to continue to profit without adapting to changes in technology, is detrimental to artist equality.

Section II of this comment will discuss the background of music industry contracts and the issues artists face. Section III will discuss the proposed Performance Rights Act and what the Act is attempting to change in more detail. Section IV will discuss the changes that have occurred in the industry because of technological advances, and Section V will compare the differences between analog and digital radio. Finally, Section VI will explain how Congress, by staying silent on this issue, can provide artists with a more permanent solution to their right for equality in the music industry.

I. THE MUSIC INDUSTRY - A BASIC BACKGROUND

During the 1980s and 1990s, a consolidation in the record and music publishing industry took place.¹¹ This meant that there were fewer "major" labels and now the "[g]iant conglomerates" controlled the record industry.¹² This in turn affected how business was done and shifted the power of agreements to the record companies. Contracts went from five or six pages in length in the 1950s, to modern-day contracts consisting of at least thirty-five pages and sometimes well over a hundred pages; and included in these contracts were detailed royalty rate calculations with complex accounting and payment procedures.¹³ However, to get national publicity and promotion, many artists had no

9. See Jon Parales, *1,700 Bands, Rocking as the CD Industry Reels*, N.Y. TIMES, Mar. 15, 2008, available at <http://www.nytimes.com/2008/03/15/arts/music/15aust.html>.

10. See Jim Puzzanghera, *Bearing the drum for radio royalties Sinatra backs a bill mandating payment for performers when their songs are played*, L.A. TIMES, Jun. 12, 2008, available at <http://articles.latimes.com/2008/jun/12/business/fi-royalties12>.

11. *The Breadth of the Music Industry and the Complexity of Music Industry Contracts*, in ENTERTAINMENT INDUSTRY CONTRACTS P 140.01 (Donald C. Farber & Peter A. Cross eds., LexisNexis 2010).

12. *Id.*

13. *Id.*

choice but to sign these contracts.¹⁴

A. Recording Contracts

Imagine for a moment that you are in a band and one of the major record labels, such as Sony, Atlantic, BMI, or Warner, just offered your band a contract. After years of touring across the country in a van, self-promoting and releasing CDs, silk-screening T-shirts in your garage, and working several part-time jobs to pay the rent, you seemingly have finally “made” it. As an artist looking to make a living off your music, the passage of the Performance Rights Act seems like a great idea because it will pay you for your songs that are played on analog radio. However, if you look closely at your royalty contract, you will see that the record company likely will stand to make more money off of analog radio royalties than your band will.

Assume that the contract stipulated that you will receive 14% royalties and your album achieved the “Gold Record” status, meaning that you have sold over 500,000 copies.¹⁵ While this seems as if you are entitled to a large amount of royalties from the album sales, a typical record contract contains many more provisions concerning royalty payments than just how many albums are sold.¹⁶ For instance, typical record contracts have a “recording fund,” money set aside to pay for the recording costs and advances to the producers that range in the hundreds of thousands of dollars.¹⁷ Before an artist sees any of the profit from album sales, he or she must first pay back the recording fund to the record labels. Then, the record company will deduct the costs for shooting music videos, paying mechanical license fees to songwriters—if someone other than the artist wrote the songs, and packaging fees.¹⁸ After all of these fees, deductions, and complicated royalty calculations, many artists find themselves not only receiving much less money than first envisioned when signing the contract; they end up actually “owing” money to the record company.

B. Organizations

The consolidation of the music industry and amendments to the

14. *Id.*

15. Lionel S. Sobel, *Royalty Calculations: Why Gold Records Don't Always Yield Fortunes*, in 1 ENTERTAINMENT INDUSTRY CONTRACTS P 159.07 (Donald C. Farber & Peter A. Cross eds., LexisNexis 2010).

16. *Id.*

17. *Id.*

18. *Id.*

Copyright Act caused the formation of many different organizations. Several of the main parties in the industry, the “musical works” copyright owners, the “sound recording” copyright owners, and the radio broadcasters have created special interest groups to better facilitate their members on a large scale. For instance, the “musical works” owners formed the American Society of Composers Authors and Publishers (ASCAP) that collects and distributes royalty payments to members.¹⁹ In 2007 alone, ASCAP distributed revenues of \$863 million to its 315,000 members.²⁰ The “sound recording” artist copyright owners have also formed numerous groups: the most notable groups being the Recording Artists’ Coalition (RAC), the American Federation of Television and Radio Artists (AFTRA), and the Featured Artists Coalition (FAC).²¹ The record labels, being “sound recording” copyright owners as well, have formed the Recording Industry Association of America (RIAA).²² The main advocate group for radio broadcasters has been the National Association of Broadcasters (NAB).²³ These are just a few groups given for explanatory purposes; many more groups actively work for the interests of their respective members.

Much of the debate and litigation that occurs in the music industry is done on behalf of the musicians or broadcasters by one of these groups. For instance, after Congress passed the Digital Millennium Copyright Act,²⁴ the RIAA created a new division called SoundExchange “to collect the webcast royalties for artists and labels.”²⁵ Since the record labels essentially created SoundExchange, many artists were concerned their interests would not be represented fairly by it. In 2003, to try and offset this concern, the RIAA spun off SoundExchange and

19. *About ASCAP*, ASCAP, <http://www.ascap.com/about> (last visited Oct. 20, 2010).

20. *ASCAP Reports Record \$ 863M in Revenues*, NASHVILLE BUSINESS JOURNAL, Feb. 12, 2008, <http://nashville.bizjournals.com/nashville/stories/2008/02/11/daily15.html>.

21. See *Recording Artists’ Coalition*, GRAMMY.COM, http://www2.grammy.com/Recording_Academy/Advocacy/rac.aspx (last visited Oct. 20, 2010); *About AFTRA*, AFTRA, <http://www.aftra.com/aboutaftra.htm> (last visited Oct. 20, 2010); *Who We Are*, FEATURED ARTISTS COALITION, http://www.featuredartistscoalition.com/showscreen.php?site_id=161&screeentype=folder&screenid=2987 (last visited Oct. 20, 2010).

22. *Who We Are*, THE RECORDING INDUSTRY ASSOCIATION OF AMERICA, <http://www.riaa.com/aboutus.php> (last visited Oct. 20, 2010).

23. NATIONAL ASSOCIATION OF BROADCASTERS, <http://www.nab.org> (last visited Oct. 20, 2010).

24. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

25. Anthony R. Berman, *The Digital Millennium Copyright Act*, in 1 ENTERTAINMENT INDUSTRY CONTRACTS P 160.05, (Donald C. Farber & Peter A. Cross eds., LexisNexis 2008).

incorporated it as an independent and non-profit business entity.²⁶ However, this may have been an empty gesture, as the majority of SoundExchange's board of directors is comprised of executives from the major record labels and their supporters.²⁷

II. THE COPYRIGHT ACT AND THE PERFORMANCE RIGHTS ACT

A. The Copyright Act on the Music Industry

The Copyright Act of 1976 protects musical works under section 106 and grants the owner of such a copyright the right to perform the work publicly.²⁸ There are two different copyrightable categories when a song from the radio is referenced under copyright law: a "musical work" and a "sound recording."²⁹ The first category, a "musical work," refers to words, lyrics, and notes, basically the sheet composition of the song.³⁰ Typically, either the songwriter who composed the song owns these rights, or a "music publisher who purchases or licenses" the rights of the composition from the songwriter.³¹ The second category, the "sound recording" right, refers to the actual recorded version of the song, or "rendition . . . captured in a tangible medium of expression such as a compact disc."³² The owners of this copyright are typically the performers, singers, musicians, and record labels that produced the version of the song played on the radio.³³ While one entity can own both copyrights to a song, this is generally not the case. Many artists and musicians own only the "sound recording" for their songs, while another party, typically the recording studio, owns the "musical works" copyright.³⁴

The original Copyright Act did not grant any protection for "sound recordings" until Congress amended the Act in 1971.³⁵ Congress made the Sound Recording Amendment in "response to the increased amount

26. SOUNDEXCHANGE, <http://www.soundexchange.com> (last visited Oct. 20, 2010).

27. See *Board*, SOUNDEXCHANGE, <http://www.soundexchange.com/about/people/board> (last visited Oct. 20, 2010).

28. 17 U.S.C. § 106(4) (2006).

29. 17 U.S.C. §§ 102(a)(2), 102(7) (2006).

30. Brian T. Yeh, CONG. RESEARCH SERV., RL 34411, EXPANDING THE SCOPE OF THE PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDING: A LEGAL ANALYSIS OF THE PERFORMANCE RIGHTS ACT (H.R. 848 AND S. 379) (2009), http://www.ipmall.info/hosted_resources/crs/RL34411_090520.pdf.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; See also Pub. L. No. 92-140, 85 Stat. 391 (1971).

of unauthorized duplication of records and tapes.”³⁶ However, this amendment did not apply to public performances over the radio or on television. As digital technology came into the picture in the 1990s, Congress felt the need to further protect the rights of “sound recording” copyright holders because of the ease of digital copying. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act, which gave “sound recording” copyright owners the exclusive performance right to digital audio transmissions of their recordings.³⁷ Finally in 1998, with the Digital Millennium Copyright Act,³⁸ Congress stated that this digital performance right applies to “noninteractive, nonsubscription Internet radio broadcasters” as well.³⁹ This means that both Internet radio stations and over-the-air stations that stream to listeners over the Internet must now pay royalties. Currently, only analog or over-the-air-only radio stations do not have to pay royalties to the “sound recording” copyright owners.

B. The Performance Rights Act

As more organizations are formed to cater to the specific needs of parties within the music industry, the amount of legislation concerning these needs has also increased. By combining the resources of their members, these organizations are now more powerful than ever and have focused on pushing legislation to promote their groups’ interests and rights. One such piece of legislation currently before Congress is the Performance Rights Act.⁴⁰

The Performance Rights Act is pending legislation that attempts to address the issue of nonpayment of royalties by analog radio stations.⁴¹ Currently, analog radio stations have to pay royalties only to the “musical works” copyright holders.⁴² This Act proposes to change the analog radio payment system by paying out royalties to the “sound

36. Brian T. Yeh, CONG. RESEARCH SERV., RL 34411, EXPANDING THE SCOPE OF THE PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDING: A LEGAL ANALYSIS OF THE PERFORMANCE RIGHTS ACT (H.R. 848 AND S. 379) (2009), http://www.ipmall.info/hosted_resources/crs/RL34411_090520.pdf.

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

38. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

39. Brian T. Yeh, CONG. RESEARCH SERV., RL 34411, EXPANDING THE SCOPE OF THE PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDING: A LEGAL ANALYSIS OF THE PERFORMANCE RIGHTS ACT (H.R. 848 AND S. 379) (2009), http://www.ipmall.info/hosted_resources/crs/RL34411_090520.pdf.

40. Performance Rights Act, H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

41. *Id.*

42. 17 U.S.C. § 106(6) (2006).

recording” owners as well—just like in digital radio.⁴³ The Act would amend 17 U.S.C. §106(6) by simply deleting the word “digital” from the rights a copyright owner of a “sound recording” can enforce.⁴⁴ Therefore, royalty payments will be applicable to analog “sound recording” copyright owners as well as digital “sound recording” owners. The Act also provides special treatment for small, noncommercial, educational, and religious stations, allowing for smaller royalty fees.⁴⁵

1. The Great Debate

Many proponents of the Act state that it is only fair and equitable for performers to be paid royalties for their work.⁴⁶ Radio stations make billions of dollars a year in advertising, which is based on a number of factors, including genre and the number of listeners.⁴⁷ Artists such as Sheryl Crow, Herbie Hancock, Patti LaBelle, and many others have petitioned Congress to force analog radio stations to pay royalty fees just like digital radio.⁴⁸ However, opponents of the Act, such as the National Association of Broadcasters, argue that artists and record labels must also take into consideration the benefit that analog radio has on their record sales.⁴⁹ Broadcasters argue that radio stations compensate performers by the promotional value the stations provide for new music.⁵⁰ The radio station peaks the interests of listeners and compels them to go out and buy the song or album.⁵¹ Congress considered this issue as well when it passed the Digital Performance Right in Sound Recordings Act.⁵² The Senate report noted that this was only for digital audio transmissions and “should do nothing to change or jeopardize the mutually beneficial economic relationship between the

43. *Id.*

44. *Compare id.* with 17 U.S.C. § 106(6) (2006).

45. Performance Rights Act, H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

46. Puzanghera, *supra* note 10.

47. *The State of the News Media An Annual Report on American Journalism 2009*, THE PROJECT FOR EXCELLENCE IN JOURNALISM, http://www.stateofthemedial.org/2009/printable_audio_chapter.htm (last visited Oct. 20, 2010).

48. *Musicians want pay from the radio*, L.A. TIMES, Feb. 25, 2009, <http://articles.latimes.com/2009/feb/25/business/fi-music25>.

49. See Marc Fisher, *Listener: Musicians Vs. Radio in Big Money Fight*, WASHINGTON POST BLOG (Sept. 1, 2007, 8:45 AM), http://blog.washingtonpost.com/rawfisher/2007/09/listener_musicians_vs_radio_in.html.

50. *Id.*

51. *Id.*

52. S. REP. NO. 102-128 at 15 (1995).

recording and traditional broadcasting industries.”⁵³ “[T]he sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by . . . free over-the-air broadcasting.”⁵⁴ Congress specifically chose not to interfere and did so again a few years later when passing the Digital Millennium Copyright Act, by requiring only digital radio and not analog transmissions to pay royalties.⁵⁵

III. CHANGES IN THE MUSIC INDUSTRY DUE TO TECHNOLOGY

“It’s not a growth market, . . . [t]his is a mature market that is being attacked on all sides.”⁵⁶ This quote is from Arista Records executive Tom Corson stating the current struggles of the music industry.⁵⁷ The major record labels are seeing a reduction in market share due to the introduction of digital music.⁵⁸ Legal digital download services such as iTunes and Rhapsody, combined with illegal peer-to-peer downloads have created an entirely new market for record companies to take profit from. However, they did not do so, and “many in the industry see the last seven years as a series of botched opportunities.”⁵⁹

The first peer-to-peer file sharing service, Napster, had about forty million users, and instead of allowing the service to continue with a legal monthly subscription fee, the record companies sued and had the site shut down.⁶⁰ “The record business had an unbelievable opportunity there. They were all using the same service. It was as if everybody was listening to the same radio station. Then Napster shut down, and all those 30 or 40 million people went to other [file-sharing services].”⁶¹ Before shutting Napster down,⁶² executives from the major record labels and Napster held discussions to continue allowing users to download music for a monthly subscription fee of roughly ten dollars and splitting the revenues between the record labels and Napster.⁶³ The companies, however, could not reach an agreement, even with a \$1 billion public

53. *Id.*

54. *Id.* at 14–15.

55. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

56. Hiatt, *supra* note 4.

57. *Id.*

58. *Id.*

59. Hiatt, *supra* note 1.

60. *Id.*

61. *Id.* (brackets and alteration in the original).

62. See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (analyzing the Napster injunction process).

63. Hiatt, *supra* note 1.

offer from Napster.⁶⁴ The retailers complained to the record companies that music would be cheaper to acquire through Napster than in stores, and artists did not want to relinquish any royalties.⁶⁵ With Napster gone, the record companies tried to create their own subscription services, but these failed because of the expense and compatibility issues.⁶⁶

Along with the digital change in the marketplace, other technological changes in the recording industry have brought about the dilution of record companies' value as well. In years past, signing with a record label was the only way to get airplay on the radio, record with the quality that a professional recording studio provides, and distribute music and merchandise across the country. Artists can now achieve many of these goals through the internet and digital technology. Recording an album in a professional studio can cost hundreds of dollars an hour, not to mention the producing, mixing, and mastering fees after the album is recorded. However, as digital technology has increased, an artist can now self-record their songs using professional software and programs instead of paying the high fees that professional recording studios charge.⁶⁷

The same can be said for the promotion of bands and albums through the Internet. With the skyrocketing popularity of online social networking sites such as MySpace and Facebook, many artists and bands now create their own promotional pages rather than depending on a record company to promote them.⁶⁸ By cutting out the record label middleman, artists now interact directly with their fans in a more personal environment. This allows more remote and unknown artists to promote themselves on equal footing with the artists that sign with the major record labels. The advances in technology are slowly rendering the services that record labels once provided artists obsolete. "We can record something at night, put it on the site for breakfast and have the money in the PayPal account by 5."⁶⁹ For decades, the record companies held the majority of power in the music industry; now this power is transferring back to the artists. For record companies to stay relevant, they must adapt to this change rather than hold on to a soon-to-be-extinct business model. The Performance Rights Act is a last gasp effort by recording companies and labels to profit off this obsolete

64. *Id.*

65. *Id.*

66. *Id.*

67. See *Avid Pro Tools*, AVID, <http://www.avid.com/US/products/family/pro-tools> (last visited Oct. 20, 2010).

68. See *MYSPEACE MUSIC*, <http://www.myspace.com/music> (last visited Oct. 20, 2010).

69. Pareles, *supra* note 9.

business model before having to adapt. As musician Lou Reed stated in a keynote speech at the 2008 SXSW Music Festival, “[y]ou have the Internet – what do you need [a label contract] for?”⁷⁰

IV. WHY NOT FORCE ANALOG RADIO STATIONS TO PAY ROYALTIES?

A. *The Radio as a Medium*

Between the late 1920s and the late 1940s, “the ‘Golden Age’ of radio in the United States[,] . . . a typical day’s fare of programs resembled today’s television—a line-up of comedies, dramas, and soap operas, punctuated at regular intervals by commercials”⁷¹ Before there were television sets in almost every household in the United States, there was first the radio medium.⁷² Like the musicians and record labels that have faced technological changes to the industry over the years, the radio medium has also had to deal with changes due to the advances of technology. This medium has developed new and innovative ways to disseminate information by means other than an analog signal, such as HD, Internet, satellites, and now even mobile phone lines.⁷³

HD radio is a new “digital” medium that provides the listener with “a clearer sound that is less prone to interference and static than analog signals.”⁷⁴ However, unlike satellite radio, HD Radio is still broadcast free over the airwaves. One only needs to buy a special HD receiver to receive the HD channels. Currently, the law treats HD radio like analog radio, and HD radio does not have to pay the “sound recording” artists, even though it technically is “digital.” The Digital Performance Right in Sound Recordings Act of 1995 granted to HD radio an exemption from paying “sound recording” copyright owners a royalty, while the other forms of digital transmitted radio were required to pay.⁷⁵ However, HD radio has not caught on as well as many industry insiders originally thought. “As of July 2008[,] an estimated 500,000 HD radios had been bought in the U.S. since their debut in 2002. With no requirement to convert to digital, and with only modest sales of

70. *Id.*

71. DAVID MORTON, *OFF THE RECORD* 49 (2000).

72. *See id.*

73. *See* THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 47.

74. *Id.*

75. Scott Woolley, *Broadcast Bullies*, *FORBES*, Sept. 6, 2004, at 134; 17 U.S.C. § 114(d)(1)(A) (“not an infringement of section 106(6) if the performance is part of – (A) a nonsubscription broadcast transmission .”).

receivers, fewer and fewer stations are making the switch each year.”⁷⁶ Based on the numbers from 2008, the transition to HD radio may never take over terrestrial, analog radio, likely making the argument for payment of “sound recording” royalties on HD radio a moot point.⁷⁷

While HD radio does not have to pay “sound recording” copyright owners a royalty fee, these next “digital audio transmissions” radio mediums are not exempt from the fee by Congress. Internet radio has changed the dynamic between the broadcaster and listener by giving the listener an interactive degree of control.⁷⁸ Many Internet-only radio stations permit the user to skip songs and receive personally tailored “playlists based on computer-generated matches.”⁷⁹ Internet-only radio derives the majority of its income from advertisements and offers a level of interactivity that is unmatched in any other medium of radio. Sites such as Pandora advertise that it is “a new kind of radio – stations that play only music you like,” and that the control of music is “directly in [the user’s] hands.”⁸⁰

Satellite radio is another alternative to free broadcast radio, and “[u]nlike traditional, advertising-based radio [it] generates 96% of its revenue from subscriptions paid by listeners.”⁸¹ The two main satellite stations, XM and Sirius, recently merged, giving the listeners even more choice of stations than ever before.⁸² Satellite stations offer more overall stations, premium subscription-only content, and more genre-specific stations to listeners than analog radio offers.⁸³

Another new medium that is growing rapidly is the mobile radio industry. “The industry, like satellite radio, depends on subscriptions for its financial base.”⁸⁴ Mobile radio is still rather new; however, cell phones “have a unique place in the landscape of advertising. They are the only form of media that people have on their person most of the time. As more people rely on them for Internet, radio and even television, it opens a new vista for advertisers.”⁸⁵

76. THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 47.

77. *See id.*

78. *Id.*

79. *Id.*

80. PANDORA, <http://www.pandora.com> (last visited Oct. 20, 2010).

81. THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 47.

82. *Id.*

83. *See* XM RADIO ONLINE, <http://www.xmradio.com/player/home/xmhome.action> (last visited Oct. 20, 2010).

84. THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 47.

85. *Id.*

B. The Difference between Analog and Digital

The Digital Performance Right in Sound Recording Act of 1995 (DPSR) distinguished between analog transmissions and digital transmissions on purpose by adding section 106(6) to the Copyright Act.⁸⁶ This addition reads, “in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”⁸⁷ Proponents of the Performance Rights Act claim that there should not be a difference between analog and digital radio;⁸⁸ however, the differences between analog radio and digital radio are glaring: (1) analog radio has been in a mutually beneficial relationship with the recording industry for decades, while the digital medium has not; (2) sound quality of analog radio is much worse than the quality of digital radio; and (3) interactivity as to the content of programming on analog radio does not exist.

Congress specifically exempted analog, over-the-air broadcasts from paying royalties to copyright owners of “sound recordings.” The Senate stated its reasoning for excluding analog over-the-air stations by “recogniz[ing] that the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting.”⁸⁹ The Senate also recognized that “the radio industry has [also] grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”⁹⁰ Traditional radio has helped many artists become known, enabling them to gain fans and support across the country, and basically, has given artists “free” promotion over the air waves for decades. The recording industry had a “symbiotic relationship” with radio broadcasters namely “free advertising that lured consumers to retail stores where they would purchase recordings.”⁹¹

Analog radio should not be forced to pay “sound recording” owners a royalty because the sound quality a listener hears is not nearly as good as digital radio. With the increased usage of the Internet, and as digital

86. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336.

87. *Id.*

88. Puzanghera, *supra* note 10.

89. S. REP. NO. 104-128 at 14–15 (1995).

90. *Id.* at 15.

91. *Bonneville Int'l Corp. v. Peters*, 347 F.3d 485, 487–88 (3d Cir. 2003) (footnote omitted).

music became more popular, Congress enacted the DPSR because “the recording industry became concerned that existing copyright law was insufficient to protect the industry from music piracy.”⁹² Record companies became worried because users could copy songs over the Internet and because “there is far less degradation of sound quality in a digital recording than an analog recording.”⁹³ When a user copied traditional analog radio with a tape recorder, the sound quality was poor, forcing listeners to go to a store for a good quality copy.⁹⁴

Also, traditional over-the-air radio does not have the interactivity component that the digital Internet and satellite radio stations thrive upon. Before passing the DPSR, the House justified the payment of royalties to digital transmissions over analog transmissions because “certain types of subscription and interaction audio services might adversely affect sales of sound recordings and erode copyright owners’ ability to control and be paid for use of their work.”⁹⁵ Analog radio and even the current over-the-air HD radio are free to anyone with a radio or HD receiver. The satellite and Internet stations require subscriptions, or at the very least a sign-up membership to listen to the songs.⁹⁶ There also is a degree of interaction between the digital stations and listeners that over-the-air analog and HD radio do not have. Subscribers to satellite and Internet stations are allowed to pick from hundreds of stations, specific genres, specific bands, and most importantly, are able to sometimes skip songs.⁹⁷ This process gives the listener a degree of control over the content of the music played that traditional over-the-air radio cannot match. Sure, one can call into an analog station and request a song, but the discretion to play the song is entirely left to the DJ of the station. The House noted that “interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.”⁹⁸ Analog and HD radio simply do not possess the same degree of interactivity that Congress envisioned when applying “sound recording”

92. *Arista Records, L.L.C., v. Launch Media, Inc.*, 578 F.3d 148, 153 (2d Cir. 2009).

93. *Id.* (citing Stephen Summer, *Music on the Internet: Can the Present Laws and Treaties Protect Music Copyright in Cyberspace?*, 8 CURRENTS: INT’L L. TRADE L.J. 31, 32 (1999)).

94. *See id.*

95. H.R. REP. NO. 104-274, at 13 (1995).

96. *See XM RADIO ONLINE*, *supra* note 83. *See also SLACKER RADIO SUBSCRIPTIONS*, <http://www.slacker.com/radio> (last visited Oct. 20, 2010).

97. *See id.*

98. H.R. REP. NO. 104-274, at 14 (1995).

copyright royalties to digital transmissions of sound recordings.

However, proponents of the Performance Rights Act are likely to argue that even though the sound quality of analog is not as good as digital, the future of radio is digital HD radio and that it is only a matter of time before all over-the-air radio becomes digital HD radio, just like what occurred in the television medium. There are thousands of HD stations that are digitally transmitted free over the air that allow users to copy perfect sounding copies, just like satellite and Internet radio. While this is a valid argument, the proponents still forget one thing, the interactivity aspect. Interactive services have more of an impact on traditional record sales “because the more advance information the user has about the digital transmission, the more the transmission facilitates a user’s private copying”⁹⁹ The satellite and Internet digital mediums narrow the listening genres much more than over-the-air radio does, and many services actually tell the listener what song will be played next. This “advance” information allows the listener to prepare to “copy” the song. Even if HD radio does let the listener know what song is currently playing, it lacks the “advance” information and degree of interactivity that Congress envisioned when requiring royalties for sound recording copyright holders.¹⁰⁰

V. CONGRESSIONAL SILENCE IS GOLDEN: FORCE THE RECORD COMPANIES TO ADAPT

“The record companies are like cartels, like countries, for God’s sake.” – Tom Waits.¹⁰¹ “Like all other corporations, the music industry has gotten greedier.” – Don Henley.¹⁰² Artists are starting to speak out against the inequality of power that record industries have over them. Congress has already done enough, by passing both the DPSR and the DMCA, to protect the music industry’s copyrights as it struggles to adapt to the digital technology medium.¹⁰³ The record companies and their organizations were slow to change their business models to include digital media and are now looking to Congress for a quick-fix bail out. Organizations such as the RIAA would like to have you believe that this

99. Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 COLUM.-VLA J.L. & ARTS 137, 167 (1999).

100. *See id.*

101. Edna Gunderson, *Rights Issue Rocks the Music World*, USA TODAY, available at http://www.usatoday.com/life/music/news/2002-09-15-artists-rights_x.htm (last updated Sept. 16, 2002).

102. *Id.*

103. *See* Digital Performance Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

Act is purely for the artists' benefit; however, the record companies that comprise the RIAA have the most to gain. The recording industry takes a substantial amount of royalties away from the artists as stipulated in recording contracts. Artists used to have to agree to these large label contracts because, until the Internet and digital medium took over, there was no other way to promote their music nationally. Now there are different avenues for artists to gain exposure to the masses without relying on record companies. If recording artists truly want to be rewarded fairly for their services, they should realize that the Performance Rights Act is just a ruse for the record industry to prolong its power over artists.

The Recording Artists' Coalition (RAC) is a group of 150 performers and artists, including Bruce Springsteen, Sting, R.E.M., Eric Clapton, and Dave Matthews, that is finally challenging the way the Recording Industry of America (RIAA) does business.¹⁰⁴ This group has focused their concerns on issues such as implementing caps on contract lengths, addressing faulty accounting practices, and creating health and pension benefits for artists.¹⁰⁵ These are major concerns that artists have with the recording industry, and a number of legislators that sponsored the Performance Rights Act have expressed their concern for equity in artist rights as well.¹⁰⁶ However, the proposed Performance Rights Act addresses only one small aspect of the concerns that currently impact artists, which is the payment of royalties.¹⁰⁷ The proposed Act does not address the larger, underlying concern affecting artists—the recording industry as a whole.¹⁰⁸ The main reason that legislators introduced the Performance Rights Act was because legislators wanted “fairness and equity” for artists.¹⁰⁹ What the sponsoring legislators have failed to see, however, is that this will not solve the “fairness and equity” issue for artists. The underlying issue of concern is the relationship between record labels and artists, not between broadcasters and the artists. If Congress really does want to promote “fairness and equity” in artist rights, then Congress should not pass the Performance Rights Act and force the record industry to reform. As RAC board member and manager of the Dixie Chicks stated, “[o]nce people have a true understanding of what’s involved, the

104. Gunderson, *supra* note 101.

105. *Id.*

106. *Id.*

107. Performance Rights Act, H.R. 848, 111th Cong. (2009); S. 379, 111th Cong. (2009).

108. *See id.*

109. 155 CONG. REC. S. 1544, 1546 (daily ed. Feb 4, 2009) (statement of Sen. Hatch), 155 Cong. Rec. S. 1543, 1546 (Lexis).

labels will be forced to reform.”¹¹⁰

Artists such as Radiohead have also taken on this fight against major record labels and have seen encouraging signs. The band released its seventh album, *In Rainbows*, in October 2008, by an unorthodox method of delivery.¹¹¹ Rather than releasing it through a record label and selling CDs in stores or via iTunes, Radiohead decided to release the album first as a digital download through its website.¹¹² Fans could pay whatever they wished for the download, from nothing to about \$212. Radiohead has not released official numbers of sales, but a survey group called comScore estimates that while only two out of five downloaders paid anything at all for the album, “the payers averaged \$6 per album,” working out to be about \$2.26 per album, “more than Radiohead would have made in a traditional deal.”¹¹³ Although this strategy is unlikely to work for a lesser-known band, Radiohead has shown that there are economically feasible alternatives out there other than just the traditional record deal. The fact that more artists continue to speak out against the current practices of the recording industry and some even bypass the use of record labels to disseminate their music to the public, as Radiohead did here, will be much more influential in creating “fairness and equity” for artists than the Performance Rights Act can ever hope to achieve.

Numerous high-profile artists have supported this proposed Act publically, claiming that it is only fair that artists in general get paid royalties for radio airtime.¹¹⁴ Several have even testified before Congress and urged lawmakers to support the Performance Rights Act.¹¹⁵ But there may be an ulterior motive for high-profile artists to testify in support of this Act. They, like the record companies stand to gain the most.

The irony is that it will be the less-established performers who will be hurt most by a performance tax . . . [i]f radio stations are forced to pay to play music, program directors will be less likely to take a chance playing unknown artists and will instead stick with established musicians like Bono. New artists and niche formats will suffer, and Bono and Britney Spears will become wealthier.¹¹⁶

110. Gunderson, *supra* note 101.

111. Mark Binelli, *The Future According to Radiohead*, ROLLING STONE, Feb. 7, 2008, at 55.

112. *Id.*

113. *Id.*

114. *See Musicians want pay from the radio, supra* note 48.

115. *See* Jim Puzzanghera, *supra* note 10, at C1.

116. *See* Chloe Albanesius, *Bono: Radio Should Pay for Songs, Like Web Does*, PC

This reason may be why certain artists are so vocal when pushing for the Performance Rights Act. Congress should take this into consideration and determine if this Act really will promote “fairness and equity” as the sponsors of the bill envisioned or will it simply create an industry that is beneficial to a select few and injurious to the majority.

Also, new royalty fees that the Performance Rights Act proposes to impose on over-the-air radio stations “could result in less copyrighted music being performed, either because stations may change their format to talk radio or they may need to broadcast an increased number of advertisements to pay for the additional royalty fees.”¹¹⁷ News and talk radio is “the second-most-listened to format on radio, behind country music, with 48 million listeners and 1,533 stations”¹¹⁸ If royalty costs become too high to play copyrighted songs, the stations may switch to a talk radio format, where “sound recording” fees are not required, thus further damaging the means of exposure for existing and new and upcoming artists.

CONCLUSION

Congress can address many of the music industry’s issues best by staying silent on the payment of royalties for “sound recording” copyright owners and not voting for the Performance Rights Act. For over eighty years, radio broadcasters and record labels have enjoyed a mutually beneficial industry that has warranted no congressional intervention. The music medium has advanced dramatically over the years, from phonorecords to tapes to CDs, and the recording industry has had to adapt as well. Now digital media, a new medium, has taken hold of the industry, and the industry is being forced to adapt again. However, instead of adapting, the industry is asking Congress to change an eighty-year mutually beneficial relationship between broadcasters and labels for a system that will simply put more money in the pockets of the record labels. Even if the Performance Rights Act passes, the recording industry will never be satisfied with what it has; only a total reform will ensure fairness and equity to the artists.¹¹⁹

MAG, available at <http://www.pcmag.com/article2/0,2817,2345688,00.asp>.

117. See Brian T. Yeh, CONG. RESEARCH SERV., RL 34411, EXPANDING THE SCOPE OF THE PUBLIC PERFORMANCE RIGHTS FOR SOUND RECORDING: A LEGAL ANALYSIS OF THE PERFORMANCE RIGHTS ACT (H.R. 848 AND S. 379) (2009), http://www.ipmall.info/hosted_resources/crs/RL34411_090520.pdf.

118. THE PROJECT FOR EXCELLENCE IN JOURNALISM, *supra* note 47.

119. “In 2008, Copyright Royalty Judges (CRJ) set the royalty rate that satellite radio services must pay to copyright owners for the use of sound recording during the years 2007-2012.” *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1221–22 (D.C. Cir. 2009).

On its face, it may be easy to glance at the proposed Act and surmise that it is only making things fair, that artists should be paid royalties for their works. However, upon looking further into the issues and the larger overall picture of the music industry as a whole, one will see that the record companies stand to gain the most from the passage of the Performance Rights Act. The record companies will be the ones seeing the majority of the royalties, not the artists themselves, and this will only prolong the stranglehold that the recording industry has over its artists. By sacrificing a few non-substantial royalty payments now, artists can force the record companies to adapt and change their business models, and thus create a beneficial industry for all artists in the long run.

MICHAEL C. YEH*

SoundExchange, made up of executives from major record labels, appealed the royalty rate determination. *Id.*

* 2011, J.D. Candidate, Marquette University Law School. I would like to thank my family and friends for their tremendous support throughout my law school career.