Congress Debates The Future Of Music With "Performance Rights Act"

The recent holidays were a dreary time for the recorded music industry, as it struggled through another season of plummeting CD sales that, along with continued file sharing on peer-to-peer networks and rapid advancements in myriad forms of digital distribution, continue to disrupt the traditional music business. The resulting turmoil among the four remaining "major" music labels (and their signed recording artists) has led to waves of file sharing lawsuits against individuals (their own customers), massive restructuring of music retail and distribution relationships, and continuing layoffs. Amid this chaos however, there are visions of the "celestial jukebox" — an idyllic, digital future in which all music is accessible to consumers all the time, from any device, anywhere, at a reasonable price, and in which music creators share in ever greater pools of advertising and subscription based revenue, in the place of traditional sales.


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As we lurch through this period of disruption, Washington, DC has become a music entertainment capital of the country. In 2007, Congress convened hearings to address the future of radio, the newly constituted Copyright Royalty Board rendered decisions establishing royalty rates for new forms of music broadcasting, and record labels and recording artists squared off against broadcasting interests with respect to the use of music in various media.

On December 18, 2007, these debates came to a fever pitch with the introduction of the Performance Rights Act (S. 2500; H.R.4789), whereby music labels and recording artists seek a so-called "full performance right" that would substantially increase the royalty revenues they receive from music broadcasting. The additional monies would come at the expense of radio broadcasters however, represented by the National Association of Broadcasters (NAB), one of the most powerful lobbying groups in the country. The NAB has branded the initiative a "Performance Tax" it intends to fight with all its substantial resources.

Public Performance Rights in Music

It is natural that as traditional music sales lag, more attention is focused on music industry revenues created from the "public performance" of music — royalties flowing when recorded music is broadcast on the radio, television and, increasingly, by digital means, in the form of Internet and satellite radio, webcasting and streaming. The current battle stems from a historical disparity in the treatment of two kinds of music copyrights — "musical works," the underlying songs owned by songwriters and music publishers, as opposed to "sound recordings," the recorded versions of musical works, traditionally owned by labels (who share revenue with recording artists).

Since early in the twentieth century, public performance licensing revenue has flowed from the broadcasting of musical works. Through performing rights organizations such as ASCAP, BMI and SESAC, songwriters/music publishers extend blanket licenses to radio and television stations, which typically pay a percentage of their revenues for the privilege of broadcasting music programming. In contrast, no such public performance right attached to sound recordings. Thus, for example, radio broadcasting of the holiday classic "White Christmas" has yielded the estate of songwriter Irving Berlin perennial and substantial performance revenues since its debut in 1942. However, neither the estate of Bing Crosby, whose recording made the song famous, nor his record label (Decca/Universal) has received any broadcast royalties at all. In this regard, United States copyright law differs from the vast majority of developed countries, which recognize equivalent performance rights for both musical works and sound recordings.

Digital Performance Rights

The historical disparity between songs and recordings gained new significance with the onset of digital music distribution and performance. By the early nineties, the major labels (also a formidable lobby), through the Recording Industry Association of America (RIAA), began pressing Congress for more robust rights in the realm of music performance. The RIAA claimed that because listeners could more easily access and retain streamed digital music, this form of broadcasting could eventually "replace" compact disc purchases, altering established patterns of music consumption, to the detriment of labels and artists.

As a result, in 1995 Congress passed the Digital Performance Right in Sound Recordings Act (DPRSRA), adding Section 106(6) to the Copyright Act, which for the first time recognized a public performance right in sound recordings. But the new right is limited to public performances resulting from "digital audio transmissions" — predominantly Internet and satellite radio. Terrestrial radio broadcasting and other "analog" transmissions are not included.

Through the "full performance right" sought in the Performance Rights Act, labels and artists now seek to bridge this gap, creating parity with songwriters and publishers, and eliminating the sound recording exemption enjoyed by broadcasters for decades.

Minor Changes, Major Implications

The essence of the Performance Rights Act would be accomplished with the simple removal of the word "digital" from Section 106(6) — creating a broad exclusive right to perform sound recordings publicly "by means of an audio transmission," digital or analog. In turn, this change would bring radio broadcasting within the ambit of Section 114 of the Copyright Act, which provides for a compulsory, statutory license for the public performance of sound recordings, along with royalty rates for various categories of broadcasters.

Moreover, these changes would bring US law into harmony with dozens of foreign countries, allowing labels and artists to claim public performance royalties accruing from airplay in other jurisdictions. Estimates vary, but it is generally acknowledged that a full performance right in the US would create an additional annual royalty pool in excess of $1 billion, and perhaps the same amount in reciprocal royalties based on international airplay.

In short, there are billions of dollars riding on the Performance Rights Act — dollars that will either be paid out to music labels and artists (the latter entitled by statute to a 50% stake), or remain with US and foreign broadcasters. Thus, the Congressional debates over these issues are hotly contested, featuring barbed testimony from radio executives to celebrity musicians, trading heated rhetoric as to "fairness" in music licensing, laying blame for the current music industry crisis, and accusing one another of outright greed.

Legal Vigilance in the New Entertainment Business

Whether the Performance Rights Act will advance in the election year of 2008 is difficult to predict, but the debates attending this legislation have broader implications that should not be ignored. Indeed, in many ways, these debates herald the new age of digital entertainment distribution, from music and movies, to videogames and other forms of performing arts. As we approach the era of the celestial entertainment jukebox, nearly every business has a stake, from the advertisers and marketers whose dollars pave the information highway, to the performers and producers whose creative works populate it and the technology-empowered consumers who complete the cycle.

Virtually every company is a participant in the "new" music and entertainment business. For corporate counsel, keeping abreast of the Performance Rights Act and its related debates will help maintain the perspective necessary to avoid pitfalls and take advantage of opportunities in the still dawning and fast developing era of digital entertainment distribution.

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