

Promoting Platform Parity: Equal Pay for Equal Music

BY DANIEL CASTRO | MARCH 4, 2009

The past few months have seen political blogs abuzz with talk of bringing back the Fairness Doctrine—a policy of requiring balanced coverage of controversial issues on public airwaves—that was abandoned by the Federal Communications Commission (FCC) in 1987. Most recently, the idea was thoroughly rejected in the Senate in an 87-11 vote to prevent regulators from reinstating such a policy. Yet for all of this debate about what is fair and reasonable on the public airwaves, few have mentioned another, more urgent, question of fairness—how to restore fairness to the royalty rates paid by radio.

The system has been broken for some time. Almost two years ago, ITIF documented how the current royalty rate setting process failed to produce competitive rates for the statutory license that webcasters must pay to broadcast music.¹ Furthermore, we noted that the system is fundamentally flawed as it exempts terrestrial “over-the-air” radio from paying royalties to the copyright owners of sound recordings.

For those unfamiliar with copyright law, the discussion can be confusing. It’s important to note that music recordings have two copyrights: one for the musical composition and one for the sound recording. The musical composition copyright encompasses the notes and lyrics to a song, and the songwriter or music publisher typically owns this copyright. The sound recording consists of the

actual sounds and the interpretation of the musical composition by the performing artist, and the record label usually holds this copyright.

Before 1995, terrestrial radio broadcasters paid royalties only to the copyright owner of the musical composition; they paid no royalties to the copyright owner of the sound recording. ASCAP, BMI and SESAC, the three performance rights organizations in the United States, collect these royalties for musical compositions. The Digital Performance Right in Sound Recordings Act of 1995 (DPRA) created for copyright owners a new performance right for the digital transmissions of sound recordings, but it applied only to new radio technologies and not to over-the-air broadcast radio.

If Congress wanted to create a performance right for sound recordings, it should have been created for all technologies, rather than singling out digital transmissions and exempting analog transmissions. Moreover, at the end of the day, the debate was not even over digital versus analog transmission—HD radio, a digital form of terrestrial radio, was also exempt from paying these royalties. This decision was perhaps not surprising given that webcasting was a nascent industry at the time and did not have the substantial backing in Washington that terrestrial radio enjoys from the National Association of Broadcasters.

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Since ITIF first published its 2007 report, little has changed. Terrestrial radio is still exempt from paying sound recording copyright owners any royalties for the use of their music. Recently, negotiations have broken down between webcasters and SoundExchange, the organization representing the copyright owners, over the appropriate royalty rates with neither side able to come to any agreement. Among the disputes is how exactly to structure the fees for webcasters—fees are typically based either on the number of plays or as a percentage of revenue of the webcaster. However, basing the fees on revenue becomes murky when the webcaster is part of a larger company, such as Yahoo or AOL, or webcasting represents only one facet of a company’s business model.² Needless to say, just how revenue is measured is a point of contention for both sides.

But Congress is poised to take steps to remedy some of the problems. Later this month the House Committee on the Judiciary is holding a hearing to discuss “The Performance Rights Act”, a bipartisan bill introduced by Rep. John Conyers (D-MI) and Rep. Darrell Issa (R-CA) to eliminate the exemption that has unfairly benefited terrestrial radio. A companion bill has been introduced in the Senate (S 379) by Sen. Leahy (D-VT). This legislation will help level the playing field and ensure that terrestrial radio must compensate performers in the same manner as Internet radio, satellite radio and cable radio stations.

This legislation will be a good first step towards remedying this inequity in current copyright law; however, Congress needs to recognize that a comprehensive solution is still needed. The current system of establishing royalty rates for webcasters has consistently failed to produce reasonable results or settlements agreed to by both sides. In fact, SoundExchange and webcasters have repeatedly clashed on this issue and have had to ask Congress to intervene to settle their disputes. In contrast, negotiations and arbitrations with other digital broadcasters, such as cable and satellite radio, have produced much fairer outcomes for both sides.

One reason for this is that the negotiations between webcasters and SoundExchange are guided by a different set of principles than negotiations between other broadcasters and SoundExchange. Specifically, webcasters are subjected to a rather cumbersome

“willing buyer, willing seller” stipulation that says a royalty board can set the rate it believes would have been negotiated in the marketplace. Contrast that with the model followed by other broadcasters where the goal is to satisfy four objectives:³

1. To maximize the availability of creative works to the public.
2. To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
3. To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
4. To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

As an example of the inequity produced in the current system of royalty rates for the statutory license consider the following scenario: a listener purchases a Sirius Stiletto, a portable satellite radio that can receive satellite radio stations either live via a satellite or over a WiFi connection.⁴ If she listens to the radio via satellite, the copyright holders receive one rate; if she listens via the WiFi connection, the copyright holder receives a different rate. Same device, same service, same music, different fee.

Two years ago ITIF suggested that the entire idea behind the statutory license was fundamentally flawed. Is it right to assign every piece of music the same value? While this type of one-size-fits-all agreement might have made sense in a pre-Internet era, it is an anachronism in today’s digital world. Why not create a single database where copyright owners could set their own individual “per-play” rates for webcasters and other broadcast radio stations? This will create a true “fair market” for musical works where competition and quality will drive prices. In fact, the framework for such

a system is already in place—SoundExchange already must redistribute royalties it collects from broadcasters to the copyright owners.

The goal of Congress should be to establish technology neutral policies that do not unfairly advantage or disadvantage any particular technology or business model. Eliminating the exemption terrestrial radio

has enjoyed for so many years is a good first step. But Congress must also ensure that the rules and regulations governing the rate setting process are fair and reasonable for all platforms.

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Endnotes

1. Daniel Castro, *Internet Radio and Copyright Royalties: Reforming a Broken System* (Washington, D.C.: Information Technology & Innovation Foundation, 2007) <www.itif.org/files/InternetRadio.pdf>.
2. Eliot Van Buskirk, “Webcasting Royalty Negotiations Derailed by Disagreement, Recession” *Wired* (February 18, 2009) <blog.wired.com/business/2009/02/webcasting-royal.html>.
3. “17 USC 801 Copyright Royalty Judges; appointment and functions,” BitLaw. <www.bitlaw.com/source/17usc/801.html>.
4. “Stiletto 100 Portable Satellite Radio,” Sirius. <shop.sirius.com>