

Minority Media and Telecommunications Council

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ACTION ALERT

Why We Should Oppose Public Performance Royalty Legislation

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MMTC, in the strongest way, encourages our fellow civil rights organizations to oppose Performance Royalty legislation (H.R. 848 and S.379) and NOT to sign onto letters and other documents supporting it.

We have conservatively estimated that this legislation would throw at least a third of minority owned stations over the cliff into bankruptcy. The National Association of Media Brokers (NAMB) agrees, adding that “the imposition of a performance royalty on over-the-air broadcast stations will be crippling to the broadcast industry in general, and be particularly devastating to minority broadcasters and other new entrants to the industry.”

Misinformation is circulating in the civil rights community suggesting that the legislation will not harm minority radio. In fact, Black and Spanish radio would be hit the hardest by this legislation because these stations face the greatest challenges – weaker signals, advertising discrimination (NUDs and NSDs), EEO non-enforcement, and minority under-sampling by the leading radio audience rating service.

The Performance Royalty legislation would require the Copyright Royalty Tribunal (CRT) take minority ownership into account in setting rates. That provision is well intentioned but meaningless. The CRT cannot set lower rates for minority radio without congressional findings, an Adarand study and, probably, appellate litigation.

On July 7, the Congressional Budget Office (CBO) released a report saying that the rates charged commercial radio stations could be “substantial” yet indeterminable. These findings explain why even the prospect of this legislation is inhibiting the access to capital that minority broadcasters urgently need to survive and grow. Almost no one invests in or lends to a business that’s about to endure an enormous (at least 6%) and unknown revenue loss.

Supporters of the legislation have loosely thrown about the term “civil rights.” But in NO sense is there any civil rights purpose in destroying Black and Spanish radio.

Indeed, civil rights luminaries who oppose this legislation include Rev. Jesse Jackson, Rev. Al Sharpton, Barbara Arnwine of the Lawyers Committee for Civil Rights, and at least seventeen members of the CBC and CHC, including:

1. Bishop (D-GA)
2. Brown (D-FL)
3. Carson (IN)
4. Clay (MO)
5. Cummings (MD)
6. Davis (AL)
7. Davis (IL)
8. Fattah (PA)
9. Green (TX)
10. Hastings (FL)
11. Lewis (GA)
12. Lujan (NM)
13. Ortiz (TX)
14. Rangel (NY)
15. Reyes (TX)
16. Rush (IL)
17. Scott (GA)

With the Voting Rights Act under attack in the Supreme Court, this is no time to do damage to the principal institution – minority radio – that drives minority voter turnout.

Civil rights organizations should oppose performance royalty legislation or, at least, endorse compromise legislation, drafted by MMTC, which would create a federal endowment for performers - thus providing all of the relief the performers (as opposed to the record companies) seek while not harming radio.

Background on the legislation is provided below.

I. Public Performance Royalty Concept

A performance royalty for copyright owners of a sound recording (the actual recorded work) is a fairly new concept. Such a royalty was first granted with enactment of the Digital Performance Right in Sound Recording Act of 1995, which provided copyright protections for sound recordings used by subscription and interactive services. This right was expanded with the enactment of the Digital Millennium Copyright Act of 1998, which extended the royalty to Internet webcasters. These rights are established in Section 114 of the Copyright Code.

II. Performance Royalty Legislation in the House

On February 4, 2009, legislation was introduced in both House and Senate (H.R. 848 and S. 379 respectively) that would amend Section 114 to impose for the first time a performance royalty on terrestrial radio broadcasters.

Congressmen Gene Green (D-TX) and Mike Conaway (R-TX) have reintroduced a resolution (H. Con. Res. 49) stating that no such royalty should be imposed upon broadcasters. That resolution currently has over 240 co-sponsors.

H.R. 848 was authored by House Judiciary Committee Chairman John Conyers (D-MI). It has 44 co-sponsors.

On May 13th, H.R. 848 was amended and approved by the Judiciary Committee by a recorded vote of 21 to 9. As approved by the Judiciary Committee, H.R. 848 would do the following:

- bring all audio services including terrestrial radio under the 801b rate setting standard (but excluded consideration of impact on business, which was previously in 801b);
- on a sliding scale reduces the flat fee qualifying small broadcasters (under \$1.25M) would have to pay;
- introduces a “cooling off” period after enactment in which no royalties would be paid – for stations above \$5M in revenue, one year and for stations below \$5M in revenue, three years; and
- directs the copyright royalty judges to consider the effects on religious, minority and female-owned stations and religious, minority and female royalty recipients, and non-music programming, including local news and information programming for stations that are part of station groups in which all stations within the group are located in one designated market area.

III. The Senate Bill

The Senate bill, S. 379, would require stations with revenues of less than \$1.25 million per year to pay a flat fee of \$5,000 to the recording industry. Stations with revenues greater than \$1.25 million would pay a royalty rate to be determined by the Copyright Royalty Board (CRB). Stations that make limited use of sound recordings (such as talk radio stations) would qualify for a per program license, which remains undetermined. These rates would be in addition to the royalties broadcasters already pay for the use of musical works.

S. 379 is authored by Senate Judiciary Committee Chairman Patrick Leahy (D-VT). A hearing is scheduled for August 4.

Senator Lincoln (D-AR) has introduced a mirror resolution to the anti-royalty H. Con. Res. 49 in the Senate, S. Con. Res. 14.

IV. Arguments For and Against a Performance Royalty

The recording industry argues that terrestrial radio should have to pay for the use of sound recordings. To date, Congress has repeatedly rejected such a royalty on terrestrial radio broadcasters, citing the symbiotic relationship that exists between radio and the record labels – radio’s use of music drives advertising revenues, and radio airplay results in music sales and other revenue streams for the recording industry. However, the downward trend in record sales and the growth of alternative audio platforms has given new life to the recording industry’s argument, and there exists more sympathy for recording industry’s position than ever before.

The proponents of a performance royalty have three primary arguments. 1) They argue that “corporate radio” is getting a free ride, and a performance royalty is needed to provide equality

among audio platforms. 2) They argue that the U.S. is the only industrialized nation not to grant such a royalty, and the lack of reciprocity results in a loss of hundreds of millions of dollars to the US economy. 3) They argue that copyright holders have an undeniable property right, and without the ability to determine how their property is used, the result is a “taking”.

The broadcasters’ argument centers on the promotional value of radio - specifically, the fact that a recent study showed that radio airplay directly translates to approximately \$2 billion in annual music sales, without even accounting for the promotional impact on concert and merchandise revenue. Broadcasters do not concede that there should be an expansion in this property right – and if there is one, why is it only extended to penalize broadcasters and not to restaurants, stores or other public venues. In addition, broadcasters contend, if there is a right for the copyright holder to charge for the use of their property, broadcasters should have the right to charge for the promotional value of airplay.

On the issue of parity, broadcasters cite their regulatory obligations that do not apply to other platforms, which in direct costs and opportunity costs far outweigh the burden of a performance royalty.

On the international treatment of performance royalty, broadcasters note that many foreign countries have less favorable treatment for copyright owners, and that many governments subsidize or outright control radio stations; thus it is their taxpayers who ultimately pay for the royalty.

Importantly, minority broadcasters and the civil rights organizations opposing the legislation note that the H.R. 848’s inclusion of a \$500 small broadcaster payment is not even a band-aid. Even if the payment were \$5, the high amounts of royalties paid by larger stations would seal the fate of the smaller stations. The only financing small stations can find is predicated on business plans promising to get large. If the bill passes, small stations that get large would have a license to lose money. Most small broadcaster financing has already dried up, and if the bill passes all or almost all of it will go away.

V. Support and Opposition

Proponents of performance royalty are the Recording Industry Association of America (RIAA), Sound Exchange (the organization who would collect and distribute the royalties), the American Federation of Musicians, Music First, the Future of Music Coalition, and the American Federation of Television and Radio Artists. The Copyright Office has called for such a royalty to be imposed. In congressional hearing testimony, representatives from competing platforms such as Internet and satellite radio, and the AFL-CIO have called for passage of this legislation.

The fight against the royalty has been spearheaded by the National Association of Broadcasters and the Free Radio Alliance (a collection of individual radio stations and radio interests at the grassroots level). Here is a partial breakdown of those opposing royalties:

Opposes Royalties – Civil Rights and Minority Trade Organizations

- American Women in Radio and Television
- Lawyers Committee for Civil Rights Under Law
- Minority Media and Telecommunications Council

- National Action Network
- National Association of Black Owned Broadcasters
- Puerto Rico Broadcasters Association
- Rainbow PUSH Coalition
- Spanish Radio Association
- Virtually every broadcasting company

Supports Royalties

- Christian Music Trade Association
- Latin Academy of Recording Arts and Sciences
- Leadership Conference on Civil Rights
- NAACP
- Individual Artists

VI. Process Sought

MMTC and the civil rights organizations opposed to Performance Royalty are pursuing the narrowest possible remedy: before the full House or Senate takes up the bill, we want a full examination of the impact of royalties on radio public service, radio ownership diversity, and minority ownership particularly, through a thorough study by the General Accounting Office (GAO). Such a study is reportedly underway.

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