msk

bills creating performance right for recording artists are reintroduced in congress

MSK Client Alert

March 2009

On February 4, 2009, Senators Patrick Leahy (D-VT) and Orin Hatch (R-UT) and Representatives John Conyers (D-MI) and Darrell Issa (R-CA) introduced bills -- S. 379 and H.R. 848, each referred to as the "Performance Rights Act" - that, for the first time, would require United States broadcast radio stations to pay licensing fees to performers of music. If passed, the bills would constitute a long-awaited change to the current broadcast licensing regime, in which broadcasters make payments to the owners of copyrights in musical compositions, but not to the performers (and record labels) that own copyrights in and/or contribute to sound recordings.

The current bills are an attempt to bring the United States into conformity with the rest of the world. Nearly every industrialized nation other than the United States already requires radio broadcasters to compensate performers. However, because the United States does not provide compensation for foreign performers, many foreign broadcasters do not pay for publicly performing songs recorded by U.S. performers. Upon introducing H.R. 848, Representative Issa remarked that "we have a opportunity to show the rest of the world that the United States practices what it preaches in protecting intellectual property.... Our ignorance of intellectual property rights on this issue is a worldwide embarrassment and it must end now."

The absence of a public performance right in sound recordings has inspired a long string of failed attempts to create parity among songwriters and performers. Ironically, in 1995, these attempts to obtain parity resulted in a more fragmented legal regime. At that time, Congress passed the Digital Performance Right in Sound Recordings Act, which requires digital "webcasters," but not radio broadcasters, to compensate performers. As a result, performers currently are compensated when their songs are played online but not over the radio, while songwriters are compensated in both instances.

attorneys

Marc E. Mayer

practice areas

entertainment & ip litigation

In their current form, S. 379 and H.R. 848 would amend sections 106(6) and 114 of the Copyright Act, which grant limited public performance rights to sound recordings and establish statutory licensing schemes to determine rates applicable to public performance of sound recordings, respectively. In order to curb criticism and opposition, the House and Senate versions of the Performance Rights Act contain provisions limiting the scope of the new right provided to performers. These limitations include:

- Available statutory (i.e., "compulsory") licensing with rates set by the Copyright Royalty Judges, who also currently set rates for online digital public performances of sound recordings, among other things.
- Exemptions for nonsubscription transmissions of services at places of worship or other religious assembly, as well as "incidental" use of sound recordings.
- An annual $1,000 blanket statutory license for noncommercial (i.e., public, educational, or religious) radio stations.
- An annual $5,000 blanket statutory license for commercial radio stations that generate less than $1.25 million in annual revenue (which the bills' sponsors believe will cover over 75% of the commercial radio stations in the U.S.).
- Available "per program" statutory license rates for broadcast radio stations that make "limited feature uses" of sound recordings.
- Provisions to ensure that songwriters and composers continue to receive fair compensation for public performances of their works despite the increased costs to broadcasters associated with paying performers.
- Retention of a distinction between musical works and sound recordings such that venues that play recorded music (such as clubs and bars) would continue to pay songwriters but not performers.
- Provisions requiring 50% of the royalties paid through statutory licensing of sound recordings to go to "featured" performers and "non-featured" musicians and vocalists rather than solely to copyright owners of the sound recordings. (The House bill would also require 50% of royalties earned through voluntary licensing of sound recordings for public performances on broadcast radio to be paid to "featured" performers and "non-featured" musicians and vocalists, whereas the Senate bill would not.)

The bills face some opposition, especially from radio broadcasters. The National Association of Broadcasters ("NAB"), an opponent of the bills, maintains that requiring radio stations to compensate performers "will harm your local radio stations [and] threaten new artists trying to break into the business." NAB also claims that the bills will undo the promotional "symbiotic relationship" that currently exists between radio stations, record labels, and performers. In the last Congress, such arguments inspired 227 members of the House of Representatives and 14 Senators to support Congressional resolutions (H. Con. Res. 244 and S. Con. Res. 82) opposing radio royalties for performers. However, organizations that speak for musicians contend that the promotional value of free radio play does not justify the absence of protection for sound recordings. For example, Ann Chaitovitz, the Executive Director of Future of Music Coalition, has argued that "the promotional claim is irrelevant. Authors often see sales spikes when their books are made into movies, but no one would suggest that the writer shouldn't be paid when

their work is translated to the screen because the film is 'promotional'."

The bills' sponsors have publicly stated that they are willing to work with all interested parties to see these bills through to law even if that requires amendments. So the final form of the bills may differ significantly from their current form. In the meantime, the bills have a strong base of support, and many believe that the bills have a strong chance of becoming law.

MSK is closely monitoring this and other important policy and legislative matters. For additional information, please contact one of the following attorneys: Marc E. Mayer
(310) 312-3154
mem@msk.com

Steven J. Metalitz
(202) 355-7902
met@msk.com

Karin G. Pagnanelli
(310) 312-3746
kgp@msk.com

Robert H. Rotstein
(310) 312-3208
rxr@msk.com Eric J. Schwartz
(202) 355-7903
ejs@msk.com Matt Williams
(202) 355-7904
mxw@msk.com