Fair Play Fair Pay Policy Debate:

Terrestrial Radio Performance Right

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The History

In the author's opinion, out of the areas being addressed in the Fair Play Fair Pay Act, the terrestrial radio performance right is one of the more hotly debated and important ones to prioritize. U.S. recording artists are currently not being paid out by terrestrial radio, and thus can also not earn either at home or internationally when their sound recordings are played (Bullard, 2017).

Let's first look at the history around this topic (Future of Music Coalition, 2018):

- The Digital Performance Right in Sound Recordings Act (DPRA) was passed in 1995, and disputes began between whether terrestrial radio should pay (Bullard, 2017) -- but the public was more willing to turn a blind eye because of high radio promo for artists.
- In May 2009, the House Judiciary Committee passed the Performance Rights Act in a 21-9 vote. In October 15, 2009, the Senate Judiciary Committee passed its version of the bill, which ultimately did not come to a full vote in either chamber.
- In 2013, Clear Channel, the nation's largest broadcaster striked direct deals with indie labels like Big Machine Records and one major, Warner Brothers Music for Fleetwood Mac, agreeing to pay performance royalty.
- In September of 2013, Representative Mel Watt introduced the Free Market Royalty Act (FMRA). It would eliminate the compulsory system for non-interactive web broadcasters like Pandora and Sirius XM, requiring both digital and terrestrial to negotiate with copyright owners and artists through SoundExchange rather than a set government rate.
- In April 2015, Representative Jerry Nadler introduced the Fair Play Fair Pay Act that would establish a performance right for sound recordings on AM/FM. The bill was reintroduced in March of 2017.

Other than Iran, North Korea, and the U.S., all other countries pay out -- so it makes sense to level the playing field and get rid of the disparity to be more harmonized in globalization. The fix in the Copyright Act section seems simple enough: striking the word “digital” in reference to “digital audio” so that it simply reads “audio.” So why hasn’t it been changed?

One reason is the Local Radio Freedom Act has 217 congressional supporters. The National Association of Broadcasters (NAB)’s position is that it would be difficult for the 185 representatives and 22 senators to change their position in a vote, and that works in their favor (Parisi, 2017). When those in political standing have side agendas we’re not aware of, the decision to change one’s mind can have major adverse effects.

Weighing the Arguments.

Before suggesting a policy remedy, it’s important to view both sides of any arguments. Unfortunately for broadcasters, a lot of their points don’t hold up in the digital age, which is why the Fair Play Fair Pay Act is being considered. Below are the ones that the author found to be most prevalent.

Argument: The Amount It Will Cost Is TOO Much.

One analyst from Wells Fargo, Marci Ryvicker, estimated that the performance royalty rate could cost radio between $2 and $7 billion per year. He noted that broadcasters only make in the ballpark of $14.5 billion per year. But legislation shouldn’t be decided based on how much only one side’s wallet gets hit (and some might say the hit would have been lower if they were paying artists for performances from the start); it should be based on what’s FAIR. As a counter argument, think about how much artists don’t earn as the party who has been getting hit (Indiviglio, 2010). So who takes priority?

If the rates aren’t fair set by the Copyright Royalty Board (CRB) due to not having much to compare to other than a “hypothetical free market,” perhaps negotiations need to happen directly between the recording industry and broadcasters, or another third-party who more likely would understand both sides to set a fairer rate (Indiviglio, 2010).

Some point to the direct deals already in place as proof of another solution. If labels are allowed to make direct deals with streaming services, they should also make direct deals with terrestrial radio, right? But it raises concerns of anti-competitive practices at that point. A rate for streaming is being developed as part of the Music Modernization Act (MMA) -- but the question remains whether direct deals should still be honored or should everyone follow the same rules? It would seem that allowing for direct deals allows the balance between regulated and unregulated to exist.

A big part of the argument has been that rates need to be more equitable across platforms and held to the same standards when deciding what those rates will be. In one case, ASCAP had sought a gradual increase in the current rate of 1.85% to 3% in 2014/15 while Pandora had argued for a lower rate of 1.70% in line with a separate deal at that rate reached by ASCAP with a group of parties including terrestrial radio stations. U.S. District Judge Denise Cote ruled that the rate should remain at 1.85% (Hunter, 2014). Terrestrial radio broadcasters think that Internet and satellite radio may be favored when setting rates, so it's something for policy makers to keep in mind as they determine what's fair.

Even so, this argument looks at few players rather than the U.S. economy and even the global economy as a whole. If there's no reciprocal right, foreign performance rights societies cannot distribute to American performers. So where does this money go? Into programs in other countries than the U.S. U.S. artists are essentially helping grow other countries rather than their own with losses on the U.S. side of as much as $100-$200 million annually (Future of Music Coalition, 2018). Foreign royalty rates generally fall in the 3-5% range (Parisi, 2017). Plus, it can hurt rapport when it comes to negotiations and sharing expectations for other global concerns, giving others the appearance that we don't want to play by the same rules.

Argument: Hurts Smaller, Local Radio Stations.

According to terrestrial radio stations, the "tax" could particularly affect smaller, minority-owned stations, some of which may have to switch to a talk-only format or shut down entirely. A tax goes to the government; this payment goes to the rights holders -- so the word is misleading to the general public. 77% of all radio stations (grossing less than $100,000 per year) would be eligible for fees as low as $500 per year, because there's a sliding scale based on a station's annual revenues. And broadcast of religious and talk stations that use only pieces of music during their programming are wholly exempt from royalty payments (Indiviglio, 2010). So, the act is still trying to ease the burden where it makes sense to do so.

Radio stations are major contributors to public service, providing vital news and community information and free airtime to help local charities that they say would be reduced. But radio isn't the only news source -- there's something called the World Wide Web, and that exists with or without the rate applied.

And as with any channel from newspapers to TV stations, can be biased. Even if a radio station was to give equal time to various candidates and artists, it can still steer people in the way messaging is delivered (like the so called tax) to a certain perception or viewpoint. This is a much broader topic of whether media in general provides public service when the bias can't be controlled. Freedom of speech.

And what about satellite and non-interactive radio who still have to pay? It could be said they're at a disadvantage, because terrestrial radio stations don't want to pay out. So maybe a leveling would involve also have non-interactive radio play a similar role within the community, so both terrestrial and non-interactive provide equal benefit as far as community-driven, public service content. If you can level other variables, then when rates are applied, there's less variable differences to combat for not paying.

Argument: Radio Gives More Exposure.

Radio traditionally has promoted record sales, but record sales are dropping whether there's radio promotion or not. Due to the increasing amount of free exposure channels such as online streaming services, there are lots of channels for consumers to listen to music and artists to get paid -- so the reliance on radio for exposure is less than it used to be.

The author imagines those in radio may be afraid of jobs going away due to new technologies, but what if those individuals just moved more into the digital space with their own podcasts, channels and playlists? And then they start looking at ways to still provide value and exposure but their platform is more multi-channel, multi-experience for content consumption. Combine efforts rather than combat them.

If people already enjoy listening to a particular DJ or station, now would be the time to make a transition rather than waiting to get left behind. Then, they may benefit from some of those more “favorable” rates for Internet and satellite radio as well as streaming to balance out where they pay on terrestrial, while moving toward an inevitable technology disruption and shift that may eventually phase them out. Although the logistics of this could be cumbersome, it may be worth some consideration.

Argument: Limits the Variety of Music.

Historically, radio has been preferential to major label artists, because of Payola (History.com Editors, 2019). Thus, smaller artists really never had a shot to begin with to get their music heard unless they knew a Music Director/Supervisor or DJ, and bugged him/her enough. So, one might say that digital channels like streaming are giving smaller artists and more artists air time than ever before.

Once the performance fee is enacted, new artists who aren't associated with any label -- and the indie artist / DIY community is growing -- might be more willing to give away their music for free promotion -- and radio stations would be more willing to take it without having to pay a royalty (Indiviglio, 2010). This could be a win-win situation.

The NAB says that they just don’t want to pay the labels, only artists -- because sometimes labels take advantage of artists (Indiviglio, 2010). But yet, sometimes labels help their artists like in the Payola example above. And when we’re talking about being fair to artists, is it really fair they only play the major label artists? Seems like a case of the pot calling the kettle black. If they really cared about the artists and variety of content, wouldn’t they be making more direct deals with indie artists?

Radio and labels have traditionally helped each other survive in the music landscape by laws of scarcity and control over the listener base, so it's interesting that not only artists wouldn't get paid out but also the labels who have been in mutually beneficial relationships with radio for so long. Still, radio promoters may say that labels are making deal with other channels like streaming services which harms the relationships as well through not being exclusive. But what choice would labels have when they have to seek new forms of revenue due to dropping record sales and piracy? Previously friends now foes.

Suggestions of a Remedy

From the author's perspective, there's enough backing for a rate to go through and it's going to come down to minor details as to whether it's truly deemed fair or not -- but there's enough of those minor details to keep the discussion going, which is probably why legislation has been held up.

Here are where the distinctions lie in the arguments:

1. Do labels get paid or only direct to artists?
2. Who sets the rate? Should it be CRB?
3. How will the rate be determined for terrestrial vs non-interactive vs satellite?
4. Should we leave it to direct deals, free market or compulsory license?
5. Can we find new ways to supplement broadcasters for the hit they will take?
6. Are the differences in substantive royalty rates resulting have a basis in substantial evidence that could survive heightened First Amendment scrutiny? (unknown, 2014).

And with regard to the Fair Play Fair Pay Act, specifically, it encompasses more than this issue (SoundExchange, n.d.):

1. Establish a "willing buyer, willing seller" fair market value rate standard for all digital platforms;
2. Require payment for pre-72 sound recordings;
3. Ensure royalties paid to songwriters are untouched and undisturbed by new legislation;

4. And include provisions from the AMP Act, codifying SoundExchange's longtime practice honoring "Letters of Direction" from artists who want to share royalties with producers and creative participants.

The Internet Radio Fairness Act moved webcasters from a willing seller, willing buyer standard to that paid by satellite radio. This would reverse that for the purposes of rate-setting, so Sirius/XM and non-interactive cable audio transmissions would pay under the same standard as Pandora (Casey, 2015).

If one were to separate out the individual line items, it might be easier to pass -- because there wouldn't have to be an agreement on *all* points. Though, to be fair for broadcasters, Number 2 actually makes sure Internet and satellite radio are not excluded from paying where they should as well.

These are the points that may be used as criteria for determining rates (Casey, 2015):

1. How the service uses the music, including quantity and nature of use, as well as the degree to which use of the service may substitute for or may promote the use of phonorecords;
2. Whether the use may interfere with or enhance the sound recording copyright owner's other streams of revenue from the copyright owner's sound recordings;
3. And whether relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative or technological contribution, capital investment, cost and risk.

The first two may lead to singling out of webcasters like Pandora, whose "stations" are customizable to listening preference. The language of "interactivity" may need to be revisited. The last one may be hard to quantify without clear terms on what criteria is actually being evaluated -- like what falls under "technological contribution".

Conclusion

There are some cases where you can’t please all parties. In this case, terrestrial radio in the U.S. is up against labels, artists and CMOs in other countries. The multitude of people pushing for the change is too much to just be ignored. If you create content, a product or service of any kind, one should be paid. If we can conquer just that notion, then we can move on to what is actually *fair* pay.

For around 80 years, royalty payments for air time have flowed to the songwriters and music publishers but not to the musicians or record companies. So, that’s 80 years of radio earning from not paying artists. Isn’t that enough? The author thinks it’s time for a change.

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