BY OWEN J. SLOANE AND RACHEL M. STILWELL

The Case for the Performing Rights Act

THE JUDICIARY COMMITTEES of both the U.S. House and Senate recently reintroduced the Performing Rights Act (companion bills H.R. 848 and S. 379), which would require terrestrial radio stations to pay royalties to recording artists for performing the recordings they broadcast, as well as to owners of copyrights in sound recordings. If passed, the PRA would end terrestrial radio stations' longstanding exemption from Section 114 of the Copyright Act of 1976, which requires satellite radio, Webcasters, and cable radio broadcasters to pay royalties for the public performance of sound recordings.

Copyrights in the sound recordings that are broadcast on radio are, generally speaking, owned by record labels. For many decades those record labels, as well as recording artists, believed that the promotional value given by music-playing terrestrial radio stations was so great that it made economic sense to exempt those stations from paying public performance royalties. For attorneys who represent recording artists, it has become painfully apparent in recent years that our clients can no longer depend on the existence of a causal link between terrestrial radio airplay and commensurate sales of recording. The promotional value of radio airplay has decreased in recent years, as far fewer recordings are being sold than in prior years.

Terrestrial radio stations already pay royalties to songwriters through performing rights organizations such as ASCAP and BMI. Radio owners argue that, particularly at this time when radio companies are saddled with debt and advertising revenues are down substantially, they cannot afford to pay for broadcasting sound recordings. Broadcasters also argue that recent decreases in U.S. record sales are not necessarily attributable to the decreased number of listeners tuning into terrestrial radio.

These arguments fail to recognize that, as drafted, the PRA would balance the right of content owners to be fairly compensated with the financial realities of terrestrial radio. The PRA would give relief to small commercial radio stations that generate revenues of less than $1.25 million annually and to noncommercial radio stations. These stations would pay nominal flat annual fees—between $1,000 and $5,000—instead of paying royalties.

The passage of the PRA would amend Section 114 of the Copyright Act of 1976 to provide parity and fairness among music broadcasting platforms. Currently, other types of broadcasters—such as Webcasters, satellite radio, and cable radio—that play music and profit from its use must compensate the performing artists and owners of sound recordings. Terrestrial broadcast radio is the only broadcasting platform that still does not pay for the use of sound recordings.

Moreover, the United States is one of the few industrialized countries that does not recognize performance rights in sound recordings. In most countries, radio broadcasters pay royalties to creators and owners of sound recordings. Almost all these countries are signatories to the International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention). Article 12 of the Rome Convention specifies that the performers and owners of sound recordings are entitled to be paid royalties for the broadcast of their recordings. The primary reason why the United States has heretofore refrained from becoming a signatory to this treaty is because we have been reluctant to eliminate the exemption for terrestrial radio from Section 114.

Some have argued that the United States does not need to become a signatory to the Rome Convention because it is already a signatory to the Agreement of Trade Related Aspects of Intellectual Property Rights (TRIPS), which includes a broad array of protections of intellectual property, and which overlaps some provisions of the Rome Convention. However, TRIPS lacks the provision that entitles performing artists and owners of sound recordings to collect broadcast royalties from abroad. Our failure to be a signatory to the Rome Convention causes our performing artists and record labels to forfeit royalties that would otherwise be paid by broadcasters in other nations. Under this reciprocal treaty system, only those performers and owners of sound recordings that are nationals of a Rome Convention signatory are entitled to receive performance royalties from other member countries. If the PRA were to become law, the United States could at last become a signatory to the Rome Convention.

The PRA would balance the right of content owners to be fairly compensated with the financial realities of terrestrial radio.

It is possible that some signatories to the Rome Convention would opt out of Article 12 if the United States, a major exporter of sound recordings, were to become a signatory. However, countries with comparatively robust recording industries, such as Great Britain and France, could be expected to engage in reciprocal protections with the other member countries, including the United States, so that our performers and owners of sound recordings would, like their brethren from other countries, at last be fairly compensated for the use of their content by broadcasters worldwide.

Although terrestrial radio airplay in the United States still has substantial promotional value to artists and record labels, it no longer justifies our performers forfeiting their right to be compensated fairly for the use of their content domestically and worldwide. ■

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