

THE SILENCED MINORITY: WHEN THE RIAA CHARGES COLLEGE RADIO FOR ONLINE BROADCASTS, WILL THE PUBLIC END UP PAYING?

INTRODUCTION

On November 18, 2002, the Future of Music Coalition released a study finding that the consolidation of commercial radio, as a product of deregulation caused by the Telecommunications Act of 1996, has resulted in “loss of localism, less competition, fewer viewpoints and less diversity in radio programming in media markets across the country.”¹ Perhaps foreseeing such a future, the Federal Communications Commission (FCC) during radio’s infancy, in the interest of full, fair and free speech, set aside a special segment on the broadcast spectrum for noncommercial and college radio stations to provide a forum for minority views. Thus, in light of the increasing loss of diversity, it is logical to conclude that it is more important than ever to ensure that the last bastions of diversity in broadcasting have a guaranteed place alongside commercial broadcasters in the new online world. Counter intuitively, however, Congress’ interpretation of the Digital Millennium Copyright Act (DMCA) has led to a perverse result: the new Act’s reporting and royalty payment requirements for radio have hurt college stations the most, causing countless numbers of them to pull the plug on their Internet broadcasts.

I. THE HISTORY OF RADIO’S RELATIONSHIP WITH RECORD COMPANIES

The problem dates back to the Copyright Act of 1909, which provided no protection to sound recordings (the Act only protected the underlying composition). This lack of protection, however, did not cause record companies to launch extensive fights against radio stations or even shy away from them. The record companies instead, in spite of, or because of the lack of protection, encouraged radio stations to play their records on the air as a means of promoting sales of the recordings.² The relationship

¹ *Commercial Radio Station Ownership Consolidation Shown to Harm Artists and the Public* (Nov. 18, 2002), at <http://www.futureofmusic.org/news/PRradiostudy.cfm> [hereinafter *Radio Study*].

² See Bruce H. Phillips & Carl R. Moore, *Digital Broadcasting: The Cost of Copyright*, 3 VAND. J. ENT. L. & PRAC. 168, 171 (2001).

eventually led to an unusual result when Congress revised the Copyright Act in 1976: it recognized a separate copyright in sound recordings but excluded a performance right for them.³ However, sympathy for record companies came only from very few. The industry had long demonstrated that radio airplay was a major factor in the amount of sales of a record and record labels' spending on promotion and "payola" climbed into the billions of dollars.⁴

In the 1980s, the perception of equities changed with the introduction of digital technology. For example, the Audio Home Recording Act (AHRA), recognizing that taped radio broadcasts could displace sales, placed a tax on recording equipment and distributed the proceeds to record companies.⁵ Finally, in 1995, Congress granted record companies a public performance right in their sound recordings with the passage of the Digital Performance Right in Sound Recordings Act (DPRA). However, this right would cover only digital public performances, which at the time related primarily to digital cable or satellite broadcasts; file-sharing on the Internet was virtually unknown.⁶

II. THE DMCA, ROYALTIES & WEBCASTING

In 1998, in response to the rapidly rising use of the Internet for trading music files, Congress passed the DMCA, which expanded the public performance right in DPRA to include webcasting.⁷ The DMCA provides a statutory license for certain non-subscription digital broadcasts, including retransmissions of traditional on-air broadcasts over the Internet.⁸ Eligibility for obtaining the statutory license, which saves broadcasters the hassle of negotiating licenses with each sound recording holder, comes with several requirements, including a ban on advance announcements of song titles and a requirement to report information about the song's use to the copyright holder.⁹

For such broadcasters, the DMCA recommends that the Copyright Office use a copyright arbitration royalty panel (CARP) to determine the statutory rate, which varies for different classes of

³ See *id.*

⁴ See generally Doug Abell, *Pay-for-Play*, 2 VAND. J. ENT. L. & PRAC. 52 (2000).

⁵ See Phillips, *supra* note 2, at 172.

⁶ See 17 U.S.C. § 106(6) (2002).

⁷ See 17 U.S.C. § 112. Webcasting involves the transmission of sound recordings over the Internet, much like a traditional radio station broadcasts sound recordings over the airwaves, without leaving copies of the recordings on the listener's computer.

⁸ See 17 U.S.C. § 114(d).

⁹ See 17 U.S.C. § 114(d)(2).

eligible broadcasters.¹⁰ In addition to such fee, broadcasters must also pay either a CARP-determined statutory fee or a separately negotiated royalty for “ephemeral recordings,” which are temporary copies of sound recordings made in the process of digital transmission.¹¹ In the abstract, this statutory scheme makes sense because it is similar to the blanket license that the performing rights organizations ASCAP, BMI and SESAC have used in collecting royalties from radio stations for use of the underlying compositions. The ease of these traditional blanket licenses, however, may be ruined by the strict reporting requirements like the kind that the DMCA imposes for digital transmissions of sound recordings.¹²

Once the transmitted songs are identified, radio stations must turn over the list and calculated royalties to SoundExchange, a division of the Recording Industry Association of America (RIAA).¹³ SoundExchange promised to distribute 50% of the royalties to the copyright owner, 2.5% to the AFM for non-featured musicians, 2.5% to AFTRA for the non-featured vocalist and 45% to the featured artist;¹⁴ but when SoundExchange began to request the reports and royalties, the Copyright Office discovered that most radio stations did not keep track of what was played since the passage of the DMCA.¹⁵ Because of the difficulty of determining specifics, CARP decided that for the time period of October 28, 1998 to December 31, 2002, licensed noncommercial broadcasters that are not Corporation for Public Broadcasting (CPB) qualified would pay .02 cents per song, per listener, with an additional 8.8% fee for ephemeral copies, and a minimum of \$500 per year (the federally-funded CPB pays their stations’ fees).¹⁶ Presuming a total of one thousand listeners per hour, the annual royalty fee for a college station retransmitting its broadcast on the Internet would be \$22,874. Such a fee is far greater than the fixed-rate statutory \$578 annual fee payable to ASCAP, BMI and SESAC for broadcast of the underlying compositions.¹⁷

Fortunately for college stations, the collection of these fees has not yet begun, and they may even be able to renegotiate their futures, thanks to a bill that Jesse Helms spear-headed. On Decem-

¹⁰ See *id.*

¹¹ See 17 U.S.C. § 112(e)(3).

¹² See 17 U.S.C. § 114(d)(2)(C)(ix).

¹³ See generally Richard D. Rose, *Connecting the Dots*, 42 J.L. & TECH. 313 (2002).

¹⁴ See SoundExchange, *Distribution; Royalty Administration*, at <http://www.soundexchange.com/royalty.cfm>.

¹⁵ See 17 U.S.C. § 112(e)(3); § 114(f)(2).

¹⁶ See SoundExchange, *Webcasting Royalty Rates*, at <http://www.soundexchange.com/royaltyrates.cfm>. SoundExchange estimates 12 songs per hour.

¹⁷ See 37 C.F.R. § 253.5 (2002).

ber 4, 2002, Congress passed the Small Webcaster Settlement Act (SWSA),¹⁸ which invited negotiation between noncommercial, non-CPB radio stations and SoundExchange for new rates that cover all copyright owners (not just SoundExchange members) and postponed the payment of webcasting fees incurred between October 28, 1998 and May 31, 2003, until June 20, 2003. What will result from the SWSA remains to be seen, as the RIAA has not yet met with noncommercial stations.

III. TUNED IN AND TURNED ON, COLLEGE RADIO DROPS OUT

While most commercial stations can afford to pay the new rate for digital transmissions, the fee is prohibitive for certain stations, including college radio, that are not allowed under their FCC licenses to solicit commercial advertising. Internet-only "radio stations" run by major record labels, such as MusicNet and Pressplay, do not have to pay 95% of the statutory fees, because they own the recordings and have the featured artists under their contracts.¹⁹ In addition, the noncommercial stations that receive taxpayer money through the CPB can rely on that funding to pay fees. Therefore, college radio stations are squeezed out and must either face the new licensing laws or drop out of the webcasting world entirely.

The two main problems that the DMCA poses for college radio stations are the costs of reporting and the webcasting fees themselves. Although the Copyright Office has not set forth its absolute reporting requirements for college stations, the language of the DMCA suggests that the Office will require a list that includes the song and album titles, time of broadcast, artist name, record company and the number of Internet connections made when each song was played.²⁰ This reporting task may prove to be difficult and expensive, especially when 90% of college radio stations currently use hand-written play lists to track their broadcasts.²¹ Sandra Wasson of KALX at the University of California – Berkeley warns, "[i]f the expense of record keeping exceeds the costs of the royalty, we will need to examine our ability to provide this service to the public."²²

¹⁸ Pub. L. No. 107-321, 116 Stat. 2780.

¹⁹ See Kimberly L. Craft, *The Webcasting Revolution Is Ready to Begin*, 24 HASTINGS COMM. & ENT. L.J. 1, 25 (2001).

²⁰ See College Broadcasters, Inc., *Webcasting FAQ*, at <http://www.collegebroadcasters.org/FAQ.shtml>.

²¹ See College Broadcasters, Inc., *Comments of Collegiate Broadcasters, Inc. before the Copyright Office*, No. RM2002-1B (2002), at <http://www.collegebroadcasters.org/streams.shtml> [hereinafter *Comments*] (copy on file with the author).

²² Press Release, College Broadcasters, Educational Opportunities are Being Lost, Due

The royalty fees for webcasting have also come as a shock to college broadcasters, and this is a problem almost unique to them when looking at the noncommercial section of the dial. "College radio stations, unlike CPB-funded stations, will have to find a way to pay the fees from their students' pockets or from traditionally under funded academic budgets, or shut off the streaming audio."²³ While most radio stations were fully-prepared to accept a flat fee comparable to that required for underlying composition royalties, when a 1000-listener-per-hour station uses the formula set forth by the Copyright Office, it finds that it must pay SoundExchange almost 40 times that amount.²⁴ With a royalty rate based on the amount of listeners, which is likely to grow automatically with the doubling of Internet use every 10 months,

[a] station that can afford to webcast today might find itself with a bill that it [cannot] afford to pay 10 months from now It would seem not to make sense to encourage students to succeed if the outcome of their success, reaching a larger audience, causes them to be penalized with higher fees.²⁵

In addition, perhaps offended by the suggestion that the recordings are worthy of more fees than the compositions are, ASCAP and BMI began to fight to increase their royalties as well.

These problems suggest that the better college stations will have no presence on the Internet; this prediction has come true for over 30 stations that have stopped webcasting in response to the new regulations.²⁶ Other stations have decided not to start webcasting in the first place due to the uncertainty and costs of royalty fees and reporting; these stations include Marshall University's WMUL-FM, which has won 473 awards since 1985.²⁷ Still other colleges and universities that have used broadcasts only on the Internet as their solution to limited broadcast frequencies and small budgets have decided to pull the plug as well.

Such silence is deafening for college broadcasting and all the elements it benefits. For example, aside from the stations themselves, one group that is hurt from this withdrawal of college radio from the Internet is the recording artists. While commercial stations have traditionally been apprehensive about new kinds of mu-

to New Webcasting Fees (July 1, 2002), at <http://www.collegebroadcasters.org/text/release.html> [hereinafter Press Release].

²³ *Id.*

²⁴ See *supra* notes 17-18.

²⁵ See Press Release, *supra* note 22.

²⁶ See *Save Our Streams* (June 17, 2003), at <http://www.rice.edu/cb/sos>.

²⁷ See Press Release, *supra* note 22.

sic, college radio stations embraced artists such as Nirvana, R.E.M., and the Donnas, while also providing outlets for entire genres of music that commercial stations would not touch, including hip-hop and dance music. Collegiate Broadcasters, Inc. argues, "Many of the same artists that owe their success to college radio are now effectively pushing those stations off the Internet with these new fees and oppressive regulations. As a result, the next generation of artists will have fewer opportunities to be discovered."²⁸

IV. DO THE WEBCASTING RULES MAKE CENTS FOR COLLEGE RADIO?

Because copyright is an artificial, though beneficial, restraint on trade, we must always be wary of balancing the benefit of copyright (to promote and reward the progress of the useful arts) with the marketplace in not overly restricting the free-flow of ideas and creations from the public. This tension recently appeared in the SWSA, as one of Congress' purposes for passing the Act was a finding that the CARP rates were not "fair or reasonable" to small webcasters and that they were not "rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller."²⁹ So to create a proper solution, we must determine what is "fair or reasonable" in addressing the multitude of viewpoints from the record companies, broadcasters, artist unions, publishers and the public.

For years, courts acknowledged the concept of "fair use," codified in 17 U.S.C. § 107. Using an analysis of copyright as "market failure," some scholars have found that when using "fair use" to ameliorate any damage, "the court should determine if the use is more valuable in the defendant's hands or in the hands of the copyright owner."³⁰ The defendant often wins when the use is non-commercial and yields "external benefits," or "benefits to society that go uncompensated."³¹ Clearly with college radio, the use is noncommercial, and it is also arguable that merely making artists' works available to the public is a benefit for the artists and the public at large.

Record companies, however, may counter the fourth factor of "fair use": the economic effect on the market. Although ideally webcasting eliminates the possibility of piracy that prompted the

²⁸ *Id.*

²⁹ Pub. L. No. 107-321, 116 Stat. 2780.

³⁰ Michael A. Einhorn, *Internet Television and Copyright Licensing*, 20 CARDOZO ARTS & ENT. L.J. 321, 328 (2002).

³¹ *Id.*

passage of the AHRA, labels argue that webcasting does not promote sales and that it cheats artists out of royalties. John Simson, Executive Director of SoundExchange, recently wrote that “webcasting has no promotional effect on record sales. Quite apart from any promotional benefit to the sound recording owner, any business that is built upon the use of sound recordings should pay a fair royalty to the creators of those recordings.”³² While the inquiry could go on endlessly into the reasoning that traditional radio promotes record sales while webcasting does not, it is more important to note that Simson’s concern focuses on *businesses*, while noncommercial, non-profit college radio is rarely, if ever, considered to be a business. On its face, college radio is primarily an educational experience and a voice for students, funded by students’ tuition, and not so much concerned with listenership or profit as with being different from the mainstream. Commercial radio, on the other hand, has long been a business, with advertising rates based on Arbitron’s listener rankings. Considering the purposes of college radio and the lack of proof about the different economic effects of webcasting as opposed to traditional broadcasting, it is doubtful whether CARP’s royalty rates and the DMCA’s requirements make sense after all.

V. A SOLUTION IN HARMONY WITH COPYRIGHT’S PURPOSE

If the purpose of copyright is truly to promote the useful arts, then all parties that college broadcasting affects must keep this purpose in mind when considering how the rules are to be created and enforced. Aside from looking at the importance of learning new skills and promoting unknown bands, Congress and the courts have long considered noncommercial, educational speech to be fundamentally important to democracy, free speech and the progress of ideas. This is exemplified by the FCC’s protection of the left side of the radio dial for college and other noncommercial broadcasters and the heightened fair use protection for noncommercial and educational purposes. Thus, a harmonious solution must balance as many of these policy goals and traditions as possible.

Because many parties representing artists, including the National Director of Sound Recordings at AFTRA, acknowledge that radio consolidation led to less variety and less local music on the airwaves, it is of utmost importance that college radio survives as an

³² Letter from John Simson, Executive Director, SoundExchange, to Editor, Newsweek (July 16, 2002), at <http://www.soundexchange.com/letters.cfm>.

option for Internet radio listeners.³³ The solution, therefore, must address the royalty rates and reporting requirements, since the two elements threaten to shut off all college broadcasters. In revising the rates, the next CARP must eliminate the formula based on listenership, and instead set forth a flat rate like under the Code of Federal Regulations (CFR) for composer royalties.³⁴ The flat rate makes more sense for radio stations with unstable, inflexible budgets and no listener-based advertising, and it provides some predictability for college broadcasters to determine whether they will be able to webcast within the confines of their yearly budgets. When addressing reporting, the new solution should also not be so starkly different from the CFR, which explicitly forbids more than extremely limited and occasional reporting requirements for traditional college broadcasters.³⁵ A better requirement for college radio would be one like the private agreement reached between the RIAA and CPB, which only “requires reporting for programs simultaneously broadcast and webcast only for stations with ten [or] more full-time equivalent employees.”³⁶

Meanwhile, record companies’ concerns about lack of promotion can be soothed with some creative linking. Labels, whether or not they are members of SoundExchange, could require direct links on the webcaster’s site to the labels’ own websites for direct sales of the music that the station just broadcast. Whereas traditional listeners would have to remember the name of the artist and go to the record store, record companies could reap huge profits from webcasting in one impulsive click. Therefore, by using these solutions, the relationship between record companies and radio stations can be just as harmonious online as over the air, while more artists can be assured that they have a chance to participate in the new, multicolored online world.

ADDENDUM

On May 31, 2003, five months after the submission of this article to ELI, IBS and SoundExchange reached an agreement on webcasting fees for noncommercial webcasters for the period of October 28, 1998 to December 31, 2004.³⁷ The agreement dispenses with reporting requirements and sets flat royalty rates of

³³ See Radio Study, *supra* note 1.

³⁴ See 37 C.F.R. § 253.5.

³⁵ See *id.*

³⁶ Comments, *supra* note 21.

³⁷ *In re* Notification of Agreement under the Small Webcaster Settlement Act of 2002, May 31, 2003, available at <http://www.soundexchange.com/NONCOM.pdf>.

\$200 for October 28, 1998 through December 31, 1999, \$250 per year for 2000-2003, and \$500 (or \$250 for webcasters affiliated with educational institutions with fewer than 10,000 students) for 2004. Only those noncommercial webcasters that have 146,000 or more hours of listenership must pay additional royalties. The agreement now allows an overwhelming majority of college and university radio stations to webcast under a predictable and easy-to-use method, and this in turn will allow hundreds of currently unknown artists to share their work with possibly countless future fans worldwide.

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