

Expanding the Scope of the Public Performance Right for Sound Recordings: A Legal Analysis of the Performance Rights Act (H.R. 848 and S. 379)

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Summary

The transmission of copyrighted sound recordings to the public by over-the-air AM/FM radio stations is an activity that implicates the right of public performance under the Copyright Act. However, under current law, terrestrial radio broadcasters who play copyrighted music need only compensate songwriters for the performance of their musical compositions and not the holders of the copyright in the sound recording (who may include the recording artist, musicians, and record label). Yet if music is publicly performed by digital audio transmission, such as by Internet radio stations ("webcasters") or satellite radio companies, both the songwriter and the recording artist are entitled by law to receive royalties from the transmitting entity.

Sound recording copyright holders assert that there is no justifiable reason for the copyright law to treat sound recordings differently from other categories of performable copyrighted works. They maintain that recording artists deserve to be fairly compensated by broadcast radio for public performance of their works just as songwriters and music publishers are currently being paid for such activity. They also believe that the copyright law should require the same royalty obligations for terrestrial broadcasters and digital music services, so as not to advantage some of these commercial competitors over others.

The broadcast radio industry, however, has defended its statutory exemption from paying royalties to recording artists for non-digital public performances, by arguing that radio broadcasts serve as free publicity and promotion of the sound recordings, and that performers and record producers are compensated through sales of compact discs or MP3 music download files, concert tickets, and merchandise. Furthermore, the broadcasters are concerned that any new royalty obligation imposed on radio stations could result in less copyrighted music being performed (either because stations may change their format to talk radio or they may need to broadcast an increased number of advertisements), or that the additional royalties could adversely impact the financial health and existence of smaller radio stations.

The Performance Rights Act, H.R. 848 and S. 379, introduced in the 111th Congress, would expand the public performance right of sound recording copyright holders to include analog audio transmissions—a change that allows performers to seek royalty payments from terrestrial radio stations. Concurrent resolutions have been introduced in both houses, the Supporting the Local Radio Freedom Act (H.Con.Res. 49, S.Con.Res. 14), expressing that Congress should not impose any new performance fees or royalties for over-the-air broadcasts of sound recordings by local radio stations. These opposing legislative measures reflect the contentious debate between the recording industry that desires compensation from AM/FM radio stations for performers and producers of sound recordings, and the broadcast industry that opposes changes to the status quo.

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Introduction

The scope of the public performance right granted by the Copyright Act is broader for musical works than for sound recordings. This difference accounts for the current structure of the royalty obligations of terrestrial radio stations that publicly perform copyrighted music: whereas the musical work copyright holders (songwriters and music publishers) are entitled to receive royalty fees from the radio broadcasters, the sound recording copyright holders (singers, musicians, and record labels) lack any right to demand payment for over-the-air broadcasts of their work. However, since 1995, sound recording copyright holders have possessed a limited public performance right—the right to control public performance of their work by means of a digital audio transmission. Thus, the royalty obligations for Internet radio broadcasters, satellite radio broadcasters, and cable television operators that transmit copyrighted music to their audiences are different than those of terrestrial AM/FM radio stations: entities that digitally transmit music to their listeners must pay royalties not only to the songwriters, but also to the recording artists.

Several hearings were held in the 110th and 111th Congresses examining whether the performance right should be expanded for sound recordings to encompass non-digital audio transmissions, in order to allow performers and record companies to receive compensation when broadcast radio stations play their sound recordings.[1] This report offers information regarding this issue and a legal analysis of two bills that have been introduced in the 111th Congress, H.R. 848 and S. 379 (the Performance Rights Act), that would amend the Copyright Act to provide sound recording copyright holders with a right to receive royalties from terrestrial radio stations that publicly perform their work.

Background

Copyright is a federal grant of legal protection for certain works of creative expression, including books, movies, photographs, and music.[2] A copyright holder possesses several exclusive legal entitlements under the Copyright Act, which together provide the holder with the right to determine whether and under what circumstances the protected work may be used by third parties.[3] Generally, a party desiring to reproduce, adapt, distribute, publicly display, or publicly perform a copyrighted work must either (1) obtain the permission of the copyright holder (usually granted in the form of a license agreement that establishes conditions of use and an amount of monetary compensation known as a royalty fee), (2) comply with the terms of compulsory licenses established by law,[4] or (3) assert that such use falls within the scope of certain statutory

[1] *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property,* 110th Cong., 1st sess. (2007); *Exploring the Scope of Public Performance Rights: Hearings Before the Senate Comm. on the Judiciary,* 110th Cong., 1st sess. (2007); *H.R. 4789, the "Performance Rights Act:" Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property,* 110th Cong., 2d sess. (2008); *H.R. 848, the "Performance Rights Act:" Hearings Before the House Comm. on the Judiciary,* 111th Cong., 1st sess. (2009); *The Performance Rights Act and Parity among Music Delivery Platforms: Hearings Before the Senate Comm. on the Judiciary*, 111th Cong. 1st sess. (2009).

[2] 17 U.S.C. § 102(a).

[3] 17 U.S.C. §§ 106. For a detailed description of the major provisions of the Copyright Act, *see* CRS Report RS22801, *General Overview of U.S. Copyright Law*, by Brian T. Yeh.

[4] A detailed explanation of compulsory licenses is offered *infra*.

limitations on the exclusive rights such as the "fair use" doctrine—but the validity of such claim may be subject to the judgment of a federal court.[5] The unauthorized use of one of the exclusive rights of the copyright holder constitutes infringement.[6]

Federal law recognizes copyright protection for two separate categories of works in the musical realm: "musical works" and "sound recordings."[7] A musical work refers to the notes and lyrics of a song, while a sound recording is a recorded version of a musician singing or playing a musical work, as that rendition is captured in a tangible medium of expression such as a compact disc, cassette tape, vinyl album, or MP3 file. Thus, there are potentially two different creative artists (and two different copyrights) when it comes to a single piece of recorded music: the holder of the copyright in the underlying musical work embodied in the sound recording, and the holder of the copyright in the sound recording itself. The musical work copyright holder is typically the individual who writes the notes and lyrics of a musical composition, or a music publisher who purchases or licenses copyrights from song composers. The sound recording copyright holder may include the recording artist, the background musicians, and the record label that helps with the production of the sound recording. It is possible that one individual can be both the sound recording copyright holder as well as the holder of the copyright in the musical work; for example, someone who is both a singer and songwriter may hold two independent copyrights to a piece of recorded music. However, many songwriters are not performers, and many performers are not songwriters.

While both musical works and sound recordings are eligible for copyright protection, the Copyright Act does not provide the same degree of public performance[8] protection to sound recordings that it grants to the underlying musical composition contained in the sound recording. The holder of a copyright in the musical work has a more robust right to control public performance in a wide variety of situations, while the sound recording copyright holder has a far more limited right to control public performance of sound recordings—only when the sound recording is transmitted to the public through digital means.[9] The difference in the scope of the public performance right under the Copyright Act for these two copyright holders, and its impact on royalty obligations for third parties wishing to publicly perform sound recordings, may be illustrated by the following scenarios:

- An entity that wants to broadcast a sound recording for the public through non-digital transmissions, such as a terrestrial AM/FM broadcast radio station,[10] must pay royalties to the musical work copyright holder (e.g., the songwriter) for the right to publicly perform the musical work, but the radio station does *not* have to pay royalties or otherwise get permission from the sound recording copyright holders (the recording artist, musicians, and record label).

[5] 17 U.S.C. § 107.

[6] 17 U.S.C. § 501.

[7] 17 U.S.C. §§ 102(a)(2), (7). For more information regarding copyright law and music, *see* CRS Report RL33631, *Copyright Licensing in Music Distribution, Reproduction, and Public Performance*, by Brian T. Yeh.

[8] According to the Copyright Act, to "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process. 17 U.S.C. § 101.

[9] 17 U.S.C. § 106(6).

[10] A "broadcast" transmission is defined as a transmission made by a terrestrial broadcast station licensed by the Federal Communications Commission. 17 U.S.C. § 114(j)(3).

- In contrast, if the music is transmitted to the public through digital means, the two music copyright holders' public performance rights (and the transmitting entity's royalty obligations) are different. If the public performance of the sound recording involves a digital audio transmission—as used by an Internet radio broadcaster (or "webcaster"), satellite digital radio company, or a traditional AM/FM radio station offering a simultaneous Internet stream of its over-the-air programming—then both the songwriters *and* recording artists have the legal entitlement to be paid for that activity. Stated differently, the webcasters and satellite radio companies, because they transmit audio using digital technologies, are required to pay royalties to both the musical work copyright holder and the sound recording copyright holder.

History of the Sound Recording Performance Right

A review of the history of the performance right in the Copyright Act is helpful in understanding why the scope of public performance protection differs for sound recordings and musical works. While musical works have enjoyed a full right of public performance for over 100 years, the Copyright Act did not offer any legal protection to sound recordings until 1971, when Congress enacted a law that granted exclusive rights to reproduction and distribution to sound recording copyright holders as a response to the increased amount of unauthorized duplication of records and tapes.[11] However, at that time, Congress decided not to grant sound recording copyright holders the right to control public performance, partly due to opposition by television and radio broadcasters and jukebox operators who resisted any changes to the Copyright Act that would require any additional royalty payments beyond those already mandated for songwriters and music publishers, and also because Congress considered the rights to control reproduction and distribution to be sufficient enough to address the immediate problem of record piracy.[12] In the most recent general revision of the Copyright Act in 1976, Congress directed the U.S. Copyright Office to submit a report by January 8, 1978, that would recommend whether Congress should grant a public performance right for sound recordings. In that report, the Register of Copyrights believed that a public performance right for sound recordings was warranted:

> Broadcasters and other users of recordings have performed them without permission or payment for generations. Users today look upon any requirement that they pay royalties as an unfair imposition in the nature of a "tax." However, any economic burden on the users of recordings for public performance is heavily outweighed ... by the commercial benefits accruing directly from the use of copyrighted sound recordings.... To leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified.[13]

However, at the time, Congress took no action in response to the advice of the Register.

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[11] Sound Recording Amendment, P.L. 92-140, 85 Stat. 391 (1971). By its terms, the law was effective on February 15, 1972, and applies to sound recordings made on or after that date.

[12] *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearings Before the House Subcomm. on Courts, the Internet and Intellectual Property,* 108th Cong., 2d sess. (2004) (statement of David Carson, General Counsel, U.S. Copyright Office), at 3.

[13] U.S. Register of Copyrights, *Report on Performance Rights in Sound Recordings,* H.R. Doc. No. 15, 95th Cong., 2d sess. 1063 (1978).

Technological advances in music transmission methods in the early 1990s helped persuade Congress to reexamine the issue of public performance rights for sound recording copyright holders. Record companies were concerned that consumers would use certain new technologies such as on-demand digital cable music services and other interactive services to listen to music and potentially record the digital audio transmissions, thereby eliminating their need to purchase physical sound recording media.[14]

In response, in 1995, Congress passed the Digital Performance Right in Sound Recordings Act,[15] which for the first time ever granted copyright owners of sound recordings an exclusive right to perform their works publicly—although the right was limited only to digital audio transmission of their sound recordings. However, the law specifically exempted traditional over-the-air radio broadcasts from the newly created right to control digital public performances of sound recordings.[16] The Senate report accompanying the Digital Performance Right in Sound Recordings Act noted that

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and the careers of many performers have benefitted considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[17]

In 1998, with the passage of the Digital Millennium Copyright Act,[18] Congress clarified that the digital performance right also applied to sound recordings performed by noninteractive, nonsubscription Internet radio broadcasters (webcasters).[19] As a result of these two laws, webcasters, satellite radio broadcasters, and cable broadcasters are now required to pay royalties to sound recording copyright holders when they digitally transmit their recordings, in addition to the royalties that are due to the musical work copyright holders. Terrestrial radio stations that stream (simulcast) their programming on the Internet also are required to pay royalties to sound recording copyright holders because that activity involves a digital audio transmission. Radio stations that only broadcast copyrighted sound recordings over-the-air, however, are not subject to the digital performance right for sound recordings and thus need only compensate the musical work copyright holder for the public performance.

[14] William H. O'Dowd, *The Need for a Public Performance Right in Sound Recordings,* 31 HARV. J. LEGIS. 249, 254-59 (1993).

[15] P.L. 104-39, 109 Stat. 336 (1995).

[16] Section 3 of P.L. 104-39.

[17] S.Rept. 104-128, at 4 (1995).

[18] P.L. 105-304 (1998).

[19] Section 405 of P.L. 105-304.

Licenses for Public Performance of Copyrighted Music

A license is a form of legal permission in which the copyright owner authorizes third parties to use the work, in exchange for a payment of royalty fees and compliance with certain conditions specified in the license. Some licenses are negotiated voluntarily between a copyright owner and the third party wishing to use the work. Other licenses are created by Congress and appear in the Copyright Act. These "statutory" or "compulsory" licenses compel copyright owners to allow third parties to use creative works under certain conditions and according to specific requirements, in exchange for payment of royalty fees at a rate determined by a federal government body known as the Copyright Royalty Board.[20] Therefore, a user of a statutory license need not obtain or negotiate permission for using a copyrighted work from the copyright owner; that permission is "compulsory."

When copyrighted sound recordings are transmitted through either analog or digital means, the songwriter who composed the underlying musical composition contained in that sound recording is compensated according to a voluntary license agreement that was the product of private negotiations between the transmitting entities and the musical work copyright holders, who are represented by performing rights organizations such as the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society for European Stage Authors and Composers (SESAC). A broadcast radio station, webcaster, or satellite radio company must pay license fees to ASCAP, BMI, and/or SESAC for the right to publicly perform the copyrighted musical works made by composers, songwriters, and music publishers who are represented by those organizations.

However, public performance of sound recordings through digital transmission is subject to a compulsory license created by Congress and found in Section 114 of the Copyright Act. Webcasters and satellite radio companies need not negotiate with recording artists for permission to digitally transmit their sound recordings; they only have to comply with the terms of the Section 114 compulsory license and pay the royalty rate prescribed by the Copyright Royalty Board.[21] Collection of royalty payments under the compulsory license for digital transmissions of sound recordings is handled on behalf of sound recording copyright holders by SoundExchange, a nonprofit entity originally created by the Recording Industry Association of America.

The Debate Over Altering the Existing Performance Royalty System

The broadcast radio industry has defended its statutory exemption from paying sound recording copyright holders for non-digital public performances, by arguing that radio broadcasts serve as

[20] For more background on the Copyright Royalty Board, *see* CRS Report RS21512, *The Copyright Royalty and Distribution Reform Act of 2004*, by Robin Jeweler.

[21] For Internet radio broadcasters, *see* Library of Congress, Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 72 Fed. Reg. 24084 (May 1, 2007); for satellite radio companies, *see* Library of Congress, Copyright Royalty Board, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080 (Jan. 24, 2008).

free publicity and promotion of the music, and that performers and producers of sound recordings are compensated through sales of compact discs or MP3 music download files, concert tickets, and merchandise.[22] Furthermore, radio broadcasters observe that the broadcaster exemption reflects a balanced, symbiotic economic relationship between the broadcasting, music, and sound recording industries, that Congress has chosen not to disturb for over 80 years despite repeated appeals by the recording industry to alter the existing performance royalty system.[23] The broadcasters also predict that any new royalty obligations imposed on radio stations could result in less copyrighted music being performed, either because stations may change their format to talk radio or they may need to broadcast an increased number of advertisements to pay for the additional royalty fees.[24] They are also concerned that any new royalty fees will adversely impact financially strapped radio stations' ability to provide non-music services such as local news reporting, weather information, and public service announcements, or even force them to cease operations entirely.[25] Finally, they object to comparisons between the United States and other countries with respect to royalty obligations for public performance of sound recordings because of important differences in the intellectual property law of all countries as well as the fact that many foreign broadcasters are owned or heavily subsidized by their governments.[26]

Sound recording copyright holders have advanced several arguments in support of expanding their performance right. First, they argue that recording artists deserve to be compensated for public performance of their works by broadcast radio just as songwriters and music publishers are currently being paid for such activity.[27] They point out that "simple fairness" requires terrestrial radio to pay them for performing their work, as the artists are the ones "who bring the music to life, who attract listeners to a station, and who make it possible for radio to make money by selling advertising."[28] Second, they claim that the promotional value offered by terrestrial radio for the performance of their sound recordings has been diminished by listeners seeking out alternative sources of music distribution such as satellite radio and Internet music services.[29] Third, they observe that all developed countries in the world except the United States require their radio broadcasters to compensate performers and record labels.[30] However, because the United States does not require U.S. radio broadcasters to compensate foreign performers when they play their sound recordings, reciprocity allows foreign broadcasters to deny paying royalties to U.S.

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[22] *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property,* 110th Cong., 1st sess. (2007) (statement of Charles M. Warfield, Jr., President, ICBC Broadcast Holdings, Inc.), at 2.

[23] *Id.*

[24] *Exploring the Scope of Public Performance Rights: Hearings Before the Senate Comm. on the Judiciary,* 110th Cong., 1st sess. (2007)(statement of Steven W. Newberry, President, Commonwealth Broadcasting Corporation).

[25] Free Radio Alliance, *Frequently Asked Questions, at* http://www.freeradioalliance.org/faq.html.

[26] *Exploring the Scope of Public Performance Rights: Hearings Before the Senate Comm. on the Judiciary,* 110th Cong., 1st sess. (2007)(statement of Steven W. Newberry, President, Commonwealth Broadcasting Corporation).

[27] *Exploring the Scope of Public Performance Rights: Hearings Before the Senate Comm. on the Judiciary,* 110th Cong., 1st sess. (2007)(statement of Lyle Lovett) ("[T]he songwriter who created the song deserves to be compensated when that work generates value for another business, as it does for radio. I'm proud to be an ASCAP member, and grateful for the performance royalties that have helped me to earn my living as a songwriter. But the musicians and singers who perform the song are also creators and deserve to be compensated as well.")

[28] MusicFirst, *Frequently Asked Questions About the Performance Right*, *at* http://musicfirstcoalition.org/faq/performance-right/doesnt-radio-play-compensate-artists-by-boosting-record-sale.html.

[29] MusicFirst, *Get Smart on the Performance Right, at* http://musicfirstcoalition.org/getsmart/.

[30] *H.R. 848, the "Performance Rights Act:" Hearings Before the House Comm. on the Judiciary,* 111th Cong., 1st sess. (2009) (statement of Mitch Bainwol, Chairman and CEO of the Recording Industry Association of America), at 1.

performers when they play their works in their countries.[31] Industry estimates suggest that the loss to U.S. artists in potential foreign performance royalties is about $70 million.[32]

The Register of Copyrights has also offered Congress her opinion on this issue, asserting that there is no legal justification for why the copyright law should treat sound recordings differently from other categories of performable copyrighted works, such as books, plays, and movies.[33] She also believes that the copyright law should require the same royalty obligations for both terrestrial broadcasters and digital music services, to provide a more level playing field for these commercial competitors.[34]

Legislation in the 111th Congress

Performance Rights Act

Legislation has been introduced in the 111th Congress that would expand the scope of the public performance right for sound recording copyright holders.[35] The amendments to the Copyright Act proposed by the Performance Rights Act, H.R. 848 (introduced by Representative John Conyers, Jr.) and S. 379 (introduced by Senator Patrick Leahy), would require terrestrial radio broadcasters to begin paying a royalty to recording artists and record labels when they play sound recordings.[36] The bills as introduced contained nearly identical provisions, with a few exceptions. On May 13, 2009, the House Judiciary Committee approved by voice vote a manager's amendment to H.R. 848 that made several substantive changes to the bill as introduced.[37] On October 15, 2009, the Senate Judiciary Committee adopted a manager's amendment that makes nearly all of the same changes to S. 379. However, the House bill (as order to be reported out of the House Judiciary Committee) and the Senate version (as reported by the Senate Judiciary Committee) still have a few remaining differences. The remainder of this report describes the bills as they have been amended in committee.

[31] *Id.*

[32] *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearings Before the House Subcomm. on Courts, the Internet, and Intellectual Property,* 110th Cong., 1st sess. (2007) (statement of Marybeth Peters, Register of Copyrights), at 14.

[33] *Id.* at 2, 4.

[34] *Id.* at 8-9.

[35] The legislation as introduced is substantially similar to bills in the 110th Congress on this topic, H.R. 4789 and S. 2500.

[36] The Copyright Act requires the following division and distribution of the royalty payments made pursuant to a Section 114 compulsory license: 45% of the fee is to be paid to the recording artist, 5% to the background musicians, and 50% to the record label. 17 U.S.C. § 114(g)(2).

[37] Manager's amendment available at http://www.cq.com//displayamendment.do?docid=3116587&productId=1.

Identical Provisions

Creation of the Legal Entitlement to New Royalties

Section 2 of the bills would amend sections of the Copyright Act that currently relate to digital audio transmission of sound recordings by deleting the qualifying term "digital."[38] The bills also would remove the express statutory exemption for nonsubscription broadcast transmissions (which are the type made by traditional AM/FM radio stations) from the Section 114 compulsory license for public performance of sound recordings.[39] If this legislation is enacted, copyright owners of sound recordings would enjoy a performance right for all types of audio transmissions, both analog and digital. This right would be subject to a Section 114 compulsory license available to entities that transmit sound recordings both digitally and over the air. The Copyright Royalty Board would be responsible for determining the royalty rate that radio stations would have to pay to sound recording copyright holders.[40]

Exemption from Obligation to Pay Royalties

H.R. 848 and S. 379 statutorily exempt from the Section 114 compulsory license a nonsubscription radio broadcast of religious services at a place of worship or other religious assembly, and any incidental uses of a musical sound recording (for example, talk radio, including news and sports programming, that uses brief musical transitions in and out of commercials or program segments would be exempt from paying a sound recording performance royalty for such uses of sound recordings).[41]

Per Program License Option

Section 4 of the bills directs the Copyright Royalty Board to establish a "per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings."[42] This provision may be most beneficial to stations that utilize primarily a talk-radio format, though they may broadcast sound recordings on infrequent occasions.

Blanket Licenses for Smaller Radio Stations and Public Radio Stations

Both bills provide special treatment for certain small or noncommercial radio stations by excusing them from having to pay the royalty fee established by the Copyright Royalty Board; rather, qualifying stations would only need to pay a flat annual rate for a blanket license. These annual flat fees are available to commercial and public radio stations that have annual revenue that falls within specific ranges. The Senate and House bills offer the following tiered royalty fee

[38] 17 U.S.C. §§ 106(6), 114(d)(1), 114(j)(6).

[39] 17 U.S.C. § 114(d)(1)(A).

[40] The standard to be used by the Copyright Royalty Board in determining this rate is discussed *infra*.

[41] 153 CONG. REC. E2605 (extension of remarks, Dec. 19, 2007) (statement of Rep. Darrell E. Issa, in reference to H.R. 4789, 110th Cong., 1st Sess. (2007), which is substantially similar to the House-version of the Performance Rights Act introduced in the 111th Congress).

[42] Section 4 of H.R. 848, S. 379, amending 17 U.S.C. § 114(f)(2)(B).

structure, with the Senate bill having an additional option for broadcasters that have annual gross revenues of less than $50,000:

Table 1.Royalty Rates for Broadcasters Under H.R. 848 and S. 379

Annual Revenue	Commercial Broadcaster	Public Broadcasting Entity
Greater than $1.25 million	Rate to be set by the Copyright Royalty Board	Flat fee of $1,000 per year
$500,000 < $1.25 million	Flat fee of $5,000 per year	Flat fee of $1,000 per year
$100,000 < $500,000	Flat fee of $2,500 per year	Flat fee of $1,000 per year
< $100,000	Flat fee of $500 per year	Flat fee of $500 per year
< $50,000	Flat fee of $100 per year (S. 379 only)	Flat fee of $100 per year (S. 379 only)

Source: Congressional Research Service.

Notes: For the annual revenue figures above, the broadcast station must have "at least" $500,000 but less than $1.25 million, or "at least" $100,000 but less than $500,000, etc.

However, the legislation dictates that these fixed-rate royalty fees are *not* to be taken into account in any Copyright Royalty Board rate-setting proceeding, or in any other administrative, judicial, or other federal government proceeding.[43]

Standard Used by the Copyright Royalty Board in Setting Royalty Rates

Both H.R. 848 and S. 379 would require the Copyright Royalty Board (CRB) to determine the royalty rate applicable to the performance of sound recordings by commercial radio stations that have gross revenues of more than $1.25 million per year.[44] The legislation *as introduced* would have required the CRB to set this rate by applying a "willing buyer, willing seller" standard,[45] which is the same one currently being used by the CRB in calculating the royalty rate applicable to Internet radio webcasters.[46]

However, the managers' amendments adopted in the House and Senate judiciary committees changed the standard that the CRB would need to follow. As amended, the legislation calls upon the CRB to use a "modified 801(b) standard." The so-called "801(b) standard" (referring to the section of the Copyright Act, 17 U.S.C. § 801(b)(1), that currently governs the CRB

[43] Section 3(a)(1) of H.R. 848, S. 379.

[44] Note that public broadcasters that make more than $1.25 million per year would qualify for the $1,000 flat fee option described in the table above; therefore, they would not be required to pay the CRB-established rates.

[45] The standard is described in 17 U.S.C. § 114(f)(2)(B): "[T]he Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base [their] decision on economic, competitive and programming information presented by the parties, including—(i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and (ii) the 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 contribution, technological contribution, capital investment, cost, and risk."

[46] For more information on the use of this standard in setting royalty rates for webcasters, *see* CRS Report RL34020, *Statutory Royalty Rates for Digital Performance of Sound Recordings: Decision of the Copyright Royalty Board*, by Brian T. Yeh.

determination of royalty rates for digital cable radio and satellite radio companies) requires the CRB to develop a rate that reflects consideration of several factors beyond strictly market-rate calculations. Such royalty rate must be set to achieve the following statutory objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.[47]

H.R. 848 and S. 379 would require the CRB to consider the first three criteria above, but the bills do *not* include the fourth objective. It has been asserted that the fourth factor was decisive in the CRB calculation of royalty rates for satellite radio that are substantially lower than what they might have been under a "willing buyer, willing seller" standard.[48] However, it remains to be seen whether the first three criteria, in the absence of the fourth consideration, will guide the CRB in determining rates that are lower than those that are the product of the "willing buyer, willing seller" standard.

In addition, the bills would establish "platform parity" for *all* music providers that rely on the Section 114 license for the public performance of sound recordings, by requiring the CRB to apply the "modified 801(b)" standard in setting royalty rates not only for terrestrial radio broadcasters, but also for Internet radio webcasters, digital cable companies, and satellite radio companies.[49]

Safeguards for Existing Royalties Paid to Musical Work Copyright Owners

Section 5 of the bills states that nothing in the Performance Rights Act shall adversely affect the public performance rights or royalties payable to songwriters or copyright owners of musical works. This provision is intended to preserve songwriters' existing public performance rights and clarify that the provisions of the Performance Rights Act shall not diminish them.[50] The bills contain a provision that would restrict the introduction of evidence of sound recording license

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[47] 17 U.S.C. § 801(b)(1)(A)-(D).

[48] David Oxenford, *Broadcast Performance Royalty Passes House Judiciary Committee - A Work In Progress,* May 13, 2009, *available at* http://www.broadcastlawblog.com/2009/05/articles/broadcast-performance-royalty/broadcast-performance-royalty-passes-house-judiciary-committee-a-work-in-progress/ ("[T]he entire 801(b) set of criteria has not been incorporated in the new bill. Specifically, the new criteria omit the one factor that was the most important in cutting the satellite radio royalties from what probably would have been 14% of revenue had a 'willing buyer, willing seller' analysis been used, down to 6-8% of revenues.").

[49] Section 2(d) of H.R. 848, § 2(e) of S. 379. Note that Internet radio webcasters would likely stand to benefit from this change, as their Section 114 license fees are currently determined under a "willing buyer, willing seller" standard. On the other hand, digital cable and satellite radio companies would lose the fourth objective from the 801(b) set of criteria that currently governs the determination of their Section 114 license.

[50] 155 CONG. REC. S1545 (daily ed. Feb. 4, 2009) (statement of Sen. Leahy).

fees in a rate-setting proceeding to set or adjust the applicable royalties for the performance of musical works, as follows:

> License fees payable for the public performance of **sound recordings** ... *shall not be cited, taken into account, or otherwise used* in any administrative, judicial, or other governmental forum or proceeding, or otherwise, *to set or adjust* the license fees payable to copyright owners of **musical works** or their representatives for the public performance of their works, *for the purpose of reducing or adversely affecting such license fees*. License fees payable to copyright owners for the public performance of their musical works *shall not be reduced or adversely affected* in any respect as a result of the rights granted [to sound recording copyright holders to control public performance of their works by means of an audio transmission].[51]

In addition, license fees paid by terrestrial broadcast stations for the public performance of musical works "shall be independent of license fees paid for the public performance of sound recordings."[52] Furthermore, H.R. 848 and S. 379 expressly spell out the music license obligations of terrestrial radio stations under the Performance Rights Act—in addition to the new requirement of paying for the performance of sound recordings, they must continue to obtain licenses for the public performance of copyrighted musical works contained within sound recordings.[53]

Requirements for Payment of Royalties

The bills establish the following requirements for the distribution of royalties:[54]

- A featured recording artist who performs on a sound recording that has been licensed for public performance by means of a digital audio transmission is entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract.
- Sound recording copyright owners must deposit 1% of the receipts from their licensing of public performance rights by means of a digital audio transmission, into a fund established by the American Federation of Musicians and American Federal of Television and Radio Artists, for the benefit of nonfeatured performers who have performed on sound recordings.[55]
- Radio broadcasters must pay 50% of the total royalties owed for the public performance of sound recordings directly to featured and nonfeatured artists, in the proportions called for under existing law.[56]

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[51] Section 5(a)(1) of H.R. 848, S. 379, amending 17 U.S.C. § 114(i) (emphasis added). However, this language leaves open the possibility that evidence of the sound recording royalties may be admissible for the purpose of *increasing or maintaining* the amount of the public performance license fees payable to musical work copyright holder. The current statutory provision, § 114(i), prohibits any use of such evidence in rate-setting proceedings for musical work royalties.

[52] Section 5(c) of H.R. 848, S. 379, amending 17 U.S.C. § 114(f).

[53] Section 5(a)(1) of H.R. 848, S. 379, amending 17 U.S.C. § 114(i).

[54] Section 6 of H.R. 848, S. 379, amending 17 U.S.C. § 114(g).

[55] The bills specify that the fund shall be distributed 50% to nonfeatured musicians and 50% to nonfeatured vocalists.

[56] Under the Copyright Act, the distribution of payments to all artists who performed on sound recordings are to be made as follows: 2.5% to nonfeatured musicians, 2.5% to nonfeatured vocalists, and 45% to featured artists. 17 U.S.C. § 114(g)(2)(B)-(D).

Delay in Effective Date of Legislation

A provision in both bills would delay the effective date of the legislation for three years after the enactment of the Performance Rights Act in the case of radio broadcasters with annual gross revenues of less than $5 million, or one year immediately following enactment of the act in the case of a broadcaster making more than $5 million a year.[57] The precise language of the bills provides that radio broadcasters "shall not be required to pay a royalty" during those time periods. However, as noted above, the royalty rate for commercial broadcasters with greater than $1.25 million in annual revenue is to be determined by the Copyright Royalty Board. A CRB rate-making proceeding often requires several years to conduct.[58] Therefore, for commercial broadcasters that make more than $5 million annually, the obligation to begin paying royalty rates after the one year delay will likely come to fruition before the CRB issues a decision that establishes the royalty rate. In such a situation, the commercial broadcaster would likely be responsible for paying for royalties retroactively from the date when the CRB establishes the rate.

Differences Between H.R. 848 and S. 379

H.R. 848 and S. 379 contain several provisions unique to each bill.

No Effect on Local Communities

The manager's amendment to H.R. 848 that was adopted by the House Judiciary Committee contains a provision that would amend Section 114 of the Copyright Act by adding the following:

> Neither this subsection nor the payment of royalties by broadcasters hereunder shall affect in any respect the public interest obligations of a broadcaster to its local community under part 73 of title 47 of the Code of Federal Regulations.

This provision emphasizes that the new royalty payment requirements are not meant to diminish or otherwise alter any public interest obligations of broadcasters under federal communications laws. The Senate bill as reported out of the Senate Judiciary Committee does not contain a similar provision.

Preservation of Diversity

H.R. 848 would instruct the CRB, in determining the royalty rates for Section 114 compulsory licenses, to consider evidence on the effect of such rates and terms on the following entities:

- religious, minority-owned, female-owned, small, and noncommercial broadcasters;
- 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

[57] Section 3(a)(1) of H.R. 848, S. 379.

[58] For example, the CRB announced on January 5, 2009, that it was initiating a rate-making proceeding to determine the royalty rates for Internet radio webcasters that would be applicable for the royalty period that runs from January 1, 2011, through December 31, 2015. Copyright Royalty Board, Library of Congress, *Digital Performance in Sound Recordings and Ephemeral Recordings,* 74 Fed. Reg. 318 (Jan. 5, 2009).

located in one designated market area (as determined by Nielsen Media Research); and

- religious, minority or minority-owned, and female or female-owned royalty recipients.

This section is titled "preservation of diversity"; presumably, the CRB would be responsible for taking into account evidence of significant negative economic impact on these entities in establishing or adjusting royalty rates that would moderate such impact. The Senate bill, as reported, does not contain a similar provision.

Sound Recording Performance Complement

H.R. 848 would require that traditional radio stations adhere to the same performance limitations that are currently imposed on webcasters and satellite radio (referred to as the "sound recording performance complement") as part of the conditions of using a Section 114 compulsory license, such as restrictions on their ability to pre-announce the titles of songs that are to be played at a specific time, and limiting the transmission of songs from the same sound recording or by the same artist within a certain period of time.

The Senate bill, however, would expressly exempt traditional radio stations from these conditions of the Section 114 license.[59]

Ephemeral Recordings Royalty

Ephemeral recordings are reproductions of a sound recording made solely for the purpose of facilitating its transmission by an entity legally entitled to publicly perform the work. Section 112(e) of the Copyright Act authorizes a statutory license to make a temporary or "ephemeral" reproduction or copy of the sound recording (which is generally stored in the hard drive of computer servers that facilitate the performance), for those entities who transmit a sound recording under a Section 114 public performance license. So, for example, Internet radio webcasters currently rely upon two statutory licenses in order to "stream" sound recordings to their listeners: a Section 114(f) performance license (which authorizes the public performance of the sound recording) and a Section 112(e) ephemeral reproduction license (which allows the creation of temporary copies of a sound recording that may be necessary to facilitate transmission of the sound recording). Section 112(e)(4) requires the CRB to establish reasonable rates and terms for the Section 112(e) license under the "willing buyer, willing seller" standard.

The manager's amendment to S. 379 that was adopted by the Senate Judiciary Committee would amend the standard by which the Section 112(e) license's rates and terms are determined by the CRB.[60] The Senate bill, as reported, sets forth two different standards that apply:

- For entities that make ephemeral copies of sound recordings in order to transmit them to "a business establishment for use in the ordinary course of its business,"[61] such as those that offer background music that is played in offices,

[59] Section 2(d) of S. 379.

[60] Section 7 of S. 379.

[61] 17 U.S.C. § 114(d)(1)(C)(iv).

retail stores, and restaurants), the Section 112(e) license rate is to be determined by the CRB under a willing buyer, willing seller standard.

- For entities that make ephemeral copies of sound recordings in order to transmit them pursuant to a Section 114 statutory license (used to transmit sound recordings publicly), the rates and terms for the Section 112(e) license are to be established under the "modified 801(b) standard" discussed above. However, S. 379 directs that the ephemeral recordings royalties (that a transmitting organization pays to sound recording copyright holders) "shall constitute 5 percent" of the payments made for the Section 114 performance license.

There is no comparable provision in the House version of the legislation.

Supporting the Local Radio Freedom Act

Introduced by Representatives Gene Green on February 12, 2009, the Supporting the Local Radio Freedom Act (H.Con.Res. 49) expresses that Congress should not impose any new performance fees, royalties, or other charges relating to the over-the-air broadcasts of sound recordings by local radio stations or by any business engaged in such activity. Representative Green stated that "[r]adio has played a huge role in promoting new music and artists at no cost to the record labels. The performance tax being pushed by the record labels is projected to have a huge price tag costing local stations and the community millions of dollars."[62] As of the date of this report, 250 Members of the House have signed onto the non-binding resolution as co-sponsors as of the date of this report.

A similar resolution, S.Con.Res. 14, was introduced on March 30, 2009, by Senator Blanche Lincoln. Senator Lincoln commented that "[t]his resolution will ensure that local radio stations across the country can continue to serve listeners without being subjected to additional fees that could diminish the quality of radio programming, including news, weather and AMBER Alert information that at times proves lifesaving."[63] As of the date of this report, there are 25 co-sponsors of this Senate resolution.

[62] Press Release, *Rep. Gene Green Introduces Bipartisan Measure Against Radio Performance Taxes, available at* http://www.house.gov/list/press/tx29_green/LRFAREINTRO.html.

[63] Press Release, *Lincoln Reintroduces Resolution Recognizing Value of Radio Airplay, available at* http://lincoln.senate.gov/newsroom/2009-03-30-1.cfm.

Appendix. License Fees for Public Performance of Music

	Publicly Performing a Work Through Analog Transmission	Publicly Performing a Work Through Digital Transmission
Royalties Due to the Musical Work Copyright Holder—includes the songwriter and the music publisher	As an example, ASCAP offers two types of license agreements:[a] (1) A "blanket license" is available for radio stations that broadcast music frequently. The annual fee is a percentage of the station's annual revenues; the rate for 1996 through 2000 was 1.615% for stations with annual gross revenue over $150,000, or a minimum of 1% of adjusted gross income.[b] For stations that have less than $150,000 in annual revenue, there is a flat fee schedule that ranges from $450 to $1,800. (2) A "per program license" is available for talk and news radio stations that use less copyrighted music; the fee is 0.24% of Adjusted Gross Revenue and covers incidental uses of music.	ASCAP offers several types of licensing agreements for Internet music uses, the fees for which vary depending on the size of the audience, revenue, whether the Internet service is interactive or non-interactive, the number of music performances, among other things.[c] The minimum fee for non-interactive Internet websites is $288, while the minimum fee for interactive sites is $340.
Royalties Due to the Sound Recording Copyright Holder—includes the performing artist, musicians, and record label	None. However, the Performance Rights Act (H.R. 848 and S. 379) would require terrestrial broadcasters to pay artists and record labels royalties for the right to play sound recordings over the air. The royalty rate would be determined by the Copyright Royalty Board in a ratemaking proceeding. In lieu of this rate, the Performance Rights Act would permit radio stations that have certain annual revenue to elect to pay certain fixed royalty fees: <u>For commercial radio broadcasters</u>: (1) A broadcaster that has an annual revenue of at least $500,000 but less than $1.25 million, may elect to pay a fixed royalty fee of $5,000 per year. (2) A broadcaster that has an annual revenue of at least $100,000 but less than $500,000 may elect to pay a fixed royalty fee of $2,500 per year.	The Copyright Royalty Board has established the following rates: **Commercial webcasters:**[d] $.0008 per performance[e] for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. **Noncommercial webcasters:** (1) For Internet transmissions totaling less than 159,140 Aggregate Tuning Hours (ATH)[f] a month, an annual per channel royalty of $500. (2) For Internet transmissions totaling more than 159,140 ATH a month, a royalty of $.0008 per performance for 2006, $.0011 per performance for 2007, $.0014 per performance for 2008, $.0018 per performance for 2009, and $.0019 per performance for 2010. *All webcasters must also pay an annual minimum fee of $500 per channel.* **Satellite radio:**[g] 6 % of gross revenues for 2007 & 2008; 6.5% for 2009; 7% for 2010; 7.5% for 2011; and 8% for 2012.

	Publicly Performing a Work Through Analog Transmission	Publicly Performing a Work Through Digital Transmission
	(3) A broadcaster that has an annual revenue of less than $100,000 may elect to pay a fixed royalty fee of $500 per year. (4) ***Provision found in S. 379 only:*** A broadcaster that has an annual revenue of less than $50,000 may elect to pay a fixed royalty fee of $100 per year. <u>For public radio broadcasters:</u> (1) A public broadcasting entity that has an annual revenue of $100,000 or more may elect to pay a fixed royalty fee of $1,000 per year. (2) A public broadcasting entity that has an annual revenue of less than $100,000 may elect to pay a royalty fee of $500 per year. (3) ***Provision found in S. 379 only:*** A public broadcasting entity that has an annual revenue of less than $50,000 may elect to pay a royalty fee of $100 per year.	

Source: Congressional Research Service.

a. The fee examples on this page are the product of negotiations between ASCAP and the radio broadcasters.

b. ASCAP, Customer Licensees, Radio Licensing FAQs, at http://www.ascap.com/licensing/radio/radiofaq.html. These are the rates now shown on ASCAP's website; more up-to-date rates are not available.

c. ASCAP, Customer Licensees, New Media & Internet Licenses, at http://www.ascap.com/weblicense/feeCalc.aspx.

d. Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings,* 72 Fed. Reg. 24084 (May 1, 2007).

e. A performance is a single sound recording publicly performed by digital audio transmission, heard by a single listener. For example, if a webcaster streams 30 songs to 100 listeners in the course of a day, the total would be 3,000 performances for that day.

f. ATH is the total hours of programming transmitted during a certain period of time to all listeners. For example, if a webcaster streamed one hour of music to 1 listener, the ATH for that webcaster would be 1. If 2 listeners each listened for half an hour, the ATH would also be 1. If 10 listeners listened to 1 hour, the ATH would be 10, and so forth.

g. Copyright Royalty Board, *Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, 73 Fed. Reg. 4080 (Jan. 24, 2008).

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