



Comments From The Copyright Office On GAO-10-428R (GAO-10-707SP), an E-supplement to GAO-10-428R

June 7, 2010

The Honorable John Conyers, Jr.
Chairman
The Honorable Lamar Smith
Ranking Member
Committee on the Judiciary
House of Representatives

The Honorable Jason Chaffetz
The Honorable Charles Gonzalez
The Honorable Sheila Jackson-Lee
The Honorable Dan Lungren
House of Representatives

Subject: *Comments from the Copyright Office on GAO-10-428R—Preliminary Observations on the Potential Effects of the Proposed Performance Rights Act on the Recording and Broadcast Radio Industries*

On April 16, 2010, we received a letter from the Copyright Office providing comments on *Preliminary Observations on the Potential Effects of the Proposed Performance Rights Act on the Recording and Broadcast Radio Industries (GAO-10-428R)*. As you know, this report provided our preliminary observations on the potential effects of the proposed Performance Rights Act (the proposed Act). Because we did not receive the Copyright Office's letter before we issued our report to you, we were unable to include the letter in it. However, because the Copyright Office is responsible for administering U.S. copyright laws, which the proposed Act seeks to modify, and its letter provides a number of relevant insights on the proposed Act, we are providing the letter as a supplement to our report.

In its letter, the Copyright Office voiced support for the proposed Act and suggested that our report elaborate more fully on several issues. In particular, the Copyright Office noted that the broadcast radio industry faces both cyclical and permanent challenges, and that the proposed Act includes provisions to take into account the cyclical challenges. The Copyright Office suggested that we elaborate on the permanent nature of the challenges facing the recording industry, and in particular,

the challenges arising from the illegal downloading of music. The Copyright Office also noted that the illegal downloading of music has significantly diminished the promotional value of radio airplay. Finally, the Copyright Office noted that the proposed Act will establish a new revenue stream that would allow record labels to prevent job losses and even the cessation of operations. We will keep the Copyright Office's comments in mind to inform our work as we pursue these issues in the future.

As we note in GAO-10-428R, that report reflects our preliminary observations on the potential effects of the proposed Act. It was prepared by steps such as reviewing relevant reports and analyses about the broadcast radio and recording industries and interviewing stakeholders from the broadcast radio and recording industries, as well as officials from the Copyright Office and the Federal Communications Commission, and the Chief Judge of the Copyright Royalty Board. As we agreed with committee staff, we will provide a final report that will include more extensive quantitative analyses of the relevant issues.

A handwritten signature in black ink, appearing to read 'M. Goldstein', with a long horizontal flourish extending to the right.

Mark L. Goldstein
Director, Physical Infrastructure Issues
Attachment

(543268)

Attachment



The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

April 16, 2010

Michael E. Clements, Ph.D.
Assistant Director, Physical Infrastructure Team
U.S. Government Accountability Office
441 G Street, N.W.
Washington, D.C. 20548

Dear Dr. Clements:

The United States Copyright Office (the "Office") appreciates the opportunity to review the Government Accountability Office ("GAO") February 26, 2010 draft report *Preliminary Observations on the Potential Effects of the Proposed Performance Rights Act on the Recording and Broadcast Industries* ("Draft Report").

As you may know, the Office is responsible for the administration of U.S. copyright law. In fulfilling this role, the Office has established a long history of recommending extension of full performance rights to sound recordings, including recently voicing support for the Performance Rights Act ("PRA") in Congressional hearings. Congress first created a limited performance right in sound recordings in 1995 to cover public performances made by digital satellite radio and cable systems and Congress expanded the right again in 1998 to cover all performances of sound readings made via a digital transmission. The PRA, as expressed in H.R. 848 and S.379, goes a step further and would expand the performance right by requiring terrestrial broadcasters to compensate performers and sound recording copyright owners for broadcast performances of sound recordings just as webcasters, satellite radio services and cable services do. In the course of crafting the PRA, Congress asked the GAO to provide information on the economic factors related to enacting performance royalty legislation. After having reviewed the Draft Report, the Office respectfully suggests that the Report should elaborate on a number of issues.

The Draft Report identifies two chief factors contributing to the radio broadcast industry's current economic challenges, namely today's economic climate and consumer fragmentation, both of which have led to declines in advertising revenue. However, the Office suggests that the Report should elaborate on whether the challenges currently faced by the radio broadcast industry are of a cyclical nature or whether the cited challenges are permanent. The technological advances, such as the development of Internet and mobile listening alternatives, which have caused consumer fragmentation for the broadcast industry, are likely permanent. On the other hand, the current economic climate and the resulting downturn in advertising revenue is more aptly described as cyclical. The Office suggests that the Report should acknowledge that the ad market for radio is cyclical and that current data suggests that the latest cycle in which ad revenue for radio broadcasters was in a downturn has indeed come to an end. The Office observes that not only do the recent forecasts predict an increase in radio ad revenue in 2010,

they also call for several years of compounding growth.¹ Additionally, recent analysis reveals that the ad market is improving so rapidly that market analysts are having to race to issue updates on the steadily improving market.² Furthermore, the cyclical nature of the radio ad market and the perceived health of the overall industry is reinforced by the fact, noted in the Draft Report, that there is no shortage of parties seeking to acquire licenses to operate broadcast radio stations.

While evidence indicates that broadcast radio is at the beginning of a recovery, neither the Draft Report nor any identifiable current economic forecasts indicate a similar recovery for the recording industry. The Draft Report identifies several factors that have contributed to the recording industry's economic challenges, including the ease of illegal downloading and a shift to on-demand listening in which consumers pay to access music rather than purchasing a copy of the music. Both of these factors appear to be permanent in nature.

The Office suggests that it would be worthwhile for the Report to elaborate on the permanent nature of the challenges to the recording industry and the extent these changes affect the economic health of the recording industry. For instance, the Office suggests that the Report should make note of the evidence that illegal downloading is a growing method of music acquisition and that this sustained growth is an indication that illegal downloading is a permanent challenge to the recording industry for the foreseeable future.³ The Office also suggests that the Report should elaborate on the fact that the same technological advances that cause consumer fragmentation for the broadcast industry will continue to cause a shift toward business models through which consumers access music rather than purchase it and that the technological advances driving these challenges to both industries appear to be of a permanent nature.⁴ Moreover, it would be of particular interest for the Report to consider whether the respective industries can adjust to these changes and make a reasonable profit.

The Draft Report correctly observes that the recording industry has asserted that the promotional value of broadcast radio has decreased due to the emergence of competing technologies. In addition to noting these assertions, the Office suggests that the Report should take note of a recent study noting that 52% of younger listeners between the ages of 12 and 34 learn about new music from the internet while 32% said radio was their primary source for discovering new music. The same Arbitron and Edison "Infinite Dial" surveys show that 39% of the respondents still turn to radio as the primary source for discovering new music – a significant reduction from the 2002 figures when up to 63% said radio was their primary source for this information.⁵

While the Office agrees that promotional value is decreased by the emergence of competing technologies, it suggests that the Report should not focus on a single competing technology, internet based music "access" services, as driving the decrease. The focus on music "access" services appears to discount attention to the much more significant cause of the decreased value of radio's

¹ http://adage.com/mediaworks/article?article_id=142940; See also, "Scranton radio revenue skyrockets by 42%," <http://www.insideradio.com/Article.asp?id=1740797&spid=32060>

² <http://www.rbr.com/media-news/22798.html>

³ Research by Harris Interactive shows an increase in illegal Internet downloads in 2009
<http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/growing-threat-from-illegal-web-downloads.aspx>

⁴ IFPI Digital Music Report 2010

⁵ <http://www.radioink.com/article.asp?id=1763483&spid=24698>.

promotion of record sales, namely illegal downloading. The Office suggests that the Report should more prominently acknowledge illegal downloading as a growing method of music acquisition.⁶ In addition, it should evaluate more fully the negative consequences of this illegal practice on record sales. Furthermore, the Office suggests that the Report should acknowledge that to the extent that radio has a promotional effect that prompts listeners' interest in a particular song, any positive effect on sales is severely diminished in a world of rampant illegal downloading. In other words, the Report should address whether whatever promotional value radio broadcasting may have offered to the music industry in the past has diminished or even ceased to exist either because radio now plays a lesser role in promoting sales or because radio no longer promotes sales.

Aside from analyzing the economic health of the broadcasting industry and the recording industry, the Draft Report also considers the economic impact that passage of the PRA would have on the industries. The Draft Report relays the broadcast radio industry's concerns that the PRA may cause job losses, format shifts and even discontinued operations. However, as noted above, the Draft Report fails to acknowledge the cyclical nature of the ad market and recent evidence of growth in broadcast radio ad revenue. Additionally, the Draft Report does not acknowledge that the PRA includes provisions that take into account the recent difficult economic climate for the radio broadcast industry. The Office therefore suggests that the Report highlight the fact that the PRA would not require broadcasters to pay royalties for their public performance of sound recordings for anywhere from one to three years after the date upon which the PRA is enacted, depending upon the size and nature of the broadcast station. These delayed obligations were inserted into the PRA as a way to avoid imposing an undue economic burden on the industry during an difficult economic time. Additionally, the Report should more thoroughly examine the extent to which the provisions setting low flat fee annual royalties for noncommercial and certain commercial broadcast radio stations alleviates or even eliminates any negative impact on the broadcast radio industry.

The Office suggests that the Report should elaborate on some of the more concrete positive effects that will likely come about with passage of the PRA. For instance, the establishment of a new revenue stream for performers and the recording industry would offer an avenue through which record labels would be able to prevent job losses and even the cessation of operations. While the Office has no figures on job losses or the cessation of business operations among record labels, news reports continue to provide detailed accounts of the perilous financial state of EMI, one of the "big four" major labels which is currently facing bankruptcy.⁷ The Office encourages more detailed attention to the positive impact that passage of the PRA would have on the ability of both large, small and minority owned record labels, as well as individual performers, to finance continued operation and investment in the future of their businesses amidst today's shifting market. The Draft Report acknowledges statements regarding passage of the PRA leading to more investment, including labels signing and developing the careers of more performers. The Office encourages elaboration on these assertions in order to determine whether and to what extent the PRA would result in such investment.

The Office also suggests that the Report should explore whether the recording industry will be able to adapt to market shifts toward music "access" services involving public performance, and away from a market in which the exclusive rights of reproduction and distribution are exercised in the same manner as other copyright owners, without a more complete public performance right. The Office

⁶ Research by Harris Interactive shows an increase in illegal Internet downloads in 2009
<http://www.bpi.co.uk/press-area/news-amp3b-press-release/article/growing-threat-from-illegal-web-downloads.aspx>

⁷ http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article7091054.ece

notes that songwriters and music publishers, who unlike the copyright owners of the sound recordings, possess the exclusive rights of reproduction and distribution as well as full public performance rights, seem to have been able to successfully adapt as markets shifted toward music "access" services without suffering the exponential diminished revenues experienced by the recording industry.⁸ The Office observes that the relatively new and less well established satellite radio and webcasting industries fulfill their obligation to make royalty payments for public performance of sound recordings as they continue to develop their businesses. In light of this and the predicted economic upturn for the broadcast industry, the Report should explore whether the broadcast radio industry will be able to adapt to passage of the PRA, specifically elaborating on the broadcast radio industry's ability to pay a sound recording performance royalty.

Finally, the Office observes that the Draft Report indicates that the final report will include estimates of broadcaster royalty payments that will be due after passage of the PRA. These estimates are to be based on prior decisions of the Copyright Royalty Judges setting royalties for licenses similar to the one that would be established by the PRA. The Office notes that any such estimates should take into account, and expressly acknowledge, that neither broadcast radio industry stakeholders or sound recording industry stakeholders have yet had an opportunity to present evidence or arguments regarding the license for public performances of sound recordings via radio broadcast that would be established under the PRA.

Again, thank you for the opportunity to comment on the Draft Report. The Office remains interested in providing any necessary assistance GAO may desire as it completes its report.

Sincerely,



Marybeth Peters
Register of Copyrights

⁸ <http://nashville.bizjournals.com/nashville/stories/2008/02/11/daily15.html> See also, "Music publishing's steady cash lures investors" <http://www.reuters.com/article/idUSTRE53M6TK20090424>