

March 2007

**Copyright law and the CRB: What went wrong?**

Given the ruinous rates and terms laid down by the Copyright Royalty Board last week, it might be useful to take a few steps backward and look at how Internet radio has arrived at this potentially fatal situation.

Copyright laws grant authors limited rights in a way that Congress believes encourages the creation and dissemination of their works

About the purpose of copyright law, Stanford Law professor and copyright expert Lawrence Lessig writes, "Copyright has never accorded the copyright owner complete control over all possible uses of his work. Its purpose instead is to secure a limited monopoly over certain ways in which creative works are exploited, so as to give the authors (i.e., composers and performers) an incentive to create, and thus, in turn, to 'promote the Progress of Science'." In fact, it's beyond argument today that the U.S. copyright laws recognize no absolute right in authors to prevent others from copying or exploiting their work. Rather, copyright laws grant authors limited rights in a way that Congress believes encourages the creation and dissemination of their works. In the long term, authors' intents and interests have always been secondary to that of the public. In the field of music, the intent of Congress to encourage the creation and dissemination of works is based on the same principles. Congress has wanted to insure that composers have an incentive to keep composing and performers have an incentive to keep performing, but also that third parties (i.e., those individuals and companies that disseminate works to the public in new forms (e.g., Internet radio) would have an incentive to keep innovating – in each case, remember, primarily not for those individuals' own good, but rather for the good of the public.

In each case the law has not been primarily for individuals' own good, but rather for the good of the public.

So, to that end, Congress over the past decades has seen fit to grant composers and performers a certain limited number of monopoly rights. Not unlimited rights, mind you, but enough to motivate them to keep composing and performing. For example, in the case of composers, one of the monopolies that Congress granted was a monopoly for a certain period of time to decide who could record their compositions, (specifically, the first person permitted to do this). However, Congress did not grant composers any additional monopoly rights in this regard thereafter – once that first performer has recorded a composition, any performers would be free to record the song. The composer may get some cash compensation (e.g., if the song is recorded on a CD or published as sheet music), and may benefit from the promotional value of performances (e.g., more sheet music will be sold), but composers were absolutely not granted unlimited control of their output. Congress could have granted composers additional rights, but it didn't. Congress felt that the bundle of various monopoly rights it did grant should be enough to motivate composers to keep composing.

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Now let's look at sound recordings. (I'll clarify here parenthetically: When Rod Stewart records Cole Porter's "Night and Day," there are two different creative works involved – the song (lyrics and notes) and the performance of it (as captured on that recording). We're now talking about the latter.) In the early days of cylinders and 78 RPM discs and so forth, state copyright laws granted owners of the master recordings various rights to manufacture and sell these, but it was an open question as to whether radio stations had the right to play those recordings. In fact, top crooners of the era like Bing Crosby and Paul Whiteman stamped "Not Licensed for Radio Airplay" on their records and hired lawyers to try to sue the radio stations that played their songs. However, a federal court ruled in 1940 that once a record was sold, the buyer had the right to use it in any manner he liked, including broadcasting it on the radio. In other words, the court determined that there were no copyright laws in effect that had granted that particular right (sometimes called a "public performance" monopoly right) to the performer. Recording artists had been granted several rights by Congress, the court concluded, but not that one.

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Thereafter, radio stations knew they were free to play the records they wanted to play, and the relationship between recording artists and radio stations turned out to be a virtuous one! When radio stations played a Bing Crosby record, its sales didn't go down (as he was apparently afraid they might), but soared! A healthy economy developed in which record companies and recording artists encouraged radio stations to play their records, knowing they'd mutually benefit. It wasn't until 1972 that Congress, for the first time, offered any kind of federal copyright protection for sound recordings at all, and four years later the Copyright Law of 1976 established that there was a monopoly right to "public performance" for certain types of copyrighted material... but not for sound recordings. Congress apparently believed that record companies and recording artists were already sufficiently motivated to keep creating enough sound recordings to satisfy the public good.

Having discussed the composer's and the performer's perspective, let's now look at the issues from the record company's perspective. If you're Clive Davis or Andrew Lack running a record label, you might instinctively view this whole situation entirely differently. You might think, "I paid for the making of these recordings. They're my property! They should be mine to do with as I please!" But that's not historically correct. Historically, as we have seen above, the record companies started out with no rights at all, and were only gradually granted certain rights over time. For example, record companies were given the right, for a limited period of time, to determine who could use their recordings in TV commercials, films, compilation discs, or to use an album cover art on t-shirts. These are all specific monopoly rights that legislators decided to grant record companies, but, once again, they didn't grant monopoly rights over radio airplay!



Enter digital, jumping forward to 1995 and beyond. Technology is changing. Music is now being delivered to consumers in ways never before contemplated, over broadband connections to PC's, via satellite, over cable TV systems, and even to wireless phones. Having had this "It's mine, I should be able control it" feeling bugging them for years (remember, as far back as the 1930s!), the RIAA (Recording Industry Association of America) lobbied Congress to pass a law called the "Digital Performance Right in Sound Recordings Act (DPRA)." Here was the RIAA's argument: Digital transmissions of music were about to allow consumers to make a "perfect digital copy" of the music being transmitted. Those perfect copies were going to impact revenues for recording artists horribly – so horribly, in fact, that they might lack sufficient motivation to record music thereafter. The RIAA asked Congress for an additional monopoly right regarding the "public performance" of sound recordings when a digital transmission was involved... and Congress bought it. (In defense of legislators, the RIAA was very early on the curve here, and there was no organized "other side" to raise any effective objections.)

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However, Congress did somewhat limit the new monopoly it granted the copyright owners by adding a "statutory" license, so that music services wouldn't have to negotiate on a song-by-song basis for each song they wanted to play. As for compensation to the copyright owner, Congress instructed the copyright owners and the copyright users to negotiate a royalty rate among themselves, but, if that failed, Congress instructed the Copyright Office to set up an arbitration panel (CARP) that would hold hearings to determine a suitable royalty rate. Congress also established the four criteria (policy objectives referred to as the 801(b)(1) standard) the CARP should use, if a CARP was needed at all, to set the royalty rate – *(A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return for his 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.*

In 1998, the Digital Millennium Copyright Act (DMCA) contained a bundle of new provisions to add new protections and rights for various copyright owners, including the RIAA, the MPAA, and computer software firms. Within that law, the RIAA got webcasting added as a form of digital transmission that would be covered by a "public performance" copyright, while the National Association of Broadcasters (NAB) got an exception inserted for HD Radio (although it's a digital transmission of music). The



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DMCA also changed the standard under which a webcasting CARP, if one proved necessary, was supposed to determine the appropriate royalty rate. The new standard was simpler but at the same time more vague: *"The copyright arbitration royalty panel 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."*

And thus, here's where we stand today, based on the specific bundle of monopoly rights that Congress has granted the various factions over time:

*"The copyright arbitration royalty panel 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."*

- Copyright owners of sound recordings have not been granted any rights to control which AM, FM, or HD radio stations play their recordings.
- However, because of an alleged nascent threat of consumers being able to make "perfect digital copies" of songs transmitted digitally, Congress granted record labels a new monopoly right to control who plays their recordings, meaning effectively that Satellite radio has to pay a royalty for the use of sound recordings, with a rate being set by an arbitration panel based on several criteria that are designed to be balanced to benefit, overall, the public. (That rate is not public knowledge, but is estimated by stock analysts to be about 3.5% of industry revenues.)
- Internet radio also has to pay a royalty for the use of sound recordings, but its rate is set by a trio of judges based on a single criterion that can, in my reading anyway, be interpreted as "almost whatever the labels feel like." As it turns out, the new royalty rate is (in my estimate) more than 100% of the total industry's revenues! (See illustration below.)

- » Because a typical Internet radio station plays about 16 songs an hour, that's a royalty obligation in 2006 (based on proposed rates) of about 1.28 cents per listener-hour.
- » In 2006, a well-run Internet radio station might have been able to sell two radio spots an hour at a \$3 net CPM (cost-per-thousand), which would add up to .6 cents per listener-hour.
- » Even adding in ancillary revenues from occasional video gateway ads, banner ads on the website, and so forth, total revenues per listener-hour would only be in the 1.0 to 1.2 cents per listener-hour range.
- » That math suggests that the royalty rate decision — for the performance alone, not even including composers' royalties — is in the ballpark of 100% or more of total revenues for 2006. In later years the rate is set to escalate further:

<b>2006</b>	<b>\$.0008 per performance</b>
<b>2007</b>	<b>\$.0011 per performance</b>
<b>2008</b>	<b>\$.0014 per performance</b>
<b>2009</b>	<b>\$.0018 per performance</b>
<b>2010</b>	<b>\$.0019 per performance</b>

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Clearly the process has spun off the rails. Particularly if the CRB decision drives Internet radio off the air, the public clearly doesn't benefit, and the very purpose of copyright law is not being served. The purpose of Congress granting copyright protections is to maximize the availability of creative output to the public. From the copyright owner's side, copyright protections are supposed to encourage bands like Clap Your Hands Say Yeah to keep recording music, and from the copyright user's side, these protections are to encourage the development of new services like Internet simulcasts and "B" channels and LAUNCHcast and AccuRadio and Live365 and Radio Paradise and Pandora. When both sides are doing what they do, the public benefits. Copyright law is not supposed to shut down an entire industry.

There were in my view two moments, historically, that have led to the major flaws in the current state of affairs: First, lobbyists had used a deceptive term – "perfect digital copy" – which in fact is far from "perfect." For streaming to work, webcasters necessarily stream music at much lower than CD quality. The term lobbyists should have used was "exact" copy, but it would have been a hard sell to Congress to claim that the potential availability of "exact" copies of mediocre-quality streams of music was going to seriously jeopardize music sales – particularly to the point where recording artists were going to quit recording. "Perfect digital copies" sounded a lot more threatening.



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Secondly, the change in instructions to the CARP in 1998's DMCA – from the 801(b)(1) public policy-based criteria to the "willing buyer / willing seller" standard – has led to decisions, two out of two times (!), that may be potentially enriching for one of the sides but that clearly aren't in the public interest.

In the words of the great composer and lyricist Johnny Mercer, "Something's gotta give, something's gotta give, something's gotta give!"

Literally, stay tuned.

By Kurt Hanson  
AccuRadio and RAIN

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