Virginia Association of Broadcasters
Legal Review

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** Legal Alert **

New Radio "Performance Tax" Legislation Introduced (Again); What Broadcasters Need to Know

We write today to provide an update on and some context surrounding the introduction yesterday of legislation that seeks to impose a "performance tax" on local radio stations. As you may have heard, a bill called the "Ask Musicians for Music Act" (the "AM-FM Act" or the "Act") was introduced yesterday in both the Senate and the House, by Senator Marsha Blackburn (R.-Tenn.) and Representative Jerrold Nadler (D-N.Y.), respectively. Broadcasters are opposed to the AM-FM Act, which could cause them serious harm; NAB says the Act "could decimate the economics of America's hometown radio stations[.]"

Backed by record companies, the AM-FM Act marks the latest attempt to impose a new statutory fee—or "performance tax"—by requiring local radio broadcasters to pay record companies and recording artists for playing music over the air. As of this writing, the full text of the Act has not been released; we know, however, that the Act would fundamentally alter the state of current copyright law by requiring radio stations to "obtain the express authority of the copyright owner" of a "sound recording" (more on that below) to play the recording over-the-air; that is, radio stations would be required to pay an additional fee to broadcast certain music.

The bill's sponsors claim that, "[u]nder the current patchwork copyright system, radio stations can use sound recordings over their airwaves while creators, who own a stake in sound recordings, receive no payment in return. The AM-FM Act would require all radio services to pay fair market value for the music they use, putting music owners and the creative community on the same level as other American workers."

Those claims are a bit disingenuous, to put it mildly. As radio station owners know all too well, broadcasters already pay substantial copyright fees to songwriters and composers for music

played on the radio. Radio stations pay approximately $350 million in such fees to performance rights organizations (like ASCAP, BMI, SESAC, etc.) each year.

The Two Copyright Interests in Recorded Songs. In order to better understand what the AM-FM Act aims to accomplish, we thought we'd provide a quick refresher on some copyright law basics. Remember that the critical concept to understand regarding music copyright law is that each recorded song involves two distinct copyright interests:

- The first copyright interest protects the underlying musical composition—that is, the specific arrangement and combination of musical notes, chords, rhythm, harmonies, and song lyrics. The law refers to this first type of copyright as a "*musical work*." This interest is also sometimes referred to as the "musical composition" or the "song."

- The second copyright interest protects the actual recording of a musical composition, which copyright law refers to as the "*sound recording*." This interest is also sometimes referred to as the "master" or the "recording."

While an unsigned songwriter who performs and records his or her own original songs owns both the musical work and sound recording copyrights in the song, it is often the case that the two distinct copyright interests are owned by separate individuals or entities. In general, music publishers own or control the musical work copyright, and record companies own or control the sound recording copyright.

The AM-FM Act – A New Performance Tax Proposal. The license fees that radio stations pay to performance rights organizations ultimately get distributed to the copyright owners of the musical work copyright in songs—i.e., the copyright owner of the underlying musical composition. The record companies and the supporters of the AM-FM Act want to impose an additional tax on radio stations; that is, the Act would force broadcasters, by statute, to pay the holders of songs' "sound recording" copyright (usually record companies) for playing songs over-the-air.

Adding that additional tax could financially cripple some radio station owners. And, the idea of imposing such a new fee completely fails to understand the fact that, for more than 80 years, record companies and artists have thrived from the free advertising and promotion they receive when local radio broadcasters play their music. A song's airplay on the radio translates into increased popularity, visibility, and sales of records, tickets, merchandise, and the like for record labels and the performers with whom they work.

The Local Radio Freedom Act. As broadcasters are well aware, the battle against the imposition of a new performance tax is a constant one. Broadcasters fought—successfully—against the inclusion of a performance tax in last year's Music Modernization Act. A critical part of pushing back against the kind of tax sought in the AM-FM Act is securing support for the Local Radio Freedom Act ("LRFA"), a resolution that was re-introduced in Congress earlier this year and which signals lawmakers' opposition to any legislation (like the AM-FM Act) that would impose new performance royalties on broadcast radio stations for music airplay. The LRFA states:

> "Congress should not impose any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over the air, or on any business for the public performance of sound recordings on a local radio station broadcast over the air."

As of this writing, a bipartisan group of 201 U.S. House members and 25 U.S. Senators have signed onto the LRFA. Given that widespread support, it would seem unlikely that the AM-FM Act will gain significant traction.

But that does not mean broadcasters should rest on their laurels. We will continue to try to garner additional co-sponsors of the LRFA and to work to prevent the AM-FM Act from advancing in Congress.

We will be closely watching the bill and will continue to keep you informed of any relevant developments.

Tim Nelson, Editor

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