SANFRAN MUSICTECH SUMMIT

CONTINUING LEGAL EDUCATION PROGRAM
MONDAY, FEBRUARY 25, 2005
HOTEL KABUKI, SAN FRANCISCO, CA

REFERENCE COURSE MATERIALS

"HOT TOPICS IN MUSIC & TECHNOLOGY LAW"
"ISSUES IN MUSIC – TECH LICENSING"

Digital copy of Reference Course Materials available online at:
http://sanfranmusictechsummit/cle.pdf

Program presented in partnership with the
ABA Forum on the Entertainment & Sports Industries

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THE SANFRAN MUSICTECH SUMMIT &

THE ABA FORUM ON THE ENTERTAINMENT AND SPORTS INDUSTRIES

Present

HOT TOPICS IN MUSIC & TECHNOLOGY LAW

9:20 – 10:20 AM

PANELISTS INCLUDE:

Cydney Tune, Esq – Pillsbury, Winthrop, Shaw & Pittman

Ann Chaitovitz, Esq. – Future of Music Coalition

Tony Berman, Esq. – Beat Law

Matt Burrows, Esq. – senior Counsel, Apple iTunes Division

Jonathan Blaufarb, Esq. – Davis, Shaprio, Lewitt & Hayes

LEGAL ISSUES IN MUSIC / TECH LICENSING

10:30 – 11:30 AM

PANELISTS INCLUDE:

Colette Vogel, Esq. - Stanford Center for Internet & Society

Jonathan Blaufarb, Esq. – Davis Shapiro Lewitt & Hayes LLP

Cecily Mak, Esq. – Senior Counsel, Legal & Business Affairs, RealNetworks

Whitney Broussard, Esq. – Selverne, Mandelbaum & Mintz

Brian Fukuji, Esq. - Sr. Mgr., Business Affairs at Sony PlayStation

This is part of a full day conference on the Music / Technology industry

Monday, February 25, 2008

Hotel Kabuki, Japantown

1625 Post Street

San Francisco, CA 94115

Breakfast served & evening cocktail party to follow

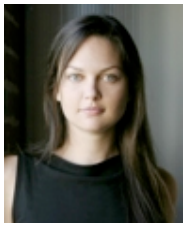
Program Eligible for 2 Hours of CLE Credit

FACULTY NAMES AND CREDENTIALS

Colette Vogele practices intellectual property law specializing in technology, new media, and the arts. She heads Vogele & Associates (www.vogelelaw.com) representing numerous bloggers, podcasters, and businesses building Web 2.0 interactive communities with contract and licensing issues, copyright, privacy, trademark and brand management, litigation, and government regulations.

Vogele speaks and writes regularly on issues related to intellectual property and the internet. She also holds a non-residential fellowship at Stanford's Center for Internet & Society (cyberlaw.stanford.edu). Her published works include the /Podcasting Legal Guide/ (2006) (with Creative Commons and Harvard's Berkman Center for Internet & Society), an audio podcast /Rules for the Revolution: The Podcast/; the article /Podcasting for Corporations and Universities: Look Before You Leap/ (with E. Townsend Gard; Oct. 2006 in the Journal of Internet Law/Aspen Publishers) and contributing authorship for the book /Podcast Academy: The Business Book/ (Focal Press/Elsevier, Inc.). She is an Advisory Board member of the /Journal for Internet Law/, the /California Lawyer/ magazine, and The Conversations Network, and a Board member of INFORUM, a division of the Commonwealth Club.

Jonathan Blaufarb is the Managing Partner of the San Francisco law office of Davis, Shapiro Lewit & Hayes, LLP, a national music law firm with other offices in New York and Beverly Hills. His law practice includes advising recording and performing artists, songwriters, producers, record labels, digital music companies, merchandising companies, film and television talent, and authors. Jon was formerly a partner in the Beverly Hills entertainment law firm of Bloom, Hergott, Diemer & Cook. His background also includes complex business and entertainment litigation with Rogers & Wells and Wyman, Bautzer, as well as music transactions as in-house counsel for Sony Music. Jon's music business experience also includes personal management of recording artists, record retail operations, and performing and recording as a professional musician.



Cecily Mak, Esq. is an intellectual property / digital media / entertainment attorney with senior in-house and top tier law firm (transactional and litigation) experience. She is currently at RealNetworks, Inc. where she advises and supports numerous teams in connection with the company's digital music service, Rhapsody.

Cecily has extensive experience in negotiating and drafting various complex license, strategic partnership, technology, development, co-brand, website operation, live webcast, promotional and live events agreements with distribution and marketing partners, record labels, music publishers, search companies, video game companies, and technology licensors.

She is a published author and frequent public speaker on the subject of digital media, music and related copyright law.

Whitney Broussard, Esq. is an entertainment attorney and digital media consultant based in the Bay Area. In his consulting practice, he advises technology companies with respect to their dealings with entertainment companies and in that regard has advised companies such as RealNetworks, Verizon Wireless, Motorola, Rowe International/AMI Entertainment and Singshot Media.

Prior to moving to the Bay Area, Mr. Broussard was a partner in the New York entertainment law firm of Selverne, Mandelbaum & Mintz, LLP, where he remains of counsel. He has represented numerous music-related entities throughout his 15 year career, including such artists as Ludacris, Fat Joe, The Wu-Tang Clan, N.E.R.D/The Neptunes, The Fugees, Wyclef Jean, Motley Crue, Gov't Mule and Third Eye Blind, and companies that include Capitol Records, Virgin Records, Blue Note Records, 19 Entertainment (American Idol), The National Geographic Society, MTV Networks, Kobalt Music Publishing and Caroline Distribution. Mr. Broussard has spoken at a wide variety of venues, including the New York State Bar Association s Antitrust Division, New York University, Duke University, Georgetown University, Hasting Law School, Loyola University of New Orleans, The University of New Orleans, New York Law School and the Future of Music Policy Summit. Mr. Broussard has been quoted widely in the press regarding digital music and other music industry issues, in publications and programs such as NPR, The New York Times, The New York Post, The San Francisco Chronicle, The Washington Post, USA Today, Billboard, Spin, Wired, the Atlantic Monthly and GQ.

Brian Fukuji is Sr. Mgr., Business Affairs at Sony PlayStation.

Brian is responsible for managing the legal and business affairs for all PlayStation audio and music-related initiatives. His practice areas include licensed audio technology, licensed/composed music and musician/voice-over union talent. His current responsibilities also include overseeing the music publishing administration for Sony PlayStation's U.S. catalog of videogame music. He is a ten-year-plus PlayStation veteran after having spent nearly a decade in the music business with positions at Enigma Records, Hollywood Records and Fender Musical Instrument Corp. Brian received his B.A. in Economics/Business from UCLA and his J.D. with a specialty in High Tech – Intellectual Property Law from Santa Clara University School of Law. He is a frequent speaker at ABA and other entertainment conferences.

Cydney Tune, Esq. is Counsel at Pillsbury Winthrop Shaw Pittman LLP's San Francisco office, and leads the firm's Copyrights practice and Media & Entertainment industry teams. Her practice includes a wide variety of intellectual property issues, including copyrights and trademarks, as well as a broad array of entertainment, licensing and E-Commerce matters. She represents a variety of clients - large and small, domestic and foreign, and in many different industries.

Her professional affiliations include: Executive Committee, Copyright Society of the U.S.A.; Vice Chair, Copyright Committee, State Bar of California; Division Chair, Merchandising and Licensing, The ABA Forum on the Entertainment and Sports Industries; Advisory Board, Berkeley Center for Law and Technology; Editorial Board, *Copyright World;* Editorial Board, *Internet Law & Strategy;* Committee for Broadcasting, Sound Recordings and Performing Artists, American Bar Association Committee on Internet Content, American Bar Association

Former Chapter Chair, Copyright Society of the U.S.A., Northern California Chapter, 2003-2005; International Trademark Association, Intellectual Property Section, State Bar of California, and the Board of Directors, Unbroken Chain Foundation.

Ann Chaitovitz, Esq. has just joined the Future of Music Coalition as its Executive Director after serving on its Advisory Board since its inception. Future of Music Coalition is a national non-profit education, research and advocacy organization that identifies, examines, interprets and translates the challenging issues at the intersection of music, law, technology and policy. FMC works to educate artists on these matters and ensures that their voices are heard in the business and policy debates that directly affect them.

As Executive Director, Ann will provide FMC's strategic vision, work directly with staff to execute campaigns and secure funding for all of the organization's core program work.

Before joining FMC, Ann was an attorney-advisor specializing in domestic and international copyright law at the USPTO. Ann handled bilateral and multilateral copyright and related rights issues in the Indian Subcontinent, Asia Pacific region and Southeast Asia and represented the U.S. in various multilateral fora, such as WIPO's Standing Committee on Copyright and Related Rights. Ann also participated in the development and implementation of U.S. domestic copyright and related intellectual property laws and policy.

Ann had 15 years of copyright experience representing songwriters, publishers and recording artists when she joined the USPTO. She worked as a staff attorney at the American Society of Composers, Authors and Publishers (ASCAP), where she practiced copyright law, and also as the National Director of Sound Recordings at the American Federation of Television and Radio Artists (AFTRA), the labor union representing recording singers, as well as performers and broadcasters in radio and television.
At AFTRA, Ann worked on domestic and international copyright issues. She worked to repeal the amendment to the "work made for hire' definition of the US Copyright Law, to ensure the direct payment of digital performance fees to artists and to change the structure of SoundExchange, so that artists would share control. She also focused on the rights of U.S. performers internationally and negotiated with foreign countries' collecting societies to ensure that U.S. performers receive their share of royalties. Ann served on the Boards of Directors of the Alliance of Artists and Recording Companies (AARC) and SoundExchange, participated in the American Assembly on "Art, Technology, and Intellectual Property" and graduated in 2004's Leadership Music class.

She holds degrees from Amherst College (BA, *cum laude*) and New York University School of Law.

Tony Berman is the founder of Berman Entertainment and Technology Law, a law firm focusing on issues implicated by the convergence of technology and the entertainment industry. His primary practice areas involve negotiation of entertainment contracts and advising clients on legal issues involved in the formation of entertainment-related organizations and protection of copyrights and trademarks. His clients include record companies, online content distribution companies, management companies, film and

television production companies, presenters of live entertainment, music venues, publishers, multimedia companies, multimedia developers, producers, technologists and industry executives as well as writers, performers and artists.

Tony is the editor-in-chief of Multimedia & Entertainment Law Online News (MELON) and a contributing editor to *Entertainment Industry Contracts*, published by Matthew Bender. He was the chair of the Sports and Entertainment Law Section of the Bar Association of San Francisco from 1998 through 1999. Tony is also an adjunct professor at Golden Gate University School of Law where he teaches Negotiating and Drafting Contracts in the Entertainment Business.

Tony received his A.B. from New York University, and his J.D. from New York Law School.

He frequently speaks at entertainment industry conferences including the South By Southwest Music & Media Conference, the Summer Music Conference, the Bandwidth Conference, the Global Entertainment and Media Summit, the Music Law Summit West, the Future of Music Policy Summit, California Lawyers for the Arts Music Business Seminar and the Streaming Media Conference.

Tony has been interviewed by media including CNN, CNET, NBC, KGO Radio, Tech TV, The New York Times, The Wall Street Journal, Business Week, Wired, The Chicago Tribune, The Los Angeles Times and The San Francisco Chronicle.

Previously, he was a partner of the law firm of Idell, Berman & Seitel. Prior to practicing law, Tony was involved in the entertainment industry as a manager, producer, performer and concert presenter. While in college he was a music journalist and radio deejay. In his teens in New York, he held internships at Arista Records and the Good Morning America program on ABC.

Tony is a voting member of the National Academy of Recording Arts and Sciences and the National Association of Recording Industry Professionals. He serves on the AFTRA Advisory Board of Managers and Attorneys.

Matt Burrows, Esq. is Senior Counsel for the iTunes division of Apple Inc. where he is responsible for negotiating and structuring various agreements for music, television and motion picture content distributed on the iTunes Store.

Prior to joining Apple, Mr. Burrows was Of Counsel to Lapidus & Haft, LLP, an entertainment law firm in Santa Monica, California, focusing on the representation of major record labels, artists, and producers. He was also previously Head of Music Business Affairs at the William Morris Agency in Beverly Hills, California where he was responsible for matters concerning The Eagles, Whitney Houston and the Lollapalooza concert tours.

Mr. Burrows is currently a Non-resident Fellow at the Stanford Law School, Center for Internet and Society where he is focusing on fair use issues.

Mr. Burrows received his B.A. in Rhetoric from the University of California, Berkeley in 1987, and his J.D. from Loyola Law School, Los Angeles in 1991.

Copyright: The Performance Rights Act

Part 1: The Proposed Legislation for Sound Performance Royalties for Terrestrial Radio.

In December, 2007, several members of Congress introduced bipartisan, bicameral legislation to their respective floors.

The subject: sound recording performance right for terrestrial radio.

If this aptly named "Performance Rights Act" is passed, it will send major ripples throughout the entertainment industry.

Regardless of its success in the House and Senate, however, the rhetoric from both sides is bringing to boil a controversy that has long been simmering.

BACKGROUND

Let's start with the basics.

Any single track of recorded music consists of 2 copyrights.

There is a copyright in the written words and music (the "musical composition"), which is typically held by the songwriter or their publisher.

There is a copyright in any recording of the composition (the "sound recording"), which is typically held by the performing artist or their label.

These copyrights give their owners the exclusive rights to reproduce, distribute, perform and alter the composition and/or sound recording.

The proposed legislation (and this article) have to do with the "performance" right.

Composition copyright owners (songwriters/publishers) are entitled to receive a royalty for performances on:

* terrestrial (AM/FM) radio

* internet radio

* satellite radio

* cable radio

This royalty is collected on behalf of the songwriters and publishers by “performance rights organizations” (PROs) such as ASCAP, BMI and SESAC.

Sound recording copyright owners (artists/labels) are entitled to receive a royalty for performances on:

* internet radio

* satellite radio

* cable radio

This royalty is collected on behalf of artists and labels by SoundExchange.

Prior to 1995, artists and labels did not have a performance right at all (i.e., they were not entitled to receive royalties from any performance of their works).

In fact, since the advent of commercial broadcasting in the 1950s – record labels and broadcasters enjoyed a symbiotic relationship.

Because there was no performance right in sound recordings, broadcasters were not obligated to pay labels for playing their songs.

Labels were content to receive compensation in the form of radio’s “free advertising” of their artists’ songs, which lead to increased revenue from album sales.

However, this symbiosis was upset when music was made available online via streaming technology.

Traditional AM/FM broadcasters began to transmit their programs and playlists simultaneously over the radio waves and on the internet (“simulcasting”).

Internet-only broadcasters (“webcasters”) created their own stations for both popular and niche music.

Today, a wide variety of web radio formats are available to the public, with some stations mirroring AM/FM programs in their non-interactive and non-subscription formats.

Other stations are extremely interactive, creating borderline “on demand” formats were listeners have a great deal of control over what songs they hear.

Still other stations are subscription based, creating a new revenue stream specifically for digital radio stations.

In part because the RIAA saw "on demand" radio as a threat to album sales and because of the possibility in sharing in subscription revenue, the RIAA embarked on a campaign to lobby Congress for relief – resulting in the Digital Public Performance Right in Sound Recordings Act of 1995.

The DPRSA gave artists and labels a limited right to collect royalties for performances of their recordings.

Part 2: Comparison of the current Copyright Act with the proposed changes of the Performance Rights Act.

Interestingly, some of the most profound changes would arise because of the deletion of 1 word - "digital."

CURRENTLY:

Section 106 of the Copyright Act lists the exclusive rights that belong to a copyright owner.

Summarized, they are the rights to:

1. copy
2. distribute
3. alter
4. display publicly
5. perform publicly

Particularly important here is the language in Section 106(6), which gives copyright holders an exclusive right:

"in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."

PERFORMANCE RIGHTS ACT:

The PRA would omit the word "digital" from Section 106(6).

This means that the public performance copyright for sound recordings would extend to ALL transmissions – not just digital ones.

And this means that sound recording copyright owners (artists and labels) would be entitled to royalties from analog audio transmissions (i.e., AM/FM radio).

CURRENTLY:

Section 114 of the Copyright Act covers the scope of the exclusive rights in sound recordings.

Section 114(d)(1) carves out certain transmissions that are exempt from the sound recording copyright.

The first exemption listed is "nonsubscription broadcast transmissions."

Without reading the legislative history – it is difficult to know why Congress felt the need to include this as an exemption, because nonsubscription broadcast transmissions are essentially AM/FM radio broadcasts – which are already exempt from the sound recording performance right under the Copyright Act.

PERFORMANCE RIGHTS ACT:

The PRA would again cut out the word "digital" and apply the exemptions to all audio transmissions that can meet the (d)(1) requirements.

However, because one of the main purposes of this legislation is to bring AM/FM broadcasts within the scope of the sound recording public performance right – the exemption for "nonsubscription broadcast transmissions" would be stricken.

The PRA would also add as exemptions “eligible nonsubscription transmissions” of (1) services at a place of worship and (2) “incidental” uses of musical sound recordings.

CURRENTLY:

Section 114(j)(6) provides a definition of an "eligible nonsubscription transmission:"

A noninteractive nonsubscription digital audio transmission not exempt under subsection (d)(1) that is made as part of a service that provides audio programming consisting, in whole or in part, of performances of sound recordings, including retransmissions of broadcast transmissions, if the primary purpose of the service is to provide to the public such audio or other entertainment programming, and the primary purpose of the service is not to sell, advertise, or promote particular products or services other than sound recordings, live concerts, or other music-related events.

So what does this mean?

“Eligible” means that these transmissions are eligible to receive a license (at a statutory rate set by the Copyright Royalty Board) to be able to use music in the programming.

“Nonsubscription” means you do not have to sign up to receive the transmission.

“Digital” means transmissions other than AM/FM ones.

Thus, taken together – an “eligible nonsubscription transmission” is a digital broadcast featuring music that you do not have to sign up for to receive and where the broadcasters can get a license at a locked-in rate from the copyright owners of the music that is played.

PERFORMANCE RIGHTS ACT:

Once again – the proposed legislation cuts the word “digital.”

The effect would be that much of AM/FM radio would be included under the umbrella of “eligible nonsubscription transmissions.”

As previously mentioned – in the current Copyright Act, AM/FM radio is exempt from paying performance royalties to labels and artists.

The PRA eliminates this exemption and also requires AM/FM broadcasters featuring music to pay a statutory rate.

CURRENTLY:

Section 114(f) sets the stage for statutory royalty rates, allowing the Copyright Royalty Board (CRB) to establish a set fee paid by digital broadcasters for their performance of sound recordings.

In particular, 114(f)(2) gives the CRB the power to set statutory minimum fees to be paid by digital broadcasters providing "eligible nonsubscription transmissions."

These minimum fees are supposed to represent the fees that would have been negotiated in the marketplace between a "willing buyer and a willing seller."

PERFORMANCE RIGHTS ACT:

The PRA would add some interesting language to 114(f)(2) regarding the statutory rates.

It states that each AM/FM broadcaster with annual gross revenues less than $1.25 million can choose to pay an annual fee of $5,000 in lieu of what it would otherwise owe under the statutory rates.

This establishes a $5,000 minimum for AM/FM broadcasters grossing less than $1.25 million.

The effect of this minimum is that AM/FM broadcasters with over $1.25 million in annual gross revenue would be subject to the statutory royalty rate set by the Copyright Royalty Board and paid by broadcasters to labels/artists (or a performance rights organization like ASCAP or BMI, but for sound recordings – not compositions).

The PRA also states that AM/FM public radio would pay a $1,000 minimum.

AM/FM broadcasters who make only occasional use of music would have the option of paying a "per program" license, instead of paying for each sound recording they use.

In Part 3, this article will explain who the parties are that are in favor and opposed to the Performance Rights Act, and will provide a quick timeline showing the recent history of the bill as it winds its way through Congress.

For Part 3 of this article, and other articles concerning Copyright, Music Law, as well as other current topics in music and law, please visit the MELON blog at:

www.melonews.com

Published by Berman Entertainment and Technology Law

www.beat-law.com

SYNCHRONIZATION LICENSE AGREEMENT
(Videogame)

AGREEMENT dated **[Date]** (the “Agreement”) between **[Licensee Name]** ("Licensee") and **[Licensor Name]** whose Tax Identification Number is **[TIN]** ("Licensor").

WHEREAS, Licensor is in the business of licensing music rights to third parties; and

WHEREAS, Licensee desires to license certain music rights from Licensor and Licensor desires to license those music rights to Licensee, which music rights are described below hereto
upon the terms and conditions hereafter set forth;

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, Licensee and Licensor agree as follows:

1. Definitions.

(a) “Artist” means **[Artist].**

(b) “Composition” means the musical composition **[“Composition”]** and the accompanying music publishing rights, synchronization rights, public performance rights and any and all copyrights.

(c) "Game" means the interactive video game tentatively titled ***“Title”*** for all gaming platforms now known or hereafter devised.

(e) " Term" commences on the date first written above and **continues for (__) years**.

(f) “Territory” means **Worldwide**.

(g) “Credit” means the following:

“Song Title’
Written by…
© YEAR, Publishing Designee

2. Grant of Rights. Licensor hereby grants to Licensee the non-exclusive, irrevocable right during the Term throughout the Territory:

(a) To fix and use the Composition in whole or in part, in synchronization or timed relation with the Game or any part thereof;

(b) To perform and exploit in any manner, medium, form or language, all or a portion of the Composition (as determined by Licensee in each instance), solely in

connection with all in-context promotional uses for the Game (excluding Radio, TV and Theatrical promotional uses) including, but not limited to, trade shows, demo discs, in-game trailers, retail videos, and website use. Notwithstanding the foregoing, Licensor acknowledges that Licensee may promote, advertise, distribute and sell the Game including the Composition within the Territory without using the Composition in any advertisements and marketing materials; and

(c) The right to mention the name of the Composition on the outside of the Game packaging, in advertising and marketing materials related to the Game, including without limitation in press releases and in television and radio advertisements, on Licensee's website and in print advertisements.

3. License Fee. In consideration for the rights granted to Licensee hereunder, Licensee will pay Licensor a one-time, buyout license fee of **$ US [Fee US Dollars]. [ADD MFN Provision: Licensor's fee will be no less favorable to Licensor than the fee Licensee pays to the copyright owner of the master recording containing the Composition.]**

4. Term. This Agreement will continue for the Term set forth in Section 1 above. Upon expiration or termination of this Agreement, Licensee is entitled, for an additional period of six (6) months on a non-exclusive basis, to continue to distribute and sell any remaining inventory of Games containing the Composition.

5. Independent Contractor. Licensor and any other person or entity working for, on behalf of or at the direction of Licensor, is an independent contractor. Licensor is not an employee of Licensee and, except to the extent specifically provided for under the terms of this Agreement, is not entitled to any benefits afforded by Licensee to its employees or employees of its affiliates. Licensor has no authority to bind Licensee to any third party or otherwise to act in any way as the representative of Licensee, unless expressly agreed in a writing signed by Licensee and Licensor.

6. Ownership and Licensor Credit.

(a) Subject to Licensor's ownership interest of the Composition, all ownership, copyrights and other rights in the Game remain with Licensee and title thereof will be in the name of Licensee or its designee. All ownership in the Composition remains vested with Licensor and title thereof will be in the name of Licensor or its designee.

(b) Licensor is entitled to have a Credit, in substantially the same form as set forth in Section 1, placed in the in-game credits of the Game. The size, placement, manner and mode of presentation of the Credit will be in Licensee's sole discretion, and any inadvertent failure by Licensee to provide the Credit will not be a material breach of this Agreement. Licensor has no right to have the Credit appear in any advertising or promotional material related to the Game, including but not limited to an interactive magazine, demonstration disc or on-line or television advertisements.

(c) The provisions of this Section 6 survive any termination of this Agreement.

7. No Obligation to Publish. Licensee has no obligation to use or distribute the Composition in connection with the Game, and Licensor will have no damages in the event the Composition is not used in the Game. Licensee's obligations hereunder will be fully performed by payment to Licensor of the license fee set forth in Section 3 above.

8. Representations and Warranties. Licensor represents and warrants that:

(a) Licensor has and will continue to have all necessary rights and authority to enter into this Agreement and license the rights to the Composition that are being licensed to Licensee herein, and nothing contained in this Agreement will place Licensor in breach of any other contract or obligations.

(b) It has, or will acquire for Licensee, all rights in the Composition necessary for Licensee to utilize the Composition as set forth in Section 2 above. Any payments in connection with acquiring the Section 2 rights will be made out of the license fee paid by Licensee to Licensor.

(c) The Composition is completely original and unique to Licensor or its designees and nothing in the Composition violates or infringes, or will violate or infringe, or conflicts with any intellectual property right of any third party, and the Composition shall be free of any third party claim of infringement.

(d) The Composition does not contain defamatory material and does not violate any person's right of privacy or publicity.

(e) It is solely responsible for and will pay all sums due any and all parties engaged by it in connection with the license of the Composition.

(f) It has not sold, assigned, leased, licensed, allowed any lien to be placed on, or in any other way disposed of, or encumbered the rights granted to Licensee hereunder, and it will not sell, assign, lease, license or in any other way dispose of or encumber any such rights.

(g) If any of the personnel who created the Composition are members of any guild, union or performing rights society, no further payments will be due to such personnel or organization from Licensee by virtue of any guild, union or performing rights contract.

(h) There is no demand, claim, suit, action, arbitration or other proceeding pending or threatened which questions or challenges the ability or right of it to enter into this Agreement or to perform any of its obligations hereunder, nor does there exist any reasonable basis for any such demand, claim, suit, action, arbitration or other proceeding.

(i) The provisions of this Section 8 survive any termination of this Agreement.

9. Indemnification. Licensor indemnifies and holds Licensee, and all others who may perform or otherwise use the Composition or any part or parts thereof, harmless of and

from any and all claims, suits, judgments, legal fees, penalties and expenses or losses arising out of or resulting from any breach or claimed breach of this Agreement on Licensor's part. Licensor will at all times maintain an Errors and Omissions policy having limits of not less than $100,000 per occurrence and $300,000 in the aggregate. Licensor will add Licensee as an additional insured thereon. The provisions of this Section 9 survive any termination of this Agreement.

10. Confidentiality. Licensor must keep in confidence, and will neither use nor disclose to any third party, any information concerning this Agreement, or any other non-public information concerning Licensee or any of its affiliates or any information proprietary to Licensee or any of its affiliates, that may be disclosed to Licensor in connection with the license hereunder. Upon Licensee's request, or the termination of this Agreement, Licensor will promptly return (or at Licensee's request, destroy) all confidential information. Licensor cannot use the name of Licensee or its affiliates in any publicity release, advertising or otherwise without Licensee's prior written approval. The provisions of this Section 10 survive any termination of this Agreement.

11. Assignment. Licensee has the right at anytime to assign this Agreement or any part or parts thereof to any of its successors, assignees, affiliates or licensees at its sole discretion. Upon such assignment, Licensee will be fully relieved of any and all obligations hereunder.

12. Notices. Any notice or other communication under this Agreement will be sufficiently given if given in writing and delivered by hand delivery, or in lieu of personal service, seventy-two (72) hours after delivery to a courier service, to the addresses listed below. Either party may designate a different address by giving notice of change of address in the manner described in this Section 12.

To Licensor: To Licensee:

[Licensor] [Licensee]
[Address] [Address]
[City, State, Zip] [City, State, Zip]
Attention: [Contact] Attention: [Contact]
Facsimile: [Number] Facsimile: [Number]

13. Force Majeure. Neither party will be liable for any loss or damage or will be in breach of
this Agreement to the extent that performance of a party's obligations or attempts to cure any breach under this Agreement are delayed or prevented as a result of any event or circumstances beyond its reasonable control, including without limitation, war, invasion, act of foreign enemy, acts of terrorism, hostilities, civil war or rebellion (whether war be declared or not), strike, lockout or other industrial dispute, or act of God; then for a duration of such contingency, or for a period of thirty (30) days, whichever is shorter, Licensee may suspend the term of this Agreement by written notice to Licensor. If a force majeure lasts more than thirty (30) days, Licensee may terminate this Agreement by written notice to Licensor.

14. Waiver; Modification. No waiver or modification in whole or in part of this Agreement, or any term or condition hereof, will be effective against any party unless in

writing and duly signed by the party sought to be bound. Any waiver of any breach of any provision hereof, or of any right or power by any party on one or more occasions, will not be construed as a waiver of, or a bar to, the exercise of such right or power on any other occasion or as a waiver of any subsequent breach.

15. Severability. Each provision of this Agreement is to be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held by a court of competent jurisdiction to be prohibited by or invalid under applicable law, the provision will be ineffective only to the extent of the prohibition or invalidity, without invalidating the remainder of the provision or the remaining provisions of this Agreement.

16. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all other agreements and understandings, written or oral, between the parties.

17. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which is an "original", and all of which together constitute one and the same instrument.

18. Governing Law. This Agreement is governed by, and will be construed and enforced in accordance with, the laws of the state of California. The parties hereby consent to, and submit to, the jurisdiction of the federal and state courts located in the State of California.

AGREED TO AND ACCEPTED:

LICENSOR LICENSEE

By: By:

Title: Title:

Date: Date:

MASTER USE LICENSE AGREEMENT
(Videogame)

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NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, Licensee and Licensor agree as follows:

1. Definitions.

(a) "Artist" means **[Artist].**

(b) "Composition" means the musical composition **"[Song Title]".**

(c) "Recording" means an on-air quality, finished, stereo, mixed master recording, suitable for broadcast advertising, embodying Artist's performance of the Composition and the synchronization rights, public performance rights, all other sound devices related thereto, and any and all copyrights therein.

(d) "Game" means the interactive video game tentatively titled ***"Title"*** for all gaming platforms now known or hereafter devised.

(e) "Term" commences on the date first written above and **continues for (_) years**.

(f) "Territory" means **Worldwide**.

(g) "Credit" means the following:

"Song Title"
Performed by [Artist]
(p) [Year] [Copyright Holder]

2. Grant of Rights. Licensor hereby grants to Licensee the non-exclusive, irrevocable right during the Term throughout the Territory:

(a) To fix and use the Recording in whole or in part, in synchronization or timed relation with the Game or any part thereof;

(b) To perform and exploit in any manner, medium, form or language, all or a portion of the Recording (as determined by Licensee in each instance), solely in connection with all in-context promotional uses for the Game (excluding Radio, TV and Theatrical promotional uses) including, but not limited to, trade shows, demo discs, in-game trailers, retail videos, and website use. Notwithstanding the foregoing, Licensor acknowledges that Licensee may promote, advertise, distribute and sell the Game including the Recording within the Territory without using the Recording in any advertisements and marketing materials; and

(c) The right to use the Artist's name, approved likeness and approved logo **[ADD: album artwork]** in advertising and marketing materials related to the Game, including without limitation on the outside of the Game packaging, in press releases and in television and radio advertisements, on Licensee's website and in print advertisements.

3. License Fee. In consideration for the rights granted to Licensee hereunder, Licensee will pay Licensor a one-time, buyout license fee of **$ US [Fee US Dollars]. [ADD MFN Provision: Licensor's fee will be no less favorable to Licensor than the fee Licensee pays to the copyright owner of the Composition.]**

4. Term. This Agreement will continue for the Term set forth in Section 1 above. Upon expiration or termination of this Agreement, Licensee is entitled, for an additional period of six (6) months on a non-exclusive basis, to continue to distribute and sell any remaining inventory of Games containing the Recording.

5. Independent Contractor. Licensor and any other person or entity working for, on behalf of or at the direction of Licensor, is an independent contractor. Licensor is not an employee of Licensee and, except to the extent specifically provided for under the terms of this Agreement, is not entitled to any benefits afforded by Licensee to its employees or employees of its affiliates. Licensor has no authority to bind Licensee to any third party or otherwise to act in any way as the representative of Licensee, unless expressly agreed in a writing signed by Licensee and Licensor.

6. Ownership and Licensor Credit.

(a) Subject to Licensor's ownership interest of the Recording, all ownership, copyrights and other rights in the Game remain with Licensee and title thereof will be in the name of Licensee or its designee. All ownership in the Recording remains vested with Licensor and title thereof will be in the name of Licensor or its designee.

(b) Licensor is entitled to have a Credit, in substantially the same form as set forth in Section 1, placed in the in-game credits of the Game. The size, placement, manner and mode of presentation of the Credit will be in Licensee's sole discretion, and any inadvertent failure by Licensee to provide the Credit will not be a material breach of this Agreement. Licensor has no right to have the Credit appear in any advertising or promotional material related to the Game, including but not limited to an interactive magazine, demonstration disc or on-line or television advertisements.

(c) The provisions of this Section 6 survive any termination of this Agreement.

7. No Obligation to Publish. Licensee has no obligation to use or distribute the Recording in connection with the Game, and Licensor will have no damages in the event the Recording is not used in the Game. Licensee's obligations hereunder will be fully performed by payment to Licensor of the license fee set forth in Section 3 above.

8. Representations and Warranties. Licensor represents and warrants that:

(a) Licensor has and will continue to have all necessary rights and authority to enter into this Agreement and license the rights to the Recording that is being licensed to Licensee herein, and nothing contained in this Agreement will place Licensor in breach of any other contract or obligations.

(b) It has, or will acquire for Licensee, all rights in the Recording necessary for Licensee to utilize the Recording as set forth in Section 2 above. Any payments in connection with acquiring the Section 2 rights will be made out of the license fee paid by Licensee to Licensor.

(c) The Recording is completely original and unique to Licensor or its designees and nothing in the Recording violates or infringes, or will violate or infringe, or conflicts with any intellectual property right of any third party, and the Recording will be free of any third party claim of infringement.

(d) The Recording does not contain defamatory material and does not violate any person's right of privacy or publicity.

(e) It will be responsible for paying all production costs related to the Recording and will provide the Recording to Licensee in Compact Disc or other format as reasonably requested by Licensee.

(f) It is solely responsible for and will pay all sums due any and all parties engaged by it in connection with the license of the Recording.

(g) It has not sold, assigned, leased, licensed, allowed any lien to be placed on, or in any other way disposed of, or encumbered the rights granted to Licensee hereunder, and it will not sell, assign, lease, license or in any other way dispose of or encumber any such rights.

(h) If any of the personnel who created the Recording are members of any guild, union or performing rights society, no further payments will be due to such personnel or organization from Licensee by virtue of any guild, union or performing rights contract.

(i) There is no demand, claim, suit, action, arbitration or other proceeding pending or threatened which questions or challenges the ability or right of it to enter into this Agreement or to perform any of its obligations hereunder, nor does there exist any reasonable basis for any such demand, claim, suit, action, arbitration or other proceeding.

(j) The provisions of this Section 8 survive any termination of this Agreement.

9. Indemnification. Licensor indemnifies and holds Licensee, and all others who may perform or otherwise use the Recording or any part or parts thereof, harmless of and from any and all claims, suits, judgments, legal fees, penalties and expenses or losses arising out of or resulting from any breach or claimed breach of this Agreement on Licensor's part. Licensor will at all times maintain an Errors and Omissions policy having

limits of not less than $100,000 per occurrence and $300,000 in the aggregate. Licensor will add Licensee as an additional insured thereon. The provisions of this Section 9 survive any termination of this Agreement.

10. Confidentiality. Licensor must keep in confidence, and will neither use nor disclose to
any third party, any information concerning this Agreement, or any other non-public information concerning Licensee or any of its affiliates or any information proprietary to Licensee or any of its affiliates, that may be disclosed to Licensor in connection with the license hereunder. Upon Licensee's request, or the termination of this Agreement, Licensor will promptly return (or at Licensee's request, destroy) all confidential information. Licensor cannot use the name of Licensee or its affiliates in any publicity release, advertising or otherwise without Licensee's prior written approval. The provisions of this Section 10 survive any termination of this Agreement.

11. Assignment. Licensee has the right at anytime to assign this Agreement or any part or
parts thereof to any of its successors, assignees, affiliates or licensees at its sole discretion. Upon such assignment, Licensee will be fully relieved of any and all obligations hereunder.

12. Notices. Any notice or other communication under this Agreement will be sufficiently
given if given in writing and delivered by hand delivery, or in lieu of personal service, seventy-two (72) hours after delivery to a courier service, to the addresses listed below. Either party may designate a different address by giving notice of change of address in the manner described in this Section 12.

To Licensor: To Licensee:

[Licensor] [Licensee]
[Address] [Address]
[City, State, Zip] [City, State, Zip]
Attention: [Contact] Attention: [Contact]
Facsimile: [Number] Facsimile: [Number]

13. Force Majeure. Neither party will be liable for any loss or damage or will be in breach of this Agreement to the extent that performance of a party's obligations or attempts to cure any breach under this Agreement are delayed or prevented as a result of any event or circumstances beyond its reasonable control, including without limitation, war, invasion, act of foreign enemy, acts of terrorism, hostilities, civil war or rebellion

(whether war be
declared or not), strike, lockout or other industrial dispute, or act of God; then for a duration of such contingency, or for a period of thirty (30) days, whichever is shorter, Licensee may suspend the term of this Agreement by written notice to Licensor. If a force majeure lasts more than thirty (30) days, Licensee may terminate this Agreement by written notice to Licensor.

14. Waiver; Modification. No waiver or modification in whole or in part of this Agreement, or any term or condition hereof, will be effective against any party unless in writing and duly signed by the party sought to be bound. Any waiver of any breach of any provision hereof, or of any right or power by any party on one or more occasions, will not be construed as a waiver of, or a bar to, the exercise of such right or power on any other occasion or as a waiver of any subsequent breach.

15. Severability. Each provision of this Agreement is to be interpreted in such manner as to be effective and valid under applicable law, but if any provision of this Agreement is held by a court of competent jurisdiction to be prohibited by or invalid under applicable law, the provision will be ineffective only to the extent of the prohibition or invalidity, without invalidating the remainder of the provision or the remaining provisions of this Agreement.

16. Entire Agreement. This Agreement sets forth the entire agreement between the parties hereto with respect to the subject matter hereof, and supersedes all other agreements and understandings, written or oral, between the parties.

17. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which is an “original”, and all of which together constitute one and the same instrument.

18. Governing Law. This Agreement is governed by, and will be construed and enforced in accordance with, the laws of the state of California. The parties hereby consent to, and submit to, the jurisdiction of the federal and state courts located in the State of California.

AGREED TO AND ACCEPTED:

LICENSOR LICENSEE

By: By:

Title: Title:

Date: Date:

Future of Music Coalition on

Full Power FM Radio – The Opportunity of a Generation

We have before us a once-in-a-generation opportunity, one that could directly increase how much chamber music, jazz, vocal, world, and community arts we hear on the radio.

This fall, the Federal Communications Commission (FCC) will give away hundreds of *full power non-commercial educational (NCE) licenses* for any qualified nonprofits. The FCC has just announced that applications will be accepted for these valuable licenses by the FCC between October 12 and October 19, 2007. For ten years, no new licenses have been given out. If you have ever dreamed of starting your own radio station, this is likely to be your last chance before all remaining FM spectrum is given away.

How much time will I need to prepare an application? The window to apply will only last seven days, and will be between October 12 and 19, 2007. Only complete and error-free applications will be considered, and putting an application together will require the help of an engineer and maybe also a lawyer familiar with the FCC process, and generally takes about two months. Engineers and lawyers are expected to get busier and busier as the October window approaches. We recommend getting started no later than July.

What kind of licenses are available? The only eligible channels distributed in this window are between 88.1 Mhz and 91.9 Mhz on the FM dial – this is a part of the FM band reserved for public radio stations. Licenses can range from 100 watts – 100,000 watts, depending on the region where the station is located. Examples of stations currently broadcasting with such noncommercial radio licenses include – independent jazz and world music station WPFW, serving Washington DC; full time classic jazz station KKJZ-FM in Long Beach, CA; Georgia Public Broadcasting, WACG in Augusta; and Pittsburgh classical station WQED.

What groups are eligible for full power FM radio licenses? Any group with *nonprofit status* is eligible to apply, and 501c3 status is not required. Over the years, all manner of community-based nonprofits, large and small, have applied for and been awarded these licenses. (Even labor organizations such as the AFL-CIO and SER – Jobs for Progress National, Inc. have endorsed or applied for community radio licenses.) Stations serving niche music interests, orchestras and classical music institutions, bluegrass and jazz supporters that have lost much of their radio coverage, can also apply. Any group, or consortia of organizations, with a message to communicate, or a desire to expand their organization locally can benefit from this rare opportunity.

What does this opportunity cost? The FCC gives out these licenses to nonprofit organizations in the United States for free, and there is no application fee. But there are costs associated with preparing the applications.

• First step: Finding a Frequency. The most important part of the application is having an available spot – *frequency* – on the FM dial where a new station can go. To determine this, you will have to do a *basic frequency search*. If there is a good frequency for your organization, then the next step is to figure out the more detailed costs for getting an

Interested in these issues? Subscribe to the FMC monthly newsletter.
www.futureofmusic.org/subscribe.cfm

application ready, hiring an engineer, and maybe an attorney. This might cost between $3,000-10,000 for technical and legal support, depending on your local conditions. Note that it is unlikely that there will be any frequency available if you live in or are within 20 miles of the 50 largest cities in the US.

• Demonstrating Access to Capital. At some point in the process, the FCC will also ask you to demonstrate that you have access to the cash to *construct* and *operate* the station without income for the first six months. Depending on the coverage you plan to provide along with other factors, you may need to demonstrate access to funds or collateral property worth anywhere between $25,000-$200,000 for the purposes of the application. Actual annual operating costs once the station is up and running will vary, depending on if you have a paid staff or use volunteers, but it could range from $25,000-$1 million per year.

• Associated Legal Fees. There is going to be a lot of competition for these frequencies, from public radio stations, schools, churches, and other community groups. So if another group applies for the same frequency you want, you might also incur legal fees to devise the best strategy to win your license. These costs have to be determined on a case-by-case basis.

When can I apply? You will be able to submit your completed, error free application between October 12 and October 19, 2007.

How long will it take? When will my organization be able to build its own radio station? Because the FCC will be flooded with applications, the processing time is likely to be at least a year. That will give you plenty of time to do fundraising and build local support for your project. After processing, the FCC issues a *construction permit*, which allows you to build the station, which might take 1-2 years. When everything is plugged in and working, you will then get your actual *license to broadcast*.

Where can I learn more? You can get more information on how to apply for a new license, on how to construct a new radio station, and on organizing, operating and supporting a community radio station from the following resources:

www.getradio.org - enter your zip code to see if spectrum might be available in your area.

Full Power Step by Step at http://www.futureofmusic.org/images/FullPowerstepbystep.pdf outlines the process of starting your own radio station, from the application process, to building and programming a radio station. It also highlights specific board actions that need to take place this summer if you plan to apply for a radio station.

Visit our del.icio.us page at http://del.icio.us/fullpower/ where you can find advice about applying for a station, explanations of the FCC's process for deciding who gets licenses, and the FCC forms you'll need to apply. We'll be updating the page through the fall with the latest news and more useful tips as we find them.

Other resources:

Interested in these issues? Subscribe to the FMC monthly newsletter.

www.futureofmusic.org/subscribe.cfm

Public Radio Capital (http://www.pubcap.org/) -- is a consultancy that helps groups find financing for new frequencies.

National Federation of Community Broadcasters (http://www.nfcb.org) – provides services and advice to community radio stations, production groups and others.

Prometheus Radio Project (http://prometheusradio.org) – has been helping build low-power radio stations all around the country.

Or, contact Mike Janssen, FMC's Full Power Project Manager at fullpower@futureomusic.org

Future of Music Coalition

FACT SHEET: Public Performance Right for Sound Recordings

January 2008

In the United States, royalties for public performances are paid to songwriters, composers and publishers. But what about the person who performs the song?

Contents:

Consider this. When you hear John Coltrane's recording of 'My Favorite Things' on the radio in the US, the estates of Richard Rodgers and Oscar Hammerstein – the composers of 'My Favorite Things' – are compensated through ASCAP. But the estate of John Coltrane receives nothing for this performance.

However, if you hear the same performance on XM or Sirius, or via a webcast, or on a cable music station – even on that terrestrial radio station's webcast – both Rodgers and Hammerstein's estates AND John Coltrane's estate are compensated.

Why the difference? US terrestrial broadcasters are exempt from paying a public performance right for sound recordings.

Royalties for Songwriters and Composers in US

Royalties are generated when a copyrighted song is performed publicly — whether on a radio station, at a sports event, or on a jukebox. In the US, these royalties are collected by ASCAP, BMI and SESAC and distributed to the member songwriters and publishers. As an indication of the significance of this revenue stream, ASCAP reported distributing over $680 million to its members in 2006..

No Royalties to Performers for Terrestrial Radio Play

Although royalties are distributed to songwriters and publishers for public performances for terrestrial radio play, this right does not extend to the performers or the sound

recording copyright owner (usually the record label). So, when you hear Patsy Cline singing "Crazy" on the radio, songwriter Willie Nelson and his publisher are compensated through BMI, but the estate of Patsy Cline receives no pay for the performance. Neither do the studio musicians, backing vocalists, or the record label.

This arrangement is the result of a long-standing argument made by terrestrial broadcasters that performers and labels benefit from the free promotion received through radio play. Broadcasters contend that airplay increases album sales, which leads to compensation for performers and record labels. As a result, broadcasters have, for decades, convinced Congress that they should be exempt from paying the public performance royalty for sound recordings. But the broadcasters' argument is steadily losing relevance, and their exempt status becomes more questionable when compared to other countries' broad requirements for performance royalties.

Exemption in US Leaves Artists' Money on the Table

The US is one of the few industrialized countries – if not the only one – that does not have a terrestrial broadcast performance right for sound recordings. At least 75 nations, including most European Union member states, do have a performance right. This means that foreign broadcasters flow royalties to songwriters/composers and performers. But since there is no reciprocal right in the US, foreign performance rights societies cannot distribute these royalties to American performers. This leaves tens of millions of dollars of royalties on the table annually rather than in the pockets of American artists.

Digital Performances Mean Broader Compensation

Terrestrial radio's unfair exemption is even more obvious when viewed alongside new media platforms. Broadcasters of digital performances – webcasters, satellite radio, cable subscriber channels – obtain licenses from ASCAP, BMI and SESAC which compensate the songwriters and publishers of the music they play. But because of the Digital Performance in Sound Recording Act of 1995 (DPRA), they also pay royalties to the performers. SoundExchange – the performance rights organization established by the DPRA – distributes the royalty payments directly to performers (45%) and to the sound recording copyright owner, which is usually the record label (50%). Non-featured performers receive 5% of the royalties, via a royalty pool managed by AFM and AFTRA. This means that terrestrial radio is the only medium that broadcasts music but does not compensate artists or labels for the performance.

Time for Harmonization

There are two clear reasons why it's important for artists and advocates to support the expansion of the public performance royalty. First, as the consumption of music moves further away from the purchase of CDs and towards "listens" via digital streaming, satellite radio and webcasting, the likelihood of performers being compensated based on traditional/retail sales continues to decline, while revenue from performances continues

to increase. Second, the US exemption penalizes US stakeholders in the international arena and results in losses of as much as 100 million dollars annually for US musicians and labels. This also hurts the US economy and limits our ability to exploit one of our few industries that has a positive balance of trade. As the music marketplace goes global, the need for a broad-based performance royalty is more important than ever.

Legislative Action in 110th Congress

Recording artist groups including FMC, AFTRA, AFM, Recording Artists' Coalition and the Recording Academy have continuously advocated for the public performance royalty for sound recordings. In 2007, the campaign ramped up considerably with the creation of the MusicFIRST Coalition, as well as repeated congressional attention on digital music services, webcasting rates, radio, media ownership and copyright. In December 2007, Rep. Berman and Sen. Leahy introduced HR 4789/S 2500, the Performance Rights Act, which would remove the performance royalty exemption for terrestrial broadcasters.

FMC urges Congress to update the Copyright Act to extend the public performance right for sound recordings to terrestrial and HD radio. Unless Congress acts, incumbent broadcasters will continue to exploit their exempt status that sets them apart from other media providers.

Educate yourself about the issue. FMC and other organizations have written a number of pieces about the need for a broad performance right, including:

Joint reply comments at FCC on Digital Audio Broadcasting (August 2004)
http://www.futureofmusic.org/news/PRDABreplycomments.cfm

FMC letter to Senate Commerce Committee on Public Performance Right (October 2005)
http://www.futureofmusic.org/news/PPRSRletter.cfm
Internet Streaming of Radio Broadcasts (July 2004)
http://www.copyright.gov/docs/carson071504.pdf
This is an excellent overview of the US Copyright Office's longstanding support for the full performance right
FMC's blog tags on the public performance right
http://futureofmusiccoalition.blogspot.com/search/label/performance_royalties
MusicFIRST Coalition
http://www.musicfirstcoalition.com/

Call your representatives and urge them to support the Performance Rights Act.

Future of Music Coalition

FACT SHEET: HD Radio

January 2008

HD Radio is a technology that claims to deliver interference-free, near CD-quality sound to radio listeners. But will it mean better radio?

Contents:

How HD Radio Works

Terrestrial radio is currently undergoing a major transformation. Using a technology called In Band, On-Channel (or IBOC), thousands of broadcasters are transmitting analog signals simultaneously with higher quality digital signals on their existing spectrum. In other words, stations are using their allotted spectrum to broadcast both an analog and digital signal at the same time.

Unlike analog broadcasts, which bleed over onto adjacent frequencies, digital signals are interference-free; it's almost like the signal is running on a train track. Since there's no need to compensate for the fade off of the station's main channel, the spectrum can be used much more efficiently. As a result, the station's adjacent or "side channels" can be used for new purposes, including entirely different programming, transmitting stock prices or traffic information, or even delivering software updates to your car.

For broadcasters, the transition to HD radio could mean the development of new revenue streams, either through the creation of entire new stations on these side channels, or through the leasing of their digital spectrum for data services. For musicians and listeners, HD radio holds the promise of a wider choice of programming.

HD Radio and Artists

Most artists' groups express broad support for the opportunities that digital radio presents to citizens and musicians. If implemented wisely, HD radio has the potential to reinvigorate radio through the creation of anywhere from three to five times the number of audio streams in a local market than are currently possible with analog technologies. Clearly, a more efficient use of the public spectrum means more opportunities for local

programming, "niche" stations that focus on specific genres like bluegrass, jazz, classical or world, and more voices on the air.

The emergence of this technology also raises a number of questions for musicians. The first is whether the government will recognize that these digital services are more analogous to satellite services like XM/Sirius and webcast stations than they are to traditional radio. If so, HD radio broadcasters should be required to pay both the songwriting royalty and the performance royalty that is currently required for digital performances but not for terrestrial radio broadcasts (*see also FMC's Public Performance Right for Sound Recordings Fact Sheet*).

The second set of questions focuses on how the FCC will define and enforce public interest standards on HD broadcasters. In this transition from analog to digital, incumbent broadcasters stand to triple their license's usable spectrum. Indications show that the FCC intends to just hand this additional spectrum over to the incumbent broadcasters without thinking seriously about the long-term implications of this transition, how it relates to media ownership in local markets, royalty parity and its bearing on the Commission's public interest obligations. FMC and many public interest groups have been urging the FCC to adopt specific public interest obligations for HD radio.

HD Radio's Rollout in the US

HD radio is already widely deployed in Europe and some parts of Asia, but is just beginning to roll out in the United States. In 2004, the FCC opened a proceeding to collect feedback from stakeholders and citizens to determine the regulatory structure that will accompany the transition from analog to digital radio, but has not issued any rules yet.

This has not, however, stopped stations from launching their HD channels. By the end of 2007 there were over 1,500 stations – AM and FM, commercial and noncommercial – multicasting more than 2,500 channels, with many NPR stations leading the way in the transition. In December 2006, the HD Radio Alliance, which includes eight of the nation's largest commercial radio groups, announced a $250 million ad campaign to promote HD radio among consumers. Despite the number of new stations, consumer interest in HD radio remains tepid, likely because of competition with internet and satellite radio offerings, the cost of buying new HD radio receivers, lack of adoption of HD radio in automobiles, and a general lack of interest, especially among commercial broadcasters, in using their HD channels to program anything fresh, local, or diverse.

Broadcast Flag? Performance Right?

While HD radio could energize terrestrial radio through the addition of new music and fresh programming, some artist and industry groups are concerned that HD radio has the potential to disrupt or diminish existing revenue streams on which musicians depend. There are already HD radio receivers on the market in Europe and Asia that let radio listeners rewind, buffer, record and store radio broadcasts and songs. This has led some in

the music industry to warn that HD radio listeners could use hardware and software to scan their local radio airwaves and "cherrypick" the best songs for recording and downloading. Industry groups contend this would diminish CD sales and even displace the emerging internet technologies offering legal downloads. The RIAA has urged the FCC and Congress to impose a mandatory "broadcast flag" — a bit of code embedded in songs and "read" by HD radio receivers — on HD radio content. Songs that were "flagged" would not be downloadable to a hard drive.

FMC recognizes concerns over protecting copyrighted works in a digital age, but we do not believe that establishing a legal requirement for broadcast flag-type technology is the best answer for either consumers or creators. Instead we urge Congress to update the Copyright Act to extend the public performance right for sound recordings to terrestrial and HD radio. By choosing "licenses over locks" Congress will ensure that consumers have the ability to use digital technologies in ways that expand their access to music. Most importantly, when united with the existing performance rights, a broad performance right in sound recordings will ensure that songwriters, composers, performers and record labels are compensated for the public performance on terrestrial radio or on the expanded HD radio of the future.

What Musicians Can Do

Educate yourself about the issue. FMC and other organizations have written a number of pieces about the challenges and opportunities that HD radio presents, including:

Joint reply comments at FCC on Digital Audio Broadcasting (August 2004)

FMC letter to Senate Commerce Committee on Public Performance Right (October 2005)

Future of Music Coalition

FACT SHEET: Network Neutrality

January 2008

Net Neutrality is the principle that preserves a free and open Internet. Certain telecommunications companies would like to charge content providers higher fees for the faster loading of their sites, which would create a "tiered" Internet. Why is net neutrality so important to musicians and their supporters?

Musicians, particularly those of the independent or niche variety, have benefited tremendously from the Internet. In years past, it was much harder for the average musician to reach potential fans without the financial investment and resources of a major label. Likewise, the selling of records was cumbersome and often inefficient, as independent artists depended on the conditions and whims of retailers and distribution companies.

The Internet is an invaluable tool with which to book tours, alert fans to shows and distribute recorded work – which increasingly takes the form of digital audio files that require no shelf space. Artists can post songs on MySpace and receive direct feedback on their work, while growing their fan base. A band can create a homemade video, post it on YouTube and see it become an international sensation, as was recently the case with OK Go. And, once in a while, a group like Clap Your Hands Say Yeah! can sell 200,000 copies of its debut CD all by themselves. Musicians can also gain exposure (and income) through subscription music services, direct licensing opportunities, webcasting, online download stores, the growing world of music blogs for every genre, and social networking sites. Net neutrality ensures continued innovation as technology companies develop new ways for consumers to discover and experience music. This, in turn, gives musicians a shot at success on their own terms, while helping to build a legitimate digital economy.

A system threatened

The current structure of the Internet is one in which the biggest record labels and the smallest bedroom recording artist exist on an equal technological playing field; in other words, Jonathan Coulton's website is just as accessible as Beyonce's, or the Philadelphia Orchestra's. But some telecommunications companies would like to charge content providers a fee for the faster loading of their sites. This would create an Internet where those companies that couldn't afford to — or didn't want to — pay this toll would be relegated the slow lane. Smaller musicians could lose an ever-important connection to their fans, while listeners might find their access to the web's varied, exciting and legal musical offerings severely compromised. Here are some recent situations where net neutrality was threatened:

Censored content

In August 2007, Pearl Jam performed an extended section of its song "Daughter" during a live Lollapalooza webcast; AT&T censored a lyric in which singer Eddie Vedder referenced George W. Bush. This illustrates what can happen if a single telecom company is given the exclusive right to broadcast content on their network. Net neutrality is essential in protecting musicians' right to free speech.

Blocked text messaging on wireless networks

In September 2007, Verizon Wireless denied NARAL Pro-Choice America a request for a text messaging "short code," which members could use to receive instant updates via their mobile phone. The company explained the restriction by stating that their messaging service was closed to organizations and groups whose content or agenda could be deemed "controversial or unsavory to any of our users." This raised issues of net neutrality and free speech, and Verizon later apologized. But their actions demonstrated how much power over Big Telecom has over day-to-day communication between groups and individuals. Or even musicians and fans.

"Shaped" Internet traffic

In October 2007, an Associated Press report documented Comcast's interference with subscribers' service. AP observed a marked decrease in download and upload speeds when sharing legal content over a peer to peer network, confirming evidence of data discrimination. This runs counter to net neutrality principles, which treats all Internet traffic equally. It also has serious implications on musicians' ability to digitally collaborate or legally share their own work.

Redirected URL typos to its own search site:

Recently, it was reported by users that Verizon's FiOS high-speed Internet service rerouted mistyped web addresses to the ISP's own search page, which of course, featured sponsored ads. Conceivably, this could open the door to further misdirection – imagine looking for an artist's webpage and being redirected to an ISP's music store. This may seem innocuous on the surface, but it could have a major effect on how musicians conduct business on the web.

A world without net neutrality

Currently, musicians and fans have unhindered access to web-based systems of content delivery and communication. However, the telecommunications conglomerates have been putting a great deal of pressure on Congress to pass legislation that would allow them to enact what would amount to a toll for companies to use their "tubes."

While it's difficult to predict exactly what a non-neutral Internet would look like, there are hints provided by the consolidation of radio, which had a negative effect not only on

independent rock airplay, but also on classical, jazz, bluegrass, gospel, blues and world music. The concentrated control of crucial pipelines typically results in a loss of access and options for both the consumer and creator; we can't let this happen to the Internet. Another concern is payola. Given what's at stake, it's entirely conceivable that a pay-for-play (or pay-for-access) scenario could emerge between Internet service providers and well-financed music business entities. Those artists not affiliated with the Big Players could be completely frozen out, or worse, they could become indirect participants in unethical and damaging promotional practices.

What musicians can do

FMC's Rock the Net campaign has been successful in raising awareness about net neutrality in the musician community. With more than 800 bands signed up and RTN concerts and events taking place across the country, artists have the opportunity to show their solidarity on this issue. Through consistent outreach to musicians and the media, FMC is demonstrating to Congress and the FCC the music community's broad support for the principle of net neutrality. FMC's MySpace page has worked as a portal to the further information available on the official Rock the Net website. A steady stream of concerned artists have joined such founding acts as R.E.M., Pearl Jam, Ted Leo, Kronos Quartet, Death Cab for Cutie, Calexico and more in urging policymakers to support net neutrality. We believe this support is essential in illustrating the importance of open Internet structures to America's musicians and their supporters.

RESOURCES

FMC's Rock the Net campaign
http://www.futureofmusic.org/rockthenet

FMC article: Untangling Net Neutrality: One Music Advocate's Perspective
http://www.futureofmusic.org/articles/NNWomex.cfm

FMC blog posts on net neutrality
http://futureofmusiccoalition.blogspot.com/search/label/net%20neutrality

Save the Internet
http://www.savetheinternet.com/

Free Press' website includes a lot more information about net neutrality

Future of Music Coalition

FACT SHEET: SoundExchange

January 2008

SoundExchange collects and distributes the digital public performance royalty, which means performers and labels get paid for digital plays of their music.

In 1995, Congress passed Digital Performance Right in Sound Recordings Act, which granted a performance right for the digital transmission of sound recordings. Previously, US copyright law contained no provisions for performance right in sound recordings. SoundExchange is the designated non-profit organization that collects the license fees and distributes royalties to those whose recordings were played digitally. Payees include the performer, non-featured artists and the sound recording copyright owner (most often, a label).

Contents:

How SoundExchange works

SoundExchange collects and distributes royalties from statutory licenses, including:

- Digital cable and satellite television services (Music Choice and Muzak)
- Noninteractive "webcasters". This includes webcasting stations that are just available on the internet – for example, soma.fm or Pandora – as well as the webcast transmissions of FCC-licensed radio stations – for example, the webcast of Seattle station KEXP.
- Satellite radio services (XM and SIRIUS)

These royalties are then distributed directly to the sound recording copyright owner (usually the record label) and the performer. The featured performer gets 45 percent, and the SCRO receives 50 percent. The non-featured performers receive the remaining 5 percent, which is distributed via a royalty pool managed by AFM and AFTRA.

Two important notes that are good for musicians: SoundExchange payments to record labels and artists are made simultaneously but separately. This means that artists' royalties can't be diverted by its label and charged against any existing debt. Also, SoundExchange royalties are administered on a per-performance or pay-per-play basis, rather than the "sampling" method employed by other organizations.

Does SoundExchange cover downloads?

No. SoundExchange only covers performance rights. Download royalties are covered by the reproduction right in a sound recording which means the royalties are based on sales and passed from the download stores to the record label, which then distributes sales royalties to the artist as per the label contract.

How often are royalties disbursed to artists and copyright owners?

SoundExchange does disbursements twice a year — once in summer and once in the winter.

How is SoundExchange different from other royalty collection agencies?

It works under the same model as ASCAP, BMI and SEASAC, but it represents a license on a different work. There are two copyrights contained in each recording – one for the musical composition and one for that particular sound recording of the composition. ASCAP, BMI and SESAC collect performance revenue for the owners of the copyrighted musical work (the song), i.e. music publishers, songwriters and composers. SoundExchange collects performance revenue for the sound recording copyright owner (usually the record label) and for the performers. They don't compete against each other – in fact, their work is complimentary.

For example, when Patsy Cline's version of the Willie Nelson song "Crazy" is heard on terrestrial radio, songwriter Willie Nelson receives a royalty from BMI, but Patsy gets nothing. However, when "Crazy" is played on satellite radio or webcast, Willie gets his royalty from BMI, but the estate of Patsy Cline also gets a payment from SoundExchange, as does the owner of that particular sound recording.

Why is it important for bands and artists to sign up with SoundExchange in addition to other performance rights organizations?

The internet has made it possible for independent artists to be heard by more listeners than ever before. This also means greater opportunities to be paid for their work, provided that they're included in SoundExchange's database of performers. It's an even

better proposition for artists that have retained ownership of their own copyrights. In those cases, individual musicians are paid as both the featured performer and the SRCO. Additionally, labels should make sure to sign up in order to receive royalties on the digital play of sound recordings they own.

How can a band or artist find out if they're owed money for digital plays of their music?

The SoundExchange website features a performance-tracking system called PLAYS (Performance Log Archive of Your Songs), which allows artists and labels to search the SoundExchange database to see whether or not they have earned any performance royalties. Searchable criteria include artist name, song and album title, and record label. If you are the featured performer or sound copyright owner of a piece of music, then SoundExchange may be holding a digital performance royalty for you. To receive payment, all you have to do is register with SoundExchange and download a few forms.

Does SoundExchange charge anything for this service?

SoundExchange is free to join. Like other royalty collection agencies, there is a small administrative fee taken out of the overall royalty pot, but bands or labels do not see a charge on their statements.

How is SoundExchange governed?

SoundExchange is overseen by a Board of Directors, which approves distribution methodology and administrative expenses. The board is split equally between artists and labels, with representatives from major and independent labels, as well as A2IM, the RIAA, and artist representatives from such organizations as AFTRA, AFM, the Recording Academy, the US Music Manager's Forum and the Future of Music Coalition.

Payment for foreign airplay

SoundExchange has also started working with foreign PROs to collect performance right royalties for those US artists who receive airplay in other countries. (Currently, 75 other nations have a performance right for terrestrial broadcasts; the US does not. Please see FMC's fact sheet on the *public performance right for sound recordings* for more info) SoundExchange offers this service to members who authorize SoundExchange to collect these foreign payments on their behalf.

Do you have to be a SoundExchange member to receive royalty payments?

No. SoundExchange will distribute digital performance royalties to any artist, band or SCRO for whom they have good payee information, i.e., a name and address. To date, SoundExchange has processed more than 200 million performances. Not all of the artists

have been paid, however, due to the lack of appropriate info. The best way to ensure payment is to sign up; membership is free.

What musicians can do

Visit SoundExchange's website to learn more about the organization. Check the PLAYS database on their site to see if you or your label has accrued any royalties. Download the forms and become a member to ensure payment of existing or future digital performance royalties.

SoundExchange
http://www.soundexchange.com/

FMC primer on SoundExchange
http://www.futureofmusic.org/articles/soundexchange.cfm

FMC blog posts on SoundExchange
http://futureofmusiccoalition.blogspot.com/search/label/SoundExchange

Future of Music Coalition

FACT SHEET: Touring Internationally

January 2008

Security clampdowns since 2001 have made traveling by air or across international borders with instruments much more difficult, complicated, and frustrating. The following are some guidelines and suggestions to get you and your instrument where you need to go.

Contents:

For American artists touring internationally

Canada is often the first international stop for American musicians. In order to work in Canada, you must obtain a Temporary Employment Authorization (IMM-1102) by applying through the American Federation of Musicians' Canadian office. The administrative fee is $150CAD for a single musician or $450 for a band of 2 to 14 players. Technical personnel also need apply for an IMM-1102. The IMM-1102 allows for multiple entries into Canada over the course of a single tour; check with the AFM Canadian office for more details.

Currently, you only need a government-issued photo ID (such as a driver's license) and a document such as a birth certificate to enter Canada by car or boat (though you do need a passport to travel by air). However, as of June 1, 2009, anyone coming into the US by either air, land or sea—including US citizens returning from Canada or any other nation—must carry a passport anyway.

Detailing visa and other requirements to work in other nations is beyond the scope of this fact sheet. Ask the venues/presenters you're working with for their experiences in working with other American artists; another suggestion is to call the embassy or consulate of the nation to which you are planning to travel. You can also check the individual country fact sheets at the US State Department's website for general information about each nation.

For foreign artists traveling to the US

The process of securing a visa to travel to the US for the purpose of touring and performing has become more daunting, arduous and expensive than ever. In addition, immigration policy and procedures continue to change frequently.

Most foreign musicians travel to the US on either O or P category visas. Nearly all visa applicants (including artists) must attend in-person consular interviews and return to that consular post to pick up the visas themselves. The process must be undertaken regardless of how many times an artist has previously visited the US, the cost of such trips, or how remote a US consular post might be from their home city or even home nation. As of late 2004, all applicants for US visas must also undergo biometric finger scanning.

The basic visa fee for a nonimmigrant worker is currently $320 (until mid-2007, it was $190). The US Customs and Immigration Service (USCIS) charges a $1000 "premium processing fee" to rush this process and deliver a response within 15 days; however, those well-versed in this area strongly urge petitioners to still work as far ahead as possible, as a "response" is not at all the same as an approval. In recent years, there have been well-publicized cases in which artists have adhered to the USCIS' rigorous procedures and deadlines and still missed their US tours because their visa applications were not approved before their tour dates. As of mid-2007, applications for O and P visas may be filed a year in advance of the proposed date of entry to the US.

In addition, USCIS agents' unfamiliarity with the performing arts and band popularity have complicated or even ended the visa obtainment process. For example, by asking world-renowned singers to prove that the Metropolitan Opera is an important venue, or by denying individual band members visas because they have been deemed by the USCIS to be "inessential" to their group, or that the band has not been "internationally recognized" for a "sustained and substantial" amount of time to be deemed worthy of visas. This has stopped many US tours and performances in the past few years, including those for Lily Allen, M.I.A, Klaxons and Holly Go Lightly.

We have the opportunity to tour the US. How do we navigate our way through the visa red tape?

The specifics of this procedure are far too complicated and dependent on too many variables to summarize here. You will undoubtedly require advice and assistance from those who have been down this path before; your best bet is to contact an immigration attorney that specializing in handling artists. (Also, keep in mind that the petitioner cannot be the foreign artist himself or herself.)

The League of American Orchestras and the Association of Arts Presenters (APAP) have created a truly excellent and frequently updated website, www.artistsfromabroad.org. This site should, at the very least, illustrate the potential hurdles you may face while familiarizing you with some of the myriad acronyms and forms associated with visa obtainments.

What if we're just coming from Canada?

Currently, Canadian artists are subject to the same stringent visa requirements as musicians coming from further abroad. There have been recent instances in which Canadian artists, pretending to be simple tourists, have tried to sneak through without visas, but have gotten caught because they were carrying instruments or even just gig itineraries. Penalties for such violations include being banned from entering the US for several years, thousands of dollars in fines, and even prison time.

Resources for US musicians touring internationally

AFM Canada Office
http://www.afm.org/public/departments/canada_office.php

AFM Local 1000: Crossing the Border to Canada
http://www.local1000.org/members/visa-assistance
US State Department: Traveling Abroad
http://www.travel.state.gov/

Resources on visas to the US
Artists from Abroad—a Complete Guide to Immigration and Tax Requirements for Foreign Guest Artists
http://www.artistsfromabroad.org/

Future of Music Coalition

FACT SHEET: Traveling with Instruments

January 2008

Security clampdowns since 2001 have made traveling by air or across international borders with instruments much more difficult, complicated, and frustrating. The following are some guidelines and suggestions to get you and your instrument where you need to go.

Contents:

I have to fly with my instrument. What should I do?

First of all, make sure you know your packed instrument's total size and weight. Whenever possible, check various airlines' limitations for carry-on and checked baggage *before* booking your ticket. (Many American-based carriers stipulate linear size of carry-ons — i.e., the total sum of height plus length plus width.) Certain musicians, such as cellists, may consider purchasing a second passenger seat for their instruments.

If you have the option of choosing your own seat, select one towards the back of the plane if possible. Most likely, you'll board the plane on the early side, which will give you more storage options for carry-ons.

Assume that the security and airline personnel know absolutely nothing about your craft or instrument. For that reason, consider putting non-essential items that may mystify TSA and airline agents (reed knives, valve oils, end pins, mutes, electronic tuners, etc.) in your checked luggage to avoid confusion and screening slowdowns with your carry-on.

In addition, make sure you print out a copy of the TSA guidelines and your airline's guidelines and bring them with you to the airport. Remember, your everyday equipment is very unusual to non-musicians. Keep in mind as well that individual TSA agents and airline staff are not always familiar with their own department or carrier's policies regarding musical instruments; it may help if you calmly explain and demonstrate to them that your instrument falls within their allowed parameters. (Consider packing a

small sewing or fabric tape measure with you so that you can prove on the spot that your instrument case meets airline size mandates.)

Lastly, allow yourself even more time than usual to get through security screening. The TSA recommends that musicians add an extra half hour to their departure timetable. Be sure to stay with your instrument as it is being screened and re-packed. The TSA also suggests including in your instrument case a short note in an easily seen spot that contains clear and concise handling and repacking instructions for "someone with no musical background."

If I carry my instrument on board, can I still bring another carry-on?

This is an area in which the TSA and individual airlines may have different policies. The TSA stipulates that passengers can carry one musical instrument in addition to one other carry-on. However, individual airlines may not allow a second carry-on; check with your airline directly. If you can manage it, consider having your instrument as your only carry-on item.

What if I run into problems anyway?

Unfortunately, the situation continues to be unreliable enough that, in spite of all your best proactive efforts, you may still encounter problems. It's advisable to have a back-up, worst case scenario plan to get your instrument where it needs to go on time. For example, consider shipping your instrument via an air courier like UPS or FedEx, renting or borrowing at your destination, or taking a train or car instead of flying.

If you experience issues with a TSA agent or airline staff such as gate crew or flight attendants, remember to stay calm and polite. Anger or indignation, however justifiable, will not get a positive or helpful response.

Haven't the American Federation of Musicians (AFM) and other organizations negotiated with the Transportation Security Administration (TSA) to make it easier to carry instruments on board planes?

Yes. However, the TSA's rules apply to their security screenings only, and not to individual carriers. The TSA holds no authority over the individual airlines' baggage policies.

Musicians still experience significant difficulties with individual airlines, and policies are not consistent from airline to airline. While here have been industry efforts to negotiating with the airline trade association (the Air Transport Association) to create industry-wide standards that accommodate musicians' specific needs, this issue has yet to be successfully resolved.

RESOURCES

The American Federation of Violin and Bow Makers: Travel Tips for Musicians

The American Federation of Violin and Bow Makers: Travel Tips for Musicians
http://www.afvbm.com/Travel.htm

AFM: Instruments as Carry-On Luggage
http://www.afm.org/public/departments/leg_issues_01.php

Polyphonic.org: Traveling by Air with Your Instrument
http://www.polyphonic.org/article.php?id=79

Transportation Security Administration: Transporting Musical Instruments
http://www.tsa.gov/travelers/airtravel/assistant/editorial_1235.shtm

Future of Music Coalition

FACT SHEET: Orphan Works

January 2008

Orphan works are copyrighted works whose owners are hard or impossible to identify or locate.

Contents:

They belong to someone, but it's hard to tell to whom. Many creative works fall into this category because (a) corporate sales, mergers and consolidations, (b) copyright protection now begins automatically upon creation, and (c) the length of copyright terms is now longer.

Under current copyright law, if you make a recording, that work is automatically protected from the moment of its creation until 70 years after your death.[1] If you sign a record label contract in which your copyrights are transferred to the label (which is the typically the case), the record label owns your copyrights for the term of life + 70 years, if you do not exercise your termination rights. If someone else wanted to license it or re-release it during that time, he/she would need to identify and locate you – or your record label – to ask permission. After the life +70 years term, your work moves into the public domain, in which no permission is needed to use your work.

In the past, creators needed to renew copyrights after their original term expired in order to retain copyright protection. The new copyright term is one longer length of time, with no renewals. Now creators already have the control, and must grant permissions to use their works. This makes it exceedingly difficult to engage in cataloging efforts, since the vast majority of created works – books, music, and other media – are protected from reproduction under the copyright term, even if they are currently out of print or unavailable to the public.

Orphan works probably comprise the majority of the creative works of 20th century. Orphan works exist in a purgatory of sorts, not able to be used in new creative efforts or made available to the public due to uncertainty over the status of their ownership.

Why is it important and what is being done to fix this scenario?

There are two primary reasons why orphan works is an important issue for the music community. First, a number of recordings are no longer commercially available to the public. Second, the law also makes it difficult for musicians to license or use older works in new songs or recordings. Creators are often forced to abandon projects that include orphan works. This is not only a loss for creative artists, but also for the public and our collective culture.

Accessing out of print works

Tens of thousands of recordings are commercially released every year, but only a handful of them end up being viable enough to be kept in print for decades. The vast majority of releases fade from the stores and mailorder catalogs as the labels and retailers make space for new product. When the recordings are no longer commercially viable enough for the label to continue manufacturing the albums/CDs, they tend to fall "out of print".

Despite their limited commercial value, the labels maintain ownership of the copyrights for these releases. But think about the number of record labels that have shut down, merged, or sold their assets to another record label – often repeatedly – and you can see how this problem manifests itself. In many cases, the labels themselves don't even know what they own. Oftentimes the cost of finding the owner is so high that creators can't use or license orphan works, even when they'd be willing to pay to get them back in print.

The challenge for using older works

A similar problem exists for today's musicians interested in licensing or sampling older works. Imagine you are a musician who is recording a new album to be released next year. You remember hearing a great piece of music at your friend's house and decide that a sample of it placed into one of your new songs would add just the right vibe.

Copyright law requires that you gain permission to use someone else's work, unless it is a fair use. This means you'll have to both identify and locate the copyright owners of the piece of music you want to use in your new song and the recording being sampled. You should search the databases of ASCAP, BMI, SESAC, the US Copyright Office, and the internet for the answers. If you are able to identify and locate the copyright owners, you can then work together on an agreement about the use of the sample in your song/recording.

But what if you can't find the owners?

If you have searched without being able to identify and locate the copyright owners, this song/recording may be an orphan work. The music business is fluid, and ownership of any given song/recording might pass through many hands over a short period of time

because of legal contracts and record label mergers and acquisitions. If the song you want to sample is an orphan work, there is currently no way for you to legally use the song.

Efforts to fix orphan works

In 2005, the US Copyright Office examined issues raised by orphan works. The Copyright Office received hundreds of comments in this proceeding, which was followed up by roundtable discussions and the release of a full report in January 2006 that concluded:

- The orphan works problem is real.
- The orphan works problem is elusive to quantify and describe comprehensively.
- Some orphan works situations can be addressed by existing copyright law, but many cannot
- Legislation is necessary to provide a meaningful solution to the orphan works problem as we know it today.

In May 2006, Congressman Lamar Smith introducedHR 5439, the Orphan Works Act of 2006. The bill allowed for more use of works for which the copyright holder can't be found, and limited liability for those who make a "reasonably diligent search" to find a copyright holder but cannot. Roundly praised by many in the creative community, the bill passed out of committee but was not taken up by the full House. A similar bill was not reintroduced in the 110th Congress.

What musicians can do

Musicians that are interested in making older recordings available should support changes to the copyright law similar to those proposed by the Orphan Works Act of 2006 that would limit copyright infringement damages on anyone that performed and documented a "reasonably diligent search in good faith" to find the copyright owner. While there is no particular remedy yet, many groups continue to propose solutions.

RESOURCES

US Copyright Office's Orphan Works page
http://www.copyright.gov/orphan/

US Copyright Office Report on Orphan Works (January 2006)
http://www.copyright.gov/orphan/orphan-report-full.pdf

FMC filed joint comments with other recording artists groups in the Orphan Works proceeding
http://www.futureofmusic.org/news/orphanworks.cfm

Copyright Issues Relevant to Digital Preservation and Dissemination of Pre-1972 Commercial Sound Recordings by Libraries and Archives
Council on Library and Information Resources (Dec 2005)
http://www.clir.org/pubs/reports/pub135/contents.html

Copyright Laws Severely Limit Availability of Music
NPR story on the August 2005 CLIR report (January 6, 2006)
http://www.npr.org/templates/story/story.php?storyId=5139522&ft=1&f=2

Orphan Works: Analysis and Proposal
Center for the Public Domain (March 2005)
http://www.law.duke.edu/cspd/pdf/cspdproposal.pdf

1. Assuming it's not a work for hire, which makes the term 90 years from publication or 120 years from creation, whichever is shorter.

Future of Music Coalition

Media Ownership Fact Sheet

by Kristin Thomson
January 17, 2006

download as PDF

In 2007, the Federal Communications Commission, Congress and the courts will once again examine media ownership rules. These debates will set policies that govern traditional media, while establishing a regulatory framework that will dictate the future of the telecommunications and media industries.

Contents:

A Few Not-So-Hypothetical Scenarios

- Imagine that a single company owns a local daily paper, two local TV stations, the cable system, the alternative weekly, the primary portal for the internet, and up to eight radio stations in your town. That company is based on the other side of the country, and answers to its advertisers and stockholders. How are they accountable to the needs of your community?
- A profitable commercial all-classical radio station in Philadelphia is bought and sold four times in the span of two years during a flurry of buyouts and mergers between media companies. Each time it is bought and sold, the price of the station zooms up, and the owners want to make their money back. In an attempt to raise its market share and increase ad revenue, the various station owners switch formats from classical music to modern adult contemporary, to urban oldies. Five years later, the format has changed two more times. What happened to the classical music fans?

- In the past two years, some of the biggest US telecommunications companies have suggested that they want to charge content providing companies like Google and Yahoo a fee for delivering data into consumers' homes via their DSL/cable lines. They imagine an internet that has "express lanes" that are only accessible to those companies and consumers that pay their toll. What would happen to website access for those small companies, innovators, nonprofits and citizens that couldn't afford this toll?

FCC on Media Ownership

At the FCC, the media ownership proceedings made famous in 2003 have begun again, this time with a new chairman, Kevin Martin.

During this biennial media ownership rulemaking, the debate continues about whether to relax or eliminate longstanding rules preventing media consolidation at both the local and national levels regarding TV, radio, newspapers and cable.

Currently these rules:

- prevent one broadcast network from owning another broadcast network;
- limit the number of local broadcast stations that any one broadcaster can own to systems serving 35 percent of the TV-viewing households in the U.S.;
- prohibit a company from owning cable TV systems and TV stations in the same community, and
- prohibit ownership of newspapers and TV stations in the same community.

FMC is particularly concerned with any effort to further relax the limits on how many radio stations a company can own in a specific market. Elements of the broadcast industry have been pushing hard to raise the cap from 8 in the largest market to as many as 12.

Why the Rule Changes? Why Now?

The original rationale for these rules was to guarantee a multiplicity of voices and prevent concentrations of power. The argument for removing them now is that many of these rules are out of date and need to be reexamined in an environment where consumers have access to a multitude of information sources - newspapers, cable, TV, radio and the Internet. Coincidentally, big media companies argue that the rules are artificially constricting their ability to grow and serve their consumer base, and have thus damaged their capacity to compete in the free marketplace. The Internet poses a particular threat, they claim, as a new source of competition that has eaten into their advertising revenue and pulled away their customers.

Congress on Telecom

While the FCC debates the rules that govern media, Congress is examining the rules that govern high-speed internet services. Different industries have been offering competing services under wildly different sets of rules. But as phone, cable and broadcast companies continue to converge and offer similar services, it is necessary to establish a comprehensive set of policy goals via legislation.

The trick, however, is to ensure that any new legislation avoids the pitfalls of the 1996 Telecommunications Act. In other words, while acknowledging that legislation may be necessary, we must ensure that it reinforces basic principles like equal access for all citizens and competition in the marketplace.

Network neutrality is one of the key issues being debated. Under current law, cable companies that provide Internet service to the home have the legal authority to control what content is available on their pipeline. Phone companies are pushing for the same legal rights for their DSL and fiber services. But imagine a marketplace where the dominant broadband providers can control your access to particular music services or CD stores -- with the determining factor being how much those companies would pay for the right to access consumers. This type of marketplace would be devastating for local, independent and niche genres of music that have so greatly benefited from the openness of the current Internet architecture. FMC strongly supports network neutrality and is working in coalition with other media reform groups to push for the preservation of unfettered internet access.

A Brief History of the Last Media Ownership Proceedings: 2002-2004

- Fall 2002: FCC Chairman Powell announces intention to wrap all separate media ownership proceedings (broadcast, cable, network, cross-ownership) into one "mega proceeding"
- Winter 2003: FCC holds official public hearing in Richmond, VA. Commissioners Copps and Adelstein begin series of "unofficial" hearings across the country.
- Spring 2003: Hundreds of organizations - from the NRA and Parents Television Council to Move On and National Organization for Women - and millions of citizens file comments in the media ownership proceedings, with 97% of citizen commenters opposed to further media deregulation.
- June 2, 2003: On a party-line, 3-2 vote, the FCC adopts a wide-ranging plan that facilitates additional consolidation of television ownership,

eliminates critical newspaper-broadcast cross-ownership rules and relaxes other important restrictions. Only radio is taken off the table.
- Summer-Fall 2003: Senate expresses outrage over FCC plan and eventually votes 55-40 to veto the rulemaking, the first time the Senate has wholly rejected a FCC decision.
- June 2004: The Third Circuit Court of Appeals rejects FCC rulemaking, sending media ownership rules back to FCC.

Stakeholders in This Process

Media Companies: owners of radio stations, cable and telephone companies, internet providers, TV stations, and newspapers.

Federal Communications Commission is the agency charged with being the public's caretaker of the public spectrum, which includes radio, TV, satellites, cable, wi-fi, and telephones. They run the media ownership proceedings.

Each Congressional representative is responsible to the districts which elect them. In 2006 Congress revisits the 1996 Telecom Act.

Media Reform Movement: Artists, writers, consumer groups, labor unions, religious organizations and elected officials who are concerned that FCC and Congressional actions will forever change the way media is controlled in this country have filed comments, written letters and participated in unofficial FCC hearings all across the country.

The Public – this is you.

What You Can Do About It

Decisions about the rules governing the use of the public spectrum have, for many years, rolled through Congress and the FCC without much public debate. But as technology has become more powerful and has transformed the way people communicate and learn and live, the landscape has changed dramatically. Over the past five years, there's been an unprecedented amount of attention on media ownership issues.

The FCC and Congress want to hear from concerned citizens and musicians about the potential impact that the lifting of these rules might have on your livelihood, your access to news and information, and your community.

Get educated, and reach out. Submit a comment online at the FCC. Participate in a public hearing and tell your stories about how your life or business or art has been affected by the dramatic changes in media ownership. Write short letters to your elected officials. Call your member of Congress. Send a letter to the editor of your local paper. Elected

officials read their local papers, so constituents' voices can send a powerful message to policymakers.

Resources

FMC's comprehensive 2006 report False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry
FCC Media Ownership lists the current media ownership rules which are being revisited
Free Press
Media Access Project

http://www.futureofmusic.org/images/MediaOwnership07FS.pdf