



## **Future of Music Coalition**

1615 L Street NW, Suite 520, Washington, DC 20036 • 202.822.2051

House Subcommittee on Intellectual Property,  
Competition Policy and the Internet  
2138 Rayburn Office Building  
Washington, DC 20515

November 28, 2012

Dear Chairman Goodlatte, Congressman Quayle and members of the committee:

Future of Music Coalition respectfully submits this written testimony for consideration in advance of the committee's November 28, 2012 hearing "Music Licensing, Part 1".

Future of Music Coalition (FMC) is a national non-profit education, research and advocacy organization that identifies, examines and translates the challenging issues at the intersection of music, law, technology and policy. FMC achieves this through continuous interaction with its primary constituency – musicians – and in collaboration with other creator/citizen groups.

For more than a decade, we have observed changes to traditional industry business models, and sought to inform artists about what these changes could mean for artists' ability to reach audiences and grow their careers. Over our twelve year history, we have participated in a number of webcasting-related matters, from the early CARP royalty hearings, to the formation of SoundExchange, to the debates about internet royalty rates and reporting requirements. Our testimony submitted to both chambers of Congress (in 2002 and 2007, respectively) urges stakeholders to work together to strike a balance that recognizes the value of webcasting to creators and listeners, but also properly

compensates performers and labels for uses of their work.<sup>1</sup> Many things have changed since those early days of online broadcasting. Over the past ten years, internet and digital radio has evolved into a robust and viable business. Services like Pandora, Sirius XM, Clear Channel's IHeartRadio and Slacker are leading the way in delivering radio-like services to millions of music fans every day, and paying millions of dollars in digital performance royalties to rightsholders, performers and songwriters.

But as these businesses have grown, the initial licensing procedures – as outlined by the Digital Performance in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998 – have become a point of contention. Pureplay<sup>2</sup> webcaster Pandora's royalty bills are based on a per-user, per-stream rate (with a percentage of revenue option that would likely be higher). Meaning, they owe a fraction of a penny for every user, and every stream, the consequence being that as the business grows, so do the costs. Pandora, which states that 50 percent of its gross revenue goes to rightsholders, says that this calculation is unfair – especially when compared with satellite radio's rate of eight percent of gross revenue. Pandora says that the differences in rates are unsustainable going forward.

Currently, there are competing bills that address the issue of radio parity in different ways.

The **Internet Radio Fairness Act**, introduced by Jason Chaffetz (R-UT) on July 20, 2012, seeks to abolish the current rate-setting standard for webcasters like Pandora. The bill proposes, instead, to calculate the royalty based on a percentage of the webcaster's gross revenue. Essentially, Pandora and other pureplay webcasters would simply pay a

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<sup>1</sup> Future of Music Coalition testimony before the Senate Judiciary Committee, May 15, 2002  
<http://futureofmusic.org/filing/copyright-royalties-where-right-spot-dial-webcasting>

Future of Music Coalition testimony before the House Small Business Committee, June 27, 2007  
<http://futureofmusic.org/filing/fmc-testimony-submitted-house-small-business-committee-webcasting-rates>

<sup>2</sup> A webcaster whose primary business is to transmit sound recordings under the statutory license, and not to sell or promote any other service or product

percentage of gross revenue, similar to how satellite radio's rates are calculated. Critics of the bill say that this will lead to a substantial decline in revenue for artists.

On August 20th, Jerrold Nadler (D-NY) offered a different vision with the **Interim Fairness in Radio Starting Today Act** (Interim FIRST). The bill would put cable and satellite radio services on the same royalty-setting standard as pureplay internet radio. That would make cable and satellite radio stations pay higher royalty fees to musicians. Nadler's bill also calls out the one platform that does not compensate performers and sound recording copyright owners for their music – broadcast radio. Interim FIRST would also compel over-the-air broadcasters to compensate performing artists, albeit through a stopgap measure that involves raising the rates for terrestrial stations' digital simulcasts to make up for what they aren't paying for over-the-air plays. Unfortunately, Interim FIRST would not collect money owed to US performers for international plays. In a tough economic climate for domestic artists, this can only be seen as a partial solution, at best.

Both pieces of legislation are problematic, but in different ways. The IRFA bill, while attempting to create rate parity among large pureplay webcasters and satellite radio, would likely do so by lowering the amount that pureplay webcasters need to pay musicians and copyright owners, by a considerable degree. IRFA also doesn't address the lack of a public performance royalty for sound recordings for terrestrial radio airplay – the most egregious loophole in regards to “parity” out there.

Another point of contention: Section 5 of IRFA contains language that could put limitations on the ability for artists (or their collective representatives) to speak publicly or otherwise advocate for compulsory licenses over direct deals.<sup>3</sup> The bill invokes the anti-monopoly provisions in the Sherman Act as justification for these restrictions. This is troubling, as collective management bodies – such as PROs, unions and

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<sup>3</sup> “Muzzling Free Speech By Artists: IRFA Section 5 Analysis,” The Trichordist, November 8, 2012  
<http://thetrichordist.com/tag/sherman-act/>

SoundExchange – offer important leverage to musicians and performers who otherwise lack input into rate-setting and other royalty negotiations.

Interim FIRST attempts to tackle the terrestrial radio exemption, but instead of confronting the problem head on and simply legislating that terrestrial stations must pay public performance royalty for sound recordings, the bill simply raises the rates on the digital part of the business to compensate for this gaping hole in rights. Traditional terrestrial airplay is still hugely important, and consistent airplay generates significant royalties for songwriters and publishers. A real attempt at parity would include the establishment of the public performance royalty for sound recordings for terrestrial airplay.

It is common for stakeholders to suggest legislative fixes that have a favorable outcome for their position. Typically, opponents characterize such proposals as extreme and unworkable, and then offer suggestions that meet their own needs. But this back and forth process gives all stakeholders room to negotiate and compromise on legislation that could achieve more reasonable middle ground.

FMC endorses seven core points that musicians and advocates must defend in the upcoming fights, no matter what the outcome:

- 1. Musicians and songwriters are primary stakeholders in these debates.** Airplay on terrestrial, satellite and internet radio are an important part of musicians' careers, not only for exposure, but also as a revenue stream via royalties paid by their PRO and/or SoundExchange. Musicians cannot just be the unwitting victims at the tail end of this process. Policymakers **MUST** include a variety of musicians and songwriters in these ongoing conversations.
- 2. Rate-setting should be reasonably platform neutral.** Although business models and competition should be factored into any rate-setting scheme, we believe that no single technology should be penalized and no platform should be exempted

from compensation obligations. Even if rate-setting standards are harmonized, rates may still differ based on unique market factors.

- 3. Direct payments to performers must be preserved.** Direct payment to musicians for digital performances – as represented by SoundExchange’s direct and simultaneous payments to performers and sound recording copyright owners – is a major advancement in fair and transparent artist compensation. It is important that the direct payment process not be whittled away in the pursuit of bargain-basement licensing deals. Any proposed legislation should include provisions to ensure direct, non-recoupable payment to artists – even under direct licensing agreements.
- 4. Rates should balance the growth of new technologies with fair compensation for creators.** It may be necessary to examine whether emerging radio technologies are able to compete against already established services. However, expansion must not be subsidized on the backs of creators who are the reason this marketplace exists in the first place. We recognize this is a difficult balance to strike, but it is a crucial one for all stakeholders. And the balance is impossible to achieve with the continued exemption for terrestrial broadcasters.
- 5. Musicians’ rights to bargain and advocate collectively must be defended.** Without the leverage offered by collective management bodies, musicians and songwriters lack input in the process of royalty negotiation. Anti-trust law must never be abused to prevent artists from speaking up for their collective best interests.

Beyond the goals of any legislative efforts to address the rate-setting standards, FMC also encourages webcasters and digital music providers to embrace business practices that:

- 6. Make it easy for listeners to discover and take action.** One of digital radio’s greatest assets is its ability to foster music discovery. On many services, webcast tracks are coupled with “buy now” buttons that redirect listeners to iTunes and/or

Amazon for song purchases. But there's more opportunity. Webcasters can help listeners to take action on their discoveries by displaying producer, songwriter and player credits, and connect to artists' websites or social media, or learn about upcoming performances.

- 7. Recognize the power of data.** Webcasters like Pandora have something that terrestrial broadcasters can never offer, and that's accurate data about what music is being streamed, how often, and by whom. Not only is this good for the accurate payment of royalties to a huge swath of musicians (many of whom have never seen royalties for traditional airplay), it could also be a new way for artists to leverage other sources of revenue. Giving musicians and their managers access to data about listener engagement could provide musicians with the tools to efficiently route tours, promote new releases, build closer connections with audiences, and offer higher-priced items to dedicated fans. Access to data should not be traded for lowered digital performance royalties, but we encourage musicians to explore the options, and for webcasters to give musicians access to play data to increase the value of their streams and forge mutually beneficial partnerships with the music community.

FMC remains committed to advocating for the fair compensation for musicians and creators. We offer our organization as a resource in any negotiations and encourage policymakers to include musicians in these important conversations.

Casey Rae  
Deputy Director  
Future of Music Coalition