

# Minority Media and Telecommunications Council

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## ACTION ALERT

### Why We Should Oppose Public Performance Royalty Legislation

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**MMTC, in the strongest way, encourages our fellow civil rights organizations to oppose Performance Royalty legislation (H.R. 848 and S.379) and NOT to sign onto letters and other documents supporting it. Rather, MMTC urges our colleagues to join in encouraging House and Senate Democratic Leadership to oppose the Performance Royalty legislation.**

We have conservatively estimated that this legislation would throw at least a third of minority owned stations over the cliff into bankruptcy. The National Association of Media Brokers (NAMB) agrees, adding that “the imposition of a performance royalty on free, over-the-air broadcast stations will be crippling to the broadcast industry in general, and be particularly devastating to minority broadcasters and their audiences, as well as to other new entrants to the industry.”

**Misinformation is circulating in the civil rights community suggesting that the legislation will not harm minority radio.** In fact, Black and Spanish radio would be hit the hardest by this legislation because these stations face the greatest challenges – weaker signals, advertising discrimination (NUDs and NSDs), EEO non-enforcement, and minority undersampling by the leading radio audience rating service.

The House Judiciary Committee’s reported version of H.R. 848 would require the Copyright Royalty Board (CRB) to consider the impact on minority owned stations in their rate setting process (no such provision is included in the Senate Judiciary Committee’s reported version of S. 379). While the House provision is well intentioned, in reality, it is meaningless. The CRB cannot set lower rates for minority radio without congressional findings, an Adarand study and, probably, appellate litigation.

On July 7, 2009, the Congressional Budget Office (CBO) released a report saying that the rates charged to commercial radio stations could be “substantial” yet indeterminable. These findings explain why even the prospect of this legislation is inhibiting the access to capital that minority broadcasters urgently need to survive and grow. Almost no one invests in or lends to a business that’s about to endure an enormous revenue loss. And no one invests in businesses that are incentivized to stay small in order to avoid this revenue loss.

**Supporters of the legislation have loosely thrown about the term “civil rights.” But in NO sense is there any civil rights purpose in destroying Black and Spanish radio. Indeed, civil rights luminaries who have written to congressional leaders in opposition of this legislation have included Rev. Jesse Jackson, Rev. Al Sharpton, Dick Gregory, Tom Joyner, and Barbara Arnwine of the Lawyers Committee for Civil Rights.**

**Twenty-three members of the CBC and CHC have expressed their concern with the impact of the Performance Royalty legislation, including:**

- 1. Bishop (GA)**
- 2. Brown (FL)**
- 3. Cardoza (CA)**
- 4. Carson (IN)**
- 5. Cuellar (TX)**
- 6. Clay (MO)**
- 7. Cummings (MD)**
- 8. Davis (AL)**
- 9. Davis (IL)**
- 10. Fattah (PA)**
- 11. Green (TX)**
- 12. Hastings (FL)**
- 13. Hinojosa (TX)**
- 14. Lewis (GA)**
- 15. Lujan (NM)**
- 16. Meek (FL)**
- 17. Ortiz (TX)**
- 18. Pierluisi (PR)**
- 19. Rangel (NY)**
- 20. Reyes (TX)**
- 21. Rush (IL)**
- 22. Scott (GA)**
- 23. Sires (NJ)**

**Background on the legislation is provided below.**

### **I. Public Performance Royalty Concept**

A performance royalty for copyright owners of a sound recording (the actual recorded work) is a fairly new concept. Such a royalty was first granted with enactment of the Digital Performance Right in Sound Recording Act of 1995, which provided copyright protections for sound recordings used by subscription and interactive services. This right was expanded with the enactment of the Digital Millennium Copyright Act of 1998, which extended the royalty to Internet webcasters. These rights are established in Section 114 of the Copyright Code. One of the main rationales for this newly created right on these services was to help ameliorate the perceived effects from piracy on digital platforms.

## **II. Performance Royalty Legislation in the House**

On February 4, 2009, legislation was introduced in both House and Senate (H.R. 848 and S. 379 respectively) that would amend Section 114 to impose for the first time a performance royalty on terrestrial radio broadcasters.

On a bipartisan basis, Congressmen Gene Green (D-TX) and Mike Conaway (R-TX) have introduced a resolution (H. Con. Res. 49) stating that no such royalty should be imposed upon broadcasters. That resolution currently has 254 co-sponsors (plus the sponsor for a total of 255 supporters).

H.R. 848 was authored by House Judiciary Committee Chairman John Conyers (D-MI). It has 46 co-sponsors.

After considerable debate lead by Rep. Waters (D-CA), on May 13, 2009, H.R. 848 was amended and approved by the Judiciary Committee by a recorded vote of 21 to 9 with 10 not voting. As approved by the Judiciary Committee, H.R. 848 would do the following:

- bring all audio services including terrestrial radio under the 801b rate setting standard (but the bill explicitly excludes from consideration the one component of 801(b) that accounts for the disruptive impact on business);
- on a sliding scale reduces the flat fee qualifying small broadcasters (under \$1.25M) would have to pay;
- introduces a “cooling off” period after enactment in which no royalties would be paid for, stations above \$5M in revenue would enjoy a one year cooling off period while stations below \$5M in revenue would get three years;
- directs the copyright royalty judges to consider the effects on religious, minority and female-owned stations and religious, minority and female royalty recipients, and non-music programming, including local news and information programming for stations that are part of station groups in which all stations within the group are located in one designated market area. Again, this language was intended to allay minority concerns, but the provisions are not realistically applicable.

## **III. The Senate Bill**

The Senate companion bill, S. 379, has six co-sponsors, and on October 15, 2009 was favorably reported out of the Senate Judiciary Committee. S. 379 is authored by Senate Judiciary Committee Chairman Patrick Leahy (D-VT) and it largely accepted the language of the House bill as reported, though with some differences:

- on a slightly different sliding scale reduces the flat fee qualifying small broadcasters (under \$1.25M) would have to pay;
- in the special treatment section of the bill, the Senate bill omits “female, minority, public and community stations” as was listed in the House bill;
- The Senate version also contains language establishing a formula for royalties due to making ephemeral copies (necessary copies made solely for the broadcast transmission).

Senator Lincoln (D-AR) has introduced S. Con. Res. 14, a companion resolution to the anti-royalty H. Con. Res. 49. The Lincoln resolution currently has 26 co-sponsors (plus the sponsor for a total of 27 supporters).

#### **IV. Arguments For and Against a Performance Royalty**

To date, Congress has repeatedly rejected such a royalty on terrestrial radio broadcasters, citing the symbiotic relationship that exists between radio and the record labels. The basic concept has been that radio stations and record labels both benefit from the other, and neither merits compensation over the other. Radio's use of music drives ratings and advertising revenues. Similarly, radio airplay translates into music sales and other revenue streams for the recording industry. However, the recording industry, citing declining album sales and the emergence of new technologies, is seeking to alter this long-standing relationship for their own financial benefit.

The proponents of a performance royalty have three primary arguments. 1) They argue that "corporate radio" is getting a free ride, and a performance royalty is needed to provide equality among audio platforms. 2) They argue that the U.S. is the only industrialized nation not to grant such a royalty, and the lack of reciprocity results in a loss of hundreds of millions of dollars to the US economy. 3) They argue that copyright holders have an undeniable property right, and without the ability to determine how their property is used, the result is a "taking."

The broadcasters' argument centers on the promotional value of radio - specifically, the fact that a recent study showed that radio airplay directly translates to approximately \$2 billion in annual music sales, without even accounting for the promotional impact on concert and merchandise revenue. In addition, broadcasters contend, if there is no immense financial benefit associated with radio airplay, there would be no need for Congress to continue the prohibition on stations being paid for airplay. On the issue of parity, broadcasters cite their regulatory obligations that do not apply to other platforms, which in direct costs and opportunity costs far outweigh the burden of a performance royalty. On the international treatment of performance royalty, broadcasters note that many foreign countries have less favorable treatment for copyright owners, and that many governments subsidize or outright control radio stations; thus it is their taxpayers who ultimately pay for the royalty.

In addition, should Congress approve performance royalty legislation, some stations will face the reality of eliminating local jobs in order to pay this unknown and extraordinary new expense. Congress should avoid adding additional burdens to the already difficult employment situation. The economic realities facing radio are bleak. The industry has lost nearly one quarter of its revenue in just the past two years. Thousands of radio employees have lost their jobs, hundreds of stations have stopped broadcasting, and many radio operators have filed bankruptcy or are on the verge of doing so. Imposing this royalty would only exacerbate these problems facing communities around the country.

Importantly, minority broadcasters and the civil rights organizations opposing the legislation note that the bill's inclusion of a small broadcaster reduced royalty is not even a band-aid. Even if the payment were \$5, the high amounts of royalties paid by larger stations would seal the fate of the smaller stations. The only financing small stations can find is predicated on business plans promising to get large. If the bill passes, small stations that get large would have a license to lose

money. Most small broadcaster financing has already dried up, and if the bill passes all or almost all of it is likely to go away.

## **V. Support and Opposition**

Proponents of performance royalty are the Recording Industry Association of America (RIAA), Sound Exchange (the organization who would collect and distribute the royalties), the American Federation of Musicians, Music First, the Future of Music Coalition, and the American Federation of Television and Radio Artists. The Copyright Office has called for such a royalty to be imposed. In congressional hearing testimony, representatives from competing platforms such as Internet and satellite radio have called for passage of this legislation. The fight against the royalty has been spearheaded by the National Association of Broadcasters and the Free Radio Alliance (a collection of individual radio stations and radio interests at the grassroots level). Here is a partial breakdown of those opposing royalties:

### **Opposes Royalties – Civil Rights and Minority Organizations**

- American Women in Radio and Television
- Black College Communications Association
- International Black Broadcasters Association
- Latinos in Information Sciences and Technology
- Lawyers Committee for Civil Rights Under Law
- Minority Media and Telecommunications Council
- National Association of Hispanic Journalists
- National Action Network
- National Association of Black Owned Broadcasters
- National Association of Black Telecommunications Professionals
- National Black Chamber of Commerce
- Puerto Rico Broadcasters Association
- Spanish Radio Association
- The Hispanic Institute
- Women in Radio and Television
- UNITY: Journalists of Color, Inc.

### **Supports Royalties – Civil Rights and Minority Organizations**

- A. Philip Randolph Institute
- Black Leadership Forum
- Labor Council for Latin American Advancement
- Latin Academy of Recording Arts and Sciences
- Leadership Conference on Civil Rights
- LULAC
- NAACP
- National Coalition of Latino Clergy and Christen Leaders
- National Congress of Black Women
- National Hispanic Media Coalition

## **VI. Process Sought**

MMTC and the civil rights organizations opposed to Performance Royalty are pursuing the narrowest possible remedy: before the full House or Senate takes up the bill, we want a full examination of the impact of royalties on radio public service, radio ownership diversity, and particularly minority ownership. Please join us in expressing your opposition to performance royalty legislation.

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