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Performance Rights Wronged

by Bartlett D. Cleland

On your local oldies radio station, when you hear Frankie Valli and The Four Seasons' hit song "December 1963 (Oh, What a Night)," neither Frankie Valli nor The Four Seasons receive any income from the broadcast of their performance.

Now, Bob Gaudio, the songwriter/composer, makes some small royalty for his musical work (the song itself). When the song is included in the stage production of "Jersey Boys" along with the background history of the song, the playwright is compensated. If "Jersey Boys" was ever made into a movie, that audiovisual work would enjoy a full performance right. If the book *Jersey Boys* by Marshall Brickman and Rick Elise is ever made into a book on tape they will get compensated for that, as will whoever performs the reading. But for the over-the-air broadcast of the sound recording, the basis of all the derivative products, performers do not get compensated for their creativity.

How can this be?

Copyright is not one right, but rather references a bundle of rights which have developed over the years through the legal and political process. Hence a song played on the radio involves several different rights, and possibly several different owners of those rights, including one for the musical work and one for the sound recording.

A musical work is owned by the music publisher and the songwriter/composer. So when a musical work is performed, some small payment is typically generated. Similarly when most works are performed, such as literary works, dramatic works, motion pictures or choreographed works, the creators have the opportunity to share in the success.

The recorded performance of the musical work, which is owned by the artist and the record company, is treated very differently. So different in fact that it has no full performance right in the United States.

Convergence Highlights Performance Rights Omission

These days the notion of "convergence" is widely understood, and in the matter of performance rights, convergence highlights a glaring omission in law. The fact is that sound recordings are the only performed copyrighted works that do not enjoy the full performance right in the U.S. In a converged era of media access, there can be no justification that sound recordings be treated so differently.

Currently, performers and the recording owners are compensated when the songs they own are played on Internet radio, satellite radio or on cable television, but not when songs are played on over-the-air radio. But depriving artists of certain rights based only on the means of transmission is technological discrimination, highlighted by digital convergence and indicative of an error in policymaking.

Some have suggested that remedying this discriminatory omission of rights would be a new tax, but this is a perversion of the notion of tax. Taxes raise revenue remitted to the government to pay for government operations. Eliminating the discrimination against over the air music through facilitating performance rights in no way meets this definition.

Yes, requiring broadcasters to pay royalties for the performance right would involve an increase in cost for them, but this would simply represent parity with other converged media. Just as Internet radio, satellite and cable music providers have to figure the real cost of music into its cost of doing business, so too should over the air radio stations.

And yes, the increase in broadcasters' costs would come about because of legislative action. But that's not indicative of a tax; that's indicative of the legislature correcting an unjust bias in treating similar property differently.

Other People's Property

Some have tried to make the case that broadcasters should be exempted from paying because they actually provide the music for "free," as if to suggest they act out of the kindness of their hearts and that they are acting in the public interest.

It is true that a "public interest, convenience and necessity" provision was included in the Radio Act of 1927 as a standard for broadcast licenses. And while that phrase has been the subject of great debate, and open to various interpretations, fundamentally the point has always been to protect the consumer, the public, from the users of the spectrum who may otherwise only seek to be self serving.

Broadcasters' complaints about new expenses ring hollow considering that broadcasters were granted their spectrum, including the public interest restriction, for free when others who are in direct competition, such as Internet radio, have to pay for their means of delivery.

But, in general, one might question whether broadcasters are serving the public interest by selling advertising based on the work of others without compensating the performers; in other words, without paying for the raw materials upon which their business model is based. Arguing that broadcasters should be able to avoid paying the artists for their work, which is what drives attention to the radio station, turns the notion of "acting in the public interest" on its head.

Broadcasters make money by providing desirable content, by tapping into consumer demand. They use content as their raw material, constructing "programming" around and with that content, to attract a specific segment of the public which advertisers would like to reach with their message. The advertisers then pay the broadcasters for the program—the content—they assemble. Without question, there is both skill and art in constructing programming in such a way that it pleases consumers sufficiently so that a business model can be built and advertising dollars can be attracted. But there is no justification for letting broadcasters "off the hook" of paying for the raw materials of their business model.

Over-the air-music broadcasters should make money and seek to increase profits. They are providing a useful product and a desired commodity for consumers. This is precisely what drives potential owners to invest in radio stations in whole or in part by buying shares, hoping that their investments will grow. And just as the value of the radio stations' investments and work should be rewarded when consumers respond, so too should the artists' work be rewarded. Working to maximize returns is exactly the correct behavior—the only problem is that those investments should not grow by depriving others of the value of their work.

Broadcasters have no justification for giving away other people's property for "free." A great business model might be renting out beachfront homes to vacationers, but that does not give anyone the right to appropriate that property for their use, even if their actions may drive up the value of the home or neighborhood. Simply put, end results cannot justify uncompensated use of others' property.

Conclusion

The current discriminatory treatment of over-the air-musical performance rights cannot be justified. In a rapidly converging world this glaring omission has become conspicuous, and should be remedied. But, perhaps more critically, when others are legitimately reaping the financial rewards they are entitled to from their participation in the creative work, it is obvious that those who performed the content—the artists—should not be omitted from compensation.

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