



Future of Music Coalition on

# Public Performance Right for Sound Recordings

FMC FACT SHEET

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

Consider this. When you hear Counting Crows' recording of 'Big Yellow Taxi' on the radio in the US, Joni Mitchell – the composer of 'Big Yellow Taxi' – is compensated through BMI. But Counting Crows receive nothing for this performance.

However, if you hear the same performance on Sirius XM, or via a webcast, or on a cable music station – even on that terrestrial radio station's webcast — both Joni Mitchell AND Counting Crows 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.



**Future of Music Coalition**  
Education, Research and Advocacy for Musicians

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## **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 pay 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 lopsided 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 (DPR), they also pay royalties to the performers. SoundExchange — the performance rights organization established by the DPR — distributes the royalty payments directly to performers (4) percent and to the sound recording copyright owner, most often the record label (50 percent). Non-featured performers receive 5 percent 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 artist 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 annually for US musicians and labels. This also hurts the US economy and limits international growth of one of our more profitable industries. As the music marketplace goes global, the need for a broad-based performance royalty is more important than ever.

## **Legislative Action in the 110<sup>th</sup> and 111<sup>th</sup> 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 2009, Rep. Conyers and Sen. Leahy introduced HR 848/S 379, the Performance Rights Act, which would remove the performance royalty exemption for terrestrial broadcasters.



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In May 2009, the House Judiciary Committee passed the Performance Rights Act in a 21-9 vote. On Oct 15, 2009, the Senate Judiciary Committee passed its version of the bill, which ultimately did not come to a full vote in either chamber.

In 2010 saw negotiations between the National Association of Broadcasters (NAB), and musicFIRST. Although these negotiations did produce rudimentary terms to be passed along to Congress, they were not without controversy, as the NAB included a provision that would compel cell phone manufacturers to include an FM radio chip in all such devices. This was not well received among the tech community. Negotiations subsequently stalled over claims that each side was not advocating for the agreed upon terms.

## **Current Activity**

In 2013, Clear Channel, the nation's largest broadcaster, began to strike direct deals with a few indie labels beginning with Big Machine Records and one major, Warner Bros, as well as a direct deal with the band Fleetwood Mac, agreeing to pay a terrestrial performance royalty when those labels' and artists' songs are played. Some broadcasters touted these deals as evidence that private deals are preferable to legislation for solving the performance right conflict. However, these agreements still leave the vast majority of artists and copyright owners uncompensated when their music is played on AM/FM radio. Additionally, they raise concerns about anticompetitive practices.

In September 2013, Rep. Mel Watt introduced the Free Market Royalty Act (HR 3219). Like the earlier Performance Rights Act, this act would require AM/FM broadcasters to pay performers and copyright owners; however the proposed mechanism would be different, and the bill would impact how non-interactive service rates are set as well. The FMRA would eliminate the compulsory system currently used by non-interactive web broadcasters like Pandora and Sirius XM, requiring digital services and terrestrial radio broadcasters alike to negotiate with copyright owners and artists through a market administered by SoundExchange, rather than paying a rate set by the government.

## **What Musicians Can Do**

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

[FMC's site tags on the public performance right](http://futureofmusic.org/search/node/public%20performance%20right)

[http://futureofmusic.org/search/node/public performance right](http://futureofmusic.org/search/node/public%20performance%20right)

[MusicFIRST Coalition](http://www.musicfirstcoalition.com)

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