

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of)
MusicFIRST Petition Regarding)
the Actions of Certain Radio Broadcasters)
in Opposition to the Performance Rights Act)

MB Docket No. 09-143

**Reply Comments of the
Future of Music Coalition**

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Future of Music Coalition (FMC) respectfully submits these Reply Comments in the above captioned proceeding regarding MusicFIRST's Petition for a Declaratory Ruling Regarding the Actions of Certain Radio Broadcasters in Opposition to the Performance Rights Act.¹ FMC has a long history of supporting the passage of legislation that would establish a public performance right for sound recordings that would ensure that performers are compensated when their work is played over the air, but more importantly we are especially troubled by allegations that artists have been threatened with a loss of airplay as a result of their willingness to engage in a public policy debate. We appreciate the Commission's attention to this important matter.

FMC reviewed the documents filed in the Comments phase by MMF-US, Paul Porter/Industry Ears, Free Press, A2IM and the National Association of Broadcasters. Our Reply Comments address some issues raised in these comments, but also offer a broader perspective on the dynamics between the radio and the music industry, and the FCC's role as the regulatory agent with jurisdiction over broadcast radio.

Over the past decade, FMC has issued a series of reports and public statements concerning the impact of the consolidated commercial radio marketplace on musicians, citizens and the music community as a whole.² These reports have been submitted to the FCC in a variety of proceedings. Much of this work is driven by our effort to understand

¹ "Comment Dates Established for MusicFIRST Petition Regarding the Actions of Certain Radio Broadcasters In Opposition to the Performance Rights Act", Federal Communications Commission, August 7, 2009 http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-09-1773A1.pdf

² Future of Music Coalition, "Same Old Song: An Analysis of Radio Playlists in a Post FCC-Consent Decree World, April 29, 2009 <http://futureofmusic.org/article/research/same-old-song>
Future of Music Coalition, "More Static: Independent Labels and Commercial Airplay 18 Months After the FCC Consent Decree and the 'Rules of Engagement'", October 20, 2008 <http://futureofmusic.org/article/research/more-static>
Future of Music Coalition, "Change that Tune: A Payola Education Guide for Musicians and Citizens", June 12, 2008, <http://futureofmusic.org/article/research/change-tune>
Peter DiCola, "False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry", December 13, 2006, <http://futureofmusic.org/article/research/false-premises-false-promises>
Peter DiCola and Kristin Thomson, "Radio Deregulation: Has it Served Musicians and Citizens?" November 18, 2002 <http://futureofmusic.org/article/research/radio-deregulation-has-it-served-musicians-and-citizens>

and document the impact of the 1996 Telecommunications Act – which led to a massive restructuring of ownership in the commercial radio industry – on musicians and the music community. We’ve also flagged concerns about the emergence of “structural payola” and challenges that many artists have voiced about the difficulties of ensuring their songs are even eligible for consideration for airplay.

While we understand and respect the First Amendment rights of broadcasters, the issues raised in the MusicFIRST complaint regarding broadcasters specifically denying airplay for musicians that support a performance right are serious and deserve the FCC’s attention. Over the years we have alerted the FCC about specific allegations of radio station behavior. These include artists and labels having to hire specific third-party promoters to get radio airplay, or artists being forced to donate time and services to play concerts sponsored by radio stations as a condition of being eligible for airplay.³

If proven to be true, the questions raised in the MusicFIRST petition are particularly troubling: as we review the record, the core allegation is that broadcasters and broadcast groups are colluding to intimidate recording artists to not take a position on a public policy position that directly impacts their livelihoods.

While it can be argued that broadcasters do not have an obligation to play music from artists who the *public* sees as controversial because they may be outspoken on public policy issues (for example, artists who are polarizing or controversial figures because of their endorsement of candidates or other public policy positions), FMC believes this is a very different case – in this instance, only the *broadcasters* deem the musicians’ position as controversial. One of the core tenets of our mission as an organization is the need for artists and the music community to directly engage in the policy process on issues that relate to musicians. We have supported the creation of a public performance right for

³ Future of Music Coalition and others, “Joint Statement on Current Issues in Radio”, October 8, 2003 <http://futureofmusic.org/filing/joint-statement-current-issues-radio-2003>

terrestrial radio for nearly a decade,⁴ and have strongly encouraged our friends and colleagues in the music community to exercise their rights as citizens to educate policymakers about the importance of this issue. If, as alleged, commercial broadcasters have engaged in an overt or implied campaign to threaten artists with a loss of airplay as punishment for expressing their rights as citizens it would be truly shocking and deserving of a full investigation.

In the face of a consolidated commercial radio landscape with a limited number of gatekeepers who are willing to leverage their market power against artists, we again encourage the FCC to take decisive action:

1. The FCC simply needs better data to understand the radio marketplace. To use this proceeding as an example, it is difficult for the FCC to evaluate the validity of the allegations without access to playlist data that could quantify the impact of the alleged retaliation. FMC has made specific recommendations in recent filings about data collection that we would like the Commission to consider.⁵
2. Policymakers have to prioritize policies that address the failure of the radical restructuring of the commercial radio marketplace in the aftermath of the 1996 Telecommunications Act. While we are grateful that the trend toward runaway ownership consolidation has slowed, the allegations in this proceeding serve as a reminder that a healthy radio marketplace will only be achieved when the Commission drafts tangible definitions of localism – principles that would reward local broadcasters for serving their community – and strongly holds broadcasters accountable to those rules.
3. Policymakers also need to expand and protect the noncommercial radio sector. The overwhelming majority of noncommercial and community radio stations are

⁴ “FMC Sends Letter to Senate Commerce Committee in Support of a Public Performance Right for Sound Recordings”, October 19, 2005, <http://futureofmusic.org/filing/fmc-sends-letter-senate-commerce-committee-support-public-performance-right-sound-recordings>

⁵ Future of Music Coalition, “Same Old Song: An Analysis of Radio Playlists in a Post FCC-Consent Decree World, April 29, 2009 <http://futureofmusic.org/article/research/same-old-song>

– by their very nature as small, community-based, nonprofit entities – rooted in the concepts of localism, competition and diversity. As part of its mission, Commission should protect and expand these voices.

Finally, the FCC needs to create a culture where broadcasters, artists and the public fully understand the rules, and know that the rules will be enforced in a clear, transparent manner. FMC believes that one outgrowth of consolidation is a climate where broadcast chains have the power and economic incentive to attempt strategies that were unthinkable in the traditional, locally based radio marketplace. We have called on the FCC to update their payola rules to account for practices in today’s consolidated marketplace, or at the very least, inform Congress of the need for more authority. At the heart of the payola issue is the ability for broadcasters to demand something of value from artists as a condition of being eligible for airplay. We’ve documented how that dynamic has included cash (through the independent promoter structure), free goods and services (via artists being encouraged to donate their time to play concerts promoting radio stations) and now, allegedly, their speech.

We strongly encourage the FCC to investigate these allegations, ideally in a context where they have better access to data and a framework to more broadly consider the relationship between artists and commercial broadcasters in an age of consolidation.

Respectfully submitted,

_____/s/_____
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