



Future of Music Coalition

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April 8, 2002

The Honorable James Sensenbrenner
The Honorable Howard Coble
The Honorable Christopher Cannon
The Honorable John Conyers
The Honorable Howard Berman
The Honorable Rick Boucher
US House of Representatives
Washington, DC 20515

Dear Members:

Thank you for your solicitation to provide suggestions for public policy initiatives related to the complex issues of music and technology.

The Future of Music Coalition (FMC) is a not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. We seek to educate the media, policymakers, and the public about music and technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to some of the challenges in this space.

We believe there are a number of issues that warrant congressional oversight and potential action. We are happy to provide additional background or clarification on any or all of these points.

The Challenge of Consolidation

Artists and citizens are clearly harmed when media companies are able to exert control in such a way that new business models and independent artists are unable to fairly compete in the marketplace. This trend has become particularly evident since the passage of the 1996 Telecommunications Act and can be seen in the following areas:

A. Radio Consolidation

Before 1996, there were limits on the number of stations a single company could own, with two in one market and no more than 24 nationwide. The 1996 Telecommunications Act removed these restrictions. As a result, the radio industry has consolidated to the point where three companies control 60 percent of the stations in the top 10 markets and, in some metropolitan

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areas, only four companies control over 90 percent of advertising revenue.¹ It has also led to some incredible vertical integration in the music industry. The most stunning example is Clear Channel, a Texas company that owns almost 1200 radio stations, marketing companies, syndicated programming, most of the major concert venues, and tens of thousands of billboards.

B. Vertical Integration

We are particularly worried about the trend towards vertical integration of radio stations with other media and entertainment properties such as performance venues. There is increasing evidence that this practice has led to anti-competitive practices such as: the purchasing of placement on valuable playlists, the requirement that artists perform at company-owned venues, the requirement that artists perform for free at radio station sponsored promotional events as a condition of being added to playlists.

C. Major Label System

We are also concerned that the market dominance of the five major international media corporations within the American music landscape leaves independent artists with few choices. To gain access to the most lucrative promotion and distribution channels musicians must first sign standard industry contracts that strip them of their copyrights and lock them into long-term, one-sided deals with low royalty rates. This is a structural devaluation of artistic labor that requires artists to become dependant on structures that are rarely beneficial. This practice has serious implications for artists both inside and outside of the music industry. The system as it currently stands clearly does not benefit the majority of artists and citizens and it should be investigated.

Public Performance Royalty

Given the Committee's desire to harmonize international intellectual property law, the passage of a performance royalty for sound recording broadcast over terrestrial broadcast radio is long overdue. The United States now is the only developed country that does not compensate recording artists and record labels for the broadcast of their performances. This practice must end so that the United States can be in compliance with the rest of the world. Not only does this practice penalize American recording artists by not paying them for their work here in our country, but every other country whose laws pay these royalties refuse to pay US artists the royalties that they earn abroad. The United States is depriving itself of tens of millions of dollars for overseas performances each year because of this policy. It is also important to note that because of the current "pay for play" monopoly in US radio, American recording artists must pay the consolidated radio monopoly (out of their future record royalties) in order to be heard on broadcast radio.

¹ Boehlert, Eric. "Tough Company", Salon.com, May 30, 2001
http://www.salon.com/ent/feature/2001/05/30/clear_channel_employees/index1.html

Boehlert, Eric. "One Big Happy Channel?", Salon.com, June 28, 2001
http://www.salon.com/tech/feature/2001/06/28/telecom_dereg/index.html

This makes the United States the only country in the world where recording artists not only don't get paid for their work being broadcast on the airwaves, insult is added to injury because they must actually pay the broadcasters for access to the public airwaves.

Defining the Digital Future

It is of great concern to FMC that the two dominant industries – radio broadcasters and major record labels – not be the prevailing voices in establishing the rules that determine the parameters of how music can be distributed in the future. The FMC believes that the music and technology industries have acted as industries tend to act – they have attempted to maximize their revenue streams on behalf of their shareholders. This approach neither benefits artists nor music consumers. It is critical that policymakers ensure that artists and citizens have a full voice in all upcoming policy deliberations. It would be a great injustice to allow the same actors who have created imbalanced models in our analog present simply replicate their dominance in our digital future.

We are especially concerned on two fronts:

A. Fair Licensing

Major labels must be required to license their content on fair, non-discriminatory terms to allow new, legal, technology-driven distribution models the opportunity to compete in the marketplace. Care must be taken, however, to ensure that independent artists and record labels are not put at a competitive disadvantage through any unanticipated consequence of federal policy.

B. Protecting Non Commercial Space

The federal government must do everything in its power to both protect and foster non-commercial voices, both in terrestrial radio through initiatives like Low Power FM, and on the Internet through protection of non-commercial and hobbyist webcasting.

C. Level Playing Field

We are also concerned that new laws are being made in regards to digital transmissions may cause or encourage similar consolidation in the nascent Internet broadcasting space. The fact that laws regarding the creation and destruction (and the reporting thereof) of ephemeral copies are not in accord with the technical realities of webcasting is an example where the best intentions regarding the collection and payment of digital royalties may also lead to prolonged struggle for small webcasters and give great advantage to those webcasters who are vertically integrated with music labels.

Direct Payment of the Digital Royalty

One clear success story from the past year is the negotiation that led to structural reform of SoundExchange. According to the agreement the 45 percent share of the non-interactive digital royalty collected under the terms of the statutory license will be paid directly to the featured artist without flowing through the artist's record label first. We

support all efforts to encourage Congress to formalize this technical clarification by writing the direct payment of the artist's share of the non-interactive webcasting royalties to artists into law.

Reversion Rights

It is estimated that 75 percent of the back catalog copyrights owned by major record labels are currently out of print. This practice reduces artists' ability to make a living by functionally removing their essential right to make their work available for sale. We therefore reiterate our suggestion for the creation of a new statutory license for sound recording copyright that would allow artists to automatically license their out of print catalog from record labels at a fair and publicly-negotiated rate.² Under this scenario, artists would be able to increase revenue by keeping their catalog in circulation in all lucrative forms. Labels would share in the proceeds of this licensing opportunity and citizens would benefit from a wider diversity of available music. The establishment of a limited reversion right is a small but tangible step that would immediately benefit hundreds of artists.

Thank you again for inviting us to participate in this process, and we look forward to the opportunity to provide any further information or data that the Committee would deem helpful.

Sincerely,

Jenny Toomey, *Executive Director*
Michael Bracy, *Director of Government Relations*
Walter McDonough, Esq., *General Counsel*
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² "Online Entertainment and Copyright Law: Coming Soon to a Digital Device Near You"
Submitted by the Future of Music Coalition to the Senate Judiciary Committee, April 3, 2001
http://www.futureofmusic.org/news/FMC_testimony_4.3.01.pdf