

Favorable Performance Rights Process Continues

Today the Senate Judiciary Committee approved the Performance Rights Act (PRA) as amended by Chairman Leahy (see attached amendment, and also the attached underlying bill which it amends). Today's amendment included several changes that are favorable to Internet radio services, and we expect more favorable changes before this bill is considered by the full Senate.

General Royalty Standard: Chairman Leahy's amendment incorporates into the bill the general royalty standard that DiMA agreed to have included in the House version of the PRA. Replacing the willing buyer-willing seller standard with the first three factors in the current 801(b) standard should result in substantially improved royalties for Internet radio services.

Songwriter Protection Provision: Today's amendment substitutes the House legislation's songwriter protection provision for the Senate's original provision, which is a step backward for DiMA and all PRO licensees because the House version more affirmatively permits PROs to use (in rate court) evidence of sound recording performance royalties to argue for increasing composition royalties, while prohibiting licensees from using evidence of sound recording royalties to argue for decreasing composition royalties. However, Senator Feinstein (who is convinced that DiMA concerns about this provision are reasonable) stated in the markup that she is dissatisfied with this provision and would like to keep working on it. Chairman Leahy agreed that work should continue on this provision, and outside the hearing room several representatives of the MusicFirst coalition acknowledged that DiMA (over ASCAP and BMI objections) is likely to prevail on this provision in the final bill.

As we discussed on Monday's membership call, DiMA faced off against songwriters, publishers, PROs and the MusicFirst Coalition in Senator Feinstein's office on Tuesday. DiMA was supported by lobbyist Alan Wheat representing Pandora, SiriusXM's General Counsel and Associate General Counsel, and MusicChoice's General Counsel and outside counsel. The meeting lasted over two hours and Senator Feinstein participated for about 45 minutes.

Songwriters/PROs conceded that the legislative "protection" provision gives them both a shield and a sword, but argued that they need special evidentiary rules to support arguments for higher royalties because musical work performance royalties are so low and litigation takes so long and the consent decree stacks the deck against PROs and songwriters. In contrast, licensees effectively argued that current law has effectively protected songwriters as Congress intended (as no licensee has ever utilized sound recording royalty data to argue for lower musical works royalties); that the proposed provision is unfair; that it amends the Federal Rules of Evidence in a way that violates due process; and that consent decree concerns can be addressed directly through amendments to the decree (not by legislation).

The result of the meeting was Senator Feinstein's favorable statement this morning, and the assurance of continuing discussions (and likely changes) before this bill is considered by the full Senate.

Small Webcaster Royalties: As expected, today's amendment imports the House bill's small broadcaster royalty discounts, but also adds a fourth tier of small broadcasters with capped royalties. The Senate bill tiers now are as follows:

<u>Revenue under</u>	<u>Royalty</u>
\$50,000	\$100
\$100,000	\$500
\$500,000	\$2,500
\$1,250,000	\$5,000

Today's amendment was silent on extending these discounts to small webcasters, but once again Senator Feinstein was very helpful, as she said in her statement that "parity and fairness require the same discounts for small webcasters." In response Chairman Leahy "urged" Senator Feinstein to keep working on a small webcaster provision.

Ephemeral Recordings Relief: After several years of DiMA documenting the unfairness of webcasters being required to pay an ephemeral reproduction sound recording royalty (which was set at an additional 8.8% of the performance royalty in the first webcasting royalty arbitration), the Senate Judiciary Committee has responded by including in today's amendment a provision which eliminates the CRB's authority to impose an ephemeral recording royalty in addition to the underlying performance royalty. (You may recall that the Copyright Office has characterized webcasters' ephemeral recording royalty obligation as "aberrant" and former House Subcommittee Chairman Howard Berman suggested it be eliminated.)

Section 7 of the attached amendment, relating to ephemeral reproductions, directs the CRB to set the ephemeral reproduction royalty at 5% of the performance royalty, and the amendment is intended to have that 5% be taken from the amount of the performance royalty rather than be in addition to the performance royalty. This solution was agreed to by RIAA and the entire SoundExchange Board, but we just received this amendment language yesterday and we are not confident that it clearly accomplishes the stated goal. Accordingly, we encourage you to review this section in detail and to provide Lee Knife with drafting suggestions.

For Muzak and other business music services that are exempt from the performance royalty, Section 7 is intended to make no changes to the status quo. Please let us know immediately if your review does not conclude that it maintains the status quo.

Next Steps: As you know, the Performance Rights Act still faces an uphill climb in order to be enacted into law. Over the next few weeks we expect artist and label representatives will be working furiously to develop a successful floor strategy with House and Senate leadership, including by figuring out what

“must pass” bill the PRA can be attached to so there is not a separate vote on the PRA. Simultaneously proponents will use floor strategy progress as a way to increase pressure on broadcasters to negotiate and accept the PRA, and proponents will also be working with DiMA and other parties to resolve issues such as those we have raised.

General Royalty Standard: Though both the House and Senate bills include the form of 801(b) royalty standard that DiMA has agreed to, the issue of Internet radio’s royalty standard is not finally resolved. As SiriusXM and MusicChoice push to reinstate the fourth (non-disruption) factor into the 801(b) standard, RIAA will argue that its inclusion requires that Internet radio and broadcast radio return to willing buyer-willing seller standard. We will fight hard against this suggestion by arguing that any royalty increases SX was expecting from the new SiriusXM/MusicChoice standard are more than offset by the new royalties generated from broadcast radio.

Songwriter Protection Provision: Senator Feinstein’s counsel has asked DiMA and licensees to generate additional political and substantive support for Senator Feinstein’s position, including perhaps from experts who specialize in evidentiary rules or due process, and experts who focus on copyright/antitrust and perhaps the ASCAP and BMI consent decrees. We are working on this and welcome your suggestions.

Small Webcaster Royalties: Senator Feinstein has proposed that the Senate bill’s small broadcaster royalties be simply extended to small webcasters, and DiMA has independently made a proposal to RIAA/SoundExchange (attached) which differs from the Senate bill in only two respects: (i) DiMA’s smallest revenue category covers webcasters under \$12,500 and suggests a royalty of \$50, while the Senate bill’s smallest category covers broadcasters under \$50,000 and sets a royalty of \$100; and (ii) DiMA’s proposal included ATH limits for each category of small webcaster. We have been told that RIAA will send a counteroffer within two weeks.

Ephemeral Recordings: Lee Knife has requested a meeting with SoundExchange/RIAA counsel to discuss the drafting of this provision. Please send Lee your questions and suggestions.

* * * *

As always, please let us know if you have questions or suggestions regarding the substance or politics of the Performance Rights Act or any individual provision.

Best regards.