

Not surprisingly, enacting the PRA in America would have far-reaching—even global—ramifications

Performance Royalties: The Letter Of The Law

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'If the United States passes the PRA and subsequently becomes a signatory to the Rome Convention, U.S. performers and labels will likely reap new international performance royalties—but only from our most robust trade partners.'

the Performance Rights Act, a controversial bill supported by performers and record labels and excoriated by terrestrial radio, will be considered by Congress in 2009. If passed, the PRA would end terrestrial radio stations' exemption from copyright laws requiring satellite radio, webcasters and cable radio broadcasters to pay royalties for the broadcast of sound recordings.

Artists and labels argue that they can no longer depend on a causal link between airplay and commensurate sales of the recordings that are broadcast and that airplay's promotional value has decreased as fewer recordings are sold. Terrestrial broadcasters argue that due to brutal competition for advertising revenue, they cannot afford to pay these new royalties. Broadcasters point out that recent decreases in record sales are largely attributed to consumer theft of recordings and are not caused by radio broadcasters.

PRA advocates have long argued that its passage would provide important parity and fairness among music broadcasting platforms and among nations.

Parity Among Platforms

Among those who argue for "parity among platforms" is Marybeth Peters, Register of Copyrights with the U.S. Copyright Office. Testifying at a House subcommittee hearing, she argued that radio broadcasters should no longer receive "an exemption from the performance right from sound recordings," primarily because of the need to provide parity among "commercial competitors who depend upon the use of sound recordings" to attract listeners and revenue. She notes that the promotional value of airplay that once existed only in terrestrial radio has been diluted by increased competition among new forms of media. Terrestrial broadcasters retort that largely due to that same competition to which Peters refers, terrestrial radio is in less of a position than ever to dole out new royalties.

Parity Among Nations

PRA proponents say that the United States is one of few industrialized countries that don't recognize performance rights for sound recordings. As Peters notes, with respect to the lack of financial remuneration for terrestrial broadcasts of recordings, the United States "stands out as the most prominent industrialized country without this protection." In most countries, broadcasters pay royalties to artists and producers.

Almost all countries are signatories to an international treaty called the Rome Convention. Peters argues that such countries recognize that "more often than not, a performer is the reason for the popularity and endurance of a particular musical recording."

The Rome Convention, in force since 1961, is the only international treaty specifically governing performers' rights in sound recordings. Eighty-six countries including Great Britain and France are now signatories. More than 100 nations are not signatories, the United States most prominent among them. In this reciprocal treaty system, only those performers and owners of sound recordings that are nationals of a Rome Convention member country receive performance royalties from other member countries.

Many PRA proponents assert that the United States' failure to become a signatory collectively costs U.S. performers and labels a significant amount of money annually and that this international revenue stream cannot be tapped unless the United States becomes a signatory.

Article 12 of the Rome Convention specifies that performers and owners of sound recordings are entitled to be paid for the broadcast of their recordings. If the United States were to become a signa-

tory, it would be required to adopt laws that create rights for artists and labels to collect royalties for sound recordings broadcast on terrestrial radio. If the PRA passes, the United States could at last sign the Rome Convention.

But some ask, "Why bother?" Almost all portions of the Rome Convention are incorporated into another important treaty to which the United States became a signatory in 1995: the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). This provides minimum standards for many forms of intellectual property regulation. Thus, some argue that it is not necessary for the United States to adhere to the Rome Convention because we already enjoy TRIPS' broader protections. However, while TRIPS adopts almost all the Rome Convention's standards, it does not adopt Article 12, the provision creating performance rights in sound recordings that are broadcast. Thus U.S. performers and labels can seek royalties only for sound recordings broadcast internationally if the United States adopts the Rome Convention.

Media attorney Mathew DelNero argues that even if the United States were to sign the Rome Convention, U.S. performers and labels may not reap significant revenue through the collection of new international royalties. Under the terms of Article 12, a signatory country may, at the time of signing, or anytime thereafter, "opt out" of Article 12 while still adhering to the rest of the treaty. Because the United States exports far more sound recordings than any other country in the world, if it becomes a Rome Convention signatory, many member countries would immediately face a huge outflow of new royalties to the United States. Any heavily importing member country would then owe far more to the United States in performance royalties than it would reap in royalties related to recordings made in its own country. Such a country would likely opt out of Article 12. Because U.S. artists and labels wouldn't collect any performance royalties from nations that "opt out" of Article 12, the argument for having the United States become a signatory is thereby significantly undermined.

However, not every country adhering to the Rome Convention imports far more recordings than it exports. Several countries including Great Britain and France have robust recording industries and have long recognized a right of public performance in sound recordings. Such countries have a significant interest in collecting performance royalties from countries besides the United States. Because these countries have money to lose by opting out of Article 12, they would likely refrain from opting out even if the United States became a signatory. Thus, by continuing to refuse to become a signatory to the Rome Convention, the United States likely sacrifices performance royalties that it would otherwise reap from countries that enjoy robust recording industries. If the United States passes the PRA and subsequently becomes a signatory to the Rome Convention, U.S. performers and labels will likely reap new international performance royalties—but only from our most robust trade partners. **R&R**

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