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The NAB's New Tack On The PRA

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Despite the fact that things on the Performance Rights Act (PRA) front remain quiet down on Capitol Hill, talk about the PRA has been burning up the trade press and the blogosphere lately. The reason? Reports that the National Association of Broadcasters (NAB) sat down with representatives from the music industry to discuss, among other things, the question of performance rights. Throw in a statement from an NAB spokesman alluding vaguely to “possible alternatives to pending legislation” (*i.e.*, presumably, the PRA), and you’ve got the grist for a blog-tastic free-for-all in which anybody and everybody has an opinion, even though most lack a complete picture of exactly what might be going on.

We have done our fair share of writing on the PRA (both in the *Memo to Clients* and on www.CommLawBlog.com), but it’s been a while. In the midst of the recent *sturm und drang*, it might be useful to clarify what we know and what we don’t know before the chatter gets out of hand.

Here’s what we know:

The PRA (H.R. 848 and S. 379) was introduced in Congress over 18 months ago. While H.R. 848 passed the House Judiciary Committee soon after introduction, neither bill has moved forward since. This is largely because there are more than 260 House Members on record as opposing a performance right applicable to over-the-air broadcasts. That’s a strong level of opposition – a factor which can be ascribed at least in part to a substantial lobbying effort by the NAB and broadcasters generally. Basically, despite years-long, high-profile efforts by the recording industry to secure some form of legislative relief on the performance rights front – efforts which have gained support from a number of influential legislators – the bill has been stalemated. That may be viewed as a success story for broadcasters.

But now the NAB appears at least to be considering compromise on the issue. Note that the NAB has *not*, to my knowledge, said that it *will* compromise on this issue, now or in the future. To the contrary, an NAB spokesperson has been quoted in the trade press as saying that the NAB has “reiterated its strong opposition to the pending bill in Congress”.

But – and here’s a big “but” – the NAB *has* acknowledged “an ongoing dialogue with the Board and NAB membership on possible alternatives to pending legislation that would be devastating to the future of free and local radio . . . while agreeing that it is appropriate for NAB representatives to continue discussions with musicFirst.”

According to published reports, those discussions have centered on:

- © a permanent, tiered royalty rate which would not exceed one percent of net revenue for any broadcast permanent removal of Copyright Royalty Board jurisdiction over terrestrial and streaming royalty rates;
- © a reduction in those streaming rates;
- © the possibility of requiring radio chips to be installed on all new mobile phones; and
- © resolution of all ongoing issues regarding insertion of commercials into webcast.

Here’s at least some of the stuff we *don’t* know:

- © Would the tiered rate in the proposed agreement apply to royalties for over-the-air performances only or to over-the-air *and* internet/digital performances?
- © If the tiered rate were to apply only to over-the-air, how would the adjustment of internet/digital royalty rates occur? Would the reduction in streaming rates also be permanent?
- © If the CRB were to end up with no jurisdiction over terrestrial or streaming operations, but there was still some statutory license applicable to performances, who would oversee and implement it, especially if the rates aren’t permanent?
- © Would performance to a mobile phone with a radio chip be considered an over-the-air performance or a digital transmission (webcast)?

Obviously, these are all factors which could dramatically affect the extent to which any compromise might work to the benefit of broadcasters in the long run. It would therefore help to have a better handle on them – and many others – before we all start debating the wisdom of the NAB’s approach here.

Too late. That debate has already started.

Many broadcasters and their allies are expressing serious concern about *anything* that

might be interpreted as a retreat on performance rights issues, and certainly NAB discussions with musicFirst (or any other recording reps) could be seen as a retreat. After all, broadcasters have incredibly strong arguments here, arguments which they have brandished effectively. The mere contemplation of “alternatives” to the PRA suggests that the notion of *any* performance rights might be valid – and broadcasters (including the NAB) have argued convincingly that that notion is *not* valid.

Moreover, the argument goes, since when does it make sense to run up the white flag when you’re winning? If anything, the broadcast industry’s track record on the PRA front in Congress has been remarkably good. If you’ve got the enemy on the run, why try to negotiate a truce?

And finally, even if the NAB is on the right track here, some broadcasters question why the NAB hasn’t been a bit more forthright – “transparent”, to invoke a favorite FCC descriptive – with them. Having faithfully followed the NAB in its staunch resistance to the PRA, many feel seduced and abandoned upon hearing that the NAB may be getting in bed with the bad guys. This is especially so in view of the fact that many small radio licensees, in particular, may legitimately fear that any performance rights royalties could have a devastating effect on their bottom lines. Why shouldn’t they feel bitter and resentful if it looks like the NAB is now helping those fears become a reality?

While these broadcasters’ views are understandable and while I agree with their calls for transparency, let’s not lose sight of the fact that there may be some method to the NAB’s seeming madness. In particular, at the risk of appearing to defend the PRA (or any other performance rights claim) – *and let me stress here that I am NOT defending or endorsing anything of the kind* – I think a couple of things should be considered.

Are broadcasters’ arguments against performance rights claims valid? Of course they are. Will they stay that way forever? That’s impossible to say. Historically – up to and including today – performers and radio broadcasters have enjoyed a quasi-symbiotic relationship which has benefited both sides, thus eliminating any need for the strict debit-and-credit accounting called for by the PRA. But like it or not, technology and demographics and society all change. Let’s not forget that the FCC is pushing more and more insistently on the expansion of Internet capacity to serve as a common medium.

Suppose over-the-air radio listenership decreases and online listenership continues to increase (in part because people are listening via Internet in their cars or on their phones). And suppose that, in response, broadcasters shift their focus to more Internet-centric operations. And finally, suppose that a compromise is struck providing that performances to a mobile phone are to be considered digital transmissions (a/k/a “streaming”), rather than over-the-air broadcasting.

If the NAB were able – today, in advance of those changes – to reach an agreement with the recording industry that, in exchange for, say, 1% of net revenues for *over-the-air* performance royalties, royalties for *streaming* would be reduced significantly, that could be a boon for broadcasters in the foreseeable future. And if that decrease in streaming royalties were locked in for the long term, during which time over-the-air listenership continues to decrease and online listenership continues to increase – well, I’m not an economist, but I can envision that situation actually leading to an overall decrease in royalty rates over the long term.

What about calling a truce when the enemy’s on the run? The critics are right: it normally does not make sense to do that. But that’s not necessarily the situation we have here. What we have is more like a siege. Neither side is on the run; rather, both are deeply dug in for the long haul. Can broadcasters sustain the siege? Probably. Can the recording industry? Probably.

And that’s precisely the problem.

A siege is expensive in many ways. It chews up resources and creates distractions that may impede progress in other arenas. And it goes on and on and on. In this case, the broadcast industry as a whole has spent, and continues to spend, an enormous amount of “political capital” in rallying legislators to its anti-PRA cause. In so doing, however, the industry has almost certainly lessened its ability to convince those same legislators to back other pro-broadcast measures. And that political capital is being spent *not* in a way which puts a permanent end to the threat, but rather in a way which merely tends to perpetuate the stalemate.

In these circumstances, it might make sense for broadcasters to take advantage of the leverage that their current superior position gives them to try to devise an endgame strategy that looks to the future. After all, there’s no doubt that the more than 262 co-sponsors of the Local Radio Freedom Act give the NAB a strong bargaining position.

To be sure, the NAB’s less-than-inclusive approach leading up to its initial talks with the recording industry has alienated a number of its erstwhile supporters. That alienation is regrettable. However, negotiations have to start somewhere, and often they require initiative from one or two players to get the ball rolling. Perhaps that’s what’s going on here. But the NAB disserves its members when it consults only with a select group on an issue of this magnitude, as it appears to have done to this point. If momentum builds, the NAB must, voluntarily or otherwise, find ways to include a more representative universe in the discussions (if you take one thing away from my particular take on the subject, I hope it is my call for increased transparency in the process and inclusion of “the little

guys” that might be the most affected by these changes).

So yes, there’s a lot of buzz about the possibility of a brokered resolution of the PRA impasse. And yes, it’s easy to see why many broadcasters may view that possibility with considerable alarm. And yes, very few of us currently know exactly what has been done, said or offered – by either the NAB or the recording industry – much less how any such discussions will ultimately shake out.

Two things that we do know for sure are that (a) we don’t know very much of what is actually happening here, and (2) none of us can be sure of precisely what the future holds for any communications operation in this era of dramatic technological change. Because of that, it may be best to keep an open mind for the time being, with eyes fixed firmly, if warily, on the future in the broadest sense.