Insight
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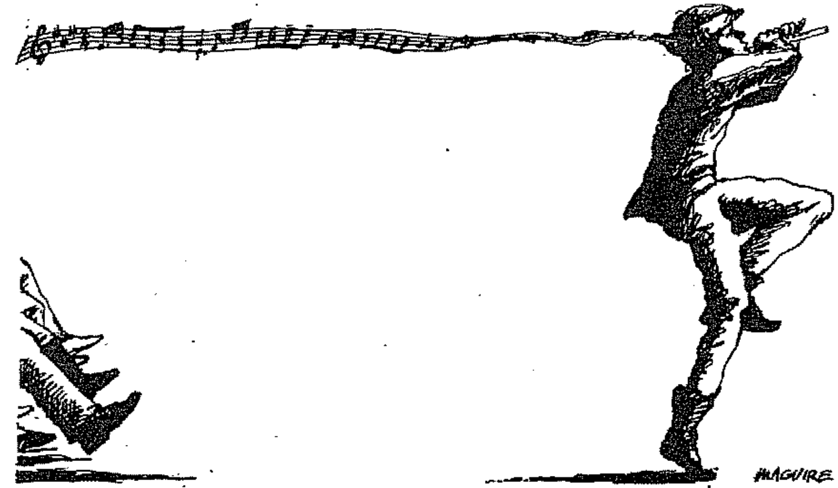
ENTERTAINMENT LAW

# Time to Pay the Piper




By Paul Menes

I have it on very good authority that the Pied Piper's performance (I've been an entertainment lawyer for a long time) is what enticed the rats to follow him out of Ireland. (He got the gig because U2 was on tour.) The services of this performer were invaluable to the people of Ireland. On the other hand, the rats weren't so happy. The piper was compensated handsomely for his performance services. If the technology existed, he no doubt would have recorded the song, it would have been played on radio and he would have collected additional performance income as a performer each time it played.

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Most cultures have always paid their performers. Sometimes they were paid through patronage, such as Mozart and other famous composers and artists, and more recently, through mechanical and performance income. But there remains one major holdout among those who believe our artists and performers shouldn't be compensated for their unique and valuable talent — U.S. terrestrial radio.

U.S. copyright law provides for performers, artists and others to be paid performance royalties for digital transmissions. Terrestrial radio stations throughout Europe and in most of the rest of the industrialized world have paid performance royalties to artists and performers for many years. It's time for radio here to likewise compensate artists and performers for the very product that allows it to be in business, attract advertisers and generate revenues.

There is currently legislation before Congress called the Performance Rights Act. It proposes to require terrestrial radio here to pay performance royalties to artists, performers and record labels for every song played on the air. Naturally, the primary opponent of the bill is the National Association of Broadcasters, which continues to advocate what I believe are fallacious arguments to maintain the status quo and to deprive artists and performers of this revenue stream.

The National Association of Broadcasters argues that the amount of performance royalties they would pay under the act is far outstripped by the financial benefits they provide to artists, performers and labels from airing their recordings. They cite the opinions of several record company artist and repertoire executives that the most effective promotional tool to establish new artists and allow established artists to continue to sell records is radio airplay. They also say that as a result, these artists are able to tour, sell merchandise, get song placements and obtain other ancillary revenue cumulatively amounting to millions. Lastly, because the act would also pay the labels as master owners, radio points at the rotten shape the U.S. record business is in for failing to acknowledge the elephant in the room — the digitization of music and the choices it gives the consumer — and radio's contention that it shouldn't have to bail out the record industry.

However, radio isn't in the business of selling music. It's in the business of selling ads. It's able to attract advertising because it plays music. If the program directors make good choices about the music they play, the stations are able to command more ad revenue, all without paying for what attracts it.

Radio's arguments appear to be both ridiculous and untenable. It's easy to see why if compared to the restaurant business. Let's say the National Association of Broadcasters owned a restaurant called "Controlled Spin." It would likely allege that it did not have to pay its food suppliers because people ate at Controlled Spin as a result of how the food was prepared and presented, not because of the food or its quality, even though the menu and wait staff highlighted it (free range chicken, exotic fresh seafood, hand-massaged beef and the like). It'd likely make the same argument to its liquor suppliers, alleging people drank at Controlled Spin because of the atmosphere, décor and background music (which, of course, the National Association of Broadcasters would have to pay for to play there) and not because it served any particular brands of booze.

That the record companies would realize increased revenues from such a performance royalty is something that doesn't sit well with lots of people in the music industry. But passage of the act wouldn't bail the record companies out of the horrible financial condition that the majors and many of the independents are in. It's a convenient argument for radio because it allows it to deflect attention away from the core issue here — the huge financial detriment to artists and performers from the lack of such a royalty.

While radio stations outside the U.S. do pay performance royalties to artists and performers, they don't pay any to U.S. artists and performers because of the lack of reciprocity with radio here.

Radio's arguments also ignore a very pertinent fact. The radio industry is in equally bad, if not worse, shape than the record industry. Most U.S. radio groups expanded aggressively in the recent past when financing was available — debt financing. As a result, they are almost wholly capitalized by debt. But there is one likely benefit to radio from the current economic environment. I believe banks would rather restructure this financing than own radio's now less valuable assets. I don't see banks or other financial institutions lining up to do this with the record industry. I'm amazed the National Association of Broadcasters' lobbyists and advocates can keep a straight face when they allege they shouldn't be bailing the labels out, when the status quo makes artists and performers at least partly responsible for bailing radio out.

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Radio also alleges that such a performance royalty would drive many smaller stations out of business, which are stations that often break new artists, and would force some stations to switch to more lucrative formats, such as adult contemporary and to limit playlists, thereby depriving listeners of musical diversity. If that's true, what's been the reason over the last several years, even before the recession, that radio has greatly limited playlists and regularly switched to what it perceives to be more lucrative formats? One thing has remained consistent, though. U.S. terrestrial radio has fought prior attempts to pay performance royalties to artists and performers with the tenacity of a post-Grammy party crasher.

Instead of campaigning and paying lobbyists (which tends to be very expensive) to advocate their position, the National Association of Broadcasters should sit down with the label and artist groups and hammer out a performance royalty system that, while it wouldn't make everybody happy, would be viable for all concerned and stop depriving artists and performers of revenues here and abroad. Radio can't exist without the pipers. They deserve to be paid.

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