

Bill tackles so-called new piracy frontier

A new House bill seeks to further protect the music industry from piracy by limiting the ability to record digital radio broadcasts, singling out satellite radio industry competitors XM Radio and Sirius.

If approved, it would create parity among satellite, cable and Internet radio services in terms of rate setting and content protection standards, while excluding terrestrial broadcasts.

The bipartisan legislation called the Platform Equality and Remedies for Rights Holders in Music Act of 2006 or Perform Act introduced Friday comes from Democratic Rep. Howard Berman and Republican Rep. Mary Bono, both of California.

Last month the Senate version of the bill was introduced by Dianne Feinstein, D-Calif., and co-sponsored by Bill Frist, R-Tenn., Joseph Biden, D-Del., and Lindsey Graham, R-S.C.

The act would address Section 114 of the Copyright Act on the issue of compulsory licenses given to satellite services, which legislators and proponents of the bill say are designed for listening-only services -- not recording.

Bill proponents are concerned that new portable devices allow consumers to record, sort and store digital broadcasts, resulting in them turning these broadcasts into downloads and creating an unlicensed music library without adequately paying the artist.

Thus, they argue that such service is bypassing the marketplace, hoping the new legislation will base all digital media broadcasters on a fair market value rule.

"When I see a device that permits consumers to identify the specific tracks they want from a satellite broadcast, record them and library them for future use, I call that device an iPod and I call the satellite service making that device available a download service," said Warner Music Group Chief Executive Officer Edgar Bronfman told Congress at an April 26 hearing. "What is clear to everyone is that these services no longer resemble and will increasingly stray from our collective understanding of what constitutes a traditional radio service."

And the Recording Industry Association of America has endorsed such proposals arguing that satellite radio services should be required to obtain a license in the marketplace to offer the capability for consumers to choose individual songs and store them to a digital library.

According to the RIAA, legislation like the Perform Act is "needed to ensure that satellite services play by the same set of rules everyone else does and not profit from becoming a download/subscription model without acquiring the appropriate license and compensating artists and songwriters."

It similarly supports content protections placed on HD radio as it makes its transition to mainstream, noting that Rep. Mike Ferguson, R-N.J., introduced a bill that requires users of free government spectrum to protect content delivered through HD radio receivers via private market agreements.

Still, businesses and advocacy groups share mixed feelings on the act.

XM Chairman Gary Parsons said in his testimony before Congress that the act "would unfairly change the rules governing the upcoming royalty rate arbitration" between satellite-radio companies and the recording industry by taking away the 801 standards. Negotiations are currently under way to set royalty rates for the next five years.

He also said if passed it could even lead to a new tax to be imposed on subscribers.

Parsons maintains that XM's products, service and licensing agreements are within the statutory framework of the Audio Home Recording Act and the 801(b) standard of the Copyright Act, which governs performance license under section 114.

Under the standard, a specific formula for performance royalties is put forth taking into consideration technological contribution, capital investment, cost, risk and contribution to the opening of the new market.

Moreover, Parsons called such legislation "device-crippling," comparing XM's new product XM2GO and future devices XM Helix and Inno players to that of TiVo.

For XM2GO, the company provides five hours of programming, seeing the device as the functionality as what TiVo did for the VCR without providing subscribers with a programming guide; while XM Helix and Inno players are next-generation devices that allow subscribers to record content in addition to storing songs from their personal music collection, or bookmark a song they enjoy to purchase later by CD or Napster to be directly downloaded on their device, according to Parsons.

Devices that would record HD Radio programs and even current FM programs would be unaffected by this bill, the XM rep pointed out.

Chair Gary Shapiro of the Home Recording Rights Coalition released a statement last week saying that the Perform Act would stifle innovation and "take away recording rights that consumers have used since the birth of the magnetic tape 50 years ago."

"Because the bill does not allow a 'transmission' of a musical recording, it also would appear to block consumers from moving one song from one room to another within their own homes via a digital network," he said.

Fred von Lohmann, senior intellectual-property attorney for the Electronic Frontier Foundation, has also pointed out that a provision in the bill would require music Webcasters to use DRM-laden streaming formats rather than MP3 formats.

As Lohmann notes, MPR streaming format is used by Live364, Shoutcast and other smaller Webcasters such as Santa Monica's KCRW and Seattle's KEXP as well as streaming radio stations included in iTunes.

"If the PERFORM Act becomes law, Webcasters who use the statutory SoundExchange licenses to play music would have to give up MP3 streaming in favor of a DRM-restricted, proprietary formats that impose restrictions on any recordings made," he wrote April 16 on the EFF blog "Deep Links."

Both bills have currently been referred to each House's Judiciary Committee.

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