

By Joseph E. Magri

Internet Radio and the Future of Music

The streaming of digital music is creating a host of new challenges for attorneys

In recent years, the music industry has faced a series of challenges posed by the development of digital audio technology.¹ The latest challenge, which has emerged from the growing popularity of the Internet as a means to experience music, is the process of streaming music over the Internet—commonly known as Webcasting or Internet radio. In order to appreciate the potential impact of Internet radio, it is helpful to understand that this medium has the ability to venture far beyond the at-home personal computer. With advances in wireless technologies (such as wireless fidelity or Wi-Fi, which offer wireless broadband) and mobile entertainment options (which offer Internet content on mobile devices), Internet radio will become widely available on mobile phones, PDAs, special digital audio receivers, and other portable devices. Consequently, Internet radio is positioned to play a significant role in the future of music and is already creating new challenges for lawyers.

Internet radio will affect the music industry in a variety of ways. To begin with, Internet radio has the ability to fundamentally change the way music is promoted and exposed to consumers. Traditional wisdom holds that conventional broadcast radio airplay translates into music sales. In order to obtain airplay, however, record labels participate in a pay-for-play system in which they pay so-called independent promoters to influence radio airplay, thereby skirting federal anti-payola laws. Record labels annually pay such promoters approximately \$150 million, which is typically recouped from artists' royalty earnings.

Assuming a pay-for-play system is not adopted by Internet radio, several positive changes can result. The most obvious is that all record labels will have access to Internet radio, not only those with large promotional budgets. In addition, programmers will regain the power to decide whether to play a particular song based on merit, not financial influence. A merit-based system has the added benefit of exposing a broader range of new music to a greater number of people, which in turn can foster the development of new talent. Moreover, record labels will be able to realize a savings on promotional costs and, hence, artists should be able to retain more of their earnings.

Internet radio will also provide an important new revenue stream for record labels and artists as well as for songwriters and music publishers. Currently, record labels and artists do not earn royalties when conventional AM/FM broadcast radio stations play copyrighted sound recordings. Under the Digital Performance Right in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998, however, sound recording copyright owners have the exclusive right to publicly perform their copyrighted sound recordings when performed by means of a digital audio transmission. This means that record labels and artists now earn royalties whenever their copyrighted sound recordings are streamed over the Internet or digitally trans-

mitted over satellite systems and cable networks. Similarly, music publishers and songwriters earn royalties when their copyrighted works are played by digital means. Therefore, the widespread adoption of Internet radio will result in a significant new source of income for record labels, artists, music publishers, and songwriters.

Internet radio engages music consumers in ways that no current media can begin to simulate. Internet radio combines audio, visual, and text-based content to enhance the individual listening experience. For example, Internet radio Web sites display the title of the song, the name of the album, and the featured recording artist while each song is played. Many sites also provide a picture of the album cover artwork and include a Click-to-Buy button from which a listener can sample and purchase the album being played. These features make it easy for consumers to instantly pursue an informed purchase, which can lead to greater consumer satisfaction and increased purchases. Internet radio also offers greater overall variety and provides an alternative to the tightly programmed broadcast radio station playlist. These examples only begin to unearth the new and creative ways that Internet radio can enhance consumers' listening experience and counter slumping music sales.

Whenever law and technology lurch forward at an unequal pace, lawyers face new challenges—and the emergence of Internet radio is no exception. Some of the challenges that Internet radio has created include navigating the uncertainty in the laws governing the streaming of copyrighted sound recordings over the Internet, relying on domestic and foreign laws that do not address digital rights management and piracy issues adequately, contending with technological advances that outpace legislative efforts, and complying with legal mandates that are technically challenging, financially prohibitive, or otherwise onerous. In order to effectively address client concerns in light of such challenges, lawyers need to keep abreast of new technology, closely monitor legislative developments, and, in a number of cases, manage risk without the benefit of legal precedent. ■

¹ See Joseph E. Magri, *New Media—New Rules: The Digital Performance Right and Streaming Music under the New Order*, 5 VAND. J. ENT. L. & PRAC. (forthcoming Winter 2003).



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