Terminating Music Licensing Consent Decrees Would Create Chaos in the Marketplace

The issue:

The Department of Justice (DOJ) recently initiated yet another review of the critically important antitrust consent decrees that underpin much of the music licensing marketplace. Television and radio broadcasters strongly oppose any significant modification or termination of these decrees, which would upset the balance Congress strived to achieve in the 2018 Music Modernization Act (MMA).

Here's why:

The two largest performing rights organizations (PROs) – ASCAP and BMI – license public performances of songs to virtually every venue and music platform in the United States. The music you hear on your favorite television show, during the broadcast of live events, on the radio, at a store or restaurant or through your favorite customized stream are all licensed through these PROs.

To comply with copyright laws, broadcasters and others obtain licenses from ASCAP and BMI (in addition to two unregulated organizations, SESAC and GMR) to play the songs the PROs control. These licenses can cover all the works in each organization's repertoire and provide a more efficient way to obtain necessary public performance rights than negotiating with every copyright owner individually. Despite that efficiency, however, collective licensing practices raise significant antitrust concerns that have long been recognized by the Supreme Court.

The catalogs of ASCAP and BMI cover more than 90 percent of the market for musical works performances. To ensure they operate consistently with antitrust laws, the DOJ entered into antitrust consent decrees that provide these organizations the ability to conduct business in a fair, efficient and equitable manner to benefit both songwriters and licensees. As a backstop, there are federal courts to oversee the PROs' behavior and decide rate disputes between ASCAP and BMI and any entity wishing to license their songs. The decrees have paved the way for efficient licensing, benefiting consumers, licensees and songwriters for decades. Given the rapid changes in the music licensing marketplace, they are more important today than ever.

In 2016, after a thorough, multi-year review based on an extensive public record, the DOJ rejected proposed modifications from ASCAP and BMI that would weaken the consent decrees and reaffirmed their fundamental protections. Recently, despite no discernable changes in the marketplace, the DOJ again initiated a review of these decrees and has signaled a strong interest in terminating them.

Terminating the consent decrees without an effective alternative licensing framework in place would bring chaos to the music marketplace, threatening the availability of music to consumers on every platform and in every venue across the country. This is why Congress included explicit oversight of the DOJ's ongoing review of the decrees in the 2018 Music Modernization Act along with clear DOJ reporting requirements prior to any efforts to terminate or modify the decrees. Seeking to terminate the decrees, even over an extended period of time (sunsetting), just as the music industry works to implement the most extensive rewrite of music licensing laws in decades, is particularly ill-advised.

The bottom line:

The music licensing marketplace is complex and requires certainty for all parties. To avoid harming licensees, songwriters and consumers, and raising serious questions about the ability of the public to continue enjoying music, Congress should ensure the DOJ does not unilaterally terminate, sunset or modify the decrees.

A Performance Tax Threatens Local Jobs

The issue:

Congress should not mandate a performance tax on free, local radio stations that would jeopardize local jobs, prevent new artists from breaking into the recording business and harm local radio's 272 million listeners.

Broadcasters urge legislators to stand up for their local radio listeners by supporting the Local Radio Freedom Act (H.Con. Res. 20, S.Con. Res. 5), which opposes a performance tax.

Here's why:

For nearly a century, record labels and performers have thrived from airplay – which is essentially free advertising – from local radio stations. But as the big record labels struggle to keep profit margins high, they are urging Congress to impose a tax on these local radio stations that are, ironically, their greatest promotional tool.

Radio's free promotion is worth more than $2.4 billion annually in music sales, concert tickets and merchandise to record labels. Local radio continues to be the top source for listeners seeking new music, far surpassing other sources. Free radio airplay provides the recording industry increased popularity, visibility and sales for both established and new artists. Promotion by local radio goes beyond the music to include concert and festival promotion, on-air interviews and social media marketing.

Each Congress, legislation backed by the record labels is introduced that would impose a new fee on local radio stations simply for airing music on the radio. This legislation would financially cripple local radio stations, harming the millions of listeners who rely on local radio for news, emergency information, weather updates and entertainment every day.

Recognizing the promotional value of free radio airplay, Congress has repeatedly rejected the record labels' attempts to impose a harmful performance tax on local radio stations. Nevertheless, new performance tax legislation, the AM-FM Act, has been introduced this Congress in the House and Senate.

The Local Radio Freedom Act, which opposes any new tax, fee or royalty on local radio stations, enjoys strong bipartisan support in both chambers. This strong support for local radio was also made clear in the 2018 Music Modernization Act, consensus legislation that benefitted all stakeholders and did not contain a performance tax.

Broadcasters have consistently demonstrated good faith in working with the record labels to try to resolve the performance tax issue through private discussions. In the past few years, numerous radio companies and record labels have negotiated private deals of their own that compensate copyright owners and performers, demonstrating the ability of the marketplace to best address the issue.

The bottom line:

Congress should not enact a government-imposed performance tax on local radio; however, broadcasters stand ready to work with Congress and the music industry on a balanced music licensing proposal that promotes innovation and recognizes the benefit to artists and listeners of radio's free, locally-focused platform.

Encourage Diversity in Broadcasting: Reinstate the Tax Certificate Program

The issue:

The National Association of Broadcasters (NAB) has consistently promoted initiatives aimed at improving diversity in broadcasting and creating new opportunities for women, people of color and other underrepresented communities.

Through the NAB Leadership Foundation, we offer numerous professional development programs and initiatives that enable leaders at every level to succeed in broadcasting. In particular, we are committed to ensuring station managers, senior executives and owners are as diverse as the communities they serve.

The Foundation's Broadcast Leadership Training program has a strong track record of preparing women and people of color to purchase and run radio and television stations. But the most impactful program to expand diversity in broadcast ownership – the Minority Tax Certificate Program – was eliminated by Congress in 1995. Broadcasters support legislation to reinstate this successful program and to eliminate barriers that prevent local TV and radio ownership by underrepresented individuals.

Here's why:

In 1978, the Federal Communications Commission (FCC) established the Minority Tax Certificate Program, which provided a tax incentive to those who sold their majority interest in a broadcast station to minorities. From 1978 to 1995, the program was highly effective in leveling the playing field for underrepresented broadcasters, increasing minority ownership in broadcast stations by more than 550 percent.

Unfortunately, Congress repealed this program in 1995. Broadcasters opposed this repeal because of the program's dramatic and positive impact on increasing ownership of broadcast stations for people of color. The tax certificate has proven to be an effective mechanism for bringing more people of color into station ownership and should be reinstated.

Earlier this year, the Expanding Broadcast Ownership Opportunities Act of 2019 was introduced in both the House and Senate to bring back the tax certificate. In the House, Rep. G.K. Butterfield (NC-01) introduced H.R. 3957 and in the Senate, Sen. Gary Peters (MI) introduced S. 2433. By reinstating the Tax Certificate Program at the Federal Communications Commission, these bills would encourage investment in broadcast station ownership for women and people of color and dramatically help underrepresented voices realize their dreams of radio and television station ownership.

In addition to NAB's support, the Expanding Broadcast Ownership Opportunities Act has the backing of the Multicultural Media, Telecom and Internet Council (MMTC) and the National Association of Black Owned Broadcasters (NABOB).

The bottom line:

Congress should pass the Expanding Broadcast Ownership Opportunities Act of 2019 to ensure owners of broadcast stations are as diverse as the communities they serve.

Allow Broadcasters to Continue Negotiating in the Free Market

The issue:

Congress should allow broadcasters and pay-TV operators to continue to conduct private, market-driven negotiations for retransmission consent and avoid tilting the scales in favor of either entity. Government intervention through legislative changes will only disrupt a marketplace that has resulted in abundant locally-focused programming choices and services that benefit communities across America.

Here's why:

Congress has long recognized that local TV stations should be allowed to negotiate compensation with cable and satellite operators for the retransmission of their signals. Cable and satellite operators are then able to resell broadcast signals to subscribers, amounting to billions of dollars in profits. Despite having the highest-rated programming on television, broadcasters have routinely been the least compensated on a per-viewer basis. The big pay-TV companies falsely claim broadcast retransmission fees are responsible for higher cable bills. The truth is, cable bills have risen faster than – sometimes triple – the rate of inflation since the mid-1990s, long before broadcasters received cash compensation for their signals.

In spite of this, the big pay-TV companies would like Congress to upend the retransmission consent process in order to reduce their programming costs while padding their profit margins. Their goal is to avoid fairly compensating broadcasters, who produce the highest-rated content on television. The current free-market process provides incentives for both parties to come to mutually beneficial arrangements, which is why negotiations are completed with no service disruptions or fanfare the great majority of the time.

The reality is that it is only two companies – AT&T[1] and DISH – manufacturing a crisis for policymakers. They alone were responsible for 82 percent of retransmission consent impasses from 2015 to 2019.[2] Unfortunately, these pay-TV companies are using viewers as pawns to pursue legislative changes to gain unfair leverage during carriage negotiations, including weakening or eliminating rules ensuring consumer access to broadcast programming on the basic tier and rules that guarantee local broadcasters can deliver and sustain programming in their local market.

The bottom line:

The retransmission consent negotiation process is fair and market-driven. Eliminating stations' ability to negotiate for the value of their signals would mean less choice for viewers and fewer resources for stations to dedicate to local news, public affairs programming, emergency weather events and community activities. Congress should not upend this free-market process.

1 AT&T includes DIRECTV and U-Verse
2 Source: NAB Analysis of SNL Kagan Retransmission Databases. Dec. 31, 2019

Prevent Harmful Changes to Advertising Tax Treatment

The issue:

Congress should not pass legislation that hurts free, local broadcasting by modifying the tax laws to make advertising more expensive for businesses. Advertising is currently treated as an ordinary and necessary business expense – just like salaries, rent and utilities – under the U.S. tax code. This means a business can fully deduct the expense in the year it was incurred.

Some in Congress have suggested changing the tax treatment of advertising for specific types of products, such as pharmaceuticals. This modification would have a devastating impact on local radio and television stations who rely on advertising revenue to survive and the listeners and viewers they serve. It also raises significant First Amendment concerns and ignores the important consumer benefits that advertising provides.

Here's why:

- The economic impact of advertising is significant. An estimated $988 billion in U.S. economic output and 1.36 million jobs are attributable to the stimulating effects of advertising on local television and radio alone.[1]
- Advertising revenue enables broadcast stations to reinvest in their newsrooms and local communities. Decreased advertising revenues would impede stations' ability to offer the high-quality news, emergency information, sports and entertainment on which the public relies.
- Any proposal to change the tax treatment of advertising for a specific industry constitutes a troubling restriction on commercial speech, and raises significant First Amendment concerns.

The bottom line:

For these reasons, all types of advertising should remain fully deductible as ordinary and necessary business expenses in the year they are incurred. Congress should not enact legislation that discourages advertising as it would hurt consumers and small businesses, impact jobs and harm broadcasters' ability to serve their local communities.

1 Source: Woods and Poole Economics, "Local Radio and TV: Helping Drive the United States Economy: 2019"

Ensure Viewers and Listeners Keep Access to Programming Delivered Through Unique Spectrum Bands

The issue:

In addition to their primary spectrum assignments for over-the-air transmissions, TV and radio broadcasters use additional spectrum in both the C-band and the 6 GHz band every day to transmit and receive critical, live content for their broadcasts. The Federal Communications Commission (FCC) is considering changes to the use of these spectrum bands to allow for new services, which could impact the programming listeners and viewers rely upon.

Here's why:

The C-band is used for satellite communications, helping to deliver many of the national and syndicated shows you watch and hear every day. In addition to TV and radio broadcasters, it is also relied upon by cable and satellite providers, as well as over-the-top video providers. Those who use this spectrum have invested billions of dollars to launch satellites and build stations on the ground to receive and disseminate critical content to consumers, such as weather information, network news and entertainment and syndicated programs for radio and TV. This spectrum has unique characteristics that are impossible to replicate by other services. Additionally, it's extremely sensitive to interference, so great care and technical consideration must be given before allowing new services to operate in this band of spectrum.

The 6 GHz band is utilized by broadcasters for critical electronic newsgathering systems. This includes transmitting from portable cameras during coverage of live, breaking news, major sporting events and emergencies to a news truck, as well as transmission from that news truck to a central receiver or news studio. Permitting new, unlicensed use in the 6 GHz band presents significant coordination challenges and interference concerns for this type of live and mobile coverage that broadcast audiences rely on to get breaking and emergency information.

The bottom line:

Broadcasters ask that any consideration of new uses of these spectrum bands takes into account the extensive use and significant investment in the bands by broadcasters and others, as well as the lack of meaningful alternatives and the unique technical properties of this spectrum. Congress and the FCC must ensure that any changes in C-band and 6 GHz spectrum protect existing users and their listeners and viewers from harmful interference or loss of service entirely.