

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:)	
)	
MusicFirst Petition Regarding the)	DA-09-1773
Actions of Certain Radio Broadcasters in)	MB Docket No. 09-143
Opposition to the Performance Rights Act)	

To: The Secretary, Federal Communications Commission
Attn.: Media Bureau

COMMENTS

Radio Training Network, Inc. (“RTN”), files these Comments in response to the Commission’s Public Notice, *Comment Dates Established for MusicFIRST Petition Regarding the Actions of Certain Radio Broadcasters in Opposition to the Performance Rights Act*, MB Docket No. 09-143 (released August 7, 2009) (the “Public Notice”). The Commission is requesting comment concerning the actions of broadcast stations surrounding the debate over the Performance Rights Act (“PRA”) and MusicFIRST Coalition’s (“MusicFIRST’s”) Request for Declaratory Ruling (“Request”).

RTN first notes that it is concerned with the vagueness and anonymity of MusicFIRST’s Request. MusicFIRST relies heavily on the Declaration of its executive director, Jennifer Bendall. The Declaration is littered with generalities such as, “one broadcasters association,” “top-selling artist,” “several stations,” and “representatives.” In some instances, Ms. Bendall declines to state the behavior that is supposedly occurring “even on an anonymous basis.” It is impossible for RTN and others to properly respond to MusicFIRST’s accusations if there are no specifics. With that in mind, RTN responds as follows to the Commission’s *Public Notice*.

1. **Whether and to what extent certain broadcasters are “targeting and threatening artists who have spoken out in favor of the PRA,” including a refusal to air the music of such artists.**

The Commission’s first inquiry is, “whether and to what extent certain broadcasters are ‘targeting and threatening artists who have spoken out in favor of the PRA,’ including a refusal to air the music of such artists.” *Public Notice* at 1. RTN believes that such a question is outside the Commission’s realm of regulation. The Commission leaves the determination of station format up to the licensee. *Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976). In making the decision not to be involved in station format choices, the Commission noted that the marketplace is the best place for format decisions to be made, and that regulation would result in high administrative costs. *Id.* at 14-17. Further, the Commission found that, “[G]overnment supervision of formats would be injurious to the public interest.” *Id.* at 17.

Similar concerns are valid here. Commission evaluation of a station’s choice to play or not play a particular song would result in staggering administrative costs. If the Commission determined that monitoring format decisions would result in “high administrative costs,” monitoring individual song choice would lead to astronomical administrative costs. Moreover, what standard would the Commission use to determine whether a station was justified in its decision not to play a song? Song choice is a subjective determination. If the listening audience does not like the song choices a station is making, the dissatisfaction will be reflected in the station’s ratings and ability to sell advertising time.

Lastly, opening the door to format challenges and playlists would subject the Commission, as well as stations, to potentially an astronomical number of complaints from any person, entity, or artist that claims a particular song was not aired. These types of challenges

have historically been rejected, as in the case where assignment applications are challenged because of a resulting loss of a particular format such as a classical format or religious format. *Id.*; *KLBU(FM), Pecos, New Mexico*, 22 FCC Rcd 18490 (2007); *WVXC(FM), Chillicothe, Ohio*, 22 FCC Rcd 6807 (2007). Programming issues are issues that the Commission has wisely left to licensee discretion.

2. The effects of radio broadcasters' alleged refusal to air advertisements from MusicFIRST in support of the PRA.

The Commission's second inquiry concerns the impact of broadcasters supposed refusals to air MusicFIRST advertisements. *Public Notice* at 2. RTN believes that this inquiry, like the first, is outside of the Commission's regulatory power. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1972), the Supreme Court found that stations are not required to accept editorial advertisements. In its decision, the Supreme Court stated that, "Conceivably at some future date Congress or the Commission -- or the broadcasters -- may devise some kind of limited right of access that is both practicable and desirable." *Id.* at 131. Neither Congress nor the Commission has taken action to give editorial advertisers a right of access to the radio airwaves. Until such action is taken, stations are free to deny selling time to editorial advertisers. Stations that allegedly denied the sale of advertising time to MusicFIRST's editorial PRA spots were exercising this right.

Additionally, requiring stations to air editorial advertisements would place a burden on them similar to that of a common carrier. Congress specifically intended for radio stations *not* to be common carriers.

The historic aversion to censorship led Congress to enact § 326 of the Act, which explicitly prohibits the Commission from interfering with the exercise of free speech over the broadcast frequencies. Congress pointedly refrained from

divesting broadcasters of their control over the selection of voices; § 3 (h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.

Id. at 116. Requiring radio stations to air editorial ads, such as the ones proposed by MusicFIRST, would fly in the face of seventy-five years of Congressional actions and intent.

3. Whether and to what extent broadcasters are engaging in a media campaign, coordinated by the National Association of Broadcasters (“NAB”), which disseminated falsities about the PRA.

Next, the Commission inquires into the truth of the information being distributed by broadcasters. The Commission does not require licensees to confirm the truthfulness of advertisements. Censorship of political advertisements, for example, is prohibited. Section 315(a) provides that “Licensee[s] shall have no power of censorship over the material broadcast [for candidates for public office].” 47 U.S.C.S. § 315(a). If MusicFIRST has an issue with the truthfulness of information being distributed by NAB, that is not an issue to be addressed by the Commission.

4. Whether certain broadcasters have evaded the public file requirements by characterizing their on-air spots in opposition to the PRA as public service announcements (“PSAs”).

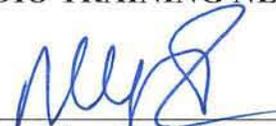
Finally, MusicFIRST asserts that broadcasters are treating PRA spots as PSAs. MusicFIRST offers no evidence to back up its assertion. In Ms. Bendall’s Declaration, she states, “It *appears* that in at least *some* instances broadcasters are characterizing these spots as ‘public service announcements.’” *Id.* at ¶ 13 (emphasis added). MusicFIRST offers no evidence

that *any* station has treated an advertisement concerning the PRA as a PSA, instead it puts forth vague accusations.

In fact, stations are being instructed to properly treat PRA spots as “issue advocacy” announcements. NAB, for example, states on its website that, “[A]ny spots stations air that are considered ‘issue advocacy’ must comply with all FCC and FEC requirements, including on-air sponsorship identification and public file disclosure. NAB recommends that stations fill out a Performance Tax Public File Form and place it in their public file. Please consult your station counsel with any questions.” *No Performance Tax Multimedia and Resources*, <http://www.noperformancetax.org> (last visited Sept. 8, 2009).

Respectfully submitted,

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By:  _____
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