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COPYRIGHT ROYALTIES: WHERE IS THE RIGHT SPOT ON THE DIAL FOR WEBCASTING?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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COPYRIGHT ROYALTIES: WHERE IS THE RIGHT SPOT ON THE DIAL FOR WEBCASTING?

WEDNESDAY, MAY 15, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:38 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, chairman of the committee, presiding.

Present: Senators Leahy and Hatch.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning, everyone. Senator Hatch has been delayed, but we are going to have to start because with the later events this morning with the President, a number of us will have to be there.

So I am going to urge all witnesses to stay to the 5 minutes. Their full statements will be in the record. Feel free to hit us with the points you would want the most. The reason I am saying 5 minutes—one, two, three, four, five six people here; that is 30 minutes. If anybody goes over, unfortunately the time will have to come from the person next to you, so think about that.

The Internet, as we know, has become the emblem of the Information Age. There are actually some worthwhile things on the Internet, if one cares to search and search and search, but it is also very helpful. I was getting e-mails last night until after midnight from my staff, and I noticed when I logged on somewhere between 4:30 a.m. and 4:45 a.m., there were a number of others, as well as from constituents in Vermont.

I like the Internet. I also like the creative spirits who are the source of the music and films and books and news and entertainment content that enrich our lives and energize our economy and influence our culture. I am impressed by the innovation of new online entrepreneurs and I want to do everything possible to promote the full realization of the Internet's potential.

I think if we have a flourishing Internet, with clear, fair and enforceable rules governing how content may be used, that can benefit all of us, including those entrepreneurs who want us to become new customers and the artists who create the content we value.

The advent of webcasting, streaming music online rather than broadcasting over the air as traditional radio stations do, is really one of the more exciting and quickly growing of the new industries that have sprung up on the Web. Many new webcasters, uncon-

strained by the technological limitations of traditional radio transmissions, can and do serve listeners across the country and around the world.

In some of the countries ravaged by war, they put in a telecommunications system and they kind of leap-frog everybody else. They go into wireless systems that work far better, sometimes because they start anew and they are not held back by the way things have been done before.

They provide new and specialized niches not available over the air, new and fringe artists, someone who does not enjoy a spot on the Top 40. They can bring music of all types to listeners who, for whatever reason, are not being catered to by traditional broadcasters. My taste in music may be different than others, and so forth.

We have been mindful on this committee that has the Internet is a boon to consumers, we can't neglect the artists who create and the businesses which produce the digital works and make the online world so fascinating. There is not going to be any content for the online world if our artists and producers and those who create it aren't compensated for their own work.

With every legislative effort to provide clear, fair, and enforceable intellectual property rules for the Internet, a fundamental principle to which we have adhered is that artists and producers of digital works merit compensation for the value derived from the use of their work.

In 1995, we enacted the Digital Performance Right in Sound Recordings Act, which created an intellectual property right in digital sound recordings, giving copyright owners the right to receive royalties when their copyrighted sound recordings were digitally transmitted by others.

We created a compulsory license so that webcasters could be sure of the use of these digital works. We directed that the appropriate royalty rate could be negotiated by the parties or determined by a Copyright Arbitration Royalty Panel, or CARP. I didn't know how apt that acronym might become later on.

Most webcasters chose to await the outcome of the Arbitration Panel proceeding, and now that the finding has been reached and is being reviewed by the Librarian of Congress, the industry is in an uproar. Nobody seems happy with the outcome of the arbitration. All of the parties have appealed.

The recording industry and artist representatives feel that the royalty rate, which is based on the number of performances and listeners rather than on a percentage-of-revenue model, is too low. Many of the webcasters have declared that this per-performance approach and the rate attached will bankrupt the small operations and drain the larger ones. An outcome like that could be unfortunate not only for them, but also for the artists, labels, and consumers, who would all lose important legitimate channels. I have heard complaints from all sides about the fairness and completeness of processes and procedures in the arbitration.

The Librarian of Congress can do three things. He can approve the decision which nobody seems to like. He could order a new proceeding, which would require considerably more time and expense for the participants, or he could reject the decision and set the rate

himself without further input, and any aggrieved party could appeal.

So it brings me to the question I want each of our witnesses today to consider. Why can't everyone—Congress, artists, labels, and webcasters alike—take the CARP as a genuine learning experience and sit down to determine what is the next best step? If the parties could avoid more time and expense and reach a negotiated outcome more satisfactory, that would be preferable, I believe anyway.

There are also lessons for Congress here as well, especially lessons about how compulsory licenses are no panacea and how we might reconsider the arbitration procedures and the guidance given to rate-setters in the DMCA.

Thee is a lot more in my statement. I am not going to take your time to read it all. We will put it in the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. We will begin with Ms. Hilary Rosen, who is the Chairman and Chief Executive Officer of the Recording Industry Association of America.

Ms. Rosen, you are no stranger to this committee and all of us benefit from it when you are here.

STATEMENT OF HILARY ROSEN, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Ms. ROSEN. Thank you. Good morning, Mr. Chairman, members of the staff. I will just—you said you are pressed for time—cut my statement in half, you will be pleased to know. So I assume that will go in the record.

I would also like to put in the record a statement of Gary Himelfarb, from RAS Records, representing the Association of Independent Labels, who wanted to be here today.

Chairman LEAHY. They will both go in the record in full.

Ms. ROSEN. Let me just say what I hope is obvious, which is that we want webcasters to succeed. The application of this technology is exciting. It has energized music lovers and fans, some of whom have turned themselves into webcasting entrepreneurs, and it has also provided a new business opportunity for some of the world's largest and most innovative media companies. If webcasters don't succeed, artists and record companies stand to lose an important new revenue stream.

For years, artists and record companies have been denied the performance rights enjoyed by other copyright owners in the United States, and indeed by artists and record companies around the world. That situation has been well documented for its inequity and was significantly addressed in 1995 by this Congress.

New revenue streams are more important than ever in a world where new technologies are dramatically changing the way people get and listen to music. We worked closely with this committee and others in 1998 when Congress enacted legislation guaranteeing in an unprecedented manner that a new business called webcasting would have access to blanket licenses for sound recordings on a compulsory basis.

We invested millions of dollars creating a collection and distribution system that would significantly ease webcasters' burden of using hundreds of thousands of different recordings in their programming, and artists and record companies engaged in this activity despite the risk that payment would not come for several years as rates were worked in the marketplace or perhaps in a CARP proceeding.

We fervently believe now, as we did then, that webcasters can succeed, while compensating creators of the sound recordings upon which their businesses are built at a fair rate. It is obvious that without sound recordings, there would be no webcasting business, a point eloquently made by the chairman.

It is equally obvious to artists and record companies that webcasters were required to pay their other costs of doing business from day one—the cost of their rent, their hardware, their computer software, their supplies, their equipment, et cetera.

So I recognize the issue of how much to pay for music is a complicated one, but obviously that compensation has to be determined by a fair process and based on the market value of the sound recordings. That was the bargain in having a compulsory license.

We think that the recently completed CARP proceeding was fair. Just to comment on what you said, Mr. Chairman, we didn't like the results, but we are not attacking the process. I think that is the difference, that we are willing to live with the result as it was. It was long, it was cumbersome, and it was expensive. But now, 3½ years later, artists and record labels are finally looking forward to actually being compensated for their works.

I think it is important to keep a few things in mind as this hearing proceeds today. The first is that the statute actually directed the parties to negotiate rates in the marketplace, and a CARP proceeding was the last resort. Because webcasters had a compulsory license and therefore didn't really need to negotiate a rate in order to get access to the music, they could avoid paying royalties for several years by not negotiating, which was fair under the statute. Many webcasters took advantage of this and have not paid royalties for several years as they began their businesses. In other words, they have already had the start-up boost to their business.

Second, nobody was out-gunned in this process. Several large media companies—AOL, Viacom, Clear Channel—had many highly-paid and skilled lawyers and consultants in the CARP proceeding fighting for as low a rate as possible. Many small webcasters did participate and presented evidence and testified. No doubt, they also benefitted from the very able counsel and experts retained by the larger companies. Even if some webcasters did not participate, their views were well represented in the proceeding.

Third, the arbitrators had a host of confidential financial information about these businesses, information that this hearing could never possibly unveil—things like costs and expenses and projected revenues and projected business plans, IPO offerings, operating expenses. In other words, the CARP had so much more detail about their ability to pay that it is tough, and inappropriate, I think, to read a newspaper or listen to rhetoric and imagine that the CARP somehow was just stupid and they didn't get it.

The Librarian of Congress is reviewing an unredacted version, which I certainly haven't seen, of the arbitrators' decision. That did have confidential financial data. I am sure that review is going to be thoughtful and considered, and it should be based on the extensive record.

Congress set up this process. Let it work through without interference. We absolutely want to be productive with the webcasters as this decision gets implemented. We, of course, want to work productively with this committee as you look at the process for future proceedings, and I will be happy to answer any questions that you might have.

Thank you.

[The prepared statement of Ms. Rosen appears as a submission for the record.]

Chairman LEAHY. Thank you. I will go into a number of steps that the CARP took. I will continue to read the newspapers, however. You never know. Every so often, like the blind pig, you actually find something worthwhile there.

Ms. ROSEN. I confess I read them, too.

Chairman LEAHY. I was going to say I know the distinguished witness reads them, and probably a heck of a lot more than the chairman does.

Mr. Potter.

STATEMENT OF JONATHAN POTTER, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION

Mr. POTTER. Chairman Leahy, thank you for inviting me to testify today on behalf of more than 20 DiMA companies that are webcasters and that support webcasters.

In a factual vacuum, the CARP-proposed sound recording royalty rate of just over a tenth of a penny per song performed to a single listener may seem small. But in context, it bears no rational relationship to the economics of the broadcast, webcast, or music industries. The proposed royalty equals 78 percent of Onion River Radio's gross revenue, while royalties to songwriters and publishers are less than 4 percent.

Many other webcasters will have sound recording royalties more than double their entire budgets, or five times or more of their total revenue. For Yahoo, MTV, and other large webcasters, the royalty rate ensures that Internet radio, which has been embraced by consumers who relish diverse music offerings, will be uneconomical and likely abandoned as a viable line of business.

Let me be clear, Mr. Chairman. The Internet radio industry is not seeking a subsidy or to perform music without paying creators. Rather, we are seeing fair pricing and fair market pricing.

When the Digital Performance Right in Sound Recordings Act was enacted, this committee, to promote licensing efficiency, provided the recording industry a limited antitrust exemption to negotiate and license collectively. But to ensure that the collective did not over-leverage its monopoly position, the Act provided a safeguard, a Copyright Arbitration Royalty Panel, empowered to determine reasonable license rates and terms.

When Congress expanded the performance right to webcasting in the DMCA, at RIAA's urging Congress changed the standard by

which the CARP determines a royalty, but it did not confer with the Justice Department about how the new standard dovetailed with the previously drawn antitrust exemption. The new standard eliminated all references to reasonableness or fairness and required royalty rates to reflect what "willing buyers would pay willing sellers in the marketplace."

RIAA immediately exploited this new standard. As the CARP concluded, RIAA offered licenses on a "take it or leave it" basis, almost exclusively to small, unsophisticated webcasters that paid negligible royalties. Why? As the Panel recognized, "this sacrificial conduct made economic sense only if calculated to set a high benchmark to be later imposed upon the much larger constellation of services." In other words, the RIAA targeted an insignificant segment of the market whose peculiar circumstances prevented their awaiting a CARP outcome to establish what the CARP said were "artificially high" and "above-market" prices in order to foist these prices on the industry as a whole.

The CARP's ruling resulted from a confluence of circumstances: first, the change to a "willing buyer/willing seller" standard that the arbitrators misconstrued not to require a competitive market outcome; second, RIAA's scheme to use its antitrust exemption to ensure, as the sole seller of the new performance license, that the CARP would review an extremely limited set of "marketplace licenses." Third, the restrictive CARP procedures, in particular the lack of notice, meaningful discovery and subpoena power, enabled RIAA to present a one-sided view of the so-called marketplace to the Panel.

Whereas RIAA offered the Panel a royalty model based only on its 26 tainted licenses, webcasters offered a rate structure based on the well-established industry standard 50-year history of radio composition performance royalties. Remarkably, because the Panel misconstrued the new "willing buyer/willing seller" standard, they dismissed in one sentence decades of benchmarks for songwriter royalties.

Unable to rely entirely on the 25 agreements that they had just characterized as tainted by anticompetitive conduct, the arbitrators instead turned to the only agreement that appeared even superficially to be the result of balanced negotiations, the RIAA's deal with Yahoo.

Unfortunately, even the Yahoo agreement was an inappropriate benchmark for industry-wide rates. As reflected in Yahoo's written testimony to this committee, its radio service and its licensing goals were entirely different than virtually all other webcasters. Ninety percent of Yahoo's service was retransmissions of terrestrial radio stations; only ten percent was original Internet programming.

Thus, Yahoo ensured that its license rate for radio transmissions was as low as possible, and Yahoo was least concerned about what concerned the rest of the industry the most, the so-called Internet-only rate. So Yahoo did not resist when the RIAA sought to artificially inflate the Internet-only rate. The CARP though, conceding that Yahoo's rate was "artificially high"—their words—still used it to derive webcasting rates for the industry as a whole.

Equally significantly, Yahoo realized that absent a deal with RIAA, its arbitration costs would exceed the entire amount of the

royalty. Accordingly, Yahoo made the rational choice to settle at above-market rates and save the extremely high costs of the arbitration.

Mr. Chairman, in 1998 DiMA was agreeable to having its webcasting member companies pay record companies and recording artists a performance royalty, so long as the statute was mutually supportive of the nascent Internet radio industry, as Congress intended. It cannot possibly be fair or reflect a fair market to have the sound recording copyright owners be paid 7 to 20 times, or more, than what songwriters are paid. Nor is it fair that a statute intended to promote Internet radio, as well as recording artists, results in a royalty that will devastate a nascent industry that Congress thought it was helping to promote, thereby resulting in no royalties or minimal royalties to artists.

Thank you.

[The prepared statement of Mr. Potter appears as a submission in the record.]

Chairman LEAHY. Thank you.

I will also place in the record an article from the Wall Street Journal this morning on music royalties written by Julia Angwim. Ms. Rosen, Mr. Potter, Mr. Schliemann and others are mentioned in it. I have found the Wall Street Journal news pages tend to be quite accurate and I toss that in there for what it is worth and others can read it.

I would also point out, and I would hope all witnesses know this—Mr. Rosen and others who have testified here before understand that once the hearing is over if you find items that you wish had been included, feel free to send them to us. If they are not too lengthy, they will be included.

By the same token, if you find in your own testimony as you look at it that there were another few sentences you meant to have said—as often happens, as you get on the elevator, you think of a question and what you should have added. This is not a "gotcha" kind of hearing; this is to help the committee. So just send those on to us and they will be included in the record.

After all, I take the advantage of taking care of any Vermont colloquialisms or syntax that nobody would understand outside our State and we clean those up in the record. So at least we can offer the same courtesy to you.

Mr. Rose.

STATEMENT OF WILLIAM J. ROSE, VICE PRESIDENT AND GENERAL MANAGER, ARBITRON WEBCAST SERVICES

Mr. ROSE. Mr. Chairman, thank you. I am Vice President and General Manager of Arbitron Webcast Services and I thank you for the opportunity to speak with you today.

Arbitron has been in the business of audience measurement and has 50 years of leadership and experience in the business. Since 1998, Arbitron, together with Edison Media Research, conducted eight studies on how consumers use the Internet and streaming.

You have several qualified panelists here today with a wide variety of backgrounds, so I will concentrate my comments on Arbitron's areas of expertise, specifically the audience to traditional over-the-air media, how consumers use the Internet and streaming,

and our general knowledge of advertising sales, planning, and buying processes.

Consumer use of streaming media has grown substantially in a short period of time. According to our first study in July 1998, 6 percent of Americans had ever listened to radio stations on the Internet. Arbitron's latest study from January 2002 shows that 25 percent have ever listened now to online radio stations.

Consumer use of Internet audio and video is now at an all-time high, with an estimated 80 million Americans having ever tried it. Our research indicates that broadband will stimulate even greater usage, because people with super-fast, always-on Internet connections use far more streaming media than those with dial-up connections.

Despite this remarkable growth, streaming media is still in its infancy compared to traditional broadcast media. As of January 2002, 9 percent of the population aged 12 and over used streaming audio or video in the past week. In fall 2001, 95 percent of people over the age of 12 had listened to radio during an average 7-day period of time. That is 9 versus 95 percent.

Streaming media provides a valuable service by enabling consumers to have a variety of choices that are not available on the traditional media. Traditional media limit the types of music the play over the air, while streaming media can expose consumers to a wide variety of music. For example, classical music is not found on commercial radio in most markets today, but it is widely available on the Internet through streaming media.

The most active streaming media users are those who listen or watch each week. Among this group, nearly two-thirds agree that they use the Internet to listen to audio content they cannot get otherwise through traditional over-the-air media.

Arbitron analyzed the proposed digital rights fees from the Copyright Arbitration Royalty Panel in an effort to understand the impact of the proposed fees and to put those fees into perspective. For example, if one of the top rated music stations in New York City rebroadcasted its programming online and it had the same audience on the Internet that it does over the air, that station would pay approximately $15 million a year in sound recording fees.

Thus, the proposed fees would be more than 25 percent of what that station currently realizes from selling traditional over-the-air advertising. If that same online station had original programming instead of a rebroadcast, its fees would be approximately $30 million, or over half of the revenue from its over-the-air advertising sales.

While broadcasters pay licensing fees to composers of music, currently they do not pay sound recording fees to artists and labels. However, if the proposed fees were applied to an over-the-air radio audience, the royalty would create an impact that would significantly hinder the financial viability of an already mature and healthy medium. Broadcasters would not be able to sustain a cost that amounts to 25 to 50 percent of their current over-the-air revenue.

The webcasting industry is in its infancy, with little revenue and profit at this stage of the market's development. If music radio had

to face similar fees in its infancy, it is highly unlikely it would have grown into the business it is today.

Arbitron and Edison recently conducted a poll from May 2 to May 6 of this year to understand consumer awareness and attitudes regarding audio streaming and digital rights issues. We spoke with 162 people who listen to Internet audio on a monthly basis. These are the regular audio streamees. Nearly two-thirds would be upset if the Web radio stations they normally listen to permanently stopped offering the ability to listen over the Internet.

Two-thirds support action by Congress to address the proposed online licensing fees in ways that help Internet audio webcasters afford to continue streaming music. Nearly 4 in 10 feel strongly enough about the threat to Internet radio to indicate they would be willing to write their Congress representatives in support of Internet audio webcasters regarding licensing and performance fees.

While webcasting's audience is growing rapidly, it is still small compared to traditional media. Arbitron believes that all parties should work together to enable the webcasting media to grow a critical mass of audience big enough to support significant ad revenue. A broad distribution of programming, greater competition, and diversity of voices on the Internet will help to achieve this objective.

Thank you.

[The prepared statement of Mr. Rose appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Rose.

Two announcements. This hearing is being webcast live over the Internet from the Judiciary Committee Web site using Real Video.

Before we go to Mr. Schliemann, I am going to yield to the distinguished senior Senator from Utah, my friend, Senator Hatch. He and I have worked together on a number of these digital issues actually for as long as they have been on the radar screen.

Orrin, I think we have put a few of those digital issues on the radar screen, good or bad.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I apologize for being a little late. I am in the middle of this trade promotion authority battle on the floor as well, so I had to go to a series of meetings on that before arriving here.

I am grateful to you for holding this hearing today. I think it is important to continue our ongoing conversation about digital entertainment in general, and about Internet distribution of music specifically. I believe our discussion today needs to be viewed in a larger context of ongoing developments in the online music sector that we have been monitoring for the last couple of years.

For about 2 years now, Mr. Chairman, we have been encouraging the exploitation of technology like the Internet to deliver the wide range of music that listeners want in a user-friendly way. We have encouraged online experimentation of broad licensing of popular content to foster the growth of this medium. We have hoped for the harnessing of technology and the creativity of intermediaries to cre-

ate synergies that allow artists and their audiences a new and closer experience.

For the better part of 6 or 7 years, since creating a digital performance right in sound recordings in the copyright law with the Digital Performance Right Act of 1996, I have repeatedly expressed the hope that we were on the verge of a well-stocked, ubiquitous, and user-friendly celestial jukebox that not only would allow music fans easy access to music they love, but provide artists greater freedom to interact with their fans and increased income from the exploitation of their works.

Let me suggest with some substantial understatement that we are not there yet. Indeed, over the past 2 years of litigation and some licensing activity, piracy over peer-to-peer networks has gotten worse and the online music market has gotten more consolidated. I believe this is the wrong direction.

Consequently, Mr. Chairman, I have sent you a letter outlining my concerns and suggesting legislative items for us to develop that can help the online music market grow for music fans and help to ensure that more of the benefits of online opportunities accrue to the artists.

I would ask that my letter to you be included as part of the record of this hearing.

Chairman LEAHY. The letter is excellent. I have read it and it will be part of the record. I think maybe toward the latter part of this week or over the weekend, you and I could sit down and discuss it more.

Senator HATCH. That would be great.

Chairman LEAHY. You raise some very good points.

Senator HATCH. Among the topics I think we should discuss are the following. First, artists ought to be able to exploit or benefit from the works that are not being exploited by the labels that currently hold the copyright, such as out-of-print works.

Second, artists ought to be paid their online revenues directly, and those revenues should not be unfairly discounted because of traditional but inapplicable offsets.

Third, artists should be able to keep their own online identifiers, their domain names, so they can more directly control their relationship with their fans online.

Fourth, we need to explore how to make copyright ownership information available through the Copyright Office more accessible and usable through the Internet.

Fifth, we must help ensure that market power and content is not unfairly aggravated, to the detriment of other legitimate distributors of online music who seek fair licensing opportunities.

Finally, Mr. Chairman, I am glad that we have an artist viewpoint represented at this hearing. Mr. Navarro represents many, many artists who are also the smallest of small business people who hope to enjoy some of the benefits digital distribution happens to offer.

To round out the input of artists in this process, Mr. Chairman, in addition to Mr. Navarro's testimony here today, I received a letter from Mr. Don Henley on behalf of the Recording Artists Coalition, submitting written testimony from this hearing, and also out-

lining briefly some broader issues that we should consider as we continue our look at this industry.

I would ask that this letter and statement be included in the record of this hearing.

Chairman LEAHY. Of course, and this committee has relied on testimony and comments from Mr. Henley a number of times. He is someone that a number of us know personally and have relied on. I would be happy to put his letter and statement in.

Senator HATCH. I have a lot of respect for him. He stands up for the artists like hardly anybody I know, and he is a reasonable person as well. Although not all of his ideas perhaps are readily workable, he is continually bombarding the committee with good ideas that we ought to consider.

Without these artists, both famous and not so famous, there would be no music to distribute online and no businesses to distribute it. Our lives are richer because of their work and, whatever we do, we need to ensure that they continue to have the incentive necessary to create great music and to share their music with us, irrespective of the medium that brings it to us. I also don't want to hurt the major music distribution companies, but we have to somehow find a way of helping everybody on this matter, and most of all the American consuming public.

With that, Mr. Chairman, I look forward to our continued conversation on these issues.

Chairman LEAHY. Thank you. I had written also to Mr. Henley and told him I appreciated his views because we had talked about this hearing.

Mr. Schliemann is here from Onion River Radio. Now, I know that you are going to be eager to know this, Senator Hatch. Onion River is also known by its Native American name, the Winooski, and the Winooski River runs straight through Montpelier. I was born on the banks of the Winooski River, in Montpelier.

Senator HATCH. I am starting to worry about it already, I will tell you.

[Laughter.]

Chairman LEAHY. I grew up there in a home that was literally on the banks of the river. We used to sometimes have to run when the floods would start. I lived there until I got married, 40 years ago this summer.

I knew you wanted to know that and you will put this now on your list of things to look at when you come to Vermont with me, right?

Senator HATCH. That was quite interesting to me. Winooski.

Chairman LEAHY. Winooski.

Senator HATCH. Winooski.

Chairman LEAHY. Senator Hatch and I are planning trips to Vermont and Utah.

Senator HATCH. I am just afraid, though, once he goes to Utah he may not want to go back to Vermont. That is the only problem.

Chairman LEAHY. He always gets me.

Senator HATCH. Vermont is beautiful.

Chairman LEAHY. Mr. Schliemann.

STATEMENT OF FRANK SCHLIEMANN, FOUNDER, ONION RIVER RADIO

Mr. SCHLIEMANN. Chairman Leahy and members of the committee and staff, I want to thank you for the opportunity to discuss the proposed sound recording royalty rate released by the Copyright Arbitration Royalty Panel and the devastating effect it will have on the webcasting industry.

Onion River Radio is an Internet-only radio station located in Montpelier, Vermont. Because the rate is a flat rate based on the number of times a listener hears a song performed, Onion River Radio and other Internet radio stations must pay for every additional listener.

Unless the Librarian of Congress or Congress itself includes a percentage-of-revenue alternative similar to what we pay songwriters and music publishers for the right to perform their copyrighted music, the recommended rate will force Internet radio to close its doors. I do not believe that this is what Congress intended when granting webcasters a statutory performance license under the DMCA.

On Onion River Radio, listeners can hear lesser-known artists mixed in with more established artists. Local artists are also featured in regular rotation. We are a media sponsor of local community events. Our advertisers are local advertisers. In short, the Internet makes it possible to listen to Onion River Radio anywhere in Vermont and to broadcast Vermont to the world.

Here is the catch–22: In order to increase my revenues, I need to build a much larger audience, but I can't afford to build my audience under the CARP per-performance rate. To explain, we need a large number of listeners to attract local advertisers. We also need a large number of listeners to ensure that those advertisers see results. In a small market, it is crucial that advertisers see a return on their investment, or else they will not continue to spend money on our station.

The advertising rate for a 60-second commercial on Onion River Radio is only $10. Our advertising rates have to stay low in order to compete with local FM stations. We cannot generate the same amount of revenue as a station in New York City, but because the rate is a flat rate based on ratings, we will have to pay the same per-song fee.

I have 10 years' experience in FM radio broadcasting. I saw the opportunity to build an Internet-only radio station, while keeping costs to a minimum. At $250 a month, bandwidth is our single largest expense. From January to March 2002, our composition performance fees to songwriters and music publishers will total $170.50. In contrast, if the CARP decision is approved by the Librarian of Congress, Onion River Radio will pay a sound recording performance fee for the same period that is almost 12 times what we pay to ASCAP, BMI, and SESAC combined.

Over the last 6 months, the total time spent listening to Onion River Radio has doubled. Under the CARP recommendations, so would the sound recording royalty. But as I explained, we cannot grow our revenue to keep up with the royalty obligations. We will be bankrupted by royalties.

We have done everything right. My background in music programming, computer networking, and engineering has enabled me to create a small business with very little overhead. Our ratings are growing fast and advertisers are starting to take notice. The future of my business should not be determined by an exorbitant flat per-performance rate.

We are not asking for a free ride from record companies and recording artists, but I cannot built a webcasting business if Onion River Radio must pay a royalty on a per-performance basis that is currently 78 percent of my gross revenue.

What webcasters need from the Librarian of Congress or from the Congress itself is a royalty rate at the established ASCAP, BMI, and SESAC standard rates, 3½ percent of our revenue, and a reasonable minimum fee. A percentage-of-revenue royalty formula is fair to all webcasters, regardless of market size.

Mr. Chairman, this issue is critical to the survival of Onion River Radio and hundreds of other Internet radio stations. This decision affects the future of the Internet webcast medium itself. Internet webcasting technology enables a small business like mine to create a compelling local broadcast medium that promotes local artists and interests to Vermont and communities around the world. If we cannot afford the royalties, Internet radio will not exist.

When Congress enacted a statutory webcasting license, I believe Congress was saying that the future of Internet radio should not be controlled by the recording industry. If this committee's intent was to encourage the growth of new technology, then the unaffordable rates proposed by the CARP will have the opposite effect.

I urge the committee and members of Congress to save my industry. Please help prevent these calamitous rates from being implemented.

Thank you.

[The prepared statement of Mr. Schliemann appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Artists are also represented on the panel. RIAA had also suggested that Billy Straus, of Websound, Inc., that happens to be in Brattleboro, Vermont—now, that is on the Connecticut River, Senator Hatch. The Connecticut is the natural boundary between the eastern State of New Hampshire and the western State of Vermont.

Mr. Straus has been nominated for Emmys for his musical direction work on TV. He was a nominated for a Grammy, I think, this year for producing the Broadway cast album of "The Full Monty."

Am I correct that you mixed that in Putney, Vermont?

Mr. STRAUS. Yes, sir.

Chairman LEAHY. This is to prepare you for that trip. Putney is a very small town where the Putney School came from and is. It also was the home of the longest-serving Senator from Vermont, George Aiken, who became Senator the year I was born and served until I arrived, for whatever that is worth.

Mr. Straus.

STATEMENT OF BILLY STRAUS, PRESIDENT, WEBSOUND, INC.

Mr. STRAUS. Chairman Leahy, Senator Hatch, thank you very much for inviting me to appear before you today as a citizen of Vermont, Senator Leahy's great home State.

I am the President of Websound, a small webcaster based in Brattleboro. We provide online webcasts to consumers via the Web sites of our commercial clients, which include brands such as Volkswagen, Eddie Bauer, and Pottery Barn. I started Websound in my barn in the spring of 2000.

On the screens, you are seeing and hearing a real-time webcast originating from Websound servers. I thought it might be helpful to quickly demonstrate for you what we do and how we do it. This particular program, "Radio VW," is produced in Brattleboro for our client Volkswagen. The listener can select from four different channels of music and continue to listen after leaving the Volkswagen site. Other than Volkswagen's branding, there are no commercials, just eclectic, interesting music programmed in a way reminiscent of the best of free-form FM radio.

My passion has always been for music of all styles and genres, and though my role at Websound is that of entrepreneur, I am first and foremost a musician and a composer. In the context of this hearing, it is my hope that perhaps this unique perspective may be somehow useful to the committee.

I would like to make three main points today in my testimony pursuant to the issues at hand. The first is simple enough: Artists must be fairly compensated for the use of their work in webcasts. It is simply not just to build an industry around the proceeds of artistic endeavor without adequate compensation to the creators. To do otherwise provides a short-term shot in the arm for the industry at the expense of a long-term liability.

Secondly, we need to create a tiered system of royalty provisions in order to encourage innovation and creativity among fledgling as well as established webcasters. This will ensure that we avoid a perilous situation where the record labels are the only ones who can afford to stream music on the Internet.

Thirdly, detailed reporting is not only possible, but is a key component in putting an effective tiered royalty system into effect. This can be accomplished without undue burden on either the webcaster or copyright owner and without running afoul of privacy issues.

Websound has produced and streamed Web radio for clients on a fee-for-service basis under a license executed with the RIAA in September of 2000. Websound negotiated this license based on a carefully considered set of business parameters which make sense in the context of our fee-for-service model. The terms of our license, therefore, cannot necessarily be held up as a model for all other webcasters.

It is crucial that we do not force all of the wonderfully diverse streams and sources of music programming out of the system by creating an untenable set of royalty provisions across the board. To do so is surely to sound the death knell for one undeniable promise offered by the Internet—global access to an infinitely broad range of musical expression.

To this end, it is not fair to subject a small, non-commercial webcaster such as San Francisco's soma-fam.com to the same roy-

alty requirements as a large commercial webcaster like Yahoo, or for that matter a smaller commercial webcaster such as Websound.

To respect the rights of copyright-holders while not overburdening the small webcaster, we should institute a multi-tiered approach. The thresholds could be tied in part to a maximum number of simultaneous listeners or to a monthly volume of performances, for example. Accurate reporting can and will help facilitate these distinctions, ensuring that each webcaster is properly classified.

To the extent accurate reporting is needed in order to properly compensate copyright owners, webcasters can and should report on their use of sound recordings. Websound has been doing this successfully for about 18 months, and our total office staff other than myself consists of only two people.

We have recently announced a new technology called RadLog, designed to streamline the tracking of sound recordings used in our webcasts. We plan to make this technology available industry-wide to help address the significant concerns mounting over webcast reporting for statutory licensees.

There is no question, however, that an initial cost will be incurred in setting up a reporting system that serves the industry well and does not overburden either the webcasters or the copyright owners. It is crucial that the record labels take the lead in constructing a central database that can be made available to the industry for the purpose of streamlining reporting, encouraging compliance with the license, and providing the specific data needed to properly process and distribute the royalties collected.

The record labels as the copyright owners are the logical source of this raw data. I wish to emphasize the importance of creating this centralized database of song information as we look to create a fully functional reporting scenario.

As an industry, we must recognize that certain entities will undoubtedly cease doing business as a result of the costs and challenges, just as others come into the marketplace with new innovations. We must provide an environment where innovation and creativity are encouraged, but we cannot possibly hope to save every existing webcasting business. We must also value the artists whose music is central to the industry, but not at the expense of creating a scenario where the only companies able to afford streaming music online are the record labels who own the copyrights.

It is my belief that a viable, flourishing webcasting industry made up of a range of participants from the smallest non-commercial entities to the largest commercial outlets is feasible under a tiered license that provides opportunity based on realistic concessions from both the webcasting community and the copyright owners.

I would be happy to answer any questions the committee may have.

[The prepared statement of Mr. Straus appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Mr. Navarro, we are very pleased to have you here. I know you have released six albums, and you and Eric Lowen have written "Constant As the Night" and "We Belong," and a lot of others.

We are delighted to have you here, and please go ahead, sir.

STATEMENT OF DAN NAVARRO, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

Mr. NAVARRO. Well, thank you, and I want to thank you particular, Senator Leahy, for including us, for your interest in this issue, and for the opportunity to explain the importance of the digital performance license income to recording artists.

I am a recording artist and a member of the American Federation of Television and Radio Artists, AFTRA, and the American Federation of Musicians of the United States and Canada, AFM, the two labor unions that represent recording artists. Both unions' members include many stars earning significant record royalties, but more numerous are the non-superstar, middle-class royalty artists and professional session singers and instrumentalists who seldom gain fame.

As you said, for more than a decade my partner, Eric Lowen, and I have written, recorded, and toured, with six albums on major labels, independent labels, and our own label. We have had several adult rock radio hits. You have mentioned a few.

To supplement my income, I have also sung background vocals on numerous albums, including releases by Julio Iglesias and Clint Black, performed as an instrumentalists on albums by Whiskeytown and others, and I am also a songwriter, writing that worldwide hit for Pat Benatar, "We Belong," and songs for Dionne Warwicke, the Temptations, and many others. I would like a Gladys Knight cut, but that is Senator Hatch's gig, I think.

[Laughter.]

Mr. NAVARRO. The recording process is involved and rigorous, and I will try to explain the process to help you understand our work. First, we decide the kind of record we want to make, the sound we are after. Then we compose or select material that reflects that artistic vision, constantly editing until we are satisfied we are saying what we mean to say.

Next, we create arrangements, make demos, select musicians, secure funding, select studios and engineers, set a working schedule and rehearse. By the time we begin recording, we have been working at it for months. Recording and mixing the album is a logistical and technological obstacle course requiring patience and stamina, not to mention artistry and technical skill.

Later, we supervise mastering, take photos, create the cover, do clerical work like union reports. It is an overall process of long hours day after day for months on end, all with the goal of conveying an artistic expression that resonates with the public. And we are done, if we are lucky, we get to go back to square one and do it all again.

One would expect that artists are paid handsomely for the level of talent and effort required, but that is not always the case. In fact, I discovered early on that there is little money to be made from recording albums. Costs incurred are advances recouped from my artist royalties. Manufacturing, promotion, marketing, videos, tour support and such are defrayed from my small share of the pie.

So no matter what royalty arrangement I made with the label, or even when I produced my own albums, I never made a livable income from my records alone. So I wrote songs for other artists, sang as a background singer and instrumentalist for other artists,

toured, and marketed merchandise. How ironic that after years of developing my skills and honing my creativity, I generate greater profits selling t-shirts.

Unlike the rest of the world, for decades recording artists have not been paid performance royalties when their work is played on U.S. radio. Congress redressed a small part of this unfair position when it passed the Digital Performance Right in Sound Recordings Act. For the first time, at least some public performances of recorded music require payment to the artist for the right to perform it.

Congress created a compulsory license for these uses and mandated that performers receive 50 percent of that compulsory license income, 45 percent to featured artists, 5 percent to backing singers and instrumentalists. I cannot overestimate how important this new income stream will be to both royalty artists and session singers and session players.

There has been a great deal of publicity lately about the plight of webcasters who say that as new and small businesses they cannot afford to pay the digital performance royalty rate set by the CARP last February. We concur that fostering the growth of these new outlets for our music is of the utmost importance to performers. But the truth is we are also small businesses and without income streams we can rely upon to make a living, we will be unable to continue to create the recordings that the public wants to hear.

Now, although webcasters have been liable for compulsory license payments since 1998, they have paid nothing, awaiting the outcome of the CARP proceedings, which comprised over 40 days of hearings, some 80 witnesses, thousands of pages of evidence, including confidential information about their businesses, and legal arguments on all facets of the license question.

The AFM, AFTRA, and the webcasters all participated, ably represented by counsel. Neither side was completely satisfied with the recommendations that the arbitrators made to the Librarian of Congress and both sides have appealed the decision. But Congress must allow the CARP process to conclude and the final determination to stand or it will undermine the integrity of the very system it established.

Our work provides the backbone of these new industries which pay for everything else they use. The electrical companies aren't being asked to provide free power. Why should webcasters get the benefit of our music for free? Webcasters could get free content by making their own recordings, but they don't because what their listeners want is our music.

In conclusion, I wish to stress that this is not simply one business versus another. At the heart of this are individuals whose talents create sound recordings. Digital performance royalties will provide us with critically important income to performers both famous and not so famous. Without us, there would be no music on any station on the dial or the Internet. So please don't make us wait any longer for fair compensation for the use of our recordings on the Net.

Thank you.

[The prepared statement of Mr. Navarro appears as a submission for the record.]

Chairman LEAHY. Thank you, Mr. Navarro.

We hear this debate over whether the Arbitration Panel's rates were too high or too low and everybody has their feelings on what it should be. I hope that we don't run into a case like the old legend of King Midas. He got one wish and the wish was that anything he touched would turn to gold, but that meant that his food, his family, and everything else he touched turned to gold and he ended up with nothing.

If the webcasters are right, for example, that the CARP would force them out of business, in the end does that help artists, labels, and consumers? They all have nothing. Ms. Rosen has said, and I definitely agree with her, that if webcasters don't succeed, artists and record companies tend to lose an important new revenue stream. So I think everybody agrees on the value of webcasters. What we are debating now is what is the value to everybody else and how do you get paid.

Mr. Navarro, let me start with you. I appreciate that artists are often not sufficiently compensated. The artist groups are appealing the CARP decision because they feel that the CARP set the rate too low. A lot of my friends who are artists certainly do not reach the Top 10 or the Top 40, but they are tremendous artists and they want to be able to make a living from their artistry, and I want them to.

So is it better to have higher rates, even if that forces many webcasters out of business, or to have lower rates that result in a larger number of webcasters playing your music?

I ask this of both of you. It is not a trick question. I am reminded, for example, of the movie industry. They got very concerned when videotapes first came out and recordings, and they were quite concerned because they said people are going to record some of these movies off the air or whatever. They had plans of selling these movies to consumers on tape for $100, $125 a tape.

I remember saying at the time, well, why don't you sell them for $10 a tape? Outrageous; we never could make a living that way. Well, now one of the companies is going to put their DVDs in the Safeway and the Giant, and what not, at $8 or $9 or $10 a DVD because they know they are going to make millions doing that.

So, basically, you understand the question, do you not?

Mr. NAVARRO. I do indeed.

Chairman LEAHY. Do you raise it and allow webcasters to go out of business, or lower it and encourage more webcasters? Which is better for you?

Mr. NAVARRO. I am not sure there is any one answer. I think it goes hand-in-hand with whether, when you make a purchase, you buy something that costs a lot of money or you get something that is real cheap. Somewhere in the middle is an axis on the double Bell curve at which point value is achieved, and to achieve the greatest value, I think, is in everyone's best interest.

I am a songwriter and a performer. I am not sure that I am necessarily qualified to establish a business model for the webcasters, but if their business model is such that it can't keep them in busi-

ness, then that is something that they have to sort out, the same way that I have to sort out whether or not I can make my rent.

Chairman LEAHY. I understand. But, Mr. Navarro, you are a good songwriter and you are a good artist, and we have to figure out what is the way that you have the widest dissemination.

Again, I don't want to push the movie thing too far, but there are a lot of movies today that are not blockbusters and are out of the theaters quickly, but they are good movies and lot of people want to see them. So they see them in the after-performance, whether it is DVDs or videotapes. I would think that an artist would want to make sure that there are as many accesses as possible in the long run to make more money. And I am not suggesting what the answer is; I am just curious.

Mr. Straus, did you want to have a try on that?

Mr. STRAUS. Yes, a few thoughts on that. I think that one of the places we get tripped up has to do with what the promotional value that an artist receives is from any given medium of distribution. Traditional radio is perceived as having an integral role in driving record sales, and I don't think there is anybody here that would disagree that, for better or worse, traditional radio is vital in that process.

Whether or not the Web currently provides or will eventually provide that same kind of benefit to artists is definitely a question. Currently, in my mind, it definitely doesn't. We don't see a lot of record sales from our service, and I don't know if other webcasters who are webcasting can attest to seeing something different.

So I think that is one of the issues tied up in this, is what is the benefit other than the direct royalty benefit to an artist from having their music played on various webcasts. So that is a question. What is that exposure worth?

I think in terms of the rate itself, speaking for Websound, we are paying a higher rate than the CARP-recommended rate.

Chairman LEAHY. Which you negotiated?

Mr. STRAUS. Which we negotiated, and for our particular model it is fine. We knew what we were getting into. We had experience in the space. We had a sense of what clients were willing to pay for music and it worked fine from day one. I mean, we are not making a lot of money, but we are holding our own, and in the context of our existing business, which is creating music compilations for clients, it works fine.

That rate might not work fine for a lot of other people, and I think I spoke to that. I think that the key thing is that—and this may be a somewhat circuitous answer—we need to limit the costs, I think, for webcasters so that Frank's company, for instance, isn't going to get buried if they are able to set up a broadcast that has a million listeners per-whatever a week.

He is a small webcaster and he is sitting perhaps in his house streaming this music out. You don't necessarily want to squash him at all. I mean, we want to encourage small webcasters. By the same token, they need to pay something, so my sense is that we need to come up with a rate that works and a scenario that caps what those royalties will be so that if a small webcaster is able to grow a big listenership, they are not getting killed.

Chairman LEAHY. I am going to put in the record a letter we received signed by 138 independent artists and labels who actually want the CARP rate lowered. They say that,

> We fear that the ultimate result of the performance royalty fee as proposed will be consolidation of the Internet radio industry to those few large corporate webcasters who can afford the high rate. Smaller Internet radio webcasters will be forced out of business. Independent artists and recording labels will lose a major source of exposure and promotion.

Of course, Mr. Straus, as you said in your case, you have negotiated a specific rate.

Mr. STRAUS. Correct.

Chairman LEAHY. You didn't become a millionaire from that by any means, I know.

Mr. Schliemann, Mr. Straus has referred to you, not to put words in his mouth, as probably more typical of what a lot of these Web sites are. Under the CARP's proposed regulations, how much will Onion River Radio owe in royalties, both retroactively for the time you have been in business since 1998 and prospectively?

Mr. SCHLIEMANN. We came on the air or started to broadcast in February 2001, so it would be retroactive to February 2001. I don't have the number in front of me, but I can tell you that for the first 3 months of 2000, so January through March, the sound recording performance royalty fee would be $1,180.93, compared to the $107 that we are paying to songwriters and music publishers for the same performance of the same works.

I am sorry. He is handing me the actual figure that I gave from earlier—$1,880.93 for the first 3 months. I apologize.

The really scary thing to me is that it doesn't end there. Our ratings have doubled in the last 6 months. Arbitron reports an explosive growth in Internet radio. Based on what they say and what a company, MeasureCast, says—MeasureCast reports actually that Internet radio listening is up 563 percent since January 1, 2001, roughly the time we came on the air.

So at my best guess, I would say that we are going to be at 100,000 streaming hours per month by the end of the year. A station that streams that much would spend $25,200 for the performance fee. Now, in Montpelier, in a small market, if we have a banner year in sales——

Chairman LEAHY. The total population of Montpelier is 8,500 people, the smallest State capital in the country.

Mr. SCHLIEMANN. That is right, and our market is actually the entire State of Vermont. And if you want to compare it to New York City, I think the population of New York City is 15 times the entire population of Vermont, so we have fewer prospects. Of course, our rate needs to remain low in order to compete with local FM. So we have a couple of issues there because we are also in a small market.

So the best-case scenario for us is that we may be able to bill between $25 and $50,000 in sales revenue if we have a banner year. If you stream 100,000 hours per month, then it is $25,000 for that fee alone. Again, right now for us, the single largest expense is the cost of bandwidth. Of course, we already pay for music, but bandwidth is our single largest expense. To put it into perspective, the proposed royalty is almost three times our single largest expense

at the moment, at our current number of streaming hours. So as we continue to grow, it gets worse and worse.

Chairman LEAHY. Thank you. I appreciate the courtesy of Senator Hatch. I want to ask one more question. You had raised Arbitron and its take on this, and with Mr. Rose here, who is the Arbitron expert on this panel, Mr. Rose, you have had studies of the webcasting industry.

How many webcasters will be forced to cease operations and how many will be able to stay in business if the CARP rates became final? Is it possible to make that judgment?

Mr. ROSE. Mr. Chairman, I would love to be able to predict. I have learned many years ago to be able to predict in the age of the Internet is a pretty challenging task. Furthermore, we are not economists. We are a company that measures what consumers do with the Internet and streaming and how they listen to the media.

But perhaps I can offer some perspective on that with some other research that we have done, pointing to the infancy of webcasting as an advertising medium. The point is advertising really hasn't begun on the medium yet, and you layer on top a very high cost in addition to it and it really makes it difficult for the media to get traction.

In June of this past year, we talked to our customers, which we are want to do, in a more formal way and some of the findings that we have point to the infancy of the medium. We asked advertising agencies, in particular, and webcasters, too, do advertisers in agencies include streaming media in their media mix on a consistent basis? Eighty-six percent of the agency people and eighty-six percent of the Webcasters said no.

By the way, that was 6 months ago, before the issues that we are dealing with now, which by the way are very public and makes it hard for advertising agencies to go to their customers, the advertisers, and recommend the medium with this uncertainty.

We then asked what size of weekly audience would be needed for advertisers and agencies to include the medium on a consistent basis in your media mix. Sixty-two percent of the agencies—those are the companies that count; they are the ones who spend the money—said that the size of the weekly audience needs to be more than twenty percent. Today, that number is 9 percent, so we are not even halfway there.

Then we took it one step further and said when do you think it is going to get to that point? If it is not there now, when would it be there? The overwhelming response again from the agencies, the people with the money to spend, said 2004, 2005, or 2006. So, clearly, the industry has not really begun from an advertising medium point of view, and if you go back and look at FM radio or you look at the cable medium and its growth, it is very much in its infancy stage.

Ms. ROSEN. Mr. Chairman, can I respond to that?

Chairman LEAHY. Sure.

Ms. ROSEN. First of all, I think the fact that Mr. Rose said he wasn't an economist was helpful because actually the CARP had multiple economists testifying to the ability of webcasters to pay to the forecast projections of these businesses and to the rates that were being considered. So I think there is a lot of credit that should

be given—economists hired by all sides, by the way, so I think some credit should be given to the evidentiary proceeding on that score.

I think the other issue is one that Dan raised, which is this issue of affordability, I think, is troublesome for the artists and record companies to really deal with because it is really an issue of who is first in line.

I have a chart that I think some of the webcasters distributed about how big a percentage the CARP fee is of their income, and I think that Frank just alluded to a high percentage there. But their operating expenses already, without a music fee, are hundreds and hundreds of percent of their operating income. So all of these businesses are already losing significant amounts of money.

So I think that to somehow say, well, we are going to go out of business because we are going to have to pay copyright fees is frankly a little unfair, because we are last in line because we have waited for 3½ years. I think you really have to recognize that the CARP looked at all of those numbers and came to those kinds of determinations.

Mr. POTTER. Can I get a shot at this one, Mr. Chairman?

Chairman LEAHY. If you don't have any objection, Orrin, please go ahead.

Senator HATCH. No. This is very interesting.

Mr. POTTER. I will be very fast. Ms. Rosen's point about the economists is well taken, particularly because it was the RIAA's economist who said that it would be appropriate for the RIAA to charge monopoly rates in this circumstance, and particularly because it was the RIAA economist who said that essentially 25 or 26 of the "marketplace agreements" were irrelevant as benchmarks because none of those companies, or very, very few of those companies had any chance of success. If a company doesn't have a chance of long-term, viable success, it should not be viewed as a benchmark for an entire industry, and that is the trouble that we have today.

Mr. Straus just acknowledged that his license is not applicable to the entire industry. He runs a fee-for-service business. He doesn't run an advertiser-supported media business. The RIAA's economist said these unique companies, all of whom the CARP called unsophisticated, uneducated, and who would be characterized in the ASCAP-amended consent decree as those in the early stages of an industry—and the new ASCAP consent decree does not permit the first 5 years of an industry's agreements to be considered by a rate court for an overall industry-wide rate. It is for all of these circumstances.

So the RIAA economist agrees with Billy Straus and agrees with the Department of Justice that all of these agreements were useless. Unfortunately, it is exactly what the CARP relied upon in setting a benchmark for the entire industry.

Ms. ROSEN. That is the value of evidentiary proceedings. You don't have to have the tit-for-tat. You know, there is actually a record to look at.

Chairman LEAHY. Well, we will go into that in a bit.

Senator Hatch.

Senator HATCH. This is extremely interesting to me.

Mr. Navarro, you raised some important issues in your testimony concerning the challenges facing a recording artist who is working to promote his or her music on his or her own. One issue you raised that I have heard from others is that some of your work is inaccessible to you and to your fans because the label that currently holds the copyright has chosen not to make the work available.

Is it your sense that works that the labels decide are not worth keeping in print would be of value to artists who recorded them and their fans if we could find a way of making those works available through legislation or otherwise? If so, would it make sense to share the new revenues from those works among the artist and the label?

Mr. NAVARRO. I see no problem with sharing those revenues. The big issue with regard to that for me is that a record company that releases 100 or so records a year, year after year, that is a pretty large number of recordings. For me, over my entire career so far, 12 years, I have released 6, which is probably less than a week's output for a major label.

Each individual recording in my career represents a substantial portion of my creative body of work and what I am able to put out there for my audience and to sell. I have no problem sharing it. I just want to be able to get it, or else a big piece of my career disappears.

Senator HATCH. Ms. Rosen, would your members support legislation to make unused catalogue available for the benefit of artists and fans, and if not, why would they not want to find a costless way of generating some revenues from these unused assets in a way that would also benefit artists and fans?

Ms. ROSEN. I have actually been looking at this issue for the last several weeks, Senator Hatch, and I think that you don't really need legislation because I think my conversations with at least some of the major record companies are that they actually on a regular basis have communications with artists whose music has been out of print. The only reason it is out of print is because some guy at a record company hasn't seen a potential market value for it.

Senator HATCH. Right.

Ms. ROSEN. But if artists go to their record company and say that they perceive a market value for it, my understanding is that the record companies have come up with very creative and favorable scenarios for artists to either find another distributor or to distribute their own. I think that you should look into that.

Senator HATCH. I think we should look into it, and to the extent you can help on that, I would appreciate it.

Ms. ROSEN. I would be happy to.

Senator HATCH. I think that that may be a way. Moods change, the public changes. Songs that may have been done 20 years ago may suddenly become popular—you never know—that didn't make it then. I have seen that happen in the songs that I write.

Mr. NAVARRO. May I respond?

Senator HATCH. Yes.

Mr. NAVARRO. I just wanted to respond to that. One of my six albums right now dropped out of print about 3 months ago by Mercury Records. The remaining 2 or 300 copies in existence we tried

to purchase, and they were actually ordered to be ground up instead.

We have been in negotiations. It is difficult for guys like us to get a phone call back, even to our manager, and what they wanted in return for allowing us—they offered us two options. One of them was to either press them on our behalf and charge us actually $3 a CD more than they had been selling for when they were still in print. The other option was to pay a royalty to them.

Now, we have no objection to that, but the royalty they requested was with a guaranteed return of a number of units over a 3-year period that equaled better than half of what they sold over a 7-year period especially when the record was new. We found that to be punitive. We are still in negotiations trying to figure out exactly how to get through this so that we can get the rights to this back, but essentially in terms of how they want to approach it right now, it is something that we can't fathom.

Senator HATCH. Well, how do you respond to that?

Ms. ROSEN. I don't know the particulars of Dan's situation, but I would be happy to do what I can to help.

Senator HATCH. Actually, for somebody who started writing 6 or 7 years ago, I have had some interesting success, but with one of our CDs I had a very similar experience with a small record company or book company. We entered into an agreement that they would sell so many of them, and we thought it was a pretty darn good Christmas record. We also got an agreement that if they didn't sell so many, it came back to us, and the agreement explicitly said that it should come back free.

They said they were going to discontinue producing and selling them, but they would sell us their remaining inventory for $4 a CD. We couldn't do that, so they went out and sold them at $4 a CD and then said if we want the master back, we will have to pay $10,000.

Now, that is with me, a U.S. Senator. I can imagine the difficulty you must have, not that you are not my equal in every sense of the word, and better than I am as a musician. But I can imagine how tough it would be for somebody who doesn't have a lot of bargaining power.

Chairman LEAHY. Originally, we were going to play a few of your CDs on the video for the hearing, but we thought that might be a little bit over the top.

Senator HATCH. Well, the only reason I mention that is because I know it is a misunderstanding and I will probably get it straightened out. But the fact of the matter is I understand what you are saying, and my experience with major record companies is that most of them would probably work it out with you in a satisfactory way.

If Mercury is not doing that, I would suggest to Mercury they ought to do that. If they are not going to make a recording go and not going to put any money into it and not going to do anything for the artist, they at least ought to let the artist try to do it.

Mr. NAVARRO. Well, I agree, and there is no question that what they stand to get from it now by sitting on it is absolute zero.

Senator HATCH. Well, that is right.

Mr. NAVARRO. So making the rates prohibitive doesn't do them any good.

Ms. ROSEN. That is right.

Senator HATCH. You and I both, Ms. Rosen, and Mr. Navarro, have seen records that were made decades ago that suddenly become popular. There just may be a mood change. They may just fit the right scheme or the right situation, and some great music has been lost because we haven't done that. So I think of worry about this a little bit.

Mr. Navarro, you also mentioned how glad you are that you can use the Internet to interact with your fans and how important it is to control your own domain name. Can you explain why it is so critical that an artist be able to control that Internet identifier, especially when he or she leaves a label to work on his or her own? You have said you have worked with labels and you have sold your CDs on your own.

Mr. NAVARRO. Our first deals were sort of pre–Internet-era. It certainly hadn't hit critical mass, and when we signed with Mercury, in particular, they didn't go out there and open up a Web site for us or register a domain name, or really didn't even seem to have it on their radar. We did it ourselves, and thank goodness we were able to do that.

The name of our group is Lowen and Navarro; it is our own names. If someone else owned my name and I couldn't get that back, I would have to change my name to something facetious just to be able to survive in the business and it wouldn't work. We have invested a lot of time and effort and money in the value of that name and to be able to control it so that I can continue my career with that label or without label. The Internet has been absolutely a cornerstone of how we are able to reach our fans, how we are able to continue to sell records, and without it we would be nonexistent.

Senator HATCH. Ms. Rosen, as you know, I am a fan of all you do and I want your companies to succeed. But how do you explain the CARP finding that the RIAA had "developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as a precedent" in the CARP proceeding, and that it concluded deals only in "substantial conformity with that sweet spot?" How would you react to this finding?

Ms. ROSEN. Well, I actually didn't find it much of an accusation. I mean, you know, the statute directed us to negotiate in the marketplace and, like other compulsory licenses the Congress enacted, provided us a setting to do that. I think it is natural for copyright owners to seek as high a rate as possible in those negotiations, and natural for the users to seek as low a rate as possible.

I think the key finding, though, of the report was that actually the CARP didn't respect the overwhelming majority of those deals that we had done. They threw out 25 of 26 of those deals, and then chose one closer to the lowest rate. So I think it is pretty clear that we were doing, in my view, what people should have expected us to do and what the statute called for, and the CARP made an independent judgment about the marketplace viability of those deals.

Senator HATCH. Let me ask both of you this question and get your perspectives. Mr. Navarro raised the issue of consolidation

among radio and concert venues. I have heard of some artists or labels being required to purchase advertising or play affiliated concert venues in order to get air play on their radio stations.

Can you each tell me how you view these types of issues from your perspectives? Let's start with you, Ms. Rosen.

Ms. ROSEN. I think you are referring to the issue of Clear Channel Radio essentially owns the largest concert and venue promotion company in the country. I have heard sort of the same kinds of anecdotal complaints, I suppose, that you have that if artists choose another promoter, they are worried about being penalized by the Clear Channel radio stations in those cities where they would like to have a relationship with radio to promote their shows, but I don't have any factual information about it.

Senator HATCH. Mr. Navarro, do you care to comment?

Mr. NAVARRO. As much I know about the situation is that the vertical integration by Clear Channel in particular, but also by other entities, has resulted in independent labels being shut out and has resulted in smaller or independent artists being shut out of the equation.

If you can't afford the time buys, if you can't work with that particular promoter, you are not going to play in the marketplace, either on the radio or live. And without that, the ability to reach an audience is severely hampered. A smaller artist and a smaller label doesn't necessarily have the wherewithal to play that game in that way, and as such is it is very anti-competitive and pretty damaging to the careers of modest artists who go out and pound the streets and tour the country and want to get played.

Senator HATCH. Well, we know how some artists work as studio singers and all of a sudden they hit it. I remember when Faith Hill was doing studio singing and, of course, has really hit it big. Natalie Grant fell in love with her husband on one of our songs, and that song has become a fairly substantial song.

Chairman LEAHY. You are the Renaissance Man.

Senator HATCH. Yes, the Renaissance Man here.

I wish we could find a way where all these really great talents could really come to the forefront. Some of the greatest singers and some of the greatest musicians I have ever seen never have a chance and I wish I could find some way of helping them. I know we have got to have a viable recording industry to do that, and we have got to have viable people who are playing these things.

So anybody who can help us do a better job here, I would like to do it. And everybody is important; it isn't just one side or the other. I would like to see us do a better job with as few mandates as we can possibly have.

Some have raised concern about the major labels' online joint ventures, suggesting they aggregate market power in ways that distort competition and therefore harm smaller competitors or artists in the online market. The primary concern, at least it seems to me, seems to be where large content competitors act jointly in aggregating their content for distribution and then do not make the content available on a fair and non-discriminatory set of terms to their distribution competitors.

I would like to ask each panelist if any of you share these concerns, and if so, do you think that a legislative remedy is war-

ranted to limit competitive harms where there is joint conduct by content competitors?

Ms. ROSEN. Well, this is a very big question, so forgive me for trying to answer it and put it in context for the very thing that we are discussing today.

With regard to the specifics of the online ventures and the competitive nature of their deals, I think you can be comforted that the Justice Department is looking closely at this and won't let a speck of paper go by without scrutiny. But I think it points out the bigger issue, which is that in some respects for music, unlike other copyrighted works, we all still have a little bit of an old-fashioned notion about how consumers get music and how the various businesses interrelate.

The issue of promotion came up. Now, despite the fact that the CARP found that there was no evidence of promotion in webcasting or no evidence of substitution of sales, and they looked at things like click-throughs and other issues, people still think that exposure is what artists and record companies want. But that is, if we think about it, based on the old-fashioned notion that once there is exposure, somebody is going to go into a record store and buy a CD or go to Amazon.com and buy a physical good.

I think what you two, in your prescient wisdom, and other members of Congress did in 1995 was say, you know what? The world is changing, where people are not going to depend on the sale of physical goods, and so we have to do for music what we already had done years ago for things like movies. Senator Leahy referenced this.

The risk and return on investment in movies is paid from theatrical release. It is paid from selling it to broadcast, it is paid from selling it online, it is paid from selling it in video cassettes, and in satellite and a host of other areas that enables them to spread out the risk.

So, for instance, if you see a DVD in the store and it is $10 and the CD is still $15, well, the DVD is their tertiary market. It is the third time they are selling it. So what we are getting here in the webcasting issue is how do we move the music business into the 21 century? How do you create incentive to these companies to license all of these users online?

You have to be able to recognize that there are going to be growing pains in that because people are going to be paying for things they never paid for before because we always depended on returns on sales in the record store. The only way prices come down for everybody and we all grow is if you recognize that multiple distribution streams and multiple revenue streams are really going to be the future that is best for everybody.

So I think what we are experiencing here is the growing pains of the webcast side of it, but it is illustrative of the problems that record companies have in their licensing in the new models because nobody wants to pay what people think it might be worth. So you have to consistently anticipate the impact of a new stream on your existing business. But if you worried less about that and more about growing multiple streams, you really have something there, and I think we have something here, but there is no question there are going to be growing pains.

Senator HATCH. Mr. Potter.

Mr. POTTER. It is a very large question, Senator Hatch, and it is one that DiMA members are deeply embroiled in. Many of those DiMA companies that don't exist today would argue it is largely as a result of their inability to get licenses, which seems to be the same case at company after company after company.

There clearly is a history in the record industry of most favored nations clauses in licensing contracts, which some would allege is a constructive price-increasing and price-equalizing across the horizontal spectrum of the industry impact.

There are issues associated with digital licensing when one is distributing downloads and one is therefore not subject to the traditional wholesale/retail pricing limitations. For instance, on resale price maintenance, downstream price controls for products, there are traditional antitrust laws that are absent when one is licensing.

When the chairman or the vice chairman of the company that owns PressPlay acknowledges that that joint venture will control downstream pricing all the way through the distributors to the consumer, that suggests that not only is digital different and it feels different, but, in fact, it has very different legal implications for consumers and for customer choice, and for frankly the ability of retailers to compete on choice, and that is troubling.

In this context, sir, to bring it back to webcasting, the RIAA had a webcast negotiation licensing committee that met regularly. It created white lists of "approved companies" that were distributed to all the record labels, and somehow those white lists occasionally made it into individual record company negotiations with individual webcasters. Frankly, that is troubling.

What we are most concerned about, however, is that the CARP seemed constrained by what it thought the willing buyer/willing seller standard required of it, which was to only look at actual sellers and actual buyers. In this marketplace, there was only one seller, the RIAA, and if you are a willing buyer and the only place you can buy the sweater you want is Nieman–Marcus, you have a choice. You can buy it at the Nieman–Marcus price or you can go without it. The CARP construed everybody who went without it to be not a willing buyer.

There are 2,800 terrestrial radio stations that are simulcasting their over-the-air broadcasts on the Web. Not a single one of them licensed the content from the RIAA in a negotiation. That does not mean they weren't willing buyers, but they were not acknowledged by the CARP as having any consideration in the rate because they weren't actual buyers.

There are thousands of webcasters that did not negotiate with the RIAA because it was clear for months and months that the RIAA had the sweet spot price. It was "take it or leave it, have a nice day." Frankly, after the 80-something witnesses and the 43 days of hearings, the arbitrators concluded that was the marketplace, that was the actual marketplace.

Unfortunately, the arbitrators also felt that they were constrained to set a rate based on the actual marketplace which they acknowledged over and over again was manipulated. So the prob-

lem is how does Congress clarify the standard to ensure that it is a competitive marketplace.

As the rate court for ASCAP for 40 years has said, the standard is competitive; it is fair market value, a reasonably competitive marketplace. Otherwise, what is the purpose of the CARP? If the RIAA, the sole seller, can go out and license these small companies at high-priced rates because they don't want to pay lawyers and they don't want to go to the CARP, and then can walk in and say here it is, 26 agreements, willing buyers, willing sellers, that is the sole parameter of the evidence you should consider in setting the rate—they can hear a lot of other witnesses, as they did, but that doesn't mean in the ultimate outcome that they have to go to with any hypothetical marketplace which was proposed or to any analogous marketplace, such as 50 years of ASCAP rates or broadcast radio rates.

Instead, they were forced to return to the actual marketplace; they felt forced by the law. Frankly, they ended up with a Yahoo agreement which is completely opposite.

Senator HATCH. Mr. Rose.

Mr. ROSE. Senator Hatch and Mr. Chairman, you asked some questions having to do with broad distribution of content or somewhat limited distribution of content. I think both of you talked about that in slightly different ways, but the essence of it is there, and ultimately what is better for the consumer, what is better for the artists, et cetera.

If I was listening carefully, I think I heard Mr. Navarro say something to the effect regarding his CDs that they are sitting on it and if they sit on it, nothing is sold. Well, one of the biggest value propositions of the Internet, according to consumers, is their ability to get things they can't get through traditional media.

So it seems to me that in essence what we are hearing from the consumers is their vote is a broad distribution of different choices to get different content from different sources, not limiting it to a select few and thereby potentially driving the market.

For that matter, we have also been talking a little bit about the promotional value of streaming media. As we are want to do, we have some research from the consumers to hopefully address this issue. In January, we had asked consumers between the following choices—the Internet, radio, television, and newspapers—which medium do you turn to first to learn about new music, the very music that we want to sell?

Among everybody 12 and older, whether they are online or not, whether they are streaming or not, the answers came out like this: 63 percent said radio. There it is, evidence that radio promotes the value of the medium, or promotes music. TV, 14 percent; I guess we can call that the MTV revolution. Internet, 9, and certainly no one can argue that newspapers really are that relevant at 2 percent.

Now, we are going to look at it among those who listened to Internet audio in the past week. These are regular audio streamees. The numbers are different. Radio goes from 63 percent to 47 percent. The Internet goes from 9 percent to 31 percent. TV is essentially the same at 13, and newspapers essentially the same at 3 percent.

So the essence of the point here is that consumers are going to go online to learn about new music far more among the streaming population than among the general population. So I think there is certainly some evidence here that streaming media does, in fact, have a promotional value for music on the Internet.

Senator HATCH. Does anybody else care to comment?

Mr. SCHLIEMANN. Yes. I guess I will approach it from the radio station side of it, Senator Hatch. Since Congress enacted the Telecommunications Act of 1996, the result is a few large companies owning the majority of radio stations. I would like to think that a radio station such as Onion River Radio provides an alternative to the cookie-cutter radio that you hear on broadcast FM.

One of the trends in broadcast radio is to limit the number of songs that can be scheduled for air play. Another trend is to decrease the amount of time before a song can be repeated, and the reason that they do that is it is called a tighter rotation. It will increase a listener's chance of hearing his or her favorite song when they drive to work, and then, of course, when they drive home they are probably going to hear those same songs again. That is what I call cookie-cutter radio. You know what is coming up in the play list.

Unfortunately, that makes it difficult for local artists, it makes it difficult for lesser-known artists to receive radio air play. But that lack of diversity, of course, creates the opportunity for our station. We play a few local Vermont bands; if I want to name a few here, Strange Folk and Soma Seth Yacavone Band. I mean, those bands don't receive a lot of FM radio air play, and when we play them on our station alongside more established artists out of Vermont such as Phish or the Grateful Dead, or if we play them along with John Mellencamp, we cross over a few different formats that you wouldn't hear on an FM station.

We receive e-mails from listeners asking how can they purchase that CD. You know, they want to know more about that band Strange Folk that they haven't heard of before. So then, of course, we can provide that information for them. I think the success of Internet radio is proof that the consumers want that variety and they want that originality that we can offer.

Chairman LEAHY. Let me ask this. I think most people feel that normal radio play promotes sales of CDs. Six months ago or eight months ago or whenever it was when I heard a cut from "Red Dirt Girl," by Emmylou Harris, I actually picked up the CD the next day. If I hear a cut from Sheryl Crow's new album or if I play something from Steve Earle or John Prine or U2—Buddy and Judy Miller came out with a great album and I heard a cut from that and got the album. But it might also be Rostropovich or Yo–Yo Ma. They are all different ones that I like, somewhat eclectic taste. I have to listen to things from Dick's Picks to get more Grateful Dead today.

The RIAA argued before the CARP that webcasting actually hurts CD sales. I am wondering if you all agree on this because I might hear Steve Earle more often on webcasting. I might hear Buddy and Judy Miller's songs because they have written so many for other people, but I might here them there, or Nancy Griffith,

or people like this. I am not trying to promote any particular artist, but I am just thinking of some of the ones that I might hear first.

Now, the CARP declined to make any finding on the impact of webstreaming on sales of records, but I have heard from a lot of webcasters that artists and independent labels appreciate the exposure they get because it helps record sales. I put into the record the letter from 138 of them. They are concerned that the CARP rate is going to force smaller webcasters out of business and consolidate it, as some of you have said, to large corporate webcasters.

I am just wondering what is the answer here. Do these promote sales? If U2 comes out, as they did with their last album, with a mega-tour, it is not going to make any difference if any of you play it. Sold-out concerts. You know, Edge, if he just waves out there, they are going to sell another 20,000 albums. That is no problem. But I am thinking of some of the lesser-known ones, those who don't go on a mega-tour.

Mr. POTTER. Mr. Chairman, 2 days ago I spoke to one of the major Internet radio companies who polled their data and said that in January of 2002, they sold tens of thousands of CDs directly through the tuner on the Web site. Another actually much smaller Internet radio company gave me survey data last week from a survey they had done just this year, but it reflected trends from a survey they had done 6 months ago of approximately 16,000 people.

Each time was a 30-day survey of people who were tuning into their radio programming, and the survey data showed a significant double-digit, 20-, 30-percent of people were having their purchases influenced by online radio. But more importantly perhaps, frankly, 40, 50 percent of those people whose purchases were influenced—actually, two-thirds of the people whose purchases were influenced were still buying offline.

So if you extrapolate from the 30,000, 40,000, 50,000 CDs that the major online player is selling and two-thirds are still buying offline, you can double and triple that amount, and that is just for that one Internet radio company. There is no doubt that small artists and small labels are getting valuable exposure from Internet radio. There is no doubt that Internet radio sells CDs and promotes CDs by providing exposure to people frankly who otherwise wouldn't be listening to the radio.

Chairman LEAHY. Mr. Rose, do you get that same impression at Arbitron?

Mr. ROSE. In fact, we do. Again, from January 2002, we had asked consumers, have you ever purchased a CD on the Internet, not got it for free, did you pay money for it? Among all Internet users, 1 in 5, or 22 percent, said yes, I have bought a CD on the Internet.

Among those who listened or watched on the Internet in the last week, the active streaming media users we talked about before, that percentage is 46 percent. They are far more likely to buy music on the Internet than those who aren't streaming.

Chairman LEAHY. It is interesting because you walk into a record store now and more and more something they didn't do before—you have got the earphones to listen to this. And they are not doing that out of the goodness of their heart. It obviously works in selling.

Ms. ROSEN. Mr. Chairman.

Chairman LEAHY. Just a moment, Ms. Rosen.

A friend of mine, Peter Yarrow, called me yesterday and a basic question he asked is shouldn't artists be compensated for the work they have done? Does anybody disagree? It has always been my basic bottom line that artists should be compensated for the work they do.

Mr. SCHLIEMANN. We are fans of the music that we play. We want to ensure that all the artists and all the creators are compensated fairly, but we can't pay a royalty rate that is so far out of whack, in plain English, with every other expense that we have. It is 12 times higher than what we pay the songwriters and music publishers.

If Senator Hatch would write a song and somebody else would perform that song, why is their performance 12 times more valuable than his creative genius?

[Laughter.]

Ms. ROSEN. Don't worry, I am not going near that one.

Chairman LEAHY. I listen to Orrin's music. I don't know if he is listening to me saying this, but I listen to his music.

Go ahead.

Ms. ROSEN. Well, this issue of this other music keeps coming up, and perhaps Frank isn't aware that a substantial part of the CARP proceeding is how much they pay for the underlying musical work. The arbitrators came to the conclusion they did with a significant amount of evidence to distinguish between the rates.

I have to clarify the record, Mr. Chairman. We did not say that webcasting hurts sales. What we said was that we didn't see evidence that it helped sales.

Chairman LEAHY. I have got CARP here and it says, "RIAA did not attempt to offer any empirical evidence to support its concerns that webcasting causes a net substitution of record sales."

Ms. ROSEN. Right, because we just don't know, and that is what we told the arbitrators. We don't know whether these are substitutional, we don't know whether it is promotional. In fact, the CARP ended up agreeing with that question mark, which is exactly the point I raised before.

But, you know, we met with a whole host of small, independent labels yesterday, all of whom said you know what? We want the money. Who knows whether people are going in the stores? Maybe this will be the only way people are going to get music, if it is so ubiquitous—thousands and thousands of channels of the most niche programming possible.

It is attractive to have that be the way you get music. It is not an accusation. These guys are not pirates. It is a fact of changing technology and new opportunity for consumers, in particular. So what we are saying is you can't assume that the pricing structure is going to be that we get it at rates that are so low that they are useless here because we are going to drive sales here. We are moving into a new era.

Chairman LEAHY. Well, some of your answers raise more questions than we have time for, and unfortunately this is a hearing that has to end now. I am going to submit questions to all of you.

I don't mean to do this to burden you. If you have questions about the questions, please call me or the staff on it.

In many ways, this may be the beginning of hearings on this because if I was given the power right now to make the solution, I am not sure what that solution would be. So maybe it is just as well for all of you that I don't have the power because I have a feeling whatever I were to decide in a case like that, some of you would like, some of you wouldn't like.

Maybe you are all in a situation—and I am obviously not telling you what to do, but you may want to consider whether it is the time to seek yet again a global settlement of this issue.

Mr. Straus, you made your own settlement within your own business model. A lot of others will not be able to do that, if it is possible to do it.

Artists should be paid, artists should be compensated. Otherwise, you are not going to have anything else to carry anywhere. But small companies like Mr. Schliemann's should continue. If I turn on the Top 10, I may not hear Steve Earle every time, but I like to listen to Mr. Earle. I may not hear others that I might want. There is a lot of opera I like, a lot of classical music I like, and I want to find niche areas to listen to that.

So what I urge, if anything, is if you are continuing talks on this—again, I can't tell you what to do; I can only make recommendations, but if you are continuing in talks, consider that the world is changing very, very rapidly and the way of selling music and getting music out there is changing and will continue to change in a digital age and in an Internet age. Newspapers are finding this, book publishers are finding this, everybody is finding this, and music is not going to be any different. It really is not.

I think there are also some potential advantages here for artists, for advertisers, for businesses, and certainly for the listening public. If the listening public finds they benefit, I have to be convinced that you can build business models where all of you benefit, too.

We have several written statements that the committee has received that we will insert into the record at this point.

Chairman LEAHY. With that, we still stand in recess. You will all have a chance to add to your comments. I want to thank Senator Hatch for his work and effort on this and, of course, our staff.

Thank you.

[Whereupon, at 11:27 a.m., the committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Dan Navarro Answers to Written Questions
"Copyright Royalties: Where is the Right Spot on the Dial for Webcasting"
May 15, 2002

Answer to question from Senator Biden ("The Copyright Office arbitration proceeding included a review of several thousand pages of written pleadings, the arbitrators heard the equivalent of 15,000 pages of witness testimony, sat for over 40 days and heard from more than 50 witnesses. The arbitrators were also privy to extremely sensitive, confidential business information from all parties to enable them to determine the fairest rate. All parties who participated in the arbitration proceeding were represented by able counsel, presented written and oral testimony, and were permitted to cross-examine adverse witnesses. This Committee does not have the benefit of, and is not in the position to examine all of the facts necessary to determine a fair rate. Why should this Committee substitute its judgment for that of the arbitrators or that of the appellate reviewer after a 2 hour hearing?"):

Thank you for the opportunity to respond to your question which addresses the heart of the matter here. For all the reasons set forth in the question, I simply do not believe the Committee should substitute its judgement for that of the arbitration panel.

While Committee hearings are a valuable means of information gathering on a wide variety of issues, they are not a substitute for a months-long adversary proceeding in which all testimony is subject to cross-examination and in which the arbitrators have the benefit of extended arguments and counter-arguments on all relevant issues. The ruling of the CARP came as the result of such a proceeding.

While no party to the CARP proceeding was completely satisfied with the recommendations that the arbitrators made to the Librarian of Congress last February, the arbitration process itself was designed to ensure thorough analysis of business data and two levels of review of the arbitrators' recommendation, including appeal of the final rate determination to the federal court of appeals. Congress must allow these statutory CARP procedures to conclude, or it will undermine the integrity of the system it established.

Answer to question from Senator Cantwell ("I understand that it is your view that the webcasting royalty rate should not be similar to the royalty rate paid by over-the-air broadcasters? What is the basis for such a distinction?"):

I appreciate the opportunity to express my views on this matter. I will provide answers to all the various permutations of this question to ensure that I respond appropriately to the question asked.

A) The limited digital public performance right in sound recordings.

As I testified, I believe the U.S. should provide a public performance right for over-the-air broadcast of copyrighted sound recordings. Unlike the rest of the world, the over-the-air broadcast radio industry in the U.S. has the right to broadcast sound recordings without paying any royalty to the musicians and singers whose recorded work the public wants to hear. As a result, broadcast companies built profitable industries by using our product for free. Since the 1960s, AFTRA and the AFM have fought for the creation of a performance right that would provide royalty payments to musicians and singers when their recordings were broadcast on the radio. All other types of copyrighted work in the U.S. enjoy a right of public performance, and there is no reason why sound recordings should be treated differently. But the powerful broadcast lobby defeated all efforts to create a performance right in sound recordings.

The creation of a full-scale performance right would benefit the U.S. economy as well as artists. Hundreds of millions of dollars are collected by foreign rights societies for the broadcast of American recordings overseas, but those societies refuse to pay the money they collect to American performers because there is no reciprocal performance right in the U.S. It is time to correct this grave injustice so that U.S. performers can reap the international benefits flowing from our creations.

B) The difference between internet-only webcasts and internet retransmissions of over-the-air broadcasts.

In the CARP proceeding, the arbitrators recommended different royalty rates for internet-only transmissions and the internet retransmissions of radio broadcasts. AFTRA and the AFM, however, requested that the same rate be applied to both internet-only transmissions and internet retransmissions of radio broadcasts. In fact, all the parties in the CARP proceeding requested the same rate for internet-only transmissions and internet retransmissions of radio signals. Nonetheless, the arbitrators recommended two different rates based on their review of the evidence. As I stated in my testimony and in my response to Senator Biden's question, I do not believe that it is appropriate for the Committee to substitute its judgment for that of the arbitrators. To do so would undermine the integrity of the rate-setting procedure that Congress established.

C) The difference between percentage-of-revenue royalty rates paid for the performance of musical works and the per-performance royalty rates recommended by the CARP.

The webcasters have complained vociferously to this Committee and in the public press that the per-performance royalty rate structure recommended by the arbitrators will harm their industry. They maintain that it should be replaced by a

percentage-of-revenue royalty rate structure similar to the rate structure applied to the over-the-air broadcast of musical works.

In the CARP proceeding, AFTRA and the AFM originally proposed a dual rate structure, in which a webcaster could choose to pay either a per-performance rate or a percentage-of-revenue/expenses rate. Ironically, in view of their current bitter complaints about the arbitrators' recommendation, the webcasters and broadcasters insisted throughout the proceeding that a percentage-of-revenue rate structure was inappropriate. Only very late in proceeding – and only after the deadline for amending rate proposals – did the webcasters and broadcasters support any kind of percentage-of-revenue rate structure. By then, they had succeeded in persuading the arbitrators that a percentage of revenue rate structure was, in fact, inappropriate in this industry. Again, whether or not AFTRA and the AFM would have reached that determination, I do not believe that it is appropriate for the Committee to substitute its judgment for that of the arbitrators.

I do think it is important to note that the mere fact that songwriters receive percentage of revenue royalties for the over-the-air broadcast of their underlying musical works is not – and should not be – determinative of what the appropriate rate structure should be for the performance of sound recordings. Because of the tracking capabilities of the Internet, exact numbers of actual users can be easily tallied, while traditional broadcast ratings services employ inexact samples, estimates and projections to gauge audience size. It is my belief that any rates established for use of copyrighted material on the Internet should reflect this definite, accurate and fair statistical capability.

D) The difference between a musical composition and a sound recording.

As I explained in A above, copyrighted musical compositions enjoy a broad performance right, so broadcasters must pay for a royalty for the over-the-air transmission of a musical work. The webcasters and broadcasters fought very hard to persuade the arbitrators that the royalty rate for the performance of musical works was the appropriate benchmark for the royalty rate for the performance of sound recordings. They presented a vast amount of evidence, argument and expert opinion on the point.

Nevertheless, the arbitrators rejected that view on the grounds that musical works and sound recordings have vastly different cost and demand characteristics. Musical works and sound recordings have different authors, different sellers, different buyers, different cost structures and different demand structures. Certainly, as I described in my testimony and mentioned above, a sound recording is a completely different creative product from the underlying song. Different recording artists routinely take a given song and transform it into distinctly different works.

The arbitrators' decision that the royalty rate for the performance of musical works should not determine the rate for the performance of sound recordings was not based on an oversight or misunderstanding. Rather, it was based on extensive evidence and a reasoned analysis of all the arguments. I do not think it is appropriate for the Committee to substitute its judgment for that of the arbitrators.

If you have any more questions, please feel free to contact me c/o Ann Chaitovitz, AFTRA, 1806 Corcoran Street, Washington, DC 20009.

United States Senate
Committee on the Judiciary

Hearing on
"Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?"
May 15, 2002

Responses to Written Post-Hearing Questions of
JONATHAN POTTER
DIGITAL MEDIA ASSOCIATION

1) **The Copyright Office arbitration proceeding included a review of several thousand pages of written pleadings, the arbitrators heard the equivalent of 15,000 pages of witness testimony, sat for over 40 days and heard from more than 50 witnesses. The arbitrators were also privy to extremely sensitive, confidential business information from all parties to enable them to determine the fairest rate. All parties who participated in the arbitration proceeding were represented by able counsel, presented written and oral testimony, and were permitted to cross-examine adverse witnesses. This Committee does not have the benefit of, and is not in the position to examine all of the facts necessary to determine a fair rate. Why should this Committee substitute its judgment for that of the arbitrators of that of the appellate reviewer after a 2-hour hearing?**

As with any regulatory process, if the outcome of the arbitration and review process does not reflect Congressional intent – in this instance Congress's dual goals of promoting Internet radio and ensuring fair compensation to creators – then the Committee and Congress are compelled to intercede. This would not be new ground for this Committee or the Congress, but instead would be quite similar to the consideration and judgment that resulted in the Satellite Home Viewer Improvement Act of 1999, which explicitly substituted the Congress's judgment for that of the Copyright Office and the relevant arbitration panel with regard to appropriate royalties for broadcast television programming retransmitted by satellite television services.

2) **What did DiMA do to facilitate the participation of smaller webcasters in the CARP proceeding? My understanding is that the CARP allocated expenses 50/50, such that copyright owners and performers pay 50% of CARP expenses and webcasters pay 50% of CARP expenses. Did DiMA negotiate litigation fees on behalf of webcasters and broadcasters so that smaller webcasters and broadcasters could participate in the CARP proceeding without paying their pro rata share of the 50% of expenses allocated to the statutory services? Why did counsel for the broadcasters and webcasters not also represent the smaller webcasters in the CARP proceeding at the same time that they were representing larger parties?**

Although DiMA was not a participant in the CARP proceeding, we worked diligently to support the development of a cost-sharing formula that enabled small and large webcasters to participate in the arbitration. DiMA did not negotiate litigations fees on behalf of any participants (large or small), but we understand that a cost-sharing system was developed and that the very significant majority of costs associated with the CARP were paid by the largest webcasters.

Although the 50/50 split of expenses of the CARP was known in advance, the actual cost was not. In fact, the costs of the arbitrators alone grew to well in excess of $1 million. Participants in the proceeding were obligated to pay these costs and this was a major deterrent to small webcasters. During the proceeding there was occasion when one or more small webcasters, notably WCPE of North Carolina, sought to participate in the CARP, and to do so without accepting an uncertain obligation associated with financing the expenses of the arbitration. The Copyright Office asked participating parties whether expense contributions could be waived for the requesting potential participants and, according to WCPE, all CARP participants except the Recording Industry Association of America were amenable to its participation without incurring a cost-sharing obligation.

3) **Before the arbitration process started that led to the rates discussed at the hearing, I understand that DiMA encouraged its members to refrain from negotiations over royalty rates on an individual basis, and to wait for the outcome of the CARP proceeding. Did you in fact encourage webcasters to await the CARP and not engage in individual negotiations with copyright owners?**

As the arbitrators pointedly describe in their report to the Librarian of Congress, the RIAA's purported negotiations were everything but. Rather, at the direction of senior recording industry executives, the RIAA intentionally adopted a "take-it-or-leave-it" licensing approach with small, inexperienced webcasters, to set an artificial above-market rate at what the RIAA testified was its "sweet spot" – a royalty rate with a sole economic foundation aptly described by the RIAA's own economist as a monopolist rate. The CARP found that the RIAA "devoted extraordinary efforts and incurred substantial transactional costs" to negotiate agreements with "minor" webcasters "that promised very little actual payment of royalties" in return – "sacrificial conduct" aimed solely at obtaining the highest possible "marketplace" rate as evidence to submit to the CARP. Although this scheme was apparent to DiMA and other industry observers quite early in the pre-CARP negotiation period, it also was confirmed by DiMA companies that spent several fruitless months attempting unsuccessfully to negotiate with the stonewalling RIAA.

In this situation, DiMA's role as an industry advocate and educator was to enlighten Internet radio companies, and remind them that instead of being victimized by the RIAA's predatory behavior they instead could avail themselves of the Congressionally-mandated statutory license and the CARP/Library of Congress process. Nevertheless many webcasters did avail themselves of their negotiation option, and some – characterized by the arbitrators as having little choice or not understanding their own legal and business situation – did execute agreements as proposed by the RIAA. Unfortunately DiMA did not anticipate that the CARP would identify and criticize the RIAA's behavior, but then mistakenly interpret the the "willing buyer-willing seller" standard to set the royalty utilizing benchmarks that resulted only from the RIAA's single-seller monopoly marketplace.

4) **Certain webcasters now seem to indicate that they are surprised by their obligation to pay royalties for performances made before the CARP decision. What efforts did DiMA undertake to educate its members, and webcasters in general, about their legal obligation to pay royalties for performances made before the adoption of a CARP rate and did it recommend that companies set aside cash reserves for the payment of statutory royalties?**

It is our impression that very few, if any webcasters are surprised by their obligation to pay royalties for performances made before the CARP decision. Rather, several webcasters are surprised that the amount of the CARP-proposed royalty is so abjectly disconnected to the economics of the Internet radio industry and their own specific business, and many of these webcasters anticipated a percentage-of-revenue royalty formula that would reflect economic and business trends in the Internet

and webcasting industry. DiMA communicated extensively with webcasters -- directly, at public events and through the media – that the royalty obligation is retroactive to October 1998 and that prudent companies should reserve funds for payment of royalties.

5) **I understand that in the webcasting CARP the attorneys for webcasters and broadcasters did not initially propose a percentage of royalty option to the arbitrators. In — fact, I understand that the webcaster/broadcaster attorneys proposed a royalty fee based upon something called Aggregate Tuning Hours. I further understand that the principal economic witness for webcasters and broadcasters opposed the adoption of a percentage of revenue option in the CARP proceeding. I also understand that several webcaster witnesses in the CARP opposed a percentage of revenue option, principally because they did not want copyright owners to be their "business partners." We are now hearing many complaints about the CARP's failure to adopt a percentage of revenue option. What discussions did DiMA, on behalf of its members, have with the parties in the proceeding and counsel regarding the need for a percentage of revenue option and why did counsel for webcasters and broadcasters wait until the end of the proceeding to propose a percentage of revenue option?**

It is true that the webcasters initially proposed that fees be set in relation to the ASCAP/BMI/SESAC broadcast radio fees, as converted to a "per listener hour" model rather than a traditional percentage-of-revenue model. At the royalty levels suggested by the webcasters' model, the arbitrating participants were prepared to accept a fee on that basis. However, webcasters testified throughout the proceeding that if the final royalty would be higher than that which they had proposed, that a percentage-of-revenue option would be necessary with percentages similar to the ASCAP/BMI/SESAC radio and Internet rates (collectively approximately 3.5% of revenues).

Thus, while the percentage-of-revenue model was not the preferred model compared to the one proposed by webcasters (for reasons explained by webcasters' expert, among other witnesses, including because they would have preferred not to have the RIAA as webcasters' business partners), the webcasters made explicit throughout the proceeding, as well as in their Proposed Findings of Fact and Conclusions of Law, that a percentage of revenue option was necessary if the final fee structure was higher than that proposed by the webcasters (which it ultimately was). Moreover, webcasters had every reason to expect, and did expect, that there would be a percentage of revenue option regardless, because it was always a part of the RIAA's proposal – beginning with the RIAA's initial direct case and all the way through the RIAA's Proposed Findings of Fact and Conclusions of Law.

June 7, 2002

Senator Joseph R. Biden
United States Senate Judiciary Committee

Webcasting Copyright Royalty Hearing: May 15, 2002

Response to Written Question from Billy Straus, President, Websound, Inc.

Senator Biden and Members of the Committee:

Thank you for your follow up question. It is my opinion solely as a small business owner, not a lawyer or lobbyist, that the Committee should not substitute its judgment where such a lengthy arbitration process has been undertaken unless it is definitively determined that such process was inherently flawed.

As I stated in my written testimony, the webcasting business environment has changed dramatically since the heady days accompanying the birth of this industry. The question of business model viability, now the centerpiece of the "small webcaster" argument where royalty issues are concerned, was in many cases barely on the radar several years ago. Thus there are undoubtedly webcasters for whom the payment of any meaningful royalties for their use of sound recordings will pose an enormous burden. Clearly our perspective as an industry has shifted dramatically and this explains, in part, the current dilemma.

I have listened to highly articulate lawyers and highly paid spokespeople battle endlessly over the webcasting conundrum. Yet I submit that there are some very basic business questions lurking behind the posturing that apparently remain unaddressed by many fledgling webcasters: Is my business viable? Am I truly adding value to the marketplace and ultimately to my end user? Am I willing to tough it out if my initial assumptions turn out to be wildly inaccurate?

One blanket assertion repeated numerous times by certain parties to the proceeding is that those webcasters who negotiated agreements with the RIAA were somehow "inexperienced" and taken advantage of by the RIAA. As a small business owner and RIAA-licensed webcaster, I can assure the Committee that this could not be further from the truth in the case of Websound, and I wish the record to be very clear on this point. We knew exactly what deal we were making, and frankly take issue with the characterization of our business dealings otherwise. On the contrary, our business perseveres as we continue to face the challenges every single small business owner in America faces: defining our customer base, leveraging our know-how, sourcing our materials, and delivering a solid product to the marketplace.

How to best structure the compulsory license for webcasters remains an open issue likely to require modification over time based on input from

a number of sources. But in order to move the process forward, we must leave the "grace" period in the past and immediately begin to account to
artists for our use of their music in webcasting business models.

HILARY B. ROSEN
PRESIDENT AND C

July 22, 2002

BY FAX – 202-228-0873
CONFIRMATION COPY BY HAND

Senator Patrick J. Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Senate Dirksen Office Building
Washington, DC 20510
Attention: Nicolle Puopolo

Re: May 15, 2002 Hearing regarding "Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?"

Dear Senator Leahy:

Thank you for inviting me to participate in the above-referenced hearing and for taking the time to study carefully the numerous issues affecting this exceedingly complex topic. As I indicated in my testimony, RIAA and its member companies want the webcasting industry to succeed. Webcasting has energized music lovers and fans, some of whom have turned themselves into webcasting entrepreneurs, and it has also provided a new business opportunity for some of the world's largest and most innovative media companies.

At the same time, we believe that webcasters, large and small, can succeed while compensating the creators of the sound recordings upon which they have built their businesses at fair market value rates. We further believe that it is unfair for any webcaster, regardless of size, to ask artists and sound recording copyright owners – a majority of whom are also small businesses – to continue to subsidize the webcasters' businesses.

My answers to the specific questions set forth in your May 24, 2002 letter to me are set forth below.

RECORDING INDUSTRY ASSOCIATION OF AMERICA
1330 CONNECTICUT AVE, NW, SUITE 300, WASHINGTON, DC 20036
PHONE: 202.775.0101 FAX: 202.293.0447 WEB: www.riaa.com

A. Written Questions from Senator Cantwell

1. *Over-the-air broadcast radio stations currently pay songwriters at a statutory rate significantly less than the amount proposed to be paid record companies by the Copyright Arbitration Royalty Panel.*

Let me begin by clarifying that the rates paid by over-the-air broadcast radio stations are not statutory rates. Rather, they are set by voluntary negotiations (individual or industry-wide) or, in the absence of any such agreement, by a rate court established decades ago to enforce the terms of separate antitrust consent decrees entered into between ASCAP and BMI on the one hand and the U.S. Department of Justice on the other.

More importantly, the rates paid by over-the-air radio broadcasters to songwriters are simply inapposite. Those rates are paid to different copyright owners for different copyrighted works, for transmissions in a different medium, for different rights, and for different types of services. In other words, the market for license fees paid by broadcast radio to songwriters involves different buyers and sellers for a different product. Simply put, record labels are not interchangeable with music publishers, sound recordings are not interchangeable with musical works, the Internet is not interchangeable with over-the-air radio, digital rights are not interchangeable with analog rights, and webcasting is not interchangeable with broadcast radio. Thus, the rates paid by broadcast radio to songwriters tell us very little about the rates that webcasters should pay for the use of sound recordings.

Musical works and sound recordings are distinct inputs into a single product – much like the contributions of a screenplay writer, on the one hand, and the contributions of actors and the motion picture company, on the other hand, are distinct inputs into a movie and do not have equal value. Musical works and sound recordings do not compete in the same market and they have entirely different cost and demand characteristics. Indeed, industry wide, record labels incur costs, and generate revenues, that are several billion dollars (4-5 times) greater than those of music publishers. Likewise, over-the-air radio and webcasting represent two distinct businesses, with entirely different cost and demand characteristics.

a. *What was the basis for the record companies request for a higher rate than that paid by over-the-air broadcasters?*

The record companies based their rate request on the rates included in 26 voluntary agreements negotiated by the RIAA with webcasters during the two-year period preceding the CARP. These agreements reflected the product of willing buyer-willing seller negotiations between the RIAA and a cross-section of the webcasting industry that included small, medium and large webcasters operating under a variety of

different business models. The record companies did exactly what Congress encouraged – they tried to reach marketplace agreements with webcasters. RIAA did not embark on a strategy of arbitrating like DiMA, which advised webcasters that it would be more advantageous to arbitrate the rates than to seek a negotiated solution. Instead of engaging economists to come up with theories for rates, RIAA went into the market and negotiated as many deals as possible. When arbitration became necessary, RIAA presented those deals as evidence of a marketplace rate.

RIAA's 26 licenses generally were the product of intense negotiations each lasting many months. The perception that RIAA had enormous leverage in the market is belied by the realities of how a compulsory license distorts a market by empowering licensees to use recordings without also requiring payment. Every webcaster had the right to use the music without signing a license – a stark contrast from the normal marketplace where copyright owners can withhold content until a licensee agrees to pay an acceptable rate. Thus, the rates negotiated in the 26 agreements were depressed by the leverage of the webcasters to get up from the table and walk away at any point.

b. *What factors were considered in determining the royalty rates that you sought?*

The RIAA's negotiating strategy and its rate request were both determined by a licensing committee consisting of record industry executives with decades of experience licensing sound recordings for various purposes. Typically, these committee members were senior business affairs executives, each with extensive experience in licensing sound recording rights in new and traditional media. Some of these members worked for companies that had invested in webcasters, so they were familiar with the webcasting business as well as that of recorded music. Based on this expertise, the committee developed positions about the types of rates deemed appropriate for statutory webcasters who had built their business upon the sound recordings created at great risk and expense by record labels. As noted above, our rate request was premised primarily on the rates in the 26 voluntary statutory agreements negotiated by the RIAA. Individual members also understood the market based on their negotiation of individual deals with webcasters and others, 115 of which were presented to the CARP and were consistent with the rates in the RIAA's voluntary agreements.

In addition, the rate request was supported by: (1) expert analyses of the webcasters, including their business plans, their financial data and projections and their willingness to spend substantial sums to gain a foothold in a market with significant future potential; (2) input from several industry executives who explained the various considerations that affect pricing decisions and the significance of Internet licensing to the future of the recording business; (3) the amounts that the record companies spend to run their businesses, including the costs of acquiring the copyrighted elements of sound recordings that they distribute to the public; (4) the marketplace actions of the webcasters themselves, including a number of extremely high-priced acquisitions made by various

webcasters; (5) a traditional analysis of intellectual property values under the criteria set forth in patent cases; (6) the type of economic value estimation on which businesses routinely rely in pricing their products; and (7) accepted economic principles concerning the value of marketplace agreements involving the same rights as those under consideration.

c. *Did you consider the economics of the range of nascent webcasting models that existed in the marketplace at the time you made your proposal to the CARP?*

Many of the 26 voluntary statutory license agreements were with smaller webcasters; therefore, inherent in our rate request was consideration of the marketplace circumstances of small webcasters. Indeed, the webcasters with whom we negotiated and reached agreements represented a cross-section of the webcasting industry: they ranged in audience size, amount of capital raised and invested, and business model. We were also mindful that all of the webcasters, regardless of size, were building their businesses using sound recordings and that they were paying all of their other business expenses, including rent, salaries, bandwidth, hardware, etc. at fair market value rates and had been doing so from day one.

Another factor we considered was the fact that, as a result of the arbitration, all webcasters (save the 26 that negotiated voluntary licenses with us) were effectively given interest-free loans from copyright owners and performers that have permitted them to stream music and build their businesses without paying any royalties to date to sound recording copyright owners and performers. Indeed, under the Librarian's decision[1],sound recording copyright owners and performers will not receive their first payment from webcasters operating under the statutory license until October 20, 2002 – four years after the October 28, 1998 effective date of the DMCA provisions that granted webcasters a compulsory license to stream virtually any sound recording..

d. *Have you considered means to mitigate the adverse impacts on a webcaster of a royalty rate that exceeds the initial revenues of a start-up webcaster? If so, what means did you consider, and have you proposed any such mitigation to the CARP or the webcasters?*

The fact that the royalty rates adopted by the Librarian may exceed the initial revenues of a start-up webcaster tells only part of the story. The part of the story the webcasters are not telling is that their other costs (e.g., employees, bandwidth, hosting, equipment purchase and leasing, maintenance) already significantly exceed their initial revenues. For example, according to a handout prepared and distributed on Capitol Hill last month by DiMA (an annotated copy of which is attached as Exhibit A hereto), the operating expenses reported by a self-selected group of webcasters represented anywhere

[1] The Librarian's Report can be found at 67 Fed Reg. 45239 (2002). It can also be accessed online at http://www.copyright.gov/carp/webcasting_rates.

from 198% to 24,416% of their self-reported gross income, without taking sound recording royalty payments into account.

The webcasters' own figures strongly suggest that most of them have not found a viable business model and would not be able to stay in business even if the sound recording royalty rate was set at zero (which would be the effective rate if struggling webcasters were permitted to pay on a straight percentage of revenues basis). Not surprisingly, a number of webcasters, including large ones such as NetRadio and WarpRadio, either ceased operations or filed for bankruptcy before the statutory rate could be set and without making a single royalty payment to sound recording copyright owners and performers. In addition, the principals of many webcasters have rewarded themselves (and their investors) without providing any compensation to the sound recording copyright owners and performers on whose recordings they built their businesses. For example, it was reported that AOL paid more than $300 million to acquire Spinner, yet it has paid $0 in royalties to date for webcasting billions of performances of sound recordings.

The situation that is confronting start-up webcasters is not uncommon. Indeed, it is extremely common for new businesses (from restaurants to telecommunications companies) to be unprofitable in the early years while they build name recognition and market share. In order for a new business to reach the point of sustainability or profitability, it must either have sufficient cash flow to cover its expenses or sufficient cash reserves to cover those of its expenses that are not covered by its initial cash flow. In fact, many new businesses will not survive because they are unable to develop sustainable business models. The problem facing struggling webcasters is not that the proposed royalty rates are too high but that their cash flow and/or cash reserves are too low.

Given the nature of the problem, it is no more fair to expect copyright owners and performers to accept less than fair market value for the use of their sound recordings than it would be to expect webcasters' landlords, bandwidth providers, computer programmers or other vendors to accept less than fair market value for the valuable goods and services they provide. For Congress to ask copyright owners and performers to accept a royalty rate that is less than fair market value is tantamount to asking copyright owners and performers to subsidize these businesses – which, by the time they make their first payment, will have already had the benefit of four years of interest-free financing and have already defaulted on their royalty obligations in large numbers.

e. *Could you please explain why it is necessary for SoundExchange to collect the substantial amount of information from webcasters through the reporting process?*

The exact scope of the webcasters' reporting requirements has not yet been decided. The matter is currently the subject of a Copyright Office rulemaking. See

Notice and Recordkeeping for Use of Sound Recordings Under Statutory License, 67 Fed. Reg. 5761 (2002) (the "NPRM"). Nevertheless, copyright owners and performers believe that the only way to ensure the distribution of statutory royalties in accordance with Congress' mandate to allocate royalties among copyright owners, featured performers and nonfeatured performers is for webcasters to identify with specificity each sound recording performed so that each such sound recording can be distinguished from every other sound recording that has been publicly released (all of which are covered by the broad license granted under Section 114 of the Copyright Act, 17 U.S.C. § 114). Webcasters must provide this information because they control their programming and are best positioned to know which songs they have actually performed.[2] Significant information is required because, based on SoundExchange's experience collecting and distributing royalties for over 85 million performances made by the preexisting subscription services (i.e., Muzak, Music Choice, DMX/AEI), sound recordings cannot be identified definitively on the basis of only a few data points.[3] Detailed reports of use are also required because "there is currently no standard publicly available and widely used electronic identification system (e.g., common numbering system, electronic watermark, digital fingerprint, etc.) and no commonly available reference database for additional identification, copyright ownership and other relevant business information."[4]

In addition to being necessary for distribution purposes, detailed reports of use are necessary for the enforcement of certain statutory requirements, such as the sound recording performance complement. Without detailed reports of use, webcasters' compliance with statutory requirements such as the sound recording performance complement will become "discretionary" as webcasters will know that without data to test for compliance, there will be little risk of their being held liable for noncompliance.

Lastly, SoundExchange is confident that webcasters will have little trouble complying with the proposed recordkeeping requirements given the high level of automation that exists within the webcasting industry. The extent of this automation can be gleaned from the comments filed by various services in response to the NPRM, which

[2] Even if SoundExchange had the resources to constantly monitor each and every publicly available channel that is webcast or simulcast, which it emphatically does not, there are hundreds of thousands of "channels" of programming that are available only to the recipient of that transmission (i.e., because they are created "on the fly") and are incapable of being monitored.

[3] Due to insufficient data, approximately 20% of the royalties received from the preexisting subscription services for performances made between February 1996 and March 2000 could not be distributed, thereby delaying payment of the royalties to the copyright owners and performers entitled to the money. All money that could not be distributed has been retained in an interest-bearing, unallocated funds account. SoundExchange continues to expend time and money researching many of these performances and it hopes to distribute the remaining, historical royalties during its next distribution.

[4] Royalty Logic Inc. Initial Comments at 3. To access the above-referenced comments online, go to http://www.copyright.gov/carp/114/rm2002-1-38.pdf.

reveal that the business of delivering music to listeners, whether it be through terrestrial radio broadcasts, satellite digital audio radio service transmissions or Internet-only webcasting, is largely done through the use of automated systems.[5]

f. *Is the information gathered by SoundExchange from webcasters in the reporting process shared with record companies for any purpose?*

All information submitted to SoundExchange by webcasters either is, or will be, subject to confidentiality regulations promulgated by the Copyright Office. Indeed, the recent NPRM published by the Copyright Office includes a provision that expressly addresses the confidentiality of Reports of Use submitted to SoundExchange (or a competing collective). This provision, which was unopposed by any of the parties filing comments in response to the NPRM, is identical to the confidentiality provision in the "Interim Regulations" that were adopted by the Copyright Office in 1998 with respect to the preexisting subscription services and prohibits disclosure to parties not entitled to sensitive business information. See 37 C.F.R. § 201.36(h)(2001); see also NPRM, 67 Fed. Reg. 5761, 5767.

SoundExchange is also bound by existing regulations governing the confidentiality of Statements of Account received from the preexisting subscription services. See 37 C.F.R. § 260.4 (2001). (Statements of Account are the reports used to calculate a service's royalty liability for collection purposes whereas Reports of Use identify the sound recordings actually performed and are used for distribution purposes.) A slightly modified version of these regulations was agreed to by the parties to the most recent CARP, following extensive negotiations. This modified version, which was adopted by the Librarian, would apply only to Statements of Account received by SoundExchange (or a competing collective) from webcasters. See 67 Fed. Reg 45239, 45275 (2002)(to be codified at 37 C.F.R. § 261.5).

SoundExchange and RIAA take their confidentiality obligations seriously. SoundExchange and RIAA have been complying with the confidentiality provisions set forth in 37 C.F.R. §§ 201.36(h) and 260.4 since those regulations were promulgated in 1998. SoundExchange and RIAA will continue complying with these regulations as well as with 37 C.F.R. § 261.5 and any new or modified confidentiality regulations that may be promulgated in the future.

g. *In your written testimony, describing why you believe it is inappropriate for the rate to be set comparable to rates paid to ASCAP, BMI and SESAC by analog broadcasters. Why do you conclude, without explanation, that "the musical work rates were adopted for use in the analog world by broadcasters, and tell us very little about the value of sound recordings in the digital world of the Internet webcaster"? It seems to me*

[5] All of the initial comments and reply comments filed in response to the NPRM can be accessed through the Copyright Office's web site at http://www.copyright.gov/carp/114/comments.html.

that you may be arguing that a digital signal has a different economic value than an analog signal. However, pursuant to the Digital Millennium Copyright Act, in order for an Internet delivery system to qualify for the statutory license, the system must be a corollary to terrestrial broadcast, in that it must be non-interactive. What was the basis for this conclusion?

The issue you raise – whether the rate for webcasters should be based on the rates paid to ASCAP, BMI and SESAC by broadcasters – was a central issue in the recently concluded CARP proceeding. As explained above, rates paid by broadcast radio to songwriters and music publishers are paid to different copyright owners, for different copyrighted works, for different rights, in a different medium and for different services. The cost and demand characteristics of the markets for musical works and sound recordings differ dramatically, including the greater costs and risks associated with creating sound recordings. Indeed, the CARP unambiguously rejected the webcasters' reliance on broadcast radio rates to ASCAP, BMI and SESAC: "The Panel agrees with RIAA that the market for the performance of musical works is distinct from the market for the performance of sound recordings. Musical works and sound recordings do not compete in the same market and they have different cost and demand characteristics." CARP Report at 41.[6]

B. *Written Question from Senator Biden*

The Copyright Office arbitration proceeding included a review of several thousand pages of written pleadings, the arbitrators heard the equivalent of 15,000 pages of witness testimony, sat for over 40 days and heard from more than 50 witnesses. The arbitrators were also privy to extremely sensitive, confidential business information from all parties to enable them to determine the fairest rate. All parties who participated in the arbitration proceeding were represented by able counsel, presented written and oral testimony, and were permitted to cross-examine adverse witnesses. This Committee does not have the benefit of, and is not in the position to examine all of the facts necessary to determine a fair rate. Why should this Committee substitute its judgment for that of the arbitrators or that of the appellate reviewer after a 2 hour hearing?

We could not agree more. The recently concluded webcasting CARP was vigorously and exhaustively litigated by a team of extremely capable attorneys who had extensive knowledge and experience concerning the issues at stake in the proceeding. Indeed, DiMA was so proud of its attorneys that it bragged to its members that it had hired the "best lawyers and economists available" to represent it in the arbitration and help it obtain the lowest possible rates. So strong was DiMA's confidence in its attorneys' abilities to achieve a low rate in the CARP that early on it made a strategic

[6] The CARP Report can be accessed online at http://www.copyright.gov/carp/webcasting_rates.pdf.

decision to encourage webcasters to arbitrate rather than negotiate. Now, unsatisfied with the result, DiMA has turned its attention to having Congress change the result.

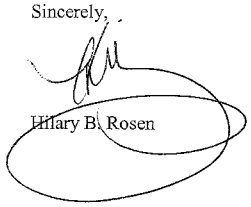
Neither this Committee nor Congress as a whole should take the webcasters' bait and overturn the decision of the Librarian of Congress. Although neither side is happy with the Librarian's decision and it is likely both sides will appeal, this is not uncommon in rate-setting proceedings. Indeed, given that the Librarian' decision was far closer to the webcasters' rate request than to the record industry's rate request, we have a hard time understanding why the webcasters seem so determined to retry this case before Congress. Congress created a rate-setting process and Congress should allow that process to work.

As you point out in your question, the arbitrators heard over 40 days of testimony from more than 50 witnesses, reviewed thousands of pages of written testimony and exhibits and were privy to a large volume of confidential business information from all parties. In order to consider and fully absorb the volume and complexity of both the factual evidence and the legal issues, the arbitrators devoted well in excess of 2,000 hours to the webcasting CARP and it is my understanding that each worked on this matter to the virtual exclusion of all other matters. With all due respect, it is difficult for me to see how the members of this Committee are in a position to conduct a more comprehensive or fairer review of the legal and factual issues that must be considered when setting a marketplace rate for webcasters after one two-hour hearing than were the arbitrators who devoted six months of nearly full-time work to this matter.

* * *

Thank you once again for the opportunity to appear at last month's hearing and for the opportunity to respond to these questions. If you or any members of the Committee have any additional questions or concerns, I would be happy to address them.

Sincerely,



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United States Senate
Committee on the Judiciary
Hearing on "Copyright Royalties:
Where is the Right Spot on the Dial for Webcasters?"

Response to written question from Senator Cantwell

June 10, 2002

Senator Cantwell's Question:

You mentioned in your testimony that less than 20 percent of advertisers consider streaming as a regular part of their advertising budget, despite the fact that advertising has been shown to be more effective on streaming media than banner advertising. Are advertisers solely focused on consumer usage or are there other barriers to entry?

Arbitron's Answer:

We appreciate your follow-up question because it addresses the heart of our testimony regarding the impact of the proposed sound recording fees from the Copyright Arbitration Royalty Panel (CARP). In my oral comments I stated,

> "The webcasting industry is still in its infancy, with little revenue and profit at this stage of the market's development. If FM radio had to face similar fees in its infancy, it is highly unlikely that it would have grown into the business it is today."

I supported our opinion about the nascent stage of webcast advertising with findings from research we conducted in June 2001with webcasters and advertising agencies[1]. This research points to the infancy of webcasting as an advertising medium. As part of that study we asked,

> **"Do advertisers and agencies include streaming media in their media mix on a CONSISTENT basis?"**
>
> - Eighty-six percent (86%) of the agencies and webcasters said "no."

We also asked,

> **"What size of weekly audience is needed for advertisers and agencies to include streaming media on a CONSISTENT basis?"**
>
> - Sixty-two percent (62%) of the advertising agency representatives we spoke to said that the streaming media audience needs to exceed 20 percent on a weekly basis to be included as part of their media mix on a consistent basis.

[1] Arbitron/Edison Media Research, June 2001.

Consumer use of streaming media has grown substantially in a short period of time[2]. However, the size of the medium's weekly audience still needs to grow significantly before it reaches the 20 percent threshold that these agencies said will be needed for streaming media to be included in their media mix on a consistent basis. As of January 2002, nine percent of the population aged 12 and older have used streaming media in the past week[3].

In your question you state, "...advertising has been shown to be more effective on streaming media than banner advertising." Our research provides substantial support for the value of webcast advertising. Fewer Americans are clicking on banner ads[4] and therefore advertisers are seeking more effective forms of advertising. Webcast advertising provides online advertisers with an effective vehicle since most consumers say that online audio and video ads are significantly less "annoying" than banner advertising[5]. Also, consumers who watch and listen to streaming media ("Streamies") are a highly attractive media target because they are predominately upscale, early adopters who spend more time online and buy more online[6].

Despite these significant advantages, streaming media must climb significant hurdles before it will be considered on an equal playing field with the traditional media. The findings cited in our testimony, and clarified above, indicate that the size of the medium's audience is the most significant factor impacting the growth of the medium's advertising revenue. However, unlike traditional media such as TV, radio and newspapers, webcasting is a new medium and therefore must also overcome lack of awareness among advertisers and agencies. In May 2001, Arbitron released a study of decision makers at companies selling streaming media advertising. They cited "Lack of Metrics" (i.e., audience size and description) as the most significant obstacle to the growth of the medium[7]. However, advertiser awareness and interest were also mentioned as significant challenges[8]. For example, the president of an Internet-only webcaster said, "Agency awareness and understanding of the medium[9]" were the biggest obstacles for webcast advertising, and the director of operations for a major terrestrial broadcast company said, "It is not a mature industry. There are few standards and little historical data.[10]" While the size of the medium's audience is crucial to the growth of webcast advertising, the industry must also face the significant obstacle of establishing its awareness and credibility with advertisers and agencies.

A parallel can be drawn between the growth of cable and the potential growth for webcast advertising. The following graph plots cable's audience as a percentage of the over-the-air broadcast television audience and cable's share of advertising relative to over-the-air broadcast television advertising revenue[11].

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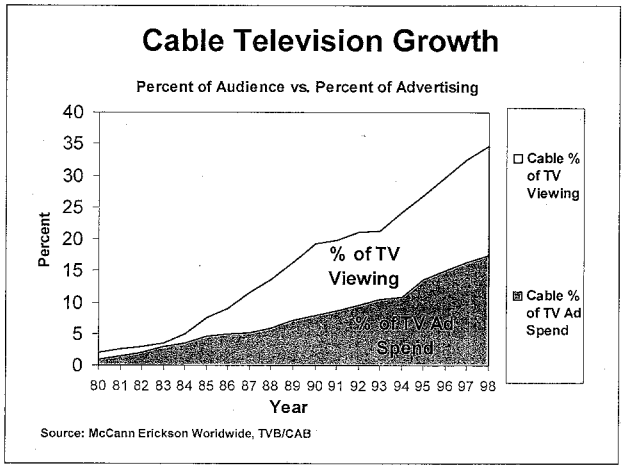
[2] Arbitron/Edison Media Research, August 1998 and January 2002. The percentage of Americans over the age of 12 who have ever listened to a radio station on the Internet grew from six percent in August 1998 to 25 percent in January 2002.
[3] Arbitron/Edison Media Research, January 2002.
[4] Ibid.
[5] Ibid.
[6] Ibid.
[7] Arbitron, *Webcasters "Speak Out!,"* May 2001
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] McCann-Erickson Worldwide, Television Advertising Bureau, Cable Advertising Bureau.



Cable's share of advertising revenue remained low while the size of its audience was less than 20 percent of the size of the over-the-air television audience. When cable's audience crossed the 20 percent threshold, its growth rate increased significantly. However, it is important to note that all new media must compete with established and well-accepted media. For example, the cable industry's advertising revenue in 1998 was only 17.5 percent of broadcast television's revenue despite the fact that its audience was equal to 35 percent of the size of the audience to over-the-air broadcast television.

Conclusion

Streaming media faces significant challenges before it will be considered on an equal playing field with traditional media. The size of streaming media's audience is still small when compared to traditional media. As of January 2002, nine percent of the population over the age of 12 had used streaming media on a weekly basis. Advertising agencies have indicated that the medium needs to reach 20 percent of the population each week for them to include streaming media in their media mix on a consistent basis. However, audience size is not the only challenge, because all new media must compete with established and well-known brand names. The cable industry's experience shows that its share of advertising revenue still lags its share of audience. Therefore, we believe that it is crucial to provide a level playing field to ensure that streaming media continues to provide a valuable service for consumers and to enable webcasting to realize its potential as an advertising medium.

Senator Joseph R. Biden, Jr.
Response to Written Question for Frank R. Schliemann, Founder, Onion River Radio
"Copyright Royalties: Where is the Right Spot On The Dial For Webcasting"
May 15, 2002

June 7, 2002

The arbitrators were responsible for implementing a statute developed by Congress, which incorporated two goals: the promotion of a new competitive broadcast medium known as Internet radio, or webcasting, and the payment of fair royalties to creators. If this Committee and the Congress believe that the arbitrators failed to achieve Congress's goals, as was the case with the Satellite Home Viewer Act, then the Committee must substitute its judgment for the arbitrators to ensure that those goals are met.

Onion River Radio, located in Montpelier, Vermont, cannot generate the same amount of revenue as a station in New York City. But, because the proposed rate is a flat rate based on ratings, we will have to pay the same per song fee. A percentage-of-revenue alternative, however, is fair to all webcasters in all markets, will allow good business models to thrive while others fall short, and will allow Onion River Radio and other Internet radio stations to grow and generate more profits for creators, publishers, performers and producers, as well as webcasters.

I have communicated with Members of Congress, either directly or through members of their staff, about the bankruptcy impact of the proposed royalty rate. The response has been "that's not what we intended." If the result is not as Congress intended, particularly given the severe impact on a nascent industry, then Congress must act quickly.

WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY

Question 1. *The Inter-industry groups working on solutions to the "Analog Hole" and the "broadcast hole" have representatives from the entertainment industry, consumer electronics industry and IT industry. How are consumer interests and fair use rights taken into account by these standard developing groups?*

Answer 1. The Copy Protection Technical Working Group (CPTWG) is an industry forum open to all who want to participate in the consensual process of exploring today's copy protection issues and potential technical responses. Naturally, the CPTWG attendees primarily represent their respective industries (Information Technology, Consumer Electronics, and Content Companies).

Intel and other consumer products manufacturers are frequently placed in the position of protecting consumer fair use rights. For example, the issue of the "broadcast hole" is being addressed by the Broadcast Protection Discussion Group (BPDG) within the CPTWG. The BPDG has been careful to focus its efforts on "plugging" the broadcast hole though preventing the unauthorized redistribution of terrestrial digital broadcasts beyond the home and personal network and not restricting the consumer's ability to enjoy content within that space. Efforts to address the "analog hole" are not as mature at this point, but we anticipate that any approach used to solve that problem will also be as narrow as possible to avoid impacting legitimate use of content.

Piracy as "Killer App"
Question 2. *Some content owners have implied, or even charged, that the IT industry has resisted technology mandates for copy protection because the companies want to make money from selling technologies that enable infringement. How do you respond to these criticisms?*

Answer 2. This is simply not true. Intel has been at the forefront of semiconductor innovation for over 30 years, and we have grown into a multi-billion dollar worldwide leader in the semiconductor industry; a company and an industry founded on shaping worldwide computing and communications. We place the highest value on protecting intellectual property, and have worked in countless forums over decades to support and defend IP rights. We know that without adequate protection, content owners will not make their content available over digital networks. Piracy for the high-tech industry means losses of about 12 billion dollars a year; for the content owners, it is about 3.5 billion a year. It is a plague for all of us. That is why our industry has spent capital and resources to developing solutions.

Our business model depends, among many things, on the long-term viability of content providers. The IT industry has only resisted technology mandates that are overly broad, unworkable, or simply unnecessary. It is ironic that the IT industry is accused of resisting, as companies like Intel have actually developed and deployed the technologies

that protect valuable content. We have spent millions of dollars and thousands of hours of engineering time to that end. It is doubly ironic that some content providers seek mandates while at the same time refusing to adopt the very technologies that we have developed at our own expense. For example, Digital Transmission Content Protection (DTCP), offered by the 5C, was welcomed with great applause many years ago, but to date only two studios have actually signed an agreement to use the technology. Content Protection for Recordable Media (CPRM), for the DVD Audio format, was developed years ago as an alternative to CDs, but to date only one major music label has adopted the technology. Also, we have developed High-Band Digital Content Protection (HDCP) for DVI, which is hailed by literally all content providers, yet zero content participants have signed up. Nevertheless, IT and Consumer Electronics (CE) companies are deploying these technologies today to ensure that there is an installed base of machines that will respond appropriately to content protected with these tools.

Problems with Legislated Mandates

Question 3. *Some content owners are calling on the Congress to mandate standards to protect digital copyrighted works from unauthorized copying in all devices. They contend that step is necessary to preserve copyright holders' revenue from, and control of, their intellectual property. Would this proposal, if it became law, have any effect on IT companies' revenue and control of their products?*

Answer 3. This proposal, if enacted, would materially adversely affect the ability of the IT industry to innovate by injecting government processes into the semiconductor design timelines and decisions. Bureaucratic impediments would thus slow the movement of new products to market, affecting revenues as well as impairing our ability to design to optimal criteria.

Question 4. *Would a legislatively mandated copyright-protection standard have any effect on the product design cycle for new hardware and software products and, if so, could you explain what kind of effect it would have?*

Answer 4. Hardware products, specifically complex silicon devices, are derived through a multiyear process involving development of new silicon design and manufacturing capabilities in addition to specific architecture definitions. The complete process of developing the next generation microprocessor is a multi-year, multi-billion dollar endeavor. If a government-mandated technology were imposed today on all new microprocessors, it would directly impact over three years of work in process. There are also the hidden costs of slower innovation, diversion of investment capital, and lost ground in the global race for technological leadership that would follow from the insertion of a bureaucratic process into our product design work.

Additionally, a subsequent technology breach and subsequent revision of mandated technology would be highly disruptive to our design efforts, and would likely result in "cul de sac" technologies implemented in expensive silicon real estate.

International

Question 5. *The Internet is truly an international medium. If a United States Government agency were to pick a limited list of DRM technologies that all American ISPs, computers and other internet-connected devices in the U.S. were legally required to support, what would happen if the rest of the Internet world did not go along with that government mandate? What if the technology mandates on American computers and other Internet devices turned out to be both expensive and unpopular with computer buyers? What effect would that have on the American computer and software industry, and other American equipment manufacturers in international competition?*

*If the Congress mandated use of certain DRM technologies, given the global reach of the Internet, is it possible that content owners come back to Congress about an "**international hole**" that we should fill, either by demanding that the whole world adopt this country's pick of approved technologies or by requiring ISPs to censor content from foreign websites?*

Answer 5. The international nature of the Internet, as well as the content, IT, and CE industries, is a very important consideration in this process. Technology mandates put US goods and services at a competitive disadvantage in foreign markets. This would likely require the IT industry to make multiple product offerings to meet the expectations and demands of consumers in a multitude of nations and compete with overseas providers. This would cause irreparable harm to our industry. While the current challenges faced by the content industry are not insignificant, it is important not to lose sight of the important role of the information technology industry in the American economy.

If mandates were adopted in America, other markets – such as Europe – would be encouraged to pursue their own mandates regimes with possibly conflicting criteria that would, again, substantially affect the competitive posture of US companies that today are the world leaders in semiconductor design. We have seen mandates and standards used in these markets in other areas as a means of creating non-tariff trade barriers. This is an immediate threat in Europe in the context of data security and privacy protection mandates, which have been discussed but not yet adopted.

Privacy/Users' Rights

Question 6. *Suppose the Congress does intervene, as some studios wish, and mandate the issue of technical protections measures for digital content. Should the Congress consider specific regulations on how intrusive digital rights management schemes can be in how they monitor and report use? Should the Congress require certain access policies and home use copying policies before a digital rights management scheme can claim protection under a law that prohibits circumvention or requires compliance?*

Answer 6. Consumer usage and privacy rights should be a major concern and focus of Congress whether technology mandates are implemented or not. Today, content protection technologies and digital rights management schemes can and are being used by

content providers to literally eliminate, in many instances, traditional fair use practices. If Congress were to mandate technologies, it should also mandate that those technologies may not be used in any way that permits consumer monitoring and reporting or any other way impacts the privacy of our citizens. In addition, Congress should specifically prohibit the use of any mandated technology in any way that interferes with consumer recording for flexible and portable uses and other general fair uses of content.

Current generation technologies are scalable and capable of providing both content protection and consumer recording rights. In this context, it seems reasonable content providers should be prohibited from taking any action against a consumer simply for circumventing a content protection technology for personal, non-commercial use if the content provider has deployed a technology that prohibits all recording or other fair uses when the technology is actually capable of meeting those consumer needs in a protected manner that does not put the content at risk of unauthorized Internet redistribution. Intel has developed content protection technologies with the hope that consumers will be able to enjoy greater rights, not fewer. These technologies, and their successors, are capable of meeting the needs of both consumers and content providers. Therefore, content providers should not be able to use these technologies as the means to deny reasonable consumer expectation in the digital age. In this context, we believe that fair use should be carefully considered in any content protection mandate, or anti-circumvention law, that may chill or otherwise undermine fair use, and the rights of consumers carefully balanced in the equation.

If No Consensus Solution Found

Question 7. *IT industry leaders have promised to work with content owners "in a consensus-based and cooperative fashion" on development and deployment of effective solutions to protect digital content. Some content owners are seeking the back-stop of a new law that says: "if the inter-industry working groups are not successful and cannot find a consensus solution, then the government will mandate a solution." Do you think that a government mandated "back stop" will make the solutions come any faster? What do you think we in Congress should do, if anything, if no agreement or consensus solution is reached?*

Answer 7. No. The IT, CE, and content industries are already working diligently to address the range of content protection challenges. Many of these challenges have already been addressed, as noted in my direct testimony, and recently identified concerns (such as the "broadcast hole") are nearing resolution. Looking forward, we anticipate continued multi-industry cooperation to address the "analog hole" and we will certainly continue to explore the problem posed by unauthorized redistribution of unprotected content via the Internet.

However, we must not lose the perspective that while technology can be an effective deterrent to theft of copyright works, it is not an infallible solution. I would emphasize that the redistribution of unprotected content is a difficult problem with no simple technology solution. A government mandate to adopt an "as yet to be determined" solution by a certain date will not make one appear where none exists. Furthermore, the

IT industry is not, as some have suggested, either refusing to examine possible solutions or resisting implementation of any known technology to address the use of peer-to-peer technology for piracy.

What is Delaying Broadband?

Question 8. *Some content owners have said that consumer demand for broadband access is proceeding too slowly in our country – implying that authorized delivery of movies would be the "killer app" to create demand for broadband and that studios will not put movies up for broadband Net delivery until protections are improved. These content owners suggest that the Congress must mandate anti-piracy technical standards to boost the availability of digital content and consumer interest in broadband service. Do you believe this is an accurate characterization of the problem? In other words, is there in fact any content-based problem when it comes to consumer interest in broadband?*

Answer 8. The widespread adoption of broadband has the potential to transform the way we live, learn, work and play. Intel believes that the deployment and use of broadband Internet access is proceeding too slowly. Several policy and business initiatives on both the demand (application) side and the supply (infrastructure) side must be considered.

On the demand side, broadband presents enormous opportunities to use video-rich applications in the fields of telemedicine, distance learning, e-government, telecommuting, e-commerce and entertainment. Growth of compelling premium entertainment offerings would certainly contribute to increased consumer demand for broadband access. There are content protection technologies available today from multiple suppliers to protect streaming video delivery, as demonstrated by Mr. Taplin, CEO of Intertainer, and I am encouraged by the recent announcement of MovieLink, a streaming movie service supported by several major movie studios. Acceleration of legitimate and compelling online content offerings will only serve to curb piracy and increase consumer demand for broadband. Internet-based entertainment services however are only one component of the demand equation, and not necessarily the most important component. Adequate digital rights management solutions, proliferation of e-government applications and demand-related policies that encourage the development of video rich applications are all critical to accelerated adoption of broadband.

On the supply side, Intel believes that the FCC, state and local policymakers could play an important role. These policymakers should expeditiously review all their policies—including unbundling policies, right of way access and spectrum reforms—to assure that they are not impeding the reasonable and timely deployment of broadband. Application developers will be reluctant to develop new services until there is a critical mass of broadband users who could use them.

Indeed, broadband, like many other high markets, presents the classic "chicken and egg" start-up problem. A new application will not be made available until a sufficient number of users have the capability to support the application (i.e., a truly robust broadband

connection, at or above 5MB per second). However, without the new application, users do not desire the capability. Thus, there is no one silver bullet that can cut this Gordian knot. Rather than viewing slow adoption of broadband as a "demand" or "supply" problem, policymakers should pursue a wide variety of initiatives that address both sides of the problem.

Fight Piracy with Legitimate Offerings

Question 9. *The unauthorized copying of valuable copyrighted works that occurs on a massive scale on peer-to-peer networks is a problem for music, movie, software, and videogame companies. Part of the solution to this problem is offering consumers legitimate online sites to access this content on an authorized basis. The music labels are doing this with MusicNet and Pressplay, and other online music sites, and the movie companies are also building broadband web sites to offer legitimate movie rentals online. Mr. Taplin is already offering movies online. But we all recognize that it is hard to compete with free.*

Some studios have told us that they need the government's help to set "technology standards to block the in-the-clear movies on illegal file sharing sites." This sounds like they want to find a cure for all the unprotected content subject to piracy already out there on the Internet. No one, I hope, would suggest the drastic cures of shutting down the Internet or forcing changes in all personal computers and other devices that connect to the Internet and being enjoyed in American households around the country.

We on this Committee have already provided a number of legal tools to enforce copyrights, including the DMCA and criminal and civil actions against infringers – and many of these tools have been used effectively. Outside of these legal tools, do you see any solution today to block unprotected movies, or other digital content, on peer-to-peer systems?

Answer 9. The unauthorized copying and redistribution of copyrighted content via the Internet is a complicated and difficult problem. There is not, in our view, a reasonable technological solution to prevent content that is currently in the clear from being distributed over the Internet in unauthorized ways. To date, most efforts to address this issue have been focused on legal means and on using protected forms of distribution to limit the availability of unprotected content. Unfortunately, no single silver bullet solution - technical, legal, legislative, or business - exists to address this thorny form of piracy.

Effect of Copyright Protection Mechanisms on Copyright Act

Question 10. *On February 19 the Supreme Court agreed to review Eldred v. Ashcroft, which challenges the constitutionality of the Sonny Bono Copyright Term Extension Act (CTEA). The petitioners in that case claim that the Congress cannot extend the copyright term or allow copyrights to go on indefinitely with the result that creative works may be blocked from ever going into the public domain. This may raise some interesting issues for copyright-protection mechanisms, both technical and legal. Do some of digital rights*

management schemes being discussed lately have the potential to extend copyright holders' control of content beyond the actual protection they are given under the Copyright Act?

Answer 10. Content protection technologies that we are currently aware of do not "terminate" protection when a copyright expires. In this context, DRM schemes may in fact have the practical effect of extending the copyright holders' control beyond the term of the copyright. This is one issue the Congress should to evaluate when considering consumer interests.

Consumer Interests

Question 11. *Congress has carefully allocated rights between copyright owners and lawful copy owners in the Copyright Act. The Copyright Office's DMCA Section 104 Report cautions that the use of access control technology and non-negotiable contracts "increases the likelihood that right holders, and not the copyright policies established by Congress, will determine the landscape of consumer privileges in the future?* U.S. Copyright Office, "DMCA Section 104 Report," 164 (2001).

Could Congress cede its power to determine the allocation of rights under the Copyright Act to technology specialists working for copyright owners? What are the implications if Congress does not protect its historic role in determining copyright privileges?

Answer 11. This could indeed happen. If digital rights management technologies are mandated, or if they otherwise become ubiquitous, and content owners are given the unilateral right to dictate all consumer use of the content, the balance between consumer rights and the rights of copyright holders struck in the Copyright Act could easily be lost. We understand that balancing anti-circumvention and fair use is extremely complex, but we would encourage Congress to actively seek ways to make sure that content portability in support of consumer recording and other fair uses be fully preserved.

Space or Device-Shifting

Question 12. *In the "Betamax Case," the Supreme Court found that unauthorized noncommercial "time-shifting" – the video recording of television broadcasts for replay at a later time – is a legitimate fair use.* Sony Corp. v. Universal City Studios, 464 U.S. 417, 447-56 (1984). *Just as time-shifting a copyrighted work is fair use, should noncommercial "space-shifting" – watching a digitally downloaded movie on a different player than the one through which it was downloaded – also be a fair use? Is it appropriate to prevent consumers from space-shifting?*

Answer 12. Space shifting should also be fair use, and it is not, in our view, appropriate to prevent consumers from doing this. Intel is of the view that consumers should be able to use and enjoy content that they have lawfully purchased in portable and flexible ways for their personal use, including space-shifting the content, provided that the legitimate expectations of copyright holders are preserved. In this context, we believe that current technologies keep the space-shifted copies "protected" while ensuring that protected content is not redistributed in an unauthorized manner over the Internet. Space-shifting

enables a wide variety of flexible consumer uses and exciting new digital devices. Consumers have already become accustomed to digital jukeboxes and placing their music content on portable Digital Audio Players in personally created play-list formats. This can all be done in a protected environment. This is the very reason Intel developed the CPPM/CPRM technologies discussed above. There is no technological reason that this same consumer usage model should not be applied to other forms of content, like movies. In fact, we believe that space-shifting, in some form, is imperative to driving new home-network usage models. Congress may want to consider protecting such uses by law.

Open and Common Content Protection Standards

Question 13. *Some content owners say government intervention is needed "to mandate open and common content protection technology." "Open standards" generally describes a process for establishing uniform technical specifications, which can then be implemented without regard to whether the software is sold commercially or given away for free. Putting aside the question of whether the government should or needs to be involved in mandating these standards, do any of your see any problem with open standards, per se?*

Answer 13. There are some difficulties with "open standards" in the content protection context, at least as the term "open standard" is traditionally understood, because the scheme must by definition keep the content protected. For example, most content protection schemes are encryption-based. Even if the standard sets out a well-known encryption algorithm, the keying material must remain 'confidential' or the system will fail. Non-uniform keying material means there will be no interoperability and the purpose of having an open standard is therefore undermined significantly.

It is our view, however, that the technologies developed by consensus through the CPTWG process are specifications that serve the same purpose as open standards; they are often publicly available specs, anyone can license and implement the technologies, they enable interoperability, and they were developed in an open forum based on input from many relevant sources. For example, the 4C specifications for CPPM and CPRM are publicly available. The only things that are not publicly available, however, are the unique device keys, derived from highly confidential keying material. By license, adopters of these technologies must build their devices in a robust manner that will prevent the keys from becoming publicly available.

Possible Congressional Action

Question 14. *Opponents of S. 2048, the "Consumer Broadband and Digital Television Act," have voiced concerns that the bill will give copyright owners too much control over how consumers use technology. They specifically argue that the legislation jeopardizes consumers' fair use rights. Do you share these concerns about the potential impact of the bill? Do you feel that an independent marketplace solution would provide better protections for individual consumers?*

Answer 14. Consumers are expecting more and more flexible and portable uses. We can deliver the products that make these uses possible, but if content providers refuse to

respect consumer fair use expectations, the capabilities of these products are irrelevant. As a technology provider, we have some limited ability to require content providers to agree to minimum consumer rights as a condition of our license. We would like to state for the record, however, that our ability to induce content providers to agree is limited, and we are always concerned that content providers will not provide the bare minimum of consumer rights.

Question 15. *Many believe that the electronics and media industries are better suited than government regulators to address the problems of copyright infringement and the illegal distribution of online content. They argue that the private sector is more efficient and better equipped to respond to the ever evolving assault on copyright protected digital content and that government should only be engaged as a last resort. Do you believe every opportunity for a marketplace solution to protecting digital content has been exhausted and that the time has come for government regulation in this area?*

Answer 15. Numerous content protection challenges have been identified over the past several years (e.g., protection of prerecorded media such as DVD, protection of digital interconnects within the home, conditional access for cable and satellite), and thus far, all have been effectively resolved through voluntary license-based solutions without government intervention. Of the outstanding issues, some, such as the "broadcast hole," will require some limited, narrow government assistance. Going forward, new threats to content will undoubtedly be identified. I anticipate that many will be addressable solely by voluntary license-based solutions. Where this sort of solution is not possible, narrow government action may be necessary once a multi-industry consensus is reached on an appropriate solution. However, in terms of a broad government mandate, I believe that the IT and CE industries are better suited than government regulators to address these problems due to our technological expertise and experience at addressing these issues.

Question 16. *Do you feel that a government mandated system for securing protection of digital content could have a damaging impact on technological innovation by stymieing private sector advances in digital content transmission and distribution? What effect would this have on U.S. companies competing in the international arena?*

Answer 16. Yes. A government -mandated system is unlikely to meet content provider needs or be acceptable to consumers on a worldwide basis. Mandating such technology within the US may also interfere with the sales of US products in overseas markets.

Question 17. *Sen. Hollings bill, S. 2048, sets a 12-month time frame for the Federal Communications Commission in consultation with Register of Copyrights to determine whether representatives of digital media manufacturers, consumer groups, and copyright owners have reached an agreement on security standards for digital content. Please describe in detail the likelihood that manufacturers, consumer groups, and copyright owners will be able to arrive at an agreement on security standards and encoding rules during this time period. What are the economic, technological, and political obstacles that stand in the way of a private sector solution? Which of these obstacles have been overcome, which remain, and which do you foresee being able to overcome in the next 12*

months? If there are some that you do not believe can be overcome during this period, why is that so? Do you believe that short of full regulation there are other ways that Congress could assist the parties in arriving at a solution?

Answer 17. There is almost no likelihood that these disparate interests could find agreement within a twelve-month time frame, which would then trigger involvement of governmental agencies in the process, with further attendant delays as a result of the necessity to accommodate political bodies.

The twelve-month target date assumes that there is a single problem that needs to be addressed, and a single solution. As discussed above, we have already addressed a multitude of problems and continue to address new problems as they arise. The list of technologies that are currently available to consumers to protect digital content is truly impressive. A small sample of the technologies that Intel is directly involved in includes DTCP, HDCP, CPPM, and CPRM. The private sector is now on the verge of agreeing to a solution for the protection of terrestrial digital broadcast TV, another issue that will certainly be resolved before the next twelve months. Content providers have now turned their attention to other issues, including the so-called "analog hole," and the issue of unprotected content that is already available on the Internet. These are much more difficult issues that we do not have a ready solution for today, but issues that we have agreed to work on. We do not expect those issues to be resolved in the next twelve months as they are extremely difficult issues. We do not believe, for example, that anyone has even proposed a reasonable technical solution regarding unauthorized distribution of unprotected content over the Internet, an opinion that is shared by many in the content industry itself.

Question 18. *If, after 12 months, the FCC determines that an agreement that conforms to the requirements of S. 2048 has not been reached through private industry efforts, what do you believe is a feasibility of having the FCC promulgate a fair and effective standard for securing digital content? Do you believe that S. 2048 provides the FCC sufficient guidance as to how to weigh the competing concerns of technology manufacturers, consumers, and copyright owners in developing a solution? Do you feel that the procedures in the bill for modifying the standards will provide sufficient flexibility for the parties to keep up with advances in copyright infringement efforts?*

Answer 18. Other than identifying vague criteria for evaluation (e.g., "reliable," "renewable," "resistant to attack," etc.), almost no guidance is provided. The injunction of political processes into technology design will in fact guarantee that the industries involved will be tempted to go back to Congress continually seeking to modify or define these criteria. Furthermore, the adoption of any set of technologies will have the effect of freezing technology in place, with "winners" struggling to retain their position of greater priority than innovation. The result will be that copyright infringement activities will quickly outstrip any adopted technology and new infringement techniques will not be addressed quickly enough by improvements in technology.

Question 19. *Are there elements of the problem of protecting digital content that appear unconquerable at this current time and for the foreseeable future? If so, and the private sector fails to find a solution for them, how would the FCC by any better positioned to establish one? Additionally, given that the provisions of S. 2048 provide for technology, consumer and copyright owner representatives to modify an imposed FCC standard, do you believe that a stable and consistent standard can be established?*

Answer 19. The unauthorized copying and redistribution of unprotected content via the Internet is a complicated and difficult problem. Unfortunately, many possible sources of unprotected content exist, including unprotected distribution, circumvention of protected content, camcorder recordings from theater screens, and diversion during production. Unfortunately, no single silver bullet solution - technical, legal, legislative, or business - exists to address this problem. Going forward, the active co-operation and participation of all sectors will be necessary to develop a range of solutions to this complex problem.

Eliminating unauthorized Internet retransmission of unprotected content does not seem conquerable at this current time or for the foreseeable future because (1) the source of this content is very diverse (2) transmission technologies are ever-evolving and are no longer centralized and (3) significant amounts of content already exist in the clear. We do not believe the FCC is any better situated to address these problems than the private sector, which possesses an incredible amount of expertise and experience, and employs leading-edge researchers and engineers to work on solutions.

SUBMISSIONS FOR THE RECORD

Testimony of Alex Alben, Vice President, Government Affairs RealNetworks, Inc. Senate Committee on the Judiciary May 15, 2002

RealNetworks as a Pioneer of Streaming Audio and the Leading Platform for Webcasting

RealNetworks, founded in Seattle, Washington in 1994, is a pioneer in the development of digital media technology and services that enable people to create, deliver, discover, and play digital audio and video content over the Internet and within intranets, both through downloading and through a method RealNetworks developed called "streaming." Streaming allows digital media files to be compressed and broken into packets, then delivered and decompressed in sequence, so that consumers can enjoy uninterrupted, real-time broadcasts over the Internet.

In 1995, RealNetworks developed the first streaming media player and the first computer software—or server—to enable streaming of audio over the Internet. Consumers rapidly embraced the RealPlayer software and it quickly became the standard for the transmission of audio on the Internet. This gave birth to "Webcasting"-- the transmission of radio style programming from an Internet server to an end user's RealPlayer. RealNetworks' enabled the very first Internet broadcast in April of 1995 – a Seattle Mariners baseball game. RealNetworks' software was used by Radio B-92 in Belgrade to webcast its government-suppressed programming during the war in Yugoslavia. When NPR suffered a satellite failure in 2000, communications were enabled via webcasting to local outlets. Webcasting has served the important function of promoting new and independent voices and recording artists via the public Internet. Thousands of unique webcast events, ranging from the first Papal Mass transmitted via the Internet to audio coverage of United Nation's sponsored Net Aid have demonstrated the public value of this new medium.

Today, we estimate that over 4,000 radio stations webcast programming around the world in RealNetworks' RealAudio format. Over 270 million unique registered users of the RealPlayer are able to access this programming from all over the world. As bandwidth increases for connected users, the quality of audio will only become more appealing to end users, promoting further growth of this vibrant communications medium. As the cost to own major media outlets such as radio and television stations continues to escalate, web radio represents one of the few media outlets with very low economic barriers to entry, enabling a wide variety of individuals to communicate their distinctive messages to a global audience.

However, the future growth of webcasting is clouded by the tangled rights picture in the United States. As you are aware, a Copyright Arbitration Royalty Panel convened to set rates for non-interactive non-subscription services (the "Webcast CARP") recently recommended a set of flat rates for Internet transmission of digital sound recordings that

have evoked a storm of protest. Not only are these rates several orders of magnitude greater than the rates that terrestrial radio pays to perform musical compositions, but the panel's failure to recommend a percentage of revenue alternative immediately threatens the viability of low-revenue webcasters, who primarily are small stations that provide diverse local programming or alternative voices. As a result, a relatively new medium with a fragile economic model is now potentially subject to disparate economic treatment.

In addition to the Webcast CARP recommendation, assertions by various parties that temporary copies in RAM buffers, server copies, and network copies should each bear distinct copyright royalties also threaten this nascent industry.

This Testimony will endeavor to explain the landscape of webcasting in light of these imbalances in our copyright laws.

Webcasting serves the public interest in unique ways, by allowing diverse voices and musical genres to find outlets for distribution before a global audience of connected users.

Webcasting is a potentially thriving industry, taking advantage of the interactivity of the Internet and its ability to carve out unique audiences and communities of listeners. This "narrowcasting" serves the public interest, as it affords expression to formats and voices that don't find distribution on terrestrial radio.

We live in a terrestrial radio world that is increasingly format driven and remotely programmed according to mass market surveys of user listening tastes. Virtually every major radio market in the United States now provides radio listeners with an "oldies" format, an "80's" format and a "current hits" format. While these stations garner top ratings and clearly please many radio listeners, they contribute to a national trend of homogenizing available over-the-air choices. Increasingly, few markets offer jazz, gospel, Broadway tunes or classical formats.

Webcasting, by contrast, allows a local classical format station such as King-FM in Seattle to reach a national and international audience by transmitting its broadcast signal over the Internet. This not only creates a new business opportunity for local stations to find new audiences, but serves Americans who don't have access to classical music programming in their local FM or AM markets. Thus, webcasting fills an important gap in the diversity of programming across the United States.

Similarly, webcasting has given birth to distinct gospel, Cajun, Hawaiian, blues, ska, electronica and swing formats, to list only a few of hundreds of musical genres available on the Internet. These formats promote the work of music writers and performers whose work does not find free airtime on pure terrestrial radio. This promotion leads to greater exposure and CD sales for these artists and writers, thus compensating them directly through the sale of records, tapes and CD's.

The recent study from Jupiter/NPD Group, dated May 2, 2002, underscores that online music fans constitute 58% of the online population and tend to purchase more music (both online and off-line) based on their online listening habits. As a consequence, there is increasing evidence that web radio is an ideal sampling medium and stimulates sales of music, boosting revenue for both record labels and songwriters.

The DPRSRA and DMCA were intended to promote a new medium, but the dual royalty structure proposed under the CARP imposes unique economic burdens on webcasters.

When Congress enacted the Digital Performance Right in Sound Recordings of 1995 ("DPRSRA") and Digital Millennium Copyright Act ("DMCA") in 1998, it intended to pave the way for a robust webcast industry through the statutory license. The legislative history of these laws make it abundantly clear that in creating a new copyright in the digital performance of sound recordings, Congress intended to foster a new marketplace. The compulsory nature of the license was designed to eliminate the burden on webcasters to negotiate separate voluntary agreements with the owners of tens of thousands of sound recordings. Rather, the compulsory license was envisioned as a vehicle to create a "frictionless" licensing process, stimulate investment in webcast operations and allow for the rapid expansion of programming via the Internet.

The compulsory license marked a new precedent in American copyright law, by recognizing a digital performance right in a sound recording. While terrestrial radio has operated in the United States for eighty years with an obligation to pay only for the performance of the underlying musical composition, Congress was now requiring a new class of radio programmers to pay two distinct royalties: 1. To songwriters for the performance of the musical composition; and 2. To the owners of sound recordings for the performance of sound recordings.

This dual royalty structure created an uneven playing field between webcasting and traditional radio. In addition, webcasters were given statutory requirements to display artist and title information, employ feasible technical protection measures, and restrict programming to make it difficult for users to access multiple songs from the same record album within a three hour time period.

Rather than equating the value of musical compositions and sound recordings, the proposed CARP rate is nine times higher than rates paid to songwriters for radio performances.

The webcasting community, hosting services such as RealBroadcast Networks, and RealNetworks as the leading technology provider to the industry widely anticipated that the performance rate for the sound recording would roughly equate with the performance rate for the underlying music composition paid by terrestrial radio—traditionally licensed as a percentage of advertising revenue. This assumption stems from the observation that both a sound recording and musical composition are embodied in each performance of a song. A song would not exist without the creative genius of the composer and lyricist.

Similarly, musical recording artists bring their unique vocal and instrumental qualities to the creation of a sound recording that embodies the underlying notes and lyrics.

The economic models of many webcasters anticipated a percentage of revenue royalty for the web performance of sound recordings that would approximate the revenue percentages paid by radio stations. In fact, evidence was introduced at the CARP that in flat dollar terms, terrestrial radio pays songwriters approximately $300 million every year, which equates to .22 cents per listener tuning hour for music performed over the airwaves.

In light of this well established economic baseline, to many observers the Webcast CARP result defies explanation. The proposed CARP rate of .14 cents per listener per song is on its face nine times higher than the terrestrial radio rate for the performance of songs.

The proposed CARP rate would result in a 100% differential between retransmission of broadcast signals and web-originated transmissions.

Further, the CARP proposed that terrestrial broadcasters pay one half the rate of webcast-only operations for the performance of songs. If this result is upheld, FCC licensed broadcasters would have a legally mandated 100% price advantage over webcasters who do not also terrestrially transmit their signal. While it is true that FCC licensed broadcasters must pay writers for the performance of musical compositions within their terrestrial signal area, there is no public policy justification to give them a 100% break on a separate royalty obligation, payable to the owners of sound recordings. In addition, it is very difficult to geographically "map" the Internet user audience of a terrestrial stations, for the audience may vary widely week to week and with different programming. Any rationale for this price reduction based on the station somehow "double paying" to serve the same copyrighted work to the same audience, only logically applies to the royalty for the performance of the musical work, payable to ASCAP, BMI and SESAC. It is not connected to the royalty for the performance of the sound recording, which was the subject of the Webcast CARP.

The CARP apparently extrapolated the "willing buyer—willing seller" standard from only one marketplace agreement.

Evidence introduced at the CARP suggested that webcasting is a nascent industry, saddled with start-up costs and the bandwidth cost of serving each unique listener. In contrast to traditional radio, which is a "one to many" medium, webcasters bear the cost of bandwidth to transmit each stream to each unique user. In addition, webcasters bear the costs of complying with the DMCA statute, and the unique burdens it places on webcasters' ability to offer programming.

While 26 agreements reached between the RIAA and webcasters were disregarded by the CARP on the grounds that these webcast services either never launched or quickly went out of business, the CARP placed great weight on the precedential value of the "rate" agreed to between Yahoo and the RIAA in the context of a legal settlement. As we were not a party to this legal settlement, we will limit our observation to the concept that settlements reached for past practices (in this case, the performance of music over prior

years by stations owned by the entity Broadcast.com acquired by Yahoo) are often not intended as an expression of a volitional market rate. In particular, a rate set by a single "willing seller"-- who controls 80% of copyrighted works in a market segment—with a single "willing buyer" is severely flawed, especially as evidence before the CARP indicated that only ten percent of Yahoo's music transmissions were originated on the Internet. For a variety of legitimate reasons specific to their unique business model, Yahoo was not seeking to establish a rate for webcasters, yet the CARP panel relied on this single agreement as if it were representative of party's reasonable economic decision to establish a going-forward rate for webcast activities.

We must conclude that either the "willing buyer- willing seller" standard specified by the DPRSRA for the Webcast CARP rate is the wrong test, or it was misapplied by this particular panel due to their reliance on a single non-fair market data point.

Congress should pro-actively address the problems raised by the current statute, because broadband and growth of the Web hold great promise for this new medium.

While the economics dictated by the CARP result are oppressive to webcasters, webcasting still has great promise as a news and entertainment. Distribution of RealPlayers and other media players are free and ubiquitous throughout the world. Webcasting also will drive demand for consumers' use of broadband, as sound quality of webcast music is much better at 96kbps streams and higher and encourages more sustained use. RealNetworks sees evidence of this in the appetite of our broadband audience for richer media streaming content. As the global audience expands, webcasters will find sustainable audiences and sell these audiences to advertisers who want to target their programming to unique demographic groups. However, at a critical moment for the industry that corresponds with the difficult financial environment created by the collapse of the Internet "bubble," webcasters find themselves confronted with the inflexible and unworkable CARP rate.

Not only should Congress revisit the payment standard and consider a moratorium on the webcast rate, but it should clarify for the Library of Congress that burdensome record-keeping obligations would also penalize the industry, imposing costly and expensive record-keeping requirements that do not apply to terrestrial radio stations. Moreover, the information sought by the record labels with respect to record-keeping for the webcast royalty goes well beyond the required data to direct payments to artists and copyright owners and crosses the "privacy" line by seeking data on the location of individual users who access webcast streams.

Congress has facilitated direct payment to artists for the performance of sound recordings via webcasting and Congress must therefore strive to establish record-keeping procedures designed to facilitate this goal. The interest of artists will be served if webcasting is allowed to grow and thrive under a reasonable rate structure, affording webcasters the chance to showcase unknown and new artists and promote their songs to the Internet

audience. As mentioned above, traditional FM and AM stations, increasingly programmed by national firms, have less and less airtime to devote to showcasing new talent and niche genres of music.

In sum, RealNetworks pioneered the streaming audio format that enables webcasting and continues to see huge consumer demand for this diverse programming over the Internet. Public policy should aim to create stable economic environments that allow for the fair taxation of content across diverse media. Congress has frequently stated that there should be no discrimination against a medium due to the technical means of distribution. This is especially true where the medium promotes diverse voices and freedom of speech. Webcast music transmitted over a digital network should be treated consistently with the same music transmitted over the airwaves via terrestrial radio. The result of the Webcast CARP, unfortunately, saddles the industry with an unfair and uneconomic rate structure, thus limiting the promise of this vibrant new communications medium.

Congress has the opportunity to act in a timely way to prevent damage to the industry and to implement the public policy goals of the DPRSRA and DMCA by promoting a webcasting industry that promotes new artists, allows a diversity of radio programming to reach a global audience and sets rates that fairly compensate the owners of sound recordings for the digital performance of their works.

Statement by John Hilbronn

Honorable members of the Committee,

I am the President of Cablemusic Networks, a company that has been webcasting since August, 1999. We were the second company to negotiate a license with the RIAA, which we did during the summer of 1999. Our primary reason for negotiating a license was to establish a dialog with the music industry. We felt this was an important action to take, given that we felt license cost management would be critical to the success of our business. In addition, an atmosphere of hostility existed between many music oriented Internet companies and the record industry. We wanted to establish the fact that we understood the industry had legitimate concerns about the use of its content, and that we would be happy to work with them. In fact, we solicited the RIAA with regard to license negotiations, even though we knew this was not required under the DMCA. We actually negotiated our license before we began webcasting.

Our strategy was to negotiate a license, establish a dialog, webcast within the parameters of the DMCA, then negotiate with the industry for additional licenses to offer more advanced services. For example, we created a service called the "Cablemusic Jack", which was essentially an online storage locker to be used by Cablemusic members. The Jack service allowed members to encode tracks from their own CD's to low fidelity files, which were then uploaded to our servers. We restricted the service such that only one person could listen to locker contents at any given time, so that there would not be any file sharing. It is also important to note that even if two or more people had the same content, each would have his or her own copy in their locker, meaning that we had duplicate files. While technically this was inefficient, legally it appeared to be in agreement with "fair use" notions. At first the industry seemed to think the service was within bounds, but eventually the RIAA told us to discontinue the service, which we did.

Eventually we entered into negotiations with Universal Music for a new license which would allow us to create a locker service using their content. During the course of negotiations, we determined that the proposed cost of the license was so high that the service could not be offered at a reasonable price, or sustained by on-line advertising. One other company, Musicbank, did announce a license agreement with UMG, but it never launched a service and eventually went bankrupt.

After these events, we concluded that we should stick with DMCA defined webcasting, and also offer our backend tracking technology as a product. (We had to develop reporting technology in order to comply with our RIAA license, so it seemed prudent to offer it to other webcasters as a service.) In order to offer a fully functional product, we had to work with a copyright clearinghouse, such as the RIAA's SoundExchange. We made attempts to learn how we could work with SoundExchange, but were never able to make any progress.

The events described above took place during the year 2000. Our license with the RIAA expired on December 31, 2000, but we extended it until January 31, 2001, in order to extend the time allowed to review the proposed renewal terms from the RIAA. The new terms had many more restrictions, some of which were disagreeable to our attorneys. In addition, the original license term mandated that we pay approximately 15% of gross revenues, a sum we thought too high given our operational experience. The RIAA indicated willingness to reduce this rate to some extent, but not to a level we thought more reasonable, somewhere around 3 to 5%, which would have been closer to the composition (BMI) license fees. We were not able to come to terms with the RIAA, so we did not renew the license for 2001, although one provision of it did extend until December, 2001. In our original license, we had a schedule for a percentage payout based on any capital we might raise from any investors. This was a concession granted by us during the extraordinary period of Internet exuberance occurring during the late 1990's. Our thought was that should raise a substantial amount of capital, the RIAA could benefit as well, since other Internet music companies had been bought out for large sums without any proceeds going to the industry. The thought was that the other businesses had achieved success through the use of industry content, so the industry should participate in any short term windfall. By the beginning of 2001, however, this provision was deemed impractical. Since we were not able to determine acceptable terms, the license expired, with the exception of the cap-raise provision.

At the time, we thought it reasonable to continue to negotiate while operating under the terms of the DMCA, knowing that eventually the Copyright Office would determine a rate. I personally testified before the CARP in D.C., having been asked to share our experience since our company was one of the first licensees. The proceedings went beyond the scheduled time allocation, so my session was probably abbreviated. I didn't think I was able to address all of the collateral issues I thought had merit, but felt that the contributions of others would likely express many of my thoughts. Regardless, in December of 2001 I proposed new parameters for a license, but the RIAA representative suggested that we just wait for the CARP decision.

As committee members are now certainly aware, the determination of the CARP was essentially incomprehensible. Their determination of a rate representative of a "willing buyer and willing seller" certainly had no relation to our experience or others in the webcasting industry. I need not repeat all of the elements of potential impact on the webcasters; they are well documented on http://www.saveinternetradio.org.

I believe the members of the committee should be very concerned about the effect of the otherwise inevitable elimination of the small webcasting businesses which seek to offer consumers and artists new and innovative ways to reach one another. Webcasters are quite distinct from file sharing sites. Downloads are not offered, the listener hears a pre-programmed playlist, and the sound is generally not CD quality. The industry is evidently not willing to consider the fact that such services may actually promote the retail sale of high fidelity music, and seems to be indifferent to the loss of webcasting, except the extent that they are allowed to offer it as a service.

It is true that Internet distribution of media in various forms is a "disruptive" technology. History shows that established companies with business models based on old methodologies frequently resist innovation. The entertainment business certainly has a record in this regard. We are all familiar with the history of the VCR, a device almost killed by the industry for fear that it would lead to unfair use of content. Fortunately for consumers and the industry alike, the VCR was allowed to be brought to market, resulting in new business for the industry and new products for consumers, as well as added convenience. Cassette tapes are another example - the industry sought to have the sale of blank tapes restricted, but eventually found that pre-recorded tapes were quite profitable, a business that would not have existed had the popularity of blanks not driven the demand for cassette players.

Artists, consumers and commercial interests are at a pivotal point. Many webcasters, including Cablemusic networks, have demonstrated a willingness to work with the industry and pay reasonable royalty rates. If the legislature allows the webcasting industry to be relegated to history as a result of the decisions of a few and the vested interests of established players, we can be reasonably certain that consumers, artists, and the industry itself will suffer considerable loss of choice and avenues of participation and ultimately profit that would have otherwise been available. As a simple example, webcasters provide listeners with a much greater variety of offerings than most people are able to experience through broadcast radio, or trips to music stores. We know for a fact that the loss of the webcasting industry will harm these consumers, and the less well known artists who offer music of interest to them. Eliminating new methods of distribution is also very likely to be counter the interests of established artists as well.

In my view, vested interests seek to preserve anachronistic business practices and distribution channels at the expense of all other current and future participants involved in the commerce of music. I request that the committee consider all of the aspects of this issue very carefully, as the negative consequences of bad policy formation will be widespread and considerable.

Thank you for your time and attention to this matter.

Sincerely,
John Heilbronn
President

Statement of Valerie Starr

I am a webcaster, and was informed that Sen. Leahy was interested in hearing from webcasters in regard to how the recommended CARP rate will affect us directly, our industry as a whole and most importantly, the people of the United States.

My name is Valerie Starr, and I am the President of Internet Radio Inc. (on-line radio properties include alldanzradio.com and choiceradio.com)

My background is in independent radio promotion (15 years in the business). 5 years ago, weary of the weekly struggle and pressure to assist the major record labels in securing the rapidly diminishing (and costly) spots on traditional radio to play new music (mainly due to radio consolidation), I saw a wonderful opportunity to provide my colleagues with a new medium to help promote and sell their artist product....namely internet radio.

Some consider me to be one of the pioneers of internet radio, starting my first internet radio station in 1998. In 1999, I founded ChoiceRadio.com and with a few early believers, raised enough money through a small friends and family round of financing to start my business. I am proud to be one of the remaining survivors of the early days of internet broadcasting, with many of my heavily funded competitors going out of business due to high overhead, high bandwidth costs, absence and slow adoption of advertising support, an overall downturn in the marketplace and lack of confidence in dot coms. Thankfully, in May of 2001, the company was acquired by Internet Radio Inc.

In the beginning my promotional colleagues at the major labels were thrilled at the prospect of having another means to promote their artist product other than traditional radio and the few and coveted spots on MTV/VH1. As time went on, and with the Napster issue and heightened threat of piracy, paranoia was ramped and the major labels started turning the wheels in motion to stall and possibly stamp out an industry that was still in it's infancy. An industry that could very well provide a valuable and free promotional service to them, however an industry that they had no control over and did not understand. Confusing and blurring the lines between streaming and actual downloading of music, the RIAA was successful in convincing Congress that the threat of piracy due to streaming "exact replicas" of the original sound recordings was real and the DMCA quietly slipped through into law. In actuality, the ability and desire to "pirate" internet radio streams is less likely than a person who would record their favorite radio station directly off their stereo. The 22kbs and 48kbs streams we provide offer far inferior sound quality to the end user and is a far cry from an "exact replica".

Choiceradio has hung in there and today our network is ranked #6 in the country according to measurecast*(http://www.measurecast.com) *measurecast is owned by the Nielsen company.

We stream on average over 400,000 total listening hours per week to over a million listeners per month. At this rate of streaming, and with no increase in listenership, we would owe more than

$500,000/year to the major labels if this proposed royalty fee becomes law. This is no where near the $500.00/year that we pay each publishing collection entity, ASCAP, BMI, SESAC. The RIAA keeps rebutting that we are crying wolf and that the rates are not as high as we claim them to be. Please check out the real math behind our individual story:

During the week of 4/29 - 5/5 IR Inc had...

475,076 ath (total listening hours)
x 52 weeks/year
=24,703,952 ath/year
x 15 songs/hour
=370,559,280 songs/year
x .0014 cents
= $518,782.99 /per year

This is assuming that we have NO growth and stay steady throughout the year, however in just one week, our radio stations have increased in ath by 100,000 hours. At this growth rate, we would be off the charts in terms of royalty payments.

There is absolutely no way to scale our business or even stay in business with a royalty rate that is 5x's our gross yearly revenues.

Recently, we have been extremely encouraged by an increase in advertising support. We feel that our business model is a sound one; one that has been a proven successful model by traditional radio for the past 75 years, and if left alone to build into a mature industry, we will be in a better position to pay a percentage of our revenues to the copyright holders, (a precedent for this type of royalty rate being already set by ASCAP and BMI). However, I would like to point out that I fail to see the logic behind a law that requires an industry based on the exact business formula of another (with the only difference being the deliverance of the product itself - streaming vs. airing) to pay a royalty when the other does not. This creates an extremely unfair and uneven playing field between internet and traditional broadcasters. To add insult to injury, the amount of data that, per the CARP's recommendations, we are required to give back to the labels, is incredibly burdensome and in itself will cause many internet radio stations including college and educational stations to go under. Note that terrestrial radio is only required to report 3 weeks logs of artist/title and label information to ASCAP/BMI.

We are passionate about our radio, but truly the most passionate are the listeners themselves. And It is these listeners who stand to loose the most if this proposed royalty rate becomes law. Internet Radio is rapidly growing in popularity but we haven't even scratched the surface for potential listeners. As broadband continues to roll out at it's own speed, our goal as an industry is to directly compete with the Clear Channels of the world. Currently our listeners are comprised mostly of the upper demo, highly educated workforce who delight in having the ability to choose special genres of music during the day, which are not available on traditional radio. Diverse and rich content is now available to all because of internet radio. Music that has been silent for years is now flourishing on the web...bluegrass, reggae, classical, new age, native American, big

band, swing....I could go on and on.

Also it is important to note that we provide a much needed avenue for many independent labels and artists to get their music out to the world. Musicians that would not stand a chance to compete with the heavily financed and promotionally supported major label artists.

Please, please Senator, continue to review these facts. We truly hope that Congress will acknowledge our viewpoint and understand that all we want is a fair platform in which to compete and grow our businesses.

Sincerely,

Val Starr, President
ChoiceRadio.com

Statement of Salvatore Lepore, George Halstead, and Jimmy Perna

Before my partner came along (Jan. 1999) , I started CyberRadio2000.com as CyberRadio927.com because at the time I had this idea to broadcast our 49-hour brokered time on WCBR 92.7 in Chicago on the Internet. That year, before I started, my father passed away. He was a Marine for most of his life and every penny that he left me as well as other borrowed funds went into this entire project. My father and I became very close finally before his death. I know it's weird but I felt that he actually passed away to leave me what he had so I could finally get into something that wouldn't fail. I haven't had the best luck in the world and to call me Bad Luck Schleprock isn't all that far from the truth sometimes.

When I started I also had "side channels" on the site because I figured that people are moody and look for music to suit the mood they're in at that time. We had 50s, 60s, 70s, 80s and the RADIO signal simulcast on the site. I figured this gave people who didn't like the RADIO format would have other formats to choose from, all on our site.

Now, we knew that the industry would spawn all kinds of ways for us to compete with other broadcasting but they weren't invented yet. .Mr. Case of AOL/TW borrowed heavily from friends and family and waited for the marketplace to catch up with his vision so it could be monetized, we did and still do the same thing. We envisioned targeted advertising with video/audio that would be received by people who actually specified what their interests were so as to NOT bore them with a product they'd have no interest in. We also knew that banner ads and borrowing money from our family and friends and being thrifty would go a long way to outsmarting the better capitalized. We watched many of our competitors implode due to many reasons, we survived, we grew and technology was getting us closer to the revenue streams we envisioned.

Now it appears we're at the finish line and someone wants to come and take that finish line and move it 50 years further and say they're acting fairly. They tell us they want us to flourish? That's like Al Capone saying how bad he felt while attending a man's funeral that he had killed. It's similar to telling an Oompa-Loompa that it should be no problem to jump over the Sears tower from a sand trap. There's no way in the world we can possibly afford to grow into a viable industry with the smothering and hijacking of revenues proposed by the label's hit squad we all know as the RIAA.

I come from a hard working family of Italians here In Chicago. My mother made a career of singing commercials and background vocals; my Father was a purchasing manager and lifelong Marine, my Brother a Chicago police officer and my Stepfather a retired Chicago police officer. I came into broadcasting because, as a kid, I wanted to be in radio because as a kid I was punished so much my best friend was a radio. I've had my bouts with radio both in and out of it but when the De-Reg Act Of 1996 came along the landscape of who and what could play that game pretty much excluded guys like me. I have no ties to millionaires, to bankers; I don't golf with important people who "know" people who can "invest". I'm not the most eloquent person in the world and I pretty much grew up with punks on the South side of Chicago, I avoided being one of them because of DJ'ing, acting and radio – never really successful at but never quitting

either. The one thing I do know is music and am responsible for programming over 55 channels on our website. [Being punished a lot as a kid had one advantage, it offered lots of hours of listening to transistor radios via an earplug]

This time, I have built something, for the first time in my life that looks like it might actually work and what happens? A group masquerading as the saviors of RECORDING ARTISTS want us BROADCASTERS to pay for what has never been paid. To say we're getting a free ride is an outright smokescreen. To say we are getting a free ride is to say that RADIO is getting one. We're broadcasting music, back catalogue, artists that labels normally spend hundreds of millions to market, they get the play from us, for free, WE'RE A CHEAP DATE. They seem intent on interrupting the very profitable marriage [BROADCASTING IS A VALUE THAT CREATES AWARENESS AND SALES – AT NO COST, KIND OF LIKE YOU SCRATCH MY BACK I'LL SCRATCH YOURS] that has been in place for 70 years. Why do I think this is happening? It's historical. Rather than embrace technology they hide from it. They have always blamed technology and said what a devil it is and yet they reap billions upon billions of dollars without ever once creating the products that allow their content to exist in the after-markets. If we relied on them there'd be no VHS, CD, Cassette or DVD market. Without those markets in place there would be billions of dollars never realized, millions of jobs and lots of music and movies rendered worthless and lost in the minds of people who would never have an opportunity to be exposed to them again.

I hope you don't let these people manipulate you into allowing this railroading to occur. I actually believe that you'll have to save the music industry from itself. As history has shown, in ten years we'll see how much better off they are BECAUSE of NEW MEDIA exposing their products. As I stated before IT'S HISTORICAL. Look at what the VHS created, CDs etc… They all helped in creating new products, new businesses, new technologies and all the jobs tied to all of that. With all that, look at the **billions** of dollars the music industry has received by simply being forced to not get in its own way.

Please help us become the BIG COMPANIES of tomorrow by protecting us today.

Respectfully,

Salvatore Lepore
George Halstead
Jimmy Perna

CyberRadio2000.com

Statement from Mark Douglas

Senator Patrick Leahy:

My name is Mark Douglas and I own and operate DH NetRadio, which is a part of iM Radio Networks. I am writing you today to express concerns that I have regarding the impending doom of CARP.

First, if I may, give a brief history. I became interested in radio at a very early age. My father had the insight to expose his children to the available technology of the time. I remember building our own ham radio transmitters and receivers, electronic kits from Radio Shack for Christmas, and an Altaire computer when they became available in the 70's. At the age of 7, a friend and I built our own FM transmitter and began putting on shows after school. Music was second nature in our household as well. My father played guitar in his uncle's band called the Nashville City SnagDraggers. Putting music on the FM airwaves appealed to my creativity and I guess this dream never left me.

I started broadcasting on the Internet in the summer of '98 but didn't get into full swing until several technologies came into place in late '99. One of these technologies was Live365, which is a bandwidth provider for Internet broadcasters. Around this time the fine folks at iM Radio asked me to come on board as a content provider, and I have been with them ever since.

From the start, though DH NetRadio is a small outfit, I have always set the standards high. Even though I knew it would be some time before DH NetRadio was a profitable business due to many economic barriers and the aftermath of the dot com bust, I have tried to conduct it in a business like manner. At this point DH NetRadio is not a profitable operation for reasons stated afore. However, I am fully dedicated to seeing it to a profitable point. This profitability is very viable and we are positioned to make the sacrifices now to see our small business becoming a profitable success in the future. As with any fledgling business, profitability is not always instant. It would seem, however, that there are those who would stomp out Internet broadcasters as viable small businesspersons.

For me, it is the thrill and contentment that music brings to my life and being able to share this same feeling with hundreds of thousands of listeners around the globe. I don't know how important music is in your life sir, however I am sure there are fond memories you shared with a loved one or friends that come to you when you hear a certain song. I could not imagine my life without music. That would be very painful.

We, as Internet broadcasters, are not a bunch of hacks who are hell bent on ripping off the artists, as the RIAA would have you believe. Actually, quite the opposite is true. We obtain our music through promotional CDs and purchasing. We pay our dues respectively to ASCAP/SEAC/BMI. Most of us, including DH NetRadio, provide links to music venues where listeners may peruse the CD and purchase it online. This information is available on a song-by-song basis. We bring you artists you remember from yesteryear, and exciting artists you've never heard of before.

We deliver content to listeners globally who are tired of homogenized, cookie cutter formats that are dominated by big money interests, or listeners who simply cannot get this type of programming in their locale. We are promoters of the music you love, and all we ask of the governing factions is that we get a fair shake and fair representation. To date we feel we have not been given these opportunities.

We're accused of being bad business people. We knew that the royalty rate was coming why didn't we set aside money for it? In fact most of us did. However, our speculation was set in accordance with what the ASCAP and BMI fees are and not these ridiculously high fees that are being proposed by the RIAA. We figured the fee would be similar to comparative compulsory licenses. Who could have known that the RIAA would be asking for such an irrational and ridiculous fee structure? There was never any indication that they would ask anywhere close to what they are asking for.

Of issue is the barrier to participate in the CARP procedure. The entry fee to take part was out of the reach of any small business alone. Yet, we are expected to abide by the law that CARP sets forth, without being a part of that process or opportunity to be properly represented. Only those with deep pockets can afford the entry fee to participate in the CARP hearings. With all due respect, that totally disregards "..by the people for the people" and "...fair representation".

The RIAA says that there is no promotional value to Internet radio, and that it doesn't sell records. Indeed, if one were to stop and think about it, if there were no promotional value to Internet radio, why would they even be making such a fuss about it? The Internet is just a fad right? It will go away soon right? In fact there is great promotional value to Internet radio. Their motivation to extort such a high price from Internet broadcasters is quite simple. If the fee structure is one that is so high that only those with big money interests can afford to play, the RIAA can be assured of filling their coffers to the fullest. Thus, slamming the door on the minority of independent broadcasters and businesspersons.

We live in an age of different emerging technologies that both wonderful and exciting. Most of these new technologies do not lend themselves to 'old school' parameters and constraints and do not follow 'old school' thinking patterns. Internet radio is one of these technologies. It is being threatened with abortion before ever being allowed the luxury of birth.

Historically, we can point to many instances where the RIAA has said that certain emerging technologies would put them and artists out of business. The cassette was one of these emerging technologies that the RIAA claimed would allow people to mass copy a single album and thus put them and artists out of business. Yet, just the opposite was true. The RIAA has continued to grow their business and artists have continued to flourish. Terra radio stations used to play entire albums and once more the RIAA screamed this would put them and artists out of business. Yet, once again, both have continued to flourish and prosper. Now, the RIAA says that, while on the one hand there is no promotional value to Internet radio, it threatens the integrity of theirs and artists' livelihood. It's a familiar "cry wolf" technique that they have perfected over the years. Voltaire said that if a person were to travel in excess of 25 miles per hour their heart would stop. Tell that to the company you bought your car from. We used to think the world was flat, but

thanks to daring, small businesspersons like Columbus, we know this to be a fallacy.

We, sir are promoters of music. We are small business persons who ask for fair representation. We feel that we have not received the opportunity to prove our viability and are not being fairly represented by CARP. We feel that the RIAA indeed represents big money conglomerates that are seeking to eradicate the diversity and freedom of the small business persons involved with Internet radio. We ask that these CARP proceedings be re-evaluated and the fees be restructured with a model more in line with the present day Internet economy.

Thank you for your time and support on these issues.

Mark Douglas
DH NetRadio
www.madawg.net

Statement from Toby Sheets

Senator Patrick Leahy:

We as Webcasters are in no way suggesting that we should not pay royalties for the songs we play. We fully support our artists and they deserve to be compensated.

Our biggest concern is that we are being separated from traditional radio stations and treated differently. The absolute only difference between a webcaster and a traditional broadcaster is our means of delivery: phone line vs. transmitter. We announce the songs and album titles just like a radio station. We pay our ASCAP and BMI licenses, fees that are supposed to cover the broadcast transmissions of copyrighted material, just like traditional radio stations.

Unlike traditional radio stations we are being asked to provide information that serves no other purpose than to provide the RIAA and associated record labels with data mining to sell more product. Radio stations don't have to collect data on their listeners, why should we? Radio stations provide data on the songs they play and when they play them. That is all that should be required of webcasters.

It has been proposed that webcasters pay an additional fee for making "ephemeral" copies of copyrighted music. This is because we make a digital copy of a song in order to play it over the Internet. It is not widely known outside of the radio industry that ALL radio stations make digital copies of their music to play over the air. Most radio stations use a system called "Prophet" to play their music, commercials, and everything else that goes over the airwaves. This system requires the station to copy the CD onto a hard drive. These radio stations have never paid an additional fee for this and the Prophet system has been in use for years. What makes webcasters a candidate for "ephemeral" fees when the radio stations are not.

The final point I'd like to raise is that the RIAA and the CARP feel that Internet streams offer a way for the end listener to make perfect digital recordings of music. While this is true to some degree there has been an oversight in their claims. Yes, a copy can be made of an outgoing stream. However, 75% of the world connects to the Internet at a speed which does not allow the transmission of high quality audio. The sound quality of most Internet radio streams is actually worse than what can be recorded with a tape deck from an AM radio station. Most Internet streams are delivering mono streams at a bit rate less than half of what is delivered on a normal CD.

When VHS tapes, DAT tapes, and CD Recorders hit the market, the music and film industries cried aloud that the industry would suffer from pirating. Instead the sales increased. We face the same scenario now with Internet radio. Instead of charging outrageous fees, why not place a small tax on computers and hard drives the way VCR's, DAT machines and CD Recorders were taxed?

Webcasters are not Napster-like file traders spreading music for free to anyone with an Internet connection. We are a new breed of radio station with a wider potential audience. We provide the same services as any traditional broadcast radio station: we promote new music, turn listeners on

to old forgotten music, and provide a new means of generating album sales for artists now affiliated with the Top 40 of every music chart.

The problem webcasters have with the CARP issue has nothing to do with webcasters not wanting to pay fees. It is the unfairness in which fees are levied against the webcaster compared to the traditional radio broadcaster. Playing music is a "public performance" and we already pay our fees to the performing rights organizations. That which is good enough for major market radio stations should be good enough for webcasters. And if the RIAA and CARP feel webcasters should pay new fees, those fees should also be charged against the traditional station.

Sincerely,

Toby Sheets

Free and Clear Broadcasters Association (facba.org)
Rio Grande Mud Radio (riograndemud.com)
Motocross Radio (motocrossradio.com)

Future of Music Coalition

1325 13th Street NW, #103, Washington, DC 20005 www.futureofmusic.org

Copyright Royalties: Where is the Right Spot On The Dial For Webcasting?

Testimony Submitted to the Senate Judiciary Committee

May 15, 2002

The Future of Music Coalition is a Washington, DC-based not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. The FMC seeks to educate the media, policymakers, and the public about music / technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to some of the challenges in this space. The FMC also aims to identify and promote innovative business models that will help musicians and citizens to benefit from new technologies.

The FMC is submitting testimony to the Senate Judiciary Committee regarding webcasting for three reasons. First, we believe that, as media channels continue to consolidate and program to meet bottom line expectations, webcasting is emerging as a vital new source for entertainment, music and news that can provide greater diversity and more choices for the public. Second, we believe that webcasting and other Internet technologies can increase the number of revenue streams for musicians by creating more opportunities for artists to promote and distribute their music. Finally, we contend that the existing music and radio industry structures underserve the majority of musicians and citizens, and these flawed structures cannot be allowed to replicate in a digital world. Therefore we urge members to consider the unique characteristics of webcasting and design policies and regulations that will allow this promising new medium to flourish.

In public comments recently submitted to the Copyright Office, the FMC has indicated its general support for the accomplishments of both the Copyright Office and the CARP. At a very basic level, it is critical to establish a respect for artistic creation and build models that fairly compensate musicians for the use of their works in commercial and non-commercial settings. We believe the royalty rate is appropriate and there is a strong opportunity to find common ground on reporting requirements. However, the FMC has urged the Copyright Office to consider the following five exceptions: *

1. Establishment of alternative license structures for non-commercial, hobbyist and small commercial webcasters
2. Reasonable reporting requirements
3. Automation of reporting

4. Elimination of ephemeral copy logs
5. Elimination of the threat of perjury through reporting

*(Detailed explanations of these five suggestions begin on page 5)

The Value of Radio

The importance of webcasting is best viewed in the context of radio. Radio is a public resource that has been managed on the public's behalf by the Federal Communications Commission since 1934. According to the FCC there are currently over 13,000 radio stations in the United States; 11,000 commercial and 2000 non-commercial or public stations. In a country as large and culturally diverse as America, radio remains an important localized medium for the transmission of news and entertainment, and reaches over 95 percent of adults on a weekly basis.[1]

Radio is also important to the music industry. In the traditional music business model, radio is seen as the best – and possibly only – way to "break" a record. Except in some rare cases, breaking a record on commercial radio is prerequisite to the sale of the millions of copies that are needed for labels to recoup costs.

For musicians and songwriters themselves, radio is not only a vehicle for promotion, but serves as a viable revenue stream in and of itself. Songwriters and composers are eligible to receive performance royalties based on airplay, which are collected and distributed on their behalf by the performing rights organizations – ASCAP, BMI and SESAC. For the handful of songwriters that garner chart-topping airplay, these royalty payments can skyrocket to the hundreds of thousands of dollars.

In addition, commercial radio airplay imprints a sense of cultural and financial legitimacy on a band or artist. While this may be an imperfect measure of "success" or "good music", it does mean that musicians who are played on the radio will not only have a better chance of selling more records, they will also have access to larger concert venues, bigger tours, and lucrative advertising and movie deals, all of which mean more revenue for the select group of artists, songwriters, labels and publishers that have access to commercial radio.

The Impact of Market Consolidation

Despite its importance to broadcasters, advertisers, musicians, labels and the listening public, there is mounting evidence to support the theory that the traditional commercial radio model is broken.

The consolidation of radio station ownership that has occurred since the 1996 Telecommunications Act has had a dramatic effect on the state of radio for musicians and the American public. While the definitive results are still under consideration, the

[1] "NAB Radio Facts Page," National Association of Broadcasters, http://www.nab.org/radio/radfacts.asp

anecdotal effects are:

- less community-based programming,
- more advertising per broadcast hour,
- continued reliance on payola-like practices of questionable legality, and
- oligopolistic levels of control over the most popular programming formats.

While some of these may be good for the radio business, the FMC questions whether any of these developments benefit musicians and the public. [2]

Commercial broadcasters would probably counter our criticisms by pointing to the industry's impressive revenue gains over the past ten years, which topped $19.8 billion in 2000.[3] They might also highlight the positive benefits that the 1996 Telecommunications Act reaped for their industry, including the ability for radio groups to streamline their back-office operations, combine sales departments, and capture national ad accounts. They might even point to the financial benefits of voice-tracking systems, which create customized programming that is beamed to regional stations from a centralized location, thus eliminating the cost of paying the salaries of hundreds of local on-air DJs and production staff. These structural changes are smart business moves that create more profitable bottom lines for those radio station groups that are in the position to consolidate, but there are two other stakeholders that have a vested interest in the state of radio – musicians and the listening public. It is on behalf of these two groups that we stake our claim that alternatives to the current radio structure need to be embraced.

Despite its perceived success over the past six years, the radio industry itself may be pondering its own long-term survival. First, statistics indicate that the audience for commercial radio is shrinking. Total radio listening has dropped by 9 percent from 1993 to 1999. The greatest reduction has occurred in listeners aged 12-24 where the drop in listenership is greater than 12 percent.[4] It's interesting to note that this is the same age group that turns to the Internet in the greatest numbers as a primary source of news, information and entertainment. According to a June 2000 study, nearly half of all teens and 39 percent of 18-24 year olds have listened to Internet radio. Rather than be satisfied with traditional radio, young Americans are turning to the Internet for different sources of music and news.[5]

There are other puzzling disconnects in radio when marketing decisions overrule public opinion. Take, for example, the incredible success of the Grammy-winning *O Brother Where Art Thou* soundtrack. Even after topping the sales charts with sales of 4.4 million copies, the tracks remain virtually unheard on country radio. In a *New York Times* article, Paul Allen of the Country Radio Broadcasters Association noted, "The recording

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[2] The FMC is currently conducting a multi-faceted research project on the effects of consolidation on these two stakeholders that will be completed in the next few months.
[3] Radio Advertising Bureau.
[4] "Will your Audience be Right Back After These Messages?", Edison Media Research/Arbitron, June 1999.
[5] Corporation for Public Broadcasting. CPB Scan, December 28, 2000, page 30. "Radio's Future – Today's 12-24 Year Olds", study conducted by Edison Media Research/Arbitron, June 2000.

academy recognizes the work of its artists and their music, from the standpoint of art, which is considerably different from what country radio is about. Country radio is purely about mass appeal music, and it has some very defined limits because there are some very defined demographics that the owners are tying to find through that music. Where the Grammys are about art, country radio is about the Benjamins."[6]

The Future of Music Coalition recognizes radio as a vital public resource for news and entertainment, but one that has been hijacked in recent years by corporate interests. We have supported efforts to create alternative radio structures such as Low Power FM stations, but the coalition of grassroots organizations that have supported LPFM have been only partially successful in their quest.

We are now standing at a crossroads regarding the future of webcasting. If rules and reporting requirements take the unique assets of webcasting into consideration, diversity and consumer choice can be strengthened. If the proposed policies place undue financial and staffing burdens on webcasters, we will surely lose this opportunity to support viable new sources for citizens to access a diversity of music and information, and for artists to benefit from new revenue streams.

The Value of Webcasting

In this increasingly consolidated and concentrated radio marketplace, webcasting represents an opportunity to break the bottleneck. While it's natural to think about Internet radio as merely a newer delivery mode of terrestrial radio, there are some distinctions between the two mediums that must be recognized as policymakers design rate and reporting requirements for webcasting. Webcasting has three unique assets that must be acknowledged and protected:

1. the opportunity for programming diversity
2. the low barriers to entry and legitimate competition; and
3. the global reach of the Internet.

Limited Terrestrial Bandwidth Means Limited Programming Choices

Terrestrial radio is fundamentally constrained by limits on available spectrum. That means that there's a finite limit to the number of radio stations that can exist in a marketplace. Because of this scarcity, the radio spectrum has become increasingly valuable in the marketplace. Furthermore, since the passage of the 1996 Telecommunications Act, we've seen existing, locally owned stations purchased by corporate radio groups, with the average transaction value of $14 million for an FM station in 2000.[7] The forced scarcity of bandwidth combined with the proven value of radio to music labels and advertisers have created a situation where only those with vast

[6] Neil Strauss, "The Country Music Country Radio Ignores", *New York Times*, March 24, 2002.
[7] "State of the Radio Industry: Radio Transactions 2001: Where Did All the Deals Go?" BIA Financial Networks 2002, page 11.

capital resources can enter this market. Even more compelling is the fact that limited spectrum and high barriers to entry have decreased legitimate market competition, where multiple owners are able to compete fairly in the marketplace. Contrary to the stated goals of the Telecom Act, there is considerable evidence that deregulation allowed a small number of companies with deep pockets to purchase multiple stations in various markets, effectively squeezing out competition while creating more leverage for themselves over advertisers, music labels and smaller competitors.

The Internet is Unlimited

Contrast this with the limitless "spectrum" of the web. The Internet, by design, allows for multiple streams to be broadcast simultaneously and globally. Unlimited streams means that there's also unlimited opportunities for webcasters to offer just about any possible mix of music and information that can be heard simultaneously virtually anywhere in the world. Webcasters can not only specialize in underrepresented genres such as classical, New Orleans jazz, punk rock, or bluegrass, but for the first time they can legitimately make a business out of aggregating small numbers of fans of these niche genres all across the world. This possibility is strengthened by the relatively low barriers to entry for webcasting, where individuals can create and launch a webcasting station with just a handful of affordable resources; access to bandwidth, some computers, software, and a little bit of know-how. They don't need signal towers, or satellite dishes, or even an office to start webcasting. In fact, many small webcasters are running their operations out of a home office, basement or garage. The limitless spectrum and low barriers to entry not only allow for programming diversity, it also means that there's a better chance for legitimate market competition – a marketplace with a great number of competitors – to flourish on the web.

Webcasting creates a wealth of new choices for music lovers and information seekers that, until now, have had their choices restricted to what's being broadcast in their local area. It is abundantly clear that webcasting can give those with access to the internet a rich and diverse set of listening opportunities that are basically nonexistent in the terrestrial world.

The Value of Webcasting for Musicians

While it's clear that webcasting can benefit citizens by offering more listening choices, it's also true that webcasting will benefit musicians and artists. The Internet has already created new ways for artists to promote and distribute their music, to connect directly with music fans, and build communities outside of the constraints of commercial business models. The FMC believes that webcasting can play a vital and growing role in this area, both as a new mode of promotion that encourages music sales and builds fan bases, and as a new source for public performance royalties.

Building Better Models: Developing Alternative Licensing Structures

As stated above, FMC believes that the outcome of the CARP is fundamentally sound. It

does not, however, reflect the reality that many webcasters are not large corporations or broadcasters with the financial and staffing resources to handle the proposed rates or reporting requirements. It is important to recognize the distinctions between various webcasters and divide the community into four general classes:

1. Corporations
2. Small businesses
3. Non-commercial broadcasters
4. Hobbyist webcasters

The FMC hesitates to specifically define these classes in this document, but we generally recognize the differences. Corporations and small business webcasters have revenue streams that are generally commercial in nature. What distinguishes them from one another are qualities such as gross annual revenue, corporate backing, staff size, and audience size. Non-commercial webcasters could include federally-registered nonprofits like the majority of college and community stations, which are often run by a handful of volunteers and rely on public donations, grants, and outside funding as revenue sources. Hobbyists can be described as webcasters who stream for various non-commercial reasons, and may often be financing their operations out of their own pockets. Once again, we are not here to determine the class distinctions, but only to note that there are at least four general categories that are operating under unique circumstances. As a result, we believe the licensing and reporting requirements should be scaled accordingly to ensure that the greatest number of webcasters have the ability to operate.

The Incubator License for Small Commercial Webcasters

In particular, the FMC recommends at least two new grades of licenses. First, we would support the creation of a transitional or "incubator" license, under which small commercial webcasters would pay reasonable licensing fees and royalty rates and meet realistic reporting requirements for a specified period of time. This incubator license would recognize the start-up nature of many small commercial webcasters and would give them the time and financial latitude to build a revenue-generating business model. Note that this incubator license should be carefully crafted and only made available to independent webcasters that have no connections to larger corporate structures, thus avoiding the chance that larger webcasters will use the incubator license as an opportunity to circumvent their obligations. If the station is successful in building revenue and audience size in the time allotted, it will transition to the standard rates and reporting structures established by the Copyright Office and the CARP.

A Noncommercial/Nonprofit/Hobbyist License

One of the potential unintended consequences of the CARP decision and Copyright Office proceeding regarding rates and reporting requirements is the economic burden that it places on non-commercial webcasters. If

these rules are adopted without modification, there's a strong chance that many community broadcasters would simply stop webcasting. Considering the value of noncommercial voices in our culture, we think this would be a terrible consequence. In an increasingly homogenized marketplace of broadcast radio, this sector of webcasters has guarded and nurtured America's musical heritage and offered a platform for new and emerging recording artists. Radio stations like WWOZ in New Orleans have provided unique programming that shares our nation's rich culture with listeners throughout the world. It would truly be tragic if such stations were no longer able to share their mission due to the implementation of the proposed rates.

To avoid this outcome, the FMC has encouraged the Copyright Office to establish non-commercial licenses and reasonable reporting requirements for webcasters who are not aiming to run a commercial venture through their service. The FMC proposed that the modified rate offered solely to noncommercial/ nonprofit/college/hobbyist webcasters should be based on existing precedents that have served non-commercial radio well for decades.

We do believe it is important that beneficiaries of this non-commercial license should be required to adhere to reasonable reporting requirements so that performance royalties can be disbursed properly. However, this license would recognize the financial and staffing realities of these nonprofit stations and be scaled accordingly. Again, we encourage members and Copyright Office to look to existing nonprofit/community broadcasters for guidance on the creation of this license.

1. Reasonable Reporting Requirements

The FMC also urged the Copyright Office to revise the reporting requirements to eliminate the collection of information that is redundant, unnecessary or has not been provided webcasters for reporting.

It is important that webcasters thoroughly report what music they have played so that songwriters, performers and labels can be accurately compensated for the non-interactive digital performance of their copywritten works. As advocates for musicians, we do not question this priority. The FMC is concerned, however, that the quantity of fields that webcasters will be required to report will unfairly burden small webcasters. Furthermore, we are concerned that in some cases the stated reporting requirements demand that webcasters track and report information that they have not been given.

For example, it is standard music industry practice for labels to send webcasters advance copies of CDs before the final album artwork is completed. Often these CDs are minimally labeled with little more than a band name and a song title. In these cases webcasters would clearly be unable to report any information beyond the artist and title

track. It is also standard practice for labels to hole-punch the barcodes on completed promo CD artwork to make them impossible to scan. In these cases webcasters would be unable to accurately report bar code information.

Considering the fact that the proposed reporting requirements would require that webcasters file their report records under the threat of perjury we believe it is critical that these requirements are reasonable. Therefore, we urged the Copyright Office to revise the reporting requirements to ensure that this process does not overly burden small webcasters.

In consideration of being granted this favorable rate, the non-commercial broadcasters would report all of the recordings that they play each calendar year. Therefore all payments distributed to recording artists and labels would be based on actual playlists rather than sampled data. This would ensure Sound Exchange payments would not run the risk of the obvious data distortions that have occurred in the AHRA royalty pool, where the use of SoundScan data has skewed the distribution monies towards a handful of prominent recording artists and major record labels at the expense of independent artists. This proposal would result in more equitable distribution and eliminate the distortions that occur when weighted systems using extrapolated data from limited sources are the sole criteria that determine which artists are paid.

3. Working Toward Automated Reporting Structures

Existing copyright data should be used to create an automated reporting software technology that will be made available to licensed webcasters to help them fulfill their reporting requirements. There are numerous public benefits to creation and maintenance of a publicly held authentication database, including more accurate reporting, less staff burden on webcasters, and full documentation of those works that have fallen into the public domain. While some argue that the marketplace will take care of this need, it is the FMC's contention that, in the long run, the most efficient means to build and manage such a database is through a combined effort of artist groups, webcasters and labels under the oversight of the Copyright Office.

In the short term, the most accurate database of information regarding the ownership of copyrights and musical performances is the database that SoundExchange has been using to distribute digital royalties for the past year. Many of the numerous fields which webcasters would be required to enter according to the proposed reporting requirements are already recorded into this database. We therefore suggest that the information from this database be made available in some form that would allow webcasters and technology developers to create an authorized automated reporting system. By creating and standardizing this reporting process, time-consuming data entry work can be minimized and information collection can achieve an increased level of sophistication, efficiency and immediacy.

4. Elimination of Ephemeral Copy Logs

The FMC believes that the requirement to periodically destroy ephemeral copies should be eliminated. Music licensed to be streamed in a non-interactive manner is only valuable if it is broadcast and heard. The ephemeral copies that are stored on webcasters' hard drives are merely an intermediate – but necessary – step in the webcasting process. According to the proposed requirements, all webcasters would be required to destroy their ephemeral copies every six months. Not only is this counterproductive, but also technically unfeasible in many cases.

The FMC does not understand the rationale for this requirement, which would force small webcasters to incur unnecessary additional expenses in the never-ending destruction and re-creation of the ephemeral copies. Plus, in many webcasting architectures it is impossible to track ephemeral copy creation and destruction. Ephemeral copies are essential to facilitate legitimate webcasting, therefore all requirements regarding the creation, destruction, and tracking of ephemeral copies should be eliminated.

5. Elimination of Reporting under Penalty of Perjury

It is in the best interests of all parties to ensure that the essential framework under which webcasters operate is clearly understood and reasonable. Given the concerns stated above about the potential impracticality of certain reporting requirements, and given the reality that any new process like this will take time to become standardized, it seems unduly harsh to require webcasters to sign their log sheets under the penalty of perjury. For some, this alone may be a disincentive for them to continue webcasting. The FMC believes that there may be more appropriate precedents in place at the FCC regarding broadcasters' obligations to be truthful in their filings.

Conclusion

The Future of Music Coalition would like to thank the Senate Judiciary Committee for organizing today's hearing. Obviously both webcasters and copyright owners are passionate about their interests and have a vested interest in the future viability of webcasting. We urge the members to consider the following modifications to the proposed rate and reporting requirements that have been suggested by the CARP tribunal:

1. Establishment of alternative license structures
2. Reasonable reporting requirements
3. Automation of reporting
4. Elimination of ephemeral copy logs
5. Elimination of the threat of perjury through reporting

The FMC recognizes that building better models for webcasting could be a long and involved reformation process. In order for licensing rates and reporting requirements to be scaled to meet the realities of different classes of webcasters, there will need to be further discussions between various parties to first distinguish the four classes of

webcasters and then come up with rates and requirements that are in line with their unique characteristics. The FMC is more than willing to take part in these discussions if they ensure that webcasting can continue to offer diverse and creative programming to the public, and serve as an new revenue stream for musicians.

Respectfully Submitted,

Jenny Toomey, Executive Director
Michael Bracy, Director, Government Relations
Walter McDonough, General Counsel
Kristin Thomson, Research Director
Brian Zisk, Technologies Director

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 14, 2002

The Honorable Patrick Leahy
Chairman
Senate Committee on the Judiciary
Washington, DC 20510

Dear Mr. Chairman:

As you know, the Senate Committee on the Judiciary has exclusive jurisdiction over intellectual property issues in the Senate. By working together across the political aisle, the Committee has long been at the center of bipartisan congressional efforts to ensure that our nation's copyright laws are up-to-date and balanced. By working together, I am confident that we can continue to add to our Committee's record of accomplishments.

It is for these reasons that I write to you today in the hope that you and I can work together on another important legislative matter. Nearly two years ago, the Judiciary Committee convened a hearing on the issue of online music. Our interest then – as it remains today – was to ensure that artists, songwriters, and other rights holders are compensated for their creativity while also ensuring that consumers have access to the music they love. We urged all parties involved to undertake efforts to embrace the opportunity the Internet presented. We were concerned that new technologies could lead to rampant piracy of intellectual property rights if consumers did not have legitimate avenues to enjoy their music with the benefits and advantages offered by advances in technology, such as the Internet.

More than a year after our hearing, the major record labels finally did launch online music services. Their hope – and ours – was that they could provide consumers with a legitimate choice in the market for online music. These services, Musicnet and Pressplay, have been organized as two joint ventures between the five major labels and, over the past year, have drawn the antitrust scrutiny of the Department of Justice.

Notwithstanding my concerns, I have still felt inclined to give the major labels credit for at least making an effort to embrace the Internet. I was, however, troubled to read in a recent issue of the *Billboard Bulletin* that a new study found that the major label's own Internet services contain only 10% of the top 100 U.S. singles and only 9% of the top 100 albums. Musicnet was found to have only three current hit singles available even though the record labels that have licensed Musicnet account for nearly 40% of the Billboard Hot 100. The article went on to point out that "the top consumer complaint against fee-based services is the narrow selection." My concern stems from the fact that the continued lack of legitimate and diverse music will drive consumers to unauthorized sites, as we have seen, and thereby make legitimate ventures impracticable to launch.

While I intend to review this study in greater detail, it appears to echo what many have been telling us – that the record industry's legitimate licensed services still do not have the depth of catalogue to compete with the free services. As you may recall, the CEO-designate of AOL TimeWarner testified last month about the complex problem facing the labels and artists and conceded that the amount of cleared, licensed tracks online represent an "infinitesimal" percentage of the music available on the Internet. Unlicensed songs means less income for songwriters and performers, and as litigation between copyright owners and technology companies continues, the illegitimate free services appear to continue to mushroom.

Accordingly, I believe we are at a point where we need to consider the public policy of legislative solutions aimed at moving the industry forward so that artists and creators can be compensated and so that consumers could have the choice to purchase and enjoy music from legitimate, innovative online music services. Furthermore, we must ensure that the online music marketplace is one that is competitive and respects both our antitrust policies as well as our intellectual property policies. For a discussion, I propose the following ideas:

1. **Out of Print Revival Right**: Congress should consider the establishment of an out of print revival right – a sort of safe harbor – for artists or on their behalf to allow services to provide streams or downloads, etc., of out of print music (music no longer made available by the labels) and pay rights holders a fair royalty for them. This could be a substantial benefit for those artists whose rights are now held but not exploited by record labels because the labels are unable or unwilling to market, or to clear the rights to, their music. It ought not threaten the major labels' CD sales since these are out-of-print tracks. The benefits could run to the artists, or to all legitimate services, including the label-owned services. In short, the creation of a revival right for out of print music could allow legitimate services to grow the catalogue of their services to compete with free services. Moreover, this could provide a significant benefit to artists whose works lie dormant and unavailable.

2. **Direct Payments to Artists**: Recording artists have expressed concerns that royalties collected for exploitation of their works online be paid directly to artists rather than through their record labels. We should explore the best way to accomplish this as well as addressing the relevance of such traditional charges against artist royalties as those for breakage, returns, free goods, etc., in the context of digital distribution. Digital distribution could ultimately prove a boon in reproduction and distribution cost-savings, which ought to be shared with the artists.

3. **Artist Rights in Domain Names**: Some contracts purport to grant domain name rights to record companies in perpetuity. Since many fans seek out information on the Internet,

and do so by the name of the artist, it makes sense for the domain name to follow the artist from label to label, if the artist so chooses, or to stay with the artist to exploit on his or her own, especially if that artist leaves labels altogether and decides to exploit their own work directly. In such a situation, the artists' most valuable asset for interacting with fans and promoting their work in the wired world – the Internet domain name – for both the fans and the artist, it ought to be controlled by the artist.

4. **Copyright Office Database Modernization**: While the Copyright Office maintains a database of music and sound recording ownership, the owners do not always keep the information current, the database is not easily accessible, and does not lend itself to high speed or high quantity use of the kind necessary to clearing rights for legitimate online music services. Accessing and using ownership information can prove to be a substantial benefit to artists and legitimate online media services. Additionally, where there is ambiguity and a lack of accurate information concerning who owns what copyright, there is enhanced risk of litigation for Internet services and increased costs to consumers.

   We should consider the creation of a new, public copyright database to be developed and maintained by or accessed through the Copyright Office; it would be accessible to the public, indexed, and fully searchable through the World Wide Web. I believe that applicants for copyright registration should be permitted to submit their applications for registration online, as well as submit their deposit materials electronically. We might further consider incentives to keeping the database accurate, consistent with our international obligations, such as allowing that good faith reliance on this database limit a user's liability, exposure to monetary damages.

5. **Non-Discriminatory Competition Protections**: We should also consider extending the nondiscrimination concepts of current copyright law to cover online music distribution services where major labels could be acting in an anti-competitive manner. Simply, if large sound recording copyright holders – who are otherwise competitors – choose to license each other or organizations affiliated with competitors, the right to reproduce, perform, or distribute sound recordings via the Internet, other bona fide services ought to be able to offer the same services provided they pay the same rates for the same services.

This provision would not affect a copyright owner distributing its own content itself, via its own affiliate or unaffiliated third-parties, so long as such an entity is not an arm of a major competitor. Since the antitrust enforcers seem to have indicated that they will not tolerate greater concentration in this market through mergers, it would behoove those of us concerned about competition policy to ensure that the digital market does not fall victim to anticompetitive aggregations of market power.

I believe that if we work together on legislation, we might be able to pass it this year. I hope we can work together, and look forward to hearing from you and working with you to draft the sort of bill we can both be proud to have supported for artists, their fans, the Internet and copyright holders.

Sincerely,

Orrin G. Hatch
Ranking Republican Member

OGH/sbb

May 14, 2002

US Senate
Committee on the Judiciary

Re: "Copyright Royalties: Where Is The Right Spot On The Dial For Webcasting"

Chairman Leahy and members of the US Senate Committee on the Judiciary:

We join together, as independent artists and recording labels, to show our deep concern that the CARP recommended Internet Radio sound recording performance and reproduction royalty rate is so high, and the recommended record keeping requirements are so extensive, that it will severely impact Internet Radio's ability to survive, and thus destroy a fledgling industry with tremendous potential to help independent artists and recording labels promote our music.

One of the best sources today for exposing independent artist and label music to the public is through Internet Radio webcasters, who are much more open to playing independent music than terrestrial radio. The consolidation of large terrestrial radio stations has substantially narrowed the diversity of musical genres available to the public, and has made it increasingly difficult for independent artists and record labels to get airplay on terrestrial AM/FM radio. Therefore, Internet Radio has become a primary source of promotion for independent artists and labels. Each and every time Internet Radio webcasters play our songs, more people become aware of our music, and more people buy our recordings, merchandise, and tickets to our concerts.

We appreciate that as independent artists and record labels; we will finally be compensated financially for our sound performances through the sound recording performance royalty. We applaud Congress for creating this opportunity for us - an opportunity enjoyed by artists throughout the rest of the world. However, we fear that the ultimate result of the performance royalty fee as proposed, will be consolidation of the Internet Radio industry to those few large corporate webcasters who can afford the high rate. Smaller Internet Radio webcasters will be forced out of business, and independent artists and recording labels will lose a major source of exposure and promotion. Plus we'll lose the financial compensation from songwriting royalty fees we currently receive, and performance royalty fees we would have received from those webcasters.

For these reasons, we ask you to support sound recording performance rates and record keeping requirements that are fair and equitable to all parties involved. We sincerely hope that the decisions made by the Library of Congress will allow all Internet Radio webcasters to grow and flourish, and in turn, continue to be a source of promotion and financial compensation for independent artists and record labels such as us.

Artists:

Absinthe Blind
Adam Fein
Mike Zoflo
Urbana, IL

Adrian Belew/Bears
Rob Murphree
Chicago, IL

Akbar Muhammad
Gardena, CA

Alpha Cat
Elizabeth McCullough
Jersey City, NJ

Ass Ponys
Randy Cheek
Hamilton OH

Atombombpocketknife
Justin G. Sinkovich
Chicago, IL

BFE
Andie Jones
Grand Prairie, TX

Big John Shearer
Chapel Hill, NC

brown25
Byron Qualls
Ashland, KY

Bruce Connole
Phoenix, AZ

Carey Slade
Tempe, AZ

Chao
Regina Chellew
Dallas, TX

Chomsky
Don Cento
Dallas, TX

Clay Vanessa
Mark S. Teixeira
Redlands, CA

Cloister
Dana Smith
St. Louis, MO

Dawn L. Low
Ann Arbor, MI

djeXACTO
San Francisco, CA

Dominic Gaudious
Chicago, IL

Elk City
Peter Landland-Hassan
Brooklyn, NY

Ellee Ven
Los Angeles, CA

Eric Brown
Woodland Hills, CA

George Lee, Jr. & the Crazed Cowboys
George Lee, Jr.
Paula Bright
St. Louis, MO

Ironman Curtis
North Hollywood, CA

Je Suis France
Chris Rogers
Athens, GA

Jefe
Jose Ayerve
Portland, Maine

Jigsaw Seen
Jonathan Lea
Los Angeles, CA

John Long
WA

Johnny V.
Canada

Jugoe
Jude Goergen
Cleveland, OH

Julie Grower
Nashville, TN

Karin Nicely
Butler, PA

Kathy Fleischmann
New York, NY

Kathy Wedvik
Auburn, WA

Ken Kase Group
Greg Berg
St. Louis, MO

Kilowatthours
Ben Lord
Brooklyn, NY

Lea Brennan
Monroe, CT

Ledenhed
Allen Cholach
San Francisco, CA

Lipis Roman
Worcester, MA

Loud Family
Scott Miller
San Mateo, CA

Mike Hays
Orange, VA

Mike Lane
Minneapolis,MN

Molusk
San Francisco, CA

Mono, Rovo
Reiko Kudo
New York, NY

Morsel
Brian Hussey
Los Angeles, CA

Naughty Uncle Norman Band
Chuck McKay
Bismarck, MD

Niko Bolas
New York, NY

Nomad Planets
Mark Mybeck
Hammond, IN

Opi Yum Yum
Carrie Reynard
Cincinnati, OH

Oxygene 8
Linda Cushma
Tempe, AZ

Paul Draws Blank
Brad Cowan
Brian Monte
Erick Lipe
Eugene Ertman
Gary Farr
Luke Mulderink
Roger Remillard
Chicago, IL

Persephone's Dream
Kim Finney
Gibsonia, PA

Phillip Wain
Butler, PA

Projektor
Darren A
Winnipeg, Manitoba

Protologic
Michael Proto
Atlanta, GA

Rhomb
San Francisco, CA

Roman Candle
Skip Matheny
Wilkesboro, NC

Seofon
San Francisco, CA

Shosha Capps
Liberty, SC

Smoke Out Society
Tedju
Canton, OH

Suicidal Poets
Carmelo
New York, NY

The Apiary
San Francisco, CA

The Left Out Kid
Jon Riley
UK

Yield
Alex Suarez
Orlando, FL

Independent Labels & Promoters:

Arena Rock Recording Co
Dan Ralph
West Orange, NJ

Astralwerks
Clint Koltv
New York, NY

Bang On Records
Dominique Gizelle
Paul Biondi
Val Thomas
Bellmore, NY

Bastard Jazz Recordings
Aaron Schultz
New York, NY

Beggars Banquet
Jenn Lanchart
New York, NY

Blakhol Records
Carol Thomas
Jackson Heights, NY

Bombastique/RTFM Records
Keith Crusher
Oakland, CA

BumpNGrind Records
Cookie Holley
Tiller, OR

Butterfly Records
Darren Stubbs
UK

Citrona Recordings
Greg Long
Amelia Island, FL

Coldwind Records
Tim Bradach
Minneapolis, MN

Cornerstone Digital
Jamaal Layne
John Staub
New York, NY

Domino Recording
Dan Kessler
New York, NY

DooWopStop Productions
Robert Backman
Cincinnati, OH

Ephiphany Records
John Dixon
New York, NY

Finger Lickin' Records
Jessica Joy Gilchrist
London, UK

Gazochtahagen Records
David Neil Cline
Lakewood, CA

Ghost Master Records
Dave Herrero
Austin, TX

Girlie Action Marketing
Ron Pastore
Ron Porter
Inge Colsen
New York, NY

Groove Distribution
Nate Vanek
Chicago, IL

Hotsauce Records
Melissa Richards
Los Angeles, CA

Idlis Communications
Michael Idlis
Boca Raton, FL

Indie-Music.com
Suzanne Glass
Columbus, IN

Jade Tree Records
Tim Owen
Wilmington, DE

John Cozolino
Indie Talent Service
Beazon, NY

Kranky
Bruce Adams
Chicago, IL

Kurly Queen Publishing
Karen Jacobsons
New York, NY

L.V. Dabbs Publishing
Leroy V. Dabbs
Glen Ellen, IL

Little Dog Records
Jennifer Herold
Pete Anderson
Tank
Burbank, CA

Matador Records
Jay Miller
New York, NY

Metropolis Records
Shannon Ludwig
Philadelphia, PA

Miami Music Group Intl
Ken Soltys
Miami, FL

Ocean Records
Azarel Yisrael
Lakewood, WA

Ojet Records
Mark Caperton
Austin, TX

Paes Records
Big Joe Duskin
Greg Schaber
Keith Little
Leroy Ellington
Marcos Sastre
Roger Yeardley
Sonny Hill
Sweet Alice Hoskins
Thomas Lomax
Cincinnati, OH

Perfect Circle Records
Mark Naylor
Phoenix, AZ

Perishable Records
Tim Loftus
Chicago, IL

Pork Recordings
Mark & David Brennand
UK

Record Factory
Latif Karoumi
Rotterdam, Denmark

Red Melon Records
Chris Rosa
San Francisco, CA

Shadow Brook Records
Dave Isaacs
Albertson, NY

Smash&Grab Music
Sandy Andina
Chicago, IL

Surgeland Records
Sandy Serge, CEO
Marietta, GA

Swansea Music
Lynda Johnson, President
Boise, ID

The Foundry
Michael Bentley
San Francisco, CA

Thirsty Ear Recordings
Bryan Roman
Norwalk, CT

Tiberius Records
Mike Montgomery
Rick McCarty
Independence, KY

Touch & Go
Zach Cowie
Chicago, IL

Tricopolis Records
Mike Nadolson
Lake Elsinore, CA

Uncle Promotions
Marc Kordelos
Los Angeles, CA

Vent Productions
R. Scott
Lakewood, CA

Statement of Robert Abbett

Aloha from Kailua, Hawai`i!

I'm one of the tiniest but, also one of the oldest Internet Radio Stations on the planet. I was a radio DJ for about 19 years, was imported to Hawai`i from Connecticut back in 1979 and found my real true home. I'm a small guy but, one who is trying to do good things for my community on the Internet with my project Internet Radio Hawai`i at irh.com.

I'm going to address the CARP and Royalty issues up front and then, should you have time I will follow with some backround on myself and what I do.

Internet Radio Hawai`i at http://www.irh.com is a small out of the house Hawaiiian music station. I play only Hawaiiian Music which is locally produced and nothing I play is produced by any major label. I am the owner, operator, dj, music director, web guy, janitor and bookkeeper. I do it out of my house and in my "spare time". I hope to grow it into a profitable small business but may never get a chance if the current CARP recommendations for copyright royalties are accepted.

Internet Radio Hawai`i has evolved over the past seven years into a listener supported entity. It has grown to the point that is costs far more than I as an individual could ever support and is reliant on listener donations for survival. My audience and I have created a relationship where I provide the music and they supply the support.

Tax year 2001 brought in about $27,000.00 in donations. Costs including bandwidth ran about $22,000.00. Taxes ran about $7,000.00 including federal and state income taxes and local Hawai`i excise paid on the donations. I paid about $1100.00 in ASCAP, BMI and SESAC licensing in 2001.

Attempts to land more advertisers have so far failed. My ability to make this project grow to the point of being able to support my family and allow me to get behind it in some sort of full time status has not yet materialized. The dot com bust and reduction in advertising expenditures in general has forced me to figure that I'll still need several more years of slow controlled growth before I can get this project to a full time status and I am ok with that.

June 5th should be the beginning of my eighth year as an Internet Radio Broadcaster.

However, I may be snuffed out of existence if the current CARP recommendations are adopted by the Library of Congress to fulfill requirements of the Digital Millenium Act.

Last year I heard that we'd most likely be charged 40/100ths of a penny per song out of our encoders by the RIAA to satisfy copyright royalty fees. Although I don't feel that Internet Radio should be treated any differently than traditional radio (which has never paid such fees) I am resigned to understanding that the Digital Millenium act calls for such and we need to deal with

that reality at present.

So last year I tried to figure out what my share would be. Since I play about 400 songs a day, I figured that fees would run about $1.60 per day or $584 per year. I understood that whatever fees were set would be retroactive to 1998. Fees retroactive to 1998 based on that rate of 40/100ths of a penny per song out of my encoder would be a little over two thousand dollars and I worked on trying to save that amount from donations.

Since February of this year, when I became aware of the much higher rates proposed and learned that these rates were to be based on a technically immeasureable per listener basis as requested by the RIAA I have feared for my project and my family's future and have had to spend most of my time addressing the inequities I see in both the CARP process as well as the rate structure proposed.

I calculated an average of what I think my listeners are listening to and how much and now discover that if the CARP recommendations are accepted as is, with my present audience size I'd be paying more like 10 to 13 thousand dollars a year in royalty fees and four years of that amount payable within 45 days will surely force me out of business and possibly even take my house.

I've been forced to spend lots of what should be operational, creative and small business development time trying to fight for a future since February.

I would never have imagined that my Federal Government might set rates for royalties that would be so excessive and so out of wack when compared to fees I pay to the music publishers. The whole thing, the process, the CARP hearings, the closed nature of everything involved has not been fair as I see it.

No one ever solicited input from down here in the trenches. No one ever attempted to contact music licensees for input and now it appears that due to some intense lobbying by the RIAA and some slick manipulation of the CARP process, my future, my small business' and family's future and the future of the promotion of Hawaiian Music on the net is in great danger.

My Dream is vanishing and I've also discovered that there are potentially thousands of people like me and small businesses like mine that are in grave danger of being snuffed out by sheer greed as I see it.

The RIAA says we're bad business people bcause we did not set aside enough money for the coming of Royalties. Again, who could have imagined a rate more than ten times higher than what we pay for music licensing? What sort of business person could have seen this coming?

The RIAA says there is no promotional value to Internet Radio such as there is with traditional AM & FM radio. I counter that. I've gotten hundreds of emails over the years from lots of my listeners who discovered Hawaiian Music through my site and who tell me about the cds they buy and the shows they go see when our musicians tour the mainland and the world. I was

actually and quite delightfully forced to become an affiliate of a local online Hawaiian Music site to help better serve my listener's music purchasing needs. So many of them wrote to me asking for information on where to find Hawaiian music and I spent so much time trying to refer them to traditional music stores here and ending up with disappointed and unserviced listeners that finding a locally based online Hawaiian Music store or creating one became a priority at one point last year.

I've had local musicians tell me that six years ago they just thought I was a nut but for the past couple of years they have come to recognize the value in what I do and several have asked to come on as guests now to promote their new albums. It has become worth their time to visit Internet Radio.

I get promo cds from the local artists and companies and enthusiastic thank you's for supporting them. In fact since our local Hawaiian Music AM&FM outlets were purchased by Cox Radio less and less Hawaiian Music is being played locally and I am beginning to attract a local audience (one I never really aimed at).

My music library is huge by all radio standards. I have almost 6000 songs in my library of Hawaiian traditional and Contemporary Music. The music in my library spans recordings from the earliest Edison wax recordings of Hawaiian chanters to what came out last week. By comparison, I am told by friends still in the local radio industry, that the two major local Hawaiian FM stations have just 350 to 400 songs in each of their libraries.

Just play with those numbers a bit - 6000 songs vs 400 - many many local Hawaiian artists who get airplay from me, don't get any from local radio. Internet Radio Hawai`i has become a part of the local music mix and it continues to grow by itself and by word of mouth as I have no budget for promotion or advertising. It grows apparently due to the value to it's listeners from all over the globe including: the US mainland, Canada, Japan, Europe and even our service men and women who are involved overseas with Enduring Freedom.

I also hear that the CARP recommendations will include calling for all kinds of reporting on all kinds of information about the music I play beyond artist and title information which I could provide. Why? How?

I now find I am writing the Committee and Senator Leahy for help.

Please over turn the CARP recommendatiions and process. Please take a look at how we got here and perhaps open up the Digital Millenium Act again for another look.

Internet Radio is important. It promotes culture. It promotes different kinds of music than traditional AM & FM radio does. It offers a place and an outlet that is no longer available for many musicians and musical genres on our public AM & FM airwaves which are now controlled by huge companies like Clear Channel which have, in my opinion ruined the radio industry, and driven talented people like myself out of it.

Internet Radio offers choices and if allowed to exist after May 21st, might even be able to provide all the things that AM & FM used to back when that industry was in it's infancy and run locally and with the public's interest in mind first and foremost.

Please feel free to call upon me for any additional information you might want or need. I am trying to be brief and to the point and probably failing.

Thanks for your time and attention.

Regards and Aloha,

Robert "Rabbett" Abbett

Some Additional backround:

In 1989 after 19 lucky years as a professional radio personality, I began work in the local construction industry and in my spare time, I began fiddling with computers. In 1994 I began operating a dial in bulletin board system built around showing off Hawai`i to others from a locals' perspective. I promoted it on the pre- web internet and folks actually called long distance from places like Boston, Sydney and Italy to look at pictures and chat about Hawai`i in my chat rooms.

On January 6th, 1995 I put the bulletin board system up on the internet along with 24 web pages and some more pictures. Immediately I began getting visitors.

In May 1995 a local high tech company came to me with the first beta version of some voice streaming softwware from RealAudio and they asked me what I would do with it.
I replied, "Let's try playing Hawaiian Music!"

I put up a couple experimental 15 minute Hawaiian Music programs and asked if anyone was out there and if there was, please let me know.

Within days I got phone calls and emails from hundreds of folks all over the world raving about how cool it was to hear about how warm it was here and to be able to listen to the music.

Soon after, Real Audio called and asked me, What the hell do you think you're doing?" and "How did you get it to sound so good?" I was interviewed by radio publications, was a live phone guest of the Australian Broadcasting Company and provided some technical suggestions to folks like the CBS radio affiliate in Boston who called asking for advice. I was also drafted to become an alpha tester for RealAudio's next rewrite of their software, version 2.0 which was intended to be a bit kinder to music.

Internet Radio Hawai`i was born!

I was hooked.

THE DREAM began to unfold - I could have my own radio station. I could be the boss. I could help promote Hawai`i, her people, cultures, places, and the Aloha Spirit. I could bring expatriates home, tantalize new visitors, take up where Webley Edwards and "Hawai`i Calls" and Arthur Godfrey left off and maybe, just maybe I could make some money at it and even some day be able to quit the day job and do it full time.

The Internet appeared to be a way for small guys to have the same impact as the big guys. I could create something on the net that would be equal with the big guys on a new level playing field. I could become a broadcaster and do radio without having to license an am or fm signal. I could use a computer for a transmitter. I could use the internet as my antennae.

Internet Radio Hawai`i programs became longer as hardware evolved and disk space grew. I began producing bi monthly, then weekly programs. The shows ran 30 minutes, then 60 minutes and I began to include local news features and events calendars and interviews. Listeners began to send small donations to help offset my costs. By year two I ran into my first major problem, my early partners couldn't make any money at it and decided to let their end of the project (the server) lapse. I said goodbye to my audience and was prepared to end my project when I got a call from a visiting professor from the International University of Japan who was vacationing in Waikiki. One of his colleagues, who was a huge Hawaiian Music fan had gone out and solicited a grant from a major Japanese hi-tech and game company to build a RealAudio Server in Tokyo and build a network with some big bandwidth on which they wanted me to stream my programs.

I was flabbergasted and took them up on their offer. For the next six years I broadcast that way. Along the way I contacted ASCAP & BMI even before they knew what to do about online music. I wanted to make sure that what I was doing was legal and legitimate. I was one of the first to sign experimental licenses with both organizations. My station began to grow in listenership and complexity and the listeners began to help shape IRH into it's current listener sponsored status. Donations increased. A small business model began to take shape. I landed a small sponsor. The Hawai`i Visitors and Convention Bureau kicked in $400 a month and I have promoted their web, online calendar and free Vacation Planner magazines. I became their number two referral source behind their millions spent on tv advertising.

In 1999 I also tried to play catch up. Radio stations had already been streaming live for a few years on the net but I was sure I could do it also and with more donations of a couple more computers and some better bandwidth deals and more listener donations, I was up and running a low cost hybrid 24/7 service by December of that year.

I have since expanded to my third streaming provider and am now able to offer unlimited access to an average of 1400 listeners each day. Internet Radio Hawai`i has grown to the point that is costs far more than I as an individual could ever support and is reliant on listener donations for survival. We have created a relationship where I provide the music and they supply the support. I hope some day to attract advertisers and take some of the load off the listeners.

I look to the future eagerly and continue to try and do a good job for my community every day. I hope to have the chance to do a better job. I am sincere in what I am trying to do and the longevity of my little project should speak well to that end.

Thank you again for your time.

Statement of Robert Pullman

Let his letter serve as my official record and statement of facts that relate to the Senate Hearings on the Judiciary Committee dealing with the subject "Copyright Royalties: Where is the Right Spot On The Dial for Webcasting". I am Robert Pullman, President of Inetprogramming Incorporated, (POB 4183, Renton, WA, 98057-4183), and I have been responsible for the development and growth of the streaming operation of Inetprogramming.com (http://www.inetprogramming.com).

Let me first qualify my related work experience dealing with the subject matter. During the end of the 1960's and early 1970's I worked as a professional musician, a keyboard player for the band Revolution - I spent 8 years on the road while attending university and working positions in broadcasting (Global TV Network and CITY-TV in Toronto). I started with computers at the same time beginning in 1969. During an interview on television in 1973 I was asked what I wanted to eventually do, and I replied that I would like to work with computers and broadcasting. In addition to the above activity, I spent 1974 - 77 as President of TCB Productions operating and supporting 18 nightclubs in the metro Toronto, Ontario area including the booking of bands and entertainment. I met, and worked along side of, all the big names in the music industry, especially the R&B artists. In early 1978 I joined the staff of the Boston Globe as an assistant circulation manager, a position that led me to being a national sales manager for the broadcast side of Wang Laboratories. By 1980 I was meeting directly with Dr. An Wang and it was at that time that I proposed we put audio on the computer. He agreed and started the process which we now all take for granted. I moved on to Gschwind Machine Works as sales manager, and proceeded to obtain the initial contracts for parts manufacture, from Raytheon Corporation - those parts being the pre-Patriot Missile systems. I also worked closely with US Windpower, the firm that built the first windmill farms in California. I spent the remainder of the 80's working on technical documentation and publications for US military products, in Norfolk, Virginia, including systems on the Redstone Missile Project. My experience took me to work on the Nato EH101 helicopter project, a joint project between the military of Canada, England, and the Italian government, and Unisys in the United States. By 1990 I was in Northern Kentucky where my wife had decided to resume a university degree after 20 years. It was also at this time that I started working my own company in technical documentation, and publishing a weekly newspaper. In early 1994, I recognized the potential of the internet and started to learn html for webpages. By August 11th 1994, I had successfully launched the very first website in Northern Kentucky on the internet - and came to find out years later that it was one of the first 800 websites ever built. I was enthralled with the internet - full color publication, instantaneous delivery, worldwide delivery all for just $40 a month. So I became a computer guru and built Northern Kentucky Zine (http://nkyzine.com) which I still publish today - one of the oldest continuously published publications on the internet. In 1995, I started a second publication known as ZineV - the V was supposed to stand for video, and while we had some primitive material online, it was a concept way before its time, as the internet delivery speeds were too poor. I continued to lead in the development of the web, with the first webcam on the internet from the mid-west, the first multi-lingual publication on the web, the first public transit system including route maps on the web, and the first independent cancer research laboratory on the web

(Wood Hudson Cancer Research Laboratory in Newport, Kentucky). My wife graduated from Northern Kentucky University Cum Laude and went to work for Wood Hudson. She herself was diagnosed with cervical cancer in 1993, and has survived to tell about it - she continues to dedicate her life working on a vaccine to cure ovarian cancer, at the Pacific Northwest Research Institute in Seattle -which is how I've ended up in Seattle - I followed her this time (1997).

In the four years of being in the Seattle area I continued to keep all operations in Kentucky going, out of my own pocket - after ten years of developing my company and clients, I did not want to lose the base I had setup. I financed my operation from revenue generated from technical writing, and intranet web consulting for clients Boeing, Microsoft, The United Way, IBM Global and the Washington State Department of Health Social Services, and during the past year I provided documentation management and consultation with technical writing services of the Alaska Airlines General Maintenance Manual in order to meet the FAA, and the Independent Safety Assessment Team requirements, and I designed the Technical Publications Website in support of the General Procedures Manual - this is the first example of an ATOS compliant manual in the aircraft industry.

At the same time, I built up my computer hardware skills by purchasing used computers from Boeing Surplus - machines from $100 and up, so with an easy cheap inexhaustible supply of parts I started to build a computer network.

I expanded to Victoria, British Columbia with a server and webcam, (my parents are retired there), and I put servers online in Covingtn, Kentucky (my mother in law still lives there). I supplied some machines down to Portmore Jamaica to the sons of friends from my TCB Production days in Toronto - friends who I maintained contact with throughout the years. I built up small clients on websites, and did desktop publishing on the side.

I continued to learn about server software and networking, while continuing to run online publications, websites, and still maintain a regular 9-5 contract job. I still had the dream of doing video on the internet but the cost of software from Real Networks and Microsoft was too high - $500 for 50 listeners and another $500 for another 50 - not a workable solution under any conditions when compared with regular radio and television. So I kept looking for technology that might be workable - cheap yet allow expansion of listeners without being penalized. After all there had to be a chance of generating revenue - and all radio from day one has been to make revenue from advertising - the more listeners the higher the advertising rate. So it wasn't financially feasible to even attempt to do so.

December of 1999 was my first exposure to a new audio server software package called Shoutcast. It had a 30 day demo (price tag was $299) but it had promise - it could handle 1100 listeners so it had a good price for delivery ratio - the first time that any streaming software did.. Frankly audio quality on the available products from Real and Microsoft had been pretty poor (outside of the cost) and I didn't know if the product was going to be any different - it used a technology that was called mp3 streaming. I knew nothing about mp3 technology at the time - the closest knowledge I had was that my Directv dish used something called mpeg delivery. I first tested the technology to see if it could in fact transmit a quality output that listeners would stay

tuned to. The audio quality was comparable to AM radio. While the software could send improved quality down the pipeline to listeners the cost per person was absolutely horrendous compared to regular over the air broadcasters. In fact there was no possibility of doing so as all I had for connectivity to the internet was a 256K DSL - the fastest then available. Quality means bandwidth and on the internet that means money...lots of money....and eating bandwidth means only limited listeners can listen. There was no possibility that a webcaster could compete with the standard over the air or satellite broadcasters. There was and still is a massive myth that the internet has high speed...and that it is a threat. In actual fact until the world is wired with fiberoptic drops to each listeners abode the odds of making any serious impact in the industry is almost nil. (While so called experts talk about high speed bandwidth we are realistically looking at 5 to 10 years or longer before households are wired sufficiently to handle high quality transmissions.). I tested the technology by running a local AM Seattle radio station off air as a feed to monitor the audio quality and to learn the software. I called the folks at the station (KSRB a classic R&B AM station at the time) and asked for permission to do so (stream test), and they agreed - in fact they didn't even have a web page and were interested in possibly webcasting on a regular basis. After a few days of testing I started to get email for the station, which surprised us both - mail from Europe. Shoutcast had the ability to list the station on their directory thus giving exposure to an audience. I asked KSRB if they wanted to stay on the internet and they said yes; for me this was a natural extension of my website development for clients, and was the first opportunity since 1995 that a dream might be fulfilled. I specifically asked the station management, would we need to get additional music licenses from BMI and ASCAP, as I wasn't sure about some wording on regulations as explained on the Shoutcast website. They very clearly stated to me that streaming was simply the same programming and that they were fully covered under their current licenses for the radio station. So we continued to stream and test the software. Since the one feed was doing well, I decided to press ahead with a test stream of my own. I had a spare computer and this was a positive step from my original plan back in 1995. Also Shoutcast dropped the price of the software to zero - no cost. I tested various formats a few days at a time, and examined what it would take to stream on a regular basis. I had to examine the bandwidth issues, as well as the technology issues involved. Since the feed of KRSB was growing in listeners, I decided to go ahead and build a station. I went out and purchased two Sony Megachangers capable of handling 300 cds each - a thousand dollar investment. - direct music straight into the computer sound card - no recordings on any hard drives. I also increased by bandwidth to 512K which had just become available. I also took a Boeing surplus computer and put it on steroids - a Dell 133mhz computer with 40 meg of memory and a one gig hard drive (February 2000). I decided on a Kentucky Bluegrass music format. Since I still had a Kentucky publication it was a natural extension.

I then went through and contacted SESAC, BMI, and ASCAP - since there is no one source for music licensing (they can only license music that they have legal contracts to represent, was the way they worded it) and no standards between groups on procedures, it was very difficult to even figure out the forms. All I saw were groups that wanted my money but didn't have any firm specifics on the business of internet radio....all I saw were blanket licenses. All I saw was someone making a buck off of artists but no guarantees that the artists ever saw any return. All I saw was "we want our cut but we don't know anything about the web or webcasting....but we've got this piece of legislation that says we are entitled to a piece of the action (with none of the

liability)". So I got licenses from each of the three organizations. I picked the minimum fee plus percentage of profit option, as opposed to minimum fee plus number of hits option. I did not want to penalize my ability to expand listeners with ever increasing fees - the two concepts were at odds with each other (it was also a concept that isps wanted to charge you more for more usage - a fatal concept considering the whole point of the web was to get readers and more readers, and get them to return to your website.). I felt that the fees with a percentage of profit was a logical way to go - if I was successful then it was logical that the artists should benefit from that success. (minimum fees were $250, $265, and $100 per year from each agency - not cheap considering that the station was running on a $130 computer, and this was after all being built while I still worked a regular 9-5 job and it was all my own capital).

After all I had no idea whether internet radio was even going to work - I was the risk taker. Most radio stations only used BMI, and ASCAP, but I wanted to ensure that I was perfectly legal so I obtained SESAC as well - even though I new nothing about them, nor their artists. My intention was to work with independent artists and labels, because they failed to get exposure on regular radio, and I thought for a plan of action that would make good sense. My goal was to build a unique listener audience - I had no intention of attempting to duplicate regular radio. I just wanted to make sure everything was legal. Shoutcast had information about copyright office forms, one for the isp, and one for some statutory license application. Since the streaming was going to evolve separate from my documentation efforts I filed the isp form, and I filed an application for this so called statutory license. It was very unclear what this license was supposed to be for, nor were their any firm figures or numbers to deal with as nothing, according to the US Copyright office, had been finalized. The page also indicated that the RIAA was to be involved.

So I contacted the RIAA about web licensing since like the other organizations, they said they had a web license. Unlike BMI, SESAC, and ASCAP they did not have a standard procedure or form or contracts on their website - I thought this was an oversight on my part looking through their website. So I contacted them by phone. They stated that they didn't have any forms on their website. They replied that they could negotiate a license, and would we please send them some information on our operation so that they could work with us on getting a license. I sent them a rather lengthy reply with all the information they asked for and more. At the time I was still running the KSRB radio station feed on one stream, and the day after I sent the RIAA the info, the National Association of Broadcasters sued the RIAA. A few days later, I still had not heard a reply from them so I again sent them the information with a note stating that I was doing so to ensure that they received the mail in case it had gone astray. Another couple of days passed so I again called them on the phone indicating my desire to discuss the web licensing. They verified that they had received the information and it was sufficient for them to work with, and that was the last I heard from them. They never made any attempt to discuss a license nor make any move to issue one. As such I feel they forfeited their right to enter into any contracts on this issue.

The RIAA argument that appeared in the press at that time, was that they felt the webcast of an internet radio station was in effect a duplicate recording. This was and still is the most absurd idea ever proposed in any industry. A computer output is nothing more than a transmission box...just a transmitter at the end of the board. Any other attempted definition is ludicrous. Since the RIAA had never had a footstep in this area I saw and still see the whole attempt as nothing

more than pure greed - its this greed that gives the recording industry such a rotten name - a name that it has worn for the last eighty years.

On March 1st of 2000 I began streaming Bluegrass music. I had only a half dozen listeners while the KSRB feed had about 30 at a time. But as times change the bottom fell out of the Seattle based dot com industry and KSRB changed formats. So after several months of only a handful of listeners I decided to see if adding an additional format or two might increase listeners. Since there were no books on how to stream and build listening audiences on the internet, it was a matter of experimentation to find a formula that might work. I spun Inetprogramming.com off into its own legal corporation on August 1st of 2001 (Inetprogramming Incorporated), as it looked like streaming might have a future. By January of this year (2002) I had finally built up enough equipment to handle listener growth, and I had established music formats that people wanted. I also was playing 95% independent artists and labels - none of whom belonged to the RIAA, and each of the artists and labels I was playing had directly contacted me to play their music. I felt then that after 2 years of work and paying all the bills out of my own pocket, that it was finally time to see if revenue could be generated - after all I now had a listening audience of 100 at a time on the Bluegrass. As with any business the rule of thumb was it take 5 years to generate enough clients to pay the bills.

I had done no promotion, nor had I generated any revenue for the stations in the two years. I paid all the bills including the music licensing fees, even though I wasn't playing artists represented by the licensing agencies, each year from my own personal funds. I had sunk about $60,000 of my own money, sweat, and tears into the operation by this point - all this done on my own time, while still working the regular 9-5 job. Even though I was working 19 hours days 7 days a week, I thought I had built something for the future upon which I could reap some reward on - an investment for the future. I knew I was starting in the right direction when at the Poppy Mountatin Bluegrass Festival in Morehead Kentucky in September of 2001, I was introduced to Ralph Stanley who looked up at my T-shirt and stated : Inetprogramming - you play my music!". For me, a Canadian boy married for two and a half decades to a Kentucky native, the recognition from the number one Bluegrass musician on the planet made all my efforts seem worthwhile. In January of this year, the Poppy Mountain Bluegrass Festival themselves asked me to broadcast their festival over the internet this coming September, and I felt honored to be recognized by the Bluegrass music industry - that yes indeed my little station made a difference.

In February, with only a three week comment period, the proposals from CARP and the RIAA were made public. It was immediately obvious that the RIAA had only one goal in mind and that was to ensure there would be no webcasting on the internet. - the proposed fees for my operation alone would be in the hundreds of thousand of dollars range. I made $300 selling tshirts for promotion of the website in two years. I, like everyone else, expected any licensing fees to be in league with BMI, ASCAP, and SESAC in a worst case scenario. The fee of $200 per person per stream per year is the highest ratio of expenses ever in the communication business - its higher than the isp fees of broadband suppliers, its higher than satellite fees, cable television fees, and its higher than any pay service in existence to date.

I don't have the money to pay that type of fee structure. I don't have the funds to pay for years

gone buy. In fact I would never have gotten into webcasting if I had known how outrageous these fees would have been - I would have bought a regular on air radio station - it would be cheaper. In fact I wouldn't have played CDs at all if I had know there would be fees this outrageous - I would have had live performers if I could have afforded it.

There is no question in my mind that the RIAA has deliberately mislead the Members of Congress on the issues that were examined when the DMCA was passed, and that they continue an active conspiracy to distort the facts and the reality of current webcasting. The current proposals by the RIAA to the Federal government committee are so outlandish as to border on being criminal. Of the five major record labels that make up the controlling interest of the RIAA only one is American (Time Warner) - the rest are foreign owned. Simply put, we appear to have a trade organization that is campaigning under the guise of helping artists, when in fact it appears to be a foreign controlled lobbying organization. The RIAA wants the major labels to control all music on the Web and eliminate independent artists, labels, and the new webcasting industry.

I have spent two years with artists and labels, none of which have anything to do with the RIAA, and won't have anything to do with the RIAA. In fact Inetprogramming no longer has any material from any artist or label belonging to the RIAA. In fact we have been working with artists and labels on a one to one basis to obtain copyright play releases and we have not had one person contacted that has refused to work with us. I have a right to be independent of the RIAA, yet I see no effort to protect my rights of private contract, that are protected by the constitution.

I wrote a 52 page response to the CARP proposals that was submitted on March 9, 2002. Not only are the fees outrageous but the whole justification, and the mechanism for implementation is grossly flawed. The RIAA has neither the manpower nor the resources to even administer the proposals. My response is available on my website at url:
http://www.inetprogramming.com/response.doc in Word format, and
http://www.inetprogramming.com/response.pdf in pdf format; and its number 9 on the listings at:
http://www.loc.gov/copyright/carp/114/comments.html

I have worked with every legal requirement and licensing issues for Inetprogramming from the very first steps. I followed all the rules to build upon a dream I had back in 1973. I met every federal requirement, every state requirement, and every local requirement. I have paid all my bills and I owe nothing for operations or equipment costs. I have no loans of any kind, and no delinquent issues of any kind. I have built a very small operation and pushed the limits of technology to new levels, and I have made thousands of listeners happy. I have made hundreds of artists, and bands happy. I have made hundreds of independent record labels happy. I have agreements with hundreds of artists that think I do the right job for their purposes and they are happy. I have a military listenership around the world and in Asia, that are defending my rights, that amounts to 10% of all my listeners, and they are happy and tune into Inetprogramming everyday of the week. I have done everything that constitutes success in the American definition of life.

Here I sit, having been an artist on the road for years, having worked along side of entertainers for years, having proposed audio on the computer so we could have this technology, have worked

to ensure the defense of this country by working for years on parts and documentation to make soldiers safer (I have Dept. of Defense CAGE CODE 03ZH8), have helped government and companies to make life better for all of us, and have saved 14,000 jobs of an airline threatened by safety accusations by getting a cure implemented, here I sit with everything that I've ever believed in and done, at stake, totally and completely threatened by a policy that was ill conceived and justifies the continuation of 80 years of abuse. Here I sit accused by an industry with 80 years of abuse, saying I'm ripping off millions of revenue from the pockets of artists. I warned about these proposals and the DMCA in an article published in the summer of 2000; an article that has been on the site of a Nashville Music Publisher continuously available all this time: http://trowbridgeplanetearth.com/T2/news/RPullmanRts.html .

I sincerely hope that my testimony above will help in rectifying a very wrong situation and ensure true justice. I see no future for webcasting on the web as long as the RIAA is part of the equation. I see only Inetprogramming Incorporated going bankrupt and disappointing listeners, bands, artists, and all the independent labels. And I see my American dream and everything I have believed in, going down the toilet. I wish I could be more optimistic.

Robert Pullman
President
Inetprogramming Incorporated
POB 4183,
Renton, Washington, 98057-4183 USA

Statement of Frank Coon

To whom it may concern:

My name is Frank Coon and I run an Internet radio station. One of my life's goals has been to operate my own radio station. I was raised in a family of limited financial means and I have had to struggle for everything that I have achieved. I attended broadcasting school in 1989 with the hopes of becoming a radio broadcaster. My true dream was to own and operate my own radio station. Financially I was not able to allocate enough money to start a radio station. I continued to work in non-radio related fields to support my family, my wife and two daughters who are now grown. The Internet age made new opportunities in radio broadcasting available. In 1998 I began building and Internet radio station. In 2000 I began operating my own Internet radio station know as Hounddogradio.com. This radio station allows me to opportunity to own and operate my own business. Also, I enable the recording studios and artist another avenue to have their music heard. Many of my listeners have sent emails and called in stating that they love the music that I play and are going to buy the CD. While like many new business my radio station initially lost money, but I have had a steady increase in listener traffic and will soon turn a profit. My station is a typical new business and only needs time to mature into a profitable self-sustaining business that serves the community. If CARP is implemented I will be forced to close down my business and will have to seek new employment. I will have lost 4 years of my life's efforts 2 years of preparation time and 2 years of full time operation. I have succeeded in building a new and successful business with Internet radio. Without Internet radio I would probably have never been given the chance to succeed in my profession because many cannot overlook the fact that I am blind.

Thank you,
Frank Coon
Owner and Operator of Hounddogradio.com

Statement of Mike Kramer

Greetings.

As an effected Webcaster, I would like to take a moment of your time to discuss the recent CARP rulings.

First allow me to introduce myself. My name is Mike Kramer, I am from Des Moines, IA, and I am the Owner, CEO, and driving force behind the Internet Broadcasting Station "Jolt Radio", which you may find at http://www.joltradio.net

I began this business venture in September of 1999 because I have a love of music, a love of the 1st Amendment, and of course, the gift of gab that drives any person into broadcasting.

Over the last 2 1/2 years I personally have invested countless hours, countless dollars, and endless love in establishing my station, and providing quality content to a world wide base of listeners who share my love of music. I have struggled to maintain my station within the guidelines of the RIAA's agreement with Audiorealm LLC, and am now faced with new rules that I will have to comply with as well that will take more time, and more money from me in order to be in compliance.

The RIAA paints webcasters in the light of being ammature clowns who are all out there using Napster to steal from the artists every single day. At Jolt Radio, as well as the majority of Internet based broadcast stations, nothing could be further from the truth. If you were to visit my studio, which is located in my living room, you would find not only the thousands of dollars worth of computer equipment that is necessary to run the station, you would also find thousands of CDs, Cassette tapes, LPs, and even a few 8-track tapes that are the sum total of my station's playlist. All of these "albums" were purchased with money from my household budget, taxes were paid on these albums at the time of purchase, and the artist was paid his share of his or her contract with their record label.

One thing you will NOT find, is Napster, or any other file sharing program.

At Jolt Radio, I strongly discourage my listeners from using Napster and other file sharing programs because I personally want to see the artists get paid for their work. I understand fully that if they do not get paid, they won't produce the music that I love anymore, and I preach this concept to my listeners constantly. In fact, I even go so far as to provide my listeners with links where they may purchase the music I play. Napster did us a great disservice. Anything involving music and the internet is now viewed in the eyes of the layman in the same light as Napster, when on the majority, we are simply people with a dream who are trying to legally carve our own niche in an industry who views us as evil stepchildren.

The RIAA and the music industry claim that we are not a valid promotional medium. I fail to see how this is correct. My listener base spans the globe. I have listeners not only in the US, but in

the UK, in Australia, in New Zealand, China, and there are even US Servicemen and women who are tuning in from overseas to get a dose of music from back home. My point with this is that for an invalid promotional medium, I am doing a bang-up job of exposing the artists to areas of the world where they have never even been heard of, and my listeners, both in the US and abroad, use the links provided on my site to purchase CDs.

I knew going into this, with a short background in radio broadcasting, that I would have to pay performance royalties, and I did not have a problem with this concept from the start. I assumed that the fee structure would be somewhat equal to that of terrestrial broadcasting. However, the recent CARP ruling has stacked the deck in such a manner that I will have wasted my time and money attempting to start a broadcasting based business as the royalty payments they expect are simply impossible for an independent entrepreneur. In fact, what is currently proposed is approximately twice that of what terrestrial radio stations are asked to pay per unit played.

On top of that, CARP is asking us to provide excessive information with each song played simply because we are capable. Terrestrial radio's fee structure is based upon the extrapolated data pooled by Arbitron (The industry's station ratings service). They estimate how many people are listening per time slot, and pay the royalty fee based upon that estimate. The radio station does not have to provide the exact home address of each and every person who heard each song, it does not have to provide the exact amount of time that each listener was tuned in, and they do not have to prove ownership of each and every song they play.

The RIAA and CARP ruling, however, mandate that each webcaster provide the "unique identifier" (called an IP or Internet Protocol address) of each and every listener. This is a huge security loophole in and of itself. Those IP addresses are simply the exact address of each computer listening to the stream. Those addresses will then be compiled into a database of some form. Databases are easily hackable...Exposing our listeners to the whims of virus writers and of course, hackers of the like that might steal identities, commit fraud in the listener's name, etc... Most Internet Broadcast listeners are savvy enough to know that the scenario I just outlined is not only possible, but happens every single day, and will choose to not listen anymore when faced with the potential dangers of the mandatory data gathering...Effectively crippling us.

The RIAA and CARP also mandate that we be able to prove ownership of every song we play. This means that for every song I play, I must have a hard copy of the music in my studio. This is not exactly a problem for me, however, unlike terrestrial radio stations who are given CDs by the record labels, I have to go out and purchase every single song I play out of my own pocket. In effect, I pay to possess the disk, then I pay to use it. I do not mind doing one or the other. However, doing both, and especially at the rate of double what terrestrial broadcasters strikes me as not only a "double jeapordy" situation, but a deliberate attempt to strike down fledgling competition before it can even have a fair opportunity to establish itself.

On the website of nearly every webcaster out there, you will find pages listing the songs in their playlist, the artist's name, and the album the song is recorded on. Many sites also provide the listener with links to the artists' internet homepages, as well as links to purchase the music through mediums such as CD Now, Amazon.com, Buy.com, and many other internet sales

outlets. This is tantamount to the webcaster paying not only to own and play the music, but paying out of his or her own pocket to advertise and sell it for the record labels. Not one terrestrial broadcaster that I have seen with a website provides this service, paid or otherwise. In what way can this possibly be construed as webcasters stealing from the artists?

If the playing field were level, and we were being asked to comply with the same rules that terrestrial broadcasters use the CARP ruling would not be so bad. However, in it's current form, it appears that the RIAA and CARP goal is simply to take the independent Internet Broadcaster out of the game all together with red tape, ridiculous data gathering stipulations, and exhorbitant fee structures.

When I heard that the CARP panel was being formed, I became interested and genuinely wanted to participate. I wanted to be able to state my opinions, stand my ground, and help form the rules that we as webcasters will abide by. However, the entry fee to participate was really nothing more than a barrier set up to allow the RIAA, representatives of the music industry, and representatives of huge conglomerate terrestrial broadcast systems to gather and set up rules to effectively kill any competition from the independent broadcaster. Most of us, myself included, pour our own money into our stations, and in my case, the participation fee equaled approximately 2/3 of my yearly income.

I, and I am sure many other webcasters, would genuinely love to participate in future hearings and meetings on royalty payments, however, if the fees to participate are allowed to remain so high, The Library of Congress will never hear the true voice of the people who's lives and businesses their rulings will effect. For whatever reason, each and every one of us has turned to the last true venue of free speech on the planet, and congloermate radio as well as the music industry have gone out of their way to shut us down...Effectively chipping away at yet another freedom.

I beg of you, when you attend the Senate Judiciary Committee Hearing on Wednesday, May 15th, please consider the position of the independent who is about to be legislated out of existence because our voices were effectively muted. Please help us to get our voices heard both now, and in the future.

Thank you for your time.

Mike Kramer
CEO Jolt Radio
www.joltradio.net

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

OPENING STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON:
"COPYRIGHT ROYALTIES: WHERE IS THE RIGHT SPOT ON THE DIAL FOR WEBCASTING?"
MAY 15, 2002

The Internet is an American invention that has become the emblem of the Information Age and an engine for bringing American content into homes and businesses around the globe. I have long been an enthusiast and champion of the Internet and of the creative spirits who are the source of the music, films, books, news, and entertainment content that enrich our lives, energize our economy and influence our culture. As a citizen, I am impressed by the innovation of new online entrepreneurs, and as a Senator, I want to do everything possible to promote the full realization of the Internet's potential. A flourishing Internet with clear, fair and enforceable rules governing how content may be used will benefit all of us, including the entrepreneurs who want us to become new customers and the artists who create the content we value.

The advent of webcasting – streaming music online rather than broadcasting it over the air as traditional radio stations do – has marked one of the more exciting and quickly growing of the new industries that have sprung up on the Web. Many of the new webcasters, unconstrained by the technological limitations of traditional radio transmission, can and do serve listeners across the country and around the world. They provide music in specialized niches not available over the air. They feature new and fringe artists who do not enjoy the few spots in the Top 40. And they can bring music of all types to listeners who, for whatever reason, are not being catered to by traditional broadcasters.

We have been mindful on this Committee that as the Internet is a boon to consumers, we must not neglect the artists who create and the businesses which produce the digital works that make the online world so fascinating and worth visiting. With each legislative effort to provide clear, fair and enforceable intellectual property rules for the Internet, a fundamental principle to which we have adhered is that artists and producers of digital works merit compensation for the value derived from the use of their work.

In 1995, we enacted the Digital Performance Right in Sound Recordings Act, which created an intellectual property right in digital sound recordings, giving copyright owners the right to receive royalties when their copyrighted sound recordings were digitally transmitted by others. Therefore when their copyrighted sound recordings are digitally transmitted, royalties are due. In the 1998 Digital Millennium Copyright Act we made clear that this law applied to webcasters and that they would have to pay these royalties. At the same time, we created a compulsory license so that webcasters could be sure of the use of these digital works. We directed that the appropriate royalty rate could be negotiated by the parties or determined by a Copyright Arbitration Royalty Panel – or CARP – at the Library of Congress. Little did we know then how apt an acronymn that would later become.

Most webcasters apparently chose to await the outcome of the arbitration panel proceeding, and now that

the finding has been reached – and is being reviewed by the Librarian of Congress – the industry is in an uproar. Nobody seems happy with the outcome of the arbitration and all the parties have appealed. The recording industry and artist representatives feel that the royalty rate – which is based on the number of performances and listeners, rather than on a percentage-of-revenue model – is too low to adequately compensate the creative efforts of the artists and the financial investments of the labels. Many of the webcasters have declared that this per-performance approach, and the rate attached to it, will bankrupt the small operations and drain the large ones. Such an outcome would be highly unfortunate not only for them but also for the artists, the labels and the consumers, who all would lose important **legitimate** channels to connect music and music lovers online.

Moreover, independent of the substantive outcome, I have heard complaints from all sides about the fairness and completeness of processes and procedures employed in the arbitration. Indeed, the concerns of many small webcasters were never heard, since the cost of participating in the proceedings was prohibitively expensive and their ability to participate for free was barred by procedural rules.

The Librarian of Congress can do three things. He could approve the decision, which nobody seems to like. He could order a new proceeding, which would require considerably more time and expense for the participants. Or he could reject the decision and set the rate himself, without any further input from the parties. Then, any aggrieved party could appeal the Librarian's decision to federal court, with yet another round of costly, time-consuming litigation. With respect for the Librarian, and with much sympathy for his task, I venture to guess that none of the interested parties to the arbitration are enjoying the suspense of what he will do and would prefer certainty so they can plan for the future. I also venture to guess that some if not all will find complaint with whatever he decides to do.

All of which brings me to the question I want each of our witnesses today to consider: Why can't everyone – Congress and artists and labels and webcasters alike – take the CARP as a genuine learning experience, and sit down to determine what is the next best step? If the parties can avoid more expense and time and reach a negotiated outcome more satisfactory to all participants, that would surely be preferable to rampant dissatisfaction.

There are lessons for Congress here as well, especially lessons about how compulsory licenses are no panacea, and how we might reconsider the arbitration procedures and the guidance given to rate-setters in the DMCA. Congress also should take time to evaluate how best to reach results that are as fair as possible to all concerned, and results that encourage the best use of everyone's resources in helping the Internet reach its full potential in the music realm.

I know that this panel of witnesses will be a productive and timely source of information for all of us as we move towards these goals, and I look forward to the testimony this morning.

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Statement from Don Mangiarelli

Senator Patrick Leahy:

My name is Don Mangiarelli and I am a webcaster. There are several problems with the upcoming CARP ruling. One I think is most important is that the webcasting community is misunderstood by the general public. Webcasting is simply another form of terra radio. We are providing a public performance of music for the listening pleasure of our audience. The DMCA was passed to prevent "Napster Like" sites from distributing perfect digital copies of recordings. That is a good thing as we webcasters as a community believe that artists should be paid for their work. We do not distribute perfect copies of any recordings. If one were to record a broadcast they would get a less than perfect quality recording and it would thus sound as if it was a recording of a broadcast, i.e. an FM radio broadcast recording.

Next on the agenda is the idea of charging webcasters twice as much in fees as the terra stations. For the most part we (Webcasters) buy our cd's while our commercial counterparts get theirs for free. This means that the RIAA would be getting paid twice for these recordings. Most of my fellow webcasters are footing the bill for their stations out of pocket and the notion that if we can afford bandwidth, we can afford the fees they wish to levy is totally false. I broadcast over my cable modem and I am considering sending a stream to Live 365. This in total will cost me roughly $54 per month for a grand total of $648 per year. Also, keep in mind that we do not receive revenues from advertising or the revenue we do receive is minimal. A great testimonial to that would be to visit www.wolffm.com (one of the most popular stations) and notice the link for donations on the front page. When was the last time you saw an FM radio station do that?

I would be glad to donate to an escrow fund that will pay artists on a percentage basis equal to the percentage their songs were heard over any given stream. I don't think any webcaster is against paying the artist but more against a system that would unfairly burden us and put us out of business. We would be happy to work with you to come to a happy medium and make sure that artisits receive payment for their works, we just want a fair and equitable system.

Thank you,
Don "maddog" Mangiarelli
Maddog Rock Radio
www.maddogradio.net

Statement of Robert Winklemann

Dear Ms. Howell,

I am writing to you and Senator Leahy concerning the upcoming decision on the CARP recommendatios for royalty payments for independent internet broadcasters.

I currently operate a small independent broadcasting community called Megarock-Radio.Com. We have been in operation for three years and have been licensed and paying royalty payments via ASCAP, BMI and SESAC since the licenses were available. Only in this past year has the site or any of the broadcasts begun to generate income.

This is what has alarmed me. In review of the current royalty payment recommendations it would be completely impossible to continue this operation as the fees would exceed my income for the site by close to seven hundred percent. The operation at this point is just paying for itself and had only begun to grow.

The operation, even though in it's infancy, is already one that contributes to the economy of this country in the payments for services to our ISP, telephone company, website hosts and broadcast stream providers. All income to the site is also taxed under my personal Income Tax.

The Recording Industry Association of America has had it's target on internet broadcasters since the beginnings. It is beyond me why this is such a concern of theirs at a time when entire CD's are traded like candy on the internet. Internet radio is a secure digital format that cannot be download or recorded and, outside of the transmission technology used, is no different than broadcast radio stations, which have never paid similar fees.

I also believe that the majority of the internet broadcasting community was denied it's right of due process in this matter by being denied it's voice and input into these matters. I attempted to submit comments, only to have them sent back and ignored unless I paid 300,000 dollars.

Sure wish I had that kind of money.

I am not in this for money, a primary reason why I have not gone after more income for the site or broadcasts. Broadcast radio has always been free to listen to, and has never had fees such as the ones being imposed upon us. I have operated these stations simply for the love of music and also due to the fact of over commercialized broadcast radio.

I am not opposed to fees paid to the writers, composers or artists who's works are in question in these works. We have paid these fees each time they have come due and enjoy doing so as it supports the artists we play. I am highly opposed, however, to the RIAA's participation in the collection of any fees for copyrights - these should be done by an organization with no ties to the major record labels. I also believe the RIAA has pushed for the highest

royalty rates possible, which will do nothing but harm the technology sector and shut down most internet broadcasters - all taxpayers.

The promotional value of what we do is alone worth it's weight in gold. Our site actively participates in affilkiate programs selling CD's videos and other merchandies for bands. We promote their new music as well as do constant news and articles on our site promoting anything music. We always urge our listeners to support those artists and buy their products.

There is little else to say to describe what I do and what harm can be done by this possible legislation. It will kill my site and stations. It will kill most the others. The resulting backlash on the technology sector could be devistating with a possible 50,000 - 100,000 people who pay for internet connection, websites and streaming fees all have to cut their services at once. I alone spend over 300 a month to support what I do, and many others exceed that. Multiply that by 50,000 and you've got a large piece of income that will dry up.

I believe the only royalty plan that will work is a percentage of revenue royalty payment as this
will provide the opportunity to allow the internet technologyes to grow, while still providing a reasonable
rate for payments to the artists.

Thank you for your time, patience and understanding.

Robert Winkelmann
Megarock-Radio.Com
http://www.megarock-radio.com
St. Louis, MO, USA
1)The RIAA refused to negotiate.
If they gave you the one set of terms, didn't call you back, wouldn't negotiate or in any way acted in a manner that was unreasonable to striking a deal, write it up in your own words and send it along.
2)The Small Business angle. They love stories about personal entrepreneurs. Tell them who you are. They love the individual's face on Internet broadcasting because we've been painted as a bunch of clowns by the RIAA. What have you done to start this business, and why have you lost so much money and stayed at it? (Because we love music and want to be Clear Channel's size one day ;)
3)We're accused of being bad business people. We knew that the royalty rate was coming why didn't we set aside money for it? The answer is that most of us did but in line with what ASCAP and BMI fees are, not this ridiculously high fee. We figured the fee would be similar to comparative compulsory licenses. If you can show a comparison of your BMI/ ASCAP fees and your projected CARP fees that would be that would be explosive.

4)The barrier to participate in the CARP procedure. The entry fee to take part was out of the reach of any small business alone.
5)RIAA says that there is no promotional value to Internet radio, that it doesn't sell records. If you've sold recordings off your site, show the Senate the numbers that would kick the legs out of the RIAA argument. You may want to imply that had we been allowed to participate in CARP, we would have countered that argument then.
6)Let them know that we want to participate in any forthcoming CARP and there has to be a lower barrier or no barrier for our voices to be heard.

Statement of

Dan Navarro

**Major Label and Independent Label Featured Performer,
Non-Featured Performer, Sound Recording Copyright Owner and Songwriter**

**Member of the American Federation of Television and Radio Artists
and the American Federation of Musicians of the United States and Canada**

**Before the
Senate Judiciary Committee**

Copyright Royalties: Where is the Right Spot On The Dial For Webcasting?

May 15, 2002

Introduction

My name is Dan Navarro. I am a recording artist and a member of the American Federation of Television and Radio Artists (AFTRA) and the American Federation of Musicians of the United States and Canada (AFM), the two labor unions that represent both featured and non-featured recording artists. On behalf of the over 80,000 performers and newspersons in AFTRA and the over 100,000 musicians in the AFM, I appreciate the opportunity to submit this testimony in order to speak for recording artists and to explain the importance of the digital performance license income to us. The law mandates that 50% of digital performance royalties must be distributed to recording artists. This income is critical to our livelihoods – and to our ability to continue to create and record meaningful music.

I would like to acknowledge my fellow performers in the audience, who have all come to Washington to show how important this income is to working performers.

For more than a decade, my partner, Eric Lowen, and I have written, recorded and toured. We have released six albums. Two of them were originally released on major labels, and a third independent release was subsequently purchased and rereleased by a major label. One album was released on an independent label, and we have self-produced and released two albums on our own label. We have had a number of Adult Rock radio hits – you may have heard "Walking on a Wire", "All Is Quiet," "Constant As The Night," "Just to See You" or "Rapt in You." To supplement my income, I also perform as a non-featured artist on others' recordings. I sang background vocals on numerous albums, including releases by Susanna Hoffs, Clint Black, Julio Iglesias, Enrique Iglesias, Luis Miguel and Jose Feliciano, among others, and performed as a background musician on albums by Whiskeytown. I am a songwriter and member of Broadcast Music Inc. Our songs have been recorded by artists as diverse as Pat Benatar (we wrote the worldwide top 5 hit "We Belong"), The Bangles, Dionne Warwick, The Four Tops, Dave Edmunds, The Temptations and a host of others. I am also a member of the Board of Governors of the Los Angeles Chapter of the National Academy of Recording Arts and Sciences.

I belong to both AFTRA and the AFM. AFTRA is a national labor organization that represents over 80,000 performers and newspersons in the news, entertainment, advertising and sound recording industries. Our membership includes television and radio performers and approximately 11,000 singers, , rappers, narrators and other vocalists on sound recordings. These artists include "star" singers who have royalty contracts with record labels and session singers who are not signed to royalty contracts. AFTRA negotiates the AFTRA National Code of Fair Practice for Sound Recordings (the "Sound Recordings Code") with the record labels. The Sound Recordings Code sets the minimum terms and conditions for all vocalists, both royalty and non-featured. We begin negotiations for this Code tomorrow, and I am the chair of AFTRA's negotiating committee, some of whom have come to Washington for this hearing. The Sound recordings

Code has been signed by approximately 1200 record labels, including all of the major labels.

The AFM is an international labor organization composed of 260 affiliated locals throughout the United States and Canada. The AFM and its locals represent approximately 110,000 professional musicians. AFM members make their living by recording music for record albums, films, television, radio and commercial announcements, as well as by performing live music in concert halls, lounges, theaters, orchestra halls and every kind of large and small venue. The AFM negotiates the Sound Recordings Labor Agreement, an industry-wide contract that sets terms and conditions for musicians in the recording industry. It also negotiates industry wide agreements that set terms and conditions for recorded music in the motion picture, television, radio and advertising industries.

Both unions' members include many preeminent recording artists who earn significant incomes from record deals and who are star attractions wherever they go. They also include performers who never gain fame but who are talented and dedicated professionals who earn their livings as "background" or "session" recording players and singers.

In addition to collective bargaining, AFTRA and the AFM also actively participate in all facets of public policy development that affect our memberships. Both unions frequently pursue national and international legislation and treaties that protect artists' rights, as well as joining issues in litigation and Copyright Office proceedings that are critical to our memberships' interests.

The Work of a Performer

The recording process is involved and rigorous, and I will try to explain the process in the hopes that it will help you understand the recording artists' work.

First, Eric and I have to decide the kind of record we want to make and the sound we want. Then we must compose or select the material that reflects our artistic vision, sometimes following ideas down blind alleys, until we are satisfied we are saying what we mean to say.

Next, we create arrangements, select musicians, secure funding, select studios, set a working schedule, and rehearse. By the time we begin recording, we have already been working for months on the project. When we record and mix the album, it is a logistical and technological obstacle course that requires patience and stamina, not to mention openness and technical skill. It takes years of training and ongoing maintenance to become a facile, expressive singer and instrumentalist, much like an athlete must do.

Later, we supervise the mastering, create the cover – indeed, I have designed our last three album covers myself – and do all the clerical work necessary, such as union reports and budget management. It is an overall process that requires long hours, day after day, for months on end, all with the goal of conveying a unified and universal expression, from song to song, throughout the course of an album that is more than a mere collection of tunes. And when we're done, if we're lucky, we get to go back to square one and do it all over again.

However, we are not paid for each of the many jobs we perform on a record. If we had built a house instead of an album, and had worked as architect, contractor, carpenter, mason, plumber, electrician, landscaper and interior decorator, we would have been paid for each task. But the music business doesn't always allow for such varied compensation.

Although some recordings are made by time honored formulas with clear job descriptions, some are group efforts and some recordings require that the performer guide and influence every aspect of the recording. Performers are asking, in the interest of fairness, that, as artists intricately involved in the creation of valuable recordings, we be compensated accordingly.

One would expect that performers would be compensated handsomely for the level of talent and effort required. That perception, however, does not reflect the actual practice. It isn't widely known that artists are required to finance their own recording projects. When I was on a label, it did not pay me to make an album. Rather, it advanced the cost of the recording to me, and sometimes, but not always, included a modest artist advance. Later, those monies are recouped from my sales royalties. In most cases, the additional costs of marketing and publicity, videos, tour support and other promotions are recouped as well, all from my small share of the pie. It's nearly impossible to recoup a midsize music budget unless a record company sells millions of copies of an album. Therefore, most artists go into debt to make albums. In twelve years of making records, I have never recouped or received a royalty check, even though many of my records have gone into profit.

I discovered early on that there's little money to be made from recording albums, and I learned to place my musical aspirations alongside more practical realities in order to supplement my income. No matter what royalty arrangement I made with a record label or even when I produced my own recordings, I never made a livable income from my recording projects alone. So I wrote songs for other artists, toured extensively, sang as a background singer and instrumentalist for other artists, and marketed merchandise. How ironic that, after years of developing my skills and honing my creativity, I generate greater profits selling T-shirts.

Importance of A Performance Right

A peculiarity of U.S. copyright law has had the effect of depressing the income of recording artists. Unlike the rest of the world, the over-the-air broadcast radio industry in the U.S. has the right to broadcast sound recordings without paying any royalty to the musicians and singers whose recorded work the public wants to hear. As a result, broadcast companies built profitable industries by using our product for free. Since the 1960s, AFTRA and the AFM have fought for the creation of a performance right that would provide royalty payments to musicians and singers when their recordings were broadcast on the radio. All other types of copyrighted work in the U.S. enjoy a right of public performance, and there is no reason why sound recordings should be treated differently. But the powerful broadcast lobby defeated all efforts to create a performance right in sound recordings. We believe an over-the-air performance right for sound recordings should be created. Of course, as with the digital performance right, performers must receive 50% of the royalties generated by the over-the-air performance license.

The creation of a full-scale performance right would benefit the U.S. economy as well as artists. Intellectual property is America's leading export, and our music is the most demanded music in the world. Hundreds of millions of dollars are collected by foreign rights societies for the broadcast of American recordings overseas, but those societies refuse to pay the money they collect to American performers because there is no reciprocal performance right in the U.S. It is time to correct this grave injustice so that U.S. performers can reap the international benefits flowing from our creations.

The Digital Performance Right

Congress redressed a small part of the unfair position to which American performers had been relegated when it passed the Digital Performance Right In Sound Recordings Act. For the first time, Congress required that at least some public performances of recorded music require payment to the creators of that music for the right to perform our work. Congress created a compulsory license for some of these uses, and mandated that performers must receive 50% of the compulsory license income. Congress acknowledged the importance of <u>all</u> of the performers' contributions to sound recordings and required that featured performers receive 45% of the license income and that non-featured performers -- backing singers and instrumentalists -- receive 5%.

I cannot overestimate how important this new income stream will be to both royalty artists and session singers and players. For most of us, there is no one project, job or recording that provides an adequate living all by itself. The performance license fees will be an important component of our income. It is necessary in order to enable US performers to continue to create great albums

There has been a great deal of publicity lately about the plight of webcasters, who say that as new and small businesses they cannot afford to pay the digital performance royalty rate set by the CARP last February. Truly, fostering the growth of these new outlets for our music is of the utmost importance to performers. As the breadth and diversity of what is played on over-the-air radio shrinks, webcasting potentially offers a greater variety of music and a new way for us to reach an audience. The truth is, however, that we are also small businesses, and unless there are income streams that we can rely on to make a living, we will be unable to continue to create the sound recordings that the public wants to hear.

The Copyright Arbitration Royalty Panel (CARP)

In spite of our desperate need for the new digital performance royalties, artists are still waiting to be paid by webcasters. Although webcasters have been liable for compulsory license payments since 1998, they have paid nothing while they awaited the outcome of the Copyright Arbitration Royalty Panel, or CARP, preceding that Congress designed to set the license rate. The CARP held over forty days of hearings, heard from approximately 80 witnesses, reviewed thousands of pages of exhibits and evidence, including evidence about the webcasters' businesses, and heard legal arguments on all facets of the license question. The AFM and AFTRA participated in this litigation and offered evidence about the need of artists for this new income and about the creativity, artistry and hard work that artists contribute to make sound recordings valuable. The webcasters also participated. They were ably represented by counsel and offered substantial evidence about their businesses.

No party to the CARP was completely satisfied with the recommendations that the arbitrators made to the Librarian of Congress last February. Both sides have appealed the decision. But, Congress must allow the statutory CARP procedures to conclude and the final determination to stand, or it will undermine the integrity of the system it established. Congress recognized that a CARP participant might not agree with the decision and, therefore, provided appeal procedures of the final determination to Court.

Another important and often overlooked point is that the CARP established payment terms as well as rates. The CARP adopted a payment term requiring the artists' share of royalties to be paid to them directly. Fighting for direct payment to artists has been a top AFTRA and AFM priority. We are thrilled that the CARP has adopted terms that will assure that artists receive their royalty shares in the quickest, most efficient and most accurate manner.

The CARP also designated SoundExchange as the collective agent for unaffiliated copyright owners. The full CARP Report acknowledges that artists have a "direct and vital interest in who distributes royalties to them and how that

entity operates." In particular, it acknowledged AFTRA's and the AFM's expressed preference for SoundExchange due to the collective's non-profit status and experience with similar royalties, as well as the role of artists in SoundExchange governance.[1] Contrary to the unions' view, the webcasters and broadcasters had requested the CARP to designate Royalty Logic Inc., a for-profit collective in which artists have no control, as the collective for unaffiliated copyright owners. This term has been appealed.

Other Important Issues

We may be visiting you again soon to address other performer issues. Five issues stand out to me. First, artists must be able to control their internet domain name, and record labels should not be permitted to own an artist's domain name when that artist is no longer with the label. Most of Eric and my album sales are made at live performances or through our website, and we are lucky that our contract with a major label was pre-internet era, or the label would have insisted on owning our domain name. Second, the record companies should not be permitted to deduct things like "breakage" for digital transmission. This needs no explanation, as there is no product to break. Third, and perhaps most important to me, is that artists should have the right to reacquire and exploit recordings if the copyright owner is no longer exploiting the recording in the relevant territory. This is a proposal in AFTRA's negotiations, and if we are unable to achieve it there, I'm sure you'll see me again on Capitol Hill. For example, one of my records, entitled "Pendulum," which was released on a major label, is no longer manufactured or sold by the label. Eric and I would like to manufacture and sell this recording ourselves but are unable to do so. Fourth, the Internet promises to provide new opportunities for artists to reach an audience and to break the major labels stranglehold on distribution. Some argue that new legitimate services' licensing efforts are stymied by the major record labels in their effort to perpetuate their control and prevent competition. Without legitimate services to compete, piracy thrives. We believe that the Internet should be encouraged to fulfill its promise of providing competition and new business models. Congress must watch carefully, and if competition is being stymied, action should be taken.

Finally, we welcome Congressional and Department of Justice investigation into the vertical and horizontal integration in the radio, television and concert promotion industries, especially the conduct of Clear Channel Entertainment. This is a very important issue to artists and the public, and we urge Congress to enforce rigorously the anti-trust laws. Congress must also continue to urge investigation of and hold hearings about ways that radio group owners and record labels circumvent the current laws prohibiting payola.

[1] As many of you know, last November, the AFM, AFTRA, the major record labels, and artists' groups, including the Recording Artists Coalition, the Music Manager's Forum and the Recording Academy, announced a reorganization of SoundExchange that placed it under the equal control of artist and copyright owner representatives, and committed it to direct payment of artists as a condition of a copyright owner's membership in the collective.

Conclusion

Our work provides the backbone of these new industries, which pay for everything else such as bandwidth and electricity. The electric companies are not being asked to provide free or discounted electricity. Webcasters are not entitled to get, and are not asking for, free bandwidth. There is no more reason for them to get the benefit of our music for free. And let there be no mistake -- it is our music that they, and the public, want. The webcasters could get content for free by making their own recordings, but they do not, because what their listeners want is our music.

The process Congress established to set a fair rate is still in progress. Neither side is pleased with the rate, but Congress cannot interfere without undermining the integrity of the very process it created to set the rate.

In conclusion, I wish to remind that you this is not simply one business versus another. At the heart of this are the individuals whose talents create the sound recordings. Digital performance royalties will provide critically important income to famous and ordinary musicians and vocalists. Without us, there would be no music on any station on the dial or Internet. Please don't make us wait any longer for fair compensation for the use of our music on the Internet.

National Association of NAB BROADCASTERS

Edward O. Fritts
President & CEO
1771 N Street NW • Washington, DC 20036-2891

April 4, 2002

The Honorable F. James Sensenbrenner
Chairman
House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, DC 20515

The Honorable John Conyers
Ranking Member
House Committee on the Judiciary
2142 Rayburn House Office Building
Washington, DC 20515

The Honorable Howard Coble
Chairman
Subcommittee on Courts, the Internet and Intellectual Property
B-351A Rayburn House Office Building
Washington, DC 20515

The Honorable Howard Berman
Ranking Member
Subcommittee on Courts, the Internet and Intellectual Property
B-336 Rayburn House Office Building
Washington, DC 20515

The Honorable Chris Cannon
U.S. House of Representatives
118 Cannon House Office Building
Washington, DC 20515

The Honorable Rick Boucher
U.S. House of Representatives
2187 Rayburn House Office Building
Washington, DC 20515

Dear Representatives:

The National Association of Broadcasters ("NAB") commends the Committee for its most timely review of digital music issues and related proposals to amend the Copyright Act. NAB appreciates the opportunity to submit its views on those issues that have reached a critical juncture for radio broadcasters.

A number of very serious music licensing barriers have been raised that individually and collectively are precluding, or soon will effectively preclude, radio broadcasters from streaming their signals over the internet. These barriers, and the issues they present, arise only in the context of streaming digital audio transmissions over the internet. Licensing issues relating to the streaming of television signals and audiovisual works over the internet are totally separate and apart, and are distinguishable, from those relating to the streaming of radio station signals. The NAB is unalterably opposed to any compulsory licensing scheme that would permit third party retransmissions of television station signals over the internet.

Scope of The Committee's Inquiry

At the outset, NAB considers it critical to emphasize the stated parameters and limitations of the Committee's inquiry. Specifically, the Committee's March 12, 2002, letter states that it is "initiating a process to review relevant digital music issues and related proposals to amend the Copyright Act that have been brought or will be brought to our attention" (emphasis supplied). The letter further states that examination of these issues is increasingly important "in light of growing digital music piracy, expanding public demand for online music services and the willingness and ability of many entities to meet that demand" (emphasis supplied). The letter also refers to the Committee's oversight hearings "on digital music issues" and pending legislation addressing "online music issues" (emphasis supplied).

While NAB wholeheartedly agrees with the relevance and importance of consideration of these digital music licensing issues, equally crucial to NAB is what this proceeding is not intended to address, namely compulsory licensing of audiovisual works, motion pictures and television signals for retransmission over the internet. Therefore, although not within the scope of this inquiry, NAB feels compelled to provide for the record its position with respect to such compulsory licensing.

The defining principle that serves as the economic foundation for the system of free over the air television and the network affiliate relationship is that local television stations are able to secure and enforce the rights to be exclusive provider of their network's programming, and of syndicated programming they obtain, in their local markets. For over 30 years copyright and communications law and policy have recognized and supported the seminal principle by precluding, first cable, and then satellite from importing duplicative programs from distant stations into local television station markets. A compulsory licensing allowing retransmission of television signals over the internet would completely undermine and destroy the enforceability of this territorial program exclusivity as there is no means to limit territorially the retransmissions of signals over the internet. NAB has repeatedly told Congress that: "The very substantial harm that stations have experienced as a result of unlawful retransmissions by satellite companies would be incalculably worse if . . . Congress were (mistakenly) to create a new internet compulsory license that would override the rights of stations and other copyright owners . . . . It is not an exaggeration to say that unauthorized internet retransmissions of TV stations would cripple, if not destroy, our spectacularly successful system of free, local, over-the-air television."[1] That is why the Register of Copyrights has clearly stated that existing compulsory licenses for television do not authorize internet retransmission and recommends against their doing so.[2] NAB

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[1] *Testimony of Edward O. Fritts, President & CEO, National Association of Broadcasters, before the Subcommittee on Courts and Intellectual Property, U.S. House Committee on the Judiciary*, June 15, 2000, at 5, 7.; *Testimony of Paul Karpowicz, Vice President, LIN Television Corporation, On Behalf of the National Association of Broadcasters, Before the Subcommittee on Telecommunications, Trade and Consumer Protection, U.S. House Committee on Commerce*, February 16, 2000, at 6, 7.

[2] *Statement of the Register of Copyrights Before the Subcommittee on Courts and Intellectual Property Of The House Committee on the Judiciary*, June 15, 2001. ("Again, technological solutions may be developed to address these concerns, but until they are, and unless we can be confident of their reliability and security,

wholeheartedly agrees with the Register's interpretation of these existing licenses and her recommendation and would strongly resist any and all attempts to amend the copyright laws to facilitate internet retransmission of television signals.[3]

Digital Music Licensing Barriers Precluding The Streaming of Radio Station Signals

A number of very serious music licensing barriers have been created that individually and collectively are imposing severe limitations on the ability of radio broadcasters from simultaneously streaming their signals over the internet. Left unattended these barriers are expected soon to choke off entirely the ability of radio stations to engage in this activity. Chief among these issues is the controversy that has arisen concerning radio broadcasters' liability to the copyright owners of sound recordings resulting from the simultaneous streaming of radio station signals over the internet.

A. Congress' Clear Intent That Radio Stations Be Exempt From Sound Recording Liability For Streaming Has Been Overridden

The broadcast industry strongly believes, and has consistently maintained, that passage of the Digital Performance in Sound Recordings Act of 1995 ("DPRA") and the Digital Millennium Copyright Act in 1998 ("DMCA") were not intended to create new copyright liability, arising out of digital performances of sound recordings, for the streaming of over-the-air radio broadcast signals by broadcasters. Rather, Section 114(d)(1)(A) of the Copyright Act, which exempts from such liability "nonsubscription broadcast transmission[s]," both by definition and as bolstered by the relevant legislative history, was intended to encompass the Internet streaming of over-the-air radio broadcast programming.

The sound recording performance right is new to U.S. copyright law and was intended to afford the record industry protection against threatened encroachment on record sales from new businesses in the nature of "celestial jukeboxes," pay-per-play or other subscription businesses capable of supplying high quality, digital copies of sound recordings.

In contrast, it has long been Congress' intention to ensure that such extensions of copyright protection in favor of the record industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S.

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enactment of a compulsory license for local signals would place broadcast programming in jeopardy." **Id.** at 7.

[3] Cite to NAB House testimony.

Rep. No. 104-128, at 13 (1995) (hereinafter, "1995 Senate Report"). In particular, Congress has recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.

Unfortunately, rulings to date by the Copyright Office and a federal district court, spawned by an expansive interpretation of the new performance right by the record industry, have interpreted the exemption as not encompassing AM/FM broadcast streaming. The ironic effect of these interpretations is potentially to place broadcast streaming in the legislation's category of liability that in fact was reserved by Congress for those entities – distinctly not the broadcasters – that posed the most significant risks of record sales displacement. The notion that Congress intended this result for streaming broadcasters is far-fetched and underscores the need for legislative remedy.

B. Compliance With The Statutory Conditions Attached To The Section 112 and 114 Compulsory Licenses Would Require Radical Readjustments To Radio Broadcaster Practices And Procedures

Another reason radio broadcasters are convinced that Congress never intended their streaming of their signals to be subject to sound recording copyright liability is that compliance with the conditions placed on the compulsory license designed to facilitate the use of sound recordings would require radical adjustments to radio broadcaster practices and procedures. To qualify for the CARP-determined statutory rate, streaming broadcasters must abide by a series of statutory limitations which would force such broadcasters to institute fundamental changes in their over-the-air programming practices. The very ill-fit between these license conditions and daily broadcast programming practice is further evidence that Congress intended such streaming to be exempt.

To conform to these statutory conditions, familiar radio broadcasting practices desired by listeners and beneficial to the recording industry would need to be eliminated, including playing sets of multiple songs by the same performer or from the same album. Once again, the practical impact of having to live within such strictures will be to lead to the cessation of streaming by many broadcasters. If streaming of broadcast signals is not to be exempted from liability, at a minimum the statutory conditions as they apply to radio broadcasters need to be modified appropriately.

C. The Rate And Terms For Streaming Of Radio Stations As Determined By The CARP Are Arbitrary And Unreasonable

The prevailing interpretation that radio broadcast streaming is not exempt has required broadcasters to participate in a costly "CARP" proceeding, the purpose of which was the setting of compulsory license rates and terms for (1) digital performances of sound recordings and (2) multiple ephemeral copies of sound recordings made in aid of such performances. The arbitration panel convened by the Library of Congress recently

issued its ruling – one that calls for the payment by streaming broadcasters of license fees at a rate that is arbitrary and unreasonable. The rate inexplicably is more than three times higher than the already significant prevailing public performance rates paid by radio broadcasters to the musical works performing rights organizations, ASCAP, BMI and SESAC for the over-the-air public performances of the works in their repertories. If not meaningfully scaled back by the Librarian of Congress on the pending appeal, this rate will render streaming economically unviable for most broadcast groups.

D. The Record Keeping Requirements Proposed In Conjunction With The Sound Recording Compulsory Licenses Are Absurd, Burdensome, And Would Preclude The Ability To Stream

The record keeping requirements proposed in conjunction with the sound recording compulsory licenses, which mimic the proposals of the RIAA, are absurdly burdensome and redundant, and would preclude the ability to stream. To date, the record industry has resisted common-sense proposals which would enable the RIAA to calculate payments and distributions with reasonable accuracy without imposing hugely burdensome and totally unnecessary record keeping requirements on the broadcasters. It remains to be seen what the final requirements to be promulgated by the Copyright Office will entail. To the extent, however, that they do not provide significant relief from the draft requirements, prompt Congressional action will be warranted.

E. The Issue Of Ephemeral Reproductions Of Musical Works In Connection With Streaming Of Radio Station Signals Needs To Be Resolved

The issue of ephemeral reproductions of musical works in connection with streaming of radio station signals also needs to be resolved. Much as is the case with respect to such ephemeral reproductions of sound recordings, the technology of delivery of a streamed radio station signal potentially entails the making of multiple ephemeral reproductions of musical works. At present, however, section 112 of the Act exempts solely a single ephemeral protection in aid of such a public performance. That exemption should be expanded to exempt all ephemeral reproductions in aid of otherwise licensed public performances of musical works over the Internet.

Conclusion

The simple and elegant solution to most of the current dilemmas confronting radio broadcasters desiring to stream their signal is for Congress to clarify that it never intended for this activity to be subject to sound recording copyright liability. Absent such clarification, at a minimum, amendment of the current statutory conditions and limitations in Sections 112 and 114, and the attendant proposed record keeping requirements, are required. Otherwise, streaming of radio station signals will simply cease to be a part of the mix of digital music offerings on the internet.

It is entirely fitting and appropriate that the committee has limited the scope of its inquiry to digital music licensing issues. NAB urges that the inquiry remain within this framework and not stray into the thicket of compulsory licensing for audiovisual works, motion pictures and television signals.

NAB again applauds the Committee's efforts in undertaking this process. It is both timely and critically important. We look forward to working with the Committee and share its hope that "meaningful solutions" to these issues will result.

Sincerely,

Statement of Kevin H Amstutz and Dino V. Pileggi

My name is Kevin Amstutz and my company National Media Networks Inc (State of Ohio). owns and operates (2) Internet Radio Stations. Cyberspace Sonata and Guitar Rock Radio. I currently have a blanket RIAA license agreement through Audiorealm covering me on these rates that the RIAA is trying to impose. But, I am worried about the future of Internet Radio.

What really concerns me is the company has operated in the red since day one of operations. I have yet to ever receive any type of revenues from the internet webcasting stations. You are probably wondering why I have incorporated my company and even run netcasting stations, the answer is, I LOVE music! My opinion is, if these CARP recommendations are passed internet radio as we know it will be non-existent and will be operated by BIG business!!!! If I had the money I would definitely go out and by a terrestrial FM station. I do agree that Artists should get their share of the money, but it should be a fee that is negotiable like BMI or ASCAP! What I don't understand is why isn't terrestrial FM and AM stations paying these rates already? Because if they were, they would be out of business also!! Another problem the RIAA is trying to overcome is of course all the digital media that is available on the Internet and the ease of downloading music, thus the declining record sales. Internet Radio is just another type of promotion for these Artists, especially Independent Artists who have a hard enough time trying to get their music on the air as it is! But, with internet radio they have a NEW avenue to get exposed. The Internet is the future of technology, let's not burry Internet Radio in the past.

Thank you for your time.

Kevin H Amstutz, President
Dino V. Pileggi, Vice-President
National Media Networks Inc.

United States Senate
Committee on the Judiciary

Hearing on
"Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?"
May 15, 2002

TESTIMONY OF JONATHAN POTTER
DIGITAL MEDIA ASSOCIATION

Mr. Chairman, Senator Hatch, and Members of the Committee:

I am Jonathan Potter, Executive Director of the Digital Media Association ("DiMA"), which represents the interests of the online media industry. On behalf of nearly 40 DiMA member companies, including more than 20 companies that are webcasters or support webcasters, I sincerely thank you for inviting me to testify today concerning the future of the nascent Internet webcasting industry -- an industry imperiled by the February 20, 2002 sound recording royalty recommendation of a Copyright Arbitration Royalty Panel (hereinafter "CARP Report").

This hearing could not be more timely or important for the webcasting industry. In less than a week, the Librarian of Congress will decide whether the CARP Report will be affirmed or modified. It is no exaggeration, Mr. Chairman, to state that this decision holds in the balance the future of all of today's Internet webcasters and the nature of webcasting itself.

For webcasters large and small, large media companies or local entrepreneurs, the CARP-recommended royalty is astronomically high, and bears absolutely no rational relationship to traditional copyright licensing benchmarks – rates set in the marketplace or by ratemaking bodies for analogous rights, or the costs of the business that is using the specific rights at issue. In a factual vacuum the CARP-recommended royalty rates may seem tiny – $.0014 per song per listener for Internet only webcasters, $.0007 for broadcast radio retransmissions. But in context, the following examples illustrate that the recommended rates defy any reasonable assessment of webcasting or music economics:

- For the year 2001, Beethoven.com, a leading classical music webcaster based in Connecticut, would owe $48,720 in royalties, when its total revenue was only $33,500;
- Without accounting for any growth, Internet Radio, Inc., which operates ChoiceRadio.com and alldanzradio.com, anticipates 2002 sound recording royalties of $518,783, against gross revenue of about $100,000 and annual overhead of $240,000;

- For the six months ending March 31, 2002, Live365 of Foster City, California would owe $1,024,421 in sound recording royalties, against advertising revenues of $113,782 and gross revenues of $351,032.

And the fundamental unfairness goes well beyond independent webcasters:

- Radio Free Virgin, the Internet radio division of the Virgin Group (which includes the prominent Virgin Megastore record chain), had April 2002 revenue of $23,000, and combined license fees to ASCAP, BMI and SESAC of less than $1,000 -- but a CARP-proposed sound recording royalty rate of $67,000.

For webcasters of every size -- no matter the number of performances, or the size of the media company -- the CARP's webcasting royalty leads to an unsustainable economic result. Even for subsidiaries of large multimedia companies, the business model for webcasting must be capable of generating profits and standing on its own. The CARP's royalty rate ensures this will not be the case. The webcasters covered by the CARP Report are nonsubscription services that generate revenue streams primarily from advertising, to the extent that ad sales are achieved. Typical industry advertising rates simply cannot support the cost per listener, discussed below, that the CARP's recommended rate would require.

Let me put the CARP's proposed rates in further context. The CARP's recommended webcasting rate would require payments of between $12 and $15 per listener per month. (This results merely from multiplying: (i) the $.0014 per performance rate times (ii) 12-15 performances per hour, times (iii) 24 hours per day, times (iv) 30 days per month.)

Were these webcasting fees applied to today's broadcast radio industry -- which, of course, pays no performance royalties for performing sound recordings -- the broadcasters would be incurring in the aggregate, according to Arbitron, over $4 billion annually in sound recording royalty fees, correlating to more than 25 percent of their broadcast industry revenues. Compare this figure to the approximately $350-400 million the broadcasters pay for performances of the musical works embedded in the identical sound recordings under the combined 3-3.5 percent of revenue fees paid by them to ASCAP, BMI and SESAC.

Looking at the same facts from another direction, assume today's modest Internet webcasting listenership grows to equal the broadcast radio audience. At the CARP's recommended royalty rate, Internet webcasters would incur, as noted, over $4 billion in sound recording performance fees (per Arbitron). At in excess of $4 billion, the webcasters' total performance fees (for sound recordings and musical works) would stand in stark contrast to the $350-400 million in royalties paid by the broadcasters, against whom the Internet webcasters must compete.

Neither economics nor the law justify saddling Internet media companies with this impossible burden. This result cannot be what Congress had in mind when it created the statutory license. This result cannot be permitted to stand.

For thousands of independent webcasters, community broadcaster webcasters, and college webcasters, the reality is very simple: the CARP recommendation means the end of streaming. This is not a problem for only the small start-up, college or hobbyist webcaster, Mr. Chairman. Whether you are Yahoo! or Onion River Radio, whether you are a powerful network affiliate in New York City or WNCS in Montpelier, the CARP proposal is a rate that cannot be justified financially. Companies from the largest broadcasters to the smallest start-ups are likely to cease or significantly diminish webcasting if the CARP recommendation takes effect. Innovative entrepreneurial local tastemakers who were utilizing the new media to introduce new music and support local artists will cease to exist.

Mr. Chairman, no one – neither the creators nor the webcasters – benefits from artificially inflated rates that only a few webcasters can afford. Fewer webcasters means less diversity of music on the Internet, less airplay for up-and-coming artists or niche musical genres, and less royalty money for creators. A recent survey of customers of a major Internet music retailer highlighted the economic benefits of webcasting for recording artists, finding that more than two-thirds of respondents said that their music purchases over the last six months have been influenced by listening to Internet radio. Indeed, the importance of Internet radio for consumers and artists has been highlighted in newspapers and op-ed pages since the February 20 decision. Attached to my testimony are editorials from major newspapers and a small sampling of articles from dozens of newspapers and online media, from all across the country, recognizing that the inordinately high CARP-recommended royalty rates will stifle the promise of the webcasting medium and harm the interests of consumers and the vast majority of performing artists who receive little or no airplay on mainstream radio.

Let me be clear that DiMA and its member companies seek no subsidy here. We support fair compensation to copyright owners and direct payment to recording artists. If the royalty rates recommended by the CARP were similar to those paid by webcasters and broadcasters to songwriters and music publishers through the ASCAP, BMI and SESAC collectives, there would have been no outcry and this hearing would not be necessary. Indeed, had the recording industry agreed with DiMA during the voluntary negotiations that preceded the CARP to accept compensation equivalent to that paid to these songwriters, there would never have been a CARP at all. Unfortunately, there was no agreement among the industries; the CARP was necessary, extraordinarily expensive and frustrating; and the result – a royalty for record companies seven times higher than is paid to songwriters on a per-performance basis (and multiples more than that on a percent-of–revenue basis) – defies economic logic and legal precedent.

The question for this Committee is: how did this result occur? If this Committee and the Congress intended the webcast sound recording statutory license to promote both

the welfare of artists and the development of Internet media entrepreneurs, where did the process go awry, and what can be done now to reinvigorate both of Congress' goals?

Congress Intended that the CARP Should be a Safeguard Against Anticompetitive Conduct.

In the Digital Performance Right in Sound Recordings of 1995 ("DPRSRA"), when Congress enacted the first limited sound recording performance right in digital transmissions, Congress expressed its desire to protect copyright owners and artists, and to promote the development of new technologies. *See, e.g.*, S. Rep. No. 104-128, 104th Cong. 1st Sess. at 15; 141 Congressional Record S.11945, 11961 (August 8, 1995) (remarks of Sen. Leahy).

When considering the DPRSRA, this Committee expressed justifiable concern that an unlimited exclusive performance right might unintentionally facilitate anticompetitive activity, such as the setting of monopoly prices for licensing music. After consulting with the Antitrust Division of the Department of Justice, this Committee, under the leadership of Senators Leahy, Hatch and Thurmond, incorporated into the DPRSRA several provisions that sought carefully to balance the need for efficient administration of licensing rights (which benefits licensors and licensees) against the need to protect against the formation of a recording industry licensing cartel that would have unlimited immunity from antitrust scrutiny. *See* Congressional Record S.11945, 11961-11963 (August 8, 1995) (remarks of Sen. Leahy).

The fabric of the DPRSRA wove together several essential threads of protection against potential anticompetitive licensing behavior. First, a statutory license so that eligible entities could not be denied blanket licenses to play music over new digital services. Second, a "most favored nations" provision ensuring that record companies offer the same terms and conditions to entities that are similarly situated to the labels' affiliates. Third, an antitrust exemption so that licensees could go to a single recording industry agent for "one-stop shopping" for performance rights. Fourth, the availability of a CARP as a backstop or safeguard on fees to be charged for compulsory licenses.

Integral to the CARP process, of course, are the standards and factors to be used by the arbitrators to determine the appropriate rates and terms for the statutory license. In the DPRSRA, Congress applied the standards set forth in the Copyright Act at 17 U.S.C. § 801(b)(1), that balance the rights of copyright owners and performers, the interests of the services and the paramount public interests:

> (1) To make determinations concerning the adjustment of reasonable copyright royalty rates ... [which] shall be calculated to achieve the following objectives:
>
> (A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

This standard was applied in the first CARP under the DPRSRA, and yielded a percentage of revenue royalty rate to be applied to the three then-existing cable and satellite digital music services.

In 1998, Congress again addressed how to appropriately balance creative and new media interests, and clarified the applicability of the sound recording digital performance right to Internet webcasters. At that time, webcasting was in its embryonic stages and new business models were just beginning to develop. DiMA companies were appreciative of Congress' intent, and accepting of the new royalty obligation to the benefit of creators so long as its impact was mutually supportive of the new industry.

To ensure the appropriate balance between licensing efficiency and anticompetitive risk, Congress relied again upon the same three elements: a statutory license, an antitrust exemption, and a CARP safeguard. This time, however, at the RIAA's urging -- and without revisiting how this new standard dovetailed with RIAA's previously–secured antitrust exemption -- Congress adopted a different standard to be applied by the CARP to determine statutory license rates and terms:

> In establishing rates and terms for transmissions by eligible nonsubscription services and new subscription services, the copyright arbitration royalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including-
>
> (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements negotiated under subparagraph (A).

17 U.S.C. § 114(f)(2)(B). Unfortunately, the legislative history offers no explanation or any reasons why Congress adopted this different standard, and little guidance as to how the standard is to be applied:

> The test applicable to establishing rates and terms is what a willing buyer and willing seller would have arrived at in marketplace negotiations. In making that determination, the copyright arbitration royalty panel shall consider economic, competitive and programming information presented by the parties including, but not limited to, the factors set forth in clauses (i) and (ii).

H.R. Rep. No. 105-796, 105th Cong., 2d Sess. at 86.

Given the care that Congress undertook in 1995 to prevent anticompetitive licensing conduct by the recording industry (including several written consultations with the Antitrust Division of the Department of Justice), Congress surely could not have intended that this new standard be more susceptible to anticompetitive behavior in the collective licensing process. Unfortunately, as documented by the CARP Report, that is precisely what occurred. Even more unfortunately, the CARP erroneously believed that its flexibility was so limited by the new standard, that its decision ultimately relied only on benchmarks from agreements that the arbitrators noted, throughout their decision, were tainted by RIAA's willful and intentional anticompetitive behavior.

Regrettably, Mr. Chairman, the February 20 CARP Report, the first decision issued under this new "willing buyer/willing seller" rule, is a case study of the potential for cartelized activity under the revised standard, as the RIAA successfully pursued the establishment of monopoly prices as the statutory license rate.

But the fundamental problem for DiMA and its members is not just the insupportably high rates recommended by the arbitrators in this arbitration. Those rates are but the symptom. The central flaw is how the "willing buyer/willing seller" standard to determine the statutory license rates and terms has been manipulated by the RIAA in order to extract monopoly rates, and was construed by the arbitrators as requiring them to ignore compelling evidence that would have led to a far more reasonable and justifiable

result. As explained below, DiMA urges this Committee and the Congress to consider rectifying these essential flaws in the CARP report:

1. The arbitrators erroneously interpreted the "willing buyer/willing seller" standard. They invented a prototypical "willing buyer" in the abstract, without reference to the ability of actual buyers to shoulder the rates they proposed. They incorrectly viewed the "willing seller" and the "marketplace" as an exclusive seller in a noncompetitive market. This caused the Panel to adopt rates based on what the arbitrators conceded were "above market" benchmarks obtained as a result of RIAA's single-seller market power and its "take-it-or-leave-it" licensing approach. The Panel's flawed understanding of the standard caused them to reject the most compelling and analogous evidence in the case – the rates paid by thousands of radio stations and webcasters to composers, lyricists and publishers to perform their copyrighted music.

2. Despite having chastised RIAA for its deliberate attempts to set above-market prices by licensing only a selected universe of unsophisticated licensees willing to pay such prices because of their peculiar circumstances, the arbitrators' erroneous interpretation of the legal standard led them to rely for rate-setting benchmarks exclusively upon the rates contained in the very agreements obtained by RIAA's deliberate effort to set artificially-inflated rates, including most prominently certain rates set forth in a single agreement between the RIAA and Yahoo! Inexplicably, the Panel admitted that the very incremental per-performance rates it relied upon, that were drawn for the Yahoo! agreement, did not genuinely reflect reasonable rates for Internet-only (or webcasting) services. Indeed, the Panel conceded that the rates in the Yahoo agreement were not "marketplace" rates and that they were designed by RIAA to maximize their legal arguments before the CARP (and by Yahoo to reduce the actual royalties they would pay upon their unique webcasting business model). The unfortunate, perhaps inevitable consequence of these errors is that the arbitrators, mistakenly believing they were compelled to rely on the Yahoo license, recommended royalty rates for Internet webcasting that will essentially bankrupt today's Internet webcasting industry – rates that not even Yahoo would accept.

3. Equally important is that the arbitrators failed to adopt an alternative rate on a percentage-of-revenue model that would enable webcasters to build a critical mass of listeners, attract advertising and related revenue, and thereby build a solid foundation for their future business.

4. Finally, for the benefit of future CARP proceedings (and although it will not assist webcasters in the current proceeding), in light of the documented efforts by RIAA to abuse the "willing buyer/willing seller" standard, Congress should carefully consider whether that standard should be amended or rescinded in favor of the pre-existing section 801(b) standards for setting sound recording performance royalty rates and terms.

RIAA's Anticompetitive Licensing Practices, as Exposed by the February 20 CARP Report, Torpedoed Legitimate Marketplace Negotiations.

As I noted previously, Mr. Chairman, DiMA initially sought to negotiate an industry-to-industry settlement with the RIAA in 1999. This effort collapsed when the RIAA refused to discuss any rate that approached the types of reasonable, established royalties that were being paid to perform musical compositions. The reasons for that collapse may be gleaned from the CARP Report, which describes how RIAA, concurrent with those negotiations, devised a scheme to artificially inflate the royalty rates, with the intention of creating "precedent" for above-market rates before the CARP.

The Report recounts how the RIAA Negotiating Committee attempted to manipulate the standard so as to establish a high benchmark to be used as "willing buyer/willing seller" precedent for the CARP. *See* CARP Report at 48-51. Per the direction of the RIAA Negotiating Committee (comprised of a senior executive of each of the five major recording companies), the RIAA intentionally adopted a "take-it-or-leave-it" licensing approach, with a small segment of the webcaster community consisting almost entirely of small, impecunious and inexperienced webcasters, to set an artificial, above-market rate at what the RIAA Negotiating Committee called its "sweet spot." *Id.* RIAA "meticulously crafted" confidentiality clauses that would prohibit any licensee from disclosing the rates and terms to other parties, yet reserved RIAA's right to use the agreements as it wished before the CARP. *Id.* at 50. Indeed, the CARP found that the RIAA "devoted extraordinary efforts and incurred substantial transactional costs" to negotiate these agreements only with "minor" webcasters "that promised very little actual payment of royalties" in return -- "sacrificial conduct mak[ing] economic sense only if calculated to set a high benchmark to be later imposed upon the much larger constellation of services." *Id.* at 50-51. The Panel further determined that RIAA's effort to justify this conduct "lacked credibility." *Id.* at 50.

DiMA did its best to communicate to webcasters that they did not have to deal with RIAA or be victimized by their predatory scheme in order to continue webcasting, and that they instead could avail themselves of the Congressionally-mandated statutory license under the CARP result. But, as the CARP Report acknowledged, a segment of the webcasting industry had particular needs or desires that required an RIAA license, even at artificially-inflated rates. For those webcasters, DiMA's advice was of no avail.

The CARP Procedures Exploited by the RIAA

RIAA's calculated efforts to rig the CARP rate were aided, as discussed below, by the unduly limiting and unique rules of CARP proceedings which are in dire need of reform. Those rules require that the parties' entire main case be presented in writing by a date certain, and without any advance warning or notice to the other parties identifying their rate-setting model. Here, having first secured a legislative change to a "willing buyer/willing seller" standard, RIAA proceeded to obtain licenses from its self-selected

group of two dozen webcasters -- all but one of whom RIAA conceded were "unsophisticated" -- and posited simplistically as follows:

- the RIAA, armed with its antitrust exemption, was the only "seller" of the brand new Internet sound recording performance rights at issue;
- the RIAA, as such, knew that the only "buyers" were the 2-dozen companies that RIAA licensed (pursuant to their scheme described above); and,
- speaking for itself and its licensee-"buyers", RIAA thus assured the CARP that both RIAA, as the seller, and the licensees with whom it had done deals, were "willing" sellers and buyers and that these deals were the only licenses ever secured covering this new right.

Having thus manipulated the market (as the CARP Panel later found), the RIAA then set about to take advantage of the CARP's uniquely-limiting procedural rules. Unlike litigation in federal and state courts, the CARP rules effectively limit "discovery" to documents specifically referenced in a party's witness statements. There is no ability in a CARP to ask interrogatories, take depositions or subpoena testimony from anyone; and normal evidentiary rules (for example, those prohibiting hearsay) do not apply. Finally, irrespective of the complexity of the case or number of parties, CARP cases by statute must be concluded (decision and all) within 180 days, an extremely truncated timetable for what was called the "mother of all CARPs."

Knowing all this, RIAA set out, in calculating fashion, to ensure that every one of its license agreements with webcasters prohibited the licensee from disclosing the rates, terms and surrounding circumstances of their licenses to anyone, while nonetheless permitting RIAA alone to use the agreements affirmatively, as it pleased, in the CARP proceedings. These one-way confidentiality provisions, combined with the highly restrictive CARP discovery rules, prevented webcasters from getting substantive information about the circumstances surrounding these agreements, and thus created a remarkably unjust litigation scenario. RIAA proceeded to provide the CARP with a one-sided, selective and distorted factual landscape -- and then argued that the CARP Panel was required by the "willing buyer/willing seller" standard to establish rates on a par with those set forth in the licenses which RIAA previously had secured (and that RIAA alone was able to testify about).

In these circumstances, it is almost miraculous that the webcasters -- via a combination of cross-examination and successfully urging the CARP Panel to request further disclosures from the RIAA, as well as testimony from RIAA licensees -- were able to demonstrate how much RIAA sought to manipulate the CARP rate. But, as noted above, it was small solace for webcasters to be able to demonstrate RIAA's decidedly anticompetitive intent and licensing approach, insofar as the Panel still relied exclusively, in establishing its royalty rates, on the tainted license agreements that RIAA had secured .

The fact that the rates recommended by the CARP were considerably less than those secured by RIAA from its self-selected licensees may have led the Panel to believe

that some measure of justice was being done. But even awarding RIAA 40% of the per performance royalty it requested will cripple the webcasting industry at its inception.

DiMA requests this Committee and Congress to closely scrutinize these aspects of the CARP Report and their resulting implications for the above-market royalty rates adopted by the CARP. This is particularly important at this critical time, because two more arbitrations are to be conducted within a few months from now: the first CARP for new subscription webcasters, and the second CARP for these very same nonsubscription webcasters -- both to be decided under the new "willing buyer/willing seller" standard.

The Arbitrators Misinterpreted the "Willing Buyer/Willing Seller" Standard.

Even a cursory reading of the CARP Report reveals that the "willing buyer/willing seller" standard was not correctly applied by the Panel. The CARP and the parties agreed that this standard envisioned a hypothetical negotiation between a willing buyer and willing seller in the marketplace. However, the CARP Report misinterprets three key elements of the test: what is the nature of the "willing buyer"; what is the nature of the "willing seller;" and whether evidence from the most analogous market, *i.e.*, licenses for performing musical works, are relevant to the willing buyer/willing seller test for performing sound recordings. Unless the Librarian of Congress remedies the CARP's errors, we believe that the misinterpretations of these three critical elements of the standard require Congressional clarification.

The Definition of a "Willing Buyer"

Congress should make clear that the hypothetical "willing buyers" should reflect actual economic conditions of typical buyers within the buyers' industry. The CARP Panel agreed that the "willing buyers" in this equation are the webcasters. However, the Panel erroneously viewed these hypothetical buyers purely in the abstract, without any attempt to factor in the general economic condition of the buyers, or the impact that these economic conditions might have on their willingness or ability to pay royalties at a particular level.

Obviously, industry economics influence how "willing" or able a hypothetical buyer would be to agree to particular rates and terms. Actual economic conditions were particularly relevant in light of the specific CARP findings that most of the webcasters that had agreed to pay royalties to the RIAA under voluntary licenses, in fact, could not afford the rates they had agreed to. The Panel found that only three, perhaps four, of the 26 webcasters that signed such licenses with the RIAA paid any significant royalties at all. *Id.* at 52-54. For these very sorts of reasons, as discussed below, courts and the Department of Justice have refused to allow copyright licensing collectives to rely upon rates in license agreements from nascent industries. Yet, the Panel dismissed any relevance of industry economics in a brief footnote, contending that the considerable detailed record evidence of webcasting economics and the operation of webcast services would not materially aid its determination of what royalty rates willing buyers and willing

sellers would actually agree to for the licenses at issue. *Id.* At 36 n. 23. It is no wonder that the rates hypothesized by the CARP, set without any reference to the business conditions of actual webcasters, will bankrupt the actual buyers.

The Definition of a "Willing Seller"

It similarly should be clarified that the "willing seller" must be a willing seller in a competitive market, not a market of single-source monopoly sellers. The CARP correctly rejected RIAA as an appropriate model for the "willing seller," inasmuch as they conceded that a single concentrated licensing entity was a monopolist rather than a willing seller. Yet, paradoxically, after properly labeling the RIAA a single seller with undue market power, the Panel nonetheless relied exclusively on benchmarks from a marketplace in which the RIAA acted as a single-seller collective.

In the end, the Panel erroneously simulated negotiations in a non-competitive market, which not surprisingly resulted in the CARP assessing an anticompetitive -- monopoly -- rate. It is readily apparent from the Panel's Report, which established royalty rates drawn exclusively from agreements that the Panel found were at "above market," "artificially high" rates, that the Panel did not view its task as requiring it to set rates that would approximate those set in a competitive "willing buyer/willing seller" marketplace.

If Congress truly intended that the "willing buyer/willing seller" test should result in competitive market rates (and absent this intention the CARP would serve no purpose), then it is clear that the CARP erred by analyzing only a non-competitive single-seller market as the basis of determining willing buyer-willing seller prices. A truly competitive market that avoids cartel pricing, of concern to Congress, requires competition among licensors, not licensees. Predictably, this faulty analysis resulted in an artificially elevated rate as reflected in the CARP Report.

The Scope of the Relevant Marketplace

The Report further errs in narrowly defining the market so as to reject the single most relevant evidence presented to the CARP, namely, the long history of payments to ASCAP, BMI and SESAC for the right to perform the musical works -- the notes and lyrics -- embodied in the sound recordings. Each is an essential copyright right necessary to perform music online.

As the Copyright Office found in a prior proceeding, no credible evidence suggests that a license to perform sound recordings is inherently worth more than a license to perform the musical works. To the contrary, in light of the promotional value of airplay and the higher revenue derived by sound recording copyright owners from the sale of sound recordings, there are persuasive economic arguments for a lower license rate. In prior proceedings, the CARP and the Copyright Office used musical work

performance licenses as an appropriate analogy for the sound recording performance licenses at issue.

Moreover, the CARP record contained overwhelming evidence from analogous marketplaces -- where musical works and sound recordings are licensed at the same time for the identical use -- demonstrating that sound recording licenses are no more valuable than musical composition licenses. For example, the voluminous license data ($20 million in license transactions covering more than 700 songs) for transactions involving the reproduction rights associated with the incorporation of songs into movies and TV programs demonstrated the overwhelming extent to which producers value licenses to use sound recordings and musical compositions equally (with publishers and record companies alike typically seeking and obtaining most-favored-nations treatment against each other's rates). Similarly, the evidence from international markets -- where there is a long history of concurrent sound recording performance and musical work performance rights payments made by radio broadcasters to both record company and publisher collectives -- demonstrates that sound recording performances typically are compensated at rates lower than or equal to the rates paid for performance of musical works.

Yet, the CARP Panel amazingly chose to express "no opinion" on the relative value of musical works performances to sound recording performances and thus completely ignored all of this evidence. It did not even look to musical composition performance rates as a "sanity check" on the rates that the Panel proposed for the webcasting industry.

The CARP's reliance on the RIAA's negotiated deals with a handful of webcasters, while failing to consider the evidence of musical works performance rates, was particularly prejudicial and erroneous, in light of legal precedent admonishing courts to take particular care when evaluating agreements entered into in new and evolving industries, where there is little market experience in valuing the rights at issue. For example, the ASCAP and BMI rate courts consistently have rejected the use of voluntary agreements entered into at the inception of an industry, because such agreements generally reflect extraneous factors such as the desire to avoid or settle litigation, and rarely are indicative of a competitive market outcome. *See, e.g.,* United States v. ASCAP; Application of Showtime/The Movie Channel Inc., 912 F.2d 563, 579-82 (2d Cir. 1989). Indeed, such considerations underlie provisions in the most recent ASCAP consent decree, which preclude ASCAP from relying upon agreements entered into during the first five years of licensing music users in a new industry as evidence of a reasonable final royalty fee. *See* United States v. ASCAP, No. 41-1395 at 13-14 (S.D.N.Y. June 11, 2001). *See* Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, at 35, United States v. ASCAP ("[new] music users are fragmented, inexperienced, lack the resources [to litigate over rates] and are willing to acquiesce to fees requiring payment of a high percentage of their revenue because they have little if any revenue").

Consequently, by ignoring long-established music performance license rates, and by relying on inherently unreliable sound recording licenses engineered by RIAA to yield above-market rates, the Panel set a rate for the performance of sound recordings that is seven times higher (on a per-performance basis) than the standard industry rates historically paid for analogous rights.

A Percentage of Revenue Alternative for Commercial Webcasters is Necessary.

In enacting the limited digital sound recording performance right in 1995, and in extending that right to cover Internet webcasters in 1998, Congress explained its unequivocal intention to promote the growth of new technologies and music delivery methods for the benefit of consumers. Under the statutory license, Internet webcasting has become a vibrant opportunity even for entrepreneurial companies, whereby sites like Onion River Radio, Beethoven.com, SOMA-FM, WOLF-FM and others can get a foot in the door and provide compelling programming alternatives to commercial radio.

Another reason fueling the entrepreneurial webcasting opportunity is its relatively low start-up costs in comparison with terrestrial, cable or satellite broadcasting. Notwithstanding, Internet services encounter the "chicken-and-egg" problem I alluded to previously in my testimony. To attract any advertising revenues, a service must attract substantial numbers of listeners; to attract sufficient revenues to support an ongoing webcast venture, a service must have extraordinary numbers of listeners. Yet, unlike broadcasting, in which the upfront costs are high but the marginal cost of adding each new listener is zero, for webcasting, the upfront costs are lower, but adding each new listener adds additional costs in terms of bandwidth and server capacity.

Given these fundamental economic realities, it is easy to see how the per-performance/per-listener royalty can prejudice Internet webcasters, whether they are entrepreneurial start-up ventures or well-funded media companies. If a webcaster must pay high royalties, regardless of revenue, then the royalty scheme creates substantial new barriers to entry and success of smaller marketplace competitors.

The traditional marketplace licensors for blanket performance licenses in the music industry, ASCAP, BMI and SESAC, all recognize this economic fact of life. Their licenses always have offered a minimum fee with a percentage of revenue option. Under their licenses, the rights holders always are guaranteed a fair return via the minimum fee. Then, through the percentage of revenue fee, the more successful a webcaster becomes, the more revenue it will have, and the greater will be the royalties that it pays. In the interim, however, the performance license itself does not become an insurmountable barrier to entry.

While percentage-of-revenue licenses cannot always be justified as the sole formula for assessing music license fees, a revenue-based fee option thus has demonstrable virtues -- particularly in emerging industries. By rejecting a percentage of revenue option, the CARP Report has perhaps inadvertently dealt a death blow to

entrepreneurship in webcasting. Consistent with Congress' policy to promote the growth of Internet webcasting, it is critical that action is taken now to ensure that a minimum fee and percentage of revenue option remains available to webcasters.

The CARP Report, to Great Harm, Erroneously Based the Industry-Wide Rate on a Single Agreement with a Unique Company.

A great deal of attention has been paid in the CARP proceeding and the media to the deal between RIAA and a single, unique webcaster -- Yahoo! The reason why it has garnered so much attention is because the CARP, after eliminating all other evidence under an erroneous interpretation of the "willing buyer/willing seller" standard, had ONLY the Yahoo agreement left to consider. Yet, the facts set forth in the CARP Report demonstrate why even this agreement was an unreliable measure for an industry-wide rate, and why the CARP's erroneous and undue reliance upon this single agreement resulted in exorbitant and insupportable rates for the webcast industry at large.

First, as the CARP Panel observed, the RIAA entered into negotiations with Yahoo for the same reasons as their negotiations with the other 25 licensed entities: to create a precedent that would allow RIAA to manipulate the CARP rates. Reciprocally, as the CARP admitted, Yahoo was quite willing to permit itself to be manipulated in this manner, as long as its unique business objectives were met. *Id.* at 64-66. On its face, the rates and terms of such a license cannot satisfy the public interests in assuring that the statutory license is fair for all market participants.

Second, while the CARP believed that, given Yahoo's stature, the parties were negotiating on a level playing field, *id.* at 61, the CARP failed to recognize that Yahoo was playing a different game from the rest of the webcasting industry. The overwhelming majority of Yahoo's webcast streaming performances were retransmissions of radio station signals. *Id.* at 61. Internet-only programming on Yahoo was, at that time, a very small percent of its webcast offerings. By contrast, the vast majority of Internet webcasters are exclusively streaming Internet-only channels. Naturally, Yahoo was concerned primarily with obtaining the lowest possible total fee. After negotiating an upfront lump sum fee that covered the vast majority of the performances it made, Yahoo (as any rational business) naturally would have cared a lot more about the incremental rate stated for its radio retransmission performances than the rate stated for Internet-only performances. As the CARP conceded, Yahoo had little reason to resist RIAA's attempts to artificially inflate the incremental Internet-only rate, so long as the broadcast retransmissions rate was acceptable, and the "blended rate" resulting from the mix of broadcasts and Internet-only royalty payments also was acceptable. *Id.* at 63-65.

Consequently, Yahoo cared least about what concerned the rest of the industry most; and it was plainly erroneous for the CARP Panel to use as a benchmark an "artificially" inflated rate that even the Panel conceded was intentionally manipulated to be unreasonably high.

Third, as the CARP Panel notes, Yahoo recognized that by entering into a voluntary agreement before the CARP determination, they would be saving substantial amounts of money in CARP litigation costs. *Id.* at 68. And, by settling Yahoo would save "opportunity costs" by allowing key managers to devote time and resources to pursuing business deals rather than the arbitration. *Id.* at 68 and n. 46. The net result was that the costs for Yahoo to participate in the CARP could reasonably be expected to exceed their potential royalty obligations under the proposed deal with RIAA -- a fact that would motivate any rational economic actor to proceed with a deal even where the royalties were excessive under any objective measurement.

Fourth, perhaps because the CARP Panel erroneously believed that webcast economics was irrelevant, *see* Report at 36 n. 23, the Report fails even to mention that at the time of the Yahoo-RIAA agreement, Yahoo was not a "benchmark" type of webcaster that could accurately serve as a proxy for an industry "willing buyer." Virtually unique among Internet companies, Yahoo was a highly profitable public company with sizable revenues and millions of dollars of cash in the bank. Similarly unique among webcasters, Yahoo focused its branding on being an Internet "portal," not a webcaster.

In sum, the Yahoo agreement embodies artificially-inflated rates entered into by a sui generis, diversified Internet company in order to avoid prohibitively expensive arbitration costs, and to allow its managers to focus instead on attracting new revenue. It defies credulity to suggest that this single agreement somehow serves as an appropriate benchmark or proxy for appropriate rates to be paid by all webcasters. Indeed, the Panel's approach seems all the more bizarre and egregious in light of the fact, as noted above, that there existed a benchmark performance rate that all webcasters and broadcasters pay on an equivalent basis – the rates in the blanket licenses offered by ASCAP, BMI and SESAC for the performance of musical works.

There is No Basis to Set Disparate and Prejudicial Rates and Terms for Internet-Only Webcasts over Broadcast Retransmissions.

Fairness suffered two additional casualties in the CARP Report.

First, the Panel proposed a rate for Internet-only transmissions that is double the proposed rate for webcast retransmissions of terrestrial radio broadcasts. It is significant that neither RIAA nor the webcasters asked for disparate rates. Instead, the Panel was led to this aberrant result based upon yet another misapplication of the terms of the Yahoo-RIAA agreement. But their purported rationale (*i.e.*, the promotional value of radio airplay) holds no water in this instance. The arbitrators merely assumed that "this factor *likely* was considered by RIAA and Yahoo!, and is *evidently* reflected in the resulting difference between [radio retransmission] and [Internet-only] rates." *Id.* at 75; emphasis added. Notably, however, the Report cites no actual record evidence to support these assumptions and, as noted above, the evidence is to the contrary.

Second, the irrationality of the CARP Panel recommendations goes beyond issues of the rate itself. The Panel illogically applied the inflated Internet-only per-performance rate even to partial performances of any duration. The CARP's report makes webcasters liable for full payments even when a song is discontinued a moment after it starts streaming (whether due to technological glitches or listener action). Thus, the Panel Report would impose punitive costs on webcasters for simple conveniences enjoyed for free within the broadcast radio world, wherein a listener can shift from one station to the next if he/she does not wish to listen to a certain song, or encounters signal static or interference.

The "Willing Buyer/Willing Seller" Standard Should be Revisited.

With the benefit of 20/20 hindsight, perhaps it seems obvious why the "willing buyer/willing seller" standard does not and cannot work in a new, highly concentrated market dominated by a very few powerful players who hold monopoly rights over vast catalogs of the world's most popular sound recordings. Unfortunately, the willing buyer/willing seller standard adopted in the DMCA creates perverse incentives to manipulate the marketplace, so as to set the CARP rates at far above fair market value.

In this regard, it bears noting that industry has come before Congress to intervene in the CARP process twice in the last three years, to set aright royalty determinations that bore no reasonable relationship to the economics of the industries in which they were levied. DiMA cannot help but remind the Committee that each of these disproportionate results occurred in arbitrations that applied the "willing buyer/willing seller" standard.

We urge Congress to ensure that such attempts to manipulate the CARP standards and processes cannot recur. DiMA has suggested above a number of concrete ways in which Congress can clarify its intentions in the existing "willing buyer/willing seller" standard, so as to rectify the unjust results of this most recent CARP, and to re-set the economic foundations for the webcasting industry. Nevertheless, in light of the experiences of webcasters and the satellite television industry, perhaps the unavoidable truth of the matter is that the "willing buyer/willing seller" standard simply does not work in the context of new and emerging industries. Although it will not help webcasters for this CARP, DiMA respectfully submits that Congress should seriously consider whether it is advisable and necessary to rescind the willing buyer/willing seller standard and replace it with the balanced section 801(b)(1) factors applicable to past sound recording performance rights CARP arbitrations.

Procedural Deficiencies in the CARP Process Should be Rectified.

Congress intended the CARP arbitration process to be a swift, relatively inexpensive and reasonably fair way to adopt and adjust copyright royalty rates. Webcasters' experiences in this CARP suggest that certain procedural safeguards are necessary to ensure the fairness of the process.

Discovery

As noted above, current CARP discovery rules limit the parties to discovery only of documents that specifically underlie the written testimony submitted by the parties. The unfortunate consequence of this limitation is that the CARP and the parties may be denied access to information that would be extremely valuable in setting a fair and reasonable rate. We therefore recommend that Congress consider adopting limited-in-time and limited-in-scope "federal"-type discovery provisions. This would avoid the pitfalls of "trial-by-ambush" strategies of the nature employed by RIAA in the recent CARP without delaying the CARP litigation process.

Similarly, preparation of the webcasters' cases in this proceeding were substantially hampered by the intentional insertion by RIAA of confidentiality clauses that restricted the licensees from discussing the terms of their agreements with the services' counsel. Therefore, at minimum, we recommend that at a date no later than 30 days before all written cases are due, parties should be required to disclose the identity of any license that it intends to submit in support of its written case; to affirmatively state in such disclosure the name and last known address and telephone number of the persons who negotiated the licenses for both licensor and licensee; and, for purposes of use in the CARP proceeding, to specifically release all such persons from any confidentiality obligations that otherwise may have been imposed under the agreements.

Further, as a means of streamlining the issues for hearing, we suggest that the parties be permitted to serve Requests for Admission to other parties, as set forth in the Federal Rules of Civil Procedure.

Subpoena Power

We note that much valuable evidence was introduced during the rebuttal phase in this CARP proceeding from webcasters that had signed licenses with the RIAA, including Yahoo, after all the RIAA's licensees were asked by the Panel to testify (at webcasters' urging). Had these licensees not stepped up to the plate, the arbitrators would have been denied access to record evidence that became essential to their decision; yet this last-phase and limited testimony was hardly sufficient to protect webcasters from the distorted and one-sided evidentiary record that RIAA was able to develop by manipulating the existing CARP rules, as discussed above. We recommend that the arbitrators, like other administrative agency judges, be authorized to issue subpoenas and permit CARP participants to seek to enforce such subpoenas in the federal courts.

Webcasters Need Relief Now.

As I stated at the beginning of my testimony, a few days from now DiMA and all Internet radio services will learn of the decision of the Librarian of Congress. If the recommendations in the CARP Report are upheld, hundreds, perhaps thousands, of Internet webcasters and broadcasters will shut off their programming, rather than continue

incurring extraordinarily high royalty liabilities that they manifestly cannot pay, and as a matter of fairness no webcaster should be required to pay. I have summarized in my testimony several of the most significant flaws in the CARP Report. We hope that the compelling arguments made by the broadcasters and webcasters to the Copyright Office will win the day, and that reason and economic rationality ultimately will prevail. Should this not be the case, we hope that Congress will consider carefully, and rapidly promulgate, the clarifying statements recommended in our testimony. These clarifications will guide the Librarian of Congress and, potentially, the Court of Appeals, in the proper application of the current standards, and will restore greater confidence in the checks and balances built into the current CARP process.

Whatever the result for this proceeding, DiMA respectfully submits that the CARP Report in this proceeding, and the negotiations chicanery undertaken by the RIAA, prove beyond question that the "willing buyer/willing seller" standard must change. There can be no hypothetical "willing seller" in a non-competitive market where there are no alternative sources for the same licensed works. In such a market, as shown in the CARP Report, the marketplace can too easily be manipulated by monopoly sellers so as to produce an artificial above-market rate, concocted solely as precedent for the CARP. We submit that Congress should act promptly to rescind the willing buyer/willing seller standard, to reinstate the section 801(b) factors as the relevant touchstone for the CARP determination and, to paraphrase that great rock philosopher Pete Townshend, to ensure that we don't get fooled again.

Thank you again for your attention and your consideration. I would be pleased to answer any questions the Committee may have.

Statement of Ludwig Th. Dirksz

As English is not my native language I, in advance, apologize for any mistakes in this email regarding the Copyright Royalties CARP issue in your country.

I have a dutch internet station here in The Netherlands using American internet facilities (LIVE 365 and ImNetworks). The name of my station (owned and handled by one person: me) is Radio Fantastica (www.radiofantastica.com). It is an honour for me (and, I do think, many others not living in the USA) to be able to use USA facilities. It proves again that your country is the world leader and helps the rest of the world, even small entrepeneurs as me, to get ahead and to develop myself.

For me it is easy to not get involved in the CARP discussions as it concerns USA judiciary and has nothing to do with our local laws here in the Netherlands. But I do believe in internet radio, in "broadcasting the voice of the people via the internet", I do believe in a strong western world with democratic leadership and I do believe that it is wrong not to give small entrepeneurs as me, wherever in the world, a change to further develop ourself because of a big lobby group in the USA.

I also do believe in paying everyone his or hers part of the reveneus but I also believe that, as the world grows, revenue sharing must be looked at again: we cannot, while new techniques become available, keep on working and shairng revenues the same way we did the last 20 or 30 years. There are indivuduals who can broadcast now, maybe not via the airwaves but via the internet, why don't give them a change to develop within new business models?

Regards,
Ludwig Th. Dirksz
www.radiofantastica.com

Statement from Joseph Naro

Senator Patrick Leahy:

Copyright Royalties: Where is the Right Spot On The Dial For Web casting Radiostorm.com, one of the largest privately owned Internet Radio Networks would like to relay some of our story to you.

A brief history of Radiostorm.com. Radiostorm.com was founded by my business partner and friend of 18 years, Mike Donahue in 1998 as a single Hard Rock channel. I joined him in his efforts in 2000, and since then we have expanded to a network of channels and have grown the audience to some 1,500,000 hours spent listening a month! Included in our network is an Associated Press News feed which we pay a license for, and on Sept. 11th, 2001 and the following days had some 300,000 tuning hours. Many listeners emailed and called us to thank us for being one of the only internet sources of information that was accessible. Radiostorm was able to provide these streams to such a large audience on incredibly short notice thanks to the help of the ENTIRE webcasting community and of course the AP. There were no contracts signed, no money to be gained, just a pressing desire to do what we could in a time of need. I point this out in order to stress the fact that it is not just music delivery that is in jeopardy due to these license rates, but webcasting on a whole and the services that we currently provide and hope to provide in the future.

Despite having a large audience and potential for advertising revenue, the economy and infancy of this new medium have both been against us. We have been working diligently to educate the marketplace about the value of Internet Radio as an advertising platform and have been making progress. The same effort has been made to educate record labels of the promotional value of internet radio. Many smaller labels and independent artists agree and already send us music based on the promotional value of "airplay".

Radiostorm.com attempted to negotiate a license from SoundExchange several times in the last two years. At times we were quoted percentage of revenue deals on the phone, at other times we were quoted per play models that were NOT per listener. We asked on numerous occasions for these "deals" to be sent to us for review by our lawyers. Nothing was ever sent and more importantly our calls stopped being returned. I want to point out that we pay ASCAP/BMI/SESAC licenses, and had no trouble at all negotiating these licenses, since the rates are established, reasonable and also capped. They seem to respect the promotional value of internet radio to such a degree that there is no need to multiply licenses per listener. The object is, after all to have us play the music, not establish obstacles to us doing so. We have tried our best to be involved in the CARP process as much as our resources have allowed, yet feel we are being immensely out gunned by the vast resources of the RIAA. The RIAA seem to be doing a fairly good job of playing down the fact that some of their larger members are already involved in Digital Music Distribution (PressPlay and MusicNet), and launching their own internet radio sites (A&M Records, RoadRunner Records), despite the rants of internet radio being the "scourge of the music industry", it seems clear that they intend to own music distribution

from start to finish, if this is in fact legal, it certainly did NOT present a fair buyer/seller market place to negotiate in.

So, "Where is the Right Spot on the Dial?". It is interesting that 'dial' is a traditional radio term... traditional radio does not have to pay an additional license fee due to promotional value . In the spirit of trying to negotiate in good faith though, I would hope the rate, if there does in fact need to be one, would fall in line with current ASCAP/BMI/SESAC rates. I think it is very easy to justify a license rate based on established rates, set forth by established unbiased third parties interested in the best interest of Copyright holders who want their music exposed to the largest audience possible, rather than a rate based on the self interest of one very powerful lobby.

I sincerely hope that Members of Congress and the Senate Judiciary see clear of the cloud of deception the RIAA is putting forth to recognize the efforts of many internet broadcasters who have worked incredibly hard to establish, grow and create credibility for this incredible new medium of content delivery.

I would be happy to speak directly or answer any questions you might have.

Statement of Don Henley
On behalf of the Recording Artists Coalition
Before the Committee of the Judiciary
United States Senate
May 15, 2002

Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to present the views of the Recording Artists Coalition (RAC) on the issue of CARP webcasting rates. My comments, while focusing on the webcasting issue, also touch upon other unresolved issues affecting recording artists. All of the problems and issues of the music business are interrelated. We hope that while the Committee searches for an answer to the webcasting conundrum, it will also help resolve other lingering problems facing recording artists.

The Digital Millennium Copyright Act ("DMCA") provides to recording artists, for the first time, a public performance right for digital transmission of sound recordings. Before passage of the DMCA, recording artists were precluded from receiving royalties for public performance of their sound recordings. While songwriters receive public performance royalties for radio airplay of their musical compositions, recording artists receive nothing for radio airplay of their sound recordings.

Broadcasting interests have always argued that a sound recording public performance right for radio airplay is not warranted because radio airplay helps sell records. While that may be true to some extent, the Copyright Law does not provide for a "promotional" exception. Arguably, radio airplay helps songwriters sell sheet music. No one argues that it is inherently unfair for songwriters to

receive income from both sources. But for the recording artist, the rules are different. The public performance right that was established for all other creators of copyrighted works does not apply to the recording artist for radio airplay. This inequity must not be forgotten when contemplating the fairness of webcasting rates.

Furthermore, performers all over the world collect for all public performances, not just for webcasting, and that because the United States does not have such a right beyond webcasting, American recording artists are denied substantial income for overseas performances. Now that recording artists have finally been granted, in the digital world, what should have been granted to them in the analog world decades ago, there is a strong movement to restrict these new rights. Nothing could be more unfair and unsympathetic to the recording artist.

Regarding the CARP webcasting rates, it is important to separate the process from the result. While the CARP process is not perfect, it is the best method devised so far to overcome the seemingly inevitable gridlock between content creators and content users. This arbitration system, when working correctly, will ensure that music is readily available for Internet usage, even in the face of ongoing animosity such as exists between the webcasters and the record industry. At times, a party submitting to the CARP process may feel wronged by a decision, but that is the nature of arbitration. The parties present their case and a decision is rendered. At times, the parties may have a right to appeal but, overall, the integrity of the system is based on submission to the result.

If the webcasters agreed to arbitration and took part in the arbitration, they should, in principle, abide by the arbitrator's decision. The viability of any arbitration system would be severely diminished if every decision was contested and the process always attacked. Neither side totally received what it requested in this particular CARP proceeding, but at least a rate was set.

Nevertheless, some valid concerns have been raised by the smaller and less commercially driven webcasters. There is much to be said for the viability of small, independent webcasters as they offer varied musical genres and introduce new recording artists to the public. In some instances, relief should be granted, but only through direct negotiation with the recording artists, the record companies, or SoundExchange. When webcasters seek congressional intervention every time a CARP decision is not to their liking, it brings into question the entire validity of the process. Congressional intervention at this time would set a very bad precedent.

A balance must be struck between the right of a recording artist to be fairly compensated and the desire of a webcaster to create a new business. In some instances, the two may be mutually exclusive. If a webcaster can survive by paying the recording artist only a nominal or relatively non-existent royalty, then perhaps the webcaster's business model is not viable. Amazon.com lost money for many years before turning a profit. That company did not ask Congress to waive its responsibility to pay the manufacturers of the merchandise it sold. Amazon.com took a loss until it could turn a profit. Other e-commerce businesses went bankrupt because they could not pay their vendors. That is free enterprise. If a webcaster cannot pay a viable, fair royalty to the recording artist and the record

label, then the webcaster should either be prepared to take a loss, like Amazon.com, or look for another business.

Some webcasters propose implementing a "percentage of revenue" formula. In our estimation, in most instances that is not the answer. Many webcasters have developed business models that do not foresee or even contemplate a serious stream of income, either in the short or long term. If a webcaster is a non-profit organization, then perhaps Soundexchange, the record labels, and the recording artists should entertain a request for limited licensing fees or even waiver of a licensing fee altogether, and relief from onerous reporting requirements. This type of relief should be requested on a case by case basis, and the negotiations should occur directly between the non-profit webcaster and the copyright holder.

However, if a webcaster is a for-profit business, then the CARP rate should apply. If a small webcaster needs relief to stay in business, the webcaster should seek relief directly from the copyright holder. RAC, as a matter of principle, wants a strong, independent webcaster presence on the Internet, and maintains that it will promote a liberal policy of webcaster exemptions or reductions in rate, as well as relief from onerous reporting requirements, based on legitimate economic need. RAC will also work within SoundExchange to promote a liberal and flexible licensing rate and reporting policy toward smaller and non-profit webcasters. Neither the Copyright Office nor Congress should micro-manage the problem. The Copyright owner is in the best position to determine whether relief is warrented and in the best interest of the music industry as a whole. Of course, no license can be more than the basic CARP rate, but the final determination of

whether the rate is less than the CARP rate is a decision only to be made by the Copyright owner.

It is premature to start changing CARP before the system is given a chance to work. If the system proves faulty after some time, then Congress perhaps should consider reform, but we are not there yet. Furthermore, Congress must appreciate the importance of the gain made by recording artists when they secured the long-sought after sound recording public performance right. A number of major recording artists, such as Mary Wells, might not have died impoverished if a viable public performance right for sound recordings had been put in place many years ago. The recording artist cannot continue on a roller coaster ride -- so when considering the merits of granting relief to a webcaster claiming economic deprivation, keep in mind the recording artists who have been denied income from public performances of their sound recordings for their entire careers. The gains made by the recording artists in DMCA must be preserved.

If Congress truly believes in supporting the rights of recording artists, then Congress should allow CARP to work. Congress must have faith that the common interests of the recording artist community and webcasters will compel the parties to work out their differences. Fiddling with CARP now will set a dangerous precedent and will potentially -- and perhaps permanently -- impair the viability of the CARP system. Without a system such as CARP, there will be continued gridlock and that will ultimately harm the recording artists, the webcasters, and the public.

Congress should also recognize that issues relating to music on the Internet are not unrelated to other issues affecting recording artists. If Congress truly wants to facilitate the creation of a functioning Internet music system, as well as an overall functioning music industry, then Congress needs to address other unresolved issues between the record companies and the recording artists. In particular, RAC strongly believes that Congress should call for hearings on the issues of sound recordings as "Works for Hire," unconscionable record contract provisions (including control over artist websites), the creation of an analog public performance right for sound recordings (i.e., a sound recording public performance right for radio transmission), and reversion to the recording artist of out-of-print catalog. All of these issues are serious impediments to the creation of a well functioning system, as they all negatively impact the interests of the recording artist and the public. Without resolution, the music industry will become even more dysfunctional than it is today. The situation requires good faith, outside intervention. Congress must play a key role.

Thank you again for the opportunity to present our views to the Committee. Congress must continue to hear from the independent voices of recording artists. RAC is dedicated to bringing issues directly affecting recording artists to your attention. Recording artists must always have an independent voice as our interests are unique, vital, and at times contrary to the interests of the mainstream, major record companies and the Internet community. Recording artists create the music that fuels these industries. Without our input, no real solutions can ever be found.

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May 14, 2002

Via Facsimile & First-Class Mail

The Honorable Jeff Sessions
United States Senate
Senate Russell Building, Room 495
Washington, DC 20510

Re: Copyright Arbitration Royalty Panel "(CARP") Recommendation

Dear Senator Sessions:

This letter is written on behalf of Reality Radio, Inc. ("Reality"). Reality is a 501(c)(3) non-profit corporation which operated a contemporary Christian FM radio station in central and northern Alabama from November 1998 through August 2000 and, until recently, "streamed" contemporary Christian music over the internet. We recently learned that the Senate Judiciary Committee intends to hold a hearing on May 15, 2002, to consider the recommendation of the CARP panel regarding royalty rates for broadcasting music over the internet, also known as "webcasting." This letter is to provide Reality's comments on that CARP report and request your and the Committee's special attention to the CARP's failure to distinguish between for-profit and non-profit webcasters.

You may recall that Reality Radio was started by a number of community and church leaders in the Birmingham area, including James Spann, Gaither Spradling, Sarah Mizerany, Bob Reid, Lenora Pate, Rod McSweeney, Mike Whitten and Barry Copeland. During the time Reality operated as an FM station, it simultaneously broadcast or "simulcast" its radio signal over the internet. After the radio station was sold and changed music formats, Reality broadcast contemporary Christian music only over the internet. Reality ceased webcasting upon realizing the severe financial effect the CARP recommendation would have on its activities.

I am confident that the Committee will hear tomorrow from many webcasters who believe the CARP's proposed royalty rates are grossly excessive, particularly in light of the royalty rates paid by ordinary radio broadcasters. Reality is in general agreement with the

position of those webcasters, and believes they will adequately present arguments favoring a substantial across-the-board reduction of the CARP's proposed royalty rates. Consequently, this letter will not attempt to repeat those arguments.

We are **not** confident, however, that the witnesses before the Committee or any other person submitting comments on this matter will represent the interest of non-profit webcasters like Reality. Some "non-commercial" radio broadcasters who simulcast their radio signal over the internet did participate in the CARP proceeding, and the CARP recommendation would establish a lower royalty rate for non-commercial webcasts of a radio signal. Unfortunately, it is not clear that "non-commercial" equates to "non-profit," and all too clear that the lower rate only applies to web simulcasts of radio transmissions. In short, the CARP recommendation does not specifically address the non-profit webcaster situation and clearly should do so. It is Reality's position that the proposed royalty rate should be revised downward generally, that the royalty fee schedule should contain a separate category for non-profit webcasters, and that non-profit entities such as Reality should be entitled to a royalty rate which is significantly lower than (or at least as low as) the rate for simulcasts of "non-commercial" webcasts of a radio signal.

Reality also notes that the arbitration royalty panel process established by Congress and utilized by the Copyright Office in this matter is not the ideal vehicle for receiving and considering public input on an issue of such importance. We were particularly concerned that parties who had not participated in the CARP proceeding were not allowed to submit comments on the CARP recommendation prior to its submission to the Librarian of Congress. We believe the Copyright Office should be encouraged to utilize a process (like notice and comment rulemaking) which will ensure maximum public notice and participation in this decision. While Congress did establish the CARP process, it did not prohibit the Copyright Office from using additional means of obtaining public input.

Reality would be happy to provide additional information for your or the Committee's consideration. We appreciate very much your attention to this matter.

Sincerely,

Glenn G. Waddell

GGW/jwf

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United States Senate
Committee on the Judiciary
Hearing on "Copyright Royalties:
Where is the Right Spot on the Dial for Webcasters"
May 15, 2002

TESTIMONY OF WILLIAM J. ROSE

Arbitron has over 50 years of leadership and experience in audience measurement. We are most commonly known for measuring network and local market radio audiences across the United States; surveying the retail, media and product patterns of local market consumers; and providing software used for analyzing media audience and marketing information data. Arbitron serves radio broadcasters, cable companies, advertisers, advertising agencies and outdoor advertising companies in the United States, Mexico and Europe. We have approximately 800 full-time employees, with executive offices in New York City, research and technology facilities in Columbia, Maryland, and field sales offices in Atlanta, Chicago, Dallas and Los Angeles.

In 1998, Arbitron together with Edison Media Research of Somerville, New Jersey, conducted the first of our twice yearly studies on how consumers use the Internet and streaming. These studies are free to the general public (available at www.arbitron.com) and they have become widely cited in the industry and the press. In 1999, Arbitron formed our Webcast Services division dedicated to providing credible third-party measurement that advertisers and advertising agencies use in order to make informed media planning and buying decisions, and webcasters use to demonstrate the size and value of their audience.

I started with Arbitron in 1981 and have been vice president/general manager for Arbitron Webcast Services since 1999. Prior to my current position, I served in marketing, management and sales roles at Arbitron working with radio stations, advertisers and advertising agency customers. I have also worked in radio station sales management and co-founded a company that provided radio managers and programmers with in-depth audience analysis and strategic advice.

You have several qualified panelists here today with a wide variety of backgrounds, so I will concentrate my comments on Arbitron's areas of expertise: specifically, the audience to traditional over-the-air media, how consumers use the Internet and streaming, and our general knowledge of the advertising sales, planning and buying process.

The size and growth of the streaming media audience

January 2002 research[1] shows that streaming is highly popular among American consumers. Streaming media usage is at an all-time high, with an estimated 80 million Americans having tried it. Also, regular usage of Internet audio and video increased substantially in the last year. The growth of residential broadband will most likely stimulate greater usage because people with broadband Internet connections use far more streaming media than those with dial-up connections.[2] Twenty-seven million Americans

[1] Arbitron/Edison Media Research. *Internet 8*, Winter 2002.
[2] Ibid.

now have broadband connections at home, and 14 percent of those with dial-up access plan to get broadband in the next 12 months.[3]

Despite this remarkable growth, streaming media is still in its infancy compared to traditional broadcast media. As of January 2002, nine percent of the population aged 12 and older used streaming audio or video in the past week.[4] In fall 2001, 95 percent of people 12 and older listened to radio during an average seven-day period.[5]

Streaming media provides a variety of voices and choices not available through traditional media

Streaming media provides a valuable service by enabling consumers to have a variety of choices that are not available through traditional media. For example, it is highly unlikely that consumers would be able to hear klezmer or Celtic music on over-the-air radio, but these music styles are easily found online. Also, Classical music is not found on commercial radio in most markets today, but it is widely available on the Internet through streaming media. The ability for consumers to get "what they want, when they want it" is one of the medium's strongest value propositions. Traditional media limit the types of music they play over the air, while streaming media can expose consumers to a wider variety of music. Also, since the cost of entry is so low, streaming media is capable of promoting a wider variety of voices than traditional media. The most active streaming media users are those who listen or watch each week. Among this group, nearly two-thirds (63 percent) agree that they use the Internet to listen to audio content that they cannot otherwise find through traditional over-the-air radio.[6]

Impact of proposed digital-rights fees

We analyzed the proposed digital-rights fees from the Copyright Arbitration Royalty Panel (CARP) in an effort to understand the impact of the proposed fees and put the fees in perspective.

Digital-rights fees for a top-ranked music station in New York:

As an example, if one of the top-rated radio stations in New York rebroadcast its programming online and had the same audience on the Internet as it does over the air,[7] that station would pay approximately $15 million per year[8] in digital-rights fees. Thus, the digital-rights fees would be more than 25 percent of what that station currently derives from selling traditional over-the-air advertising (approximately $56 million per year[9]). If that online station had original programming on the Internet (versus a rebroadcast), its digital-rights fees would be approximately $30 million, or over half of the revenue a top-ranked music station in New York derives from its over-the-air advertising.

Digital-rights fees for a top national radio network:

If one of the top national radio networks had the same size audience online that they do over the air,[10] their digital-rights fees would be $358 million, which amounts to approximately 39 percent of the entire network radio advertising industry revenue today (approximately $910 million[11]).

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[3] Ibid.

[4] Ibid.

[5] Fall 2001, Arbitron, American Radio Listening Trends, Cume Rating, Mon-Sun 6AM-Mid.

[6] Arbitron/Edison Media Research, *Internet 8*, Winter 2002.

[7] Approximately 162,000 listeners during an Average Quarter-Hour during the Fall 2001 Arbitron survey in the New York Metropolitan Statistical Area.

[8] 162,000 listeners per Average Quarter-Hour X 15 songs per hour X 24 hours per day X 365 days per year X $0.0007 proposed digital-rights per-performance fee for radio stations that stream a rebroadcast of their over-air content online = approx. $15 million

[9] Source: Broadcast Investment Analysts (BIA) 2001 annual revenue estimate for the top-ranked music station in New York.

[10] Approximately 3.9 million people listen to a top ranked radio Network during an Average Quarter-Hour, according to the RADAR® Summer 2001 Radio Network Audience Report.

[11] Source: Radio Advertising Bureau

Digital-rights fees for the entire radio industry:

If the number of Americans listening on the Internet to rebroadcasts of the programming of music stations equaled the size of the over-the-air audience, the radio industry would pay approximately $2.4 billion[12] in digital-rights fees. This amounts to approximately 13 percent of radio's total advertising revenue for 2001.[13]

While broadcasters pay licensing fees to composers of music, currently they do not pay fees to artists and labels. However, if the proposed fees were applied to an over-the-air radio audience, the royalty would create an impact that would significantly alter the financial viability of an already mature and healthy medium. Broadcasters would not be able to sustain a cost that amounts to 25 percent or 50 percent of their current over-the-air revenue. The webcasting industry is still in its infancy, with little revenue and profit being generated at this stage of the market's development. Therefore, the impact on the webcasting industry would be even more burdensome.

Consumer awareness and attitude toward proposed digital-rights fees

Arbitron and Edison Media Research conducted a poll from May 2, 2002, to May 6, 2002, to understand consumer awareness and attitudes regarding audio streaming and digital-rights issues. We spoke with 162 people who listen to Internet audio on a monthly basis.

- Half (49 percent) are aware of the current issues facing audio webcasters regarding licensing and performance royalty fees.[14]
- One in six (16 percent) say that Web radio stations and Internet-only audio Web sites or channels they listened to online in the last year have stopped offering the ability to listen over the Internet.[15]
- Nearly two-thirds (64 percent) would be upset if the Web radio stations or Internet-only audio Web sites or channels they normally listen to permanently stopped offering the ability to listen over the Internet.[16]
- Two-thirds (67 percent) support action by Congress to address the proposed online music licensing fees in ways that would help Internet audio webcasters afford to continue streaming music.[17]
- Nearly four in 10 (39 percent) feel strongly enough about the threat to Internet radio to indicate that they would be willing to write to their Congress representative in support of Internet audio webcasters regarding licensing and performance royalty fees.[18]

Conclusion

While webcasting's audience is growing rapidly, it is still small compared to the traditional media. We believe that all parties should work together to enable webcasting media to grow a critical mass of audience big enough to support significant advertising revenue. A broad distribution of programming, greater competition and a diversity of voices on the Internet will help achieve this objective.

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[12] Approximately 32 million Americans listened during an Average Quarter-Hour according to the Fall 2001 RADAR Radio Network Audience Report. Approximately 82 percent of listening during an Average Quarter-Hour is to music-formatted radio stations according to Arbitron's American Radio Format Trends. 32 million listeners per Average Quarter-Hour X 82% X 15 songs per hour X 24 hours per day X 365 days per year X $0.0007 proposed digital-rights per-performance fee for radio stations that stream a rebroadcast of their over-air content online = approx. $2.4 billion.

[13] $18.36 billion; source: Radio Advertising Bureau

[14] Arbitron/Edison Media Research, Poll of Monthly Listeners to Internet Audio, 5/2/02-5/6/02.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Ibid.

Testimony of Hilary Rosen

Chairman and CEO, Recording Industry Association of America

before the

Committee on the Judiciary

United States Senate

on

"Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?"

May 15, 2002

I am Hilary Rosen, Chairman and CEO of the Recording Industry Association of America, Inc. ("RIAA"). I would like to thank Chairman Leahy, Senator Hatch and the other members of this Committee for affording me an opportunity to testify and to clear up some of the confusion about the recent Copyright Arbitration Royalty Panel ("CARP") proceeding involving webcasters. As you know, RIAA members own the copyrights in over ninety percent of the legitimate sound recordings produced in the United States, and RIAA participated on behalf of those members in the recent arbitration. We also have helped to establish SoundExchange, a collecting agency whose board is composed evenly of record labels and recording artists and their representatives. SoundExchange, which will soon be incorporated as a separate legal entity, and will collect and distribute the royalties paid by webcasters and others for the digital performance of sound recordings.

We want webcasters to succeed. This application of technology is exciting. It has energized music lovers and fans, some of whom have turned themselves into webcasting entrepreneurs, and it has also provided a new business opportunity for some of the

world's largest and most innovative media companies. If webcasters don't succeed artists and record companies stand to lose an important new revenue stream. For years, artists and record companies have been denied the performance rights that other copyright owners enjoy in the United States and that artists and record companies enjoy in other countries – a situation that has been well documented for its inequity. New revenue streams are more important than ever in a world where new technologies are dramatically changing the way people get and listen to music.

The fact that we worked closely with this committee and others in 1998 when Congress enacted legislation guaranteeing, in an unprecedented manner, that a new business called "webcasting" would have access to blanket licenses for sound recordings on a compulsory basis, is a testament to our commitment to the success of these businesses. We even invested millions of dollars creating a collection and distribution system that would significantly ease the webcasters' burden of using hundreds of thousands of different recordings in their programming. Artists and record companies engaged in this activity despite the risk that payment would not come for several years as rates were worked out in the marketplace or in a CARP proceeding.

We fervently believe now as we did then that webcasters can succeed while compensating the creators of the sound recordings upon which they have built their business. It is obvious that without sound recordings there would be no webcasting business. It is equally obvious to artists and record companies that webcasters were required to pay other costs from day one of their business: their rent, their bandwidth, their webmasters, their suppliers of computer hardware, software and office equipment, etc.

The issue of how much to pay for music is a complicated one. The compensation should be determined through a fair process and be based on the market value of the sound recordings. We believe that the recently completed CARP proceeding was fair. It was long, cumbersome and expensive. But now, three and a half years after Congress first created this new compulsory license we look forward to the implementation of the arbitrators' decision so that record labels and artists can finally be compensated.

I am fully aware that the Committee has been hearing from some webcasters that the rates are too high or that the process was unfair. And so I am pleased that we all have the opportunity of this hearing to air our views. I believe that an analysis of the CARP process generally, especially after one of the most expensive and lengthiest CARP proceedings ever, will serve us all well in the future. And it is certainly within this Committee's discretion to change that process for future proceedings. But with respect to an analysis of the current proceeding, it is important to keep several things in mind as you listen to testimony today.

- The statute directed the parties to attempt to negotiate rates in the marketplace, and a CARP proceeding was a last resort. Because webcasters had a compulsory license and therefore didn't need to negotiate a rate, they could avoid paying royalties for several years by opting not to negotiate. Many webcasters took advantage of this and have avoided paying royalties while awaiting the final outcome of the CARP decision. In other words, they have already had a significant boost in starting their business.
- Nobody was "outgunned." Several large media companies, including AOL, Viacom and Clear Channel had many highly paid and skilled lawyers and

consultants in the CARP proceeding fighting for as low a rate as possible. Many small webcasters also participated by presenting evidence and testifying, and no doubt benefited from the very able counsel and experts retained by the larger companies. Even if some smaller webcasters did not participate, their view was well represented.

- The arbitrators had access to a huge amount of confidential financial data about the webcasting and recording businesses. They did their homework. They looked at large and small companies, their costs, their financial projections, their forecasting statements, their IPO offerings, etc. In other words, the CARP had a lot more information about the webcasters' ability to pay than this hearing could ever unveil.
- The Librarian of Congress is currently reviewing an unredacted version (which I certainly haven't seen) of the arbitrators' decision. I am sure that review will be thoughtful and considered, and it should be based on the extensive record evidence. Congress set up this process. Let it work through to the end without judgment or interference.

I am pleased to be here today and look forward to your questions. We absolutely want to work productively with the webcasters on the implementation of this decision. And, of course, we want to work productively with this Committee as you determine the best course for these types of proceedings in the future.

Background: The Digital Performance Right and the CARP Process

To help understand the importance of this issue, some background is necessary. Because of a historical anomaly, for most of the twentieth century sound recordings did not have any performance right under U.S. copyright law. Congress sought to correct this inequity in part in 1995 when it enacted the Digital Performance Right in Sound Recordings Act ("DPRA"). The DPRA gave recording artists and record companies a limited performance right, applicable only to the digital transmission of their works. In 1998, Congress clarified in the Digital Millennium Copyright Act ("DMCA") that this right applies to certain Internet music services like webcasters, but granted the webcasters a compulsory license to help streamline the process of clearing rights and paying royalties for the use of sound recordings. Under a compulsory license, a webcaster does not need to negotiate for permission from the copyright owner to perform sound recordings, but must pay the royalty established by law. Congress made clear that one-half of these royalties collected under this compulsory license would be allocated to the recording artists (including background vocalists and musicians) and one-half to the record companies.

After the DMCA, all a webcaster had to do to begin performing sound recordings to its listeners was to file a single piece of paper with the Copyright Office and pay a small filing fee of around $20. Because the royalty rate is to be set by negotiation or a CARP, webcasters accrue but do not have to pay any royalty until the rate is set. Indeed, in the three-and-one-half years since enactment, nearly all webcasters have not paid any royalties for their use of sound recordings while the CARP process has been ongoing. Many webcasters have come and gone in that time, and it is likely that no royalties will ever be paid for those services' use of sound recordings.

In light of these circumstances, RIAA found trying to negotiate the rates and terms for the statutory license to be quite difficult. Early on we were informed that the Digital Media Association ("DiMA"), a webcaster trade association, could not negotiate on behalf of its members as a group, and that we would have to negotiate individually with each webcaster over its rates and terms. Of course, because they could enjoy use of the recordings without payment under the compulsory license and negotiating with the copyright owners would mean paying immediately, most webcasters opted to sit and wait for the CARP to set the rates and terms, and never discussed a deal with us. Indeed, as we learned, there was a concerted effort to discourage webcasters from engaging in private negotiations and to instead join the "team" that was preparing for litigation. As a result, we unfortunately were unable to avoid a costly arbitration.

We were successful, however, in reaching agreement with 26 webcasters, large and small, and presented these agreements to the CARP as evidence of the marketplace rate. The CARP closely scrutinized all of that evidence, as well as the evidence presented by the webcasters and broadcasters and evidence that the CARP developed itself that neither party presented. Based on that extensive record, the CARP issued its proposed royalty rates. Both sides appealed the ruling to the Librarian of Congress, and he is considering those appeals now.

Correcting Some of the Myths About the CARP Process and Decision

The CARP decision was the result of a ten-month long proceeding that included more than fifty witnesses and thousands of pages of documents. We have asked the Librarian of Congress to modify the opinion because we believe the rates do not reflect

the overwhelming evidence that fair market value for sound recordings is much higher. However, we have been careful to limit our arguments to the appeals process.

Some webcasters want Congress to change the rules of the game now that the time to start paying is finally at hand. In the end, if Congress believes a subsidy for webcasters is appropriate, it should not come on the backs of the individual creators and companies who provide the webcasters with the key component of their business. Perhaps other subsidies, such as tax breaks, would be more appropriate.

The purpose of the CARP process is to determine rates in a fair and efficient manner. The process should be respected, and efforts to have rates set by some ad hoc alternative method should be rejected. In any event, dialogue on this issue is often difficult because of confusion and misinformation surrounding the CARP proceeding and decision. We would like to address some of those issues now.

Myth #1: The proposed rates will bankrupt small companies and silence webcasting. In fact, under the CARP's decision a webcaster will pay at most around 2 cents to play one hour of recorded music to one of its listeners, and some (such as many college radio stations that put their signal online) will pay about one-tenth of that amount. Some webcasters paint a very simple, but misleading, economic picture – they claim that the CARP's proposed 2 cents per listener hour rate leads to a royalty payment that is multiples of their revenues and therefore would bankrupt them. What they don't tell you is that nearly all of their other expenses – such as their bandwidth, hardware, software, marketing and employee costs – are many multiples of their revenues. New businesses

are often "deficit-financed" where costs exceed revenues, and Internet music services are exemplars of this approach.

For example, in the CARP proceeding nine webcasters, big and small, presented data that showed that combined they would spend over a half-billion dollars on expenses for the 1998-2002 period. The CARP's proposed royalty for these companies would be only about 4 percent of these expenses (approximately $20 million). This data includes data for Live365, an aggregator of "small" webcasters, as well as other small webcasters.

The notion that the sound recording royalty is the cause of financial hardship for these companies is also belied by the reality of the past three years, when hundreds of webcasters launched and did not survive even though they never paid a cent in royalties for sound recordings. For example, NetRadio, one of the first webcasters, raised tens of millions of dollars in investment capital, but shut down last October before ever paying anything for the hundreds of millions of sound recording performances it made.

In essence, because of the compulsory license, artists and labels are "last in line" to be paid by webcasters, even though their entire business revolves around our creative product. No one would suggest that the webcasters' hardware vendors, bandwidth providers or employees be forced by Congress to give webcasters rebates, below market prices or agree to accept a percentage of a webcaster's revenue to help "preserve" the webcast industry, even though the webcasters typically spend more on those components of their business than they currently earn in revenues. There is no reason artists and record labels should be treated any differently and forced to subsidize webcasters.

Even so-called "smaller" webcasters vastly overstate the effect of the CARP's proposed royalty. A real world example demonstrates this. Hober.com is a webcaster

from Takoma Park, Maryland who was recently mentioned in the Washington Post as a smaller webcaster who might be harmed by the CARP's decision. Hober.com specializes in what it calls "unvarnished music," which appears to include folk, bluegrass, blues and jazz. On its site Hober.com asks listeners to support its webcasts with donations. It claims that "[i]t costs a few cents an hour to broadcast to each person," and suggests "every day listeners" make a one time gift of $50 to $100 dollars, and that "if you want to be a saint," you should donate $20 a month.

To put the CARP's proposed rates in perspective, if one "every day" listener donated $50 to Hober.com, that donation alone would pay the royalty obligation for that listener to listen to Hober.com six hours a day for every day of a year. If Hober.com is willing to spend "a few cents an hour" to broadcast to each person, why should it not be willing to spend just 2 cents an hour for the creative work that forms the core of its service? In fact, Hober.com explains that the donations are used "to make sure that our children and grandchildren have continued access to this incredible wealth of natural music played by real humans." We agree – and that is why the 2 cents (at the very least) should be paid to the "real humans" who have created the "wealth of natural music" that Hober.com provides to its listeners.

Myth #2: The CARP process is unfair and prejudicial to smaller webcasters.

We understand that some webcasters who are not happy with the CARP decision after-the-fact are claiming that the process was not fair to them. While the artists and record labels are not happy with the result either -- the result is a lot closer to what the webcasters asked for than what we asked for – the process thus far has treated all parties

and potential parties equally. Just as some smaller webcasters like XACT Radio and RadioAmp participated in the CARP proceeding and presented evidence, the artists and labels presented evidence based on agreements with smaller webcasters (characterized by webcasters' counsel in the proceeding as "chump change"). Some smaller webcasters claim that they could not afford to participate in the proceeding, but the same situation applied to hundreds of individual artists and independent labels that are depending on these royalties as an important source of income in the changing marketplace for recorded music. Indeed, this Committee has received written testimony from the American Federation of Independent Music that outlines the burdens on small record companies in their everyday business.

I would also like to debunk one of the rumors that has emerged after the CARP rates were announced: that RIAA somehow prevented smaller webcasters from participating in the CARP proceeding or would not agree as others did to subsidizing their costs. This unfortunate assertion is completely untrue. RIAA never had the authority to keep anyone from participating in the CARP process, and the case presented by the artists and record labels was also harmed by the inability of smaller parties to present their views without full CARP participation.

At one point the Copyright Office asked for comments on the possibility of establishing different procedures for smaller parties. RIAA suggested that the Office establish procedures that would allow consideration of amicus filings by smaller parties on a case-by-case basis, consistent with the procedures followed in federal court. The Copyright Office, however, decided that it could not adopt new procedures in the middle of CARP proceedings, in part because it did not have clear authority to do so. All parties,

and especially smaller parties, would have been harmed if the Office followed invalid procedures that required the whole proceeding to be thrown out after a tremendous amount of time and effort was spent litigating the case. This decision applied equally to parties of all types, including artists groups that ultimately did not participate in the proceeding because of the ruling.

Moreover, the CARP heard substantial amounts of testimony about smaller webcasters from participants in the CARP proceeding. Live365, which has been vocal in leading the after-the-fact complaints about the rates on behalf of smaller webcasters, was a full participant in the CARP, as its chief legal officer testified at the hearing, noting that it had three well-known law firms representing it on statutory license matters. Live365 has also taken clear advantage of the process by having separate counsel file a separate appeal that purports to address issues of concern to smaller webcasters. Witnesses for other smaller webcasters such as XACT Radio and RadioAmp participated fully, explaining their services and their businesses to the CARP. It should be noted that these webcasters also testified that they use a substantial number of copyrighted sound recordings in offering their services.

In fact, the CARP actually ended up setting a lower rate for certain noncommercial parties that would generally be considered "small" webcasters. Many of the noncommercial college radio stations that are complaining about the impact of the rates may not be aware that they will be able to pay rates that are only about one-tenth the rates that will be paid by commercial webcasters for the webcasting of their over-the-air signal. That amounts to far less than one cent per hour of music – surely much lower than they are paying for their other expenses, even on a minimal budget.

Finally, the CARP process did not take place overnight. After about two years of preliminary proceedings, the CARP hearing took place over six months, during which three independent professional arbitrators received dozens of volumes of written testimony, reviewed thousands of pages of exhibits, heard from more than fifty witnesses whose testimony was tested on cross-examination during forty days of evidentiary hearings, reviewed 15,000 pages of transcripts from those hearings, and reviewed close to 1,000 pages of legal briefs submitted by experienced counsel. The arbitrators also had access to sensitive business and financial data from virtually all the parties – data that is not available to any of us because of its highly confidential nature. The arbitrators weighed all of this evidence for months and wrote a 135-page report analyzing the evidence and setting the rates.

Thus, while the parties may disagree with the arbitrators' ultimate conclusion, the process was certainly fair.

Myth #3: A percentage of revenue rate makes more sense for smaller webcasters, but the RIAA fought against the adoption of such a rate in the CARP proceeding. Some webcasters are now saying that the CARP should have adopted a royalty rate based on a percentage of the services' revenues, rather than the "per performance" or per use rate it adopted. They argue that this would allow services to afford the royalty in the early stages when their revenues are low.

The reality is that the CARP exhaustively considered a percentage of revenue option because the RIAA (not the webcasters) proposed that a webcaster could choose to pay 15 percent of its revenues (with a minimum fee of 5 percent of its operating

expenses). It was the webcasters who insisted upon a per use fee (except at the very end of the process after final rates were proposed), and several webcaster witnesses, including their principal economic expert, testified against the adoption of a percentage of revenue rate. In the end, the CARP (relying in large part on the webcasters' expert witness) concluded that a percentage of revenue metric was inappropriate for several reasons.

First, the arbitrators recognized that with a percentage of revenue rate, the devil is in the details. It is difficult to define exactly what "revenues" are covered by the rate, especially where the webcaster does many things on its web site that may be unrelated to music. Also, the arbitrators determined that webcasters should not be permitted to make extensive use of sound recordings and pay very little in royalties simply because their business structure provides for very little revenue in their webcasting operation. For this reason, RIAA proposed a minimum fee based on a percentage of the webcasters' operating expenses to guarantee that some value was paid for the use of the sound recordings. But this too has its complications, as one must define what "operating expenses" are covered.

The CARP also found that a percentage of revenue rate would be unfair because webcasters using the same amount of music might pay wildly different royalties if their revenues differed. In addition, the CARP noted that because webcasters are currently generating very little revenue, the percentage of revenue rate could result in very little royalty for an extensive use of sound recordings and thus deny record labels and artists fair compensation.

Myth #4: The rates for performance of sound recordings should be the same as the rates for performance of musical works. Some webcasters have also suggested that the proposed CARP rates are significantly higher than the rates paid to ASCAP, BMI and SESAC for the performance of musical works, and that the rates for musical works and sound recordings should be the same. This claim is really an attempt to reargue the CARP proceeding, as this issue was at the center of much of the arbitration, where the CARP considered an enormous amount of evidence presented by both sides on this very issue.

The bottom line is that the comparison is really one of apples and oranges, on many levels. First, the sound recording business and the musical work business are very different, with different cost structures and revenue streams. After hearing substantial evidence on this point, the CARP concluded that it does not make sense to equate the two for purposes of rate setting. Second, even on the surface the rates cannot be accurately compared, as the CARP's rate is a "per use" rate, something ASCAP and BMI have never used in their dealings with services because they have negotiated variations of the percentage of revenues rate. In fact, ASCAP and BMI told the CARP that it would be inappropriate to convert their percentage of revenue rates to per use fees. Finally, the musical work rates were adopted for use in the analog world by broadcasters, and tell us very little about the value of sound recordings in the digital world of the Internet webcaster.

The Importance of a Meaningful Performance Right for Sound Recordings

To be sure, we understand that webcasters are struggling to figure out how they can generate enough revenue to support their businesses and earn a healthy return on their investment. That is a reality that our members face in their own business everyday. As the creators of recorded music, we would love to see as many webcasters as possible thrive in the marketplace, because it means more royalties and more outlets for our creative product. We strongly disagree, however, that the sound recording performance royalty is an obstacle to that success, and believe that webcasters should spend more time seeking a constructive solution with artists and labels to help both industries grow.

Congress created the digital performance right because sound recordings have been the lone exception to the bedrock principle of copyright law that creators and owners of copyrighted works should share in the benefits when others make commercial use of their works. Congress agreed that, with new digital technologies on the horizon, the rules of the road should be laid out in advance and this old injustice remedied. That's why artists and labels were awarded royalties from digital transmitters of music – because the historical anomaly of not paying performance royalties was unfair, inconsistent with the treatment of every other copyrighted work, and inconsistent with international norms.

As it happens, this decision was not only right, but also prescient. As you well know, new technologies are facilitating the widespread looting of recordings, eating away at the sales that have been the sole source of revenues underlying the entire recording industry.

This is not a piracy argument we are making. Rather, if, as everyone believes, technology is moving the consumer away from buying physical goods in the record store, new distribution systems must be available to spread out the risk and ensure a return to those who invest in the creation of sound recordings. In other words, for decades, artists and record companies have relied solely on the sale of physical product in the stores for their return on investment. As technology develops, there must be an incentive for labels and artists to license other forms of music delivery. Other owners of copyrighted works are able to spread their investment risk over multiple revenue sources. For instance, movie studios earn licensing fees from television broadcasters, from cable operators, from satellite services, from theaters and more. Similarly, music songwriters and publishers earn licensing fees from radio and television broadcasters, concert halls, satellite carriers, cable operators, and other entities that publicly perform their works.

Record labels are licensing their recordings to meet consumer demand for new products and services that go beyond the familiar compact disc; those efforts will go nowhere if below-market rates like those proposed by the CARP are cut back even further. Congress should be doing everything possible to encourage the broadening of income streams available to the recording industry, so that a single technological development like peer-to-peer does not kill off an industry because it has no other sources of revenue.

As a matter of public policy, it would be terribly unwise to take away the digital performance right – and make no mistake, lowering the royalties beyond the minimal level proposed by the CARP is akin to taking away the right to be paid fair market value for our works. Cutting back on alternative revenues is the wrong policy, at the wrong

time. Pre-judging the arbitration process also doesn't make any sense at this time. Support the implementation of the CARP decision and let everyone benefit from the advent of this exciting new application of technology – the creators of the works, the businesses who exploit those works and, most importantly, the music fan who will benefit most from us all working together.

We are grateful for this opportunity to present our views and I am pleased to answer any questions you may have.

Testimony of Frank Schliemann

Founder, Onion River Radio

Before the Senate Judiciary Committee

Hearing on

"Copyright Royalties: Where is the Right Spot on the Dial for Webcasting?"

May 15, 2002

Introduction

Chairman Leahy and members of the committee, I want to thank you for the opportunity to discuss the proposed sound recording royalty rate released by the Copyright Arbitration Royalty Panel on February 20th, 2002. I am privileged to be here on behalf of the Internet radio community.

Onion River Radio is an Internet-only radio station located in Montpelier, Vermont. Our objective is to serve our community, which we do in many ways. We are a Media Sponsor of community events such as First Night Montpelier and Green Up Vermont. We also feature local music in regular rotation to provide exposure and opportunity to local artists.

We believe, based on feedback from our listeners, recording artists, advertisers and the community, that Onion River Radio is in the earliest stage of what will eventually be a successful, local business. The recommended royalty rate, however, will cause Onion River Radio and hundreds of other Internet radio stations to file for bankruptcy. This is not the result Congress intended when enacting the DMCA.

Personal background

My career in radio began in 1992. Over the past ten years I have "worn many hats." As an On-Air Personality, I interviewed various artists such as Sheryl Crow and Melissa Etheridge. I also had the privilege of introducing the Dave Matthews Band to an intimate crowd of fans and record executives. The performance celebrated the band's major label recording contract with RCA.

As Management Information Systems Director with Capstar Broadcasting, I provided Local Area Network management support, developed the Internet department for the creation of station web sites and sale of online advertising, and assisted the Engineering Department in the maintenance and repair of studios, transmitters, and associated equipment.

I was able to combine my programming background with my engineering experience working for Burlington Broadcasters. As Acting Operations Manager I oversaw all Programming, Marketing and Operations in the absence of the General Manager, and oversaw the build-out of WIZN-FM and WBTZ-FM On-Air, Production, and Performance Studios.

Most recently with Killington Broadcasting, I oversaw the build-out of the On-Air and Production Studios for WEBK-FM, as well as all Programming and Production. When WEBK-FM was acquired by Pamal Broadcasting, the owner of many stations in Vermont and New England, I was offered a higher position within Pamal.

Rather than accept the position with Pamal, I chose to start an Internet-only radio station called Onion River Radio. I made the decision for several reasons:

1. The programming offered by broadcast radio has suffered as a result of the substantial consolidation of stations into a few large chains that was permitted by the Telecommunications Act of 1996.

2. Unlike terrestrial radio, Internet radio is not limited by local terrain or signal strength.

3. My combination of music programming, computer networking and engineering skills enabled me to create a viable business while keeping costs to a minimum.

A few large companies own the majority of broadcast radio stations, resulting in "cookie cutter" radio

Since Congress enacted the Telecommunications Act of 1996, radio stations have been bought and sold numerous times. Eventually, companies such as Clear Channel were able to acquire many of the other broadcasting companies. WVGO-FM, for example, was under the ownership of five separate broadcasting companies over the span of three years: Benchmark, ABS, SFX, Capstar, and Clear Channel.

In an effort to reduce costs, many broadcasters use a single music consultant for stations with a similar format. The songs played on a country station in Springfield, Massachusetts are the same songs heard on a country station in Springfield, Illinois. The result is "cookie cutter" radio.

Another trend in broadcast radio is to limit the number of songs that can be scheduled for airplay and decrease the amount of time before a song can be repeated. Fewer songs and a tighter rotation increase the listener's chance of hearing his or her favorite song as he or she drives to work. Unfortunately, the same listener will hear the same songs on the drive home. This also makes it difficult for local and lesser-known artists to receive radio airplay. A lack of diversity on the other hand, creates opportunity for stations such as Onion River Radio.

Internet radio provides listeners and artists with an alternative to cookie cutter radio

The success of Internet radio, as reported to you in this hearing by Arbitron and as documented daily by our server logs, is proof that music-loving consumers want access to the originality and variety that online radio represents (see, for example, a sample from the numerous testimonials from our listeners that I have attached to the end of this testimony). Notwithstanding the technological imperfections of this new and developing medium Onion River Radio's audience is steadily growing, and Internet radio generally has exploded. Since January 1, 2001, the total time spent each week listening to Internet radio stations measured by one ratings company, MeasureCast, has increased 563%, as shown in the attached chart.

A listener in Los Angeles sent the following email: "I figured a Vermont station might play toward my classic rock, slightly granola, songwriter leanings. It really is a great station free from bubble gum pop and overplayed classics." On Onion River Radio, listeners can hear lesser-known artists mixed in with more established artists. Local artists and record labels also appreciate the exposure we provide them.

Internet radio overcomes the physical limitations of broadcast radio

In Vermont, as you know, Mr. Chairman, local terrain makes it difficult to listen to broadcast radio. Although only forty miles away, a listener in Montpelier cannot hear a 50,000-watt broadcast station in Burlington. The Internet however, makes it possible to listen to Onion River Radio anywhere in the world.

Internet radio stimulates the growth of broadband services

Internet radio also gives consumers a reason to install a high-speed connection in their homes, therefore encouraging the growth of broadband. Very soon, wireless broadband networks using third-generation or 3G technology will take Internet radio to the next level. The growth of networks such as this will expand Onion River Radio's opportunity for success. The Internet is an exciting new medium that needs time to develop.

The CARP's proposed decision would bankrupt my business

As General Manager, Program Director, Engineer, and Traffic Manager, I have invested a considerable amount of time over the last sixteen months to ensure the success of Onion River Radio. I have also invested a substantial amount of money. Our audience has continued to increase, and prior to February I was convinced that Onion River Radio would not only survive, but also provide results for local advertisers. Then the Copyright Arbitration Royalty Panel recommended music licensing rates that would result in royalty fees totaling 78% of our gross revenue.

The RIAA and SoundExchange have said many times in the media that webcasters should not get a "free ride" from record companies and recording artists. Webcasters are not asking for a free ride. We want to ensure that all creators are fairly compensated for their work. Like broadcast radio, Internet radio stations already pay royalty fees to songwriters and music publishers for the same performances of the same works. If the CARP decision is approved by the Librarian of Congress, Onion River Radio will pay a sound recording Performance Fee of $1,880.93 for January – March 2002. In contrast, our performance fees for that period to songwriters and music publishers, through ASCAP, BMI and SESAC, will total $170.50.

The total time spent listening to Onion River Radio has doubled between October 2001 and March 2002 (from 16,513 hours to 32,162 hours). Because the CARP-recommended royalty rate is a flat rate based on the number of times a listener hears a song performed, Onion River Radio and other Internet radio stations must pay for every additional listener. As our ratings continue to increase, I expect our TSL (total time spent listening)

will reach a minimum of 100,000 hours per month by the end of the year. A station that streams 100,000 hours per month will be required to pay an annual Performance Fee of $25,200 (Performance Fee = TSL x 15 songs per hour x .14¢).

A percentage of revenue royalty formula is fair to all webcasters in all markets

Radio broadcasters have paid songwriter royalties on a percentage-of-revenue basis for decades. For a typical broadcaster, larger audience means increased payments for advertising, which means increased payments to songwriters and music publishers through ASCAP, BMI and SESAC. The percentage-of-revenue formula is a win-win for broadcasters and songwriters.

The advertising rate for a 60-second commercial between 6 a.m. and 7 p.m., on Onion River Radio is $10. Our advertising rates must remain low in order to compete with local broadcast stations. With limitations on growth and advertising revenue, the sound recording royalty is even more threatening. We need a large number of listeners in order to attract local advertisers and increase revenue. We also need a large number of listeners to ensure our advertisers will get results. An increase in the number of listeners, however, will result in a higher fee. We will be bankrupted by royalties.

I have been asked why Onion River Radio did not prepare for this new royalty. To the contrary, we did. Regretfully, I assumed, like everyone else in the industry, there would be a percentage-of-revenue alternative similar to the 3-4% webcasters already pay to songwriters and music publishers. Rather than a flat rate based on the unknown, a percentage-of-revenue alternative will allow Onion River Radio and other Internet radio stations to grow and generate more profits for creators, publishers, performers and producers, as well as webcasters.

The record industry has misinformed Congress and the media about Onion River Radio and webcast economics

I am troubled by the lengths to which the RIAA has gone in its effort to squeeze every penny possible out of webcasters, with no regard to whether they are killing the goose in their greed for golden eggs. For example, in a recent letter that was published in Salon.com ("The Battle Over Web Radio Continues") Steve Marks of the RIAA makes the following misstatements and distortions:

1. "OnionRadio [Onion River Radio] is part of the WarpRadio Network, which includes 12,518 stations."
   - Fact: The actual number of stations is between 180-195 according to Denise Sutton, WarpRadio CEO.

2. "WarpRadio is likely to be paying, not OnionRadio."
   - Fact: All sound recording licensing fees are the responsibility of the affiliate (in this instance, Onion River Radio), according to our contract with WarpRadio and according to Candice Seevers, WarpRadio Traffic Manager.

3. "More important, based on MeasureCast reports, WarpRadio would owe about $57 per station."
   - Fact: At our current audience size, it will take less than two days to exceed a fee of $57, and as noted above our fee for January-March 2002 is almost $1900.

Additionally, in a recent New York Times story, Mr. Marks said "They [webcasters] pay for the bandwidth, they pay for their computers, they pay for the streaming software. There's no reason they should not be able to pay for the very music they're building a business on."

- Fact: Onion River Radio already pays for music. We also pay performance fees to songwriters and music publishers, through ASCAP, BMI and SESAC. At a cost of $250 per month, bandwidth is our single largest expense. Because our contract with WarpRadio includes live no-limit streaming the cost of bandwidth will remain unchanged. As technology improves we anticipate bandwidth costs will in fact go down. Our performance royalty of $675 per month, however, will increase as our audience continues to grow.

Internet radio should be treated like broadcast radio

Broadcast radio has never paid sound recording performance royalties, based on the theory that radio performances serve to promote CD sales. However, the same can be said for Internet radio. In fact, Internet radio is a better promoter of music sales than is broadcast radio: If a listener hears a new song on Onion River Radio that is unfamiliar, he or she can find the artist, song title, and record label by clicking on the "Menu" button and "New Music Playlist." Other Internet radio stations let the listener click right through to a sales destination to buy the new song or CD that they just heard and enjoyed.

Onion River Radio should not be held responsible for revenue the RIAA believes it is losing in CD sales from file-sharing web sites such as Napster. Internet radio is similar to broadcast radio and does not pose a threat of piracy. There is a fundamental and crucial difference between streams, which Internet radio sites like Onion River Radio provide and which are transitory occurrences that are not stored on a computer's hard drive any more than a song played by broadcast radio is stored on your car radio, and downloads, which are made available by services such as Napster and KaZaA and which are permanent copies that are stored on hard drives.

Physically, there is little difference between WIZN-FM, WBTZ-FM, WEBK-FM and Onion River Radio. All four stations use similar hardware and software. In order to maximize hard drive space, broadcast radio stations use compressed copies of original sound recordings. Like broadcast radio, Onion River Radio uses compressed copies of sound recordings that are approximately one-fourth of the original file size. Streaming further degrades the quality of a recording. Onion River Radio streams at a rate of 20K bits/second with a frequency of 22.05 kHz. With a 20K, 22.05 kHz stream, the bit rate is compressed by more than 6 times and the frequency is cut in half.

The copyright principles that exist for broadcast radio should also apply to Internet radio. However, the law presently discriminates against the Internet, by requiring Internet radio to pay whole sets of royalties that broadcast radio does not have to. Unlike broadcasters, webcasters are required to pay a Performance Fee as well as an Ephemeral License Fee (9% of the Performance Fees due). In order for an Internet transmission to sound as smooth as broadcast radio, a few seconds of audio are retained in the RAM (random access memory) of the listener's computer. Once performed, the buffered audio is discarded and replaced with the next few seconds of music or commercial announcement. The Ephemeral Recordings do not have any economic value.

The recordkeeping requirements sought by the RIAA are oppressively burdensome

I am also concerned with the extensive monthly reports that the RIAA is urging the Copyright Office to require. Our Music Use Report for BMI requires the following four (4) fields of information: song title, artist, composer, and count (the number of times the song was played during the reported time period). The regulation submitted by the RIAA and published for comment by the Copyright Office requires twenty-three (23) fields of information (including ten separate means of identifying each sound recording, with items such as the UPC code) even though Congress, in the DMCA, required webcasters to submit only three (song title, album title and featured artist) to ensure the accurate distribution of royalties.

The proposed regulation requires webcasters to provide information on every song played, every hour of the day, every day of the year. Music reporting is a huge burden on a small business. It currently takes three weeks to compile the information requested by BMI for a three-month period. Keep in mind that BMI is requesting only four (4) fields of information. Compiling all twenty-three (23) fields of information (including ten separate means of identifying each sound recording) required by the RIAA would be infeasible.

I am now in the process of having new music scheduling software written that will enable me to record the additional information required by the RIAA and generate an electronic file. The time it will take to obtain the information, and whether it is possible to provide all of the requested data, is still an issue.

In addition, many details of this information could even be considered proprietary, like the order in which songs are played. This is information that broadcast radio stations pay research companies to keep track of on their competitors' stations in order to "counterprogram" their station. And there is no assurance for webcasters that we won't be competing with the RIAA directly within the webcasting space.

Conclusion

In the (attached) Business Week article "Saving Web Radio: The 5% Solution," Steve Marks of the RIAA "argues that the shakeout in the webcasting business would be a natural step toward a more mature industry." The future of my industry, and my right to

build a healthy local business in Vermont, should not be determined by an exorbitant flat rate. Unfortunately, the reality is that these royalties would never be paid, as we would be forced into bankruptcy. A percentage-of-revenue alternative would allow good business models to thrive while others fall short.

Giving consumers a choice makes good business sense. Onion River Radio is similar to a broadcast radio station with regard to format clocks, music categories, and certain programming rules. The music, however, is a unique mixture of AAA, Americana, Classic Rock, and Modern Rock, with local and lesser-known artists featured in regular rotation.

If the intent of the Digital Performance Right in Sound Recordings Act of 1995 and Digital Millennium Copyright Act of 1998 was to encourage the growth of new technology, implementing the exorbitant proposed rates will have the opposite effect. Instead, it will decimate the webcasting industry, reduce consumer choice, and decrease artists' opportunities to promote their music. I urge the committee and members of Congress to help save my industry, and do everything in your power to prevent these calamitous rates from being implemented.

Statement of Thomas McAllister

I am the founder and operator of Solvent Loud Radio, an Internet-only streaming radio station that features the hard rock side of Christian music. The station is entirely funded by me. I have not received any financial backing to get started and, at this time, we do not run commercials or receive profit from any advertising on our web site.

Solvent Loud Radio was created in my personal effort to promote the bands in the Christian hard rock genre that do not receive worthwhile airplay on FM or AM Christian radio stations. Simply put, it is nearly impossible to find a FM station that plays our style of music. My goal was not only to stream the broadcast in hopes that I might be filling a void for listeners looking for our style, but also to provide a flexible, creative environment where I could allow even a significant amount of independent artists an opportunity to get "airplay" and be heard. They have had that opportunity and the artists are thankful.

Because I am a web developer by profession, I understood the technologies involved in starting the station. Most of the music that I played in our broadcast initially was all purchased by me. But shortly after things progressed, I began to get packages of CD's and promotional materials from Christian rock record labels...some big, some small. So, I have had the support of the majority of the labels from the very early stages. In fact, several have commented about their excitement regarding what I am doing because it is "fresh" and "unique". In exchange for their support, the labels know that I not only play their artist's music, but also I have links to the artist's web site, the label web site and to sites that sell the artist's products. You don't get any of that on FM radio.

(**I think it's worthwhile to note that most Internet-based radio stations, like mine, have the technology to display the current artist and track on the station's web site. My web site will be adding this within a week or so. This is an added-perk over the FM/AM stations because listeners can learn who the artist is instantly when they hear a track they like. And, many times they can also follow a link to potentially buy the release.)

What started as a small, fun operation is still a small and fun operation. Our listener base has grown and the number of artists and labels who are contacting me has as well. Over the past year I have received numerous emails from listeners around the world thanking me for not "selling out" and for featuring the style of music that they have been looking to find for so long. Because this genre is not given much airplay, the music is new to most people. The listeners get excited and want to know who the artist is and where they can buy it. Reaching the listeners with this genre and hearing this feedback is my profit and makes it all worthwhile.

It frightens me to think that an Internet-based radio station like mine could be shut down due to the fees that are being recommended by CARP. When I got the operation up and running, my broadcasting company began paying our licensing fees and we worked diligently to comply with all DMCA requirements. Today, we continue to comply with all regulations and we stay up to date on changes that we need to make. As for the future, our online station will not be able to meet the strict, suffocating fees and regulations recommended by CARP and we will have no

choice but to shut down and turn our listener base away.

Again, we are a unique genre and our listeners will not have an alternative. Not to mention that the labels, who specialize in this genre and normally only find FM stations will to play hard rock shows after midnight, will lose one of the fastest growing promotion sources going for them. The genre will go without significant airplay and thus, without promotion. And, a passionate promoter who is able to use the Internet as a medium to help reach the world with this particular genre of music will be unable to spend my free time doing what I love.

I urge you to do what you can to help broadcasters like myself to keep our stations online. We are not in this to profit! We are in this because of our love for this style of music and our love for the artists who make it. Labels and artists alike support what we do. If the CARP recommendations are approved, it will be a sad day in this great country. Please, help to support us. Time is running out and I feel like our days are numbered.

Thank you for your time and efforts.

God bless,

Thomas McAllister
Solvent Loud Radio

Statement of Rusty Hodge

Dear Senator Leahy,

I would like to introduce you and Senator Leahy to SomaFM, a small but popular internet radio station. We have over 100,000 listeners a month, yet we run on a shoestring budget out of a garage in San Francisco.

SomaFM began as an experiment to determine if there was an audience for non-mainstream music. With commercial radio being dominated by several corporations playing formats with mass appeal, musical diversity was fast disappearing from the radio dial. The radio marketplace was so competitive that it was now unheard of for radio to take a chance and play something that might not be popular with the majority of the audience. I saw an opportunity in using the vast geographical reach of the internet to create niche music formats and hopefully find an audience that could support our endeavors. By recruiting a few friends to volunteer with the project in the hopes that some day we'd have a viable business, we got things going. Radio by the people, for the people.

Starting with one channel in 1999, playing "ambient" music, we found that we developed a small but dedicated audience. By early 2000, we had 3 channels. Our audience was small by broadcast standards - our AQH ratings were under a few hundred. (By comparison, a major market FM station will have a AQH of around 20,000. By 2001, we had 7 different channels - all focusing on niche genres rarely if ever heard on commercial radio.

One of the great things about the internet is how it lowered the barriers to entry to creating a mass media service. For the price of a few computers, and donations of excess bandwidth from Internet companies we worked for and with, we were able to acquire the "transmitter" we needed. The others who helped with SomaFM brought their knowledge of music and their skill at "DJing" and music programming. Together, we assembled a music collection of over 5000 CDs and close to 1000 LPs. (A music collection that is steadily growing.) We applied for ASCAP and BMI licenses, and for our first years pay them about $600 a year.

Initially, we thought we could make enough money to support the station by linking our playlists to a "Buy Now" button linked to Amazon.com. We would get a small percentage on each album sale, usually 75 cents. But we found while many users clicked through to

Amazon, many ended up buying the CD someplace else. Our commissions weren't bringing in as much money as we hoped.

At that point, we still didn't have enough audience to make significant money from advertising, so we decided to become "listener supported and commercial free". Much like NPR or Public Radio, we wouldn't run traditional advertising and rely on donations instead. This worked surprisingly well, we initially started getting over $1000 a month in donations.

We continued to promote out station, introducing more stations. In 2002, we now have 9 different channels and an AQH of 2,000. Our donations are up to $2000 a month.

This model has almost worked, we were very close to breaking even. That is until we got the news of the CARP royalties. We were shocked. Expecting the sound recording royalties to be comparable to the ASCAP and BMI rates, when we learned that we would have to pay 0.14 cents per listener per song, and we realized that we could no longer continue in business if these rates were to be adopted.

Let's look at some numbers. In the last 30 days, our month long AQH as 1,820 persons. Figuring 15 songs per hour, our CARP fees for the last 30 days alone would be $27,526, or about $900 a day. This is more than ten times our monthly revenue (including Donations, record sales commissions, T-Shirt sales, etc).

Total Listener Hours last 30 days: 1,310,809
Average concurrent listeners (AQH persons) is 1,820
Average songs/hour: 15
RIAA fees for last 30 days: $27,526
Estimated RIAA fees for this year: $330,323

This amounts to approximately $15 per concurrent listeners per month in royalties alone. There is no way we can make this work with advertising, donations or even subscriptions at this rate.

We strongly believe that if Internet Radio is going to survive - which would be good because it is filling a gap left in the commercial radio field - it must have a percentage of revenue fee model. Furthermore, we believe that the sound recording royalties should not be more than the performing rights royalties, which are approximately 5%.

Regrettfully, we were not able to participate in the CARP proceedings

due to the high cost. We barely break even now, we have no deep-pocket investors. We're old fashioned entrepreneurs who are trying to "bootstrap" our company rather than seek investors. Counsel and costs involved with CARP were out of the question. We would have liked to file briefs but weren't allowed to. The truly small webcasters were effectively barred from the proceedings.

The RIAA has claimed that internet radio broadcasters don't want to pay for the music that they base their businesses on. This statement is inaccurate on 2 counts: we are willing to pay a reasonable royalty in addition to the royalties we pay now. And our businesses are not based on music. Our businesses are based on presenting music and exposing an audience to music that they otherwise would never have known about. The value we present to the listener is that of a filter - we discover new music, group it into genres and present it in an interesting and pleasurable format. There is a fine line between exposing an audience to new music and alienating them with something unfamiliar. We carefully get them to take a chance on something new, something different.

Internet radio is selling records, and in often cases, lots of them. For example, Pork Recordings, one of the first labels dedicated to the genre of music SomaFM features, credits us with being one of the leading referrals to their web site. Waveform Records even donates records to us to give away to our listeners. They find that SomaFM is an extremely good promotional tool for them.

We now receive about 10 CDs a week from small record labels who want us to play their music. We also receive a large number of requests from unsigned, independent artists to play their music. In most cases, these artists haven't even released a CD yet. They will send us MP3 files of the music they have written and recorded in their home studios. They will have no opportunity to get airplay on a commercial broadcast station, and they know that we can expose their music to an audience and that will in turn sell records or lead to a record deal. Small record labels love internet radio.

We want SomaFM to grow into a successful small business. We are on the way to establishing that. However, if these fees are put in place, we will have to cease our internet radio broadcasts.

We sincerely believe that SomaFM and other small, niche internet radio stations will bring great value to the consumer; sell more records; provide a legal alternative to file-swapping services for discovering new music; drive adoption of broadband technology;

provide a valuable service to users of the internet; and ultimately result in more money going to artists and record labels.

Sincerely,

Rusty Hodge
General Manager and Program Director
SomaFM
San Francisco, CA

Statement from Bryan Payne

Dear Senate Judiciary Committee,

In the spring of 1998 a partnership was legally formed and that initiated the start of our initial growth and Involvement in the Internet Broadcasting Industry as "both" a Technology Developer as well as an "Internet Broadcasting Company/Network". Upon Receiving notification in early fall of 1998, and as per DMCA requirements that all Companies or Individuals had until October 28th, 1998 in which to file an intent with the Copyright office for "Compulsory License" for the Digital Transmission of Copyrighted materials, we indeed complied and immediately filled out and mailed in the required forms with our $20 fee. This is currently on record with the copyright office.

As we began development of our "Internet Broadcast Management Technologies" and during the initial stages of planning our Business model and the terms of which we would operate it under. We made a conscious and decisive choice to base our Technologies Development and our "Base" Business model on what both the DMCA as well as the RIAA had outlined at that time. It was of utmost importance and certainly our primary intention that Artists, Musicians and Writers be fully compensated for the usage of their Copyrighted works that we would be publicly performing and eventually generating revenues from.

So we looked at the then current scenario occurring early within our industry and we actively approached the RIAA early in 1999, from which we began initial negotiations for appropriate licensing, exercising Section 114 of the U.S. Copyright Act, as amended by the Digital Millennium Copyright Act, which authorizes voluntary negotiations for determining reasonable rates and terms for licenses to perform sound recordings.

During the negotiation period that followed - we continued development of our Webcasting Tools and Technologies and built and launched our Internet Web presence. In January 2000, we filed under the State of Texas as a "Limited Liability Corporation" under the company name of "Spacial*Audio Solutions" and then we launched "officially" in February 2000. On March 6th, 2000 Spacial Audio Solutions announced the signing of the first webcasting performance license agreement with the RIAA for a "NETWORK" of webcasters. Under the terms of the agreement, any individual or entity that creates a webcast utilizing Spacial*Audio Solutions' proprietary Stream Audio Manager ("SAM") technology and is an affiliate of the Audiorealm Broadcasting Network is covered by the license.

Our Concept?
Utilizing our Webcasting Technology (SAM), or "Streaming Audio Manager" - we can provide anyone using this tool with directly integrated assistance in maintaining DMCA compliance involving their webcast as well as automating the logging the required reporting data to our Web Data Base infrastructure including each individual webcasters "Song Performance History". This bundled with the unique opportunity to offer to "any qualified individual or company" that desired to Webcast via the Audiorealm Network,

coverage under our "Blanket" license as well as the other resources we offered. This included an already pre-formatted web page to display to the public as per the DMCA each Webcasters "Currently Playing" Song/Artists information as well as providing each Artists BIOS, Lyrics and links from which to purchase the Musicians/Artists Works. It was indeed and still is to date the ONLY webcasting tool of it's kind.

So, what did we charge for these resources and tools? Nothing - they indeed where offered for FREE!

It was our thought that by providing a Complete "end to end solution", which also provides the Individual webcaster "Licensing Coverage", that we would be capable of "Legally" growing our Network of Webcasters while enabling each webcaster who produces the programming this unique opportunity and most importantly relieving the burden that would be placed upon each webcaster to report the required data that the RIAA requested for reporting and eventual payment of fees that it collects for the appropriate Copyright holder. In return we asked that each "Member" webcaster run a small amount of both banner and audio advertising once the time came that we would begin to fill our advertising inventory. This of course never transpired due to the downfall involved in our economy as well as the new uncertainty of the upcoming outcome of the CARP panels decision. That's fine we thought - at least we are a two fold company- surely SOMEONE would find interest in our Technology and unique development due to the fact that eventually every webcaster would have to comply with Licensing and Reporting as per DMCA?

Great Concept?

Apparently not - It taken over two full years to build our Network to "only" approximately 200 full time webcasters. We had found it difficult to generate any interest in our company or such a concept, nor could we seem to generate any interest from the press or media over the last several years in our attempts to get the message out we had a "Legal and Viable" alternative. Because we had "Done a Deal" for licensing it seemed as though we where branded by some in this Industry as a sellout, the RIAA's lackey, etc. This is simply not the case however, we believe that not only did we make the "Correct and Legal" choice in how we would run our company, but that we have indeed guaranteed it's survival for now due to the fact that the current CARP recommendations are for the period retroactive back to 1998 and we had made the right choice in acquiring and maintaining our "Licensing Coverage". But the rest of the Industry apparently was asleep on this issue. Whenever I personally questioned representatives of other companies involved in our industry about their reasoning for not entering into negotiations - everyone's identical answer was - "We'll wait for the CARP Arbitration Process". Well I suppose each individual certainly has the right just as we did to run their company and make their own decisions? Interesting response now however once the CARP recommendations had been announced? You see an Industry running around scared, claiming they had no idea, no clue, no understanding of how this could have happened? And certainly to some extent

even I was taken aback by the CARP panels recommendations? However, this response from many of the same people I once used to ask why they didn't get more involved in the process to begin with. Sad indeed. It's my assumption that many of these corporations simply where asleep at the wheel and had no real concern about the issues at hand. They all appeared to me to be lackadaisical and non concerned, apparently placing their belief that the CARP Arbitration panel, or as many see it - the "Government," would simply NOT allow such a thing to happen? Well guess what folks? It did. And you'll find me personally hard pressed to have sympathy for those that chose to not become involved. Because we built our business on what we felt were the "right ethics", and while it may seem we rolled he dice and won on the current issues regarding CARP, our own future is still unknown. Indeed sadly enough, webcasters over the past several years simply appeared to not have any concern regarding the issues of responsibility to the Artists, Musicians and Composers who's copyrighted works they used that formulated their businesses. How sad that an Industry would take on such an approach. We tried relentlessly to offer our services, resources and licensing to anyone involved in this Industry but only to fall on deaf ears. We actually thought we had a great idea and concept? Licensing coverage? Reporting and accountability automation? Maybe we where just too ahead of our time? I'm still stunned.

You see, we have funded our company entirely out of our own pockets and with our life's savings. My 21 year old business partner and I have worked almost 16-18 hours a day for over 3 years. We've survived the dotcom fallout and we continue to struggle everyday to grow our business. A business based on doing the correct things. Knowing that this Industry would take time to grow both in the "legal" as well as the technological areas - we had no issues with being patient and growing along with it. We refused to waste Millions of dollars we did not even have to "grossly" promote and or market our company and it's services during a time when both the technology nor the consumer much less the "Legal" aspects were ready. We set back quietly as we watched the majority of the Corporate Webcast Industry field "Legal counsel after Legal counsel" and enter into costly court proceedings in which they chose to battle with the Recording Industry rather than enter into an equitable negotiation process. One thing was for sure in the last several years, the ONLY individuals that made money in the Internet Broadcast Industry where the "Lawyers" for both the Recording Industry as well as "Corporate Webcasters". And during that time companies such as our own suffered from the outcome. Yes, I'm personally upset with how the Webcasting community handled itself prior to and during the CARP proceedings. Rather than do the correct thing and entertain the idea or actually act upon some equitable negotiation so that the CARP Arbitration process was not as necessary, they chose to behave in what I consider "Selfish" behavior. To say the least I am disappointed in the webcasting Industry and how they chose to deal with this issue. And now that CARP has made a recommendation these webcasters NOW decide to get involved? I would equate that to a irresponsible person who had received a traffic violation a few years ago and ignored paying the fine or dealing

with it. Then they get pulled over again later and are found to have a "Warrant" issued because they ignored or chose not to deal with it back when it was not a huge issue. You can imagine anyone in that position would regret not taking care of that responsibly "when" it was relevant to do so. In essence, many webcasters have now placed themselves in that position. And I assert, Ignorance of the law is no excuse. Truly, I am disappointed at how both the RIAA and the Webcasting Industry have conducted themselves prior to, during and now following CARP. Both sides are basically entangled in a hate each side relationship. No one can agree to find middle ground or will allow each side to find some common unity in which to work together on. The key as I see it is that each will have to come to some understanding and find middle ground to begin to work "together" towards or we will all simply find this issue continuing to be entangled in "Legal" battles. Not good for the growth of an Industry and certainly not good for the true victims in all this. The Musician, Artists and Composers.

Well, sadly the CARP arbitration process had to intervene and "here" is where I believe many issues got misconstrued and grossly misrepresented. When one looks at the Companies and Individuals that where actively involved in testifying and participating during CARP Arbitration, one sees a fine who's who list of the "Dominating" Broadcasting and Internet Technology companies in the World. Each came equipped with their "expensive" legal counsel teams to do battle with the Recording Industry who in turn make up a large team of legal counsel themselves. Each had their own agenda and an outline of what their thoughts are involving Licensing terms and fee structures. The CARP panel had the difficult task to attempt to determine and understand not only the New-Age "legal" responsibilities of the licensing and royalty fee issues but they also had to grasp at understanding technological aspects of this New industry and how indeed it will eventually equate to a viable and profitable one as well. Certainly the most Important issue would be what this is inevitably all about ? - The copyright holder and their compensation for the fair use of their performed works. While I can only speculate that at that time during the CARP proceedings the only "REAL" or viable corporation or company that held any large base business model as well as having the "financial" ability to grow under what are now PAST business models was Yahoo?
It has been rumored that indeed the CARP panel's main decision for Rate structure was based on the only viable "Large" deal that the RIAA had signed with YAHOO? Interestingly because it's probably one that is similar to our own?

Unfortunately, if that is true - this would explain the HIGH royalty rate structure that the CARP panel came back with - while that may have been a potential case during the initial Dot Com growth phase, as we all know that cannot be the case now. Simply due to the fact that the numbers of most any company or corporation, especially the size of YAHOO would have been "grossly" inflated at that time in which they had initially signed a deal with the RIAA. This as we know was pretty much the problem across the Dot Com and Internet Technology Industry. In our own dealings with the RIAA in negotiating our licensing it was in

the beginning of the peak of the Technology boom. While I cannot legally at this time discuss the main aspects of that licensing deal I can say that initially the RIAA was asking most webcasters for either a 15% of all GROSS income OR an $11/100^{th}$ of a cent per song TIMES the amount of listeners per performance. They did NOT ask for or combine both. They offered one or the other. Also, 15% is generally equated to a business's potential "Profit Margin". What interest would it serve for business to offer all of their potential Profits? But - as with the Industry at the time these deals where being made - everyone had HUGE eyes and huge appetites. Realistically we foresaw the downfall of the dotcom Industry and the fact that when we initially licensed we knew there would be only very minimal revenues to be generated by our business. Again the Technology wasn't ready, Broadband had not propagated into enough homes and therefore there would only be a small limited consumer audience. So in essence, not only did we personally want to operate our Company as legal as possible and see that compensation was paid to the persons who where due it -we indeed foresaw that in the way that our own licensing deal was structured that we would never be generating enough profit that we would ever break over the "minimum" fee that we agreed to pay - which I can say was roughly $5000/year. The "Actual" % fee structure while not quiet as bad for us as for some others, was still too high for any company that would have potentially seen a large amount of profitability.

Then something odd occurred. Eventually our licensing deal we negotiated also seemed to bother both the "Corporate" webcast giants as well as the RIAA once the CARP process began. I also assume that each side to some extent was threatened by the terms of our licensing as well? In fact I was personally contacted on numerous occasions by both via telephone so they could conduct questioning involving our deal with the RIAA. We in fact where invited by both the "Corporate Webcasters legal Team" as well as the RIAA, both offering to provide transportation and accommodations to Washington DC if I desired, to attend and testify during the CARP proceedings. But I got the feeling that each one if providing my transportation and accommodations was expecting me to be appearing on each of their behalf.

This was NOT within my Interests to choose either side but to actually testify on mine and my Company's behalf as well as for the most overlooked entity that will be adversely effected by the CARP recommendations if passed - It was my intention and indeed I was scheduled to be in Washington DC during September, 2001 to testify before CARP, but as we all now know the Terrorists tragedy and all the problems that followed kept that from being realized. Eventually in Early October of 2001 I was sent a "Certified Letter" from the CARP panel expressing their interest in my testimony and if I could not make it to DC, then at least testify via telephone. Again misfortune had taken place and I did not receive this letter until after the expressed time frame in which the CARP panel had pre determined for accepting my Testimony. This time the mail was delivered too late due to the ongoing Anthrax issues during October, 2001.

So, unfortunately I had missed out on my opportunity to participate and there was no one there truly representing the "little man" or those of whom that actually make up the primary and dominant numbers involved in Internet Broadcasting currently today.
Indeed the "Hobbyist or Independent Webcaster".

While one might think to equate Broadcasting to large corporations with deep pockets. On the Internet this is simply not the case currently. There are currently 10's of thousands of these little Independent or Hobbyist webcasters who actually make up the primary listener audiences worldwide! They are kindly old gentlemen and men and women in their late 20's, 30's and 40's and many in their 50's and even older! They are retired broadcasting pioneers from the 40's and the 50's, 60's and 70's - indeed the very people many of us may even remember during the "Golden" era of Radio itself? They are people who have always dreamed of the possibility of operating and owning their "own" Radio Stations. They are generally middle class and they work 8-12 hour days and use their small amount of expendable income to fund their dream. Indeed the very nature of the Internet itself and technologies like that in which we "ourselves" have developed are allowing these individuals to afford to pursue their passion, their Hobby and someday even possibly grow into a potential business?

Let's equate this to a person who is an avid Automobile collector/hobbyist. Most are not wealthy by any means - most are middle class folks who work blue collar jobs and choose to spend their expendable income and many times save up to buy parts and services to restore these automobiles. In a way - the Hobbyist or Individual Webcaster is the same - like those that restore and show pride in their Classic automobile - these webcasters are as passionate and committed about their Webcasts. Because of this commitment and because of the large and ever-growing numbers of these Individual or Hobbyist "personal" webcaster there has been a recent growth in new and vibrant businesses that provide support, tools and resources to support this New Industry!

Again, very much like in the automotive collector industry where companies refurbish parts, provide remanufactured accessories, etc. These new companies and services are providing the Hobbyist and Independent Webcast Industry with affordable Bandwidth, Web hosting, ISP connectivity and tools for managing Webcasts - These folks are also purchasing Music and tons of it! They are buying Newer PC's or upgrading memory and Hardrives - they are buying Microphones, Mixing boards, Speakers - everything and anything that it takes to assist them in producing their Broadcasts over the Internet. Yes, NEW income revenues generated for TODAYS economy. And NOT small amounts of money either - but millions of dollars, new jobs, new emerging services and technologies being created almost daily. It is a HUGE Industry growth just in the last year alone. It is also fueling companies that at one time thought they would have to shut down and lay off their employees, but they too see the potential and adapted their business models to accommodate. The Independent and Hobbyist Webcaster did not have

representation or a voice during the CARP proceedings - it was my intention as I said to point this out to the CARP panel.
These Hobbyist and Independents also what to do the most important thing as well - they WANT to provide royalty compensation to the Artists, Musicians, Composers and indeed ANY holder of Copyrighted works in which they would perform publicly in their webcasts. These individuals would be the last to deny that and as evident in the CARP hearings there was no voice for them to express that. BUT given the current CARP royalty fee structure, this will be the death sentence of 99% of not only the Hobbyist and Independent webcaster, but the majority of small to medium sized companies such as our own. Then as with all things, the trickle down effect will take place. These new services and companies that have formed over the last year or so and indeed ISP's, hardware manufactures, software companies, technology companies and all in the food chain that supports these webcasters including the very Musicians themselves will loose. Jobs will be lost; companies go out of business and leave debt. This trickle down syndrome will indeed hurt the economy. Worse yet is the threat that indeed Offshore and European companies would take this fallout and the very economy over and they would see the benefit from this loss. Because of the very structure of some other Countries licensing fees you will find that some Companies and Individuals would simply move their operations to Europe or Overseas. This is a real concern - one I'm hoping that our government would not let occur. American dollars feeding another economy outside of our own first? I shudder to think.

While earlier in my letter I made a somewhat educated guesses on how the CARP panel ever came up with the Rate structure that they did. One can only assume what the real reasoning was?
And as I stated, every webcaster wants to pay a "Fair Rate" for licensing. But one only needs to do the math utilizing the current Rate structure to determine that it would be impossible, even for a wealthy person to pay such a rate. What is fair? Well this will probably be debated for a lengthy time I'm sure, but for a small hobbyist or Independent they are looking for something that makes sense? Something that not only they can afford but also that can actually get into the hands of the Copyright holder and indeed immediately. Remember that these fees are also retroactive - and most of these individuals could not afford even thousands of dollars in back due fees. If one wanted to make sense of it all maybe a good place to look is in how agencies such as BMI, ASCAP and SESAC license? Their rate structure is setup to accommodate these individual webcasters. And as they grow and prosper so will the potential fees that these agencies are able to collect grow. They all start out with a basic annual rate of an average of $250 - $300 dollars per year. While I for one understand that the RIAA represents collection of a somewhat different royalty fee than the other agencies, it is still not dissimilar and appears to me that a rate structure specifically for the Hobbyist Industry would make more sense? Indeed if the CARP rate passes as is currently - I can guarantee you that collection of Royalty fees would be basically none. If these webcasters are pushed out by the fee structure, no one will be able to collect, as these individuals would not be around to collect from. In that event

who looses? Well, certainly the Webcaster but what about the Artists, Musicians and Composers that this whole issue is truly supposed to be about?

And then to make matters worse, CARP recommends a rate that is twice that of what is being asked from Terrestrial broadcasters? These Terrestrial broadcasters who have the money and the power to essentially take over any broadcast medium they don't currently own or have made any contribution to? I can attest to that as a technology developer. We'll develop and grow the very technologies that drive Internet Broadcasting just so the big corporate giants can take over and use these very tools we develop to essentially put us out of business? And why should and industry that has already been exempt from paying RIAA fees to artists they broadcast on terrestrial Radio be given a rate structure twice that of an Internet only? They will too be "webcasting" in the same digital format that "Internet only" broadcasters do? They in fact have the luxury of reaching the masses already via Terra Radio and now why would an industry that is being developed by "Internet only" broadcasters as well as technology developers such as myself be handed over to them to essentially dominate even more? This would leave little or no room for this industry to actively grow and goes against the very reason the Internet was opened up for FREE communication and Growth. While I'm all for "fair" competition, if CARP fees for Terrestrials broadcasters is allowed to pass it would become "Total Domination"! Where is the fairness in that? If at the very least it should be that we are all equal, whether Terra Radio or Internet Only based, BOTH should have an equal opportunity to grow and prosper from their Internet webcast presence. Indeed set a fair and level playing field and this equates to at least an equal Royalty fee structure? I for one as a developer of webcasting technologies would like very much to consider Terra Radio as a potential user of the technologies we develop. But not at the expense of those who would actually be the "primary" users of our technologies.

While the issues of Reporting requirements that the RIAA seeks are currently probably not of your concern, they have in fact become another potential roadblock as well. So much so that the CARP panel produced a "Roundtable" discussion last week in an effort to get a better grasp on that issue. Again we as a company where invited to participate on this panel. And again in my efforts to make the trip to Washington DC I was met with disappointments. This trip for me coming from Texas was a Major expense - It took me literally down to the wire to gather up the finances to cover it - but that was 15 minutes longer than I could afford. I was 15 minutes too late for checking in at the Gate and was not allowed to board my plane. I was however able to get one of our Broadcast Network members to take my place on the panel. But again it seemed as if fate was driving another force. During the first panel of 3 there was a security breach or something and the entire building was evacuated – it took almost 2 hours to get the participants back into the building and this eventually led to the 3rd or final panel being shortened considerably. My representative was unable to have the opportunity to express our companies thoughts and opinions on the reporting requirements. Probably also to the liking of the other Webcast and RIAA

participants as well, because we had many interesting points to make. For instance the RIAA is asking for 22 pieces of Data to be reported from each Webcaster. All 22 pieces of data are irrelevant for that matter. But the Webcast Industry did offer to accommodate and report 4 basic pieces of data. Artist, Song Title, Album and label. However the RIAA does require at least 2 more pieces of data – the SKU# and the PL line code. This makes it much easier and more successful in matching the performed works with the correct Copyright holder. But the Webcasters asserted that that would be Impossible and too burdensome. While the RIAA does not need all 22 pieces of data that they requested, we personally can see the validity in the 6 pieces I mentioned and sadly again I watched as the Webcast Industry profess in unison that even these 6 where impossible and that technology doesn't exist that can provide that capability and or that if it where to be available they could not afford it and many other excuses that I know for a fact where not true. It is indeed something we built our technology to manage, and many of the Individual webcasters on that panel know this. But for whatever reasoning failed to declare that information to the panel. Indeed even the RIAA knows this, but nothing was brought up. Needless to say it was just another disappointing moment. In the words of my business partner and Chief Technology Officer, "What I hated about the whole meeting was nobody was willing to give any ground. There were instances where it looked like the RIAA and SoundExchange was willing to come to a compromise, but 99% of the people insisted on zero reporting - so they just stopped trying. Webcasters should have stopped stating the problems and tried to find a workable solution. Now its all in the hands again of people that don't understand the technology involved and probably not in the best position to make suggestions on possible solutions". Did we have the answers? Well probably not for everyone, but if we can accommodate and produce such technologies than why can't these webcasters? Let's see – the cost involved using our solution? Currently None, we have over the last several \years offered and Industry this opportunity and our technology, but just as I have expressed in my letter, it just seems that some webcasters do not even want the opportunity to comply if they feel it's not in the least of their own benefit. What's currently wrong with this industry? My observations are this simple. Each Webcaster and or Webcasting company is too set on the "Me, Myself and I" selfish syndrome. Our Industry refuses to work together to achieve and overcome many important issues. It was only recently that the CARP recommendations threatened their very businesses that the Industry as a whole agreed to join forces to combat the CARP decisions. Now if only these same persons in our Industry would agree to cooperate in finding and or developing common solutions to many issues regarding our industry and including the "Reporting Requirements" then we might all have an opportunity to move forward and grow successfully. This could even include aggregating listener numbers to garner Ad revenues, which will not happen given the fractured state of the Industry now. If only these companies could agree to work with the energies and passion as well as with the level of CO-operation they currently are expressing in their combined fight of the CARP recommendations, indeed what we all could achieve!

In closing, while I am sure it is evident that I am "personally" disappointed and even possibly bitter about the behavior and actions of my fellow Webcasters and the Corporations involved in this Industry. You will find that I am also in agreement that something has gone dreadfully wrong with the CARP recommendations and the process that lead to them. In simplest terms, if these recommendations are passed it will essentially mean the end of what is potentially one of the "Largest" and fastest growing Industries currently on the Internet. It will mean an enormous loss to our economy and a blow to the average consumer and their free right to choice. It will negatively effect many things but most Importantly it will effect the very persons that this whole issue is inevitably about. The Artists, Musicians and Performers. Something needs to be done, there must be an answer to the issues and soon – many businesses including my own sit stagnate without any potential to grow further. A combination of "Legal" uncertainties and no potential opportunities to generate revenue to provide that growth the support it needs is currently our only answer, and I assert – this will not do!!

I only ask this question?
Should a Company such as ours who purposefully and intentionally chose to conduct business in a manner that is "Legally and Ethically" correct be punished by an Industry full of Greed and uncompromise? Because indeed that is what has happened. We cannot move forward, no potential business in this air of uncertainties and all because we choose to do what we feel was the correct thing and yet and Industry, that including Both the RIAA and the Corporate webcasters have the clout, money and power to continue to hold us all hostages? So is this to be what becomes of innovators? If something is not done and some resolution found soon, I expect that we will indeed become a victim of doing the right thing. Maybe this is what the Industry wants? They want us and our technologies to go away? Maybe they don't realistically want to accept compliance as stated in the DMCA law? But after all it is the law? And it was my assumption that law was to protect the innocent as well as help convict the guilty?

King Regards,

Bryan Payne – CEO/Managing Partner.
Spacial*Audio Solutions, LLC

Statement from Mike Hays

Senator Patrick Leahy:

My name is Michael Hays and I am a small business person involved in the webcasting industry. I have worked in commercial radio off and on for 30 years. In 1998, after seeing what the Telecomm Act was doing to radio, i.e. consolidation and the narrowing of playlists as the major record labels and their agent the RIAA as well as independent promoters (payola specialists if you ask me) were attempting to control who got radio exposure and who did not, I decided to investigate webcasting, knowing that a worldwide audience could build into a niche large enough to draw a reasonable size audience. After much research I launched www.TwangCast.com to feature country music artists who had no chance of getting radio airplay, not because of a lack of talent, but because they were not on a major label with hundreds of thousands of dollars to launch their careers. I have built an audience of around 40,000 listeners each month.

I went live with TwangCast on Jan 1 of 1999 and have built the webcast to the point where it just about pays it's bills. Needless to say I invested heavily in computers and software to make this work as a 24 X 7 operation and spent thousands of hours preparing music files for playback in the proper format. Just as I am seeing a light at the end of the tunnel, here comes this outrageous CARP rate and reporting requirements, either of which, if enacted, will put me out of business. I expected some kind of royalty as I already pay ASCAP, BMI and SESAC to compensate writers and publishers and expected the royalty rate to fall within the same reasonable range.

I find it interesting that the major record labels can spend hundreds of thousands of dollars in promotional fees and payments to indie promoters (payola) to get a small group of artists on the radio in the hope that they will sell millions of records and the label will make some money yet when we play music which in our case has been supplied by the labels (but often is bought by webcasters) the RIAA argues that we have no promotional value. I could put you in touch with many artists who would tell you just the opposite. My operation even has a direct link from every artists name while it is in play which links directly to a on line sales outlet. Aside from live show sales, on line sales are quite often the only sales some artists see. I know that first hand as I released a CD in 2000 and more than 75% of my sales have been through on line outlets.

I urge you to consider this entire issue quite carefully for if CARP is enacted, there will be 10,000 webcasters shutting down, in turn affecting thousands or tens of thousands of artists, on line sales outlets and others.

Thanks for your time and consideration.

Statement of Deborah Proctor

Dear Senator Leahy,

WCPE is a non-profit "community" public broadcaster.

I am its General Manager and I am writing concerning the recent Copyright Arbitration Royalty Panel (CARP) proceedings, which were held by the US Copyright Office under the Digital Millennium Copyright Act (DMCA).

I understand you have the authority of review to ensure that fair practices are followed in proceedings like these. *We don't believe we were fairly represented at all.*

Early in 2001 we wanted to participate; we filed our paperwork with the Copyright Office. We wanted to ask that our "new" webcasting royalties and reporting requirements be about the same on a per-capita basis, and about the same reporting requirement, as the existing over-the-air requirements set by the Copyright Royalty Tribunal Regulations in 37 CFR 304.6(b)(1) for non-commercial broadcasting.

We were told participation in the full process would be costly. It would require intensive paper-work and legal-work. This was reflected in various communications with the Copyright Office, including its January 18, 2001 letter.

We understood the cost of a full proceeding could be $100,000 and we understood from the Office that we'd be liable for the full fee if we participated as a full member.

In that same letter, the Copyright Office invited comments on allowing small entities to submit short pleadings and indicated its support. In late January we petitioned the Office for this option. But from a list of groups over five pages long, just one -- the Recording Industry Association of America (RIAA) -- objected to limited participation by small groups.

On March 16, 2001, the Copyright Office said they were forced to rule in favor of the objection because the rules said comments by small parties could only be accepted if no one objected. ***We weren't aware that one party could veto any small pleading.*** **One powerful group essentially excluded anyone who couldn't afford the full cost. This one objection silenced us and our specific concerns. We felt abandoned by the Office. Thereafter, all the small entities we knew of withdrew; we got copies of several dozen of their withdrawals before we were pulled from the list.** The Copyright Office did "encourage" small entities to pool resources and participate jointly but the April deadline was not extended and no other suggestions were given.

We feel that we were silenced by a poll tax. We believe the proceeding was fatally flawed by the failure to allow small parties to voice their concerns. That could have invited the presentation of questionable "facts" with less

fear of rebuttal; it definitely altered the outcome.

For the same music and number of listeners our "old" fee for ASCAP, BMI, and SESAC totals $1,000 yearly; it is a reasonable blanket fee for our non-profit community FM station. The "new" CARP fee exceeds $120,000 with the same number of listeners and the exact same broadcast on the internet. It may also apply to relays which we use, and it adds an additional nine percent surcharge if an internet server even makes a backup file or makes an internal second copy that it erases a half second later -- to me, *that reflects pure greed!*

Under the "old" reporting requirements I understand we might be asked to make a handwritten or typed photocopy of one week's music logs. The "new" CARP mandates continuous 24/7/365 music and listener loggings down to the specific number of listeners and every recording played identified precisely -- we can not possibly do this; it is impossible.

The "old" rules don't say anything about what music we select nor does it limit us about telling our listeners what symphonies or selections we'll be playing. The "new" CARP rules actually limit how we can choose and promote the classical music selections themselves -- there is even a rule forbidding program guides except under limited circumstances!

> It is unfortunate that a non-profit community station can't be heard when an agency has hearings which determine onerous payments, impossible mandates, and actually limits our ability to select the works we may wish to play!

We there are 20,000 or so people who listen every day to our free internet, home satellite, and cable system feeds. There are several dozen small community radio stations across our nation which use us for free to stay on overnight and during school recess. Are the "new" CARP regulations going to make us pay double or triple when we give someone else use of our public broadcast signal? And more people are listening every day. What are we to tell those folks if we can't afford these new fees?

I don't think this is what Congress wanted when it passed the DMCA. Now I am beginning to worry that the "new" CARP rules might force us to silence our service to the many people across our Nation who are coming to rely upon us for classical music.

I feel it is unjust to be made to pay twice for the same music, but the "new" CARP rules could be read to infer that we would have to pay once for our music on our FM transmitter, twice for that same music to be sent to the Chicago relay terminal, three times for the home satellite uplink from there, four times for the internet, five times for the cable systems, and six times for the stations carrying us overnight. *Please help!*

Respectfully Submitted,

Deborah S. Proctor

Statement from Lee Hauser

Senator Patrick Leahy

Are they serious? We still play 45's dating from the 50's, LP's from the 60's and CD's over 12 years old. They're called oldies; like Paul Anka's, "All of a Sudden My heart Sings," a rare song that never gets played on tightly programmed major market oldies stations. We still rotate songs using index cards. We have over 10,000 songs in the library down the hall (the station's been collecting them since the late 1950's). And I've got to supply how many fields of information including the UPC for each and every song played on the air/internet? And display title, artist and record company visually? And not say what I'm playing until after I've played it? And not play it again for how many days? And submit how much information for each and every visitor on the internet who accesses it? And pay for each and every listener whether they are actually listening at the time they're online or not? Good grief!

The last time I looked at the UPC on music here, it had a hole or two punched in it and was stamped, "for promotional purposes only, not for sale." And, hey, it was given to the radio station, so we would be sure and have a copy to play on the air. Had it recently come from Time Warner AOL it would have likely been stamped, BUT NOT ON THE INTERNET. Time Warner music doesn't service us, neither does RCA, but I wonder about Forevermore Music in Henrletta, NY; and Ecko Records in Memphis, TN; and Ripete Records in Elliott, SC; do they really not want us to play their music on the Internet?

Yes, the DMCA caught all of broadcasting in the U. S. asleep at the switch.The RIAA got it right immediately, however: their very own "whole world wide" (www) juke box or radio station!

Laws can be repealed! It's one big, very expensive telephone with pictures, folks, and the terminal in my office is being eaten alive with junk email and viruses; the novelty is wearing off; the higher the speed the worse and more cumbersome it gets. The Internet; that's only for a handful of the really big record companies to play their own music on (Imagine not having to beg thousands of radio stations or large group owners to do so). Uh, radio, wake up! We all have a stick and it's bigger than we realize. Let's just require an internet waiver permitting simulcast streaming before we play a song on the air. Simple. Immediate impact. Come on, Clear Channel, do it! The record companies are convinced they soon won't need terrestrial radio anymore; they've made deals with XM and Cirrus satellite radio that would cause the Justice Department's most junior staffers to wince; they've gotten Congress to reserve the Internet for their exclusive use and regulation when it come to playing music on line. Call it what it is: Blatant protectionism legislation benefitting only a small few.

Artists, you need to wake up, also. Ever heard of Billy Scott (formerly with the Georgia Prophets, now living in Raleigh, NC)? He had the No. 1 Beach Music tune in 2001, a remake of "My Kind of Girl," found only on the compilation CD, "All Aboard, Too! The Beach Boogie Train," RubyJude Records 5202. He's booked for the Saturday Night Dance at the White Lake Water Festival on May 18th. Why, a couple dozen folks "tuned in" at any given time might have

enjoyed what a small town station was playing and what the live announcers were saying as it streamed a limited bandwidth on a small capacity server. But, gosh no! Someone out there in Nevada might have turned on a cassette recorder plugged into the earphone jack and copied it, fallen in love with the song, gone to great lengths to purchase their own copy at an "approved" online site or, worse, followed a link to the local record store back in nearby Whiteville to order it by mail. Jing, jing, a sale! The artist gets his fractional share; so does the store. The record company gets the rest. What's wrong with that?

Simply put: broadcasters who stream an identical simulcast of their terrestrial signal should be exempt because we are already subject to appropriate licensing and fees.

Lee Hauser
General Manager
WGQR 105.7 FM

Law ■ Technology ■ Marketing & Media ■ Property Repo

MARKETPLACE

WEDNESDAY, MAY 15, 2002 B1

THE WALL STREET JOURNAL.

Web Radio Showdown

AOL Time Warner Finds Its Divisions at Odds Over Online Music Royalties

By JULIA ANGWIN

TWO WEEKS AGO, hundreds of Internet radio stations went silent as part of a protest against proposed royalties that they say would put them out of business. But the biggest Internet radio station of all, run by AOL Time Warner Inc.'s America Online service, kept playing music all day long.

A big part of the reason: America Online wants to keep the peace with a sister division, Warner Music Group, which is fighting for the royalties for its recording artists and labels.

"It would appear that AOL has found itself on both sides of the table," says Raghav Gupta, chief operating officer of Live365 Inc., one of the small Web radio stations that is fighting the royalties.

So much for synergy between the former AOL and Time Warner: Two of the company's business units are divided on this important issue. Yet perhaps because they are now under the same roof, the America Online and the Warner Music divisions have been treading lightly. America Online's radio services haven't been vocal in supporting their Web-radio allies, while Warner Music executives have been careful about which battles of the recording industry they join.

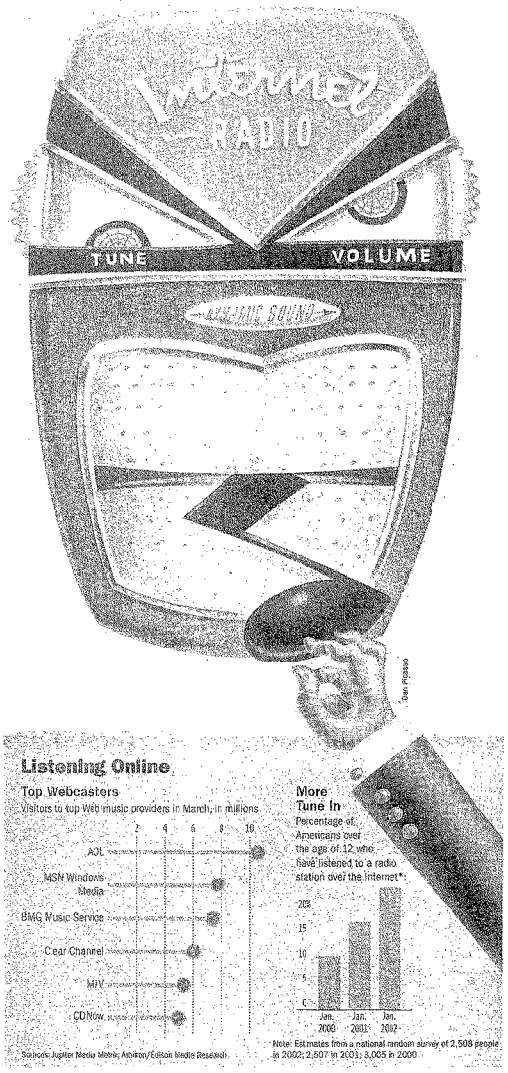
"This is a dispute between industries and we have units in each of the industries involved," says Kathy McKiernan, an AOL Time Warner spokeswoman. She adds that the New York company's units are participating in the government mediation process that is supposed to determine the royalty rate. "We have confidence that the process will produce a [royalty] rate that will work for everyone involved."

AOL's delicate balancing act highlights the tensions the issue has raised. Although the royalty question has been simmering for years, it is expected to reach a boil today as Chairman Patrick Leahy of the Senate Judiciary Committee holds a hearing on the matter, with witnesses including Hilary Rosen of the Recording Industry Association of America and Frank Schiemann of Onion River Radio, a small Webcaster from Sen. Leahy's home state of Vermont who says the fees would put him out of business. "We would have to pay a royalty fee that is 78% of our gross revenue based on the first three months of 2002," he says. "This is going to decimate the industry."

The dispute revolves around a 1998 law that will permit record labels to charge royalties for music played online. Until now, radio stations—both online and offline—paid royalties only to composers, not to the musicians and singers who recorded the songs. That meant, for example, that Aretha Franklin never got paid a dime for all the times that "(You Make Me Feel Like) A Natural Woman" has been played on the radio, but the song's writer, Carole King, got paid each time.

Under the new law, artists will finally

Please Turn to Page B4, Column 1



AOL Time Warner Is Divided Over Web Radio Fees

Continued From Page B1

start getting paid—but only when their songs are played online, not when they are played on traditional radio stations. The new fees are set to be finalized by the Copyright Office this month.

Under the proposed rates, Web broadcasters will pay the music industry .14 of a cent a song per listener, with an annual minimum payment per Web station of $500. "It's the first step to correct decades of inequality," says John Simsón, executive director of SoundExchange, a trade association of the RIAA that advocates for the fees.

But Webcasters say the law will create a new inequity since the online radio stations are forced to pay but the better-funded traditional radio stations are exempt. Many Web radio stations have very little revenue. "The royalty rate ... will bankrupt virtually all the of the independent Webcasters," says Kurt Hanson, publisher of the Radio and Internet Newsletter, who helped organize the "Day of Silence" protest by Web broadcasters.

America Online's Web-radio division, based in San Francisco, has kept quiet about the fees, though some of its employees object to them, according to people familiar with the situation. AOL Time Warner's Ms. McKiernan says the company made the decision not participate in the day of silence, in part, because of its longstanding policy of not using the online service for political purposes.

Publicly, America Online has left the issue in the hands of the Digital Media Association, a three-person outfit in Washington, D.C., that is the leading advocate for the Webcasters fighting the royalty proposal.

"I consult with AOL regularly," says Jonathan Potter, executive director of the association. America Online is on the board of directors of DiMA. He says the royalties for small broadcasters should be based on a percentage of their revenue, and that eventually online and offline radio should be treated equally.

Meanwhile, Warner Music Group has aligned itself with the powerful RIAA and its SoundExchange, a 22-person division that is leading the battle to support the proposed royalty rates. "Warner has been very supportive of our efforts," says Mr. Simson of SoundExchange. SoundExchange had originally sought higher royalties but now says the Copyright Office's recommendation should be respected.

Warner Music, a founding member of SoundExchange, has carefully chosen which of the group's battles it wants to join. Paul Robinson, a senior vice president of business affairs at Warner, signed a recent "open letter to the music community" from SoundExchange that declared that "Webcasters and simulcasters are not entitled to a free ride or a subsidy."

However, Mr. Robinson, who is on the board of SoundExchange, declined to sign a subsequent letter complaining about the Webcasters' "day of silence." People familiar with the situation say he wasn't given much time to consider the letter and was wary of the tactics being used.

"In this one specific case we chose not to participate in a public-relations ploy by a small number of Webcasters," says Dawn Bridges, a Warner Music spokeswoman. "We are continuing to participate actively in the process of discussing substantive issues with the other RIAA and SoundExchange companies."

Statement from Denise Sutton

Chairman Leahy and Committee Members:

Warpradio.com is a radio station aggregator providing bandwidth (Internet Service Provider) and other services for streaming audio on the Internet. Our company was funded with under $2 million in 1999, and we have seen numerous competitors with tens of millions more funding than us go out of business in the last three years.

Warpradio.com lead the Measurecast rating services as a network for the year 2001. In April 2001, we had under contract over 560 radio stations. We are currently at just over 200 radio stations under contract including OnionRadio.com who is testifying May 15, 2002, regarding CARP reporting and fee structure. How did we loose almost two-thirds of our network? It had nothing to do with our firm as we provide superior service at an extremely fair price to our stations and the stations will attest to that!

April 2001, our radio stations received notice of possible additional fees for airing AFTRA commercials on their streams from national advertising firms. I have copies of notices the radio station's received stating the cease and desist of these commercials or the station would be at risk of paying hundreds of dollars in fees. After speaking with numerous Advertising organizations it was apparent that the "Advertiser" was to pay the additional one-time fee to cover the right to use the talent on the Internet rebroadcasts not the individual radio stations. Due to this misinformation many radio stations ceased their Internet broadcasts until a solution was available to cover the ads and the radio station could then be compliant and not have to fear the threat of lawsuits.

What would make sense is to have commercials produced using an imbedded code (inaudible tone) opening the commercial and with a code (inaudible tone) closing the end of the commercial – this is already being done when networks provide programming for affiliates. Software would easily be able to detect the codes and replace the commercials without any compliance issues putting the onus back on the advertiser if indeed they didn't want the additional audience exposure on the Internet to hear their product or service.

With too many hands in the pot and absolutely no revenue to cover just the licensing costs, CARP was the straw that broke the camels back and many stations pulled their streams and said no more. We have ASCAP and BMI charging approximately a combined 4%, then SESAC jumps in with their fees, AFTRA threatens the stations, and now the RIAA. Mind you the stations are use to paying fees for copyrights, but the inaccurate information they are receiving now just sealed the coffin and they have said no more.

The RIAA website is a good example of providing misinformation. It states: "OnionRadio.com – OnionRadio is part of the WarpRadioNetwork, which includes

12,518 stations. Based on Measurecast reports, WarpRadio would only owe about $57 per station."

Where do they come up with this information? Based on Measurecast we have approximately 200 radio stations in our network not 12,518. How do they base their fee of $57 per radio station? Why didn't they discuss this information with us before making such an outrageous statement to the public?

The last and only time we had contact with the RIAA was in October 1999. We tried to negotiate with them regarding our fee. We were not allowed to negotiate and were only told a flat 15% of gross revenue period. At that time we immediately filed Warpradio.com with the Copyright office and still to this day we have only received 3rd party information regarding the status of CARP.

This brings up another point. Warpradio.com is merely a bandwidth provider (Internet Service Provider) with a website broadcasting our radio stations. Our main income is from service fees we receive from streaming radio stations. Our website revenue for the last 3 years is less than $40,000 total. Various licensing firms informed us that our fee structure is based on Warpradio's total gross revenue. Does this mean that MSNRadio by Microsoft will be charged based on Microsoft's total revenue or just revenue on the MSNRadio website?

What also needs to be address is the fact that one stream just redirected to other sites and not digitally altered will be receiving multiple royalty fees. This makes these streams no different than those coming from 3 different radios (home stereo, boom box, radio alarm clock) in a home environment. The CARP fee structure would have to be based on the origination of the stream otherwise there are multiple royalty payments for just one broadcast. For example: Radio station WXYZ is charged based on listeners, Warpradio.com is charged based on streaming the station from their website, Microsoft is charged based on streaming from their website, and on and on for those who link to these stations. How many fees for the same digital imprint can the RIAA collect for – UNLIMITED!

Our network breakdown in January with approximately 3 million streaming hours is as follows:
Music intensive formats totaled 1.3 million streaming hours for January 2002, followed by Non-commercial stations and Religious stations with a combined 565,000 hours. Internet only stations (many are side channels set up by radio stations) 408,000 hours, and News Talk/Sports, and Business formats 260,000 streaming hours.

As you can see our network is only reporting one third of our stations being music intensive at this time. Will the fee be charged to Warpradio.com at one third of the rate? Will I have to pay a fee for non-music sites? How will a network such as ours report music aired or will it be a flat rate?

Reporting requirements to be compliant are excessive. Many of the CDs received by radio stations do not provide all of the information. Radio stations that contract satellite programming don't have access to music logs on a per play basis. Numerous small market radio stations Warpradio.com provides service to do not have automation systems and would cost thousands of dollars to implement. We have spoken with third party software companies who state that they are able to provide the information required to be compliant with CARP. One provided stated they would have to put 50 servers in our co-location facility just to pull the information from our servers for our small network. After that statement we didn't bother going into the cost of their service.

As you can see by the above there are many unanswered questions and issues that I really haven't seen addressed previously. Our small firm of 6 people with its limited resources has already felt the impact of the overzealous licensing and reporting entities by loss of clients and revenue starting back in 2001. The ability for our firm to continue to provide streaming services to radio stations will hedge on your decision and it is our hopes that the fees are reasonable otherwise the real underlying reason will be ultimate the big labels, websites will win and all of us little firms will be put out of business.

Thank you for your time in letting me express the concerns of the small business owner trying to survive. If you have any questions or would like further information regarding my comments, please feel free to contact me.

Sincerely,

Denise Sutton
CEO
Warpradio.com
303-799-9118

Statement from James J. Brust

Senator Patrick Leahy:

I began webcasting just over two years ago. During that time telecommunications were flourishing and the Internet was still looking like a viable business prospect for the future of broadcasting. Since that time, as we all know, both infrastructure and content providers have suffered greatly in the wake of their own shortsighted financial planning and ill-gotten gains. Amazingly enough, independent webcasters like myself held strong. Indeed we have done so by operating under low overhead in a highly unregulated market. It is fully understandable that this market needs to narrow somewhat and become more competitive in order to become profitable. Yet, this had already begun to happen. The cost of bandwidth necessary to maintain a significant listening audience is high enough that only a limited number of broadcasters are able to compete in this arena. They have done so by using sensible business models and producing content that appeals to their consumers. The fact that this is even possible suggests that there is certainly a demand for this unique service. In fact, I personally became involved because my peers and I all share a common dissatisfaction with the current radio industry. None of us are looking for a free ride. We fully support ASCAP, BMI, and above all the promotion of independent artists seeking exposure. I myself am a musician and artist rights are a top priority. The problem is that anyone who intends to limit the exposure of artists to areas where there is widespread demand for their music is truly causing the greatest infringement on their rights. Due to bandwidth restrictions, webcasters use various forms of compressed audio transmission comparable to FM. This is in a continuous live format and is not recordable any easier than FM. In fact, the digital format allows for various forms of copy protection and future development of improved methods of copy protection not possible with FM. Yet large business interests that can foresee the benefit of this technology are attempting to control competition and create a barrier to entry using our own legal system. There is simply no reason webcasters should for any reason pay fees greater than their counterparts in terrestrial radio. This is a delicate new industry on the verge of tremendous growth at a time when our country already faces widespread economic difficulty. It is critical to independent business and the foundations of the American economy that we are treated fairly. Thank you for your time.

Sincerely,

James J Brust

Copyright Royalties: Where Is The Right Spot on the Dial for Webcasters?"
Senate Judiciary Committee Hearing: May 15, 2002

Written Testimony of Billy Straus, President, Websound, Inc.

Chairman Leahy, Senator Hatch, and members of the Committee, thank you very much for inviting me to appear before you today. I am truly honored be here as a citizen of Vermont, Senator Leahy's great home state.

I come before you today as the president of Websound, a small webcaster based in Brattleboro, Vermont. My passion has always been for music of all styles and genres, and though my role at Websound is that of a businessman, I am first and foremost a musician. As a composer, producer, and musical director, I have been nominated for two Emmy Awards for my work with Nickelodeon and Disney Television. I was nominated for a Grammy Award this year as producer of *The Full Monty* Broadway Cast Album, which was mixed in our Putney, Vermont studios. As a songwriter I own numerous copyrights, which I license through ASCAP and the Harry Fox Agency. My music has appeared in movies, television, on records, and on-line. I have performed with the legendary Chuck Berry and was fortunate enough in 1981 to tour with a young Irish band called U2. My recording credits span artists as diverse as Bruce Springsteen, DC's own acapella group Sweet Honey in the Rock, and jazz legend Miles Davis. Since childhood, music has played a primary role in my personal and professional pursuits. In the context of this hearing, I hope that perhaps my perspective as both an artist and entrpreneur may be useful to the committee.

In 1995 I founded Rock River Communications, a company that produces branded, private-label compilation CDs sold through many "lifestyle" retailers such as Old Navy, Banana Republic, Eddie Bauer, and the like. For example, the CDs you may have seen for sale at the counter in Pottery Barn stores have all been produced by Rock River.

The inspiration for Rock River grew out of my frustration following the release of a CD I co-produced in the early 90's for the PBS television series *Where in the World Is Carmen Sandiego?* The program, for which I earned an Emmy Award, educated kids about geography, and the CD brought together artists such as Tito Puente and His Orchestra and street-corner, doo-wop innovators the Persuasions, as well as a host of others embodying the geographical diversity of the show. Unfortunately, the CD, still one of my works of which I am most proud, was completely lost in the mainstream music-distribution pipeline, and it never got to its intended audience. Realizing that there had to be a better way to reach those listeners, I contemplated

bypassing the major music-distribution channels entirely and going instead to non-music retailers frequented by the audience I was seeking.

Seven years later Rock River has sold hundreds of thousands of CDs through these nontraditional channels, creating new revenue streams for independent as well as major record labels and valuable exposure for emerging talent desperate to have their voices heard. And having just released our fortieth Pottery Barn CD, I can assuredly confirm my original hypothesis that a large potential audience is not being well served by the mainstream, hit-oriented record industry.

In our compilation business, we work primarily with content licensed from a range of large and small record labels. Our expertise lies in knowing our audience, programming great music concepts, licensing the content, and helping clients merchandise and market the CDs in their stores. Leveraging many of the same skill sets and relationships, my partner, Jeff Daniel, and I decided in 1999 to launch Websound for the purpose of putting great music programming up on our clients' then brand-new websites. As we had helped them transition into the idea of selling music in their brick-and-mortar stores, we would now help them make the same transition on-line, and in the process we would help evolve the Internet from a silent, two-dimensional medium into a fully three-dimensional experience.

The idea fit perfectly with our existing CD business, and in late 2000 we launched EB Radio at Eddie Bauer's website. We subsequently provided on-line webcasts to consumers via the websites of other commercial clients, which include brands such as Volkswagen, Polo/Ralph Lauren, and Pottery Barn. Websound's business originated in my barn in Putney, Vermont, and is now based in the Marlboro College Technology Center in nearby Brattleboro.

I would like to make 3 main points today in my testimony pursuant to the issues at hand:

Firstly, artists must be fairly compensated for the use of their work in webcasts. It is simply not just to build an industry around the proceeds of artistic endeavor without fair compensation to the creators. To do otherwise provides a short term shot in the arm at the expense of a long term liability.
Secondly, we need to create a tiered system of royalty rates in order to encourage innovation and creativity among fledgling and non-commercial webcasters. This will insure that we avoid a perilous situation where the record labels are the only ones who can afford to stream music on the internet
Thirdly, detailed reporting is not only possible, but is a key component in putting an effective tiered royalty system into effect. This can be accomplished without undue burden on either the webcaster or copyright owner, and without running afoul of privacy issues.

Websound is a small webcaster that produces and streams music to our client sites on a "fee for service" basis under a license executed with the RIAA in September 2000. Pursuant to the license, Websound has reported its use of music and remitted royalty payments to RIAA on a monthly basis. We have developed a new technology called "RadLog," designed to streamline our tracking of the sound recordings used in our webcasts. As we announced at the Copyright Office Roundtable last Friday, we plan to make this technology available industry-wide to help address the significant concerns mounting over webcast reporting for statutory licensees.

For webcasters large and small the last several years have been extremely challenging. The 1998 passage of the DMCA, with its statutory webcasting provision, provided an exciting open door for entrepreneurs, creative music programmers, and anyone else so inspired to set up a web server and begin streaming music to the world. But unfortunately the "gold-rush" euphoria surrounding many commercial, music-oriented Internet start-ups hatched a plethora of untenable business models based on inflated projections of e-commerce revenues, ad revenues, and the ubiquitous dream of a public offering.

Unfortunately, the industry now finds itself struggling to come to grips with the hard realities of "the morning after." For many commercial webcasters fortunate enough to remain in business, we face very difficult decisions in attempting to balance a creative vision and a passion for music with the realities of the marketplace. For those webcasters who have deferred payment of any royalties for several years in anticipation of the CARP determination, the prospect of having to make retroactive payments is painful to say the least. This was very evident at the roundtable on Friday.

Further complicating the situation has been the widespread subjective perception that music on the Internet can or should be available free. Though this situation was most visibly manifested in the Napster controversy, there is no single culprit here. For Websound, one of the biggest hurdles we faced was the devaluation of music by venture-funded competitors who were compelled to give away streamed music for free to commercial clients who would, and should, otherwise be willing to pay. Many such webcasters were operating loosely, if not recklessly, under the statutory license. A number of those competitors have gone out of business, leaving the rest of us to begin the process of trying to build a viable structure out of the rubble.

Smaller webcasters, including Websound, often point to the promotional value that their programs offer to emerging labels and artists. It is important to note that while I believe there is some truth to this claim, nothing contemplated in the DMCA prevents any emerging artist or label from creating its own, royalty-free program as a way of promoting its music if it so chooses. The point is that promotional consideration may not, simply by definition, relieve webcasters from an ethical and/or legal obligation to compensate artists for

their work. To use a "real world" analogy, virtually every run of CDs we produce and put into the hands of Pottery Barn consumers provides unquestionably valuable promotional benefit for the artists represented, but we never ask those artists to waive their royalty payment. The business reason is simple: we believe it is crucial to maintain the value in the underlying work, since in the end this is what makes the whole proposition viable. Unfortunately, the Internet has tended to have the opposite effect and the industry is now reeling, in part, from the unintended effects of turning recorded music into a commodity.

The issue of fair compensation for copyright owners must, however, be separated to some degree from the current state of the webcasting business, as difficult as this may be. In my mind there can be no doubt that artists must be compensated for providing the content upon which every single webcaster constructs an offering.

It is also abundantly clear, however, that one size will not fit all. Websound executed its license with RIAA based on a carefully considered set of business parameters, which make sense in the context of our fee-for-service model. The terms of our license, therefore, cannot necessarily be held up as a stand-alone model for other webcasters. It is crucial that we do not force all of the wonderfully diverse sources of music programming out of the system by creating an untenable set of royalty provisions across the board. To do so is surely to sound the death knell for one undeniable promise offered by the Internet: global access to an infinitely broad range of musical expression. To this end, it is surely not fair to subject a small, noncommercial webcaster such as San Francisco's "soma-fm.com" to the same royalty requirements as a large commercial webcaster like Yahoo, or for that matter a smaller commercial webcaster such as Websound. To respect the rights of copyright holders while not overburdening the small webcaster, we should institute a multi-tiered approach. The thresholds can be tied, in part, to a maximum number of simultaneous listeners, or to a total monthly volume of "performances," for example. Accurate reporting can and will help facilitate these distinctions, and we believe that a reporting technology such as RadLog will form a part of the big-picture solution.

The issue of reporting under the statutory license is very contentious. To the extent that reporting is needed in order to fairly compensate artists, webcasters can and should report on their use of sound recordings. Websound has been doing this successfully for about eighteen months with a total office staff of two people; you can't get much leaner than that. Our experience proves that the reporting can be accomplished, and the minimal monthly expense for a service such as RadLog will ensure that the reporting requirements will not drive the many small webcasters out of business. There is no question that an initial cost will be incurred in setting up a system that serves the industry well and does not overburden either the webcasters or the copyright owners. Specifically, it is crucial that the record labels take the lead in constructing a database that can be made available to the industry for the purpose of streamlining reporting, encouraging

compliance with the license, and providing the specific data they require to properly process the royalties collected. The record labels, as the copyright owners, are the logical source of this raw data. I wish to emphasize the importance of creating this centralized database of song information as we look to create a fully functional reporting scenario for the industry.

Terrestrial broadcasters wishing to transmit their programs over the Internet present a separate set of issues. Using the perspective of an industry where promotional consideration is the accepted currency when it comes to sound recordings, it will logically be very difficult to craft a royalty-payment scenario that will be initially viable for many conventional broadcasters. There is no shortcut around this fact, and we must consider the idea that the Internet is better suited to webcasting models focused on the realities of this new medium--the opportunities as well as the costs--than it is to conventional broadcasters looking to "plug in" to a new pipeline.

Websound has survived thus far by leveraging our strengths, staying focused, and keeping our expectations realistic in through unstable times. As an industry, we must recognize that certain entities will undoubtedly cease doing business as a result of the costs and challenges, just as others come into the marketplace with new innovations. We must provide an environment where innovation and creativity are encouraged, but we cannot hope to save every webcasting business. We must also value the artists whose music is central to the industry, but not at the expense of creating a scenario where the only companies able to afford streaming music online are the record labels who own the copyrights.

It is my belief that a viable, flourishing webcasting industry made up of a range of participants from the smallest noncommercial entities to the largest commercial outlets is feasible under a tiered license that provides opportunity based on realistic concessions from both the webcasting community and the copyright owners.

Thank You.

Statement from Joslyn Tillar

Senator Patrick Leahy:

Thank you for allowing us this opportunity to provide you with more information that will help the committee come to an understanding of the process that took place and how that process can be improved. Attached, please find an amended spread sheet of pro forma for a sample of small commercial webcasters with the CARP recommended royalty fees and the new addition of the 2001 BMI/SESAC/ASCAP numbers. As you can see, there is a huge disparity between the TOTAL established PROs and the RIAA recommendation.

I have to admit that I was quite honored and impressed by your and your staff's knowledge and understanding of the CARP issue that was evident during our meeting. In this, I truly felt comfortable in the belief that the "system" can work.

If you have any questions, you may contact me at which point I will take the query to the group if I do not have a ready answer for you.

Statement from Elbert Dee Walston

Senator Patrick Leahy:

We as Webcasters fully support our artists and they deserve to be compensated. We are in no way suggesting that we should not pay royalties for the songs we play.

Our biggest concern is that we are being treated differently from traditional radio stations and are being separated from traditional radio stations . The only difference between a webcaster and a traditional broadcaster is our means of delivery: phone line vs. transmitter. We announce the songs and album titles just like a radio station. We pay our ASCAP and BMI licenses, fees that are supposed to cover the broadcast transmissions of copyrighted material, just like traditional radio stations.

We are being asked to provide information that serves no other purpose than to provide the RIAA and associated record labels with data mining to sell more product. Traditional radio is not required to collect data on their listeners, why should we. Radio stations provide data on the songs they play and when they play them. That is all that should be required of webcasters.

It has been proposed that webcasters pay an additional fee for making "ephemeral" copies of copyrighted music. This is because we make a digital copy of a song in order to play it over the Internet. It is not widely known outside of the radio industry that ALL radio stations make digital copies of their music to play over the air. Most radio stations use a system called "Prophet" to play their music, commercials, and everything else that goes over the airwaves. This system requires the station to copy the CD onto a hard drive. These radio stations have never paid an additional fee for this and the Prophet system has been in use for years. What makes webcasters a candidate for "ephemeral" fees when the radio stations are not.

The final point I'd like to raise is that the RIAA and the CARP feel that Internet streams offer a way for the end listener to make perfect digital recordings of music. While this is true to some degree there has been an oversight in their claims. Yes, a copy can be made of an outgoing stream. However, 75% of the world connects to the Internet at a speed which does not allow the transmission of high quality audio. The sound quality of most Internet radio streams is actually worse than what can be recorded with a tape deck from an AM radio station. Most Internet streams are delivering mono streams at a bit rate less than half of what is delivered on a normal CD.

Webcasters are not Napster-like file traders spreading music for free to anyone with an Internet connection. We are a new breed of radio station with a wider potential audience. We provide the same services as any traditional broadcast radio station: we promote new music, turn listeners on to old forgotten music, and provide a new means of generating album sales for artists now affiliated with the Top 40 of every music chart.

The problem webcasters have with the CARP issue has nothing to do with webcasters not wanting to pay fees. It is the unfairness in which fees are levied against the webcaster compared to the traditional radio broadcaster. Playing music is a "public performance" and we already pay our fees to the performing rights organizations. That which is good enough for major market radio stations should be good enough for webcasters. And if the RIAA and CARP feel webcasters should pay new fees, those fees should also be charged against the traditional station.