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# INTERNET STREAMING OF RADIO BROADCASTS: BALANCING THE INTERESTS OF SOUND RECORDING COPYRIGHT OWNERS WITH THOSE OF BROADCASTERS

## HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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# CONTENTS

JULY 15, 2004

## OPENING STATEMENT


Page

The Honorable Lamar Smith, a Representative in Congress From the State of Texas, and Chairman, Subcommittee on Courts, the Internet, and Intellectual Property ..... 1

The Honorable Howard L. Berman, a Representative in Congress From the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property ..... 2

The Honorable Rick Boucher, a Representative in Congress From the State of Virginia ..... 4

The Honorable Zoe Lofgren, a Representative in Congress From the State of California ..... 5


## WITNESSES


Mr. David Carson, General Counsel, Copyright Office of the United States, The Library of Congress

Oral Testimony ..... 6

Prepared Statement ..... 8

Mr. Dan Halyburton, Senior Vice President/General Manager, Group Operations, Susquehanna Radio Corporation, on behalf of the National Association of Broadcasters

Oral Testimony ..... 22

Prepared Statement ..... 23

Mr. Steven Marks, General Counsel, Recording Industry Association of America, Inc.

Oral Testimony ..... 37

Prepared Statement ..... 39

Mr. Jonathan Potter, Executive Director, Digital Media Association (DiMA)

Oral Testimony ..... 43

Prepared Statement ..... 45


## LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING


Letter to Rep. Rick Boucher from David O. Carson, General Counsel, Copyright Office of the United States, The Library of Congress ..... 61


## APPENDIX

### MATERIAL SUBMITTED FOR THE HEARING RECORD


Prepared Statement from the Honorable Howard L. Berman, a Representative in Congress From the State of California, and Ranking Member, Subcommittee on Courts, the Internet, and Intellectual Property ..... 65

Prepared Statement from the Honorable John Conyers, Jr., a Representative in Congress From the State of Michigan ..... 66

Prepared Statement of the American Federation of Television and Radio Artists (AFTRA), the American Federation of Musicians of the United States and Canada (AFM), the Recording Artists Coalition (RAC), and the Future of Music Coalition (FMC) ..... 66

# INTERNET STREAMING OF RADIO BROADCASTS: BALANCING THE INTERESTS OF SOUND RECORDING COPYRIGHT OWNERS WITH THOSE OF BROADCASTERS

**THURSDAY, JULY 15, 2004**

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

I will recognize myself for an opening statement and then other Members as well.

The purpose of today's hearing is to begin an examination of issues that relate to the streaming of copyrighted sound recordings over the Internet. A related issue is the potential impact of new technologies and devices such as HD or digital radio upon the balance of interest embodied in our copyright laws.

After reviewing the testimony of the witnesses, it is apparent that the concerns of the broadcasters, while substantial, are but one thread in a complex and interrelated quilt of issues. As is common with copyright issues, these concerns involve, one, the incentives to create and protect intellectual property; two, the economic interest of those who benefit from broadcasting and distributing these created works; and three, the public's interest in maximizing access to these works at a reasonable price.

By enacting the Digital Performance Right in Sound Recordings Act in 1995, Congress took an important and historic step. It did so by establishing for the first time in the United States an exclusive, though limited right, for sound recording copyright owners to perform their works publicly by means of certain digital audio transmissions. The law was historic because it permitted sound recording owners, including performing artists, to receive compensation for the commercial use of their recorded performances and not solely rely on income from sales of their recordings.

The law was limited because it exempted certain performances from its protection, including those made by traditional broadcasters. This exemption for FCC-licensed broadcasters was premised on an understanding that, one, the promotional air play of

records by analog-radio broadcasters has long served as a catalyst for music sales; and two, a recognition that the consumer taping of analog-radio broadcasts did not create a significant threat to recording artists.

As we will hear today, many broadcasters believe that DPRA, as well as amendments that were included in the DMCA which was enacted in 1998, have been inappropriately applied to their operations by the U.S. Copyright Office and the Federal courts. In their words, their view is that the application of certain provisions of sections 114 and 112 of the Copyright Act have in fact resulted in "new and unreasonable burdens on radio broadcasters," burdens they assert have resulted in more than 1,000 U.S. radio stations ceasing their Internet broadcasting operations.

The general position of the broadcasters is they wish to relax certain protections that are intended to make it more difficult for those who intend to pirate sound recordings to identify the songs that are about to be played. They also object to paying royalties for the performance of sound recordings and record-keeping requirements.

Not surprisingly, the RIAA which represents music labels, is opposed to a lessening of existing protections. In fact, they believe the development of new technologies such as digital radio receivers that can selectively identify, record and disaggregate specific songs poses a grave threat not only to the livelihood of music artists, but also to the advertiser-supported business model of radio broadcasters.

We are fortunate to have excellent witnesses with extensive experience related to the issues before this Subcommittee today, and we all look forward to their testimony.

The Ranking Member, Mr. Berman, is recognized for his opening statement.

Mr. BERMAN. Thank you, Mr. Chairman.

I appreciate your holding this oversight hearing on balancing the interest of sound recording copyright owners and the broadcasters. While I am confident in the outcome of the Bonneville case, I am not convinced that pure webcasting and the simultaneous webcasting of an over-the-air radio broadcast are identical activities which should be subject to the same licensing conditions. It may be that the rule should be technology neutral, or it may serve a greater public need to carve out exceptions to the rule to account for the differences between the technologies.

But before we get to the points of controversy, I think it is important to note that at least all of the witnesses here today acknowledge that the prevention of piracy of sound recordings is an important goal. With the advent of new technologies, we are once again faced with the problem of ensuring that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings will be protected. The Copyright Office has suggested granting copyright owners of sound recordings a full performance right to harmonize the rights of owners of sound recordings with those of other copyright owners once and for all. There is great appeal to that proposal in that we need to focus not only on the immediate problem and seek the particular

solution, we can stop having the tail wagging the dog of whatever technology is next.

Just a short time ago, we proposed a sound recording complement to prevent copying of music which would replace sales of sound recordings. Now, there is already technology which allows users to copy all of the recordings transmitted on a webcast channel, disaggregate them, save them to substitute for purchases of legitimate downloads or CDs, and redistribute them with peer-to-peer software. In the near future, we will probably be back here to discuss in depth the effect of digital audio broadcasting or HD radio on the sound recording performance right as well.

I doubt that the witnesses before us today will express unified support of a full performance right for sound recordings. In fact, I don't even doubt it; I know they won't. Instead, broadcasters and webcasters take issue with some of the provisions of the section 114 license.

For its part, the record industry illuminates problems emanating from the ease of copying sound recordings from a broadcast or webcast. Clearly, if we are going to have a section 114 webcasting license, it should be a workable license. We should ensure that its terms do not unduly burden licensees nor unduly impair the legitimate interests of copyright holders.

On the latter issue, I am concerned that several provisions of section 114 designed to deter piracy and preserve the recorded media market are not working. Specifically, I refer to the sound recording performance complement and the requirement that transmitting entities accommodate copy protection technologies used by sound recording copyright owners. It appears these provisions have fallen short in terms of protecting the interests of sound recording copyright owners.

There will be testimony about the need or lack thereof for a separate license to cover multiple ephemeral copies. Section 112(e) created a statutory license to allow any service operating under the section 114 statutory license to make one or more ephemeral recordings of a sound recording to facilitate the digital transmission of these works governed by section 114.

Even the Copyright Office has stated that section 112(e) can be best viewed as an aberration. However, the marketplace has borne out that there is a value to multiple ephemeral copies.

There seems to be a discrepancy as to what the valuation of an ephemeral copy is. Instead of computing a separate value for the 112 license to copy, could we put before the CARP establishing the rate for the 114 license? Can we put before that CARP the requirement to include in its evaluation the value, if any, of the multiple ephemeral copies?

I am aware it is described in the written testimony of NAB and DiMA that there is some distrust among the broadcasters and the webcasters of the CARP proceeding. After all, the claim is made that stations pay at least five to six times as much for sound recordings royalties than for musical works. However, I am not sure that speaks as much to the CARP as it does to the inequity of royalties paid to musical works copyright owners.

That being said, I agree that to some extent the CARP needs to be reformed, and I therefore support H.R. 1417. Technology pro-

vides many new opportunities to reach new audiences. However, we have to be aware of trampling on certain rights in order to get there.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

Are there other Members who wish to make opening statements?

Mr. Boucher is recognized.

Mr. BOUCHER. Thank you, Mr. Chairman. I want to commend you for convening today's hearing. This is an important subject for our Subcommittee, and it does deserve our attention.

In my view, webcasting of recorded music should receive the same treatment under the copyright law that the more traditional terrestrial broadcasts receive. Both webcasts and regular broadcasts deliver the same service, they merely deliver it by a different means; and the current copyright law imposes far higher payments on webcasters than on traditional broadcasters.

For example, radio stations pay no performance royalty when they terrestrially broadcast recorded music. The theory of the exemption is that the copyright owners benefit enormously from the publicity that accompanies repeat broadcast airings of their music. Their reward comes through increased sales of CDs arising from that publicity.

But radio stations must pay a performance royalty when the station's signal is streamed over the Internet. Webcasting is just another means for radio stations to reach an audience, and the same theory that supports an exemption from royalty payments for regular terrestrial broadcasts should also support an exemption for webcasting of the identical signal. And yet webcasting is burdened with a payment that averages about 11 percent of gross receipts from radio station webcasting.

This disparate treatment, to me, makes no sense. Here is another example of the unfair treatment of webcasting in comparison to the treatment of comparable services. Satellite-delivered radio, such as XM or Sirius, and radio delivered over cable systems pay a performance royalty based on the standards that are set forth in section 801(b). At the core of these standards is a fairness and reasonableness test.

But if the same radio signal is delivered over the Internet, the fairness and reasonableness test no longer applies. Instead, the webcaster royalty is set based upon what a willing buyer would pay to a willing seller. That test assumes the presence of a functioning competitive market for the music.

But the market is broken; there is no competition. The recording industry has a statutory antitrust exemption which enables the labels to sell collectively and to establish a uniform price for music. Essentially, there is only one seller in the market who can extract a take-it-or-leave-it bargain. The result is that the willing buyer-willing seller standard imposes far higher royalties on webcasters than are imposed on cable or satellite under the fairness standard when exactly the same service is delivered. The only difference is the platform that is used.

These disparities, Mr. Chairman, are wrong. We should not discriminate against the Internet as a distribution medium, but that

is exactly the effect of current law. And this law, to me, cries out for reform.

I very much appreciate your examining this subject, Mr. Chairman, bringing to light these inequities, and I hope following this hearing it will be the pleasure of this Subcommittee to adopt the kinds of reforms that establish parity in copyright treatment across all of the delivery platforms.

Thank you very much, Mr. Chairman. I yield back.

Mr. SMITH. Thank you.

Ms. Lofgren.

Ms. LOFGREN. Mr. Chairman, I will be brief. I am appreciative we are having this hearing. I do think it is an important issue, and as has been mentioned by Mr. Boucher, it provides us with an opportunity to level the playing field across technologies.

The situation we have today provides disincentives for Web streaming, and I don't think there is any public interest in disincenting the particular form of technology. We certainly want to make sure that content creators are properly compensated. I think there is unanimity on that score. But if that is the case in radio that is land-based, it should be equally the same on satellite or on webcasting.

We need to have a system that does not discriminate based on technology. I am hoping also that we can consider the Bonneville case, because I do think we need to deal with that on a head-on basis.

Finally, I am interested in the whole issue of interactive services. I think we have failed to give appropriate guidance to the Copyright Office on this issue, and although there will always be a gray zone, I think the gray zone is a little bit broader than it needs to be.

I think some of the new technologies and the Internet companies have made it possible for listeners to request a genre, to request a song, but they cannot decide when it is going to be heard. I don't think that is a whole lot different than when I was a girl and calling into the radio station and requesting my favorite song, and some day the DJ might play it. I am hopeful we can take a look at that and narrow the gray area somewhat on the noninteractive question.

With that, I look forward to hearing the witnesses. I appreciate your courtesy, Mr. Chairman, and also Mr. Berman.

Mr. SMITH. Thank you, Ms. Lofgren.

Our first witness is David Carson, General Counsel of the Copyright Office of the United States Library of Congress. Mr. Carson is the principal legal officer of the office with responsibility for the office's regulatory activities, litigation and administration of the copyright law. He also serves as a liaison on legal and policy matters to Congress and other Government agencies. Mr. Carson is a graduate of Harvard Law School, and received his Bachelor of Arts and Master of Arts degrees in history from Stanford University.

Our second witness is Dan Halyburton, who is the Senior Vice President and General Manager of Susquehanna Radio Corporation. In that position, Mr. Halyburton oversees programming, interactive marketing, and research and engineering efforts for the group's 33 U.S. stations. A resident of Dallas, Mr. Halyburton is a

past board member of the Texas Association of Broadcasters. He testifies on behalf of the National Association of Broadcasters.

Our third witness is Steven Marks, General Counsel for the Recording Industry Association of America. He routinely represents the RIAA on legislative issues, particularly those that relate to the Copyright Act. In addition, he oversees litigation, licensing and technology initiatives for the industry.

Mr. Marks is a graduate of Duke Law School where he served as Articles Editor of the Duke Law Journal. In addition, he received his B.A. from Duke University.

Finally, Jonathan Potter, Executive Director of Digital Media Association, DiMA, a position he has held since DiMA was organized in 1998. DiMA's goal is to represent the leading companies that provide online audio and video content to consumers.

Mr. Potter is a graduate of New York University School of Law and the University of Rochester. Most importantly, he is a newlywed, having just gotten married over the 4th of July. In fact, this Committee did a very rare thing, we actually postponed by a week this hearing to accommodate Mr. Potter's schedule and wedding.

Mr. BERMAN. We did some other things during that week that made up for it, though.

Mr. SMITH. Yes. Mr. Berman was wondering whether that was a fair decision and trade or not.

It is a tradition of the full Committee and, hence, needs to be done by the Subcommittee to swear in all witnesses.

[Witnesses sworn.]

Mr. SMITH. Just a quick reminder that all written testimony will be made a part of the record. Please limit your comments to 5 minutes.

Mr. Carson.

**TESTIMONY OF DAVID CARSON, GENERAL COUNSEL, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS**

Mr. CARSON. Mr. Chairman, Mr. Berman, Members of the Subcommittee, thank you for inviting me to testify on behalf of the Copyright Office on Internet streaming of radio broadcasts and section 114 of the Copyright Act.

As you know, the Digital Performance Right in Sound Recordings Act of 1995 granted copyright owners of sound recordings, for the first time, an exclusive right to make public performances of their works by means of digital audio transmissions subject to a compulsory license for certain uses. The Digital Millennium Copyright Act updated section 114 and expanded the scope of the compulsory license.

We at the Copyright Office believe that the creation of a limited performance right in sound recordings was a step in the right direction. It has fostered the growth of new digital technologies which support the legitimate use of music transmitted in digital networks such as the Internet and satellite radio services. But technological advances since the DMCA was enacted pose new threats to performers and copyright owners, and this hearing provides an opportune occasion to reconsider the scope of the sound recording performance right and whether it offers sufficient economic

incentives for the investment in and creation of sound recordings in light of the threats posed by the emergence of new technologies that threaten to transform activities such as digital broadcasting into interactive enterprises that may further weaken the traditional market for distribution of sound recordings.

It has been the long and consistent recommendation of the Copyright Office that sound recordings be given the same panoply of rights as other categories of copyrighted works. However, recognizing the political difficulties of extending an exclusive public performance right to sound recordings, the office has also gone on record in favor of a compulsory license governing public performances of sound recordings that, among other things, would require broadcasters who transmit performances of sound recordings over the air to pay a statutory royalty to copyright owners.

The DPRA and DMCA were steps in that direction, providing for exclusive rights for copyright owners in connection with interactive digital transmissions of public performances, and a statutory license for noninteractive digital subscription services, eligible nonsubscription services—or webcasters—and satellite digital audio radio services; but over-the-air broadcasts of sound recordings remain exempt from the digital performance right.

While that state of affairs may have been acceptable in the past, new technological developments lead us to believe that the time has come for Congress once again to address the scope of the performance right.

The advent of digital broadcasting threatens the continued livelihood of the music industry as tools are being developed that promise to make it a simple matter to make perfect digital copies of all of the recordings you want off the air. If Congress is not yet ready to grant a full performance right for sound recordings, a right that is recognized in most parts of the world, it should at least consider extending the existing right to digital broadcast transmissions.

In the remainder of my time, I would like to give you an update on some of the Copyright Office's activities in the administration of section 114 and its statutory licenses.

Prior to the convening of the first copyright arbitration royalty panel to determine rates and terms for the webcasting license, we conducted a rule-making to address whether broadcasters who retransmit their over-the-air signals on the Internet have the same legal status as any other webcasters and are subject to the statutory license for eligible nonsubscription services, or whether they enjoy the same exemption on the Internet that they enjoy when broadcasting over the air.

We concluded that section 114 treats them just like any other webcasters when they are webcasting, and a Federal district court and the United States Court of Appeals for the Third Circuit have agreed. That issue now appears to be resolved, although broadcasters would dearly love to have you change the law.

When the CARP made its determination on rates and terms for webcasting for the years 1998 to 2002, we reviewed that determination. The Register of Copyrights recommended to the Librarian of Congress that he cut the rates for Internet-only webcasters because the CARP's determination on that issue was arbitrary, and the Librarian accepted that recommendation. Those rates expired

at the end of the year 2002, and the rates that are currently in place were negotiated by broadcasters, webcasters and copyright owners. Those negotiated rates are remarkably similar to the earlier rates.

We are also establishing notice and recordkeeping regulations governing digital music services operating under the statutory license. These regulations play a crucial role in ensuring that the royalties paid under these licenses ultimately are paid to the copyright owners and performers whose sound recordings are played on these services. Without accurate identification of the recordings that are being played, there is no way to ensure that the royalties reach the artists and record companies who are entitled to them.

Just this week, we announced proposed regulations governing notice and recordkeeping for the period during which webcasters have not been reporting their performances. Those regulations will designate the reports already made by preexisting subscription services for the same period as proxies for records of performances by webcasters. This solution will resolve the problem of how to account for performances by webcasters who have no records of what they have performed in the past.

As always, Mr. Chairman, the Copyright Office stands ready to assist you as you consider the important issues we are addressing this morning.

Mr. SMITH. Thank you, Mr. Carson.

[The prepared statement of Mr. Carson follows:]

PREPARED STATEMENT OF DAVID O. CARSON

Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you on behalf of the Copyright Office to testify on internet streaming of radio broadcasts. In my testimony today, I will address the workings of the section 114 compulsory license and the role the Copyright Office has played in administering this license. As you know, in 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[1] which, for the first time, granted to copyright owners of sound recordings an exclusive right to make public performances of their works by means of certain digital audio transmissions, subject to a compulsory license for certain uses of these works codified in section 114 of title 17 of the United States Code. In the Digital Millennium Copyright Act ("DMCA")[2] of 1998, Congress updated section 114 and expanded the scope of the compulsory license.

We at the Copyright Office believe the creation of a limited performance right in sound recordings was a step in the right direction. It has fostered the growth of new digital technologies which support the legitimate use of music transmitted in digital networks such as the Internet and satellite radio services. However, there are those who still oppose a public performance right in sound recordings and would oppose any further expansion of that right beyond the limited performance right granted to the copyright owners by virtue of the passage of the DPRA and the DMCA. Whether to expand the scope of the performance right or limit it further remains the prerogative of Congress. But we are convinced that after considering the current state of affairs and the workings of the section 114 statutory license, Congress should be reassured that the creation of a digital performance right, although limited in its scope, was the proper step to take at that time in order to strike a workable balance between the rights of the copyright owners and the demands of users who wished to use these works in new and creative ways.

In fact, technological advances since the DMCA was enacted in 1998 pose new threats to performers and sound recording copyright owners, and this hearing provides an opportune occasion to reconsider the scope of the performance right for sound recordings and whether it offers sufficient economic incentives for the investment in and creation of sound recordings in light of the threats posed by the emer-

[1] Pub. L. No. 104–39, 109 Stat. 336 (1995).
[2] Pub. L. No. 105–304, 112 Stat. 2286 (1998).

gence of additional new technologies that threaten to transform activities such as digital broadcasting into interactive enterprises that may further weaken the traditional market for distribution of sound recordings

BACKGROUND

Sound recordings did not receive protection under the 1909 Copyright Act or under earlier versions of the copyright law. Instead, a copyright owner had to seek relief at common law in state courts for unlawful use of their works. That changed in 1971 when Congress enacted a law, effective February 15, 1972, that granted exclusive rights of reproduction and distribution to copyright owners of sound recordings.[3] Congress took this action in order to curb the mounting losses suffered by the record industry from the burgeoning trade in pirated records and tapes. However, Congress did not grant the full bundle of rights given to other copyright owners because traditional users of these works fiercely opposed a performance right for sound recordings. Moreover, the more limited set of rights seemed sufficient to deal with the immediate problem of record piracy.

Even so, those who opposed federal copyright protection for sound recordings mounted a constitutional challenge to the amendment adding a limited copyright for sound recordings. Twice, the courts considered the question and in both cases the courts upheld the law as constitutional,[4] confirming the position long held by the Copyright Office that a sound recording was capable of being considered the "writing of an author" within the constitutional sense[5] and reinforcing the conclusion that sound recordings are creative works worthy of full copyright protection.[6]

Although these events settled the basic question of copyrightability and questions with respect to the reproduction and distribution rights for sound recordings in the early 1970's, the debate on whether and to what extent sound recordings should enjoy full federal copyright protection that began in the 1960's has continued. In most cases, stakeholders have retained their original positions during the intervening period, although there is now a general consensus that performers and record producers' creative contributions are entitled to some degree of copyright protection.

Historically, television and radio broadcasters, jukebox operators, and wired music services—the traditional users of the sound recordings who publicly perform sound recordings—have opposed any changes to the Copyright Act that would require payment of a royalty for the performance of a sound recording. These users were already paying authors and publishers of musical works for the right to perform the musical works embodied in sound recordings and saw no reason to make a second payment to performers and record companies for the same performance. Traditional users, however, did not stand alone in their opposition to the movement for a full performance right. In the early 1960's, music publishers aligned themselves with these users and opposed the public performance right for sound recordings because they feared that the creation of a sound recording public performance right would result in a decrease in their stream of revenue. Basically, they envisioned that the royalty pool generated from the public performance of recorded music would remain fundamentally the same and that they would have to share these royalties with the record companies and the performers of sound recordings.

On the other side of the debate stood the representatives of the record companies—*e.g.,* the Recording Industry Association of America (RIAA)—and representatives of the performers—*e.g.,* the American Federation of Musicians ("AFM"). The record company representatives took the position that there was no principled reason for treating sound recordings differently from other categories of works. AFM took a broader view. It focused more sharply on the economic deprivation experienced by performers who received no compensation from the public performance of

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[3] Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391 (1971).

[4] *See Shaab* v. *Kleindienst,* 345 F. Supp. 589 (D.D.C. 1972) (sound recordings qualify as writings of an author that may be copyrighted); *Goldstein* v. *California,* 412 U.S. 546 (1973) (the term "writing" can be broadly interpreted by Congress to include sound recordings).

[5] *See* Supplementary Register's Report on the General Revision of the U.S. Copyright Law, House Comm. Print (1965) at 51 ("1965 Supplementary Register's Report") ("We believe that, leaving aside cases where sounds have been fixed by some purely mechanical process involving no originality whatever, the aggregate of sounds embodied in a sound recording is clearly capable of being considered the 'writing of an author' in the constitutional sense. . . . Thus, as indicated in the 1961 Report, we favor extending statutory copyright protection to sound recordings.").

[6] *See* Statement of Barbara Ringer, Register of Copyrights, before the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary, United States Senate, pursuant to S. Res. 72 on S. 111, July 24, 1975, at 11("July 1975 Statement of the Register of Copyrights").

their own recordings, while others, including jukebox operators, radio and television broadcasters and wired music services - as well as composers and music publishers—benefitted commercially from these actions. However, AFM did offer a solution to the problem in 1967, during the early stage of the debate regarding the revision of the 1909 Act. It proposed an amendment to establish a "special performing right that would endure for 10 years and would be subject to compulsory licensing,"[7] a novel idea that would not come to fruition in any form until thirty years later.

Copyright owners and performers were not alone in their quest for the elusive performance right. On a number of occasions during consideration of the omnibus bill to revise the 1909 Copyright Act and since, the Copyright Office has voiced its unwavering support for the creation of a full performance right for sound recordings, while also acquiescing to proposals to subject the right to a compulsory license.[8] In fact, the push for a performance right nearly paid off. Proponents were successful in getting Senator Harrison Williams to introduce a formal amendment to the 1967 Senate bill which, among other things, aimed to create a compulsory license for the public performance of sound recordings. The amendment was accepted when the revision bill was reported by the Senate Subcommittee on Patents, Trademarks and Copyrights to the full Judiciary Committee on December 10, 1969, and remained in the 1971 and 1973 bills, which were reported favorably by the full Senate Judiciary Committee on July 3, 1974. The amendment, however, did not survive opponents' efforts to remove the provision from the bill, and it was removed from the 1975 revision bills in both the Senate and the House.

In fact, the issue was so explosive that in 1975, Register of Copyrights Barbara Ringer refrained from pushing for the creation of even a limited public performance right for sound recordings in the omnibus bill, and testified accordingly:

> At the same time it must be said that, on the basis of experience, if this legislation were tied to the fact of the bill for general revision of the copyright law, there is a danger that it could turn into a "killer" provision that would again stall or defeat omnibus legislation. This danger exists even more clearly than when I testified to this same effect last July, and would be very severe if the potential compulsory licensees—notably the broadcasting and jukebox industries—exerted their considerable economic and political power to oppose the revision bill as a whole. Should this happen, there could be no question about priorities. The performance royalty for sound recordings would have to yield to the overwhelming need for omnibus reform of the 1909 law.[9]

Thus, when Congress passed the 1976 Copyright Act, it did not include a performance right for sound recordings. It did, however, ask the Copyright Office to submit a report on January 8, 1978, making recommendations as to whether Congress should amend the law to provide performers and copyright owners any performance rights in sound recordings. But change could not occur in a hostile environment.

In that report, the Copyright Office reaffirmed its earlier position and stated without qualification that a right of public performance for sound recordings is fully warranted, offering the following explanation for its unwavering position:

> Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances.[10]

The predicate underlying this position—that the creation and delivery of music requires a joint effort by songwriters and music publishers as well as performers, record producers and record companies—was not widely recognized in the early 1960's, and even in the early 1970's certain opponents of the performance right con-

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[7] *See* Second Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1975 Revision Bill, October-December 1975, pp. 214–216 [Draft] ("Register's Second Supplementary Report").

[8] *See* 1965 Supplementary Register's Report; July 1975 Statement of the Register of Copyrights; and Register of Copyrights, Report on Performance Right in Sound Recordings, H.R. Doc. No. 15 (1978) ("1978 Report on Performance Right in Sound Recordings").

[9] Testimony of Barbara Ringer, Register of Copyrights (December 4, 1975), before the House of Representatives, Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary on H.R. 2223, Serial No. 36, part 3, at 1908 (1975).

[10] 1978 Report on Performance Right in Sound Recording, at 177.

tinued to argue that sound recordings lacked sufficient creativity to justify copyright protection.[11] Nevertheless, the realization that the creation and delivery of music had changed dramatically over time and was the result of the contributions not only of composers and music publishers but also of performers and record producers gradually took hold, becoming a generally accepted principle by 1978, and one which remains unquestioned today.

Yet, in spite of this general understanding and the efforts of those who supported a full performance right for sound recordings, no legislation was passed in response to the Office's 1978 recommendation, and the controversy died down. The debate remained relatively dormant until the late 1980's. Congress acknowledged that the development of digital audio tape ("DAT") machines posed a real threat to the record industry and passed the Audio Home Recording Act of 1992 ("AHRA").[12] Congress passed AHRA to allay the fears of copyright owners that consumers would use the new technology to make unauthorized high - quality digital reproductions *en masse,* thus displacing sales in the marketplace.[13] It did so by requiring the incorporation of a Serial Copy Management System into each digital audio recording device in order to prevent serial copying, and by requiring payment of a royalty fee for the importation and distribution, or manufacture and distribution, of digital audio recording media and devices. AHRA also immunizes a consumer who has made a noncommercial reproduction of a musical recording as provided in Chapter 10 of Title 17 from suit for infringing the reproduction right of the copyright owners, although it does not transform infringing consumer uses into non-infringing ones. And it does not cover reproductions of songs stored on a computer in which one or more computer programs are fixed.

But use of DAT recorders was merely the tip of the iceberg. Digital technology continued to advance at a rapid pace, forcing Congress to reexamine the effect of new digital technologies on the record industry. The outcome of this reevaluation was an acknowledgment from Congress in 1995 that the advent of on-demand digital subscription services and interactive services posed a serious threat to performing artists and record companies. Record companies believed, and rightfully so, that consumers would adapt to the new technologies and use these services to fulfill their desire to obtain music, and do so without having to purchase a retail phonorecord.

Consequently, after carefully weighing the rights of the copyright owners against its desire to foster new technologies and business models, Congress took action in 1995 and passed the Digital Performance Right in Sound Recordings Act ("DPRA"), which granted copyright owners of sound recordings an exclusive right to perform their works publicly by means of certain digital audio transmissions, subject to certain limitations. In taking this action, Congress sought to preserve and "protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues from traditional record sales, . . . without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[14]

For this reason, the DPRA restricted the application of the new digital performance right to interactive services and subscription services, and specifically exempted traditional over-the-air broadcasts and related transmissions, including certain retransmissions of radio signals and incidental transmissions and retransmissions made to facilitate an exempt transmission. It created these exemptions in recognition of the fact that the possibility of these transmissions displacing sales was never very high. It also included a statutory license for subscription services so that these services could avoid the difficulties involved in direct licensing and devote more of their resources to developing new business models for the benefit of the public.

However, services operating under the statutory license are subject to specific terms that are designed to limit unauthorized copying of the works by the recipient of the performance. These terms include requirements that the service avoid the use of a signal that would cause the receiver to change from one program to another; refrain from publishing or preannouncing particular songs that will be played during the course of a program; and schedule songs to avoid playing too many different songs by the same artist or from the same phonorecord in a short period of time or, to state it in legal terms, to avoid violating the "sound recording performance complement."

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[11] *See* Register's Second Supplementary Report at 221.
[12] Pub. L. No. 102–563, 106 Stat. 4237 (1992).
[13] H. Rep. No. 102–873, at 18–19 (1992).
[14] S. Rep. No. 104–128, at 14–15 (1995).

While these terms did offer a measure of protection to copyright owners and performers during the early days of the technological era, they only covered those problems associated with services in existence at the time. It soon became apparent that the DPRA was too narrow. It failed to anticipate the rapid development of the Internet and its ability to offer perfect digital transmissions to a global audience instantaneously. Thus, three years later, Congress had to revisit the issue of digital audio transmissions and consider how the digital performance right applied to new noninteractive, nonsubscription services that were springing up overnight and offering real time transmissions of a wide variety of musical choices over the Internet to anyone who had a computer.

These services, commonly referred to as webcasters, offered for the first time a rich and diversified selection of music for free over a communications network that was readily accessible to anyone with an internet connection. The problem, however, was the unique programming options that these services offered. For example, some webcasters offered "artist-only" channels that played works of one artist continuously 24 hours a day, while other webcasters offered programming techniques that permit listeners to influence the selection of sound recordings that are part of programs created by the webcasters."[15] In light of these programming capabilities and the exponential growth of these new services, Congress recognized that even nonsubscription services can pose a threat to the economic health of the record industry. For this reason, it again amended section 114 with the passage of the DMCA to clarify that the digital performance right applied to these non-subscription webcasters and that these services came within the scope of the statutory license. Moreover, Congress imposed additional terms, beyond those already adopted under the DPRA, on these new nonsubscription services in order to address the programming and technological problems raised by Internet transmissions.

Specifically, the expanded section 114 license requires licensees: to cooperate with copyright owners to prevent recipients from using software or devices that scan transmissions for particular sound recordings or artists;[16] to allow for the transmission of copyright protection measures that are widely used to identify or protect copyrighted works;[17] and to disable copying by a recipient in the case where the transmitting entity possesses the technology to do so, as well as taking care not to induce or encourage copying by the recipient.[18]

Congress also made a few other modifications to the Copyright Act in 1998. One major change was the creation of a second statutory license in section 112(e). This license allows any service operating under the section 114 statutory license to make one or more ephemeral recordings[19] of a sound recording to facilitate the digital transmissions of these works governed by section 114. The DMCA also differentiated between those services that were operating prior to the passage of the 1998 amendments and those that came on line after the DMCA's date of enactment, October 28, 1998. The three preexisting subscription services (Music Choice; DMX Music, Inc.; and Muzak, L.P.) and the two preexisting satellite digital audio radio services (Sirius Satellite Radio, Inc. and XM Satellite Radio, Inc.) comprise the former group and all other services fall into the latter category. Prior to the DMCA, the rates for the preexisting services were set in accordance with four statutory objectives that also apply to some of the other statutory licenses but do not necessarily yield a marketplace rate.[20] These services retained this standard when section 114 was amend-

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[15] Committee of the Judiciary House of Representatives, Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998, at 52 (Comm. Print 1998).

[16] 17 U.S.C. 114(d)(2)(C)(v).

[17] 17 U.S.C. 114(d)(2)(C)(viii).

[18] 17 U.S.C. 114(d)(2)(C)(ii).

[19] These reproductions are referred to as ephemeral copies because they generally must be destroyed within six months of the first transmission to the public.

[20] Section 801(b)(1) provides that "rates applicable under sections 114(f)(1)(B), 115, and 116 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; and

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices."

17 U.S.C. § 801(b)(1).

ed in 1998 even though Congress adopted a willing buyer/willing seller standard for setting rates for all other services operating under section 114.

Congress's responses to threats from new digital technologies in 1995 and in 1998 were limited, just as in 1971. Each time, Congress has chosen to focus only on the immediate problems presented to it and to calibrate the rights of sound recording copyright owners to address these particular problems, rather than adopt a full performance right, even though many urged Congress to grant sound recording copyright owners a full performance right. In testimony before the Senate Judiciary Committee in 1995, the Register of Copyrights restated the Office's steadfast support for a full performance right for sound recordings, citing the need to harmonize the rights for copyright owners of sound recordings with those of the music publishers once and for all.[21] Moreover, an earlier study conducted by the Copyright Office in 1991 had underscored the need for such a right as a means to protect record companies and performers who suddenly were faced with the high probability that digital technology would provide readily available distribution channels for the reproduction and performance of their works without a counterbalancing means to compensate the creators of the sound recordings.[22]

In light of this danger, there was no principled reason to continue to allow one group—music publishers—to receive compensation for the performance of their works while denying another similarly situated group of copyright owners—record companies—the same right to collect royalties for the very same performance, especially in the case where the users' businesses relied heavily on the use of the creators' works to turn a profit. This is an observation that has been made repeatedly in support of a full performance right and one articulated by the Working Group on Intellectual Property Rights in its 1995 report on Intellectual Property and the National Information Infrastructure.[23] This report characterized the lack of a performance right in sound recordings as "an historical anomaly that does not have a strong policy justification—and certainly not a legal one. Sound recordings are the only copyrighted works that are capable of being performed that are not granted that right."[24]

Nevertheless, most users of these works continue to oppose a full performance right for sound recordings and argue that the economies in the current marketplace favor the user and the emerging technologies over the creator, even those who stand on the opposite side of the argument when it is their works that are being targeted for use by another group. Indeed, in the last few weeks, broadcasters have participated in meetings at WIPO considering proposals for a treaty that would obligate countries to provide exclusive rights to broadcasting organizations against the fixation, rebroadcasting and retransmission of their broadcast signals, among other rights. The broadcasters claim this new protection is necessary due to changes in technology, such as the Internet, which threaten their existing business models. They seek these rights notwithstanding their efforts here in the United States to oppose and limit the same rights for the creators of the sound recordings that the broadcasters transmit. Paradoxically, if such a treaty is concluded, broadcasters may be able to exercise exclusive rights over their performance of sound recordings even though the copyright owners of the same sound recordings have no rights in that context.

Congress has the power to remedy this situation and strike the proper balance in favor of a full performance right. Thus, the question should no longer be whether Congress should provide a full performance right for sound recordings, but rather whether it should be subject to statutory licensing and, if so, what the value of that right should be in order to insure that copyright owners and performers have sufficient monetary incentives to continue to create works for the enjoyment of the public, and what restrictions, if any, should be placed on that right to insure the viability of new businesses to disseminate the works in a high-quality, readily accessible format. Stated another way, the challenge of copyright in this context, as it is in general, is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one

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[21] Statement of Marybeth Peters, Register of Copyrights, before the Senate Committee on the Judiciary (March 9, 1995).

[22] Report of the Register of Copyright, Copyright Implications of Digital Audio Transmission Services (October, 1991).

[23] Information Infrastructure Task Force, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* (Sept. 1995).

[24] *Id.* at 222.

hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[25]

THE SECTION 114 STATUTORY LICENSE- HOW IT AFFECTS BROADCASTERS

Although the digital performance right enacted in 1995 and expanded in 1998 is a step in the right direction, it is not an unfettered right. It is subject to certain exemptions—*e.g.,* nonsubscription broadcast transmissions are exempt—and to a statutory license for certain noninteractive transmissions. Pursuant to this license, many digital transmissions of performances of sound recordings may be made without the permission of the copyright owner if the licensee adheres to the terms of the license, pays the statutory royalties, and complies with the Copyright Office regulations governing notice and recordkeeping. Users, however, have complained that the license terms and regulatory requirements have in some cases created barriers that prohibit them from taking advantage of the license.

*a. Scope of the exemption for nonsubscription broadcast transmissions.*

Broadcasters have been particularly vocal about their treatment under the license, arguing in the first instance that they should not be subject to the digital performance right for their digital, Internet-based activities, such as webcasting. At the outset of the first rate setting proceeding for the webcasting license, broadcasters argued that retransmissions of AM/FM broadcast programming enjoyed an exemption from the newly created digital performance right and that simulcasts of radio broadcast programming therefore were not subject to the statutory license. The recording industry and associations representing the interests of performers[26] did not agree. They opposed this interpretation and sought a ruling from the Copyright Office declaring that retransmissions of a broadcast signal over a digital communications network, such as the Internet, were not exempt from the digital performance right under section 114(d)(1)(A) of the Copyright Act, as amended by the DMCA. Because the resolution of this question would determine whether broadcasters chose to participate in the rate setting process and because it was necessary to resolve whether the rates being set would apply to broadcasters' retransmissions over the Internet, the Copyright Office postponed the rate setting hearing until it could decide the legal questions posed by the broadcasters and the record industry.

Broadcasters, however, questioned the Office's authority to conduct a rulemaking to ascertain whether simulcasts of AM/FM broadcast programming over the Internet came within the scope of the section 114 statutory license. For this reason, the National Association of Broadcasters ("NAB") filed an action in the U.S. District Court for the Southern District of New York, seeking a declaratory ruling on the issue.[27] This action was eventually withdrawn. In the meantime, the Copyright Office conducted a notice and comment rulemaking proceeding and made a determination that the exemption for broadcast transmissions did not include transmissions made over a digital communications network such as the Internet.[28]

The key question in this proceeding centered on the meaning of the phrase, "nonsubscription broadcast transmission," which is not defined expressly in the law. More specifically, the analysis focused on the statutory definition of the term "broadcast" transmission. The statutory definition characterizes a "broadcast" transmission as "a transmission made by a terrestrial broadcast station licensed as such by the Federal Communications Commission."[29] The Office then focused on the phrase "licensed as such by the FCC," finding that it limited the exemption to those transmissions made under a license issued by the FCC, and that these transmissions are limited to the local service area of the radio transmitter. In reaching this conclusion, the Office noted that Congress used the descriptive term "over-the-air" frequently in the legislative history to identify those broadcasts that it sought to protect under

[25] *Sony Corp. of America* v. *Universal City Studios, Inc.,* 464 U.S. 417, 429 (1984).

[26] RIAA represented the interests of the record industry in the rate setting proceeding and the rulemaking proceeding to address the legal questions regarding the scope of the section 114 statutory license as it relates to simulcasts of broadcast radio programming over a digital communications network, like the Internet. The Association of Independent Music, the AFM, and the American Federation of Television and Radio Artists filed comments jointly with the RIAA in the rulemaking proceeding.

[27] *See NAB* v. *RIAA,* 00–CV–2330 (S.D.N.Y.).

[28] 65 Fed. Reg. 77292 (Dec. 11, 2000) (amending the regulatory definition of a "service" in order to clarify that transmissions of sound recordings by means of digital audio transmissions over a communication network, such as the Internet, are not exempt from copyright liability under section 114(d)(1)(A) of the Copyright Act).

[29] 17 U.S.C. § 114(j)(3).

the exemption and never referenced any other type of transmission made by an FCC-licensed broadcaster when discussing the scope of the exemption.

In addition, the Office determined that had Congress wished to exempt all transmissions made by an FCC-licensed broadcaster—the position urged by the broadcasters—then there would not have been a need to carve out additional exemptions to cover certain retransmissions of an AM/FM radio broadcast program. In reaching this conclusion, the Office focused on an exemption in the law which provides that the performance of a sound recording by means of a digital audio transmission is not an infringement in the case of a retransmission of a radio station's broadcast transmission, provided that "the radio station's broadcast transmission is not willfully or repeatedly retransmitted more than a radius of 150 miles from the site of the radio broadcaster."[30]

Broadcasters had argued that this 150-mile exemption applied only to third parties who retransmitted the original broadcast programming and not to the original broadcaster, but the Office rejected this interpretation. The law draws no distinction between the original broadcaster and third party retransmitters, nor does it or the legislative history offer any reason why Congress would allow original broadcasters to retransmit their programming globally while at the same time restricting the retransmissions of others to a defined geographic area.

In fact, an exception in the law to the 150-mile limitation for retransmissions of a radio signal in the case where the radio signal is "retransmitted on a nonsubscription basis by a terrestrial broadcast station, terrestrial translator, or terrestrial repeater licensed by the Federal Communications Commission"[31] supports this position. In all cases, the purpose of these provisions is to restrict each retransmission of a digital audio transmission of a radio signal to a limited geographic area, even in those instances where the retransmissions are done by terrestrial physical facilities regulated by the FCC.

The Office found further support for its determination that broadcasters could not retransmit AM/FM radio programming over the Internet when it examined section 112, the provision that governs the making of ephemeral copies of sound recordings necessary to facilitate a public performance under the section 114 statutory license. While traditional broadcasters can make a single server copy of their radio programs to facilitate their over-the-air broadcasts under an exemption in section 112(a), webcasters are unable to rely upon this provision for making all the necessary ephemeral recordings that are needed to facilitate a transmission over the Internet. Webcasting requires more than a single copy of a work to effectively transmit over the Internet. For this reason, Congress created a second statutory license in section 112(e) which, subject to the rates and terms of the statutory license, allows a webcaster operating under the section 114 statutory licensing regime (or certain services that provide transmissions to a business establishment for use during the normal course of business) to make one or more ephemeral recordings to facilitate their transmissions. Thus, broadcasters who wish to retransmit their radio station programs over the Internet would have to operate under the section 114 license in order to be eligible under the section 112(e) statutory license to make all the ephemeral recordings needed to effectuate the retransmission of the AM/FM radio program over the Internet.

Not surprisingly, the broadcasters did not accept the Office's determination. They immediately filed a lawsuit under the Administrative Procedure Act challenging the Register's determination, but the Register's decision was upheld by both the district and the appellate courts.[32]

In making its decision, the United States Court of Appeals for the Third Circuit rejected the broadcaster's fundamental argument that Congress had intended to provide a broad exemption to cover any transmission made by a licensed broadcaster. Specifically, it held that the reference to "broadcast station" in the definition of a "broadcast" transmission referred to the physical facility licensed by the FCC and not to the broadcaster. It noted that under the FCC rules a station must be a physical facility and that the FCC license referenced in the statutory definition must be tied directly to the operation of a particular facility rather than a corporate entity. Consequently, the court held "[a] 'broadcast transmission' under § 114(d)(1)(A) would therefore be a radio transmission by a radio station facility operated subject to an FCC license and would not include a webcast. AM/FM webcasting does not meet the definition of a 'nonsubscription broadcast trans-

[30] 17 U.S.C. 114(d)(1)(B)(i).

[31] 17 U.S.C. 114(d)(1)(B)(i)(I).

[32] *Bonneville Int'l. Corp.* v. *Peters,* 347 F.3d 485 (3rd Cir. 2003), *aff'g* 153 F. Supp.2d 763 (E.D. Pa. 2001).

mission' and does not therefore, qualify under § 114(d)(1)(A) for an exemption from the digital audio transmission performance copyright of § 106(6)." [33]

The court found additional support for its conclusions in the fact that Congress included additional exemptions from the digital audio transmission performance right for retransmissions of certain nonsubscription broadcast transmissions, noting that the common-sense reading of the exemptions in § 114(d)(1)(B) requires an interpretation that does not differentiate between webcasting of AM/FM radio programming by one group, i.e, broadcasters, and webcasts of the exact same programming by third parties. Likewise, the court read the legislative history of the DPRA and the DMCA as supporting an exemption for traditional radio broadcasts, and concluded that the exemption for a "nonsubscription broadcast transmission," which was added with the passage of the DPRA in 1995, did not contemplate protecting AM/FM webcasts by any group.

This interpretation of the scope of the exemption for "nonsubscription broadcast transmissions" offered by the Office and by the courts is totally consistent with Congress' perception at the time the DPRA was enacted that traditional over-the-air radio did not pose a threat to the record industry.

*b. Interactive services.*

The section 114 statutory license is not available to an interactive service. Such a service is defined, in general, as "one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient." [34] Interactive services must negotiate separate licenses in the marketplace with the copyright owners of the sound recordings for the right to perform publicly specific sound recordings by means of a digital audio transmission. Congress took this position and imposed full copyright liability on interactive services because Congress realized these services had the greatest potential for displacing record sales. Consequently, in 2000 the Digital Media Association (DiMA) petitioned the Copyright Office to initiate a rulemaking proceeding for the purpose of adopting an amendment to the rule defining the term "Service" to make it clear that a service is not interactive simply because it offers the consumer some degree of influence over the programming offered by the webcaster.

After considering DiMA's arguments for initiating the rulemaking and RIAA's opposing arguments, the Office determined that a rulemaking was not the appropriate way to resolve the question of interactivity because there was no way to articulate with any precision specific guidelines that would distinguish between an interactive service and an non-interactive service beyond what was already in the statute, especially when business models were undergoing constant change.[35] Moreover, the Office noted that "such a determination had to be made on a case-by-case basis after the development of a full evidentiary record in accordance with the standards and precepts already established in the law." [36] Consequently, the Office denied the petition.

*c. Notice and recordkeeping requirements.*

Sections 114(f)(4)(A) and 112(e)(4) require the Librarian of Congress to establish regulations specifying notice and recordkeeping requirements for use of sound recordings in a digital transmission. Accordingly, the Office issued interim regulations on March 11, 2004, specifying notice and recordkeeping requirements for use of sound recordings under the sections 112 and 114 statutory licenses.[37] These rules require users of the section 112 and 114 statutory licenses to report on the sound recordings they perform so that SoundExchange, the collective that collects the statutory royalties and disburses them to copyright owners and performers, knows how to divide up the royalties for performances of sound recordings. Because the amount of royalties paid to each copyright owner and performer depends upon the number

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[33] *Id.* at 495.

[34] The statutory definition provides additional explanatory language to distinguish between interactive and non-interactive services, stating that "[t]he ability of individuals to request that particular sound recordings be performed for reception by the public at large, or in the case of a subscription service, by all subscribers of the service, does not make the service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated by either the transmitting entity or the individual making such request. If an entity offers both interactive and noninteractive services (either concurrently or at different times), the noninteractive component shall not be treated as part of an interactive service." 17 U.S.C. § 114(j)(7).

[35] 65 Fed. Reg. 77330 (Dec. 11, 2000).

[36] *Id.* at 77332.

[37] 69 Fed. Reg. 11515 (March 11, 2004).

of performances of each sound recording, such reporting is crucial to the operation of the statutory license. Requirements have long been in place for preexisting subscription services, and we believe they are working well.[38]

However, the rulemaking proceeding governing notice & recordkeeping requirements for eligible nonsubscription services such as webcasters is ongoing, and it has proved to be difficult and controversial. Representatives of record companies and performers have sought comprehensive information about each and every performance of each and every sound recording transmitted by a service, arguing that such information is essential in order to ensure that the correct amount of royalties is paid to each copyright owner and performer, and that information that will permit monitoring compliance with the requirements of the sound recording performance complement is also needed. Webcasters and broadcasters opposed such detailed reporting requirements, asserting that they would be excessive and too onerous for an industry that historically has accounted for its performances of musical works in a totally different manner. Throughout the rulemaking, they maintained that the Office should require reporting of only that information that would identify the sound recording for purposes of making a distribution of royalties. Specifically, they submitted that only five data elements would be needed for this purpose : name of the service, sound recording title, name of the artist, call sign of the station and date of transmission. They also suggested that the rules should allow services to obtain this information through a sampling process (*e.g.,* providing information for only two weeks out of every year) rather than accounting for each performance.

In adopting interim regulations setting the requirements for the information that eligible nonsubscription services must report to SoundExchange, we rejected the type of sampling proposed by broadcasters because it would be likely to under report—or omit reporting at all—performances of the lesser known artists and performers receiving playtime from those webcasting services that offer multiple channels of niche programming, covering an array of genres, *e.g.,* hip-hop, gospel, classical, country, folk, new age, and pop. Morever, we found it difficult to credit claims from webcasters that although their transmissions—and frequently the programming of the content of their transmissions—are controlled and accomplished by the use of computers, they would be unable to report all actual performances of sound recordings. Ideally, this computer-driven medium should be well-suited to the reporting of actual performance data that would ensure that each copyright owner and performer is compensated for the value of the transmissions of performances of his or her recordings.

On the other hand, we recognized that for many webcasters, maintaining and reporting any information at all about their transmission of performances would be a novel experience, and that it would be desirable to have a period of transition during which they would become accustomed to such reporting. Thus, while it is likely that we shall require year-round reporting of all performances in the not-too-distant future, the new interim rules require licensees to maintain records for two weeks out of every quarter, identifying which sound recordings were performed during this period and how often they were performed. In deriving these rules, the Office balanced the need to obtain accurate information about performances of specific sound recordings for purposes of compensating as many copyright owners entitled to receive these fees as possible against the burden imposed on the services to provide the needed information and the need for a period of time during which licensees will become accustomed to reporting actual performance data. The ultimate goal remains a final regulation requiring year-round reporting.

Meanwhile, the interim rules require the licensees to report only a relatively minimal amount of specific information needed to identify and differentiate sound recordings from one another. In addition to its own name and the category of transmission (*e.g.,* eligible nonsubscription transmission other than a broadcast simulcast, or eligible nonsubscription transmission of a broadcast simulcast, or eligible transmission by a business establishment service making ephemeral recordings), a licensee is currently required to report as few as four key items for each sound recording performed: sound recording title; featured recording artist, group or orchestra; sound recording identification;[39] and total number of performances.[40] They do

[38] *See* 63 Fed. Reg. 34296 (June 24 1998).

[39] The sound recording identification may consist of either the International Standard Recording Code (ISRC) for the particular recording or, in lieu of the ISRC, the album title and the marketing label of the company that markets the album which contains the sound recording.

[40] Total performances may be reported either by reporting the actual number of times a sound recording was performed by the licensee multiplied by the number of recipients; or by reporting the total number of times the sound recording was performed as well as the licensee's aggregate

Continued

not require the licensee to report other information sought by the record industry, such as the catalog number, the track label (P) line, the duration of the sound recording, the universal product code, or the release year. Nor are the licensees required to report specific information that would aid the copyright owners in assessing compliance with the programming restrictions, *e.g.,* the start date and time of the transmission of the sound recording. Moreover, the rules do not require a full census report at this time, although they do require licensees to maintain precise records for two weeks out of every quarter.

The rulemaking is ongoing. The Office is still considering rules that would establish specific electronic formats for transmitting this information. The format issue has proven difficult. One might have imagined that although there would be differences of opinion over what kind of information must be reported, the interested parties would be able to work out the technical issues involving the electronic formats in which the reports of use would be made. SoundExchange has been working on its own system for maintaining the data that will be reported to it on sound recording performances, and many broadcasters and webcasters have their own electronic systems that already report information on their performances. We had anticipated that SoundExchange could sit down with broadcasters and webcasters to work out the details of how these systems can communicate with each other, but thus far very little progress has been made despite our encouragement and urging.[41] We at the Copyright Office have no familiarity with or expertise about the electronic systems maintained by SoundExchange, broadcasters and webcasters, but the interested parties appear to have decided to leave it to us to prescribe the technical rules on the formatting of reports of use of sound recordings, specifying precise fields and delimiters for reporting the required information. We remain hopeful that the parties may come to an agreement—and we strongly urge them to do so—but meanwhile, we are considering a recent submission from RIAA that proposes revised specifications for filing electronic reports of the performance data and has been forwarded to DiMA for consideration. We hope to publish a notice of proposed rulemaking on formatting requirements this summer, and we are optimistic that we can conclude that phase of the rulemaking proceeding by the end of this year.

We are also near to concluding the portion of the proceeding concerning reports of use for the historic period. On Tuesday, we published a Notice of Proposed Rulemaking concerning reporting requirements for use of sound recordings during the period prior to April 1, 2004. The notice proposes use of data already provided by the preexisting subscription services to SoundExchange for the relevant period as a proxy for the reporting of actual performances made by all other services during the same time period. This approach had been suggested in our Notice of Inquiry,[42] and has been endorsed by the copyright owners and performers as well as the affected licensees. Both groups have acknowledged that little useful data exists at this point in time and that there is no apparent way to reconstruct the information needed to file reports of actual use. Consequently, copyright owners, performers and licenses advocate the use of a proxy to account for the historic performances.

Use of a proxy, however, is an imperfect solution, since it is likely to undercount some performances and over-count others. Nevertheless, it has many advantages. First, the data from the preexisting services for the historic period offers accurate reporting for programming that is by and large comparable to what was offered by the nonsubscription services during the same time period. Second, the preexisting subscription services had transmitted a diverse number of sound recordings so that a large number of copyright owners and performers can be compensated. And finally, the data has already been used by SoundExchange for distribution of royalties received from the preexisting subscription services and can easily be used for distribution of the royalties received from the nonsubscription services for the corresponding time period.

For these reasons, we believe the use of the reports of the preexisting subscription services as a proxy represents the simplest, most practical and cost-effective solution, and that the affected parties will continue to embrace this solution. Interested parties have thirty days to file comments either in support of this solution or offering alternative proposals.

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tuning hours—i.e., the total number of listener hours by all who have accessed the service during a given period of time.

[41] "The Office encourages copyright owners, broadcasters and webcasters to work together to agree on formatting requirements that will serve all of their needs, and to submit joint proposals or comments if possible." 67 Fed. Reg. at 59576 (Sept. 23, 2002).

[42] 68 Fed. Reg. 58054 (Oct. 8, 2003).

*d. Conditions for use of the statutory license.*

It is our understanding that, now that the question of whether their Internet transmissions are exempt from the performance right has been resolved against them, broadcasters are questioning whether certain terms in the statutory license should apply to simulcasts of AM/FM programming when retransmitted over the Internet. Specifically, broadcasters have focused on those provisions that prohibit a service from announcing its play schedule in advance and the requirement that a service not play more than a limited number of selections from a particular record album or by a particular recording artist within a 3-hour period (the "sound recording performance complement"). These restrictions, among others, were adopted in 1995 to inhibit copying of music by consumers who could make near-perfect digital copies of a sound recording. The reasons behind the restrictions are simple to understand. They were adopted to make it difficult for an individual to identify in advance, and thereby copy, specific works, thus avoiding the expense of purchasing a copy of the work.

The need for such restrictions, however, may be less obvious when one considers a typical radio program offering Top-40 selections. Many radio stations routinely play the same selections over and over so that one need wait only a short time before the most recent release of a hit song is played over the airwaves. Consequently, preannounced schedules of these programs may do little to prevent a listener from copying the newest hits. Thus, it is unclear whether the restriction has much value with respect to these types of radio programs. On the other hand, it is hard to understand how the term creates a hardship for broadcasters who simulcast over the Internet today or to understand the need for such preannounced schedules, since most listeners would not consult a program guide before listening to AM/FM radio anyway. The typical practice is to flip on the radio and surf the channels to see what is playing at the moment or to tune in to a favorite talk show at the regularly scheduled time. Thus, until more information comes to light, it is hard to understand what harm the broadcasters suffer today under the preannouncement restriction, or why there is a need to eliminate this term with respect to broadcast programming.

Similarly, it is hard to understand the broadcasters' complaint with respect to the sound recording performance complement restriction since the definition was crafted so that it would permit programming that was typically used by broadcast radio stations. Specifically, the legislative history notes that "[t]he definition [of the complement] is intended to encompass certain typical programming practices such as those used on broadcast radio."[43] Whatever confusion does exist with respect to the application of this provision may well stem from a misunderstanding of what the complement does and does not allow. For example, it would not prohibit a service from playing the same three songs from a single phonorecord as many times as it wanted during a 3-hour period, provided that no more than two of these songs were played consecutively. The sound recording performance complement would similarly allow a service to play up to four different songs by the same featured recording artist or four different songs from any particular boxed set of phonorecords over and over again during a 3-hour period provided that no more than three of these songs were transmitted consecutively. Since these provisions seem to accommodate normal scheduling practices, it is hard to see how the sound recording performance complement imposes a burden on a typical AM/FM broadcast station.

Certainly, should these restrictions be shown to pose a substantial burden on programming practices that outweigh whatever protection they provide, then Congress should take another look at their application to broadcast programming being retransmitted over the Internet. In fact, that day may well be near at hand, because new technologies and software that allow a consumer to capture and edit programming transmitted via the Internet already threaten their effectiveness.

DIGITAL AUDIO BROADCASTING—DOES IT POSE A THREAT TO COPYRIGHT OWNERS?

Digital audio broadcasting, also known as HD radio, is no longer a vision of the future. Technology to facilitate digital audio broadcasts has already been approved by the Federal Communications Commission ("FCC"). In 2002, the FCC adopted the in-band on-channel system developed by iBiquity Digital Corporation as the standard technology for enabling digital broadcasts by AM and FM radio stations that wished to begin digital transmissions over the airwaves immediately.[44]

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[43] S. Rep. No. 104–128, at 34 (1995).

[44] Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, 17 FCC Rcd 19990 (2002).

Although radio stations did not immediately embrace the new technology, they are doing so now. In January of this year, KZIA in Cedar Rapids, Iowa, began the movement when it announced its intent to become the first station to offer HD radio.[45] Less than five months later, iBiquity issued another press release, announcing that radio station KEMR-FM in San Jose, California, had become the 100th radio station to launch HD radio broadcasts.[46] It also has compiled a list of more than 300 licensed radio stations that have begun offering HD radio or will begin to do so soon.[47]

The electronics industry has also been hard at work. Companies are manufacturing and marketing digital radio receivers for those who wish to be among the first to receive clear, digital radio signals over the airwaves. But technologists have not stopped there. Companies are also busy designing and manufacturing new products to capture and record these signals and anticipate the release of a number of new products which will allow a consumer to record digital audio radio signals so that a listener can listen to his or her favorite radio talk show, news show or music program at a later time. In some instances, these products will operate in the same manner as a VCR or a TiVo device, allowing the listener to fast-forward over the segments that one prefers not to hear.[48] In fact, some early digital radio recorders, *e.g.,* Blaze Audio's Radio Recording Suite,[49] already include functions that allow the listener to program the device to record a program at specified times, convert an analog signal into a digital format, and upload the recorded program onto a personal computer in a transferable file.

In spite of these features, the early release of these devices did not disturb the copyright community because radio programming was not being offered in a digital format at the source. Consequently, programs that were transmitted in an analog format and later converted to a digital format were only as good as the original analog signal. In many cases, recordings of these signals were plagued by static, fades, and hisses.

The advent of digital audio broadcasting ("DAB") and advances in the recording devices, however, will greatly improve audio quality, removing the flaws associated with analog broadcasts. Moreover, these devices and software packages will allow the listener to change the traditional passive listening experience into an interactive process. They will give the recipient the means to edit and store specific segments and songs from a prerecorded program, upload these selections onto the recipient's personal computer, and allow for further distribution of these segments to others via electronic transfers over the Internet or by other means.

On-Demand Audio expects to offer a digital radio recorder this fall that will provide these functions.[50] It promises not only to capture and record the digital radio signal, but also to include technology which will allow the listener to skip from song-to-song and skip over advertisements. Moreover, according to its promotional material, its SongSurfer Technology will be able to identify specific segments of a radio program or a song, and bookmark each segment for identification and use at a later time. The product will also include a Jukebox Mode which will allow the user "to save songs, interesting ads, and talk radio segments to a built-in Jukebox. . . . Saved songs can then be sorted into playlists either when they are saved or later."[51]

Similar technology is available to capture online music over the Internet. Replay Music promotes its ability to save every song played by an on-line music service, automatically tag each song with the artist name and song title, and separate the song into individual tracks for easy access and play-back. The company claims that its "Replay Music sports the most sophisticated track splitting algorithms on the planet. Besides just recording and tagging, each MP3 file contains the entire song—no more, no less."[52]

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[45] IOWA—First in the Nation for HD Radio, The Hollywood Reporter.com (January 2, 2004) located at *http://www.ibiquity.com/press/pr/010204.htm.*

[46] HD Radio Going Live Coast-to-Coast . . . and Beyond (April 19, 2004) at *http://ibiquity.com/press/pr/041904Coast2Coast.htm.*

[47] iBiquity has established a website, *www.HD-Radio.com,* where visitors can find information about stations across the United States that are either offering HD radio now or intend to do so in the near future.

[48] *See Elisa Batista, A TiVo Player for the Radio,* Wired News (May 12, 2003), at *http://www.wired.com/news/technology/0,1282,58769,00.html.*

[49] *http://www.blazeaudio.com/products/radiorecorder—softpack.html.*

[50] *See also Neuros HD 20GB MP3 Digital Audio Computer* located at: *http://www.neurosaudio.com/ store/ product.asp?catalog%5Fname= Digital Innovations Catalog & category%55Fname= Neuros+Players&product%5Fid=401020.*

[51] On-Demand Radio Overview at *http://www.gotuitcom/audio/agradio.html. See also http://www.gotuit.com/audio/aConsumer.html.*

[52] Replay Music at *http://www.replay-music.com/.*

These technological advances threaten to disrupt the careful balance Congress struck between the record industry, on the one hand, and the purveyors of new digital technologies, on the other, in the DPRA and the DMCA. Moreover, widespread use of these products would alter the longstanding relationship between record companies and radio broadcasters in which record companies have provided radio stations with the latest releases at no cost in exchange for promotional airplay, a relationship based on record companies' expectation that consumers would purchase new CDs based upon what they heard over the airwaves. But today listeners are not limited to what they hear on the radio to inform their choices, nor do they necessarily purchase CDs containing the songs they like. Instead, new technologies, *e.g.,* peer-to-peer services, offer free access to music and a means to obtain free copies of the works they enjoy. In this new environment, record companies cannot necessarily have any expectation of financial reward because consumers find ways to obtain copies of their works for free. Nevertheless, radio broadcasters who use music as a hook to get listeners and, by extension, advertising dollars, as well as the makers of the software packages that facilitate the free exchange of music over the Internet profit directly from their use of sound recordings.

Clearly, the threat posed by today's new technologies is most ominous for the performers, the record companies and authorized on-line record stores, like iTunes and MusicMatch, whose profits depend, at least to some extent, directly upon sales of CDs or digital downloads; but the potential harm is not restricted to these businesses. Broadcasters and subscription services will suffer, too, from the use of technologies that can capture, record, and preserve individual sound recordings, and the more valuable segments of a radio station's program. Subscription services will find it hard to sell reproductions of a sound recording to listeners through use of a "buy button," when these listeners can capture the songs they want and upload them directly to their personal computers with the use of a On-Demand Audio device or Replay Music software. Why would anyone pay for a reproduction of a sound recording when they can create their own private music collection without expending a dime for the reproduction? Broadcasters could also suffer from extensive use of these new technologies, albeit in a more indirect fashion. In the event that the TiVo type devices become popular, listeners will simply avoid the ads, making it ineffective for businesses to advertise on radio. Were this to occur, businesses will seek better ways to reach consumers, and advertising dollars will no longer flow to the broadcasters.

The answer, however, is not to inhibit the roll out of HD radio; nor is anyone suggesting a slowdown on this front. HD radio promises to deliver a high-quality audio product that should draw consumers back to the airwaves. The more promising approach would be to grant copyright owners of the sound recording a full performance right so that they can seek marketplace solutions to the problem, perhaps by negotiating licenses for performance rights that would include measures to protect against the types of activities that would make record sales obsolete. At the moment, sound recording copyright owners have no means to prevent a broadcaster from broadcasting their works over the airwaves or to compel protection of their work. Alternatively, Congress may want to consider technological methods to prohibit unlawful copying, an approach the Federal Communications Commission has already begun to explore. On April 20, 2004, it published a Notice of Inquiry to consider the question of digital audio content control in response to concerns presented to the it by the Recording Industry Association of America.

While we take no position on the FCC's recent action, it is apparent that digital audio broadcasting raises many of the same concerns and fears voiced by the record industry when digital technologies first made their appearance in the nineties, and these concerns are even more valid today. How the issues should be addressed, however, remains an open question. But what is clear is that the process must include a careful analysis of copyright policies. Moreover, any solutions adopted must provide strong incentives to the creators to continue their artistic endeavors and equally strong incentives to encourage the continued development of new technological advances. In the absence of corrective action, the rollout of digital radio and the technological devices that promise to enable consumers to gain free access at will to any and all the music they want will pose an unacceptable risk to the survival of what has been a thriving music industry and to the ability of performers and composers to make a living by creating the works the broadcasters, webcasters and consumer electronic companies are so eager to exploit because such exploitation puts money in their pockets.

Mr. Chairman, as always, we at the Copyright Office stand ready to assist you as the Committee considers how to address the new challenges that are the subject of this hearing.

Mr. SMITH. Mr. Halyburton.

**TESTIMONY OF DAN HALYBURTON, SENIOR VICE PRESIDENT/ GENERAL MANAGER, GROUP OPERATIONS, SUSQUEHANNA RADIO CORPORATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS**

Mr. HALYBURTON. Thank you, Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee.

When Congress enacted section 405 of the DMCA, it clearly sought to foster Internet streaming while preserving the longstanding, mutually beneficial relationship between radio and the recording industry. Unfortunately, the potentials of this technology have not been realized.

In April 2000, there were more than 1,700 U.S. Radio stations streaming their programming via the Internet. Industry estimates predicted that each month 100 stations would add streaming services. Today, those bright expectations have not materialized. By the end of 2002, well over 1,000 stations had discontinued streaming due in large part to copyright issues.

My company, Susquehanna Radio, helped pioneer radio Internet delivery, and 23 of our stations are still trying to make a go of it. However, the DMCA has made it impossible to create a viable business model for simulcast streaming. In fact, it is a recipe for losing money, which is exactly what we are doing.

Here are the problems we face. First and foremost, we are subject to a rate structure under which the more audience we attract, the more we pay. The result is that once we draw enough audience to attract advertisers, the RIAA fee becomes so expensive we lose money.

Not only must we pay for the right to perform sound recordings, but we also have to pay for so-called ephemeral copies that are technically necessary to stream but have no independent economic value.

Third, the statutory conditions interfere with our programming. DJs cannot preannounce records, and we are limited to the number of cuts we can play of one artist or from a single album. And there is a concern that the complex and expensive recordkeeping requirements may be adopted. No wonder most stations looked at this scheme and said, No thanks.

So let me suggest five steps Congress should take to fix the law so that Internet radio streaming can mature into a workable business model and serve our listeners.

First, Congress should exempt from sound recording fees streams to a station's local over-the-air audience. It simply makes no sense to treat this audience differently when they listen to our signal on the Internet; the same local public service benefits are provided. Moreover, the recording industry cannot deny the enormous promotional benefit that it gets from radio air play, by far the most important driver of record sales. This same benefit exists when a station streams its programming over the Internet to its local audience.

Second, the sound recording performance fee and the standard by which it is set must be reformed. The willing buyer-willing seller standard and the DMCA is a recipe for abuse. Before the CARP

proceeding, RIAA set out to negotiate 26 agreements at fees far above the competitive market rate for the purpose of establishing an artificially high benchmark in order to influence the CARP. The CARP threw out 25 of those agreements, but still relied entirely on a single agreement between the RIAA and Yahoo to arrive at the current rate, and that rate is exorbitant.

Susquehanna will pay RIAA six times what we pay ASCAP, BMI and SESAC combined for those same exact performances. Just one of our stations, KPLX in Dallas, will pay almost $50,000 in fees in a year to reach a small fraction of its over-the-air audience. Congress should establish a fee comparable to what is paid to BMI, ASCAP, and SESAC.

Third, Congress must reform the statutory license conditions and make them consistent with broadcast practices. Radio stations should not be forced to choose between either radically altering their over-the-air programming practice or risk uncertain and costly copyright infringement litigation.

Fourth, Congress should eliminate additional copyright liabilities for ephemeral recordings that simply exist to facilitate a licensed or an exempt performance.

And fifth, Congress should ensure that the reporting and recordkeeping requirements in the act do not preclude broadcasters from streaming.

Mr. Chairman, coupling the powers of the Internet with the longstanding strengths of free, over-the-air radio promises exciting opportunities for our listeners, your constituents. Let me thank the Subcommittee for its leadership and hard work in moving forward legislation to reform the CARP system. Unfortunately even if the CARP process is fixed, the law will continue to stifle the growth of radio streaming.

We look forward to working with the Subcommittee to repair the law and create a workable copyright regime that allows fledgling service to flourish rather than suffocate.

Mr. SMITH. Thank you, Mr. Halyburton.

[The prepared statement of Mr. Halyburton follows:]

PREPARED STATEMENT OF DAN HALYBURTON

Chairman Smith and Members of the Subcommittee. My name is Dan Halyburton. I am the Senior Vice President and General Manager for Group Operations for Susquehanna Radio Corp., which owns 32 broadcast radio stations.

I appreciate the opportunity to appear before you today on behalf of the National Association of Broadcasters to discuss a matter of importance to the radio industry and to the many members of the public who want to hear their favorite radio station over the Internet on their home or office computers but who have been frustrated by what has become, through various judicial and administrative actions, a burdensome and unworkable law.

In 1998, Congress enacted section 405 of the Digital Millennium Copyright Act with the goal of fostering the growth of Internet streaming while preserving the longstanding, mutually beneficial relationship between the radio and recording industries. The Internet offered an opportunity for all types of radio stations throughout the country, small and large, urban and rural, to reach their audiences in a new, more convenient and more creative way, coupled with information, graphics, and other material that can be placed on a web site.

Unfortunately, that goal has been thwarted. A medium that was once thought to have a bright future to enhance the ability of radio stations to serve the public is vastly underused. As you may have noticed, relatively few radio stations now stream their programming on the Internet. In 2000, more than 1,700 radio stations were streaming their programming and nearly 100 additional stations were ex-

pected to commence streaming each month. By the end of 2002, however, well over 1,000 stations had stopped streaming and those stations that now come online overwhelmingly are all talk stations.

There are a number of reasons for this, but the biggest part of the problem lies with the rules governing sound recordings. Specifically:

- The fee set by the copyright royalty arbitration panel and the Librarian of Congress in 2002 was much too high, and far exceeds a reasonable or even a hypothetical competitive fair market rate. As an example, if the Internet listenership of one of our most popular stations ever matched its over-the-air listenership, the sound recording fees would be 15 millions dollars a year. Even at today's listenership levels, our stations pay 5 to 6 times as much for sound recording royalties than *we pay to the musical works copyright owners for the right to make the same Internet performances of all of the musical works embodied in the sound recordings.*
- The applicable statutory performance license is subject to a host of conditions that are inconsistent with the way radio stations program their stations. Radio stations are faced with the untenable choice of making fundamental changes to their programming, not streaming, or incurring the risk of having to defend uncertain and hugely expensive and complex copyright infringement litigation.
- The law governing the making of copies that are used solely to facilitate permitted transmissions unreasonably requires the payment of still additional fees and is subject to conditions crafted in the earlier days of radio that fail to accommodate modern technological practices and realities.
- The Copyright Office has raised the specter of onerous and unnecessary record keeping and reporting requirements in the near future. Many radio stations, particularly smaller stations, simply will not be able to comply using their existing systems and business practices. The threat of these requirements keeps many from even considering streaming.

Mr. Chairman, I know you are concerned about the failure of this new opportunity for radio to serve the public to develop. You have already moved to address the problems associated with the CARP (arbitration panel) procedure that the DMCA put in place to set fees, and we greatly appreciate your leadership and efforts. We strongly support HR1417 and hope that the Senate will pass it promptly and that it will become law.

Unfortunately, the CARP procedure is a relatively small part of the difficulties current law and regulations pose for streaming radio stations. There are major substantive problems with rights afforded to the copyright owners of sound recordings in sections 114 and 112 of the Copyright Act. These must be addressed if Internet streaming of radio stations is to fulfill its promise.

I would first like to provide some history of the sound recording performance right, to review how we got here. Then I will describe the current state of radio stations simultaneously streaming their over the air signals on the Internet (simulcast streaming). Finally, and most importantly, I will offer specific suggestions to fix the problems that are preventing simulcast streaming from happening.

## I. HOW WE GOT HERE—THE HISTORY OF THE SOUND RECORDING PERFORMANCE RIGHT

Until 1995 there was no performance right in sound recordings. Instead, radio stations paid well over a hundred million dollars annually to music composers and publishers while the producers and performers of sound recordings made billions of dollars from the sales of records promoted by radio airplay.

In 1995, Congress first created a carefully and narrowly circumscribed performance right in digital audio transmissions to address the specific concerns of record companies that certain interactive and multi-channel, genre-specific subscription performances would displace record sales. In 1998, in response to issues concerning the status of Internet-only webcasts, the right was expanded to include certain nonsubscription transmissions. In our view these rights were never intended to apply to radio broadcasters.

Congress has, for decades, recognized the symbiotic relationship between the recording and radio industries, first refusing to grant a public performance right in sound recordings, and then granting it narrowly only in response to a specific threat. Even then, Congress provided that nonsubscription broadcast transmissions would remain free from any sound recording performance obligation. Although broadcasters believe that Congress intended this exemption to include the Internet streaming of radio broadcasts, the Copyright Office and the Courts ruled otherwise.

It is not at all clear why radio stations should be required to pay record companies for the right to stream their radio broadcasts over the Internet. After all, the recording industry has for decades tried, using every device imaginable and spending millions upon millions of dollars annually, to encourage broadcasters to play their records in these very same broadcasts. Why? Simply because radio play is, far and away, the most important vehicle for exposing to the public the products of the record industry. Consumers buy what they hear, and what DJs they trust play. Arbitron studies have proven as much—fully two thirds of those polled said they turn to radio first to learn about new music.[1] A radio broadcast has the same extraordinary promotional value to the record companies whether it is heard over the air or over the Internet. In a truly free, competitive market, the net balance of payments would flow from record companies to radio stations, not vice-versa, just as free copies of their recordings still flow every day from the record companies to radio stations.

*A. Pre-1995*

Throughout the history of the debate over sound recording copyrights, Congress has consistently recognized that record companies reap huge promotional benefits from the exposure given their recordings by radio stations and that placing burdensome restrictions on performances could alter that relationship to the detriment of both industries. For that reason, in the 1920s and for five decades following, Congress regularly considered proposals to grant copyright rights in sound recordings but repeatedly rejected such proposals.

When Congress did first afford limited copyright protection to sound recordings in 1971, it prohibited only unauthorized reproduction and distribution of records but did not create a sound recording performance right. The purpose of such protection was to address the potential threat such reproductions posed to the industry's core business: the sale of records. During the comprehensive revision of the Copyright Act in 1976, Congress again considered, and rejected, granting a sound recording performance right. As certain senators on the Judiciary Committee recognized in their (prevailing) minority views:

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which, in turn, depends in great measure upon the promotion efforts of broadcasters.[2]

Congress continued to refuse to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records.

*B. 1995*

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA")—enacted less than ten years ago—that even a limited performance right in sound recordings was granted. Even then, the right was limited to certain subscription and interactive digital transmissions that threatened to displace the sale of recordings.

In granting this limited public performance right in sound recordings, Congress stated it: "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[3] As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscription and interactive services—but not by broadcasting and related transmissions."[4]

Consistent with Congress's intent, the DPRA expressly exempted from sound recording performance right liability non-subscription, non-interactive transmissions,

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[1] *See, e.g.,* Internet 9: The Media and Entertainment World of Online Consumers, Special Radio Industry Edition, available at http://www.arbitron.com/downloads/I9NAB.pdf (viewed June 8, 2004).

[2] S. Rep. No. 93–983, at 225–26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

[3] S. Rep. No. 104–128, at 15 ("1995 Senate Report"); *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording 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.").

[4] *Id.* at 17.

including "non-subscription broadcast transmission[s]"—transmissions made by FCC licensed radio broadcasters.[5] Congress made clear that the purpose of this broadcast exemption was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[6]

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[7]

In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities to fulfill FCC licensing conditions[8]; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[9] Each of these features—i.e., nonsubscription, non-interactive, mixed programming content and public interest content, promotion of record sales, and single-channel—also characterizes the web stream of a broadcast signal.

*C. 1998*

Just three years after enactment of the DPRA, the record industry voiced dissatisfaction with the scope of the new performance right, contending that such right should encompass certain categories of nonsubscription music services. At the same time, the Digital Media Association ("DiMA"), a newly formed association of Internet-only "webcasters," approached Congress seeking clarification of the status of such webcasters with respect to sound recording performances on the Internet. DiMA and RIAA, neither of which represented the interests of FCC-licensed broadcasters, negotiated amendments to the DPRA, that were put into the House version of the Digital Millennium Copyright Act of 1998 ("DMCA") literally on the eve of passage, and that were enacted without any hearing or debate.[10] For their part,

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[5] 17 U.S.C. § 114(d)(1)(A). All statutory citations are to the Copyright Act, Title 17 of the United States Code, unless otherwise noted.

[6] 1995 Senate Report, at 15.

[7] *Id.*

[8] Radio broadcast stations are subject to numerous "public interest" requirements in order to obtain and maintain their FCC licenses—requirements that do not apply to Internet-only webcasters. *See* 47 U.S.C. §§ 307, 309–10 (1998). These requirements apply to the content of licensed stations' broadcasts and to their operations and record-keeping procedures. *See, e.g.,* 47 C.F.R. § 73.3526(e)(12) (requiring a quarterly report listing the station's programs providing significant treatment of community issues); 47 U.S.C. § 315(a) (requiring a station to offer equal opportunity to all candidates for a public office to present views, if station afforded an opportunity to one such candidate); 47 C.F.R. § 73.1212 (requiring identification of program sponsors); *id.* § 73.1216 (providing disclosure requirements for contests conducted by a station); *id.* § 73.3526 (requiring maintenance of a file available for public inspection); *id.* § 1211 (regulating stations' broadcast of lottery information and advertisements).

[9] 1995 Senate Report, at 15.

[10] *See, e.g.,* Jane C. Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 137 Colum.-VLA J.L. & Arts 137, 166–68 (1999) (noting that the Section 114 amendments regarding digital performance right in sound recordings were a "last minute" addition to the DMCA resulting from "negotiations between copyright owners and digital transmission services"); Bob Kohn, *A Primer on the Law of Webcasting and Digital Music Delivery,* 20 Ent. L. Rep. 4 (Sept. 1998) (describing the version of the amendments to Section 114(d) passed by the House, as being "negotiated" and "drafted" by DiMA and RIAA, at the suggestion of the Register of Copyrights, "days, and perhaps hours" prior to passage).

broadcasters were assured by both parties and others that none of the DMCA would affect the exempt status they enjoyed under the DPRA.

The RIAA/DiMA deal removed certain exemptions that had previously been available under the DPRA, including the exemption for "a [digital] nonsubscription transmission other than a retransmission" and expanded the types of transmissions that would be eligible for a statutory license to include at least some of the previously exempt nonsubscription, non-interactive transmissions.[11]

The relevant DMCA amendments were inspired by and directed to "a remarkable proliferation of music services offering digital transmissions of sound recordings to the public," primarily via the Internet.[12] "In particular," the House Manager reported, "services commonly known as 'webcasters' have begun offering the public multiple highly-themed genre channels of sound recordings on a nonsubscription basis."[13] As used in the legislative history, the term "webcaster" referred, not to radio stations streaming their AM/FM over-the-air broadcast programming, but to "services" originating on the Internet[14] and offering "a diverse range of programming," often "customized" to an individual user's preferences.[15]

The DMCA, however, did nothing to disturb the DPRA's exemption for "nonsubscription broadcast transmissions" or the definitions that accompanied the exemption. Indeed, AM/FM streaming is a conspicuously poor fit with the "webcasting" services described in the DMCA legislative history—and AM/FM streaming presents none of the "webcasting"-related concerns that motivated passage of the DMCA.

Moreover, as I will discuss in greater detail below, the RIAA/DiMA deal that was enacted in the DMCA imposed new conditions on the statutory license for non-subscription services that were inconsistent with the way radio stations are traditionally programmed. Thus, DiMA and RIAA agreed to waive the conditions for third party webcasters that retransmitted a radio broadcast. However, the waivers did not apply to broadcasters transmitting their own programming. In other words, once the sound recording right was construed to apply to radio broadcasters, those broadcasters were placed at a significant disadvantage compared to third party retransmitters of radio broadcasts.

Broadcasters believed, and still believe, that Congress intended radio broadcasters streaming their own programming to be exempt under the DMCA, and broadcasters vigorously, but unsuccessfully, pressed that position before the Copyright Office in a rulemaking[16] and on appeal in federal court in *Bonneville International Corp.* v. *Peters.*[17]

Broadcasters still believe that the *Bonneville* decision was wrongly decided and that the last thing Congress intended was to pass a law that required record companies and radio stations to haggle over what can be played, how often, who should pay whom what, and the records broadcasters must keep of what they play. Yet that is precisely the deeply-flawed system we are today confronting. That system must be repaired, even starting from the premise that some portion of radio broadcast streaming should be subject to the sound recording performance right.

## II. THE UNFULFILLED PROMISE OF SIMULCASTING RADIO OVER THE INTERNET

In April, 2000 the radio industry believed that simulcast streaming was not subject to the sound recording performance right, and therefore was not subject to the fees and conditions imposed by the statutory license contained in Sections 112 and 114 of the Copyright Act. By industry estimates, there were more than 1,700 U.S. radio stations streaming their programming via the Internet.[18] Nearly one hundred

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[11] *See, e.g.,* 17 U.S.C. § 114(d)(2) (1998).

[12] *Staff of House Comm. on the Judiciary, 105th Cong., Section-by-Section Analysis of H.R. 2281 as passed by the United States House of Representatives on August 4, 1998,* at 50 (Comm. Print 1998) (hereinafter, "1998 House Manager's Report").

[13] *Id.*

[14] *See e.g., id.* at 51 (discussing low barrier to entry for Internet-based webcast services, which "can be started by an individual with one computer in his or her home").

[15] *See id.* at 50 ("Many webcasters also offer certain types of programming, such as archived and continuous programming, that permit listeners to hear the same recordings repeatedly and anytime the listener chooses."); *id.* ("Most significantly, the Internet enables a music service to interact with its listeners so that listeners have the ability to hear their favorite music whenever they wish, select certain sound recordings or programs, skip to the recordings of their choice, and to create personalized channels that are customized to their specific tastes.").

[16] Copyright Office, *Public Performance of Sound Recordings: Definition of a Service, Final Rule,* 65 Fed.Reg. 77292 (Dec. 11, 2000).

[17] 347 F.3d 485 (3d Cir. 2003).

[18] *See* BRS Media Inc., "Web Radio Stats," www.brsradio.com/iradio/ analysis.html (viewed April 16, 2000).

(100) radio stations were expected to begin broadcasting over the Internet each month.[19]

These bright expectations have not materialized. By the end of 2002, well over 1,000 U.S. radio stations had stopped streaming their signal on the air due to copyright issues.[20] The stations to come on line since that time are overwhelmingly news/talk/sports stations that are not hamstrung by the sound recording statutory license. In Texas, for example, only 130 of the more than 900 licensed radio stations simulcast their streams, and more than half of those are news, talk, or sports formats, according to radio-locator.com. In Wisconsin the numbers are even more disappointing. Only 41 of the approximately 337 radio stations reportedly stream their signals. Only nine of those are music-intensive commercial stations; the rest are either public radio (which operates under a separate, confidential fee structure) or talk.

The nation's largest radio group, Clear Channel, for example, owns more than 1,000 radio stations, but only 180 of them are simulcast streaming today, and most of those are news/talk stations rather than music stations. After the CARP sound recording fee rates were announced, Clear Channel shut down most of its streaming, and has only slowly brought back a few stations over the past few years, focusing on news or talk stations that do not run up large license fees. The only music stations Clear Channel currently streams are in its smaller markets, where listenership will not be so large that the license fees will eat up the station's entire marketing budget. Our colleagues at Emmis Communications have taken a similar approach. Emmis currently streams four out of its five (80%) of its news/talk stations, but only eighteen percent (4 out of 22) of its music stations. At Entercom, they have given up on streaming altogether for their 100 radio stations, halting all streaming almost two years ago, in the face of the substantial fee burdens and the additional requirements of the statutory license.

Smaller group owned radio is faring even more poorly. Between the fees, the need to change business practices that I will discuss, and the threatened reporting burden, very, very few smaller group owned music stations are streaming.

At Susquehanna, we are still trying to make a go of it, streaming the programming of every station we operate. We were one of the very first broadcasters to simulcast our over the air broadcasts. Way back in 1995—a lifetime ago, in Internet time—our Dallas news/talk station became one of the first radio stations streamed by a little unknown outfit called AudioNet, which became Broadcast.com, and ultimately Yahoo!Broadcast.

Despite our long involvement with simulcast streaming and our successful broadcast business, we have still not found a viable business model for simulcast streaming. Susquehanna has never made a dime on streaming; in fact our stations consistently lose money on streaming. The sound recording performance fees are simply too high—right now, license fees are by far the single largest expense of our streaming budget, and the vast majority of those license fees are for the sound recording right. *In fact, we are today paying between 5 and 6 times more for the sound recording rights than we pay to the musical works copyright owners for the right to make the same Internet performances of all of the musical works embodied in the sound recordings. Moreover, the musical works licenses are broader and do not contain the limitations and conditions included in the sound recording statutory license.*

We, like most broadcasters, stream in order to provide our local listeners with an alternative means of hearing our station. There are places radio waves do not easily reach, particularly inside of buildings. Studies consistently show that about as many people listen to the handful of stations within their local listening area, as those who listen to all other stations (U.S. and worldwide) combined.[21]

Streaming is a very small, ancillary part of any broadcaster's business. Audiences for simulcasts are universally a small fraction of a station's over-the-air audience.

In addition, the content of a broadcast simulcast is driven by local and over-the-air needs, not by considerations relevant to the development of a viable Internet business.[22] Programming is selected to compete in the local, over-the-air market, not

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[19] *See* BRS Media Inc., "BRS Media's Web-Radio Report[s] Strongest Growth Segment of Webcasting is Radio," www.brsmedia.fm/press000410.html (viewed April 16, 2000).

[20] *See* "BRS Media's Web-Radio reports a steep decline in the number of stations webcasting," http://www.brsmedia.fm/press020912.html (viewed June 8, 2004).

[21] *See, e.g.,* Internet 9: The Media and Entertainment World of Online Consumers, Special Radio Industry Edition, available at http://www.arbitron.com/downloads/I9NAB.pdf (viewed June 8, 2004).

[22] Thus, whether disseminated solely over the air or simultaneously streamed over the Internet, local radio broadcast programming serves the needs and interests of the local community in which the broadcaster has been licensed by the FCC. The programming includes, for example, (1) locally produced public service announcements to benefit the local community (*Digital Per-*

an Internet market characterized by webcasters with tens, or hundreds, of genre-specific channels. A single radio station on the Internet simply cannot, and does not, try to compete with the likes of AOL's Radio@Network, Yahoo!'s LAUNCHcast, Live365, or Virgin Radio. The audience, and the business model, are dramatically different.

Even when streamed over the Internet, local radio broadcast transmissions serve the needs and interests of the *local* community in which the broadcaster has been licensed by the FCC. The programming includes, *inter alia,* (1) locally produced public service announcements to benefit the local community[23]; (2) local news, sports and weather; and (3) station announcements encouraging community members to vote in upcoming elections.[24]

Broadcasters are proud of their record of local service. Attachment A to this Statement gives just a few examples of outstanding local service, several of which were honored by NAB on June 14th. They include work to combat domestic abuse, extraordinary efforts during Hurricane Isabel, and work with students in remote parts of Alaska. The Attachment also describes local broadcasters' work with the Amber Alert system that works to recover abducted children. To date, local broadcasters have helped recover 134 abducted children. Just this past May, residents of Hallam, Nebraska credited radio stations KSLI, KTGL, KZKX, KIBZ, and KLMY with saving their lives by joining a local television station in providing several hours of uninterrupted coverage of severe tornados and storms that devastated the town. Residents were able to evacuate to safe areas because of the extensive coverage of the storms provided by broadcasters.

## III. SPECIFIC CHANGES IN THE LAW THAT ARE NEEDED TO FOSTER SIMULCAST STREAMING

The root cause of the problems with simulcast streaming today is easy to explain. The rules were developed by the record companies and Internet-only webcasters to meet programming and business models that differs dramatically from those of radio. A single set of sound recording fees have been set for radio simulcasts and for multi-channel Internet-only webcasters on the basis of a false premise that the two compete in the same market. In fact, radio simulcasting has unique needs that must be accommodated in the law, if the public is to have access to this service.

The radio industry's concerns relate to four distinct sets of issues—(i) the sound recording performance fee for Internet streaming, including the amount of the fee, the fact that it is imposed on broadcasters for listeners who are within the broadcaster's local service area, and the standard by which that fee is determined, (ii) the conditions under which the necessary statutory licenses are available, (iii) the law governing the making of copies used solely to facilitate lawful performances, and (iv) the threat of impossible and unnecessary reporting and record keeping requirements.

### *A. Simulcast Streaming to Listeners within a Station's Local Service Area Should Be Exempt.*

Congress should make clear that Internet streaming of a radio broadcast to members of a radio station's local over-the-air audience, is not subject to the sound recording performance right, just as the over-the-air performance is not. Internet transmissions to those local audiences are indistinguishable from over-the-air performances. As discussed above, they are provided as a service to the public that is ancillary to the over-the-air transmission, to facilitate access. Transmissions to these local audiences provide the same public service benefits to the community as over the air transmissions.

Further, Internet transmissions to a radio station's local audience provide the same promotional benefits to the record companies as the station's over-the-air broadcasts. As the arbitration Panel concluded, "[t]o the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the

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*formance Right in Sound Recordings Act of 1995: Hearings on H.R. 1506 Before the House Comm. on the Judiciary, 95th Cong.* 1, at 118 (1995) (hereinafter "1995 House Hearings") (Executive Summary of Broadcasting Features—independent study submitted by NAB)); (2) local news, sports and weather; and (3) station announcements encouraging community members to vote in upcoming elections. *Id.*

[23] 1995 House Hearings, at 118 (Executive Summary of Broadcasting Features—independent study submitted by NAB).

[24] *Id.*

promotional impact is any less."[25] RIAA's own CARP witness agreed that "[p]er capita per listener minute, the promotional benefit to Sony of someone listening to a radio signal over-the-air and someone in the same geographical area listening to the same signal over their computer is going to be very similar."[26]

The Copyright Act recognizes that transmissions within a radio station's local service area are special, and specifically exempts from the sound recording performance right retransmissions of radio broadcasts that remain within a 150-mile radius of the transmitter.[27] This exemption is not available if the broadcast is "willfully or repeatedly retransmitted more than a radius of 150 miles."[28] The Copyright Office has held that this exemption does not apply to Internet retransmissions, as Internet transmissions are not so limited.

Of course, in 1995, when this exemption was enacted, Congress was not focused on the fact that Internet retransmissions could not be limited to 150 miles. There is no reason to limit this exemption to retransmission services that prevent retransmissions beyond the station's local service area. Transmissions beyond 150 miles can be subject to the right and charged a fee. Transmissions to local listeners should not be, regardless of the fact that other listeners may be outside the local service area.

*B. The Sound Recording Performance Fee, and the Standard By Which it Is Set, Should Be Reformed.*

The DMCA negotiations also produced a profound change in the standard by which the sound recording performance fee is set. In 1995, after a fully inclusive process, Congress determined that the fee should be based on a consideration of four policy factors that previously governed rate setting set forth in section 801(b) of the Copyright Act. These factors include affording the copyright owner a fair return and the user a fair income, recognizing the contribution of both the copyright owner and the service, including the contribution in opening new media for communication, and minimizing the disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The DMCA negotiations gave rise to a new standard—"the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,"[29] a standard that has given rise to a presumption in favor of agreements negotiated by the cartel of record companies, acting under the antitrust exemption contained in the Copyright Act.[30] The standard, and the RIAA's use of that standard, led to an unreasonably high fee in the CARP that set sound recording fees.

*1. The "Willing Buyer/Willing Seller" Standard Is a Recipe for Abuse.*

In the 1998–2002 proceeding, RIAA relied on 26 agreements its "Negotiating Committee" had reached with webcasters that had specific needs and a willingness to pay a fee far above the fee that would prevail in a competitive free market. As the arbitration panel found:

> [b]efore negotiating its first agreement, RIAA developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as precedent, in the event a CARP proceeding were necessary. The RIAA Negotiating Committee reached a determination as to what it viewed as the "sweet spot" for the Section 114(f)(2) royalty. It then proceeded to close only those deals (with the exception of Yahoo!) that would be in substantial conformity with that "sweet spot."[31]

The "sweet spot" was not based on any calculation of a reasonable rate of return or any economic study, but "simply reflected on the Negotiating Committee's instinct of what price the marketplace would bear." Report 48 n. 28. The Panel found a "consistent RIAA strategy" to develop evidence to present to the CARP.[32]

The RIAA Committee adopted a "take-it-or-leave-it" approach, entering into agreements with services willing to agree to its terms for numerous reasons that did not reflect the value of the sound recording performance right.[33] *In fact, not a single radio broadcaster was willing to pay the fees sought by RIAA.* For this, and a host

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[25] Final Report of the Copyright Arbitration Royalty Panel in Docket No. 2000–9 CARP DTRA 1 & 2 (February 20, 2002) (hereinafter "Panel Report") at 75.
[26] Transcript of CARP Proceedings at 12861–62 (McDermott).
[27] § 114(d)(1)(B).
[28] § 114(d)(1)(B)(i).
[29] § 114(f)(2)(B).
[30] § 114(e)(1).
[31] Panel Report at 48.
[32] *Id.* at 49. The Panel found that RIAA's denials "lack[ed] credibility" in light of extensive record evidence. *Id.* 49–51.
[33] *Id.* at 51.

of other reasons—including the fact that many of RIAA's licensees never paid any fees under their agreements, or never commenced operations—the Panel concluded that 25 of the agreements "do not establish a reliable benchmark."[34] The Librarian confirmed the Panel's rejection of these agreements.

Nevertheless, the Panel ultimately relied entirely on the twenty-sixth agreement—the agreement between the RIAA Negotiating Committee and Yahoo!—despite the fact that this agreement resulted from the same common plan by the Committee to create CARP evidence. Further, despite the fact that the Yahoo agreement defined the fee for simulcast streaming at .05 cent per listener per song after an initial bulk payment, the Panel increased the fee to .07 cent.

Incredibly, the Panel had before it Yahoo's own testimony that it made the deal not because it believed the sound recording fee was competitive, but because it wanted to avoid the cost of participating in the CARP, estimated to exceed $2,000,000. Not by coincidence, this amount was approximately the total amount Yahoo paid under its agreement. In short, the deal did not reflect the value of the sound recording performance right; it reflected the cost of avoiding participation in the CARP litigation.

Yahoo also testified that it could not pass along to broadcasters even the .05-cent per performance fee set forth in its agreement for radio retransmissions. Yahoo's representative told the panel:

> [W]e've not passed any of these fees along to the radio stations because we have every interest in keeping those stations signed up with us. So we've made the business decision that it made more sense for us to actually stomach these fees than to try to pass them on to our radio station partners because we're afraid that if we tried to do that, they would terminate their agreements with us.[35]
>
> Upon further questioning, Yahoo's representative confirmed that "Yahoo!'s judgment is that if it passed along to the radio stations the radio station retransmission rate that it has negotiated, a lot of those stations would just pull the plug."[36]

Moreover, Yahoo terminated the deal at the end of 2001, before the Panel issued its report recommending a fee. Then, within one week after the Librarian announced his decision affirming the Panel's proposed fee, Yahoo announced that it was shutting down its radio retransmission business.

Later, after the Librarian's decision was rendered, other evidence emerged, further confirming just how unreliable the Yahoo deal was as an indicator of a competitive fair market fee. Mark Cuban, the founder and President of Broadcast.com, the company that became Yahoo's broadcast retransmission business, wrote in June 2002 to the industry newsletter "Radio and Internet News" to say that "the deal with RIAA was designed with rates that would drive others out of the business so there would be less competition."[37]

Why did the arbitration panel rely on this agreement under these circumstances? Simply put, the Panel concluded that an effort "to derive rates which would have been negotiated in the hypothetical willing buyer/willing seller marketplace is best based on a review of actual marketplace agreements."[38] In short, the Panel essentially created a presumption in favor of the RIAA agreements, despite the overwhelming evidence that those agreements did not represent the relevant, hypothetical, competitive free market.

The radio industry, of course, believes this decision was grossly incorrect, and we are continuing to prosecute an appeal in the D.C. Circuit. Unfortunately, that appeal won't be heard until October, and no decision is likely for months thereafter. In the meantime, the Librarian's decision hangs around our neck like the Ancient Mariner's albatross.[39] Further, the D.C. Circuit has, in the past, applied a very deferential standard of review to the Librarian's decision, so while our cause is just,

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[34] *Id.* at 51–60.

[35] Transcript of CARP Proceedings at 11,429 (Mandelbrot).

[36] *Id.* at 11,430.

[37] *See* Attachment B, hereto.

[38] Panel Report, 43.

[39] Indeed, in the face of this precedent, the crushing cost of a second CARP proceeding after the first had cost millions of dollars, and the lack of revenue to justify a second CARP proceeding, several large broadcast groups including Susquehanna agreed to a continuation of the existing fee through 2004, pending the outcome of the appeal of the first proceeding, legislative action on HR 1417, and our hope that Congress would act to reform the fee standard and provide the legislative relief sought here. This agreement should in no way be viewed as acceptance of the reasonableness or validity of that fee.

there is a significant risk that the courts simply will not act to rectify this dysfunctional situation.

*2. The Radio Industry Needs Prompt Relief from the Fee Set in 2001.*

Based on the Yahoo Agreement, Librarian decreed that broadcasters engaged in simulcast streaming should be required to pay .07 cents per listener per song, plus an additional 8.8% for the right to make server copies to facilitate the performances, which I will discuss below. The total fee is .07616 cent for each song played to each listener. While this may not sound like a lot at this most granular level, the evidence presented to the Panel showed that it was more than three times what radio stations pay ASCAP, BMI and SESAC combined, for the right to perform musical works over the air.

Further, the fee adds up quickly if a station has any Internet audience at all. Considering that a typical music station plays about 11.5 songs per hour, on average, a station that made performances to an average of just 500 listeners at a time would pay more than $38,000 per year in sound recording licensing fees. Susquehanna's KPLX, known and loved by Dallas radio listeners as Texas Country, 99.5 The Wolf, will pay almost $50,000 in fees in 2004, if listenership follows the trend set in the first quarter of this year. And that reflects a growth in Internet listenership of about 55 percent since 2001, which is still a small fraction of our over-the-air audience. If The Wolf's Internet listenership were to ever approach its over-the-air audience, the bill could eventually become a staggering $15 million a year in sound recording royalties alone. And that is just one of our stations.

Compare this to what the entire radio industry pays for the right to stream radio broadcasts over the Internet to the composers, lyricists and publishers who combine to create the music that forms the core of a recorded song. For example, under a negotiated agreement with BMI, which controls about half of the music played on radio, the radio industry as a whole pays a flat fee averaging $500,000 per year for the unlimited right for each and every radio station to stream its broadcast to as many listeners as possible, with no conditions on the content of those performances.

There is absolutely no justification for a system that requires radio stations to make payments to record companies that so dramatically exceed the freely negotiated amount paid to musical work copyright owners. We are aware of no other country in the world where this situation exists. The situation is doubly absurd, because record companies and artists receive far more benefit from record sales that are stimulated by radio airplay than do the musical work copyright owners.

The sound recording performance fees are simply exorbitant. Congress should take action, just as it did when it passed the Satellite Home Viewer Improvement Act of 1999 in part to vacate the decision of a CARP and reduce by one third to almost one half, the royalty fees to be paid by satellite television services.[40] This relief could take several forms, including cutting the fee to no more than what the radio industry pays to all musical work copyright owners for the right to stream their broadcasts over the Internet.

*C. The Statutory Performance License Conditions Must Be Reformed To Accommodate Longstanding Industry Practice.*

The statutory performance license applicable to Internet streaming contains several conditions that are incompatible with the traditional way radio stations are programmed and administered. These conditions impose untenable choices on radio broadcasters:

- Change their programming and business practices (an absurd concept given the success of these practices, the relatively miniscule audience that even successful stations obtain over the Internet compared to over the air, and Congress's clearly stated desire not to change radio broadcasting practices);
- Obtain direct licenses from each and every record company whose music they play (an even more absurd concept, considering the impracticability and Congress' longstanding desire to keep record companies and radio broadcasters from direct dealings over what gets played on the radio);
- Stop streaming (an idea wholly inconsistent with Congress' goal of getting more music to consumers over the Internet and contrary to the interest of the listening public, which wants the convenience of hearing their favorite station when they might not have access to a radio); or
- Face the prospect of having to defend uncertain and hugely costly copyright infringement litigation if any claims are made that the statutory license is not available.

[40] Pub. Law 106–113, 113 Stat. 1501, § 1004, codified at 17 U.S.C. § 119(c)(4).

The statutory sound recording performance license for streaming contains nine eligibility conditions. Three of these conditions, negotiated behind closed doors by the RIAA and DiMA on the eve of House passage of the DMCA, are so inconsistent with longstanding broadcasting practices that the parties recognized that they could not be complied with. Thus, while the statute exempts third-party broadcasters that retransmit radio broadcasts from these conditions, it requires broadcasters who want to stream their own programming to comply with them.[41] The situation is unfair, unstable, not in the public interest, and must be changed.

The specific conditions that cause problems for broadcasters are:

- Condition (i), which prohibits the play of sound recordings that exceed the so-called "sound recording performance complement" during any 3-hour period, of 3 selections from any one album (no more than 2 consecutively), 4 selections by any one artist (no more than 3 consecutively), or 4 selections from a boxed set of albums (no more than 3 consecutively);[42]
- Condition (ii), which calls into question the ability of a disc jockey to announce the songs that will be played in advance;[43] and
- Condition (ix), which requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist and the name of the source phonorecords as is being performed.[44]

*1. The Sound Recording Performance Complement Is Discriminatory and Inconsistent with Broadcasting Practice.*

Radio stations often play blocks of recordings by the same artist or play entire album sides. These features, such as Breakfast with the Beatles, or Seven Sides at Seven, are popular among listeners and remind audiences of great music that is available to buy. Tribute shows (or entire tribute days) are also common on the death of an artist, an artist's birthday, or the anniversary of a major event in music. Thus, many radio stations played numerous George Harrison songs throughout the day after he died. Radio stations similarly played many Beatles songs on the fortieth anniversary of their first arrival in New York. All of these practices would violate the statutory license if the station were streaming.

Even if a station wanted to change its practices to comply with the complement, it would be virtually impossible to do so without the assistance of a computerized music automation system to establish playlists that comply with the complement. Many smaller stations do not use such systems.

Again, third-party webcasters retransmitting radio broadcasts are protected: this requirement does "not apply in the case of a retransmission of a broadcast transmission if the retransmission is made by an entity that does not have right or ability to control the programming of the broadcast station."[45]

*2. The Prohibition on Pre-Announcements Is Discriminatory and Inconsistent with Broadcasting Practice.*

Condition (ii) prohibits "prior announcement" of "the specific sound recordings to be transmitted" or, even, "the names of featured performing artists" other than "for illustrative purposes." This may well mean that every time one of our DJs says "Next up, the latest hit by Beyoncé," or even, "in the next half hour, more Led Zeppelin," the DJ is violating the license and putting our station at risk for being sued for copyright infringement.

These, and the naming of songs to be played in the near future, are all common broadcasting practices. Ironically, in all of the many years I have been working in radio, record companies have always encouraged radio stations to make such announcements, as they help keep the listener tuned in and waiting to hear the latest and greatest song. To make saying as much the trigger for copyright infringement is just ridiculous, but that is the way the law is written today.

Of course, the DiMA-RIAA negotiations on the DMCA took care of non-broadcaster webcasters. Like the other statutory license conditions that don't match reality, third party retransmitters received a broad exemption from this requirement.

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[41] *See, e.g.,* § 114(d)(2)(C)(i), (ii) and (ix).
[42] § 114(d)(2)(C)(i).
[43] § 114(d)(2)(C)(ii).
[44] § 114(d)(2)(C)(ix).
[45] § 114(d)(2)(C)(i).

*3. The Obligation To Provide the Internet Player with a Simultaneous Display of Title, Artist and Album Information Is Discriminatory and Beyond the Capabilities of Radio Stations.*

Condition (ix) requires broadcasters to transmit a visual statement of the title, artist, and album of the current song playing. This requirement simply does not recognize the realities of the radio business, which has developed over the years to meet the needs of its over-the-air business model. For example, the condition requires a transmitting entity to have a digital automation system to control its broadcasts and to have title, artist and phonorecord information loaded into that system. Many stations do use such a system. But many smaller radio stations, and some of the largest, still run their broadcasts the old-fashioned way—production staff place a CD manually into the player, hit the play button, and turn dials to fade out one song and start the next.

Further, the great majority of recordings played by radio stations are received directly from the record companies, in the form of advance promotional singles and albums, or from third party services. Although these discs often include a phonorecord title, many do not. Moreover, radio stations often do not load that title into their music information databases, because it is not relevant to their primary over-the-air activity. Even many of those that do capture this information haven't been able to figure out the technology to make the information appear on the player of the recipient. These stations should not be disqualified from Internet streaming.

Once again, of course, DiMA and RIAA agreed that the statute should exempt third party retransmitters of broadcast signals.

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It makes no sense, and serves no one's interests, to require radio stations to alter their programming practices, which have served both them and the record industry well for decades. Nor is it fair or practical to require broadcasters to incur substantial costs to change the way they do business in order to stream their broadcasts over the Internet. This would be worse than the tail wagging the dog, as Internet streaming today isn't even a hair on the tail, compared to radio's core business.

There has never been a showing that these three conditions offer any benefit to anyone. They should be eliminated.

*D. Congress Should Provide an Exemption for Reproductions of Sound Recordings and Underlying Works Used Solely To Facilitate Licensed or Exempt Performances, and Should Ensure That the Conditions Applicable to Those Exemptions Are Consistent with Modern Technology.*

Section 112 of the Copyright Act provides the right to make certain royalty-free temporary copies of musical works and sound recordings from which transmissions are made and that have no purpose other than to facilitate licensed or exempt public performances. These provisions need to be expanded and adapted to accommodate modern realities.

The ephemeral recording exemption of Section 112(a) of the Copyright Act allows an entity entitled to make a public performance of a work to make one copy of the material it is performing in order to facilitate the transmission of that performance, subject to certain restrictions. This exemption is based in large measure on the premise that if a transmitting entity had paid for the right to perform the work, it would be unreasonable (and a form of double dipping) to make the entity pay a second time for the right to make a copy that had no other role than facilitating that performance.[46] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time, namely, the use of program tapes by radio and television stations to facilitate their performances.[47]

Of course, program tapes are no longer the staple of broadcasters. Now, radio stations typically use digital compact discs and digital music servers to make their performances. However, stations still have the practical need to make recordings in order to make licensed performances. In fact, broadcasters may need to create multiple copies in order to engage in Internet streaming, and the transmission technology itself may cause additional copies to be made.

The DMCA recognized this practical reality when it created the statutory license in Section 112(e) for multiple ephemeral recordings of sound recordings performed

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[46] Likewise, if public policy interests decreed that the performance should be exempt, there was no rationale for charging a fee to make a copy used solely to facilitate the exempt performance.

[47] *See* H.R. Rep. No. 94–1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

under the new sound recording performance license. However, by creating a statutory license instead of expanding the Section 112(a) exemption, the law created an artificial opportunity for record companies to double dip and earn added fees based on the technology used by the transmitting entity rather than on the economic value of the sound recording.

The Copyright Office opposed this statutory license in 1998 and has recently restated its opposition and its belief that an exemption should be enacted. In the report ordered under Section 104 of the DMCA, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration."[48] The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. . . . Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." *Id.*

Further, the DMCA left a significant gap in the law that has created further risk and uncertainty for all transmitting organizations, even those paying the double-dip ephemeral recording royalty to the record companies. The Section 112(e) statutory license applies to the sound recording, but does not apply to the musical or other works embodied in those sound recordings. It makes no sense to differentiate between the sound recording and the underlying work that is the subject of the recording. Such copies should be exempt for the same reason that multiple ephemeral recordings of sound recordings made solely to facilitate a licensed performance should be exempt.[49]

Moreover, three conditions applicable to the existing ephemeral recording exemption (two of which also apply to the Section 112(e) statutory license) discriminate against broadcasters and ignore the realities of today's technology. First, the exemption in Section 112(a) applies only to copies made to facilitate performances made in the transmitting organization's "local service area." The legislative history of the DMCA made clear that, where the Internet was involved, the "local service area" was congruent with the reach of the Internet.[50] However, in its December 11, 2000 rulemaking holding radio subject to the sound recording performance right, the Copyright Office attempted to support its conclusion by taking the position that broadcasters, but not Internet-only webcasters, were subject to a narrower "local service area" (their primary broadcasting area) and that the Section 112(a) exemption was not available when broadcasters streamed their programs on the Internet.[51] Unfortunately, in making these comments, the Copyright Office was focused on sound recordings, which are subject to the Section 112(e) statutory license; it failed to consider the impact of its position with respect to musical works, which are not covered by Section 112(e). If the Office's dictum is correct, radio stations that stream their broadcasts would face significant uncertainty and risk with respect to ephemeral recordings of the musical works they broadcast. Congress could not have intended this result. Any ephemeral recording exemption should extend beyond transmissions within a "local service area."

Second, the exemption provides that "no further copies or phonorecords" may be made from the exempt or licensed ephemeral recording. While that limitation worked for program tapes, it does not work with today's transmission technologies. The Internet operates by making intermediate copies. Cache and other intermediate copies are essential to any transmission.[52] Digital receivers also typically make partial buffer copies of the works being performed. The "no further copies" condition should be amended so that it does not apply to copies or phonorecords made solely to facilitate the transmission of a performance.[53]

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[48] *See* U.S. Copyright Office, DMCA Section 104 Report at 144 n.434 (Aug. 2001).

[49] Further, there is no known licensing mechanism available to license the ephemeral recording of all works embodied in performed sound recordings.

[50] *See Digital Millennium Copyright Act,* H.R. Conf. Rep. No. 105–796, at 80 (Oct. 8, 1998) (clarifying that Section 114(f)-licensed "webcasters," whose local service area is the Internet, "are entitled to the benefits of section 112(a)").

[51] *See* 65 Fed. Reg. at 77,300.

[52] *See* H.R. Rep. No. 105–551, Part 2, at 50–51 (July 22, 1998).

[53] For the same reason, the law should deal clearly with those cache and buffer copies, which may or may not qualify within the scope of the existing Section 112(e) license. The Copyright Office, in its Section 104 Report, supports this recommendation; after extensive study of the issue, the Copyright Office recommended "that Congress enact legislation amending the Copyright Act to preclude any liability arising from the assertion of a copyright owner's reproduction right with respect to temporary buffer copies that are incidental to a licensed digital trans-

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Third, broadcasters more and more are using digital music servers to make licensed performances. Music from compact discs may now be loaded onto computers, from which the performances are transmitted. These server copies have no use other than to facilitate the performance. It serves no purpose, and creates a dead-weight economic loss, to require transmitting organizations to purge these servers every six months.

The ephemeral recording exemption is designed to ensure that transmitting entities that are providing performances to the public can operate efficiently and without uncertainty and risk. These performances are already fully compensated or have been deemed exempt from copyright liability. There should be no further payment needed to make copies used only to facilitate the permitted performance.

*E. Congress Should Ensure that Reporting Requirements Do Not Preclude Broadcasters from Engaging in Simulcast Streaming.*

The Copyright Act directs the Copyright Office to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings" under the statutory license and "under which records of use shall be kept."[54] The Copyright Office has construed these provisions to require each and every service performing sound recordings to provide identification of numerous data points for each sound recording performed in order to facilitate distribution of royalty fees, regardless of whether a service receives such data in the first instance (e.g., from the record company providing the sound recording for play, or from a third party syndicators that creates the program) and regardless of whether the service maintains such data in the ordinary course of its business.[55] The Office has, on an interim basis, required these reports for two weeks each calendar quarter. However, the Office has stated that "it is highly likely that additional requirements will be set forth after the Office has determined the effectiveness of these interim rules" and that its "ultimate goal is to require comprehensive reporting on each performance a webcaster makes."[56]

To the Copyright Office's credit, the interim regulation is far more manageable than its original proposed rule.[57] That proposed rule was based on the recording industry's wish-list of census reporting of a multitude of data points for each and every performance, and would have eliminated virtually all broadcasters from the Internet. The industry is assessing the interim regulation, and I am confident that those who are streaming are doing their best to comply.

Unfortunately, the interim regulation is still inconsistent with the way many broadcasters—particularly smaller stations—do business. Thus, it all but assures that such stations will be kept from streaming their programming on the Internet. Moreover, the threat of added burdens in the future weighs heavily on the decision to stream or not.

It is important to keep in mind that broadcasters have developed their internal systems to run their primary over-the-air business, not an ancillary Internet service that generates very few listeners. Most of the sound recordings played by radio stations are provided to those stations by the record companies themselves. Typically, these sound recordings are provided on special promotional disks, not the retail album sold to consumers. The precise nature of these promotional recordings varies. In some cases, they are in slickly produced special promotional singles. At other times, the recordings are on "homemade" CD-Recordables, or "CD-Rs," not unlike the discs consumers would burn using their home computers, that contain one or more songs and are identified by nothing more than a handwritten or typed label. Some stations get their music by direct electronic download into the broadcast group's servers, or are sent MP3 files. Smaller labels provide music with even less formality. There is only one constant—*the music provided by the record labels to radio Broadcasters commonly do not contain all of the information required even by the interim rule, much less the information that would be required by a "more comprehensive" final rule.* For example, record companies routinely send radio stations songs with only title and artist information.

In addition, almost all radio stations broadcast third-party content at some point during their broadcast day. These syndicated and other third-party programs, provided for over-the-air use, are often accompanied by little, if any, information about the music they include. Nevertheless, the Copyright Office has concluded that it

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mission of a public performance of a sound recording and any underlying musical work." *See* DMCA Section 104 Report at 142–43.

[54] § 114(f)(4)(A).

[55] *See* 69 Fed. Reg. 11,515, 11,521 (March 11, 2004).

[56] *Id.* at 11,518, 11,522.

[57] 67 Fed. Reg. 5761 (Feb. 7, 2002).

does not have "authority" in the Act to exempt such programs from any reporting obligation, despite the fact that the Act required only "reasonable" notice and recordkeeping.[58]

Further, even those radio stations that have automated their music scheduling, have done so around the needs of their over-the-air broadcasts. Thus stations typically have not captured the name of the record label or the album name in their computers. Others don't rely on automated scheduling, and it would cost millions of dollars to redesign systems or to create new systems. Many stations simply cannot justify such cost for the limited benefits of streaming.

The type of census reporting the Copyright Office says it intends to require in the future is not necessary in order to permit reasonable accuracy in royalty payments. Indeed, the large music performing rights organizations (PROs), ASCAP and BMI use sampling for their distribution, and require a smaller sample than the Copyright Office has included in its interim rules—typically one or two weeks per year. The PROs even shoulder most of the burden of gathering data themselves by listening to radio stations.

Moreover, the music PROs, as well as standard recording industry publications, identify recordings by title and artist information alone. This information, which is consistent with the information provided by record labels to radio stations when they provide the records we play, should provide sufficient information to permit distribution.

Congress should either clarify the law or make clear that the "reasonable" reporting obligation it imposed contemplates reasonable sample periods, permits the exclusion of information a station lacks, and would be satisfied by the reporting of sound recording title and artist name.

CONCLUSION

We appreciate the Subcommittee's interest in this matter of great concern for radio broadcasters. We hope that, as a result of this hearing, the Subcommittee has the basic background information it needs to repair the law governing the simulcast Internet streaming of radio broadcasts.

The webcasting provisions of the DMCA were written with Internet-only webcasters, not radio broadcasters, in mind. We urge the Subcommittee to act promptly and decisively to begin the process of fixing the law in a manner that properly accounts for longstanding radio programming and business practices and recognizes the ancillary nature of Internet streaming to radio broadcasters. The NAB stands ready to work with the Subcommittee to reform the system so that radio broadcasters will not continue to be kept off the Internet by excessive fees and unrealistic and overly burdensome statutory license conditions and reporting requirements.

The current state of affairs harms not only radio broadcasters, but their listening public, who often are unable to listen to their favorite stations in places where over-the-air reception is hampered. It also harms the copyright owners of musical works, who are deprived of their public performance revenues, and performing artists, who are deprived of this additional avenue of exposure and promotion for their music by an industry that for decades has worked hand-in-hand with the recording industry to create demand for those sound recordings through the airplay they receive through radio.

Mr. SMITH. Mr. Marks.

## TESTIMONY OF STEVEN M. MARKS, GENERAL COUNSEL, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC.

Mr. MARKS. Good morning, Mr. Chairman, Ranking Member Berman, and Members of the Subcommittee. I am Steven Marks, General Counsel of the Recording Industry Association of America; and we appreciate the opportunity to present our views concerning the balance between the interest of sound recording creators and users.

I would like to begin by thanking the Subcommittee under the leadership of Chairman Smith and Ranking Democratic Member Berman for its commitment to ensuring that sound recording creators continue to have the incentives necessary to make music.

[58] 69 Fed. Reg. at 11,521.

Today, we are at a critical juncture in ensuring that those economic incentives continue to exist. New developments threaten to undermine key assumptions of legislation designed to protect the creators of sound recordings. Let me explain.

In the Digital Performance Right and Sound Recordings Act, and the Digital Millennium Copyright Act, Congress recognized that America's unique lack of a sound recording performance right leaves creators of recordings singularly dependent on sales income. This recognition led to the fundamental premise of that legislation, that services performing recordings through new digital technologies should not be allowed to displace sales.

To that end, the DPRA and DMCA struck a carefully balanced multifaceted compromise among competing interests. Congress distinguished among three main categories of services:

First, free local over-the-air broadcasts were exempted because they were thought not to pose a threat to the description of recordings;

Second, digital subscription services and webcasters were granted a statutory license with conditions designed to ensure that sales would not be displaced;

Finally, interactive services were made subject to full copyright protection because they were thought most likely to displace sales.

Now, new recording functionality allows users to cherry-pick recordings meant only to be performed, vitiating the assumptions underlying the DPRA and DMCA. For example, software such as Streamripper and Replay Music enable users to easily record streaming music from webcasters and its simulcasters, save it as individual, high-quality MP3 files which are automatically tagged with the artist and song title. Some even offer integrated CD burning.

Likewise, as broadcasters switch to digital over-the-air broadcasting, opportunities for people to take music without paying for it are inevitable unless the recordings in those broadcasts are protected. The FCC has tentatively decided to permit digital broadcasting "in the clear," that is, without any protection for the copyrighted works being broadcast. If the FCC sticks with that decision, digital radio receivers will permit listeners to automatically build CD-quality libraries of music without ever listening to the broadcast. There will be little reason for most consumers to buy a download from a legitimate online service like iTunes or to buy a CD if they only need to plug in a digital radio receiver to compile a collection of every popular recording. Indeed, such copying will replace peer-to-peer services as a source of music for many who would rather take it than pay for it.

The effects of these kinds of products is to transform the passive listening experience we know today as radio into the equivalent of an interactive performance and distribution service. Such a transformation dramatically changes the nature of these services, which will become the next platform for piracy. Such a transformation would also turn the policies of the DMCA and DPRA on their head. That leaves the question of how to maintain the balance struck by the DPRA and DMCA.

With respect to digital broadcasting, we are pleased that the FCC is looking at the issue now. Hopefully, the Commission will

do the right thing and provide adequate protection for recordings. We also hope that broadcasters will join us in embracing use of such content-protection features because it is not in their interest for users to automatically record selected music and strip out the advertising.

Today, we ask this Subcommittee to support our efforts in the FCC process to ensure that the FCC's regulation of broadcasting does not undermine Congress' consistent copyright policy. For webcasting, we understand that there is technology available to protect webcast streams from unauthorized and illegal copying, but webcasters and simulcasters do not employ that technology.

The statutory license does not require webcasters and simulcasters to use streaming technologies that effectively protect recordings from widely available piracy tools. That should change. And it is also why providing even less content protection as some are proposing by relaxing the performance complement or otherwise picking apart the compromises struck in the DPRA and DMCA is not the way to restore balance to this legislation.

Instead, we hope this Subcommittee will ensure that protections put in place in the DPRA and DMCA are meaningful. The recording industry wants nothing more than to be able to keep creating the music that Americans enjoy and that make the broadcasting and webcasting industries viable. The way to keep the music playing is for Congress to remain true to its consistent policy of maintaining real balance in copyright legislation.

Thank you.

Mr. SMITH. Thank you, Mr. Marks.

[The prepared statement of Mr. Marks follows:]

PREPARED STATEMENT OF STEVEN M. MARKS

Good morning. I am Steven Marks, General Counsel to the Recording Industry Association of America ("RIAA"). I am grateful for the opportunity to present our views concerning the use of sound recordings by broadcasters, particularly as they move into the new business of webcasting and rely upon the statutory licensing provisions of Section 114 of the Copyright Act. The provisions of Section 114 provide important protection for creators at a time when the economic incentives necessary for the creation of new musical recordings increasingly are under assault from new uses that do not incorporate protections against abuse of copying and redistribution technology. I would like to begin by thanking the Subcommittee, under the leadership of Chairman Smith and Ranking Democratic Member Berman, for its dedication to assuring that the public enjoys access to a steady stream of new creative works by providing protections in copyright law such as those contained in Section 114. However, there is a substantial danger that Congress' efforts in this regard will be undermined by the abuse of new recording technologies not envisioned when Congress last addressed this subject. I hope this Subcommittee will consider action to ensure that the important protections it previously has written into law are not erased by the current threats faced by creators.

As you probably know, RIAA is the trade group that represents the U.S. recording industry. Its member record companies create, manufacture or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States and comprise the most vibrant national music industry in the world. This morning I will begin with some background concerning the provisions of Section 114. I will then explain why the content protection provisions of Section 114 protect vital interests of RIAA member companies that make it financially possible for the music industry to keep bringing American consumers the music they enjoy, and why it may now be necessary to enhance the protective provisions of Section 114 to ensure that Americans continue to have access to creative new music.

BACKGROUND

As the Committee knows well, copyright law confers upon creators a bundle of exclusive rights. These rights are intended to ensure that creators can receive a fair return from their creative investment and so are encouraged to create—and able to finance the creation of—new creative works for the benefit of the American people. These rights generally include rights of reproduction, adaptation and public distribution, performance and display. Today's hearing primarily concerns performance rights. In the case of most kinds of copyrighted works, performance rights allow creators to be paid for all means by which works can be rendered, including to a live audience and by broadcast, satellite, cable, Internet and other transmissions.

However, American copyright law has never afforded to the creators of sound recordings the performance rights enjoyed by the owners of copyright in every other kind of work, and by recording artists and producers in many other countries. This is an historical anomaly. When Congress comprehensively revised the Copyright Act in 1909, there was little in the way of a commercial recording industry, and accordingly, the legislation did not provide any protection for sound recordings. The first efforts to amend federal copyright law to protect sound recordings date to the 1920s. However, as the industry matured, and it increasingly became clear that creators should be compensated for the use of their recordings, proposals for extending copyright protection consistently faced opposition from broadcasters and others who benefited from the uncompensated use of recordings. Thus, it was not until 1971 that sound recordings received any federal copyright protection at all, and then it was only half copyright protection—bereft of any performance right.

In the ensuing years, the Copyright Office twice studied the absence of a performance right and unequivocally recommended that a general performance right be extended to sound recordings. Over time, the absence of a performance right became increasingly problematic in light of new digital technologies—such as digital cable and on-demand delivery technologies—that were clearly the wave of the future and held the potential to replace record sales with uncompensated performances. Eventually, record companies came to believe that this risk was so great that they should accept a severely limited performance right to equip the industry for the future. Under the leadership of members of this Subcommittee and others in Congress, input was sought from the Copyright Office and all the affected industries: record companies, musicians' unions, broadcasters, cable music services, cable providers, business music services, music publishers and others. Through those consultations, a complex compromise was fashioned in the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA").

The key elements of that package of compromises are as follows:

- Sound recording copyright owners received a performance right, but it was severely limited: It only extended to performances by means of digital audio transmission.[1] Thus, live performances, analog transmissions, and audiovisual transmissions were not covered.
- Within the scope of that limited right, there were numerous exemptions.[2] Broadcast transmissions, certain retransmissions of broadcasts, and certain other kinds of transmissions were all exempted.
- Most non-exempt digital audio transmissions were made subject to a compulsory license so that users were assured that they would have the ability to use recorded music at royalty rates set by the government, so long as they complied with certain content protection requirements carefully crafted to prevent licensed transmissions from displacing sales.[3] Those requirements include:
  - A numerical limitation, called the "sound recording performance complement," on the number of tracks from the same album, artist or box set that can be transmitted within a three hour period.[4] By preventing transmission of entire albums or larger numbers of works by an artist, the complement encourages consumers to buy albums and therefore diminishes the displacement potential of licensed transmissions.
  - A prohibition on pre-announcement intended to minimize home recording by withholding the identity of the recordings to be transmitted.[5]

[1] 17 U.S.C. § 106(6).
[2] 17 U.S.C. § 114(d)(1).
[3] 17 U.S.C. § 114(d)(2), (f).
[4] 17 U.S.C. § 114(d)(2)(B)(i), (j)(13).
[5] 17 U.S.C. § 114(d)(2)(B)(ii).

- A prohibition on automatic channel switching intended to prevent evasion of the complement and otherwise prevent a licensee from complying with channel-specific requirements while offering a service with all the sales displacement potential of an interactive service.[6]
- One important kind of transmission was not made subject to the compulsory license: an interactive transmission.[7] Creators of recordings were permitted to control interactive digital audio transmissions because they posed the greatest threat to sales.

In 1998, Congress clarified that this basic arrangement applies to Internet webcasting. Congress also refined some of the existing conditions on the compulsory license, and added new ones, to strengthen the protection of sound recordings against activities that would undermine sales.[8] Of these, perhaps the most important is a requirement that transmitting entities not cause or induce copying by users, and if the technology used by a transmitting entity enables the transmitting entity to limit copying, the transmitting entity uses that technology to limit copying.[9]

Thus, the current statutory system recognizes a basic tension between the benefits and risks to the creation and dissemination of music posed by digital technologies. As the Senate Report to the DPRA observes:

> new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible. These new technologies also may lead to new systems for the electronic distribution of phonorecords with the authorization of the affected copyright owners. Such systems could increase the selection of recordings available to consumers, and make it more convenient for consumers to acquire authorized phonorecords.
>
> However, in the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged, ultimately denying the public some of the potential benefits of the new digital transmission technologies."[10]

The current statutory system carefully balances these concerns by distinguishing various kinds of digital transmissions, and dealing with them differently. At one extreme, free, nonsubscription, over-the-air broadcasts consisting of a mix of entertainment and non-entertainment and other local public interest activities were not in 1995 thought to pose much risk to creators, even if digital broadcasting involved a higher sound quality than analog, because the passive activity of listening to broadcasts did not appear to pose a threat to distribution of recordings.[11] Accordingly, broadcasts were exempted from the new performance right. At the other extreme, creators were given the strongest rights with respect to interactive services, because

> Of all the new forms of digital transmission services, interactive services are most likely to have a significant impact on traditional record sales, and therefore pose the greatest threat to the livelihoods of those whose income depends upon revenues derived from traditional record sales.[12]

In between are subscription services and webcasting, which were thought to pose a risk of substitution, so that compensation to creators and content protection provisions were clearly warranted, but were not though to pose so much of a risk that creators should have the power to withhold their content to make their own decisions about the degree of risk posed by these services.

CONTENT PROTECTION IS A VITAL PART OF THE DPRA COMPROMISE

The basic architecture of the DPRA described above and the specific content protection provisions of the DPRA protect the very core interests of the recording business. The economics of the recording industry reflect the scope of copyright protection for recordings. Because the creators of recordings enjoy exclusive rights of reproduction and distribution, they are paid for selling copies and, to a much smaller degree, for licensing reproductions and distributions. Because the creators of recordings have only an extremely limited performance right, they receive only a tiny por-

[6] 17 U.S.C. § 114(d)(2)(A)(ii).
[7] 17 U.S.C. § 114(d)(2)(A)(i).
[8] 17 U.S.C. § 114(d)(2)(C).
[9] 17 U.S.C. § 114(d)(2)(C)(vi).
[10] S. Rep. No. 104–128, at 14 (1995).
[11] *See Id.* at 15.
[12] *Id.* at 16.

tion of their revenues from licensing performances. That means that sales income is necessary to finance the creation of new works, and displacement of sales by uncompensated performances poses a grave threat to the industry's ability to continue to produce the music Americans enjoy. The limitations on the scope of the compulsory license and the specific conditions on the license were included as an integral part of the package of compromises represented by the DPRA to prevent transmissions from substituting for sales.

Now would be a terrible time to consider picking apart the DPRA compromise by weakening its content protection provisions. Anyone who has read the newspapers in the last several years has heard about the tremendous pain that piracy—particularly that caused by peer-to-peer services—has inflicted on the music industry. Sales of recorded music products have declined some 30% over the past three years. Likewise, sales of the top selling albums for each of the past three years has steadily decreased. Because the top selling albums provide the profits that make possible creation of the vast majority of recordings that do not achieve commercial success, these twin factors have deprived the public of creative new music as record companies have been forced to slash their artist rosters and support for new artists. Moreover, the revenue loss occasioned by this reduction in sales of CDs affects not only the record companies themselves, but the rest of the music industry as well. Lost sales have reduced royalties paid to artists, songwriters and music publishers, and thousands of Americans have lost their jobs due to retail store closings. For example, during the first half of 2003 alone, 600 record stores closed, probably in large part due to the pressures of piracy.

Weakening the protections provided by the DPRA by giving creators even less control over the use of their works is to invite more of the same. By contrast, these protections should be an immaterial limitation on broadcasters. It bears emphasis that the digital performance right does not apply at all to the traditional analog broadcast activities of broadcasters, or to their new digital over-the-air broadcasts. The provisions of the compulsory license apply to broadcasters only to the extent they choose to enter the new business of webcasting in search of new profit opportunities. And even then, limitations such as the complement were "intended to encompass certain typical programming practices such as those used on broadcast radio."[13] In addition, should a broadcaster wish to make webcasts in excess of the complement or other limitations on the compulsory license, it is always free to ask permission. The marketplace works. Broadcasters obtain clearance for all the other copyrighted material they transmit, and many webcasters have struck private licensing deals. Nothing in the DPRA prevents a broadcaster from seeking permission to transmit sound recordings on whatever basis the broadcaster and copyright owner might agree.

NEW THREATS WARRANT MORE, NOT LESS, PROTECTION

Today, the vital interests the DPRA was designed to protect, and Congress' intent that the DPRA "ensure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used,"[14] are in real jeopardy from risks not foreseen nine years ago when the DPRA was negotiated and enacted. At this critical juncture, attention should be given to more, rather than less, protection of those interests.

Perhaps the greatest threat the creators of recordings face today comes from recording devices and software that use the identifying information or "metadata" transmitted in digital radio and by satellite services, webcasters and others to allow users to selectively record or disaggregate programs into individual tracks to be listened to again and again apart from the original transmission program, or to be redistributed. Within the basic architecture of the DPRA, such automated recording is a threat because it blurs the distinctions between broadcasts, noninteractive and interactive services—giving listeners on-demand access to recordings that have been transmitted and so giving any kind of transmission the sales displacement potential of an interactive service.

We already see this phenomenon in the case of webcasting, where software such as "Streamripper" allows users to copy all of the recordings transmitted on a webcast channel, disaggregate them, save them to substitute for purchases of legitimate downloads or CDs, and redistribute them with peer-to-peer software.[15] Replay

[13] S. Rep. No. 104–128, at 34 (1995).

[14] *Id.* at 10.

[15] As Streamripper's own website explains, using Streamripper "you can now download an entire collection of goa/trance music, an entire collection of jazz, punk rock, whatever you want." http://streamripper.sourceforge.net/about.php.

Music likewise enables users easily to record streaming music from webcasters or subscription services and saves them as individual, high-quality MP3 files that are automatically tagged with the artist and song title. The program even offers integrated CD burning. Creators have little ability to prevent webcasters from fueling the use of such software, since the compulsory license does not require webcasters to use new secure streaming technologies as and when they become available, but only to take advantage of the security features of the technologies they do use.

As broadcasters switch to digital broadcasting, we fear that we are on the verge of devastation to the industry that will dwarf the harm wrought by the peer-to-peer piracy problems of the last several years. Digital broadcasting is a whole new medium dramatically different from analog broadcasting. The FCC has tentatively permitted digital broadcasting "in the clear"—that is, without any protection for the copyrighted works being broadcast—even though the technical specifications for the approved transmission technology indicate it incorporates a sophisticated digital rights management system. Today, digital radio receivers like The Bug[16] have storage that permits features such as pause and rewind. Someday soon, digital receivers will have built-in hard drives, multi-channel decoding, and electronic program guide features that will permit users automatically to compile enormous collections of near CD-quality recordings from digital broadcasts, and to access whatever specific recordings they want whenever they want them.

The unrestricted copying, disaggregation and redistribution of digital transmission programs threatens to turn noninteractive services, like webcasts and broadcasts, into the equivalent of on-demand interactive services. This risk is particularly acute because the music broadcast on radio tends to be the most popular music, which fuels the economic engine of the recording industry, as well as pre-release recordings, where copying in the days before a recording is released in stores could eat substantially into sales. There would be little reason for most consumers to buy a download from a legitimate online service like Apple's iTunes store or buy a CD if they only need plug in a digital radio receiver to compile a collection of every popular recording. Indeed, such copying threatens to replace peer-to-peer services as a source of music for those who would rather steal it than pay for it. Why run the risks and endure the bother of using Kazaa if one only need plug in a digital radio receiver to obtain consistently high-qualities copies of every popular recording? This kind of technology would mark an unprecedented shift in the nature of broadcasting and home recording, and upset the delicate balance that Congress and this Subcommittee have tried so hard to maintain over the years.

We are pleased that the FCC is looking at this issue right now. We hope that the Commission will do the right thing and require that the content protection features we understand are in the digital broadcast technology tentatively approved by the FCC be used to protect the livelihoods of everyone in the music industry dedicated to providing new music to American consumers. We also hope that broadcasters will join us in embracing use of such content protection features, because it is not in their interest for users to be able to record automatically selected music they want to listen to and to strip out the advertising and other broadcast programming. However, digital broadcasting is only part of the problem, so the action we are requesting from the FCC can only be part of the solution. We hope this Subcommittee will consider adding to Section 114 of the Copyright Act similar content protection requirements for the non-broadcast transmissions covered by Section 114's compulsory license and will keep an eye on the proceedings before the FCC to ensure that the Commission acts with respect to broadcast transmissions in a manner consistent with federal copyright policy.

Mr. SMITH. Mr. Potter.

## TESTIMONY OF JONATHAN POTTER, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION (DiMA)

Mr. POTTER. Chairman Smith, Mr. Berman, and Members of the Subcommittee, thank you for the opportunity to speak today about whether the sound recording performance right appropriately balances the interests of creators, broadcasters and webcasters, and consumers.

[16] http://www.pure-digital.com/Releases/Release.asp?ID=212.

My testimony will focus on how the performance right impacts Internet radio services offered by DiMA member companies, including Yahoo, AOL, RealNetworks and Microsoft.

DiMA members are pleased that in some respects section 114 is working as planned. By exposing new and diverse music to enthusiastic audiences and paying many millions of dollars in royalties, Internet radio has greatly benefited recording artists, record companies and consumers. Unfortunately, the potential success of Internet radio is limited by imbalances in the legal standards for determining performance royalties under the section 114 license and uncertainties in legislative license requirements.

Perhaps the most fundamental imbalance is the continuing exemption of broadcasters from sound recording royalties and digital programming restrictions. As a result, cable radio, satellite radio and Internet radio are competitively disadvantaged as a matter of law.

Even more disturbing is the inequity suffered only by Internet radio as a result of the new royalty-setting standard that was enacted in 1998. Rates for most statutory licenses, including for cable and satellite radio, are set using a long-established standard in section 801(b) of the Copyright Act. That equitable standard requires royalties to be reasonable and fair to both copyright owners and users.

In the 1995 Digital Performance Right in Sound Recordings Act, Congress and the Justice Department's Antitrust Division considered the 801(b) reasonableness standard as an essential safeguard against the collective licensing power of the recording industry.

In 1998, without extensive consultation with the Antitrust Division, Congress created a new standard only for Internet radio, lacking a fairness or reasonableness requirement. In fact, the new standard effectively compelled the CARP to adopt above-market rates.

Under the new willing buyer-willing seller standard, the Librarian of Congress ultimately imposed a royalty rate for fledgling Internet radio services that was 50 percent higher than that paid by more established competitors in cable and satellite radio. This enormous rate disparity is indisputably unfair and could not have been the result Congress intended. Recently, Register of Copyrights Marybeth Peters suggested to the Subcommittee that the standards for cable, satellite and Internet radio be conformed. DiMA echoes that request.

Experience under the 1998 amendments has revealed a second significant flaw, the new definition of interactive service. For good reason, the 1995 act made interactive services ineligible for the statutory license and defined them as essentially on-demand music services. The 1995 definition was clear and there were no disputes regarding whether or not a service was interactive. In 1998, to address new services enabled by new technologies, Congress modified the interactive services definition, but the new standard was significantly more ambiguous.

As the Copyright Office noted in a proceeding on this very question, the amended definition of "interactive service" requires such an intensive, fact-specific analysis of each service and its individual features that one cannot be certain just how much consumer input

is permissible before a service crosses the line. However, the Copyright Office agreed with DiMA that the new definition of "interactive" clearly permits qualified statutory license services to utilize some amount of consumer influence when creating programming and play lists.

Despite the Copyright Office decision, the recording industry has sued for infringement virtually every innovative company that provided consumers a modicum of influence in programming. In fact, in one infringement litigation against a service that sought to invoke and pay royalties under the statutory license, the recording industry is asserting that any element of consumer influence in Internet radio programming makes a service interactive and thus infringing.

The combination of statutory ambiguity with the enormous potential infringement liability if a service guesses incorrectly how a court will rule on its eligibility for the statutory license has chilled innovation, experimentation and investment in Internet radio which would benefit consumers and creators.

DiMA strongly urges the Committee to reconsider the 1998 amendment to the definition of "interactive service," and to either provide legislative clarity or authorize the Copyright Office to provide regulatory guidance in ways that will not impose retroactive and inappropriate infringement liability.

These and other issues described in my written testimony have hindered the development of new, compelling services that will better enable legitimate royalty-paying online music services to compete against piracy. DiMA urges the Subcommittee to consider legislative solutions that help bring the full benefits of Internet radio to the creative community and to consumers.

Thank you.

Mr. SMITH. Thank you, Mr. Potter.

[The prepared statement of Mr. Potter follows:]

PREPARED STATEMENT OF JONATHAN POTTER

Mr. Chairman, Representative Berman, and Members of the Subcommittee:

Thank you for inviting me to testify today on behalf of the Internet broadcast music performance services offered by DiMA member companies, including by AOL, Apple, Live365, Microsoft, MusicMatch, Napster, RealNetworks, and Yahoo!.

The subject of today's hearing is "balance" between the creators and owners of copyrighted works on the one hand, and broadcasters of sound recordings of all types—including broadcast radio, cable radio, satellite radio and Internet radio—on the other hand. DiMA was formed in 1998 to promote balanced copyright law and fair competition, as reflected by our two core public policy principles:

1. Creators and copyright owners deserve fair compensation for uses of their content; and
2. Copyright and commercial law should not discriminate between classes of media companies based solely upon their choice of technology to deliver content to consumers.

Since the Internet radio sound recording performance license was enacted in 1998 as part of the Digital Millennium Copyright Act, DiMA companies have paid several millions of dollars in royalties to recording companies and recording artists. In part, these payments reflect our first core principal, as we support and promote America's creators and copyright owners. They also evidence widespread consumer adoption of Internet radio. However, the very fact of and the amount of these payments serves to underscore how the law discriminates against Internet media companies based solely on our choice to deliver music to consumers via the Internet, rather than broadcast, cable or satellite radio technologies.

Congress' creation of a sound recording right for digital audio transmissions explicitly exempted broadcast radio transmissions. Accordingly, Internet radio services are significantly disadvantaged vis-á-vis their direct competitors in broadcast radio, who are not required to license or pay royalties for their performances of sound recordings. In addition, 1998 amendments to the performance right made it unequivocally favor satellite and cable radio—even when those services compete directly with Internet radio in the broadband music marketplace.

Internet radio competes directly against terrestrial radio for a limited universe of listeners and advertisers, and competes directly against cable and satellite radio for an even smaller universe of subscribers and advertisers. Paying higher royalties requires Internet radio to reduce programming or performance quality, or increase advertising prices or frequency, in ways that unfairly inhibit Internet radio's competitive opportunity. With respect to the point of this hearing, if, as the Subcommittee will hear today, the sound recording performance right is out of balance with respect to any music performance service—then it is most out-of-balance with respect to online media, as only Internet-based services are subjected to royalty rates set under the "willing buyer-willing seller" standard.

Additionally, with respect to Internet radio only, there is a further imbalance, namely, whether an online music service is permissibly consumer-influenced within the scope of the Section 114 statutory license or is "interactive" and thereby fails to qualify for the statutory license. The definition of "interactive" as amended by the DMCA created an ambiguity in the law that has spawned two court cases, has been the subject of an administrative proceeding in which the Copyright Office declined to set standards or to provide a roadmap for well-intended royalty-paying compliance, has materially inhibited innovation, and has even driven DiMA companies into liquidation. Today, more than five years since these legal proceedings were initiated, we ask the Subcommittee to end this legal quagmire and fix the definition of "interactive" service so that it reflects Congress' intention to promote rather than inhibit innovative royalty-paying music performance and discovery services.

Finally, I will discuss two additional points of imbalance in the sound recording performance right: (a) the requirement that online services pay a mechanical royalty for server copies of sound recordings associated with licensed royalty-generating public performances; and (b) the sound recording performance complement, which is overly restrictive and significantly hinders Internet radio's competitiveness.

I. THE PERFORMANCE RIGHTS ACT IS GENERALLY UNBALANCED IN ITS TREATMENT OF COMPETING NEW MEDIA SERVICES, AS INTERNET RADIO SUFFERS A MARKEDLY LESS FAVORABLE ROYALTY-SETTING STANDARD.

When the sound recording performance right was enacted it was expressly imposed only on new digital music services—not on FCC-licensed broadcasts, which Congress exempted even for digital audio terrestrial broadcasts. Thus, Internet radio and all digital music performance services suffer a significant copyright royalty disadvantage compared to our competitors in broadcast radio. I hope this imbalance is not permanent, but I appreciate political reality and the remote possibility—at best—that this Subcommittee will reconsider the inequity between my powerful friends in traditional terrestrial radio and their new online competitors as it respects sound recording copyright royalties.

What is perhaps more surprising and unfair is how the law advantages cable and satellite radio, even when those entities compete against us on our own turf—in the broadband marketplace. This cannot be what Congress intended when it created or amended the performance right statute, and we are pleased that the Copyright Office has suggested that the Committee review the issue.

*a. Background: Though Imposed Only Upon New Digital Music Services, the 1995 Act Balanced the Performance Royalty With Reasonable Protections.*

Understanding today's imbalance in royalty-setting standards requires a brief review of the history of the performance right.

In 1995, when enacting the first sound recording performance right, the legislative history documents Congress's dual and balanced intentions: to protect and promote the interests of copyright owners and recording artists *and* to promote the development of new technologies. Congress wished to provide a new right and royalty (benefiting creators and copyright owners), to promote efficient collective licensing processes (benefiting licensors and licensees), and also to incorporate the lessons of decades of antitrust controversy that had confronted similar collective licensing efforts, most notably of ASCAP and BMI.

After consulting with the Antitrust Division of the Department of Justice, Congress incorporated into the Digital Performance Right in Sound Recordings Act several provisions that sought carefully to balance the goals of enabling efficient licens-

ing processes and ensuring that a new recording industry licensing cooperative would not have unrestrained pricing power. The provisions that furthered these goals included (a) a statutory license (rather than an exclusive right) to ensure the availability of blanket licenses to play music over new digital services; (b) an antitrust exemption to promote efficient license negotiations; and (c) the availability of a royalty-setting arbitration, or CARP, as a backstop or safeguard to ensure that above-market royalties would not be imposed on licensees.

Integral to the safeguard provided by the CARP process were the standards and factors to be used by the arbitrators to determine the appropriate rates and terms for the new statutory license. In 1995 Congress applied the traditional standards set forth in the Copyright Act at 17 U.S.C. § 801(b)(1), that balance the interests of licensors, licensees, and the public interest:

> (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 1995 Act, and yielded a royalty rate that applied to the three then-existing cable and satellite digital music services. Today, this royalty standard continues to apply to cable and satellite radio services.

*b. 1998 Amendments Unraveled the 1995 Balance By Stripping Away the Act's Original Protections—but Only for the Newest Digital Music Services: Internet Radio.*

In 1998, Congress again considered 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 that would benefit creators, so long as it was competitively fair and set at a reasonable level so as to permit the continued rapid growth of this nascent 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 consulting with the Department of Justice, 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) (emphasis added). Unfortunately, the legislative history offers no explanation or any reasons why Congress adopted this different standard for Internet radio, 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 excessive pricing power by antitrust-exempt licensors (including several written consultations with the Antitrust Division of the Department of Justice) and to ensure that the CARP would serve as an appropriate backstop, Congress surely could not have intended that this new standard be more susceptible to market power-based pricing by collective licensors. Unfortunately that is precisely what the arbitrators concluded in the first CARP under this new standard.

In their decisional Report the arbitrators in the first CARP under the willing buyer-willing seller standard recount in some detail how the RIAA adopted a "take-it-or-leave-it" licensing approach with a limited group of impecunious webcasters likely to accept whatever deal was offered them, in order to create a body of evidence of overpriced agreements and then argue to the arbitrators that only these executed agreements should be permitted as evidence of willing buyers and willing sellers. The arbitrators found that the RIAA "devoted extraordinary efforts and incurred substantial transactional costs" to negotiate 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 [Internet radio] services." *Id.* at 50–51. Illustrating the strength of the evidence supporting this conclusion, the arbitrators specifically found that RIAA's effort to deny this manipulative intent "lacked credibility." *Id.* at 50.

More important to this Subcommittee than the RIAA's behavior is that the strategy ultimately was successful because the arbitrators concluded that their hands were tied, believing that the willing buyer-willing seller statutory standard *required* them to consider only a few executed agreements, but not the relevant experience of thousands of services with music licensing royalty rates. The arbitrators, therefore, ignored compelling evidence that would have led to a far more reasonable and justifiable rate if they could have considered the four factors utilized in the traditional CARP standard found in 17 U.S.C. § 801(b), or even if they could have considered "fair market value," the CARP standard utilized in cable television royalty proceedings.

This conclusion 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, and to ignore 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.

Setting aside whether the arbitrators incorrectly applied the willing buyer-willing seller standard, DiMA urges the Subcommittee to consider that the courts most experienced in the consideration of collective licensing agreements—the ASCAP and BMI rate courts—consistently have rejected evidentiary 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 evidence fair market value. *See, e.g., United States v. ASCAP; Application of Showtime/The Movie Channel Inc.,* 912 F.2d 563, 579–82 (2d Cir. 1989). These very concerns underlie provisions in the most recent ASCAP consent decree which preclude agreements entered into during the first five years of licensing music users in a new industry as evidence of a reasonable royalty. In support of this provision the Department of Justice Antitrust Division explained that "[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." *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.* Thus, the very type of agreements that courts and the Department of Justice have rejected as evidence of fair value were the *only* agreements that the

arbitrators believed the law allowed them to rely on using the willing buyer-willing seller standard.

Consequently, by requiring arbitrators to ignore long-established music performance license rates, by requiring reliance on inherently unreliable licenses intended by RIAA to yield above-market rates, and by eliminating the concept of fairness, balance or fair market value from the rate-setting standard, the willing buyer-willing seller standard resulted in a royalty rate for the performance of sound recordings by Internet radio that is:

- more than three times higher than the rates historically paid for public performances of compositions, and
- 50 percent higher than sound recording performance royalty rate paid by cable and satellite radio.

There is no principled basis why digital media services should be favored or disfavored relative to one another merely because they transmit performances to the consumer using different technologies. There is also no principled basis why the recording industry utilizes the traditional four-factor § 801(b) rate-setting standard when it is a licensee in proceedings to set songwriters' royalties, but benefits from the more favorable willing buyer-willing seller standard when it is licensor in the Internet radio context. DiMA respectfully asks the Subcommittee to rectify these imbalances. We note that Register of Copyrights Marybeth Peters—in responding to a written question from Chairman Smith following a 2003 hearing on the issue of CARP reform—also has suggested that the Subcommittee reconsider the rate-setting standards that apply to essentially competitive digital radio services.

*a. The Law May Disfavor Internet Radio Even Against Digital Music Competitors That Compete Directly in the Broadband Marketplace.*

Recently DiMA has learned that Music Choice, a cable radio provider that is defined as a "pre-existing service" under Section 114, and therefore has its royalties set pursuant to the traditional 801(b) standard rather than the willing buyer-willing seller standard, is competing directly against DiMA companies and broadcasters in the broadband radio marketplace, but Music Choice is not paying royalties equivalent to those paid by online radio or broadcaster simulcasters.

Music Choice is utilizing the broadband connections of its cable partners such as Comcast to essentially webcast its traditional cable music channels *plus additional new channels* to cable broadband subscribers. This may be a brilliant idea that earns Music Choice and its cable partners lots of money. But it highlights the unprincipled foundation of a performance rights law that enables two companies to provide competing subscription broadband music services, but requires them to pay different royalty rates to creators and copyright owners. This law is unbalanced with regard to the competing services, and also is unbalanced with regard to copyright owners and performing artists.

The Music Choice example (or loophole if Music Choice's legal position is correct) highlights DiMA's core policy principle—that copyright law should be technologically neutral so that all competing media services pay the same royalty rates and compete on a level playing field—and highlights the prejudice and disparities that result when the law does not follow that basic principle.

III. CONTRARY TO CONGRESS'S INTENT, THE 1998 AMENDMENT TO THE "INTERACTIVE" SERVICES DEFINITION HAS PROMOTED LITIGATION RATHER THAN INNOVATION.

Congress enacted the DMCA statutory Internet radio license to promote the growth of Internet radio as an innovative, competitive medium. Whether a particular Internet radio service qualifies for the statutory license is dependent on several statutory factors, most notably that it:

- complies with programming restrictions, e.g., that limits the number of songs of a single artist or album that can be played in a 3-hour period, and
- is not "interactive" as defined in the statute.

The "interactive" service exclusion was first included in the1995 Act, to ensure that statutory performance licenses were not available to "on-demand" music services that threatened to directly displace sales of pre-recorded music. The DPRSRA defined an "interactive" service as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." This definition was clear, and there was never any question whether a service qualified or did not qualify for the statutory license on the basis of whether it was or was not interactive. In the statute Congress even confirmed that a consumer's ability to request a song was not enough to make a service inter-

active, inasmuch as broadcast radio and other media regularly perform consumer requests.

In 1998 Congress amended this clear, bright-line definition of "interactive" service. Unfortunately, the revised standard makes it much less certain whether a service qualifies for the statutory license. The amended law defines an "interactive service" as

> one that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient.

As in the original definition, the 1998 definition continues with a safe harbor: "The ability of individuals to request that particular sound recordings be performed . . . does not make a service interactive, if the programming on each channel of the service does not substantially consist of sound recordings that are performed within 1 hour of the request or at a time designated . . . by the individual making the request."

Relying on this safe harbor and their interpretation of the "interactive" restrictions, several DiMA companies developed Internet radio services in 1999 and 2000 that permitted varying levels of consumer influence. "Consumer influence" features included the ability to rate songs, artists and albums, and to request that specific songs or artists' recordings be performed (but not at a specific time or in any specific order). Recording companies complained that these services did not qualify for the DMCA license and threatened to sue. In an effort to clarify the situation DiMA petitioned the U.S. Copyright Office for regulations interpreting the definition. The Copyright Office declined to propose regulations, or to specify specific features that individually or in combination would disqualify programming from the DMCA license. The Copyright Office did, however, affirm unequivocally that services can incorporate consumer influence in their programming without making the service interactive.

In May, 2001, several recording companies filed a copyright infringement suit against Launch Media (now Yahoo!), contending that the service's consumer-influence features disqualified it from the statutory license. In a second effort to resolve the issue without rancor, DiMA filed a declaratory judgment action on behalf of the Internet radio industry, but that court declined to hear the action and referred it instead to the court hearing the pre-existing infringement lawsuit.

In a follow-on action the recording industry also sued several additional DiMA companies, seeking again to disqualify consumer-influenced radio from the statutory Internet radio license. Some DiMA companies settled by agreeing to pay extraordinarily high royalties and maintain some consumer influence features; others agreed to eliminate all consumer influence features; and others went out of business.

As the Register of Copyrights determined, Congress clearly expressed its intent that some amount of consumer influence be a part of basic Internet radio and compliant with the statutory license. The recording industry, through its licensing behavior and public statements has agreed. However, through its litigation and conflicting public statements, the recording industry has also proffered more restrictive interpretations of the definition of "interactive" and intentionally fostered an uncertain, litigious environment.

For example, the RIAA has entered into statutory licenses with services that offer programs based upon listener preferences and with services that allow users to skip songs and pause songs, but has sued other services offering similar functionality. In fact, strikingly, in the litigation that continues today, the last remaining recording industry plaintiff has asserted that non-interactive webcasts are not permitted to allow any level of individual consumer influence over a program. This assertion clearly conflicts with the RIAA's own licensing practices and the Copyright Office decision, and suggests that to be non-interactive a service must replicate the experience of broadcast radio. This would be an absurd result, as it would prohibit webcasters who already operate under significantly more restrictions than broadcast radio to utilize any functionality of the digital medium, absent direct licenses from the recording labels that would cause even greater anticompetitive impact than does the statutory license.

DiMA believes that the recording industry is taking unfair advantage of the unfortunate uncertainty that was created by the 1998 amendments to the definition of "interactive service," in pursuit of grossly higher royalties for Internet radio services' use of any consumer influence features, notwithstanding clear Congressional intent and the Register of Copyrights' decision to the contrary. Moreover, the higher royalties for so-called "interactive" services (or for services that do not have million-

dollar litigation budgets) will not have to be divided evenly with recording artists as they will fall outside of the statutory license.

As DiMA has testified in other contexts, in a strict liability environment with high statutory damages, uncertainty chills innovation and can destroy the entrepreneurial spirit. We urge the Subcommittee to clarify the definition of Internet radio interactivity, or to revise the statute to delegate regulatory authority to the Copyright Office so that it periodically can re-define "interactivity" in light of newly developing services and market conditions. DiMA companies want to focus our energy on developing exciting royalty-paying products and services that combat piracy, rather than on lawyers and litigation.

**1. Although Broadcasters Have a Copyright Exemption to Utilize "Ephemeral" Reproductions of Compositions In Support of Broadcast Performances, Webcasters Do Not Have An Analogous Exemption for "Ephemeral" Reproductions of Sound Recordings And Are Required to Pay Significant Royalties for Such Copies.**

As the U.S. Copyright Office pointed out in its August 2001 Section 104 Report to Congress, there is an imbalance between the legal and financial treatment of so-called ephemeral copies of compositions in the broadcast radio context, and similar copies of sound recordings in the Internet radio context. This imbalance in favor of sound recording copyright owners disadvantages Internet radio services, as well as broadcast radio simulcasters.

Since 1976 broadcast radio has had a statutory exemption, and thus royalty-free authority, to make reproductions of copyrighted compositions so long as the reproductions remain within their possession and are used solely to facilitate licensed royalty-generating performances of the same music. Internet radio services also require the same ephemeral recordings to enable their webcasts; but whereas a typical radio station requires only one copy to transmit over the air, webcasters need copies in different formats in order to let consumers listen using different software players (such as RealPlayer or Windows Media Player) and at different bandwidth speeds (for dial-up and broadband access). Although each one of the webcasters' ephemeral recordings functions exactly the same way as the copies exempted for radio broadcasters, recording companies persuaded Congress to provide it with a statutory license for the same ephemeral recording for which terrestrial radio stations are exempt. The CARP and Librarian of Congress awarded the recording industry nearly a 9 percent bonus on top of the performance royalty for the making of these ephemerals.

In the Section 104 Report, the U.S. Copyright Office noted this imbalance between the exemption that is provided broadcasters for composition ephemerals but that is not provided to broadcasters or webcasters for sound recording ephemerals. The Copyright Office said that the compulsory license for sound recording ephemerals, found in section 112(e) of the Copyright Act, "can best be viewed as an aberration" and that there is not "any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license." *Section 104 Report, p. 144, fn. 434.* The Copyright Office urged repeal of section 112(e); DiMA agrees.

**2. The Section 114 Programming Restrictions are Overly Rigid, and Prevent Internet Radio from Engaging in Traditional Broadcast-Style Practices That Do Not Undermine the Recording Industry's Interests.**

Another disparity between the rights of broadcasters versus the restrictions imposed upon webcasters is created by the programming controls imposed by Section 114, namely, the prohibitions against advance announcements and the sound recording performance complement. *See* 17 U.S.C. § 114(d)(2)(c)(i) and (ii). While intended by Congress to limit the digital public performance license to radio-like activities, in reality these provisions prevent Internet radio from engaging in many of the most common practices of radio broadcasters that have proved, over decades of experience, to promote rather than harm the interests of the record labels and performing artists.

For example, radio stations typically announce specific songs that are going to be performed either next or at an unspecified time in the near future, as an inducement to keep listeners tuned to their stations; Internet webcasters cannot. Or, when a famous artist such as Ray Charles passes away, radio stations have complete latitude to pay tribute by playing extended blocks of the artist's work; the sound recording performance complement limits the ability of Internet radio to honor the artist to no more than two songs consecutively, and four songs total over a three-hour period. There is no evidence, however,

that the broadcasters' practices have harmed the record industry, or that webcasters' adoption of these practices would be harmful. Given the clear promotional benefits of webcasting to the recording industry and performing artists, there is no reason why webcasting should not also be permitted this additional programming latitude to better attract and maintain its audience against broadcast competition.

These restrictions, if they ever served a meaningful purpose, became even more anachronistic in the age of personal computers as media centers. Any consumer can use the same personal computer to listen to webcasting or, by merely installing a PC card with an FM tuner (or, soon, a digital radio tuner), to broadcast radio. Soon it will not even be necessary to use a PC card, since software-based radio tuners are being developed and tested.

Under current law, nothing restricts that PC from digitally recording broadcasts on a hard drive either temporarily or permanently. And nothing prevents PCs from redistributing those recordings over the Internet utilizing peer-to-peer software. Yet, even though the very same PC can be used to either listen to the radio or to webcasting, only webcasting has unfairly been saddled with programming restrictions. Indeed, webcasters even have additional obligations under Section 114 that broadcasters do not have, such as to identify all songs they perform, to utilize available technological means in their transmission technologies to prevent direct recording of the webcast signal, and to prevent automatic scanning and switching of channels to find particular songs.

The Section 114 programming-based restrictions cannot be justified, particularly in light of the introduction of digital FM radio and technological convergence. If Congress perceives no danger from what consumers can do with broadcast radio on a PC, then there is similarly no danger with respect to webcasting. Therefore, the sound recording performance complement and the restrictions on advance announcing should either be eliminated or substantially relaxed, as a matter of fairness, logic and parity.

**3. CARP Reform Legislation Accomplishes Much, But Additional Change is Needed to Ensure Balance in Sound Recording Performance Rights**

In recent years this Subcommittee has responded several times to promote the business and legal environment of legitimate online music services. The sound recording performance right amendments provided a needed measure of stability to our industry in 1998, and the Small Webcasters Settlement Act was a lifesaver for many small webcasters.

Additionally, DiMA is most appreciative of the Subcommittee's efforts and accomplishments with regard to H.R. 1417, and we are hopeful that the Senate will soon approve this bill and that it will be signed into law by the President. However, as Chairman Smith and Ranking Member Berman stated clearly as that legislation was being considered, H.R. 1417 only corrects procedural flaws in the CARP system, and not the substantive flaws that are equally important.

DiMA's goal with regard to the sound recording performance right is the same goal we have urged before—that the law balance the interests of copyright owners, creators and users, and that all media companies be treated alike regardless of whose business was created first or what technology a service chooses to utilize.

DiMA hopes the Subcommittee will recognize that consumers and creators should be indifferent, to the technological means by which their music or other entertainment programming is delivered, so long as the content is of a high quality, is reasonably priced, is secure against piracy, and is accounted for and reasonable compensation is paid. Rather than focusing on fiber versus satellite versus copper wire versus coaxial cable, the law should ensure fair payment based on the value of the work and the use—and then the law will be well-balanced.

Thank you for the opportunity to testify today.

Mr. SMITH. First, it seems to me that under the umbrella of the general subject of our hearing today are half a dozen substantive issues. I don't know if we are going to be able to address them all. It is rare that we would have so many issues that come up, and it will probably be the future, probably next year before we get to all of them, but at some point they do need to be addressed.

Mr. Carson, in your testimony you implied a fairly bleak future for performing artists. You did not use of the word that is of interest to a lot of us, and that is "piracy," but I think that is what you meant in some cases.

How great a threat do you think that is to performing artists?

Mr. CARSON. Piracy is a very great threat to performing artists, depending on how you define "piracy," of course. But just look at what is happening with peer-to-peer services right now. They pose a major threat to recording artists and record companies.

Beyond that, talking about other kinds of conduct that are possible now or will be possible in the future, given the roll-out of new technologies which do all sorts of wonderful things for the consumer, but they may not be so wonderful for the recording artist or record company trying to make a living off the recordings.

Mr. SMITH. Mr. Halyburton and Mr. Potter, do you agree with what Mr. Carson said; and if you agree that there is a real threat, who should be most responsible for preventing the misuse that Mr. Carson talks about?

Mr. POTTER. Mr. Chairman, that is a good question. The business of many DiMA companies is the distribution of sound recordings by sale, by subscription, by performance. So DiMA is wholeheartedly aligned with the RIAA, with performers against piracy.

We are very sympathetic to these technological concerns, and as Mr. Marks has referred to, there are content protection standards in the DMCA today, standards that we agreed to when the DMCA amendments were developed.

Mr. HALYBURTON. In terms of broadcasting, we believe that broadcast and even high definition broadcast do not represent a threat. Our content is not presented in a way that makes it kind of suitable content for the kind of process that is being talked about. The music is played tightly together, the disk jockeys talk over the fronts of the recordings and the backs of the records. There are musical drop-ins.

It is not for radio stations just a back-to-back music situation like it is on the Internet for webcasters. It is really an entirely different kind of content and product.

Mr. SMITH. What are the odds, Mr. Halyburton and Mr. Marks, of you all, that is NAB and RIAA, reaching some kind of consensus on the subject of content protection?

Mr. MARKS. We have had preliminary discussions with the National Association of Broadcasters and look forward to further discussions to work cooperatively and to coordinate on finding a resolution to this problem.

We would welcome further participation from Mr. Halyburton's company and other broadcasters to sit down with us and figure out the resolution here in a way that does not hold up HD radio. That is not our goal. We are excited by the opportunities that are presented by digital radio and do not want to interfere with the roll-out of that to consumers.

Mr. SMITH. Mr. Halyburton, do you agree with that?

Mr. HALYBURTON. I agree with that. It is important that we not impair the roll-out of HD. We too face a lot of new technologies and new services, and we need to move aggressively into that area.

Mr. SMITH. Another question for you, Mr. Halyburton, and this is contracts with the performing rights organizations like ASCAP and BMI that already require broadcasters to report the songs they play. Given that, why do you consider it to be more difficult to report this type of information in order to qualify for the benefits under the 114 and 112 licenses?

Mr. HALYBURTON. I believe if we stay somewhere near where we are now with the interim regulations, where we are talking about title, artist and the name of an album, those are the kinds of fields of information that are readily available to us and could be reported. Just in the interim regulations, we would be reporting a far greater number of times and a far greater amount of information to the RIAA as a result of that. So we believe these interim regulations are, for the most part, workable.

What we really worry about is if we go beyond that and increase the frequency or the amount of fields, it will be very difficult to keep up with that.

Mr. SMITH. Mr. Potter, what is DiMA's response to the Copyright Office and also to NAB's suggestion that ephemeral copies have no independent economic value and ought not to be subject to a separate royalty payment?

Mr. POTTER. DiMA believes that the full value of our activities in the Internet radio space is found in the actual performance and that the performance royalty should cover essentially what we are doing.

DiMA also believes that the law should be technologically neutral and where broadcasters and their over-the-air activities have an exemption from ephemeral copies, there is a reason for it, and we should have equal exemptions for ephemeral copies vis-a-vis music publishing royalties, and we should also have equal exemptions or equal obligations with regard to sound recording royalties.

Mr. SMITH. Thank you.

Without objection, I am going to yield myself one more minute since we will only have one round of questions.

This question is in an effort to run some interference for Mr. Boucher. If you all could very briefly respond to the point he made which is, we ought to treat regular broadcast and the streaming as virtually the same when it comes to royalties.

Mr. Carson.

Mr. CARSON. We agree. Broadcasters should pay just like webcasters should.

Mr. HALYBURTON. We believe local broadcasters should be exempt in their local area from any fees. It is the same. It is over the air, it is over the Internet. It is really the same service.

Mr. MARKS. We believe they should be treated the same.

It is worth noting that the United States is the only country with sophisticated copyright laws that grant such as exemption, and that exemption is all the more extraordinary when you look at the facts in the marketplace today, where our industry is being devastated by piracy and is in need of more revenue streams, not less.

Mr. SMITH. Okay.

Mr. Potter.

Mr. POTTER. Mr. Chairman, if this is the only round of questioning, I should thank you for your scheduling indulgence. Par-

ticularly on behalf of my bride, who appreciated it at least as much as I did.

In response to your substantive question, I think there are two parts here. At least with regard to digital radio, Internet radio, cable radio and satellite radio, it seems unfair we are paying 50 percent higher royalties than satellite radio and cable radio.

With regard to broadcast radio, we have a standing principle that all technologies, all media, should be treated the same. That is obviously a harder political effort, and we welcome that discussion; but at least in the interim, we would prefer, those of us in the digital space, to be treated the same.

Mr. SMITH. The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you, Mr. Chairman.

It is good to know at least three of the four witnesses agree with Mr. Boucher that there should be a performance right for all kinds of broadcasting and streaming.

Section 114 has language—and this is really for Mr. Marks—has language about accommodating and not interfering with digital rights management. Has that language aided in protecting piracy or the technical measures being utilized; and if not, why not?

Mr. MARKS. In addition to that statutory license condition, there is another statutory license condition, as well, that requires webcasters to implement protection measures in technologies that they are using. At the time that the legislation was passed, we thought that adequately addressed the content protection needs we had.

As it has turned out, the content protection within the streaming technologies that are being used by webcasters and simulcasters are not effective against the literally hundreds of stream-ripping technologies that exist. Therefore, we believe giving some teeth to those conditions so that effective technologies are required to be used by webcasters and simulcasters should be considered by Congress.

Mr. BERMAN. Given your answer, then, I would like to throw out sort of just at least a hypothetical grand bargain, which is the sound recording complement, from what you said, really is not—none of these provisions are achieving the goal of preventing piracy; and it is a problem for the licensees, such as the broadcasters and webcasters. You are complaining of different aspects of things you have to do which are not achieving the goal that the recording companies and the recording artists wanted to achieve.

So would it be a fair trade-off to remove the sound recording complement requirements and, at the same time, strengthen the requirements of copy protection and perhaps shift that cost to the webcasters? In that situation, the DMCA would be able to be a backstop for one who is attempting to circumvent the anticopying technology; the copy protection would aid in the interoperability of the standards when accounting for different media players, like Microsoft or Real Networks, and would possibly prevent a future problem with the copying from HD radio. I would be interested in the panel's reaction to that kind of a trade-off.

Mr. CARSON. It is certainly worth thinking about. One part which I would need to give more thought to is the part that would shift

the cost of that to the webcasters and broadcasters. I am not sure who should be bearing that cost.

One could argue that record companies need to be thinking about that protection, not just on the Internet, so maybe it is a cost they are already going to bear. But I would agree that the current provisions in section 114 with respect to technological protection are pretty weak. There is a lot to be said for doing something to strengthen those, and if the trade-off is you strengthen those and you get rid of the complement, we would want to hear what the interested parties have to say, but it is well worth thinking about.

Mr. POTTER. Let me start by saying that we have never been approached by the recording industry to discuss strengthening these technological protection measures, either as a matter of negotiation or as a matter of law, so this is a new subject.

We clearly discussed it in 1998 leading up to the DMCA legislation, and we were all fairly comfortable that there were specific copy and no-copy possibility flags or bits in streaming technologies that our companies were certainly interested in using. DiMA companies are not interested in creating radio programming that people can copy and redistribute.

As for a compromise or the grand trade-off, I think we are always interested in discussions that will inhibit piracy, and we are always interested in freeing up some regulatory restrictions. We might prefer to trade off willing buyer-willing seller for technological protection measures, but if there is going to be a grand negotiation, we are looking forward to working with the Subcommittee and the stakeholders.

Mr. BERMAN. Let me ask one additional question. The broadcasters and DiMA both say it is unfair to pay a separate license fee under section 112 when you need to make the multiple ephemeral copies to operate under the section 114 license and you claim there is no independent economic value.

Would it therefore makes sense to have that determination made in the course of establishing the 114 webcasting rate? In other words, do away with that provision of section 112, but allow a 114 CARP to adjust the rate if, and only if they find there is a value in certain aspects of making more copies to facilitate webcasting?

Mr. HALYBURTON. Our big problem with the CARP and the whole process of it is the willing buyer-willing seller does not work, and then the sheer cost for both sides of litigating that and going through the process. It ends up, we end up paying more in legal fees than we would have paid in royalties. While we do not like the fees that we operate under today, and yes, they were negotiated, we did not have much choice because a CARP would be a far worse process.

The CARP process is clearly flawed. This Committee has taken steps to try to work on that, and there is more that needs to be done.

Mr. BERMAN. But what about—I understand your answer, although it did not focus on the specific issue. Wherein ephemeral copies have no real inherent value, I think DiMA makes not a bad case, why are we paying that? If that is the test, why not fold that into the 114 process, whether through negotiations or the CARP, too, I guess.

And let me ask, Mr. Potter, your reaction.

Mr. POTTER. As a matter of practice, Mr. Berman, if we review the transcripts of that CARP, it was one king of a CARP, we would find that very, very little attention was actually paid to the 112(e) royalty and the value of those ephemeral copies. All of the testimony and all of the witnesses focused on the value of the performance.

[11 a.m.]

Mr. POTTER. It was only in the very late stages that people threw a few quick arguments into the proceedings because they realized that the CARP would have to make a separate decision about whether the 112 ephemerals had any value. As a matter of practice, I think the CARP almost went there and then realized they had to make a decision, so they essentially threw in a 10 percent kicker.

We are not uncomfortable with saying the performance royalty should compensate for all uses of the sound recording associated with that performance, and essentially that glosses over the issue, but including all the reproductions of the sound recording, all the cache copies, all the network copies, all the formats. Ultimately, we think there's a fair argument that the value is in the performance, and whatever is associated with that, we are happy to pay our fair share.

Mr. BERMAN. I am told that in certain situations, to get it faster and better, you need more ephemeral copies than in other situations. Some ephemeral copies are just a requirement to actually do the act, but others actually enhance the value.

Mr. POTTER. You're right, but they enhance the value of the performance, and therefore, if the value of the performance—if the consumer receives a higher-quality performance because more ephemerals are out there in the network, then the value is still in the performance, and the advertising dollars or the subscription fees are associated with the performance. So you might be correct that if there are more ephemerals cached out in the network, you will get a higher-valued performance.

For the arbitrators to sit there and say, oh, my goodness there is an Intel server farm over here, and there is a Qwest server farm over there, and there's cache copies flying around, and how much are they worth is a very hard thing. It is much easier to say, how much is the performance being valued at, what are the advertising rates, what are the subscription rates, and it is a much more tangible economic argument. So I think we would agree with you generally.

Mr. MARKS. Can I give a brief answer on that? I think some of this is a little bit of semantics. The question is whether there is an independent economic value, whether you roll that into a performance royalty or you have a separate statutory license is really a different question. And as a practical matter, the arbitrators for the performance did address at the same time the ephemeral issue and found there should be an additional fee. And in the negotiations that we had in the marketplace last year, there was one fee—those two fees were rolled into one for purposes of the fee that exists today.

But there is a misperception, I think here, that there is no economic value. In truth, there are a variety of reasons why there is economic value for those additional copies. Mr. Berman touched on one of them, making additional copies that could be on a distributed network architecture so that the reliability of streams and the user experience is better, therefore enabling a particular Webcaster to attract more listeners. Same thing for making available different formats to give the consumers choice so that one Webcaster versus another would be attracting more listeners to its site. All of those are examples of things that may lead somebody to make additional ephemeral copies and, therefore, would be evidence of independent, economic value.

Mr. SMITH. Mr. Halyburton, you would like to respond to Mr. Berman's question?

Mr. HALYBURTON. Broadcasters, we just need one copy. We need it for our on-the-air performance, and it happens to be the same on-the-air performance that ends up on the Internet.

Mr. SMITH. The gentleman from Virginia Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman, and I also want to thank you for using some of your time to inquire into one of the issues I raised. I appreciate very much your doing that, and I think you have exhausted that particular point thoroughly, so I will move on to other matters.

Let me at the outset just inject a bit of a note of caution about the idea of applying a broadcast flag to digital—terrestrial radio. I wouldn't want Members of the Committee to make the underlying assumption that this is going to be accepted without debate or controversy, and that the only question is what do we trade it for, because I think this is going to be extraordinarily controversial in and of itself. And it implicates not only broadcasters and the RIAA, but it also implicates the manufacturers of equipment and ultimately consumers of broadcast radio services.

And so the debate, if this proposal is put forward in a serious way, I think will be extensive, and it will not be something that is easily resolved in and of itself, and I wanted to note that at the outset.

Mr. Carson, I have a couple of questions for you. Fairness and reasonableness is the standard that guides royalty rate-setting with respect to the delivery of recorded music over satellites, over cable, and even when the recording industry is a licensee under the mechanical performance—the mechanical royalty. But the willing body, willing seller standard governs rate-setting under Webcasting, and experience has shown us that that produces a higher rate. So there is a, in my view, discriminatory treatment with regard to the Internet as compared to these other means of delivering the same service.

When Mrs. Peters, the director of your office, testified before this Subcommittee in a previous hearing, Chairman Smith asked her if she thought that there should be harmonization of the standard for rate-setting across these various mediums given the fact that essentially the same service is delivered, and the only thing that differs is the platform upon which the service is delivered. And her answer to that question was yes, that she believed that the same

standard should apply. Now, I don't think she went so far as to say what that standard should be.

My question to you is this: Does the copyright office stand by that position today? Do you believe that we should have the same rate-setting standard with respect to all of the platforms over which recorded music is delivered for these purposes? And if you do stand by that recommendation, would you urge the Subcommittee to take action to harmonize that standard?

Mr. CARSON. You didn't get to the hard question.

Mr. BOUCHER. I am going to get to it in a moment.

Mr. CARSON. The answer to that two-part question is yes.

Mr. BOUCHER. Now let me get to the hard one. You have seen these two standard operations in operation. The fairness and reasonableness standard has, in my view, withstood the test of time. It is even enjoyed, as I indicated, by the recording industry itself when it is in the position of being a licensee and is paying royalties to songwriters and music publishers. But the recording industry is in a very different position when it is a recipient of royalties, and in that instance enjoys, from its perspective, a far more favorable willing buyer, willing seller standard. The way I'm posing the question, you might guess what my answer to it is, but I would like to hear yours. Which standard should we adopt once we go to parity and uniformity?

Mr. CARSON. I don't think the office has come to an official position on that, but we are aware of the issue. I spoke to the Register about it yesterday, and probably the best way to state it is that it would be the present inclination of the office to support a fair market value standard, which is probably a lot closer to and, frankly, probably tantamount to a willing buyer and willing seller standard. And the reason for that is simply that compulsory licenses are exceptions to the normal rule of exclusive rights, and the reason you have compulsory licenses is generally——

Mr. BOUCHER. My time is limited, but I have an important question about that. How do you establish a fair market value? You are sort of endorsing by implication the willing buyer, willing seller test when the market itself is broken, when you really only have one seller, and that seller of the product has an antitrust exemption given by this Committee so it can collectively sell its product on the market. There is no competition in the offering of this service. You wind up with a take-it-or-leave-it proposition. Why in the face of that market structure which is inherently nonmarket-oriented would you suggest that willing buyer, willing seller or fair market value should prevail?

Mr. CARSON. Well, to say that fair market value is the standard is not necessarily to say that in order to determine what the fair market value is, you look to a particular agreement that might have been arrived at under those circumstances.

Mr. BOUCHER. How would you get to it?

Mr. CARSON. I think there are a number of ways you can get to it. There was another model that was proposed.

Mr. BOUCHER. Would you give me an example?

Mr. CARSON. I will give you one example, and I am certainly not endorsing it, but in that CARP that many people are upset with, there was another model that was, in fact, to say let's argue by

analogy based upon what's happening with respect to musical compositions (ASCAP, BMI, and so on). Had the CARP elected to go in that direction, it would have been perfectly permissible to do so. That would have been another way of determining fair market value.

Mr. BERMAN. You mean percent of revenue?

Mr. CARSON. It might have been.

Mr. BOUCHER. Your recollection of this may be better than mine because I have to focus on lots of other things. You have the luxury of being able to focus on this. But my recollection of that CARP is that the arbitrators felt that their hands were tied because they were restricted by the statute, and they had to look at these transactions exclusively and couldn't go beyond the bounds of those to look at anything else. In fact, they protested that, did they not?

Mr. CARSON. I don't recall them protesting, but if that was their view, I think they had a rather inflexible reading of the law.

Mr. BOUCHER. Well, I'm happy to hear you say that. Maybe if we're confronted with this situation again, we can show them the transcript of your answer here, and they will be a little more flexible in the way they apply things.

I am going to ask one more question, with the Chairman's indulgence.

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. BOUCHER. I thank the Chairman.

I understand the concern of the recording industry that the more interactive a service becomes, the more likely that service is to displace sales; that it was on the theory of that reality that the compulsory license was denied for interactive services. But we have had a very difficult time in establishing what is interactive and what is not, and it now appears that even the slightest amount of listener influence is sufficient to stimulate litigation and a potential denial of the compulsory license.

For example, even these rating services that are nothing more than a public opinion poll, where the station is saying to the listeners in a Webcast, rate on a scale of 1 to 5 who your favorite performers are, not—or something such as that, not so that they can customize something for that particular listener, but so they can get a response and feedback from the audience in order to influence the general programming that that particular Webcaster offers, and even that tiny amount of listener influence, nothing more than a public opinion poll, has generated litigation against some of the major Webcasters. Even Yahoo has been involved in this litigation. And I think that experience cries out for more certainty. We need to know where the line is.

Would you support this Committee giving you rulemaking authority so that you could draw the line and determine to the certainty of all parties concerned exactly what is the proper amount of listener influence in terms of deciding whether or not the compulsory license is available?

Mr. CARSON. Well, I'm not sure whether we don't already have that authority. We were invited by Mr. Potter to assert that authority.

Mr. BOUCHER. Do you believe you have it?

Mr. CARSON. I think we may well have it, but I think it's a much more difficult task than one might imagine.

Mr. BOUCHER. I don't discount the difficulty perhaps of achieving the task, but my question is a different one, and that is do you have the authority to undertake the rulemaking?

Mr. CARSON. I think we probably do.

Mr. BOUCHER. Have you discussed this with Mrs. Peters?

Mr. CARSON. Not since the year 2000. I don't have an active recollection, but that was the last time it was on anyone's agenda.

Mr. BOUCHER. Would you respond to us in writing with a simple answer as to whether or not it is the position of the office that you have rulemaking authority?

[The response from Mr. Carson follows:]

**United States Copyright Office**
Library of Congress · 101 Independence Avenue SE · Washington, DC 20559-6000 · www.copyright.gov

July 28, 2004

Re: July 15, 2004 Oversight Hearing on Internet Streaming of Radio Broadcasts

Dear Representative Boucher:

At the July 15, 2004 oversight hearing on internet streaming of radio broadcasts, you asked me the following question:

> Would you respond to us in writing with a simple answer as to whether or not it is the position of the office that you have rulemaking authority?

Transcript, p. 55, lines 1226-28. The question related to rulemaking authority to "determine to the certainty of all parties concerned exactly what is the proper amount of listener influence in terms of deciding whether or not the compulsory license is available." Transcript, p. 54, lines 1206-1210.

The response to your question is:

> Yes; it is the position of the Office that we have rulemaking authority.

Sincerely,

David O. Carson
General Counsel

cc: Honorable Lamar Smith

The Honorable Rick Boucher
2187 Rayburn House Office Building
Washington, D.C. 20515

Mr. SMITH. The gentleman's 9 minutes have expired, and the gentlewoman from California is recognized.

Ms. LOFGREN. I don't mind that 4 of my 5 minutes went to Mr. Boucher because he was asking questions that I had in mind as well. Just for clarification, as I was listening to the discussion that I found quite fascinating on ephemeral copies, it occurred to me that if instead of Members of Congress we had 18-year-olds who know how to use computers listening to the concept that you would charge a special fee for cashing copies so that you could adequately stream, that that would be an additional fee is just astonishing. Is that what is really being proposed here?

Mr. POTTER. Actually that is what exists in the law, and I think what Mr. Berman was asking is can we capture the value that might or might not exist in those ephemeral copies in the performance royalty. And my response was it is much easier to quantify the number of performances and the value of the performances than it is to have any clue as to the number of ephemeral copies that are flying around a network or to assert a value on any one of those or all of those, since all of the value is upstreamed into the performance.

Ms. LOFGREN. I think—I know we have been notified we are going to have a vote in a few minutes, but it seems to me that if we step back from arguing about technology and look instead to analogizing the experience to the analog world, that this would be a lot simpler for us to propose.

For example, on interactive, I do think that we need to have some certainty. And I would—if the office does not feel it has the ability to issue regulations, I look forward to hearing that, because I think we need to have some certainty so that the market can actually, you know, exist lawfully and there is not all this litigation. People need to know what the rules are. Having said that, if my kid can call into an on-air radio station and request a song that will someday be played, and that is not interactive in the real radio world, why would it be interactive on a Webcast.

Mr. MARKS. Could I address that point? I am not aware of any copyright owner or label or artist that has taken the position in a litigation that the mere calling in, so to speak, over the Internet, providing views on programming that is not especially created for the recipient, which is the test, is interactive. So I don't think the uncertainty that is being discussed now exists. Indeed, the definition is very straightforward, the definition of interactive. It is whether the programming, based on input from the user, is being specially created for that user.

Mr. POTTER. I would be happy to respond. I notice Mr. Marks tempered his response with the phrase "in litigation," and nobody has asserted that in litigation. Under the threats of litigation—first of all, the threats. Obviously, the litigation is done by the individual companies. But the discussions about what is legal or not often do not happen in litigation because most of our companies do not have the sizeable litigation budgets that the record industry has, and therefore, they—having seen the first huge litigation when every company, MTV settled, Musicmatch settled, Xact Radio went out of business—having seen these companies driven out of business or driven to their knees by an ambiguous statute, they

have decided not to innovate and not experiment and not to invest in those sorts of technologies.

Ms. LOFGREN. That is the impression that I had had. And it seems to me that some certainty here, wherever we draw the line, would be very helpful, and we ought to—I mean, if you can go on the radio, and they do, and say, what is the top tune, and Billboard says, what's the top tune, I mean, basically the surveys are the same function. So I am just urging, I guess, that we look to the consumer experience and measure that against the analog world rather than, as we have done for the past several years, chase our tails trying to control technology, which we will fail at because the technology is going to continue to change. We'll never be able to contain it. And I think that the experience of the recording industry is the poster child for how that is a losing strategy.

We need to get some certainty, and we need to make sure that we do not deter different platforms from delivering content. And I think that the system we have now is certainly broken, and hopefully, with your efforts, we can fix it.

I just want to make one other comment on the broadcast flag issue raised by Mr. Boucher. Too often, I think, we are discussing these issues here between content owners, creative artists, distributors of material. But Mr. Boucher is correct, there is a whole other world that's involved in this. And technology developers. And you could have any standard in the technology world, and we'll live within it.

I am very concerned and alert to the possibility that we might enable monopolistic approaches to the consumer electronic world or software world that would be adverse to all of us, including creative artists and content holders. So if there is any interest in doing a broadcast flag, I do agree that we have to have substantial review of this to prevent that kind of adverse outcome that would really end up squeezing every other act, including the RIAA and everyone else in this whole area. And with that, thank you, Mr. Chairman.

Mr. SMITH. Let me thank all the panelists. This was very, very interesting. You all know that we are not likely to move this legislation this year, but we do hope to get an early start next year, and we will consider everything you mentioned in your testimony and look forward to hearing from you again.

Thank you for being here, and we stand adjourned.

[Whereupon, at 11:20 a.m., the Subcommittee was adjourned.]

# APPENDIX

## MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman thank you for holding this oversight hearing on balancing the interests of sound recording copyright owners and the broadcasters. I'm looking forward to hearing from the witnesses about the impact of internet streaming on various business models. While I am confident in the outcome of the Bonneville case, I am not convinced that pure webcasting and the simultaneous webcasting of an "over the air" radio broadcast are identical activities that should be subject to the same licensing conditions. It may be that the rules should be technology neutral, or it may serve a greater public need to carve out exceptions to the rules to account for the differences between the technologies.

However, before we get to the points of controversy, it is important to note that at least all the witnesses here today, acknowledge that the prevention of piracy of sound recordings is an important goal.

With the advent of new technologies we are once again faced with the problem of ensuring that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected.

The Copyright Office has suggested granting copyright owners of sound recordings a full performance right to harmonize the rights of owners of sound recordings with those of other copyright owners once and for all. There is great appeal to that proposal in that we need not focus only on the immediate problem and seek the particular solution, we can stop having the tail wagging the dog of whatever technology is next. Just a short time ago we proposed the sound recording complement to prevent copying of music, which would replace sales of sound recordings. Now, there is already technology which allows users to copy all of the recordings transmitted on a webcast channel, disaggregate them, save them to substitute for purchases of legitimate downloads or CDs and redistribute them with peer to peer software. In the near future, we will probably be back here to discuss in depth the effect of digital audio broadcasting or HD radio on the sound recording performance right as well.

I doubt the witnesses before us today will express unified support of a full performance right for sound recordings. Instead, broadcasters and webcasters take issue with some of the provisions of the Section 114 license. For its part, the record industry illuminates problems emanating from the ease of copying sound recordings from a broadcast or webcast.

Clearly, if we are to have a Section 114 webcasting license, it should be a workable license. Therefore, we should ensure that its terms do not unduly burden licensees, nor unduly impair the legitimate interests of copyright holders. On the latter issue, I am concerned that several provisions of Section 114 designed to deter piracy and preserve the recorded media market are not working. Specifically, I refer to the sound recording performance complement, and the requirement that transmitting entities accommodate copy protection technologies used by sound recording copyright owners. It appears these provisions have fallen short in terms of protecting the interests of sound recording copyright owners. I expect to ask our witnesses a number of questions about the continued utility of these provisions as currently structured.

There will also be testimony about the need, or lack there of, for a separate license to cover multiple ephemeral copies. Section 112(e) created a statutory license to allow any service operating under the Section 114 statutory license to make one or more ephemeral recordings of a sound recording to facilitate the digital transmission of these works governed by section 114. Even the Copyright Office had stat-

ed that Section 112(e) "can best be viewed as an aberration." However, the marketplace has borne out that there is a value to multiple ephemeral copies. There seems to be a discrepancy as to what the valuation of an ephemeral copy is. Instead of computing a separate value for the 112 license to copy could we put before the CARP establishing the rate for the 114 license the requirement to include in its evaluation the value, if any, of the multiple ephemeral copies?

I am aware as described in the written testimony of NAB and DiMA, that there is some distrust among the broadcasters and webcasters of the CARP proceeding. After all the claim is made that stations pay at least 5 to 6 times as much for sounds recording royalties that for musical works. However, I am not sure that speaks as much to the CARP as it does to the inequity of royalties paid to musical works copyright owners. That being said I agree that to some extent the CARP needs to be reformed and therefore support HR 1417.

Technology provides many new opportunities to reach new audiences. We must be wary though of trampling on certain rights in order to get there.

Thank you and I yield back the balance of my time.

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PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND RANKING MEMBER, COMMITTEE ON THE JUDICIARY

I believe that our laws are where they should be on digital music rights. It is the songwriters, the recording artists, and the record labels that actually create the content that the other industries profit from; it is only fair that they get paid for it.

In the mid-1990's, I was a lead proponent of the idea that there should be a digital performance right. The lay of the land, as we all know, was that artists and labels received no royalties for radio play of their music, although the songwriters did. When a new technology, the Internet, came along, I believed it was the right thing to do to make sure that all of the creators of music were compensated for their creativity and efforts.

After all, it is copyrighted works that are the driving force of our economy, providing what may be the only positive balance of trade for our nation. It would be unwise to bite the hand that feeds us by saying they should not be compensated for what they do.

I do not think that the fact that artists do not get paid for over-the-air radio broadcasts is an effective argument for saying Internet transmissions should be royalty free. An oversight in one technology does not mean there should be an oversight in another.

I also believe that, as we develop newer technologies, we should ensure that content is adequately protected. The development of technology that permits copyright law to be evaded is not something to cheer; in such instances, the copyright laws must be updated.

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PREPARED STATEMENT OF THE AMERICAN FEDERATION OF TELEVISION AND RADIO ARTIST (AFTRA), THE AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA (AFM), THE RECORDING ARTISTS COALITION (RAC), AND THE FUTURE OF MUSIC COALITION (FMC)

On behalf of the thousands of recording artists—both musicians and vocalists, and both royalty artists and studio artists—who belong to our organizations, the American Federation of Musicians of the United States and Canada ("AFM"), the American Federation of Television and Radio Artists ("AFTRA"), the Recording Artists Coalition ("RAC") and The Future of Music Coalition ("FMC") would like to thank the Chairman, the Ranking Minority Member, and the Members of the Subcommittee for holding a hearing on the transmission of sound recordings and in particular for their continued concern, oversight and leadership on the many issues of crucial importance to recording artists and the industries that depend upon their artistic product.

INTRODUCTION

The theme of the hearing is balance, and representatives of the industries that are built upon selling, broadcasting and transmitting our recordings appeared on the panel before this Subcommittee and argued that elements of the current system are sufficiently out of balance as to cause serious harm to their industries. Ironically, the panel itself was off-balance in a critical way: it did not include any rep-

resentatives of the musicians and vocalists whose recorded performances are at the heart of the recording, broadcasting and webcasting industries. To be sure, as creators we desire the success of the recording companies who invest in our art, as well as of the old and new industries that help bring our art to the public. But it must always be remembered that it is *our music* that the public wants to hear and therefore *our music* from which these industries profit. Simply put, without our creative work, there would be no sound recordings and no musical product to broadcast or transmit.

Given that fact, there really is no feasible way to achieve a balance in and among these industries unless the needs of recording artists are met and our voices are heard. As we discuss in more detail below, recordings do not spring by magic from our instruments, and although innate talent is necessary, talent alone is not sufficient to bring recorded work to fruition. Recording careers require hard work and the investment of vast amounts of time, effort and perseverance on the part of musicians and vocalists. Moreover, as we also discuss below, most recording artists—whether they are royalty artists or studio artists—do not fit the public stereotype of rich celebrities. Very few talented and hardworking artists can manage to survive economically, and those that do for the most part earn only modest livings. Historically, a key part of those modest earnings hinged on the sale of recordings because the lack of a performance right in sound recordings deprived recording artists of any income stream from the broadcast of their work. Now, even these modest earnings from sales are threatened by the ongoing transformation of the business from one based on the sale of product to one based on the sale of a listen. Unless performers can survive economically during this time of change and in whatever new world arrives, the relevant industries—and American culture—will most assuredly be out of balance because there will be no recording artists left who can afford to dedicate their working lives to making recorded music. Before turning to our detailed discussion of these issues, we set forth additional information about our organizations.

AFTRA, THE AFM, RAC AND FMC REPRESENT THOUSANDS OF RECORDING ARTISTS

The American Federation of Television and Radio Artists ("AFTRA") is a national labor organization representing approximately 80,000 performers and newspersons that are employed in the news, entertainment, advertising and sound recording industries. AFTRA's membership includes more than 11,000 recording artists, including more than 4,500 singers who have a royalty contract with a record label ("featured artists") and roughly 6,500 singers who are not signed to a royalty contract ("non-featured artists").

The American Federation of Musicians of the United States and Canada (AFM) is an international labor organization composed of over 250 Locals across the United States and Canada, with over 100,000 professional musician members. AFM members perform live music of every genre and in every size and type of venue and include over 10,000 musicians actively involved in recording music as featured artists or studio musicians.

The Recording Artists Coalition ("RAC") is a nonprofit coalition formed to represent artists with regard to legislative issues and to address other public policy debates that come before the music industry.

The Future of Music Coalition ("FMC") is a nonprofit organization that identifies, examines and translates the challenging issues at the intersection of music, law, technology and policy for musicians and citizens.

Our groups represent a wide range of diverse royalty artists at all levels and stages in their careers from Blink 182, the Temptations, Elton John, Billy Joel, Jay Z, David Sanborn, Mandy Patinkin, Aimee Mann, Quincy Jones, Lowen & Navarro, Anthony Hamilton to Ruth Brown, as well as most of the professional studio musicians and session singers.

SOUND RECORDINGS ARE UNIQUE WORKS OF ART THAT ARE CREATED BY THE TREMENDOUSLY HARD WORK OF TALENTED PERFORMERS

Traditional broadcasters and the new digital transmission services often point out with some asperity that they already pay one set of creators, the songwriters, for the right to broadcast or transmit the underlying musical work embodied in the sound recordings they play. It is absolutely essential that they do so, because songwriters, like performers, are at the creative core of the music industry and must be able to earn a living if American culture and its varied entertainment industries are to be healthy. But it is equally essential to understand that the act of recording the song involves an additional and different creative process which also must be compensated if recordings are to be made.

Thus, Harold Ray Bradley, the most recorded guitarist in history, frequently adds his own conclusion to the songwriters' motto. "It all starts with a song," he agrees, "but it doesn't end there." Songs are beautiful and unique works of art, but they are meant to be heard, and unless they are performed by musicians and vocalists, they can reach no one at all. It is when a song is recorded, and the recording is played and heard, that a song can reach out to hundreds of thousands or millions of people.

Recording musicians and vocalists breathe life into a song, not only by making it audible, but also by shaping its tone, style, rhythm, sound and color—interpreting it, and in the process, creating yet another unique work of art, the recorded musical performance. Two recordings of the same song can be utterly different, and reach completely different levels of success. In the 1960s, Ray Price recorded the Kris Kristofferson song "Help Me Make It Through the Night" in a Frank Sinatra, two-beat style. Ray Price was a popular recording artist, but that recording was not a hit. In 1970, Sammi Smith recorded the same song, and with it won a gold record, a Grammy, and a #1 spot on the country charts. What was different? The song was the same great song in both versions. But in the Sammi Smith version, she contributed her beautiful, seductive voice. And the musicians made an important creative contribution as well—they slowed the song down and put it into a straight 8ths rhythm that gave Sammi Smith the space she needed to put a lot of feeling into the lyrics.[1]

Recording artists work long and hard at their craft, whether they are the "featured" or "royalty" artists whose names are most associated with the recording, or whether they are the studio musicians and vocalists whose performances form the musical backbone of the recording. There is no one model of how the recording process works, but the bottom line of every kind of recording is the talent, skill, time, effort and work required of the performers in the process.

For example, recording artist Jennifer Warnes' 1986 recording *Famous Blue Raincoat* was a tremendous commercial, critical and audiophile success.[2] She conceived of the album as a tribute to songwriter Leonard Cohen, and in it, she reframed many of his songs from folk renditions to edgy combinations of acoustic, electronic and synthesized sounds. She invested a year of her time and worked on all the creative and practical elements necessary to bring her concept to fruition. She not only contributed the featured vocals, but also secured the funding, chose material to be recorded, rented the studio, found musicians, and with the collaboration of the fellow-artists she chose, arranged, recorded, mixed and mastered the album. It takes innate talent to be a recording artist, but it takes much more as well. Royalty artists—whether they are primarily vocalists like Jennifer Warnes, primarily instrumentalists, or a combination of all the creative disciplines like singer-songwriter-instrumentalists—work hard for many years to develop all the skills and abilities that allow them to express their creative vision in the recording process. The whole course of their professional lives, and each recording project individually, represent investments of time, skill, energy and plain hard work.

Although the listening public often does not learn the names of most of the studio musicians and vocalists who perform on the recordings they love, the creative contributions of those performers are also critical to the sound and success of the recordings. The "background" musicians and vocalists in a recording session style the song with intros, fills, chord changes, solos, tempo and rhythms. Their talent, insight and skills are necessary to achieve a truly great arrangement, interpretation and performance.

A classic (and frequently analyzed) example that beautifully illustrates the work and collaboration in the recording studio is Patsy Cline's recording of the Willie Nelson song, "Crazy"—the number one jukebox hit of all time.[3] Seven studio musicians

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[1] Guitarist Harold Ray Bradley described and analyzed the two recordings of "Help Me Make It Through the Night" in detail in his written testimony submitted to the Copyright Arbitration Royalty Panel that set certain Section 114 compulsory license rates for digital performances of sound recordings. Direct Case of the American Federation of Musicians of the United States and Canada, In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000–9 CARP DTRA 1&2, April 2001. Bradley performed on the Ray Price recording.

[2] Jennifer Warnes described the creative process involved in *Famous Blue Raincoat* in her written testimony written testimony submitted to the Copyright Arbitration Royalty Panel that set certain Section 114 compulsory license rates for digital performances of sound recordings. Direct Case of the American Federation of Television and Radio Artists, In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000–9 CARP DTRA 1&2, April 2001.

[3] Guitarist Harold Ray Bradley described the "Crazy" recording session in his written testimony submitted to the Copyright Arbitration Royalty Panel that set certain Section 114 compul-

were called to that session, and with producer Owen Bradley they created a perfect arrangement and performance that transformed the song into a timeless hit. For example, bass players Bob Moore and Harold Ray Bradley are said to have achieved the apex of country bass with the rhythms they created together,[4] Walter Haynes added a tremolo sound on pedal steel and Floyd Cramer added a blues element on the piano, all of which, together with the inimitable background vocals of the legendary Jordanaires, are an integral part of the greatness of the recording. Like the royalty artists, studio musicians and vocalists must have innate talent, but they also must work hard to develop their skills and hone that talent in order to deliver the performances that transform songs. It is a lifetime career, and takes an investment of all their time and abilities.

PERFORMERS DEPEND ON COMBINING MANY INCOME STREAMS

The popular image of recording artists as fabulously rich celebrities is very far from the reality. A few creators in the music business do earn substantial livings. Many more fail to survive at all in the industry—despite being gifted musicians or vocalists who work hard at their craft. And, of the successful creators—those who do manage to survive financially—most either struggle financially or earn no more than a modest living. They are ordinary, hard-working Americans. What sets them off from the general population, other than their musical talent, is the fact that living by their talents does not provide them with a normal job or a steady paycheck. Instead, they are participants in the unique and complicated music industry, and earn their livings—or don't—from complicated statutory and contractual arrangements that produce sporadic and varied income streams.

For example, royalty artists are not paid for all of the many varied creative tasks they perform when they make a recording. Whether they are vocalists or instrumentalists, they are, for the most part, small businesspersons or entrepreneurs, with a complex web of creative and business relationships developed to enable them to make their recorded product. Typically, royalty artists enter into complex contracts with recording companies in which the companies invest in the production and promotion costs and then make royalty payments to the artist based on sales. Later, those monies are recouped from the artist's royalties. In most cases, the additional costs of marketing and publicity, videos, tour support and other promotions are recouped as well, all from the artist's small share of the pie. The bottom line is that a royalty artist can be quite successful in terms of sales and artistic value without making a substantial profit on recording sales. Sales are crucial to recognition, survival and success—but they almost never produce sufficient income on which to live. Royalty artists must also develop—and they depend on—other income streams such as live concert fees, T-shirt sales and other merchandising, songwriting income (for those who are also songwriters) and other business opportunities to help them make a living.

The income stream that all recording artists historically have lacked is, of course, any income based on the performance of their recorded work on the radio—even though radio airplay of recordings built broadcasting into an enormously profitable industry. Under current law, performers receive no payments as a result of digital or analog radio airplay because there is no full performance right in sound recordings in the U.S. However, since 1995 there has been a limited digital performance right from which royalty artists benefit. Royalty artists share in the license fees for interactive digital performances (like on-demand streams on the Rhapsody or Napster 2.0 subscription services) in accordance with their royalty contracts (or through direct licenses if they own their copyright in the sound recording). As to the compulsory license payments made for non-interactive streams transmitted by webcasters, satellite radio and cable subscription services, royalty artists are paid 45% of the license proceeds in accordance with a sharing scheme mandated by Congress, and because this money is paid to artists directly, it is not recoupable. The income streams produced for recording artists by the digital performance right are very small now, but artists have a vital stake in the growth of this new market for their work and its potential to expand as an important income stream, one of the many streams necessary for them to earn a living.

Like royalty artists, studio musicians and vocalists are far from the typical employee of a standard business. They don't have nine-to-five jobs but work in recording sessions for a host of different employers whenever they are called. And, like

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sory license rates for digital performances of sound recordings. Direct Case of the American Federation of Musicians of the United States and Canada, In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000–9 CARP DTRA 1&2, April 2001.].

[4] "30 Essential Bass Albums You Must Own," *Bass Player,* June 1997.

royalty artists, they historically are dependent upon the sales of recordings as a critically important part of their income.

Musicians working under the AFM's Sound Recording Labor Agreement—which is negotiated with all five major recording companies and later agreed to by hundreds of small and independent companies—earn scale wages, pension contributions, health and welfare payments, and "re-use" fees if the recording later is used in another medium like a movie. In addition, musicians earn deferred income based on sales. Signatory record companies are required to make contributions to the Sound Recording Special Payments Fund. These contributions are made according to negotiated formulas based on sales. The Fund is then distributed annually to recording musicians in accordance with a formula based on their scale earnings in the industry over a five year period. It is important to note that royalty musicians also earn these benefits when they record for signatory companies.

Similarly, studio vocalists working under the AFTRA National Code of Fair Practice for Sound Recordings—which is negotiated with all five major recording companies and later agreed to by hundreds of small and independent companies—also earn scale wages, contributions to the AFTRA Health and Retirement Funds, and "re-use" fees if the recording later is used in another medium. Health and welfare contributions are based on earnings (not just scale wages, but all earnings including royalty earnings for royalty artists) and thus form an important source of health care coverage for vocalists. Under the Sound Recordings Code, vocalists also benefit from sales because they receive "contingent scale" (i.e., additional) payments when the records on which they perform reach certain sales plateaus. As noted, royalty vocalists also earn these benefits when they record for signatory companies.

Finally, studio musicians and vocalists also benefit from the digital performance right in sound recordings created by Congress in 1995. Studio musicians and vocalists are entitled to receive a portion of the major recording companies' interactive digital license income pursuant to a 1994 agreement between those companies, the AFM and AFTRA. In addition, they are entitled by law to 5% of the compulsory license fees (2½% for musicians and 2½% for vocalists) paid by the non-interactive digital streaming services such as webcasters, satellite radio and cable subscription services pursuant to the Section 114 compulsory license for non-interactive digital transmissions. As yet, these income streams are very small, but studio musicians and vocalists have a vital stake in their growth.

The AFM and AFTRA are proud of the standards they have set in the recording industry, which allow many musicians and vocalists to earn decent livings in an occupation that is characterized by uncertainty and intermittent employment. But overall, the earnings of studio musicians and vocalists, like those of royalty artists, are modest, and dependent on the ability to add together income from many sources.

### INDUSTRY CHANGES AND NEW TECHNOLOGIES POSE SERIOUS THREATS AS WELL AS NEW OPPORTUNITIES TO ARTISTS

As we move into the twenty-first century, new technologies, services and business realities are affecting—and in some instances, threatening—artists' ability to earn a living.

While the reasons for the reduction in sales of recorded music are hotly contested, there is no question that in the United States and internationally sales have dropped precipitously. Fewer sales translates into real financial hardships for recording artists—less money to invest in new recordings, even lower royalty payments, lost Special Payment Fund contributions which decrease musicians' income, lessened potential for contingent scale payments to vocalists, and overall the contraction of the industry in which we work and strive to earn a living.

Meanwhile, new technologies and new services offer exciting new ways to deliver music. Digital downloads, digital subscription services, internet radio, digital audio broadcasts are all developing and are, or soon will be, competing with each other and hopefully expanding the marketplace for music. Obviously, much of this new development focuses not on selling recordings (in *any* format) but rather on selling the opportunity to listen to the broadcast or transmission of a chosen recording or genre of recordings.

How ever these new services and markets will develop, one abiding truth will remain: an essential part of the balance that must be struck by our copyright law is that the new models must provide adequate compensation to recording artists, both royalty artists and studio artists. If the recording, broadcasting and transmitting industries are allowed to seek only to balance their business interests vis-á-vis each other, without providing for the livelihoods of artists, there ultimately will not be a varied, lively or vibrant creative product on which to base their businesses.

THE NEED FOR PERFORMANCE RIGHT

In this new era, we would like emphatically to reiterate the Copyright Office's call for a comprehensive performance right in sound recordings. The denial of a full public performance right is inconsistent with the philosophy of copyright law to secure the benefits of creativity to the public by the encouragement of the individual effort through private gain. Without a full performance right, especially as we move into an era of digital technologies and new business models, recording artists must rely disproportionately on a dwindling sales income, which will not provide the necessary incentive for recording artists to create in the twenty-first century.

The historical denial of a performance right to recording companies and recording artists has always been inconsistent with the structure of the "bundle of rights" that make up copyright in our country. Copyright owners of every other copyrighted work that is capable of being performed also enjoy a performance right in that work and, thus, have the right to profit from their creative effort by licensing performances and earning performances royalties. The Copyright Office has explained the historical anomalies that resulted in denying sound recording copyright owners and performers the same ability that other creators have to benefit financially from their work when others perform it publicly. We agree wholeheartedly that this situation should not be allowed to continue.

The U.S. is one of the few industrial countries—if not the only one—that does not have a broad performance right for sound recordings. At least 75 nations, including most or all European Union member states, have a performance right. Entertainment is America's number one export and more U.S. recordings are performed overseas than foreign recordings are performed here. As a result, in addition to not receiving compensation when their works are broadcast here, U.S. performers and record labels lose hundreds of millions of dollars each year that are collected when U.S. recordings are broadcast overseas because we do not have this right in the U.S.

This situation is all the more untenable in light of the fact that radio stations have built vibrant and successful businesses—and earned huge profits—based upon the broadcast of our members' work. It is our music that attracts listeners to radio stations, and enables them to sell advertising on the basis of market share. Broadcasters receive their biggest resource—our recorded performances—at no cost, and then do not share any revenue with the creators whose sound recordings are actually responsible for the revenue.

The broadcasters' mantra—that radio broadcasts promote sales, and that therefore they should have no obligation to pay for the performance, is neither universally true nor particularly relevant. "Promotional value" of a performance does obviate the requirement to pay creators of other creative works; for example, a novelist can expect to see increased book sales if the novel is made into a movie, but no one would suggest that the novelist therefore need not be paid for the visual interpretation. In any event, the promotional value of radio airplay cannot be universally assumed. Many recordings race up the airplay chart but never make it out of the middle of the sales chart. In addition, oldie sound recordings provide the radio stations with an entire format and stream of revenue but do not result in commensurate sales for the performer or record label.

Moreover, the rationale of the twentieth century no longer applies in the twenty-first century. Even if the promotional argument provided a justification for denying a performance right in sound recordings in the twentieth century, business paradigms are now changing. As the music industry changes, revenue streams also are changing—some are new, some are growing and some are now less important. The public performance revenue income stream is taking on increased importance in the new business models. As we noted above, the time may soon arrive when the presumed—and most important—"consumption" of a sound recording is no longer a sale but is a "listen." In the future, especially as we become wireless, many music fans may never "buy" product, but rather will rely on broadcast/transmission services to hear all the music they desire. A great variety of such services, many of them without any component of a traditional sales distribution, already are becoming more important. There are many radio streaming services such as XM, Sirius and Rhapsody where the consumer purchases "listens" instead of product or downloads.

The music industry must change, and we need to encourage new creative legitimate models that serve customers and music fans in new ways that the customers want. But as much as we support the development of new technologies and new models—and we do support them because we believe that they can be good for our art—we urge this Subcommittee and all of the relevant industries to take seriously the fact that these new developments cannot thrive if they result in imbalances that harm our ability to survive as creators. The digital music services that are subject to the Digital Performance Right in Sound Recordings Act must pay performance

royalties in order to use our music; but, unfortunately, FCC licensed radio stations are not required to do so, even when they are competing for the same listeners. That certainly is not a level playing field. XM has to pay for using sound recordings, as it should; why should Clear Channel have an unfair advantage when they are both competing for the same listeners?

Copyright law must regain its focus so that it continues to provide incentives for investment and creative works in the digital landscape. In the past, Congress has worked to ensure that the Copyright Act strikes the appropriate balance to provide incentive for the creation of sound recordings and exploitation of those works in a digital world. The balancing act must be an ongoing one. As technology propels broadcasting and performances, rather than just sales, into the ultimate consumptive use, it is more important than ever that sound recordings be given a performance right, and that the real needs of artists remain a critical consideration in the policy debates.

DIGITAL AUDIO BROADCAST

The emergence of digital audio broadcasting ("DAB") reinforces the immediate need for a performance right.

Digital audio broadcast has developed, and likely will continue to develop, differently from what was envisioned in 1995. It is not simply the same as analog radio transmitted digitally. Rather, DAB is being advertised as "radio you" because it will be able to provide individualized services and will have the capacity to broadcast—or, more accurately, to "narrowcast"—programming that is tailored for each recipient. DAB receivers store data, while analog radios do not; DAB provides audio "on-demand," while analog radio does not; DAB can provide customized programming, while analog radio does not; DAB allows the listener to pause and then go back to where they left off, while analog radio does not; DAB includes a program guide, telling the listener what's coming, while analog radio does not; DAB is accompanied by meta-data indicating artists and title, while analog radio generally is not; DAB isn't limited to audio, while analog radio is; DAB is a "fat" data pipe, while analog radio is not.

Given these characteristics, DAB will provide the type of service that Congress intended to be covered by a performance right. When enacting the DPRA in 1995, Congress said

> The limited right created by this legislation reflects changed circumstances: the commercial exploitation of new technologies in ways that may change the way prerecorded music is distributed to the consuming public. It is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.[5]

If DAB develops into a service which will be so personalized and so narrow—and which will include the ability to rewind, skip, or scan the channels in order to receive only the recordings a listener wants, and then to record, store and catalog them—it will threaten both the distribution of sound recordings via sales and, as well, the new business models such as digital subscription services on the internet, subscription digital satellite radio, and other services that are subject to the digital performance right and pay royalties for the use of recorded music. With DAB, members of the public may be able to receive what they want, when they want it. They will no longer have to purchase product or even "listens." But if that is the case, how will the services that pay us survive, and how will we, the artists, earn a living? There will be no financial incentives left for the creators of and investors in sound recordings.

CONCLUSION

The balance that Congress struck between record companies and performing artists, on the one hand, and digital technologies and broadcasters, on the other hand, is now off kilter. We firmly believe that technological advances and fairness require Congress to revisit the Copyright Act and enact a broad performance right for sound recordings, in a form that ensures a fair benefit to artists.

Congress must be mindful that this is not simply one business versus another. At the heart of these important issues are the individuals whose talents create the

[5] S. Rep. No. 104–128, at 15 (1995), *reprinted in* 1995 U.S.C.C.A.N. 356 ("DPRA Report").

sound recordings. Performance royalties will provide critically important income to famous and ordinary musicians and vocalists. Without recording artists, there would be no music on any station. Please don't make sound recording creators wait any longer for fair compensation for the performance of their music.

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