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On behalf of the National Association of Broadcasters

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Committee on the Judiciary

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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 expected 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 non-subscription 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

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).

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, 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

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.

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.

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 conditions⁸; (4) promote, rather than replace, record sales; and (5) do not constitute “multichannel offerings of various music formats.” 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

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.

passage, and that were enacted without any hearing or debate.¹⁰ For their part, 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 Internet¹⁴ 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.

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).

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.”).

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 rulemaking¹⁶ 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 (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,

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).

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).

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

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).

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 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 community²³; (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.

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 Performance 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.*

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 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

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).

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

²⁷ § 114(d)(1)(B).

²⁸ § 114(d)(1)(B)(i).

²⁹ § 114(f)(2)(B).

³⁰ § 114(e)(1).

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 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

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.

³⁴ *Id.* at 51-60.

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

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.

while our cause is just, 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.

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

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.

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

⁴¹ See, e.g., § 114(d)(2)(C)(i), (ii) and (ix).

⁴² § 114(d)(2)(C)(i).

- 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 it 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

⁴³ § 114(d)(2)(C)(ii).

⁴⁴ § 114(d)(2)(C)(ix).

⁴⁵ § 114(d)(2)(C)(i).

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.

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.

* * *

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 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

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.”).

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

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

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).

“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

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

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 transmission 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.

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 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

⁵⁷ 67 Fed. Reg. 5761 (Feb. 7, 2002).

⁵⁸ 69 Fed. Reg. at 11,521.

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.