Before the
U.S. COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of **Music Licensing Study: Notice and Request for Public Comment**	**Docket No. 2014–03**

COMMENTS OF NATIONAL ASSOCIATION OF BROADCASTERS

Introduction

The National Association of Broadcasters ("NAB")[1] hereby submits its comments in the above-referenced proceeding. NAB appreciates the opportunity to respond to the Copyright Office's Notice of Inquiry ("NOI") on the effectiveness of existing methods of licensing music rights. The legal issues raised by the licensing of music rights are many and thus the scope of the NOI is broad, covering many different topics and sub-topics.

As of 2013, there are 17,113 broadcast stations in the United States – 1,783 of which are television stations and 15,330 are radio stations. 2013 NAB Annual Report at 18.[2] Nearly 60 million Americans rely exclusively on broadcast television (and do not subscribe to cable or satellite service). *Id.* at 19. Nearly 242 million people listen to radio each week. *Id.*

The commercial broadcast industry directly employs nearly 314,000 people across the country, including advertising and programming personnel, and generates over $3 billion in GDP on an annual basis. Woods & Poole Economics, *Local Broadcasting: An Engine for Economic Growth*, at 2 (2014).[3] Taking into account broadcasters' impact on other industries and their stimulative effect on the economy, broadcasters support approximately 2.65 million jobs nationwide, and contribute approximately $1.24 trillion in GDP on an annual basis. *Id.*

NAB members are both creators and users of copyrighted works and, as such, recognize the important need to balance the rights of copyright owners against the public interest, including the public's interest in products and services that increase the availability of copyrighted works, a need that has been repeatedly recognized by the Supreme Court. As the Copyright Office has previously observed:

> It has been a generally accepted principle in copyright law that the needs and concerns of the public must be acknowledged. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)("The primary

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[1] NAB is a non-profit trade association, which advocates for free, local radio and television stations and broadcast networks before Congress, federal agencies, other government entities, and the courts.
[2] https://www.nab.org/documents/about/2013_NAB_Annual_Report.pdf.
[3] http://www.nab.org/documents/newsRoom/pdfs/Local_Broadcasting_Engine_for_Growth_Publication.pdf.

> objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public."); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

United States Copyright Office, *STELA §302 Report* 16 n.24 (2011).

NAB offers responses below on Subjects 2, 6, 9, 10, 12-15, 17-19 and 21-23.

Executive Summary

- Direct licenses are preferred and should be encouraged; however, statutory licenses remain essential.
- The statutory sound recording licenses and exemptions are critical to music licensing.
  - The Section 114 sound recording performance license remains essential, but should be improved by eliminating certain programming restrictions that have proven unnecessary.
  - The Section 112 ephemeral provision is out of step with the marketplace and the way technology is used to enable digital music performances and cannot be justified economically. All server, buffer, and cache copies used solely to facilitate licensed or exempted music performances should be covered by the Section 112(a) exemption.
- Neither state nor federal law should recognize a performance right in pre-1972 sound recordings.
- The government can facilitate the development of direct and other alternative music licensing by requiring greater disclosure of copyright ownership and administration information by the various licensing collectives.
- The financial health of digital music licensees, copyright owners and artists are interdependent.
  - Broadcasters, record labels, performers, songwriters, and publishers have a mutually beneficial relationship.
  - Broadcasters pay excessive digital sound recording performance royalties for their simulcasting activities in light of the tremendous free promotional value they provide.
  - Non-interactive streaming services have provided new royalty revenue streams to record companies and recording artists, while not causing any decrease in other record company revenue streams, and have thereby helped subsidize the record companies for their unrelated losses. At the same time, these streaming services have been unable to generate any profit under the existing sound recording royalty rates.
  - Excessive sound recording royalty rates have impeded broadcaster innovation.
- Several key changes will substantially improve the efficiency and fairness of rate-setting proceedings before the Copyright Royalty Board ("CRB").
  - Eliminate the bifurcated hearing procedure and conduct a single trial.
  - Place the burden of proof on copyright owners to establish a reasonable rate.
  - Replace arcane procedural rules of the CRB with adoption of relevant portions of the Federal Rules of Civil Procedure and Evidence.

    - Implement a standardized blanket protective order for non-public, commercially-sensitive information produced in discovery and submitted as evidence.
- The Section 114(i) restriction on using sound recording performance royalty rates as benchmarks before the PRO rate courts was imposed at the request of the music publishers and songwriters when they thought it would work in their favor. The CRB subsequently set those sound recording rates many multiples higher than the PRO rates on the express premises that (1) the sound recording and musical composition performance licenses were not comparable and (2) the sound recording performance right was inherently much more valuable than the musical composition right. It would therefore be manifestly unfair to repeal Section 114(i) at this time to allow music publishers to attempt to use the sound recording rates as benchmarks for the PRO rates.
- If only one standard is to be used for all statutory copyright licenses, that standard should be the Section 801(b) policy-based reasonable rate standard. The fictional "willing buyer – willing seller" standard has proven unworkable.
- The mutually beneficial relationship long enjoyed by broadcasters, record companies, and recording artists (and long recognized by Congress) should not be upset by extending the limited digital performance fee to cover broadcasting and other exempt performances.

Comments

I. <u>WHEN DIRECT LICENSING – THE PREFERRED METHOD – CANNOT BE ACHIEVED, THE STATUTORY LICENSES ARE CRITICAL TO LICENSING AND CAN FACILITATE LICENSING FURTHER THROUGH MODEST IMPROVEMENTS</u>

A. <u>Direct Licenses Are Preferred; However, Statutory Licenses Remain Essential</u> (Subject 14)

As a general matter, direct licensing is always preferable in functionally competitive markets and if licenses may be obtained efficiently. Even where statutory or collective licenses are appropriate, they should allow for direct licensing alternatives. That said, the actual markets for music performance rights are neither competitive nor efficient.

There is an inherent problem of market failure associated with the direct licensing of blanket music performance rights. One source of this failure is the thousands of copyright owners, and, therefore, thousands of direct licenses that would need to be individually negotiated, engendering impossibly high transaction costs for such licensing. Another source is the inherent market power enjoyed by the larger copyright owners, which those owners have historically misused (or attempted to misuse) to extract supracompetitive license fees from licensees.

Even so, at least in the context of music licensing for television, there has been some success with direct licensing. As discussed further in the comments of the Television Music License Committee, it is essential to preserve the right of local television stations to secure performance rights licenses either directly from composers and music publishers ("direct licenses") or through program suppliers who themselves acquire those rights on the stations' behalf ("source licenses") and to require performance rights organizations ("PRO" or "PROs") to issue economically viable alternative licensing forms such as the "per program" license and the recently judicially mandated adjustable-fee blanket license ("AFBL"). These mechanisms enable stations to secure public performance rights to at least portions of their music uses via direct and source licenses, and do so without their having to pay twice for the same rights.

B. Although the Section 114 Performance License Remains Essential, Server Copies, Buffers, and Caches Made Solely to Facilitate Licensed Performances Should Be Exempted, Not Licensed, Under Section 112 (Subjects 6 & 17)

The Section 114 License Remains Essential

As the Copyright Office has previously acknowledged, the collective licensing of large catalogs of music copyrights inherently raises antitrust issues and therefore typically requires regulation and oversight. U.S. Copyright Office, *STELA §302 Report* 95-96 ("there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees"). The inherent market failure noted by the Copyright Office in connection with the collective licensing of musical composition performance licenses applies equally to the collective or direct licensing of sound recording digital performance right.[4] Indeed, the ownership of sound recording copyrights is even more concentrated than that of musical compositions. Consequently, the Section 114 digital performance license remains essential to address that market failure by streamlining the licensing process and regulating the record companies' abuse of their market power to extract supracompetitive rates. While the general framework under the Sections 112 and 114 exemptions and licenses should be continued, specific areas of this statutory scheme can be improved.

We now have almost twenty years of experience with the practical, real-world impact of the various terms related to the Sections 112 and 114 licenses, which Congress did not have when the Digital Millennium Copyright Act ("DMCA") was passed. This experience demonstrates that certain changes should be made to clarify and improve those licenses (and the various exemptions related to those licenses).

The Section 114 License Should be Improved

The sound recording performance complement and other restrictions related to the Section 114 license should be re-evaluated and most of the restrictions should be removed. First, it is clear that the performance complement restrictions should be eliminated with respect to the simulcasting activities of broadcasters. Even the record companies have acknowledged that traditional radio programming, to which the complement does not apply and which frequently does not conform to the complement, helps to promote, rather than substitute for, the sale of records. Rather than protect the record companies from piracy, the restrictions of the sound recording performance complement merely serve as a bargaining chip for leverage in the negotiations with broadcasters, due solely to the undue burden such restrictions place on radio stations that seek to stream their broadcasts.

[4] Notwithstanding these problems, some broadcasters have successfully negotiated direct licenses with record companies covering the public performance of sound recordings, including digital audio transmissions. These agreements are to be preferred over any mandatory performance right in sound recordings.

Similarly, the restrictions on pre-announcing artists and songs should be done away with completely. Radio stations routinely pre-announce songs and artists to be played in the near future, and have done so for decades. Such pre-announcements serve to keep the audience engaged, and also serve promotional purposes for the record companies and performers. Indeed, for these reasons record companies have always encouraged radio stations to make these pre-announcements. These types of pre-announcements of songs and artists to be played in the near future have caused no harm to record companies or performers. Nor has the recording industry presented any evidence to that effect.

Not only should pre-announcement restrictions be removed, so should the restrictions imposed while songs are played – such as the requirement for displaying a song's title, artist, and album title. Some broadcasters – particularly those that maintain the practice of manually playing music – simply lack the technological infrastructure or systems to be able to transmit such information. Those in the best position to have accurate information do not make it available, leaving broadcasters – station-by-station – to guess and manually input artist, song title, and album information. Even when such capabilities are available, album information lacks a reliable source to draw from, which often leads to incomplete, inaccurate or inconsistent information being transmitted from one station as compared to another. Consequently, these restrictions should be eliminated.

Indeed, the record companies have recognized that these conditions are not essential to protect their interests. Although the conditions provided extra leverage to the labels, they ultimately granted waivers of all three conditions to simulcasting broadcasters in connection with the Webcaster Settlement Act rate agreement with NAB.

Additionally, the Section 114 license would be improved by encouraging the authorization of more than one collective to administer the license. Competition between multiple PROs on the music publishing side has benefited songwriters by providing incentives for each PRO to increase efficiencies (and therefore the amount ultimately paid to the songwriters). Creating similar competition with respect to the sound recording digital performance license would provide similar benefits to recording artists.

The Section 112 Ephemeral License Is an Aberration and Should Be Abolished in Favor of an Expanded Exemption

With respect to Section 112, the "ephemeral recording" provision, both the Section 112(a) exemption and the Section 112(e) license, as currently configured, are hopelessly disconnected from the realities of the way server copies, buffers, caches, and other intermediate copies[5] are used by music services and valued in the marketplace. With respect to copies of sound recordings (including the underlying musical compositions embodied therein) made solely for the purpose of facilitating an otherwise lawful public performance of that sound recording, all such copies should be subject to the Section 112(a) exemption.

[5] To be clear, many (if not all) of such intermediate copies are not fixed and/or do not constitute phonorecords under the Copyright Act. Even if they did, however, they have no value independent of the performances they enable and should be exempted under Section 112(a).

The Copyright Office has previously acknowledged that intermediate copies made solely for the purpose of licensed music performances have no independent economic value:

> The economic value of licensed streaming is in the public performances of the musical work and the sound recording, both of which are paid for. The buffer copies have no independent economic significance. They are made solely to enable the performance. The same copyright owners appear to be seeking a second compensation for the same activity merely because of the happenstance that the transmission technology implicates the reproduction right, and the reproduction right of songwriters and music publishers is administered by a different collective than the public performance right.

Register of Copyrights, U.S. Copyright Office, DMCA Section 104 Report, at 143 (Aug. 2001). Indeed, in addition to opining that such intermediate copies were likely fair use, the Register noted the Copyright Office's view that:

> [S]ection 112(e) can best be viewed as an aberration. As we indicated in 1998 to the affected parties who championed this provision as part of an overall compromise, we saw no justification for the disparate treatments of broadcasters and webcasters regarding the making of ephemeral recordings. Nor did we 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. at 144 n. 434.

The Register's analysis and recommendation addressing server copies, buffers and caches were, and remain, correct. All such server copies, buffers and caches are made solely to facilitate permitted performances, and have no independent economic value incremental to the value of the performances they enable, and should be subject to an appropriately-crafted exemption.

Indeed, even in a marketplace characterized by intense market power enjoyed by copyright owners, record company direct licenses commonly include the right to make server copies, buffers, and caches at no additional charge beyond the royalty payable for the performance of the recording. In the context of the Section 114 license, the "royalty" payable for the related Section 112 license has consistently been set, by recording industry agreement, as an allocated portion of the performance royalty. The CRB has never been presented with any marketplace evidence of an independent value for the server copies, buffers, caches or any copies used solely to facilitate a lawful performance. Thus, an exemption for all such copies is consistent with the Register's reasoning, economic and technological reality, and marketplace evidence.

In order to fully conform to these realities, however, the exemption would have to differ somewhat from the current Section 112(a) exemption and the Section 112(e) license. First, the limitation to a single copy would need to be eliminated. This limitation is unnecessary and inconsistent with the way server copies are actually used to facilitate digital music performances. In many instances, multiple server copies are necessary for the purposes of redundancy and to allow for transmission in varying bitrates, among other reasons. In no instance, however, do these multiple server copies have any value independent from their role in facilitating the lawful performance of music. Similarly, by their very nature, buffers and caches often require that more than one buffer or cache copy be made at the same time. Second, particularly with respect to server copies, the requirements that no further phonorecords be made from the server copies, and that such copies be destroyed after six months should be eliminated. By the very nature of digital transmission technology, server copies result in the creation of intermediate buffers and caches necessary to perform the recordings digitally. Moreover, the server copies (unlike buffers and caches) are not meant to be temporary. It simply makes no sense to require that server copies be deleted and then re-created every six months.

As noted above, artificially "deeming" an arbitrary portion of the Section 114 performance royalty to be attributed to the Section 112 ephemeral license does nothing more than create a legal (and business) fiction. Eliminating this legal fiction would not only better align the law with reality, but would also benefit artists. Under the current statutory regime, recording artists receive direct payment of half of the Section 114 royalty, but do not receive any direct payment for the portion allocated to the Section 112 license. Due to the terms of their agreements with the record companies and various record company accounting practices, this means that the vast majority of recording artists never see a penny of the portion of the performance royalty allocated to the Section 112 license. Given that, as noted above, all of the value flows from the public performance of the music, it is only fair that the entire performance royalty payment be distributed pursuant to Section 114 in the way that most benefits recording artists.

C. <u>Neither State Nor Federal Law Should Recognize a Performance Right in Pre-1972 Sound Recordings</u> (Subject 10)

As the Copyright Office has acknowledged, "state law does not appear to recognize a performance right in sound recordings." United States Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, http://www.copyright.gov/docs/sound/pre-72-report.pdf, at 44 (December 2011). Indeed, to the extent a state purportedly provides any copyright protection to pre-1972 sound recordings, broadcasters are commonly exempt from liability. *See id.* at 26 ("Most states have at least a few exceptions, the most common being exceptions for broadcasters to facilitate broadcast transmissions and/or for archival purposes, such as those found in the laws of California, Michigan and New York, discussed above.").

Moreover, the constitutional policy rationale for copyright law does not apply to pre-1972 sound recordings. Copyright law aims to promote the progress of science and useful arts by, among other things, inducing authors to create new works of authorship. Pre-1972 sound recordings, however, were made by authors with no expectation of a federal copyright. Consequently, retroactive federalization cannot result in more pre-1972 sound recordings. The expectations of the performers and rights holders were settled long ago, as were those of the services using such recordings, and a new right or royalty does nothing to foster the creation of new works or the dissemination of those works to the public. Any such grant of new rights would just be a means of transferring wealth from one party to another without any countervailing public interest justification.

Notwithstanding that no state has ever recognized a public performance right for pre-1972 sound recordings during the past several decades in which broadcasters have been publicly performing such recordings, the record companies have recently advanced the misguided claim that state laws do provide digital performance rights analogous to the digital performance right for sound recordings under federal copyright law. The Copyright Office, however, has explained that so-called state law copyright protection consists primarily of various civil tort and criminal causes of action to address record piracy and bootlegging:

> [e]arly cases relied on common law, principally the tort of unfair competition, to protect sound recordings from unauthorized duplication and sale. By the 1950s, record piracy had become a serious problem, with pirates openly competing with record companies. For that reason, attention shifted to legislation imposing criminal sanctions starting in the 1960s.

Id. at 20. Obviously, no analogue to the public performance right under copyright is necessary to achieve these important goals.

State laws have simply not been used, nor should they be used, to prohibit broadcasting or digital performance of pre-1972 sound recordings. To do so now would upset 100 years of broadcasting history where no payments were ever sought much less required. In any event, this matter is currently before the courts, and it would be premature for Congress to address the issue at this time.

II. **<u>THE GOVERNMENT CAN FACILITATE LICENSING BY REQUIRING GREATER DISCLOSURE OF COPYRIGHT OWNERSHIP AND ADMINISTRATION INFORMATION BY THE COLLECTIVES</u>** (Subjects 15 & 22)

One of the most significant challenges for licensees is the lack of access to any accurate and complete source of copyright ownership information for musical compositions and sound recordings. Lack of access to such information has increased transaction costs and hindered licensing activities – both direct and collective. The terms of any statutory music license should require that copyright owners provide sufficient identifying data to any licensing collective authorized pursuant to the license, as a condition of receiving royalty distributions, and that any authorized collective make that information available to licensees in a usable electronic form, as a condition of receiving royalty payments. With respect to musical composition performance rights, which are not subject to any statutory license, the government should facilitate the creation of a database of copyright ownership information, including the identification of any PROs authorized to collectively license each musical composition.

III. THE FINANCIAL HEALTH OF DIGITAL MUSIC LICENSEES, COPYRIGHT OWNERS, AND ARTISTS ARE INTERDEPENDENT

As a preliminary matter, it is unfortunate that the NOI only asks about how developments in the music licensing landscape have impacted the revenues of songwriters, composers, and recording artists. In fact, broadcasters are similarly impacted by such developments, and their financial health is interdependent upon the others'.

A. Broadcasters Have Increased the Income of Songwriters, Composers, and Recording Artists (Subject 18)

Broadcasters, and sound recording and music copyright owners, have all faced economic challenges in recent times. Broadcasters have not, however, been the cause of any decrease in music industry revenues. To the contrary, during these times, simulcasters (and other non-interactive streaming services) have provided new royalty revenue streams, which have helped subsidize unrelated music industry revenue losses.

A number of dramatic changes have occurred over the past fifteen years as the music industry has had to adapt to new technologies and an evolving marketplace, yet the interdependent relationship between radio and the music industry has endured. Although the transition to digital, combined with a general economic downturn and other factors, has impacted recording and music copyright owners, they have generally remained profitable.

In reality, the causes of such revenue declines are numerous, including online music piracy, an extended recession and the resulting diminution of consumer discretionary spending, and increased competition for that shrinking consumer budget from other forms of entertainment. Record sale revenues have also decreased due to the advent and prevalence of single-track downloads, which have freed consumers from having to purchase an entire album and pay for eleven recordings they did not want just to get the one they did. But there is no evidence or data suggesting that broadcasters contributed to such sales and revenue declines. Nor is there evidence that that radio broadcasters had any adverse effect on creativity, innovation or have in any other way decreased the incentives to create music.

Although the recording industry has seen declines in sales and revenues in recent times, industries across the world have experienced similar declines. Broadcasters were not immune to the recent economic downturn, which had a significant adverse impact on local television and radio. During this time, the broadcast industry suffered sinking revenues, layoffs and tightening budgets. Indeed, over-the-air radio station revenues dropped by approximately 20% – approximately $3.2 billion – from 2008 to 2009. *See* Woods & Poole Economics, *Local Broadcasting: An Engine for Economic Growth*, at 6 (2014). However, as a matter of perspective and scale, approximately 13,000 U.S. radio stations share $17.6 billion in revenues[6]

[6] http://www.rab.com/public/pr/RevenueReportQ42013Final.pdf

while three major recording companies share most of the $15 billion in revenues generated by the recording industry.[7]

Simulcasters and webcasters have played no part in any reduced revenues to the record companies or artists. To the contrary, such non-interactive, curated digital music performance services have provided new, additional royalty revenue to record companies and artists, which does not come at the expense of any other record company revenue. At the same time, these digital music services have been unable to generate any long-term profit from those activities under the existing sound recording performance rates. It is, therefore, clear that under those existing rates, the additional revenue from such non-interactive digital music performance services have been subsidizing the record companies for their unrelated losses. This is particularly unfair to broadcasters, who face their own significant changes and challenges to their traditional business models.

To the extent recording artists have not been adequately sharing in the new revenue streams from on-demand streaming services (the only services with potential to substitute for traditional record company sales revenue), it is likely due to these same creative accounting schemes that the record companies have employed for decades to underpay artists.

Examples of record company and music publisher exploitation of artists and songwriters are not few. Artists and their estates are routinely forced to sue merely to obtain the (often meager) royalties and benefits contractually owed to them. For example, in early 2002, musicians who composed some of the Eagles' most popular songs – "Peaceful Easy Feeling," "Take It Easy," "Best of My Love" and "Already Gone" – commenced an action against their music publisher, claiming that they have been shortchanged millions of dollars in royalties from a 1975 album. Ann W. O'Neill, Eagles' Songwriters File Lawsuit Claiming Royalties Underpayment (February 27, 2002) (http://articles.latimes.com/2002/feb/27/business/fi-eagles27). The lawsuit settled later that year. Songwriters Settle Eagles Royalty Suit (November 25, 2002) (http://www.billboard.com/articles/news/73339/songwriters-settle-eagles-royalty-suit).

In April 2005, two popular Brazilian songwriters, Antonio Jobim and Vinicius de Moraes, authors of Portuguese compositions including some world-famous songs such as "The Girl from Ipanema" and "How Insensitive", commenced an action against their publisher, alleging the publisher breached their agreement by paying reduced royalty amounts. *See Jobim v. Songs of Universal, Inc.*, Docket No. 05-CV-03527 (S.D.N.Y.) (actions stayed since May 2013); *see also Producoes v. Songs of Universal, Inc.*, Docket No. 06-CV-6407 (PAC) (S.D.N.Y.) (status indicated as stayed).

In 2012, Norman West, a longtime songwriting partner of Aretha Franklin, commenced an action against Springtime Publishing Inc. for failing to pay Mr. West royalties owed under publishing agreements between the parties. The Associated Press, Songwriter sues Aretha Franklin's publishing company over royalties from latest CD (July 2011) (http://www.mlive.com/music/index.ssf/2011/07/songwriter_aretha_franklins_pu.html); *West v. Springtime Music, Inc.*, Docket No. 12-CV-14858 (PJD) (LJM) (E.D. Mi.) (resolved by stipulated order of dismissal in February 2014).

[7] http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf

Also in 2012, the estates of well known artists such as Count Basie, Sarah Vaughn, Woody Herman, Benny Goodman, Patty Page, Kitty Kallen, The Mills Brothers, Jerry Murad, Sister Rosetta Tharpe, Frankie Laine, Tony Martin and Les Brown alleged that defendants UMG Recordings, Inc. and Universal Music Group, Inc. failed to submit accurate and truthful reports and royalty payments, by inappropriately calculating royalties, not reporting payments received from third parties, and not providing, when requested, relevant licensing information. *See The William J. Basie Testamentary Trust v. UMG Recordings, Inc. and Universal Music Group, Inc.*, Index No. 651518/2012 (Sup. Ct., N.Y. County 2012), Compl. at ¶ 209.

In *Allman et al. v. UMG et al.*, Index No. 650199/2006 (Sup. Ct., N.Y. County 2006), Gregory Lenoir Allman, Jaimoe f/k/a Jai Johnny Johanson, and Claude Hudson Trucks, members of the Allman Brothers Band, alleged that UMG Records and Polygram Records, Inc. willfully failed to pay royalties due under their recording agreements. Pursuant to an audit, the Allman Brothers determined UMG Records had kept over one million dollars in royalties due to the three band members during the audit period. *Allman et al. v. UMG et al.*, Index No. 650199/2006 (Sup. Ct., N.Y. County 2006), Compl. at ¶ 1.

Similarly, in *F.B.T. Prods., LLC v. Aftermath Records*, defendants Aftermath Records doing business as Aftermath Entertainment, Interscope Records, UMG Recordings, Inc., and Ary, Inc. (an entity allegedly owned and operated by Andre Rommel Young, Jr., professionally known as "Dr. Dre") were alleged to have failed to properly account to and pay millions of dollars in royalties with respect to recordings by Eminem. Docket No. 07-cv-03314 (PSG) (MAN) (C.D. Ca. 2008), Compl. at ¶ 1.

In the words of the artists themselves, it is the record companies that are responsible for any lack of fair payment to recording artists:

> "How To Sell 1 Million Albums and Owe $500,000" (Martin F. Frascogna, July 12, 2011, https://www.youtube.com/watch?v=NcwgdB0NltY.)
>
> I got something in the mail last week I'd been wanting for years: a Too Much Joy royalty statement from Warner Brothers that finally included our digital earnings. Though our catalog has been out of print physically since the late-1990s, the three albums we released on Giant/WB have been available digitally for about five years. Yet the royalty statements I received every six months kept insisting we had zero income, and our unrecouped balance ($395,277.18!)* stubbornly remained the same.
> Now, I don't ever expect that unrecouped balance to turn into a positive number, but since the band had been seeing thousands of dollars in digital royalties each year from IODA for the four indie albums we control ourselves, I figured five years' worth of digital income from our far more popular major label albums would at least make a small dent in the figure. Our IODA royalties during that time had totaled about $12,000 – not a princely sum, but enough to suggest that the total haul over the same period from our

major label material should be at least that much, if not two to five times more. Even with the band receiving only a percentage of the major label take, getting our unrecouped balance below $375,000 seemed reasonable, and knocking it closer to -$350,000 wasn't out of the question.
So I was naively excited when I opened the envelope. And my answer was right there on the first page. In five years, our three albums earned us a grand total of…
$62.47
What the f**k?
I mean, we all know that major labels are supposed to be venal masters of hiding money from artists, but they're also supposed to be good at it, right? This figure wasn't insulting because it was so small, it was insulting because it was so stupid. (Tim Quirk, December 1, 2009, http://www.toomuchjoy.com/index.php/2009/12/my-hilarious-warner-bros-royalty-statement.)

I've never made a dime from a record sale in the history of my record deal. I've been very happy with my sales, and certainly my audience has been very supportive. I make a living going out and playing shows. (Lyle Lovett, July 10, 2008, http://www.reuters.com/article/2008/07/10/us-lovett-idUSN1030835920080710.)

The recording industry is a dirty business – always has been, probably always will be. I don't think you could find a recording artist who has made more than two albums that would say anything good about his or her record company. . . . Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured. The record company gets all of its investment back before the artist gets a penny, you know. It is not a shared risk at all. (Don Henley, The Eagles, July 4, 2002, http://www.pbs.org/newshour/bb/entertainment/julydec02/musicrevolt_7-4.html.)

What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts. . . . A bidding-war band gets a huge deal with a 20% royalty rate and a million dollar advance . . . . Their record is a big hit and sells a million copies . . . . This band releases two singles and makes two videos . . . . [The record company's] profit is $6.6 million; the band may as well be working at 7-Eleven . . . . Worst of all, after all this the band owns none of its work . . . . The system's set up so almost nobody gets paid . . . . There are

> hundreds of stories about artists in their 60s and 70s who are broke because they never made a dime from their hit records. (Courtney Love, Hole, 2000, http://archive.salon.com/tech/feature/2000/06/14/love/.)

> Young people . . . need to be educated about how the record companies have exploited artists and abused their rights for so long and about the fact that online distribution is turning into a new medium which might enable artists to put an end to this exploitation. (Prince, 2000, http://www.news24.com/xArchive/Archive/Prince-slams-record-companies-20000810.)

B. Broadcasters Pay Excessive Performance Royalties For Simulcasting in Light of the Tremendous Free Promotional Value They Provide (Subject 19)

Non-interactive, curated music performance services like radio stations, simulcasters and webcasters, are not mere "distributors" of music. In this context, "distribution" is an inaccurate and loaded term, which has the effect of minimizing the significant contributions that many licensees make to their services. Broadcasters are not technical conduits for the "distribution" of music. Even with respect to their music programming, broadcasters expend significant creative effort in selecting and sequencing the music that is broadcast. They create various original content that surrounds the music, such as interviews, contests, promotions, news, sports, weather, traffic, and public affairs programming. Beloved or controversial, radio personalities connect with and engage listeners and help create the station's unique voice and brand. All of these components serve to engage listeners and enhance the promotional value of airplay for the record companies.

To be precise, broadcasters do not distribute music at all. Instead, broadcasters provide original programming for free to the public. Only one component of that programming is the performance of music. The inaccurate conflation of performance and distribution when analyzing the statutory licenses and services that use them is a fundamental error.

Particularly in the digital context, the legislative history of the Digital Performance Right in Sound Recordings Act ("DPRSRA") makes clear that Congress explicitly delineated these two distinct categories of rights. The Senate Report states

> The intention in extending the mechanical compulsory license to digital phonorecord deliveries is to maintain and reaffirm the mechanical rights of songwriters and music publishers as new technologies permit phonorecords to be delivered by wire or over the airwaves rather than by the traditional making and distribution of records, cassettes and CD's. The intention is not to substitute for or duplicate performance rights in musical works, but rather to maintain mechanical royalty income and performance rights income for writers and music publishers.

DPRSRA, S. Rep. No. 104-128, at 37 (1995). To use these two different terms interchangeably conflates performance rights with reproduction and distribution rights in contravention of Congress's intent.

Unlike true music distribution channels, such as digital download providers, the hallmarks of radio are that it is local, free, and required to serve the needs and interests of the communities to which it is licensed. Local stations use on-air personalities to differentiate their programming, including by commenting on the music they play. In general, except in very limited circumstances, listeners cannot choose what songs they will hear next.

Broadcasters serve the public through their local communities and are subject to Federal Communications Commission ("FCC") restrictions and obligations. Beyond the obvious benefit of free entertainment to all, local radio and television stations provide hundreds of thousands of jobs, deliver information during crises, and give back to the local communities in which they operate. Local broadcasters serve the public interest in numerous and varying ways, including by airing local and national news and other audience-responsive programming, such as sports, religious and foreign-language programming. Broadcasters participate in the Emergency Alert System ("EAS") and cover natural disasters and other emergencies; broadcasters help save lives with comprehensive, timely information. Furthermore, local stations coordinate with local law enforcement, assisting with the recovery of abducted children. Local stations support and organize community events, and provide a unique community service by providing a public voice for charitable, civic and other organizations. The value of the public services provided by local broadcasters exceeds $10 billion annually. NAB, National Report on Broadcasters' Community Service, at 3 (http://www.nab.org/documents/newsRoom/pdfs/2008_National_Report.pdf.) No other music performance service, including satellite or webcasting, provides anything approaching this type or level of free service to communities across the country.

The following are recent representative examples of local broadcasters serving their communities:

- When deadly tornadoes ripped through parts of the South and the Midwest in late April 2014, broadcasters stepped into their important lifeline roles as first informers, stopping the music and interrupting regularly scheduled programming to provide live, wall-to-wall storm coverage (http://www.nab.org/documents/newsRoom/PSI/052014LTS.html);
- WAFF-TV Huntsville, Alabama, teamed up with Kroger and the American Red Cross to help victims of a recent storm in northern Alabama, encouraging viewers to make monetary donations for the tornado relief efforts (*id.*);
- WTNH-TV New Haven, Connecticut, teamed with the Connecticut chapter of the Boys and Girls Club, New England Subaru dealerships and Connecticut high schools for the first annual SportsEdge Sports Equipment Drive (*id.*);
- WLTV-TV Miami has visited more than 18 schools and participated at several events as part of the Pequeños y Valiosos (Young and

Valuable) campaign, which raises awareness among parents about the importance of actively interacting with their children every day, from birth through the pre-school years, in order to help them learn (*id.*);

- KOMO-TV Seattle, Washington, and KATU-TV Portland, Oregon, partnered with the United Way of Snohomish County to host a telethon in March 2014 to raise money for landslide recovery efforts, raising $225,000 in a single day (http://www.nab.org/xert/2014emails/publicservice/042014LTS.html);
- WOI-TV West Des Moines, Iowa, recently aired the 40th Annual Variety Telethon in 2014 to support Variety-the Children's Charity, dedicated to improving the lives of underprivileged, at-risk and special needs children throughout Iowa, raising $4.1 million in 20 hours and nearly $100 million since the telethon's inception (*id.*);
- KLAC-FM Denver hosted the 13th annual Children's Miracle Network radiothon in 2014 to benefit the organization's local hospital, raising $1.87 million over three days and $14 million over 13 years (http://www.nab.org/xert/2014emails/publicservice/032014LTS.html);
- KDXY-FM and KAIT-TV Jonesboro partnered to host the 16th annual Have-A-Heart Wishathon in 2014 to benefit the Make-A-Wish Foundation's Mid-South Chapter, which helps to grant the wishes of children with life-threatening medical conditions, raising $323,000 (*id.*);
- WPSG-TV and KYW-AM Philadelphia spotlighted 10 individuals who have "changed the game" for the African-American community in the Greater Philadelphia area in celebration of Black History Month (*id.*);
- WACO-FM Waco, Texas, morning program, *The Zack and Jim Morning Show*, broadcast live from Afghanistan for a week in February to show support for members of the military who are stationed overseas (*id.*).

One recent example of radio broadcasters serving the public through innovation is Emmis Communications ("Emmis"), a broadcaster that developed NextRadio – a hybrid radio smartphone application that allows users to access free over-the-air radio on their smartphones. Enhancing the overall user experience, the application – integrated with numerous social media platforms allowing users to more fully engage with the music and artists – also provides a visual display, including album art, and song information. All of these features not only improve the radio experience, but also increase the promotional value of airplay to record companies and artists. Emmis and a coalition of radio broadcasters recently announced a partnership between Emmis and Sprint pursuant to which Sprint will provide its customers FM-enabled wireless devices, which receive FM broadcasts via an FM-tuner rather than the Internet. The FM-tuner gives users access to local radio stations and critical information in the event of an emergency. Activation and use of the FM-tuner across all carriers would further benefit consumers and artists by increasing competition (and therefore innovation) among music applications on smartphones, enhancing public safety during times of emergency where cellular networks fail, offloading data traffic from the carriers' cellular networks, and reducing users' costly data charges.

To maintain this high level of local programming and other services, however, local radio stations must remain competitive and be sustained by sufficient advertising support. As the FCC concluded over twenty years ago, the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[8]

Local radio stations represent brands created and maintained at great expense – e.g., there are costs for on-air talent, promotions, content-production, and staffing to select and program content, including musical content. As a means of self-promotion, performers want to be associated with local radio station brands. For example, Ryan Seacrest is the morning on-air personality on KIIS-FM in Los Angeles – one of the top-rated stations targeting young people in the U.S. When KIIS-FM plays a new artist, listeners take notice, and this airplay has the potential to break that new artist.

And when listeners hear music they like on the radio, they are likely to purchase that music. As Congress has repeatedly recognized, the radio industry provides tremendous benefits both to performing artists and to record companies. The recording industry invests money promoting songs in order to get radio airplay, and earns revenues when radio airplay leads to – directly or indirectly – the purchase of the music they hear. Artists consistently recognize the fact that radio airplay is invaluable.

This promotional value of radio airplay is tangible and quantifiable. Empirical analysis demonstrates that artists and record labels derive significant value from local radio airplay, ranging from $1.5 to $2.4 billion annually. "[R]adio airplay increases music sales and … performing artists and record labels profit from exposure provided by radio airplay." James Dertouzos, *Radio Airplay and the Record Industry: An Economic Analysis,* at 5, (June 2008). (https://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf).

Members of the recording industry at the artist and label levels confirm the promotional impact of radio airplay:

> "Thank you to radio...This record ['Stay'] never would have been this big if it wasn't for radio" says @rihanna at @iheartmusic Awards. (https://twitter.com/InsideRadio/status/462048988997648385?refsrc=email.)

> "You can see a direct correlation. If you looked at a terrestrial radio audience chart and at the iTunes top 10 singles chart, I would say 75 percent of it matches up." (RCA Records Executive Vice President & General Manager Joe Riccitelli, *Label Love for Radio*, September 26, 2013 http://www.radioink.com/Article.asp?id=2704233&spid=24698.)

[8] Report and Order, 7 FCC Rcd 2755, 2760 (1992) (Report and Order relating to the Notice of Proposed Rule Making in MM Docket 91–140, 6 FCC Rcd 3275 (1991), which proposed to relax the Commission's local and national radio ownership rules).

> Radio "still has massive reach in the local community" and "the top of the food chain" for making hits. (Island Def Jam's Steve Bartels, NAB Radio Show, September 18, 2013 http://www.allaccess.com/net-news/archive/story/122418/the-2013-radio-show-kicks-off-in-orlando.)
>
> "Radio connects the world together. It's my friend and it's everyone's goal to have a big hit song on the radio." (Lady Gaga producer and songwriter/producer and label executive RedOne, SXSW "Navigating The Waters Of Radio To Your Benefit" panel, http://www.allaccess.com/net-news/archive/story/116420/radio-s-clout-hailed-at-sxsw.)

Indeed, listeners identify FM radio as the place they first heard the music they purchased.[9] With an audience of 242 million listeners a week, the radio audience dwarfs the listenership of satellite radio and Internet music services. 2013 NAB Annual Report at 19.

Furthermore, local radio stations provide new and emerging artists with needed exposure and access to a listening audience. But the unknown artists are not the only ones who benefit; even established artists with classic hits benefit from radio airplay. Artists – old and new – eagerly seek out radio airplay.[10] Record companies and their artists gain not just from radio airplay, but also from on-air interviews and promotions of local concerts and new albums. Despite the advent of new technologies and digital audio transmission services that permit sophisticated user manipulation of on-demand and customized music, the promotional value of traditional local radio remains strong.

The fact that consumers have new ways in which to discover and obtain music does not diminish the value of over-the-air radio's marketing and promotion. Over the past few years, new digital channels are giving consumers the opportunity to legitimately buy music in many new ways, but the sheer number of recordings available online creates too many choices. In the new digital environment, in which millions of artists are vying for the attention of hundreds of millions of fans, radio has remained a constant, reliable beacon for listeners overwhelmed with excessive choices. Radio exposes listeners to new music and converts that discovery into sales.

Of course, broadcasters also pay hundreds of millions of dollars annually to music publishers and songwriters and tens of millions more to recording interests for simulcast royalties. In light of these payments, the billions of dollar in promotional value provided to record companies and recording artists by broadcasters, and the billions in public services they

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[9] *See generally* Reggie Ugwu, Consumer Data Shows Old Ways Still Most Profitable, SXSW Panel Says (March 14, 2013) (http://www.billboard.com/biz/articles/news/1552283/consumer-data-shows-old-ways-still-most-profitable-sxsw-panel-says)

[10] *See, e.g.*, Garth Brooks, Trisha Yearwood, Reba McEntire, more hail radio's Bob Kingsley (http://blogs.tennessean.com/tunein/2014/02/18/garth-brooks-trisha-yearwood-reba-mcentire-more-hail-radios-bob-kingsley/); Lady Gaga trumpets the value of radio (http://rbr.com/lady-gaga-trumpets-the-value-of-radio/); Fleetwood Mac plays the radio card to promote new release (http://rbr.com/fleetwood-mac-plays-the-radio-card-to-promote-new-release/); Rihanna taps radio to help launch new music (http://rbr.com/rihanna-taps-radio-to-help-launch-new-music/); Coldplay using radio to keep album sales humming (http://rbr.com/coldplay-using-radio-to-keep-album-sales-humming/).

provide for free, it is clear that broadcasters are contributing considerable value to their local communities, the music ecosystem, and the listeners who depend on them. Broadcasters that simulcast should be allowed to develop a profitable business model for streaming, which the current inflated webcasting royalty rates simply do not permit. Moreover, any new performance fee on broadcasters is neither warranted nor equitable.

C. Excessive Sound Recording Royalty Rates Have Impeded Broadcaster Innovation (Subject 21)

At the outset, NAB objects to the NOI's use of the term "distribution models" to describe licensees' service, for the reasons set forth above in Section III.B. Moreover, the supracompetitive and excessive rates that have been set for the sound recording digital performance right have hindered innovation.

Historically, the webcasting activities of broadcasters have been unprofitable. It is clear that under existing royalty rates those services have not been allowed to retain a fair amount of their own revenues. Indeed, the lack of profitability from streaming prevents broadcasters from making any sort of a profit from the endeavor. This is due almost entirely to the extraordinarily inflated sound recording rates, in contrast to the musical composition rates which have remained relatively reasonable. Of course, these high sound recording rates do not maximize revenues for recording companies and artists; indeed, lower, fair, and reasonable rates could actually increase revenues to those parties. Under the current state of affairs, nobody wins. And the most regrettable part is that a moderate sound recording royalty would allow broadcasters to increase their simulcasting (and webcasting) activities and "grow the pie," resulting in substantially higher overall payments to record companies and recording artists, as well as increased promotional effects for their other revenue streams. This would truly be a win for all: broadcasters, record companies, recording artists, even songwriters and music publishers, and the listening public.

Not only have the excessive sound recording royalty rates impeded entry and sustainability in the simulcasting market but, for broadcasters who do simulcast, excessive rates and the resulting financial losses have deprived broadcasters funds that could be used to innovate and improve their digital offerings. Even with these challenges, however, broadcasters have innovated.

The history of broadcasting comprises over one hundred years of innovation. If the sound recording royalty rates were lowered to fair and reasonable rates, instead of the supracompetitive, monopoly per-play rates currently in place, broadcasters would be encouraged to enter the market in greater numbers and would have both the incentive and ability to increase their innovation in that market. As noted above, the result of such increased activity and innovation would be a vibrant and sustainable digital music market and a significant net increase in revenues paid to record companies and recording artists. Everybody would gain from such a result.

IV. THE RATE-SETTING PROCESSES SHOULD BE IMPROVED

A. Several Key Changes Will Substantially Improve the Efficiency and Fairness of Rate-setting Proceedings before the CRB (Subjects 2 & 9)

There is a fundamental distinction between rate-setting and distribution proceedings before the CRB. The two types of proceedings are of a vastly different character and have different procedural, evidentiary, and discovery needs. These different needs are rooted in the distinction between the divergent goals of royalty distribution proceedings, which must divide up a fund of royalty fees already paid among various copyright owners, and royalty rate-setting proceedings, which must determine broadly-applicable royalty rates that can determine the fates of entire industries. Moreover, while the current CRB procedural regulations have worked well and are uncontroversial in the context of distribution proceedings, the same cannot be said in the context of rate-setting proceedings.

The bifurcated nature of the current CRB rate-setting procedures is very inefficient.[11] This inefficiency, coupled with the compressed nature of the proceedings and the high stakes for the industries involved, all operate to make the proceedings costly while at the same time making it difficult, if not impossible, to create a full and fair evidentiary record for the CRB Judges.

Although there are many problems with the current CRB procedural rules applicable to rate-setting proceedings, the following general changes[12] would go a long way towards mitigating those problems:

Conduct a single trial

Rate-setting proceedings before the CRB exact a considerable toll on parties and the Judges alike: parties expend significant time and resources, substantial judicial resources are

[11] Generally, a rate proceeding before the Copyright Royalty Board commences when the Copyright Royalty Judges publish a notice of commencement of proceedings in the Federal Register. 17 U.S.C. § 803(b)(1)(A)(i). Those wishing to participate must file a petition to participate within thirty days of the publication of the notice. 17 U.S.C. § 803(b)(1)(A)(ii). After the petitions to participate are filed, a voluntary negotiation period of three months follows. 17 U.S.C. § 803(b)(3)(A)-(B). After the negotiation period expires, a deadline is set for the filing of each party's written direct statement, which must include each party's rate proposal and all witness testimony and other evidence supporting that proposal. 37 C.F.R. § 351.4. Only after written direct statements are filed do the parties get a short, 60-day discovery period for all document requests, interrogatories and depositions. 37 C.F.R. § 351.5. Notably, the scope of document discovery is limited to information directly related to the other side's written direct statement; a party may not seek documents to support its own direct case. *Id*. Shortly after discovery is closed, the parties proceed to a live hearing before the CRB. 37 C.F.R. § 351.9. At the hearing, the parties are generally limited to presenting the same testimony and other evidence contained in their written direct cases. After the direct phase hearing is concluded, the parties submit written rebuttal statements and repeat the limited discovery and hearing process all over again, this time on an even more compressed schedule. *See* 37 C.F.R. § 351.11. After the taking of evidence concludes, the record of the proceeding closes. 37 C.F.R. § 351.12. The parties may then file proposed findings of fact and conclusions of law. *Id.* at § 351.14. After brief closing statements, the matter is then submitted to the Judges for determination.

[12] NAB does not propose or support making changes to the rules and practices applicable in royalty distribution proceedings before the CRB, which as noted above raise different issues and have historically been treated separately under the Copyright Act. *See, e.g.*, 17 U.S.C. § 803(b)(6)(viii) (specifying discovery rules and practices for distribution cases that are distinct from those applicable to rate-setting proceedings under 17 U.S.C. § 803(b)(6)(C)(v)-(vii), (ix)).

consumed, the overarching issue is re-litigated through direct and rebuttal phase mini-trials, and the bifurcated design of the process tends to confuse rather than clarify issues. Bifurcation offers no advantages or efficiencies in discovery, comprehension of complex issues, savings in judicial resources, or elimination of duplicative presentations of evidence. Indeed, there is no possibility that the direct trial may be dispositive and eliminate the need for the rebuttal trial.

A CRB rate-setting proceeding should include rules generally analogous to the Federal Rules of Civil Procedure and Evidence, including a single, longer discovery period, the option to submit pre-trial submissions informed by that discovery, and a single trial.

Place the burden of proof on copyright owners

In typical litigation, one party carries the burden of proof. In rate-setting litigation before the ASCAP and BMI rate courts, for example, the PROs bear the burden of proving that their rate proposal is reasonable. In rate proceedings before the CRB, however, there is no burden of proof, which effectively means that all parties participating in the proceeding carry the burden of proof. This unusual litigation dynamic places licensee-participants at a significant evidentiary disadvantage, because (among other reasons) they often do not have access to potential benchmark license agreements, which are held by the licensor participants, at least until well after they have filed their written direct cases.[13]

Replace arcane procedural rules with relevant portions of the Federal Rules of Civil Procedure and Evidence

Under the existing CRB procedural rules, as noted above, the proceedings are bifurcated into two discrete phases. In each phase, the parties must all, on the same date and without any prior discovery, file their written cases for that phase. Notably, parties may not present any testimony or other evidence at the subsequent hearing (other than as impeachment) that was not contained in the written direct or rebuttal statement.

In addition to this bifurcated phasing, the discovery rules for CRB rate proceedings are unduly restricted and prejudice licensees. As noted above, the scope of document discovery is limited to documents directly related to *the other side's case*; participants may not seek documents to support their own affirmative cases (unless those document also happen to be directly related to the other side's case). Moreover, the discovery periods are far too compressed, especially given the high stakes for the industries involved. During the direct phase, the parties have only 60 days to serve discovery requests, serve written responses and objections, make any necessary motions to compel (sometimes over a dozen of such motions may be necessary in one phase of one proceeding), and take depositions. The result is that parties often do not obtain documents from the other side until after discovery has closed, and often on the eve of the hearing. This is especially problematic in rate-setting proceedings, where parties may seek to rely on benchmark agreements involving non-parties.

[13] In CRB royalty distribution proceedings, by contrast, are parties are in the same position, as all are seeking shares of the same royalty fund. As a result, the equal assignment of the burden of proof in royalty distribution proceedings makes sense.

The statutory limitation of only ten depositions per side, spread among all participants and both phases, is also typically insufficient. In the webcasting proceedings, for example, there may be several different participants on the licensee side, representing different segments of the webcasting market and with differing positions and strategies. In the currently-pending *Webcasting IV* proceeding, over 25 different licensees or licensee trade associations filed petitions to participate. Moreover, each side typically files far more than ten witness statements during the course of a rate proceeding. This necessarily means that a large number of witnesses have not been deposed prior to the hearing, which in turn severely limits the efficiency and utility of cross-examination at the hearings.

The various inefficiencies and other problems created by the current CRB procedural rules applicable to rate cases have resulted in proceedings that are at least as, if not more, expensive than analogous litigation in the federal ASCAP and BMI rate courts, but also provide less complete evidentiary records and therefore less satisfactory results. These problems with the CRB procedure could be remedied by making relevant portions of the Federal Rules of Civil Procedure and Evidence (with appropriate modifications) applicable in CRB rate-setting proceedings, either directly or by promulgating analogous regulations. Doing so would not only improve the rate-setting process, but would have the added benefit of increased predictability; the Federal Rules have a long history of precedent for the application of the rules in many contexts (including music royalty rate-setting in the ASCAP and BMI rate court context). One example of a potential modification to the Federal Rules would be the relaxed hearsay rule currently applicable in CRB proceedings, which has functioned reasonably well and created efficiencies in those proceedings.

Create standardized blanket protective order for non-public, commercially-sensitive information produced in discovery and submitted as evidence

"The Copyright Royalty Judges may issue such orders as may be appropriate to protect confidential information . . . ." 17 U.S.C. § 803(c)(5).

By their very nature, rate proceedings involve testimony and other evidence that contain confidential information, such as financial and pricing data, contracts, marketing and sales data, forecasts and business plans, or other commercially sensitive material. While the CRB has shown a willingness to issue protective orders, they routinely revisit confidentiality designations at the hearings, and require page by page proof of competitive harm from disclosure of many exhibits. Moreover, prior Judges have imposed a very high, and sometimes arbitrary, standard for finding such competitive harm. For example, the Judges have refused confidentiality for business contracts that have been kept confidential on the sole ground that the term of the contract has expired. The terms of private business deals do not necessarily lose their sensitive nature merely because they are no longer in effect. Terms from expired agreements are often carried forward into new agreements or renewals. Allowing the recently-expired agreements into the public record under such circumstances allows business competitors and partners to obtain financial and deal information that can then be used against the participant. Moreover, because these decisions have been made during the hearings, participants have no real ability to prevent their confidential information from suddenly entering the public record.

The volume of sensitive financial information introduced into evidence in CRB proceedings is substantial. Requiring a page-by-page (and sometimes line-by-line) showing of the need for confidentiality is grossly burdensome and inefficient. Historically, the Judges have not needed to include the vast majority of this material within their written determinations. Consequently, there is no significant public interest in forcing participants to publicly disclose their internal confidential business documents. A standardized, blanket protective order, similar to the one used by the Trademark Trial and Appeal Board, should be adopted (http://www.uspto.gov/trademarks/process/appeal/guidelines/stndagmnt.jsp).[14] Such a blanket order should allow the parties to protect their sensitive business information efficiently, while still providing for confidentiality designations to be challenged by other parties to the proceeding to the extent material is improperly designated.

B. Section 114(i)'s Prohibition on the Use of Sound Recording Royalty Rates as Benchmarks in PRO Rate Court Should Not Be Repealed (Subject 6)

The prohibition against using sound recording performance royalty rates as benchmarks for musical composition performance rates in the ASCAP and BMI rate courts was imposed at the request of music publishers and songwriters when they thought it would work in their favor. Now that the CRB has set the sound recording rates many multiples higher than the PRO rates on the explicit premises that (1) the two licenses are not comparable and (2) the sound recording performance right is inherently much more valuable than the musical composition right, Congress should not repeal the Section 114(i) prohibition at the music publishers' behest.

The Copyright Act expressly provides that: "License fees payable for the public performance of sound recordings . . . shall not be taken into account in any . . . proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works." 17 U.S.C. § 114(i).

Nevertheless, major publishers have recently become fixated on the higher rates that record companies – often their corporate affiliates – are receiving for sound recording rights under Section 114 when compared to the rates for public performance rights obtained through ASCAP and BMI.

As described in the recent Pandora ASCAP rate decision, publishers like Sony simply could not ignore the gap:

> We were struck by the vast disparity between what record companies received from digital music services for the sound recording rights that they conveyed and what was paid for the performance right.

See In re Pandora Media, Inc., No. 12-8035, 2014 WL 1088101, at *14 (S.D.N.Y. Mar. 18, 2014). Setting aside whether "closing the gap" between the musical composition and sound recording rates is actually needed, the ASCAP rate court described the force behind this fixation as the "publishers' envy at the rate their sound recording brethren had extracted . . . ." *Id.* at 120.

[14] The CRB should adopt a standard order similar to the TTAB's, but with appropriate changes.

It was the publishers and songwriters themselves, however, who lobbied *to get* the Section 114(i) restriction against using sound recording rates as evidence in rate court proceedings. They did this because they believed that sound recording rates would be set lower than the existing musical composition rates and, if used as benchmarks, would lead to a lowering of the PRO rates. *See id.* at *12 n. 30 ("Publishers lobbied for this provision in Congress because they were concerned that the sound recording rates would be set below the public performance rates for compositions and drag down the latter. ASCAP also supported the enactment of the provision, for the same reason.").

In the very first Section 114 rate proceeding, for the services now called the "Pre-existing Subscription Services," the Copyright Arbitration Royalty Panel ("CARP") (and the Register and Librarian of Congress on appeal) did use the aggregate PRO royalty rate as the primary benchmark to set the rate for the new sound recording performance right. *See Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final Rule and Order) ("PSS-I"),* 63 Fed. Reg. 25394, 25405, 25409-10 (May 8, 2008). *See also Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Docket No. 200-9 CARP DTRA 1&2, 67 Fed. Reg. 45240, 45247 (July 8, 2002) (in appeal of later webcasting proceeding, the Register and Librarian noted that that had used the PRO rate as the benchmark to set the original rate for Pre-existing Subscription Services). Indeed, as anticipated by the music publishers when they requested the Section 114(i) restriction, the Register and Librarian set the sound recording performance rate *lower than* the equivalent musical composition performance rate. Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25394-01, 25409-10 (May 8, 1998)("*PSS-I*") ("Nevertheless, the Register did take into account the negotiated value of the digital performance right in the DCR license in making her determination that the statutory rate should be less than the value of the performance rights of the musical compositions. This determination followed from a review of the evidence on the relative value of the sound recording component and the musical works component of a phonorecord, which failed to support the record industry's assertion that the marketplace valued the sound recording component more than the musical works component.").

When it came time for a CARP to determine the first sound recording rates for webcasters, however, the CARP (and later the CRB) were persuaded by the record companies' arguments that the markets for sound recording and musical composition rights were drastically different, and the value of the sound recording performance right was a significant multiple higher than the value of the musical composition performance right.

When evaluating which agreements to consider as benchmarks in *Webcasting I*, the CARP agreed with the RIAA that the market for the performance of musical works is distinct from the market for the performance of sound recordings, adding that "[m]usical works and sound recordings do not compete in the same market, and they have different cost and demand characteristics." *In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9 (CARP) (DTRA), Report of the Copyright Arbitration Royalty Panel, at 41 (February 20, 2002)

During *Webcasting II*, the newly-appointed Copyright Royalty Judges also rejected using rates for musical works as benchmarks for digital performance rights in sound recordings on multiple grounds. First, the CRB found that "the sellers are different and they are selling different rights." *In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral Recordings*, 72 Fed. Reg. 24084, 24094 (May 1, 2007). Second, the CRB found that, for record companies, "not only are there some initial sunk investments, but there is a requirement of repeated substantial outlays year after year" based on "evidence of a substantially greater investment of this type in sound recordings as compared to musical works." *Id.* Lastly, the CRB rejected the premise that "the market for sound recordings and the market for musical works are necessarily equivalent." *Id.* at 24095.

Similarly, in the *SDARS I* proceeding, the CRB reiterated the point that "the musical works benchmark analysis is based on a marketplace in which, while the buyers may be the same as in the SDARS marketplace, the sellers are different and they are selling different rights." *In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services,* 73 Fed. Reg. 4080, 4089 (January 24, 2008). The CRB again found that "substantial empirical evidence shows that sound recording rights are paid multiple times the amounts paid for musical works rights in most digital markets." *Id.* Based on such findings, the CRB concluded that

> the marketplace evidence from other digital markets submitted by SoundExchange casts substantial doubt on the reasonableness of using the proferred [*sic*] musical works rates as a benchmark for the sound recording rates to be determined in this proceeding, except as an indicator that a reasonable rate for sound recordings could *not* be as low as the musical works rate.

Id. at 4090 (emphasis in original).

In *SDARS I,* SoundExchange argued in its Proposed Findings of Fact that

> [i]t is a different right, operating in a different market. The evidence shows that in every context, there is no pattern or relationship between the rates obtained by sound recording copyright holders and the rates obtained by musical works copyright holders — except for one: the rates obtained by sound recording copyright holders are invariably higher.

In re Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, Docket No. 2006-1 (CRB) (DSTRA), Proposed Findings of Fact of SoundExchange, Inc. at ¶ 28. SoundExchange then explained that the difference is justified

> because the sound recording is simply more valuable to the consumer, and therefore to the service, than is the musical work. It also because, as the record amply reflects with virtually unrebutted evidence, the production of sound recordings demands far greater investment, costs and risk than does the production musical works.

Id. While broadcasters disagree with this reasoning of these CARPs and judges, and, indeed, have argued otherwise, there can be no dispute that the current sound recording digital performance rates are vastly higher than the analogous musical composition rates specifically based upon the premises that (1) the two rights are not comparable and (2) the sound recording rights are inherently worth much more than the musical composition rights.

The CARP, Register, and Librarian all got it right the first time, in the first Section 114 proceeding, when they found that the aggregate PRO rate was a usable benchmark for the Section 114 rate, and that the sound recording performance rate should be set below the PRO rate.

However, subsequently after the first Section 114 proceeding, the CARP and the CRB, at the urging of the record companies and on fallacious grounds, improperly set the sound recording performance rates much higher than the musical composition performance rates for the very same services. Now that the sound recording rates have been set artificially high on these grounds, the music publishers want to back out of their own bargain and seek to eliminate the very evidentiary restriction they created. This is inequitable for at least two reasons. First, having argued for the restriction when they thought it would work in their favor, they should not be allowed so many years later to eliminate the restriction because they now believe it works against them. Second, and more important, the only reason that the sound recording rates for webcasters are currently so high is because the CRB (1) rejected the PRO rates as a comparable and (2) accepted the argument that the sound recording license is inherently more valuable than the PRO rates. Allowing publishers to now use those artificially high sound recording rates as comparables to drive up the musical composition rates would be manifestly unfair. Indeed, webcasters typically pay approximately 50% or more of their revenue for the sound recording right. Giving music publishers rates equal (or even close) to those currently received by the record companies would lead to the absurd result of a total royalty burden equal to or in excess of 100 percent of revenue.

V. “PLATFORM PARITY”

“Platform parity” is a loaded term, and is not helpful in objectively framing the issues relating to statutory rate-setting standards. Moreover, it is a vague term, which is used by its proponents to mean different things in different contexts. To the extent it is used to imply that all music licensees should pay the same rates, this implication is clearly wrong. To the extent the term is used to argue that all statutory license rates should be set pursuant to the fictional “willing buyer – willing seller” standard created for webcasters, that argument is also wrong. Finally, to the extent that “platform parity” is used to urge a performance tax on broadcasters, Congress should not reverse course after many decades of refusing to disrupt the mutually beneficial relationship between record companies and broadcasters.

A. One Single, Uniform Rate Should Not Be Imposed on All Digital Music Services

One sense of the term “platform parity” carries the implication that music performances have one, inherent value and that all types of music services should pay the same (or similar) rates. This premise is fundamentally flawed, and is inconsistent with basic economic principles, which assume that there may be segmented markets and price differentiation among different buyers and sellers in truly competitive free markets. This is particularly true where, as with the market for music performance licenses, marginal costs approach zero.

This platform parity argument also ignores the fundamental fact that different types of music services have very different cost structures. Webcasters, for example, have much lower operating costs than broadcasters. In a functioning, competitive market, one would expect to find different rates to accommodate the differing cost structures of different types of market participants.

Fundamentally, prices signal how capital and labor should be allocated and, in the copyright context, provide incentives for the creation of new works. Because "platform parity" price necessarily must be an average of different equilibrium prices, any such parity price will be too low for some services and too high for others. A "platform parity" price too high for a number of the services will result in little or no demand for these services and no revenue to incent additional innovation. Both sides of the equation lose; consumers are deprived of services that might enjoy and artists are deprived of additional exposure and revenue. Likewise, a "platform parity" price would also be too low for some services and result in foregone revenues that could have incentivized additional creative content.

B. <u>If One Rate-Setting Standard Should Be Used for All Statutory License, It Should Be the More Flexible, Policy-Based Standard of Section 801(b)</u> (Subject 12)

The NOI's framing of this issue is problematic to the extent it describes the various statutory licensees as "delivery platforms." This is another inaccurate and loaded term, which has the effect of minimizing the significant contributions that many licensees make to their services. Broadcasters are not mere technical conduits for the "delivery" of music; rather, they provide original programming for free to the public. One component of that programming is the performance of music. The inaccurate conflation of performance and distribution when analyzing the statutory licenses and services that use them is a fundamental error. Even with respect to music programming, broadcasters expend significant creative effort in selecting and sequencing the music that is broadcast, and also create various content surrounding the music, such as radio personality interaction with listeners, which serves to engage listeners and enhance the promotional value of airplay for the record companies.

Not only does the term "delivery platforms" haphazardly merge distributors and broadcasters, it ignores a finer yet significant point: broadcast radio is distinct from webcasting and satellite services. Neither webcasting nor satellite services share radio's history or reach. Broadcast radio has been in existence for nearly a century and engages a weekly audience of 242 million people. 2013 NAB Annual Report, *supra*, at 18.

That said, the "willing buyer – willing seller" standard selectively applied to certain digital music services, particularly as that standard has been interpreted by the CRB, has proven to be unworkable and has led to the imposition of cripplingly high rates bearing no relationship to hypothetical fair market rates. Fair market rates are typically defined as rates to which a willing buyer and seller would agree in an effectively competitive market where both buyers and sellers have adequate information, and a real ability to say no. Obviously, the market for blanket performance licenses for large catalogs of music can never fit this definition. Each major record company or music publisher individually and inherently has extraordinary market power in any such licensing negotiation.

The market failure inherent in the blanket licensing of musical copyrights leads to the problem of benchmarks. To the extent that a potential marketplace direct license benchmark exists, it is almost certain to contain supracompetitive rates and terms. Although such potential benchmarks may be simplistically labeled as “willing buyer – willing seller” benchmarks because a particular buyer did, in fact, enter into the license, such a license does not necessarily (or typically) reflect a competitive fair market value. Buyers typically have no choice other than to either accept the terms offered or exit the business. Such buyers cannot truly be considered a “willing buyer.”

The ASCAP and BMI rate courts have implemented a fair market, willing buyer-willing seller standard in a way that corrects for these inherent benchmarking problems by engaging in a rigorous evaluation of whether proposed benchmarks were the product of excessive market power. If such market power is found, the courts adjust for that problem, if possible, or reject the benchmark if adjustment is not possible. Because the ASCAP and BMI rate courts are the product of antitrust actions against the PROs and are presided over by federal judges experienced in antitrust law, the PRO rate courts have been very effective in analyzing these issues and making determinations of fair market value for musical composition performance licenses.

By contrast, the CRB has, thus far, been far less inclined to perform any substantial analysis of market power effects or anticompetitive conduct. This has led to its use of benchmarks that were clearly the result of the record companies’ exercise of market power to extract supracompetitive rates, such as the interactive webcasting benchmark. The use of such benchmarks has, in turn, led to webcasting rates set so high that no webcaster has been profitable, and many have exited the market. With respect to broadcasters, the excessive rates set using the willing buyer – willing seller standard have inhibited many broadcasters from simulcasting their broadcasts. Other broadcasters only simulcast portions of their broadcast day not containing recorded music.

The Section 801(b) policy-based rate standard, currently applicable to the record companies for their mechanical licenses and to pre-existing subscription and satellite services, is a fairer and superior standard. It has been in use longer than the willing buyer – willing seller standard. It also has the benefit of being policy driven and flexible. These attributes are particularly desirable in a market that has never had competition, willing buyers or willing sellers. Instead, the Section 801(b) standard looks to the policies that the statutory license is meant to serve, such as the opening of new markets for the enjoyment of music, and the factors that typically drive fair market value negotiations, including a fair return to copyright owners and a fair profit for licensed services.

There are ways in which the Section 801(b) standard may be improved and clarified, based upon the manner in which that standard has been interpreted by the CRB in prior cases. As noted above, the CRB has not tended to scrutinize potential benchmarks for the influence of excessive market power. The standard should provide guidance that, to the extent marketplace benchmarks are used, only comparable benchmarks resulting from arms-length negotiations, without the influence of excessive market power may be considered. The standard should also clarify that the Judges may not assume (as they have sometimes done), without specific supporting evidence, that a particular benchmark rate already incorporates or furthers the specific Section 801(b) policy factors merely by virtue of being part of a marketplace agreement.

Finally, the CRB has consistently failed to consider the promotional value of the licensed services when setting rates pursuant to Section 801(b) on the grounds that such promotional effect was not sufficiently or precisely quantified. This is inconsistent with Section 801(b), which requires consideration of the services' promotional impact. While it may be difficult to precisely quantify promotional impact in a way that may be converted easily into a specific adjustment to a benchmark or proposed rate, promotional value must be included in selecting a rate from within a given range of reasonable rates, and the standard should be clarified to require that it be included.

C. Sound Recordings Should Not Be Given a New Performance Right (Subject 13)

The limited scope of the digital performance fee, which is the product of a deliberate and well-considered decision by Congress, has not had any adverse effect on music licensing. For almost a century, the music recording and broadcasting industries have mutually benefited from the relationship between the two industries. This reciprocal dynamic has served both industries well in that record labels and performing artists profit from the free exposure and promotion provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services, so that broadcasters may play and promote the music to the public for free. Indeed, the U.S. is the most significant exporter of music and the largest territory for recorded music sales.

When it created a limited digital sound recording performance fee for new services that diverged so dramatically from the nature of traditional radio, Congress accounted for the differences between digital audio transmission services and local radio. *See* S. Rep. No. 104-128, at 15 (1995); H. Rep. No. 104-274, at 13 (1995). Congress rejected the notion that local radio broadcasters pose a threat to sales. S. Rep. No. 104-128, at 15 ("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.") (emphasis added); H. Rep. No. 104-274, at 13. And from the very first rate proceeding, any arguments that the value of the sound recording digital performance fee should be impacted by Congress's decision that broadcasters should remain exempt from any performance tax have been rejected. *See In re: Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings, Report of the Copyright Arbitration Royalty Panel*, Docket No. 96-5 CARP DSTRA, p. 46, ¶ 154 (Nov. 12, 1997).

Rather than decrease the revenues of record companies and artists, broadcasters increase those revenues by providing significant free promotional value from local radio airplay, interviews with artists and concert promotions and merchandise. A 2008 study demonstrates that the promotional benefit provided to the recording industry from free radio airplay ranges from $1.5 to $2.4 billion annually. *See supra*, *Radio Airplay And The Record Industry: An Economic Analysis*, at 13. When it specifically decided to exclude broadcasters from the new performance tax created by the DPRSRA, Congress did so because it understood that the current system works. Indeed, as noted above, Congress specifically found that local broadcasters promote sales of music to the financial benefit of the record labels, and that this longstanding, mutually beneficial relationship should not be disturbed. *See* Senate Report 104-128, at 15.

The record companies themselves acknowledge the financial benefit they receive from radio airplay. Indeed, the record companies spend millions of dollars annually on trying to persuade radio stations to play their recordings so that they can increase the promotional benefit from that airplay.

When the record companies attempted to revisit this issue in the 111th Congress, the "Local Radio Freedom Act," introduced by Reps. Mike Conaway (TX-11) and Gene Green (TX-29), indicated strong congressional opposition to any performance tax on local radio. The bill has been continually re-introduced, in the 112th and 113th Congress, and currently has 219 bipartisan co-sponsors in the House of Representatives.

Not only do the record companies benefit from radio, but so does the public. Unlike any other music licensee, radio and television broadcasters provide over $10 billion annually in various public services, news, localized content, etc., unrelated to music, as discussed above in detail in Section III.B.

In justification for their attempts to up-end almost one hundred years of the mutually beneficial relationship recognized by Congress, the record companies have argued that the United States should conform its law to that of various foreign countries that have imposed a sound recording public performance "tariff" or "levy." They further claim that Congress's studied refusal to impost a similar tax in the United States results in the loss of approximately $70 million[15] per year in foreign performance royalties, which are collected for foreign broadcasts of American sound recordings but not paid to copyright owners because American broadcasters do not pay a reciprocal performance tariff to foreign sound recording owners. Neither of these arguments justifies the imposition of a performance tax in the United States.

First, under the longstanding, mutually beneficial arrangement whereby broadcasters publicly perform sound recordings without payment in exchange for tremendous promotional value to the record companies, the United States recording industry has developed into the strongest, most prolific recording industry in the world. The recording industry in the United States is twice the size of that of next-largest Japan, and larger than most major European countries combined. The absence of any performance fee from broadcasters clearly has not impeded the growth or supremacy of the United States recording industry, nor has the existence of such a tariff in foreign countries led to additional industry growth in those countries. Second, many of the countries that impose a tariff on broadcasters provide less overall protection for sound recordings, under "neighboring rights" regimes, than is available under United States copyright law, including but not limited to the term of protection.

Third, in many of these countries, the broadcasters paying the highest fees to record companies are, or have been, government-owned or subsidized. Thus, the performance tariffs in those countries are essentially government subsidies to the local record companies. Government subsidized broadcasting in many countries is used to control content by promoting cultural, political, and other agendas.

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[15] The estimated (but never substantiated) $70 million dollars in foreign performance tariffs essentially constitute a rounding error to the major record companies, which in 2013 generated $7 billion according to the RIAA.

Finally, the sound recording performance rights recognized in other countries applies to all business that use recordings, including bars, restaurants, sporting arenas, and others, not merely broadcasters.

The existing system of mutual benefit, which has been in place for almost one hundred years and has led to the development of world leading broadcast and recording industries, adequately compensates copyright owners. Broadcasters already pay hundreds of millions of dollars every year to composers and publishers through fees paid to ASCAP, BMI and SESAC, and tens of millions more to sound recording copyright owners to simulcast their broadcasts. Layering an additional payment requirement onto the system that already provides tremendous value to record companies would unfairly tax broadcasters and benefit copyright owners, who already gain billions of dollars in free promotion from radio airplay.

Broadcasters look forward to maintaining and developing the mutually beneficial relationship that embraces the fundamental nature of broadcasting, as well as new opportunities arising from evolving digital technologies. That future, however, cannot happen if the limited sound recording performance right is expanded to include the activities of broadcasters.

VI. **ECONOMIC STUDIES** (Subject 23)

Dr. James N. Dertouzos, *Radio Airplay and the Record Industry: An Economic Analysis*, June 2008, https://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf.

Woods & Poole Economics, *Local Broadcasting: An Engine for Economic Growth* (2014) http://www.nab.org/documents/newsRoom/pdfs/Local_Broadcasting_Engine_for_Growth_Publication.pdf.

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