Before the
U.S. COPYRIGHT OFFICE
Library of Congress
Washington, DC

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

COMMENTS OF THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

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Comments of the National Religious Broadcasters Music License Committee

The National Religious Broadcasters Music License Committee ("NRBMLC" or the "Committee") offers these comments as its initial response to the Copyright Office's March 17, 2014 Notice of Inquiry on music licensing issues. 79 Fed. Reg. 14,739 (Mar. 17, 2014) (the "NOI"). The NRBMLC appreciates the opportunity to comment in this important inquiry.

Introduction and Summary

The NRBMLC offers the following thoughts:

- Any analysis of music licensing issues must be conducted in light of the public interest purpose of copyright law, with an eye towards maximizing the benefit to the public;

- The market for music performance rights is not competitive, is adversely affected by competition-destroying collectives and major publishers that abuse their extensive market power, and, as a result, must effectively be regulated;

- Music publishers successfully sought a firewall insulating music performance rights fees from consideration of sound recording performance rights fees and successfully urged (through their affiliated record companies) that sound recording rights are worth multiples of music rights, and should not now be heard to seek removal of that firewall;

- The law should be amended and streamlined to eliminate double-dip rights claims by making clear that server copies used only to make licensed or exempt public performances are exempt from copyright liability and that streamed performances do not require a reproduction or distribution license;

- There is no justification for the creation of a sound recording performance right applicable to over-the-air radio broadcasts; and

- It is essential to fix the sound recording performance right by, among other things, (i) changing the applicable statutory license fee standard to one that recognizes the public interest and forecloses adoption of supracompetitive fees, (ii) exempting radio station transmissions within their local service area, (iii) harmonizing the statutory license conditions with longstanding radio broadcasting practices, (iv) streamlining burdensome notice and recordkeeping obligations, and (v) reforming the rate-setting process.

The NRBMLC elaborates on these points below.

The NRBMLC is a standing committee of the National Religious Broadcasters. The NRBMLC represents approximately 900 full-power commercial and noncommercial AM and FM radio stations in their musical work and sound recording licensing dealings.[1]

The NRBMLC originally was formed in 1985 to provide a more focused effort on behalf of religious-formatted stations that performed relatively little copyrighted music, but that performed enough music that they could not effectively use the per-program licenses from ASCAP and BMI that were negotiated by the Radio Music License Committee (RMLC). Later, classical music and other similarly situated stations joined. ASCAP's and BMI's resistance to a meaningful per-program alternative to their preferred blanket licenses forced the Committee into litigation in the ASCAP Rate Court, which ultimately resulted in a more useful license. *United States v. ASCAP (Application of Salem Media)*, 981 F. Supp. 199 (S.D.N.Y. 1997). Since that time, the Committee has continued to seek reasonable licenses from ASCAP, BMI, and SESAC in its negotiations.

The Committee also represents its stations in connection with the sound recording performance right for performances over the Internet. The NRBMLC participated as a party in the first webcasting proceeding before the Copyright Arbitration Royalty Panel. *See* Library of Congress, Copyright Office, *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 67 Fed. Reg. 45,240, 45,241 (July 8, 2002) ("*Webcasting I*"). It also participated in the second webcasting proceeding, which was the first held before the Copyright Royalty Board. *See* Copyright Royalty Board, *Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Final Rule and Order, 72 Fed. Reg. 24,084 (May 1, 2007) ("*Webcasting II*"). The Committee also participated in the legislative debates leading to the Copyright Royalty and Distribution Reform Act of 2004, which created the CRB.

The Committee has participated in significant music and sound recording licensing cases before the Courts. In addition to the *Salem Media* case, the Committee has been a party in appeals of webcasting rate proceedings. *See*, *e.g.*, *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939 (D.C. Cir. 2005) (appeal of *Webcasting I* decisions). The Committee also filed amicus briefs in *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2nd Cir. 2012) (supporting pro-competitive adjustable rate blanket licenses), and Amicus brief, *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, No. 12-928 (U.S. Feb. 25, 2013) (brief in support of cert. petition, supporting challenge to appointment of the Copyright Royalty Judges and arguing that the Librarian of Congress is an officer of the Legislative Branch).

[1] The noncommercial arm of the Committee is commenting separately on issues that relate specifically to non-commercial radio stations.

In sum, the NRBMLC has a direct interest in the issues raised by the NOI. Those issues will have significant ramifications for the public and for NRBMLC-represented radio broadcasters.

I. Background: The Public Interest Purpose of Copyright

It is essential for the Copyright Office to conduct its review of copyright law in light of the public interest purpose assigned to copyright law by the Constitution. The courts have made clear that copyright law does not exist to benefit authors and publishers. It exists to benefit the public. Moreover, the Supreme Court has emphasized that dissemination of copyrighted works is as important as creation to fulfilling the constitutional goal. The interest of the public and the interest of fostering dissemination must be paramount in any report and recommendation made by the Register.

Article I, section 8, clause 8 of the Constitution grants Congress the power "[t]o promote the <u>Progress of Science</u> and useful Arts, by securing for limited Times <u>to Authors</u> and Inventors the exclusive Right to <u>their respective Writings</u> and Discoveries." *Id.* (emphasis added). Thus, the power to enact copyright laws exists for a specific purpose – "to promote the Progress of Science."

The Supreme Court consistently has emphasized that the ultimate goal of copyright is to serve the public interest, not the author's private interest: "<u>The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.</u>" *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)(emphasis added); *accord Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) ("[T]he monopoly privileges that Congress has authorized ... must ultimately serve the public good."). "The copyright law, like the patent statutes, makes reward to the owner a secondary consideration." *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *accord*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (observing that "[t]he primary objective of copyright is not to reward the labor of authors").

Copyright rights are granted to authors to induce them to create and to disseminate their creations. *See*, *e.g.*, *Paramount Pictures*, 334 U.S. at 158 ("[R]eward to the author or artist serves to induce release to the public of the products of his creative genius."); *Fogerty*, 510 U.S. at 526 (copyright is "intended to motivate the creative activity of authors"). "But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975). Moreover, "[e]vidence from the founding . . . suggests that inducing <u>dissemination</u> – as opposed to creation – was viewed as an appropriate means to promote science." *Golan v. Holder*, 132 S. Ct. 873, 888 (2012) (emphasis in original).

Copyright rights are not absolute property rights but statutory creations subject to important limitations that further the constitutional goal. *E.g.*, 17 U.S.C. §§ 102(b), 107-122. "The limited scope of the copyright holder's statutory monopoly ... reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature." *Aiken*, 422 U.S. at 156.

From the beginning, the Supreme Court consistently has held that copyright is not grounded in any theory of the author's natural right. It is solely a creature of statute, and the scope of the right is strictly limited by the statutory grant. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 659-64, 667-68 (1834); *Sony Corp.*, 464 U.S. at 429 n.10 (observing that copyright law "is not based upon any natural right" of the author and describing the balance between the public benefit from "stimulat[ing] the producer" and the public detriment from "the evils of the temporary monopoly" (quoting H.R. Rep. No. 2222 (1909)). The Courts of Appeals have agreed, observing that "copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990)); *accord*, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1262-63 (11th Cir. 2001) ("The copyright is not a natural right inherent in authorship."). In other words, claims by copyright owners that "we created it, so it is ours" are inconsistent with law and the Constitution and should not be given weight.

Further, the goal of copyright law is not to maximize the revenues of copyright owners or the return to authors. Rather, the goal is to provide an appropriate level of incentive to induce the creation and dissemination of an amount of creative work that maximizes the overall welfare of society, taking into account other uses to which productive resources could be put. It can be simply demonstrated that "maximizing" the level of copyrighted works is not in the best interest of society. Taken to its logical conclusion, if all of society's productive resources were devoted to creating copyrighted works, the public would find itself outside, cold, and starving while the music played and the singers sang.

The law should also recognize the fact that once a copyrighted work is created, maximizing consumption of the work maximizes society's welfare. Unlike tangible property, where consumption by one limits consumption by others, uses of copyrighted works do not deprive others of the ability to enjoy the work.[2]

Regrettably, the NOI appears to give limited attention to these fundamental purposes of copyright law. It nowhere asks whether the existing rights are properly defined and limited or if they serve the public interest. Thus, for example, in addressing overlapping claims of public performance and distribution rights, the NOI asks whether "the licensing process" could "be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner." NOI Question 4. It does not ask the real question from the standpoint of the public interest – are such overlapping claims reasonable in the first place, or should the relevant rights be more clearly delineated, as the Copyright Office's DMCA Section 104 Report recommended? Copyright Office DMCA Section 104 Report at 142-48 (Aug. 2001). Nor does the NOI address the section 112 ephemeral recording exemption or ask whether it should be expanded, as the Section 104 Report also recommended.

[2] In economic terms, consumption is non-rivalrous.

Elsewhere, the NOI appears to take positions right out of the music publishers' and recording industry's playbooks, at times even appearing to contradict or mischaracterize prior Copyright Office positions. The NOI positions are often not in the public interest. Thus, for example, the NOI (at 14,740) suggests that streaming creates "digital phonorecord deliveries" ("DPDs") that are subject to the section 115 mechanical license. In fact, the Copyright Office refused to so hold. Library of Congress, Copyright Office, Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries (Docket No. RM 2000–7), Interim rule, 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) (the "Section 115 Interim Rule"). Moreover, the Register had previously opined that "[t]emporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142.

Similarly, the NOI notes that the ASCAP and BMI consent decrees "were last amended well before the proliferation of digital music" (a publisher talking point) but does not mention the numerous cases decided long after "the proliferation of digital music" that have found the need to stop the PROs from abusing their collective market power. See Part II.A., below. The NOI also astonishingly asserts that "a person wishing to digitally perform a pre-1972 sound recording cannot rely on the Section 112 and 114 statutory licenses and must instead obtain a license directly from the owner of the sound recording copyright." NOI at 14,741 n.12. In fact, as the Copyright Office itself recently acknowledged, "[i]n general, state law does not appear to recognize a performance right in sound recordings." Library of Congress, Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, at 44-45 (Dec. 2011). In other words, the person "wishing to digitally perform a pre-1972 sound recording, in all likelihood need not "obtain a license." Additional examples are provided in the body of these comments.

II. Music Performance Rights: The ASCAP and BMI Consent Decrees Remain Critical, and SESAC Also Should Be Subject to Regulation. [NOI Questions 5, 6, and 7]

Questions 5, 6, and 7 of the NOI ask about the necessity and effectiveness of the current process for licensing the public performance of music generally, and about the ASCAP and BMI consent decrees specifically. Unfortunately, the text of the NOI recites the rhetoric of the music publishing industry, noting that the ASCAP and BMI decrees "were last amended well before the proliferation of digital music" and asking if the consent decrees are still justified. *See* NOI 14,741 & Question 7 ("Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments."). Curiously, the NOI fails to describe the recent findings of the ASCAP and BMI Rate Court judges, who have extensive experience with the PROs' behavior, and who have consistently rejected over-reaching fee claims by the PROs. Nor does it expressly ask the obvious question – should SESAC, like ASCAP and BMI, be subject to regulation.

The NRBMLC submits that the clear answer to these questions is that the ASCAP and BMI decrees remain essential to foster competitive market pricing for music performance rights. Moreover, SESAC exercises substantial market power as a licensing collective and should be subject to regulation comparable to that to which ASCAP and BMI are subject.

The NRBMLC understands that the Radio Music License Committee ("RMLC") and the Television Music License Committee ("TMLC"), which represent mainstream radio and television broadcasters, are submitting comments that demonstrate the necessity of the existing consent decrees and the need to regulate SESAC. The NRBMLC will not burden the record by repeating their comments, but agrees with their key points. The NRBMLC writes separately to describe its experiences and provide additional insights.

A. The Market for Music Performance Rights Is Not Competitive.

Copyright law principles and market structure coalesce to eliminate any truly competitive marketplace for music performance rights. These combined factors give the PROs enormous market power insulated from competitive forces.

First, ASCAP, BMI and SESAC aggregate extremely large numbers of musical works, owned by a large number of copyright owners who would, in a competitive market, compete for market share. Second, the large music publishers have been allowed to merge to the point that the publishing industry is now highly concentrated. Three major publishers now control the vast majority of musical works.

Third, copyright law allows rights to be licensed separately. Thus, when programs or commercials that are intended for public performance are produced, the producers obtain only reproduction and distribution rights and need not obtain public performance rights. Indeed, the PROs typically will not grant public performance rights to program producers because they do not actually perform the programs they produce. Thus, it falls to the entity making the performance to clear the performance right.

Unfortunately, however, once a program or ad is produced, or "in the can," the entity making the performance is unable to engender competition among possible suppliers of the performance right. The performing entity must take the program as is and cannot alter it. This gives the licensor of the performance right the ability to exercise "hold up" power – the licensor can seek to charge up to the full value of the entire program or ad, unconstrained by the actual value contributed to that program or ad by the licensor's music.

Fourth, the PROs typically only offer licenses to their entire repertory. Thus, they effectively eliminate any competition that may exist among their members, among the PROs, between the PROs and their members, or, for that matter, between the use of music and other programming matter. The NRBMLC's own experience, discussed in Part II.B, below, demonstrates the consistent resistance of the PROs to any license in which the price of the license varies meaningfully with the amount of licensed music that is used or with that varies with the amount of music that is licensed through competing sources other than the PRO.

Fifth, these problems are compounded by the near-impossibility of identifying the potential licensors of any particular performance right. Although the PROs offer on-line searches of their databases, they do not provide a reliable or effective means of identifying the content of each PRO's repertory. As the Magistrate Judge considering a preliminary injunction against SESAC found, SESAC's online search tool "does not provide a reliable means for determining what is SESAC's repertory." Report and Recommendation at 15, *Radio Music License Committee v. SESAC Inc.*, No. 12-cv-5087 (E.D. Pa. Dec. 23, 2013). The court noted that the tool "expressly disclaims that it is accurate, advises stations that it could change on a daily basis, and limits the user to 100 searches per session." *Id.* at 15 n.13. ASCAP's search tool contains a similar disclaimer, stating that "ASCAP makes no representations as to its [search tool's] accuracy. ASCAP specifically disclaims any liability for any loss or risk which may be incurred as a consequence, directly or indirectly, of the use or application of any information provided in the Database, or for any omission in the Database." All of the search tools limit searches to one work at a time, making searches for numerous works impractical.

As a result, it is effectively necessary for an entity engaging in substantial numbers of public performances, such as a radio broadcaster or a service making streamed performances, to obtain licenses from all three PROs. The major publishers, of course, understand the anticompetitive effects of the same behavior. Even where they seek to license their catalogs directly, they strategically withhold information about their content. *See In re Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), 2014 WL 1088101 at *35, *36, *38 (S.D.N.Y. 2014) (describing significance of publisher refusals to provide Pandora with usable lists of their catalogs).

The judges that oversee the PROs' conduct have continued to recognize the PROs' market power and to curb their abuses, long after "the proliferation of digital music," which the NOI implied, without explanation, cast doubt upon the continued validity of the ASCAP and BMI consent decrees. NOI at 14,741. In 2005, the United States Court of Appeals for the Second Circuit, which oversees the Rate Courts that oversee the consent decrees, recognized that the "rate-setting courts must take seriously the fact that they exist as a result of monopolists exercising disproportionate power over the market for music rights." *United States v. BMI (Application of Music Choice)*, 426 F.3d 91, 96 (2d Cir. 2005). As recently as 2012, that same court stated that "ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music." *ASCAP v. MobiTV, Inc.*, 681 F.3d 76, 82 (2d Cir. 2012); *United States v. ASCAP (Application Real Networks, Inc. & Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010).

Courts examining SESAC's market power also have concluded that SESAC functions as a monopolist and that there is evidence that SESAC has acted unlawfully. *See*, *e.g.*, *Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177(PAE), 2014 WL 812795 at *36 (S.D.N.Y. 2014) ("In sum, there is sufficient evidence upon which a jury could find that SESAC took action to maintain and fortify its monopoly over licensing of its affiliates' work, by adopting licensing practices that eliminated all realistic competition with its blanket license."); *Radio Music License Committee v. SESAC Inc.*, Report and Recommendation, 31-33 (finding that Plaintiffs had made a prima facie case of a violation of Sherman Act sections 1 and 2, and noting that "SESAC has 100% of the market power over the unique collection of works in their repertory and there are no 'real' alternatives to SESAC's blanket license").

The only protection that users have against ASCAP's and BMI's monopoly power is the protection provided by the consent decrees. Those should be retained and, as discussed below, strengthened.

B. The PROs Continue To Resist Any License that Offers the Prospect of Competition.

The NRBMLC was created in response to the resistance of ASCAP and BMI to any license with a price that varied based on the amount of the PRO's music that a user performed.

Although the ASCAP and BMI consent decrees required those PROs to offer "per program" licenses that provided a "genuine choice," ASCAP and BMI priced those licenses for the radio industry so that they were economically meaningful only for news and talk radio stations that made virtually no feature performances of music.[3] ASCAP and BMI contended that they had negotiated these licenses with the RMLC and that the NRBMLC stations were "similarly situated" in the words of the consent decrees, so the PRO was obligated to offer only its standard licenses to all radio stations, regardless of the stations' music use.

The prevailing ASCAP and BMI per program licenses were priced so that any radio station that made even a single feature performance of the PRO's music in 30% or more of its weighted programming time paid would be required to pay essentially the same fee that it would pay under the blanket license, as if it were a 24/7 rock or country music station. The stations represented by the NRBMLC, many of which used copyrighted music in 30% to 50% of their weighted programming time, did not believe this was fair. The PROs were well aware that their pricing system destroyed most of the incentive to seek alternative sources of music or music licenses, or to create competition between the PROs.

The PROs' intransigence forced the NRBMLC to seek relief in the ASCAP Rate Court in 1996. Although the Court found that ASCAP was not required to offer a more usable per program license, it found that the NRBMLC stations were not "similarly situated" to those represented by the RMLC and it ordered ASCAP to reduce the "base" fee under its per program license for incidental uses of music. *Application of Salem Media*, 981 F. Supp. 199. As a result of the court's decision, and contemporaneous legislative efforts to require ASCAP and BMI to offer more reasonable per program licenses, the NRBMLC was able to negotiate a new set of licenses that allowed stations that featured music in less than 55% of their weighted programming time to reduce their license fees substantially below what they would have paid if they were an all-music station.

ASCAP and BMI have continued to resist competitive alternatives to their blanket licenses, and the Rate Courts have continued to provide an essential check on the PRO's anticompetitive preferences. For example, when DMX sought a blanket license that included fee reductions for competitive licenses that it obtained directly from publishers, both ASCAP and BMI resisted, arguing that they had no obligation to grant such licenses. The Rate Courts disagreed, and the Second Circuit affirmed.[4] *Broadcast Music, Inc. v. DMX, Inc.*, 683 F.3d 32 (2nd Cir. 2012). Absent the consent decrees and the Rate Courts, ASCAP and BMI would be able to pursue their anticompetitive ambitions unchecked.

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[3] A "feature performance" is a performance that is the focus of the audience's attention, and does not include background music, advertising jingles, program themes, interstitial music between program segments, or ambient music at public events.

[4] The NRBMLC filed an amicus brief in support of the more competitive adjustable fee licenses.

C. SESAC's Licensing Practices Provide an Example of what Music Licensing Would Be Without the Consent Decrees.

The SESAC experience provides an example of what the world would look like without the ASCAP and BMI consent decrees – a world of unconstrained price increases unrelated to the value of the music that is performed and insistence on blanket licensing that eliminates any incentive for competition. SESAC functions as a seller with which all radio stations must deal. It thus exercises true monopoly power.

This power is not constrained by any regulatory oversight or neutral fee-setting process and is exacerbated by SESAC's consistent refusal to offer any license other than a blanket license. SESAC does not offer any license that varies with the amount of SESAC music that is used, so there is no incentive to develop alternative sources of music rights.

SESAC's market power is demonstrated by the history of SESAC's license fee increases. During the period from 1999 to 2003, SESAC more than doubled its license fees unilaterally. SESAC then again increased its fees from 2004 to 2008. The changes made by SESAC during that period had the effect of again approximately re-doubling SESAC's fees. SESAC again increased its fee schedules by roughly 50% between 2008 and 2013.[5]

SESAC has consistently failed to demonstrate any justification for these large increases. In a study performed in 2004, the NRBMLC showed that SESAC represented only about 2.1% of titles chosen from playlists of NRBMLC stations, and more than half of the titles licensed by SESAC were also licensed by ASCAP and BMI, so they did not require a SESAC license.[6] Nevertheless, at the time, mixed format stations (with some music and some talk programming) operated by the largest group represented by the NRBMLC were paying SESAC more than 15% of the sum of their payments to ASCAP and BMI, which licensed many, many times more of the music those stations played than SESAC. Those ratios had not changed dramatically as of 2011. In a 2011 study of Contemporary Christian Music (also known as 'CCM'), the most popular genre of religious music, the Committee discovered that SESAC licensed only 1.15% of the music played by certain NRBMLC stations that was not also licensed by ASCAP and BMI. Despite SESAC's minuscule share of music, a large NRBMLC Group – Salem Communications, paid SESAC more than 1/3 of the fees it paid to each of ASCAP or BMI in 2013.

To be fair to SESAC, it has agreed to significant reductions to the price of its blanket license for NRBMLC stations that use both the ASCAP and BMI per program licenses. That is a good first step and suggests some sensitivity to fundamental fairness. Unfortunately, in light of SESAC's general fee increases, NRBMLC licensees still are required to pay far more than is justified by the size of the SESAC repertory. Moreover, SESAC still does not offer its own per

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[5] Because SESAC fee schedules establish fees based on market size and the station's spot advertising rate, increases in a station's spot rate over time would lead to further increases in SESAC fees.

[6] It is not uncommon for a song written by multiple writers to be licensed by multiple PROs. Such works are referred to as "split" works and performances of such works are licensed as long as they are authorized by one copyright owner.

program license or any other license with a fee that varies according to the amount of SESAC music that is used. Thus, there remains no competitive form of license for SESAC music.

D. While Direct Licensing Remains an Important Check on PRO Abuses, it Cannot Replace the Consent Decrees Due to the Lack of Competition Among Major Publishers. [NOI Question 14]

NOI question 14 asks about direct performance licensing by music publishers. As the Rate Courts found in the DMX cases, direct licensing, particularly by smaller independent publishers, provides an important check on the PROs' market power and offers some competition. Unfortunately, however, the major publishers have been allowed to merge under the cover of the ASCAP and BMI consent decrees to the point that the industry is highly concentrated. Moreover, due to this consolidation in the industry, the major publishers offer catalogs that every user must license, so they are no longer substitutes. Thus, the major publishers do not compete with each other. Rather, as the ASCAP Rate Court found in the recent Pandora case, the major publishers exercise extraordinary non-competitive market power and are willing to abuse that market power to extract supra-competitive license fees. In other words, direct licensing is an important alternative to the PRO blanket licenses under the consent decrees that helps to protect music users against supra-competitive fees; direct licensing is not a substitute for the consent decrees.

In the recent Pandora case, the ASCAP Rate Court found in no uncertain terms that "Sony and UMPG each exercised their considerable market power to extract supra-competitive prices" in their negotiations with Pandora. *Pandora Media*, 2014 WL 1088101 at *35. The court found that the negotiations were conducted in a manner that left Pandora with no alternative: "it could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *Id*. According to the court, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." *Id.* at *35-36.

As further evidence of the flaws in a direct-license only regime, when the major publishers tried to withdraw their digital rights from ASCAP and BMI and license them directly, they found it virtually impossible to administer their own rights. Instead, they reverted to ASCAP and BMI to administer the withdrawn rights for the vast majority of users. *See id.* at *17-18. This showed the withdrawal for what it was: an effort by the major publishers to exercise enormous market power free from the constraints of the consent decrees. They should not be allowed to do so.

E. The Proposed Change to the Section 114(i) "Firewall" Is Inappropriate and Should Be Rejected. [NOI Question 6]

Question 6 asks specifically about the impact on rate setting under the ASCAP and BMI consent decrees of section 114(i), which prohibits the courts from taking into account the license fees payable for sound recordings under section 106(6). The NOI refers to this preclusion as "significant," NOI at 14,741 n.7, but fails to describe the reason this provision is in the law or to provide any evidence supporting its significance.

In fact, the provision was sought by the music publishing industry, which was concerned that (i) that the new sound recording public performance rights fees would be seen by the rate court judges as reducing the pool of money available to pay publishers, and (ii) the sound recording fees might be less than existing musical works fees, thus leading to a reduction of musical works fees. Now that the publishing industry has seen how much the recording industry has been awarded by the Copyright Royalty Board, it is questioning its prior judgment.

As discussed below, the current royalty fees paid for the sound recording performance right are supra-competitive rates that have consistently been set at absurdly high levels. The existence of absurdly high sound recording fees provide no justification for increasing musical works rates that were set under a fair process to estimate competitive market prices.

The publishers' new-found concern about the disparity between musical work and sound recording rates is particularly ironic because the disparity exists only because of positions taken within the music industry. From the beginning, services subject to the new sound recording performance right argued that sound recording rights fees should be roughly equivalent to the fees set by the ASCAP and BMI Rate Courts for musical work rights. *See Webcasting I*, 67 Fed. Reg. at 45,242; *Webcasting II*, 72 Fed. Reg. at 24,092. The recording industry opposed this position vigorously, arguing that record companies invested more resources at higher risk than music publishers and should reap performance rights fees that were many times musical works rights fees. *See Webcasting I,* Proposed Findings of Fact and Conclusions of Law of the Recording Indus. Ass'n of Am., Inc., at 270-309 (Dec. 21, 2001); *Webcasting II*, 72 Fed. Reg. at 24,094. Virtually all of the record companies making these arguments had publisher affiliates, who are now the very entities objecting to the result upon which their own affiliates had insisted.

The publishers' objections to the existing rate disparity has led some in Congress to introduce a bill misleadingly named the "Songwriter Equity Act," H.R. 4079, 113th Cong. (2d Sess. 2014). That bill would eliminate the preclusion set forth in section 114(i), allowing publishers to argue that their fees should be related in some way to sound recording rights fees. The bill, however, would do so in a one-sided manner, expressing the "intent of Congress" that sound recording rights "not [] diminish[ing] in any respect" the fees payable for musical works. H.R. 4079, § 2. The bill would go further, by prohibiting the Copyright Royalty Board, when setting sound recording rights fees, to construe the enactment of the bill as a Congressional recognition that the level of musical works fees should be taken into account in setting sound recording fees. *Id.* § 3.

In other words, the publishers want it both ways – they want the higher sound recording fees to be relevant in setting their fees, but only in a positive way. They also want to protect their affiliate record companies and ensure that sound recording fees are not dragged down by much lower musical works fees. That makes no sense. If musical works fees and sound recording rights fees are to be related to each other, the relationship logically must flow both ways. Moreover, if sound recording rights fees are relevant in setting musical works fees, Congress should not pre-determine that the direction of relevance is to increase the fees.

The NRBMLC submits that the rate setting process of the ASCAP and BMI Rate Courts has led to license fees that are far closer to the competitive market goal than the sound recording fees set in the past by the Copyright Royalty Board. If there is a relationship between sound recording fees and musical works fees, and the NRBMLC believes that there properly should be, the law should be amended to ensure that the CRB takes musical works fees into account than to take the opposite approach sought by the publishing industry.

III. The Law Relating to Incidental Recordings Used in Making Permitted Public Performances Should Be Modernized and Rationalized. [Related to NOI Questions 4, 8, and 24]

The law relevant to reproductions that are used solely to effectuate permitted digital public performances is an incoherent mess. A longstanding exemption that should allow reproductions to be made when they are used solely to effectuate permitted public performances is outmoded and riddled with limitations and holes that create substantial risk. Moreover, music licensors claim that public performances implicate the reproduction and distribution rights solely due to technical artifacts of the technology used to make the performance.

When a service makes a licensed public performance, the economic value of the performance is fully reflected in the license fee that is paid <u>for the performance</u>. ASCAP and BMI licenses are supervised to ensure that the licensors receive that value and, as discussed above, SESAC receives far more than the value of its music. Sound recording licensors also receive far more than the economic value of the performances of their works. *See* Part V.A., below. It makes no economic sense for a service making such performances to have to pay even more for reproductions that occur simply as an artifact of the transmission technology that is used. Any such additional payment will create a disincentive for distribution that will necessarily result in fewer transmissions being made, to the detriment of the public.

The Copyright Office recognized this reality when it wrote its 2001 Report to Congress in response to section 104 of the Digital Millennium Copyright Act. The Office stated in clear and certain terms that "Temporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142. As the Office recognized: "[t]he 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." *Id*. at 143. The Office similarly recognized that "ephemeral recordings are made for the sole purpose of carrying out a transmission. If they are used strictly in accordance with the restrictions set forth in section 112, they have no economic value independent of the public performance that they enable." *Id*. at 144.

The same may be said for copies incidental to or used only to carry out public performances that Congress has decided, in its judgment, to exempt from the performance right. In those cases, Congress made a determination that the performance does not justify payment of a license fee. It makes no sense to undermine Congress' intent by imposing restraints on reproductions that have no purpose other than to facilitate the performance that Congress decided should be free of copyright liability.[7]

The law should be revised to eliminate the complexities that now exist. Server copies used for public performances should be permitted without the need for a license. Public performances should not require a mechanical license. To the extent that these issues are not covered in questions raised in the NOI, they should be. *See* NOI Question 24.

A. Ephemeral Recordings Made Solely To Facilitate Licensed or Exempt Public Performances Should Be Fully Exempt from Copyright Liability and Archaic Conditions on the Relevant Exemption Should Be Removed.

Source copies that are used for no purpose other than to make a licensed or exempt performance have, traditionally, been exempt from copyright liability under a provision called the "ephemeral recording" exemption. It is contained in section 112(a) of the Copyright Act and applies both to sound recordings and the musical works contained in the sound recordings. Unfortunately, the exemption is subject to limitations that do not reflect modern realities.[8] Thus, radio broadcasters are at risk for claims of copyright infringement regardless of whether they engage in simulcast streaming or simply over the air broadcasting. Both the recording industry and music publishing industry have used claims of violations of the terms of the exemption and statutory license in litigation and legislative efforts to obtain inappropriate leverage. *See*, *e.g.*, *Atlantic Recording Corp. v. XM Satellite Radio*, Complaint Count IV (S.D.N.Y. May 16, 2006) (asserting willful infringement based on ephemeral recordings used for licensed performances as leverage for complaint against receiver with recording function)**;** RIAA Demand Letter to Webcasters, June 1998 (asserting liability for reproductions used for nonsubscription webcasting, leading in part to DMCA expansion of sound recording performance right).[9]

The existing exemption fails in a number of important respects:

- First, the section 112(a) exemption is limited to a single copy. Digital services often require multiple copies. Notably, the section 112(e) statutory license permits multiple copies of sound recordings (but does not apply to musical works).

- Second, the 112(a) exemption (and the 112(e) statutory license) prohibit the making of copies from the exempt copy. Many radio groups need to distribute copies they receive from the record companies to stations in the group. Record companies expect and want this sharing to occur so that their recordings receive airplay. Moreover, modern transmission technologies often require the making of

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[7] One possible exception is the sound recording performance exemption for transmissions by business establishment services contained in section 114(d)(1)(C)(iv), which was the result of a specific negotiation that included, as an element, the payment of a statutory license fee under section 112(e).

[8] The exemption was created during the 1976 revision of the Copyright Act and was crafted to reflect the technology of the time, namely, the use of program tapes by radio and television stations to facilitate their performances. *See* H.R. Rep. No. 94-1476, at 101 (1976) (noting that "the need for a limited exemption [for ephemeral recordings] because of the practical exigencies of broadcasting has been generally recognized.").

[9] Available at https://web.archive.org/web/19980703045450/http://www.mp3.com/news/058.html.

buffers or caches, which may or may not be cognizable "copies" under existing law.

- Third, section 112 limits the performances for which the exempt ephemeral recordings are used to performances made "within the local service area" of the transmitter. It has been argued that this limitation excludes Internet streaming. Notably, the section 112(e) statutory license removes this condition with respect to ephemeral phonorecords of sound recordings, but there arguably is no similar exemption or license for musical works.

- Fourth, both the exemption in section 112(a) and the statutory license in section 112(e) require the server copy to be destroyed within six months of the first performance. That condition makes no sense in a world of digital music servers and likely is being honored in the breach, creating a substantial risk of claims of copyright infringement.

- Fifth, section 112(a) applies to "transmission programs," a confusing term that may or may not apply to digital servers storing individual sound recordings. Again, that limitation makes no sense in today's world and is not part of section 112(e).

- Sixth, the preamble to section 112(a) does not explicitly include all exempt types of performances. There is no reason to limit its scope.

When the recording industry and the Digital Media Association (DiMA) negotiated the expansion of the sound recording performance right in 1998, they also created a statutory license for source/server copies of sound recordings used in licensed performances, in section 112(e). The Copyright Office opposed this statutory license in 1998 and restated its opposition and its belief that an exemption should be enacted in the DMCA Section 104 Report. In that report, the Copyright Office commented that the Section 112(e) ephemeral recording license "can best be viewed as an aberration." *See* DMCA Section 104 Report at 144 n.434. The Office went on to say that it did not "see any justification for the imposition of a royalty obligation under a statutory license to make copies that have no independent economic value and are made solely to enable another use that is permitted under a separate compulsory license. . . . Our views have not changed in the interim, and we would favor repeal of section 112(e) and the adoption of an appropriately-crafted ephemeral recording exemption." There is no reason that a service making a licensed (or exempt) performance should have to pay additional compensation for server copies that have no purpose other than to facilitate the performance. In other words, an exemption makes sense; a statutory license does not.

Moreover, even on its own terms, the section 112(e) statutory license fails in several respects:

- First, although the statutory license is broader than the exemption, it is still subject to some of the unreasonable limitations of the section 112(a) exemption, including the prohibition on copies from copies and the six month destruction requirement; and

- Second, Congress did not create a statutory license applicable to musical works or expand the exemption to cover server copies of musical works, leaving a gap that publishers have exploited.

Copies or phonorecords that are used solely to facilitate a licensed or exempt performance should not bear copyright liability. The copyright owner either is paid for the performance, or Congress has decided it should not be paid for the performance. Thus, the ephemeral recording exemption in section 112(a) should be broadened for both musical works and sound recordings, and the statutory license in section 112(e) should be eliminated.

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

B. Streamed Performances Do Not and Should Not Require a Reproduction or Distribution License. [NOI Questions 4, and 24]

The same principles that apply to ephemeral recordings should apply to buffers and caches that are incidental to the transmission process. When a service makes digital public performances over the Internet, it is required to pay the copyright owner of the musical composition and of the sound recording for the exploitation of their respective works under the public performance right. That compensation either meets or far exceeds (in the case of SESAC and the sound recording right) the economic value of the performance.

The Copyright Office recognized this reality when it wrote its 2001 Report to Congress in response to section 104 of the Digital Millennium Copyright Act. The Office stated in clear and certain terms that "Temporary copies incidental to a licensed digital performance should result in no liability." DMCA Section 104 Report at 142. As the Office recognized:

> [t]he 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. The uncertainty of the present law potentially allows those who administer the reproduction right in musical works to prevent webcasting from taking place – to the detriment of copyright owners, webcasters, and consumers alike – or to extract an additional payment that is not justified by the economic value of the copies at issue.

Id. at 143. The Section 104 Report was correct.[10]

[10] Indeed, the recommendation of the Section 104 Report in this regard did not go far enough. The same

Moreover, there is a strong argument under current law that buffers created as an artifact of a transmission technology used to make a performance are not cognizable reproductions within the meaning of the Copyright Act. *See*, *e.g.*, *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008) (buffers used to effectuate a performance are not fixed and do not implicate the reproduction right); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 550-51 (4th Cir. 2004) (RAM buffers used to effectuate a digital transmission are not fixed). To the extent that they may be considered copies under current law, Congress should clarify the law to make clear that buffers are not cognizable copies or are exempt from copyright liability; not to find a means to double charge for an activity whose economic value is in the performance.

Unfortunately, the NOI neglects the reasoning and finding of the Section 104 Report, and instead misleadingly asserts that "[t]he Copyright Office has thus interpreted the Section 115 [mechanical] license to cover . . . the server and other reproductions necessary to engage in streaming activities." NOI at 14,740. Actually, of course, the Office declined to find that a stream was, in fact, a DPD subject to the reproduction and distribution rights. 73 Fed. Reg. 66,173, 66,174 (Nov. 7, 2008) ("The Office is not currently prepared to issue a regulation that definitively addresses whether such copies are within the scope of the compulsory license. . . . As such, the interim regulation takes no position on whether . . . and when it is necessary to obtain a license to cover the reproduction or distribution of a musical work in order to engage in activities such as streaming."). Rather, the Office held only that, <u>if</u> a stream resulted in a DPD, the mechanical license would cover the server and other reproductions necessary to engage in the activity. *Id.*

The NRBMLC understands that the Office was considering adopting a rule that streaming results in DPDs in order to fill a hole in the law – there is no clear exemption or means to license the server copies used by streaming services to make their performances. The Copyright Office was constrained in 2008 by the terms of existing law. Unfortunately, the solution being considered by the Copyright Office, if adopted, would have destroyed the longstanding distinction in the law among distributions, reproductions, and public performances and would have created major inconsistencies in other contexts. For example, section 114 includes a statutory license for certain non-interactive digital sound recording performances. Section 112(e) includes a statutory license for server copies used to make those licensed performances. There is, however, no license for buffer or other downstream "phonorecords" that might be created in the course of the performance. In other words, if the Office had decided that streaming results in the distribution of copies of musical works, it would necessarily also result in the distribution of phonorecords of sound recordings, effectively converting Congress's two sound recording statutory licenses into an absolute right to license the downstream incidental phonorecords. That would have made no sense and would have destroyed the statutory license system Congress created.

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reasoning applies to performances that are exempt from liability under specific exemptions adopted by Congress. Where the primary economic activity at issue is a public performance, and Congress determined that there should be no liability for that performance, it makes no sense to undermine Congress' determination by requiring the user to obtain a license under one of the other rights that may be incidental to the technology used to make the performance.

Fortunately, the NOI seeks recommendations to improve the law and is not constrained by the limitations and ambiguities of the law as it now exists. There is a better way to fix the music server copy hole, which the Committee has discussed above. See Part III.A.

For the reasons set forth in the Section 104 Report, the Office was right when it refused to establish the principle that streaming implicates the reproduction and distribution rights. It should recommend that Congress clarify the law to ensure that reproductions that are incidental to a licensed or exempt public performance (and that serve no other purpose) do not create liability under the Copyright Act.

IV. There Is No Justification for a Sound Recording Performance Right for Terrestrial Radio. [Related to NOI Questions 13, 19]

The NOI reiterates the Copyright Office's misguided call for a sound recording public performance right applicable to over-the-air radio broadcasts. NOI at 14,741 n.14. Questions 13 (asking about differences in the applicability of the sound recording performance right) and 19 (asking about the division of performance revenues) arguably relate to this issue.

The NRBMLC strongly opposes the creation of a sound recording performance right applicable to over-the-air radio broadcasts and submits that there is no justification for the creation of such a right either in the relevant history or in economics. Rather, such a right would burden broadcasters, provide an unjustified windfall to record companies, and penalize broadcasters for their long history of dramatically enhancing the value of sound recordings. The NRBMLC joins with the National Association of Broadcasters in its opposition to the creation of such a right and writes separately to add certain additional observations.

It is beyond dispute that radio broadcasts have greatly contributed to the income of the recording industry and performing artists and to the value of sound recordings. They continue to do so. Artists and record companies regularly thank radio broadcasters for "breaking" their recordings – introducing them and promoting them to the record buying, concert attending, subscription paying public. The vast majority of sound recordings that exist today have the economic value that they have because of radio airplay.

In this regard, actions truly speak louder than words. The recording industry goes to great lengths and spends hundreds of millions of dollars annually to induce radio broadcasters to play their recordings. This is not a reference to unlawful "payola." Rather, record companies maintain large internal promotions departments and hire independent promoters whose primary goal is to obtain radio airplay. They also place advertisements promoting their recordings to radio program directors, provide promotional materials to stations to give to their listeners, sponsor artist visits to radio stations, and provide free copies of their recordings to broadcasters all with one goal – to convince radio broadcasters to play their records. If airplay did not pay, the record companies would not spend this money.

The one thing record companies cannot do is directly pay broadcasters for the enormous benefits the broadcasters confer. Thus, broadcasters are able to play sound recordings, but are not entitled to compensation for the enormous promotional benefits they confer. The one compensatory benefit they obtain for this value is the right to perform sound recordings without the obligation to pay a license fee. Congress long ago decided not to upset this mutually beneficial relationship by introducing a performance right. Rather, Congress established an economic DMZ – no direct compensation flows in either direction. It has repeatedly reaffirmed that decision in the face of unceasing pressure from the recording industry to create a performance right. Congress has repeatedly recognized the extensive value that radio broadcasts confer on artists and record companies. That decision was right when it was first made and it is right today.

Moreover, it would be wholly unreasonable (and lacking economic rationality) to create a one-sided performance right without also providing broadcasters with the unfettered right to charge for the promotional benefits they confer. It would also be wholly unreasonable and unfair to change the rules mid-stream, requiring broadcasters to compensate record companies for the economic value that the broadcasters greatly helped to create in the first place, again, without compensation.

The NRBMLC invites the Register to consider the following thought experiment. Imagine a world in which Congress did not change rules mid-stream with respect to existing recordings. Rather, Congress created a performance right only with respect to new recordings first created after January 1, 2015, that weren't derivatives of existing recordings. Imagine further that Congress made the ability to seek compensation run in both directions, repealing all payola laws and pre-empting state laws that interfere with broadcasters seeking compensation for airplay. Which way would the money flow? The NRBMLC submits that decades of history and current behavior demonstrate that the net flow of money would be to the broadcasters. That alone should indicate that the creation of a potentially hugely disruptive performance right is inappropriate.

Another example of the undisputed value of airplay can be found in the MusicFirst complaint to the Federal Communications Commission about certain broadcasters that elected not to perform recordings of artists who strongly objected to the lack of a performance right.[11] In essence, those artists were complaining that radio broadcasters were taking their property without compensation. If they really believed that, of course, the artists and MusicFirst should have been overjoyed when certain broadcasters decided that they would stop "taking their property." Were they? Of course not. They ran to the FCC complaining in essence, that the broadcasters had stopped taking their property. Why, because they recognize the value of airplay and wanted their recordings on radio.

Nor does an abstract concept of "platform parity" justify creation of a performance right. It is true that webcasters must pay the recording industry for the right to make public performances. But that is the result of a deal that their trade association made with the recording industry in 1998. The deal was a bad deal and there is no doubt that webcasters everywhere regret it, particularly given the enormously high license fee rates that have been set by the Copyright Royalty Board. But that is not a reason to subject others to the same bad deal. "Misery loves company" is not good policy. "Save me from my bad deal" is not good policy either.

[11] The public notice describing and seeking comments about the petition can be found at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1773A1.pdf

Indeed, the radio industry could have stopped enactment of the provisions of the DMCA that expanded the sound recording performance right to nonsubscription, non-broadcast digital transmissions in 1998. It did not do so based entirely on assurances from everyone involved, including the recording industry, that the legislation would not affect the longstanding relationship between record companies and radio broadcasters. The recording industry's memory of those assurances is, regrettably, short-lived.

Finally, the NRBMLC regrets the Copyright Office's invocation of North Korea, Iran and China in the NOI to justify a performance right. This straw man is empty rhetoric that undermines the Copyright Office's credibility. The NAB comments demonstrate the unique success enjoyed by the U.S. recording industry as a result of the mutually beneficial relationship Congress created. Those comments also demonstrate the many differences in economic organization and cultural policy that exist throughout the world. The Copyright Office can point to no country that can match the demonstrated success of the U.S. recording industry and U.S. private radio industry. The suggestion that everyone else somehow is "doing it right" is simplistic and misleading.

Ironically, the recording industry itself declared that international comparisons were unjustified in the context of the sound recording performance right. In the first webcasting proceeding before a Copyright Arbitration Royalty Panel ("CARP"), the services proffered evidence of the relationship between musical work and sound recording royalties in numerous countries around the world. RIAA successfully resisted the international comparisons, arguing that "any such comparisons are necessarily influenced by local market considerations and must be treated with great caution." *See* Proposed Findings of Fact and Conclusions of Law of the Recording Indus. Ass'n of Am., Inc., *In re Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Docket No. 2000-9 CARP DTRA 1 & 2, ¶ 611 (Dec. 21, 2001) ("RIAA's Proposed Findings"); Report of the Copyright Arbitration Royalty Panel, *In re Rate Setting for Digital Performance Right in Sound Recordings and Ephemeral* Recordings, Docket No. 2000-9 CARP DTRA 1 & 2, at 41-42 (Feb. 20, 2002) ("CARP Report") (accepting RIAA's argument). Among other things, RIAA quoted the Copyright Tribunal in the U.K. for the proposition that "the structure and functions of the sound broadcasting industry in each of the countries referred to are so different from those of the industry in the United Kingdom that no useful comparison can be made." RIAA Proposed Findings ¶ 611. The same certainly is true of the relationship between the recording and radio industries in the United States.

V. It Is Essential To Repair the Sound Recording Performance Statutory License. [NOI Questions 8, 9, and 12]

NOI Questions 8 and 9 ask about the need for and effectiveness of the section 114 statutory license and the rate-setting process established for that license. NOI Question 12 relates to the rate setting standards used under section 114.

The NRBMLC submits that the statutory license, or a judicial alternative, remains essential to counter the enormous market power and coordinated behavior of the recording industry. There are, however, aspects of the license and the fee-setting standard and procedure that need reform to correct years of supra-competitive license fees established by prior Copyright Royalty Judges.

A. The Applicable Fee Standard for Webcasting Should Be Changed To Foster Competitive Market Results.

The Copyright Act requires the Copyright Royalty Judges to establish license fees that a "willing buyer would pay a willing seller." Congress intended to use that standard as shorthand for rates that would prevail in an effectively competitive market where neither party exercised market power. Unfortunately, of course, there is no competitive market. That makes the task facing the Judges exquisitely difficult, if not impossible.

The difficulties are exacerbated because the recording industry operates collectively through an antitrust exemption that allows its members to coordinate their licensing strategy under the umbrella of the SoundExchange cartel. Even where they theoretically operate independently, the industry has been allowed to merge to the point that it is highly concentrated – 3 major labels control approximately 85% of sound recordings. The labels are aware that any deals they make will be used in CRB proceedings to set rates. They are also aware of SoundExchange's rate setting strategy and the licenses that SoundExchange intends to use as "benchmarks" in CRB proceedings. Under those circumstances, no rational seller would undercut the SoundExchange monopoly price.

As a result of the lack of a competitive market, past Copyright Royalty Judges have construed "willing buyer/willing seller" to mean that they should set license fees based on the fees that the cartel or the major labels have been able to extract in the marketplace. In short, the regulatory body has essentially created a presumption in favor of agreements reached in this non-competitive market despite strong evidence that the market is not competitive. This has led to grossly inflated rates since the beginning. The fee standard should be changed to make clear that such rates are not what Congress intended.

A brief review of the history of webcasting fees established under the "willing buyer/willing seller" standard demonstrates the flaws in the rate-setters' application of that standard. For example, in the first webcasting proceeding before the CARP, the recording industry (acting through its trade association, the Recording Industry Association of America ("RIAA")) asked the CARP to adopt rates that it had collectively negotiated with 26 mostly small webcasters with unique needs. The CARP recognized that RIAA had sought to rig the "willing buyer/willing seller" evidence. It found that "a clear and definitive pattern is apparent" and that "RIAA developed a strategy to negotiate deals for the purpose of establishing a high benchmark for later use as precedent, in the event a CARP proceeding were necessary." CARP Report at 48. As part of this strategy, the CARP found that the RIAA Negotiating Committee "reached a determination as to what it viewed as the 'sweet spot' for the section 114(f)(2) royalty . . . [and] then proceeded to close only those deals [with one exception] that would be in substantial conformity with that sweet spot." *Id.* "By engaging in this conduct, [the CARP found], RIAA created a virtually uniform precedent with rates above those that most buyers would be willing to pay." *Id.* at 50. Thus, the CARP rejected 25 of RIAA's 26 benchmark agreements.

Unfortunately, the CARP adopted as a benchmark the 26th agreement – an agreement negotiated by the same RIAA collective with a single larger webcaster, Yahoo!, which had its own unique interests. Most notably, Yahoo! wanted to avoid the cost of participating in the proceeding, which it testified it had expected to run to $2,000,000, and to establish a lower rate for radio station simulcasts, which were 90% of its webcasting business. After the final rates were set in the proceeding, Yahoo! demonstrated the real economics of its deal with RIAA, and the problems of relying on a single license agreement as a benchmark – Yahoo! dropped its primary radio simulcast business just two weeks after the final rates were set. Ironically, it had wound up paying roughly the same $2,000,000 it had saved under its agreement with RIAA. In other words, the so-called "willing buyer/willing seller" agreement relied upon by the CARP reflected nothing about the true economics of webcasting.

In 2005, the first rate proceeding before the newly established Copyright Royalty Board convened to set the 2006-2011 fees for sound recording performances by non-interactive webcasting (including radio simulcasts). The CRB essentially gave the recording industry exactly what it wanted, supra-competitive fees based on license agreements reached between the (then) four major record companies and five on-demand streaming services – the very kind of service that Congress had determined when it created the performance right in 1995 posed the greatest risk of disrupting the record companies' core business of record sales. *See* Digital Performance Rights in Sound Recordings, S. Rep. No. 104-128, at 13-15 (1995) (describing threat to record sales posed by interactive streaming).

The CRB based its decision on those agreements despite clear evidence that the major record companies did not compete in entering those licenses. Indeed, the testimony was undisputed that the on-demand services believed that they needed licenses from all four major labels to have a viable business. The Federal Trade Commission recently confirmed this fact when it approved Universal's acquisition of EMI (reducing the major labels to 3 with an 85% market share), and found, with respect to on-demand streaming services that: "considerable evidence that each leading interactive streaming service must carry the music of each Major to be competitive. Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI." Statement of Bureau of Competition Director Richard A. Feinstein In the Matter of Vivendi, S.A. and EMI Recorded Music (September 21, 2012). As might be expected, the fees set by the CRB again grossly exceeded those that would have been set in a competitive market.

In 2010, in a proceeding that ultimately involved only one small commercial webcaster, the CRB again relied on agreements between the major labels and interactive services, as well as a skewed sample of agreements selected by the recording industry collective and negotiated in "gun to the head" negotiations against the backdrop of the grossly excessive fees set in the 2005-2006 proceeding.

In short, the "willing buyer/willing seller" standard has not led to rates that would prevail in an effectively competitive market, as Congress intended. The standard, rather, has resulted in monopoly or supra-monopoly pricing based on inflated expectations of webcaster revenues.

These fees continue to suck the life blood out of services and to deprive consumers of a wide array of choice.

The NRBMLC joins in the NAB's call for adoption of the fee standard established in section 801(b) of the Copyright Act, a standard that recognizes the public interest purpose of copyright law and that has a long history of resulting in more reasonable license fee rates. The Committee also joins NAB's suggestions for certain adjustments to the section 801(b) standard to ensure that the standard is not morphed into the problematic "willing buyer/willing seller" standard.

B. Transmissions Within a Radio Station's Local Service Area Should Be Exempt from the Sound Recording Performance Right.

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

Further, the enormous promotional benefit provided by radio airplay to record companies and recording artists is beyond dispute. Congress has long recognized the value and importance of that promotion to record companies and performing artists. Internet transmissions to a radio station's local audience provide the same enormous promotional benefits to the record companies as the station's over-the-air broadcasts. As the 2002 CARP Panel concluded in the first webcasting proceeding, "[t]o the extent that internet simulcasting of over-the-air broadcasts reaches the same local audience with the same songs and the same DJ support, there is no record basis to conclude that the promotional impact is any less."[12] RIAA's own CARP witness agreed that "[p]er capita per listener minute, the promotional benefit to Sony of someone listening to a radio signal over-the-air and someone in the same geographical area listening to the same signal over their computer is going to be very similar."[13]

The Copyright Act recognizes that transmissions within a radio station's local service area are special, and specifically exempts from the sound recording performance right retransmissions of radio broadcasts that remain within a 150-mile radius of the transmitter. 17 U.S.C. § 114(d)(1)(B). This exemption is not available if the broadcast is "willfully or repeatedly retransmitted more than a radius of 150 miles" from the transmitter. *Id.* § 114(d)(1)(B)(i). The Register in the past has expressed the view that this exemption, which is clear on its face, does not apply to Internet retransmissions. Determination of Reasonable Rates & Terms for the Digital Performance of Sound Recordings & Ephemeral Recordings, 67 Fed. Reg. 45,240 (Jul. 8, 2002). Among other things, the Register erroneously assumed that more than one ephemeral copy was needed for the transmissions. Further, at the time the Register

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[12] CARP Report at 75.

[13] Transcript of CARP Proceedings at 12861-62 (McDermott).

expressed the view, it was not possible reliably to limit the location of Internet transmissions. It now is.

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

C. The Statutory License Conditions Should Be Harmonized with Longstanding Radio Broadcasting Practices.

Section 114(d)(2)(C) establishes the nine conditions that must be met for a service subject to the sound recording performance right to qualify for a statutory license. If the service does not qualify for the statutory license, it must negotiate separately with each sound recording copyright owner.

Three of these conditions are so inconsistent with longstanding broadcasting practices that the parties who negotiated the conditions in 1998 recognized that they could not be complied with. Indeed, when the RIAA and DiMA negotiated the expansion of the sound recording performance right literally on the eve of passage of the DMCA in 1998, they established exceptions from these requirements for <u>third-parties</u> that <u>retransmit</u> radio broadcasts. *See, e.g.,* § 114(d)(2)(C)(i), (ii) and (ix). Why? Because only two of DiMA's seven members actually engaged in webcasting, and the primary business of one of those, broadcast.com was retransmitting radio broadcasts over the Internet.[14] In other words, DiMA protected its member broadcast.com with the result that it would be impossible for any broadcaster to stream its own broadcasts. Any broadcaster that wanted its programming online would need to use a third party – and the only one at the time was broadcast.com. While that might be good business, it is lousy policy.

The ultimate result – once the license fee rates for radio retransmission were set in the first webcasting CARP – was that broadcast.com's successor, Yahoo! Broadcast, left the business because it did not believe the rates would allow an economically viable business. So in the end, the deal was both lousy business and lousy policy.

Unfortunately, DiMA's bad deal means that any broadcaster that wants to simulcast its broadcasts over the Internet risks copyright liability and the possibility of Draconian statutory damages of <u>up to $150,000 per infringed recording</u>. As a result, broadcasters have had to negotiate with record companies for waivers of these conditions, which has provided additional, unjustified leverage to the recording industry.

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[14] *See* Testimony of Seth Greenstein, Hearing on H.R. 2281, Before the Subcomm. on Telecomm., Trade and Consumer Protection, Comm. on Commerce (June 5, 1998) (describing DiMA's members), available at https://web.archive.org/web/19990208225451/http://digmedia.org/testimony.html

The specific conditions that are incompatible with longstanding broadcasting practices are:

- Condition (i), which prohibits the play of sound recordings that exceed the so-called "sound recording performance complement" during any 3-hour period, of 3 selections from any one album (no more than 2 consecutively), 4 selections by any one artist (no more than 3 consecutively), or 4 selections from a boxed set of albums (no more than 3 consecutively), 17 U.S.C. § 114(d)(2)(C)(i);

- Condition (ii), which calls into question the ability of a disc jockey to pre-announce the songs that will be played, *Id.*, § 114(d)(2)(C)(ii); and

- Condition (ix), which requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist, and the name of the source phonorecord as the recording is being performed, *Id.*, § 114(d)(2)(C)(ix) .

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

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

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

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

These, and the naming of songs to be played in the near future, are all common broadcasting practices. Ironically, record companies have often encouraged radio stations to make such announcements, as they help keep the listener tuned in and waiting to hear the latest song. Identifying songs should not trigger copyright liability.

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

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

Further, the great majority of recordings played by radio stations are received directly from the record companies, in the form of advance promotional singles and albums, or from third party services. Although these discs often include a phonorecord title, many do not. Moreover, radio stations often do not load that title into their music information databases, because it is not relevant to their primary over-the-air activity.

It makes no sense, and serves no one's interests, to require radio stations to alter their programming practices, which have served both them and the record industry well for decades. Nor is it fair or practical to require broadcasters to incur substantial costs to change the way they do business. There has never been a showing that these three conditions offer any benefit to anyone. They should be eliminated.

D. Burdensome Notice and Recordkeeping Obligations Should Be Streamlined.

The Copyright Act directs the Copyright Royalty Judges to "establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings" under the statutory license and "under which records of such use shall be kept." 17 U.S.C. § 114(f)(4)(A). Unfortunately, prior Copyright Royalty Judges have imposed reporting requirements that are unreasonable and inconsistent with longstanding practices in the recording and radio broadcasting industries. As a result, broadcasters that wish to provide their listeners with the opportunity to hear their broadcasts over the Internet are saddled with extremely burdensome requirements with which many cannot comply.

The CRJs have commenced a rulemaking to modify their notice and recordkeeping requirements in response to a petition by SoundExchange that would add to the existing, unreasonable burdens. The NRBMLC is hopeful that the current CRJs will recognize the burdens imposed by their existing regulations and will alleviate those burdens. The NRBMLC does not believe, however, that a review of the section 114 statutory license would be complete without consideration of the burdens imposed by the existing reporting requirements.

Existing regulations require services that stream under the statutory license (except those with a tiny audience) to report multiple data points with respect to each and every sound recording performance. Those data points include title, artist, album, and label (or ISRC in lieu of album and label), regardless of whether a service receives such data in the first instance (*e.g.*, from the record company providing the sound recording for play, from a music service, or from a third party syndicator that creates the program) and regardless of whether the service maintains such data in the ordinary course of its business.

Unfortunately, these regulations are still inconsistent with the way many broadcasters—particularly smaller stations—do business. Thus, stations face Hobson's choice of not streaming at all, or risking claims that they are violating applicable regulations.

Broadcasters have developed their internal systems to run their primary over-the-air business, not an ancillary Internet service that generates very few listeners. Many of the sound recordings played by radio stations are provided to those stations by the record companies themselves. Often, those sound recordings are provided by downloads of digital files and on special promotional disks, not the retail album sold to consumers. The information accompanying these promotional recordings varies, but often includes only the name of the title of the recording and the name of the artist. There is only one constant – <u>the music provided by the record labels to radio Broadcasters commonly does not contain all of the information required by the regulations</u>.

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

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

The type of census reporting required by the existing regulations is not necessary in order to permit reasonable accuracy in royalty payments. Indeed, ASCAP and BMI use limited sampling for their distribution—typically only one or two weeks per year per station. The PROs even shoulder most of the burden of gathering data themselves by listening to radio stations.

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

The NRBMLC is hopeful that the CRJs will alleviate these problems in their ongoing rulemaking and will not add to the existing burdens as requested by SoundExchange.

E. The Process Should Be Reformed To Provide Equal Access to Information and Eliminate the Ships Passing in the Night Character of CRB Proceedings.

The procedures applicable to CRB rate-setting proceedings were intended to be efficient and fair. The Committee has learned through hard experience that they are neither.

The existing procedures outlined in section 803(b)(6)(C) of the Copyright Act and implemented by regulation starkly limit discovery and create an artificial phased direct-then-rebuttal-case process. The split case process amplifies the importance of the direct cases, which are by their nature the first and fullest explication of a party's position. Rebuttal cases are presented much later, with limited time for development, and on an even more expedited schedule than the direct cases.

Unlike the widely accepted and effective procedures in federal court, a party is not allowed to conduct discovery prior to submission of its hugely important direct case. The result is a process that is stacked against licensee services, which do not have access to the wide range of record company agreements that have consistently been relied upon by the Judges. Thus, licensee parties are required to develop their cases largely in the dark, without access to potentially relevant agreements that might support their position. Licensor parties are able to cherry-pick favorable agreements and present them as representative. This results in a limited record that interferes with the Judges' ability to render fair decisions. As might be expected, the resulting fees have wildly favored licensors.[15]

Even where discovery is permitted, it is limited in scope and conducted under fire-drill conditions during a break-neck 60-day period. The result is greater expense and controversy than often found in civil litigation. Moreover, the split-case process requires two trials and two discovery periods, which makes it difficult for parties and their experts to join issue. The parties' cases often resemble ships passing in the night. The end result is a process that is inherently inefficient, unfair, and that imposes litigation costs that often exceed those of litigation under the Federal Rules of Civil Procedure.

The NRBMLC joins with the National Association of Broadcasters in calling for statutory reform of CRB rate-setting procedures. Among other things, the NRBMLC supports Federal Rules documentary and interrogatory discovery for an expanded time period in advance of the submission of written testimony and the ability to take depositions of all testifying witnesses. Adoption of these recommendations should eliminate the need for a two-phase trial, facilitate efficient cross examination, and eliminate the inherent information imbalances in the current system.

[15] This is not to imply that the Judges themselves are biased. The Judges' hands are tied, and they are statutorily bound to a procedure that is inherently biased.

The NRBMLC appreciates the Copyright Office's consideration of its comments and looks forward to working with the Copyright Office on these important issues.

Respectfully submitted,

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