



**Hearing on
“Music Licensing Under Title 17: Part Two”**

**United States House of Representatives
Committee on the Judiciary**

***Subcommittee on Courts, Intellectual
Property, and the Internet***

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On behalf of the National Association of Broadcasters

I. Introduction

Good afternoon, Chairman Coble, Ranking Member Nadler and members of the Subcommittee on Courts, Intellectual Property, and the Internet. Thank you for inviting me to testify today. My name is Charles Warfield, and I am currently the Joint Board Chair of the National Association of Broadcasters, and a Senior Advisor to YMF Media. I am testifying today on behalf of the more than 6,000 free, local, over-the-air radio members of the NAB.

My career in broadcast radio has spanned more than 36 years. Over that time, I served as President and COO of one of the first wholly minority-owned radio station groups, ran the day-to-day operations of some of America's top radio stations, and even spent several years as an executive on the record industry side of the business. Many of my radio stations directly served your constituents, and continue to do so today. These included WJLB-FM/WMXD-FM in Detroit, WEDR-FM in Miami, and WBLS-FM/WLIB and WRKS-FM in New York, which became "the most listened to radio station in America" under my watch.

I am uniquely situated to testify on the issues before this Committee today for two reasons. First, NAB is an Association comprising both creators and users of copyrighted works, so it has a distinct interest in advancing the cause of both sides in this debate. Second, I was personally involved on the recording industry side of the business, so I recognize the opportunity and challenges that industry faces as well.

II. The Overriding Objective of Copyright Is the Public Good

As you undertake your review of the music licensing laws, it is worth highlighting at the outset that the Supreme Court has repeatedly held that the core objective of copyright law is the public good.¹ Not the creator's interest. Not the user's interest. But the interest of the public at large.

¹ See, e.g., *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) ("The primary 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.*

While stakeholders on each side have manipulated the text of the Constitution and subsequent case law in attempts to justify their own arguments and agendas; Congress and the Court have always strived for a copyright regime that balances the rights of creators and users to maximize this public good. The aim of this Subcommittee's Copyright Review should be no different.

Unfortunately, two weeks ago, when this Subcommittee held its first of two hearings on music licensing, groups representing artists, music publishers and songwriters seemingly ignored this incontrovertible objective. Instead, each industry made its case for fixes to copyright law that served a very different goal – ensuring that their individual constituencies receive greater compensation for their work at the expense of music licensees and listeners. Nowhere in their arguments did they emphasize the need for “balance”, the interest of “consumers”, or the impact on “competition” – any of which would promote the public good.

Today, I am going to take a different approach, and will briefly explain why I believe that broadcast radio, and the current legal framework that enables it, unquestionably promotes the public good. While unfortunately, the laws governing webcasters fail this test.

III. The Legal Framework Governing Broadcast Radio Promotes the Public Good

For over ninety years, broadcast radio has impacted the lives of Americans in many beneficial and significant ways. Radio broadcasters inform, educate, and alert our listeners to important events, topics, and emergencies. We introduce them to new music. We entertain them with sports, talk, and interviews. We are local, involved in our communities and proud to serve the public interest.

There is much to criticize regarding the complexity of the laws governing the music industry. But viewed through the lens of the public good, there should be little question that the

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”).

specific laws governing the relationship between the music and broadcast industries have been a resounding success in three ways.

First, the current law has enabled a locally-focused, community-based broadcast industry that is completely free to listeners. This free service is unique among entertainment media, and doesn't require a subscription, a broadband connection, or an expensive wireless data connection for access. Instead, it is completely free to anyone with an AM/FM antenna. Combined with an architecture that ensures that broadcast radio is always on in times of emergency, even when other forms of communication fail, broadcast radio has played a critical role in communities across America for decades.

But make no mistake, maintaining this completely free model in an increasingly competitive and costly industry is a delicate balance. Like all other businesses, local radio stations represent brands created and maintained at great expense – from on-air talent and content-production costs to staffing and equipment. Radio broadcasters' ability to continue offering their product under a completely free model is directly premised on the existing legal framework and resulting cost-structure.

Second, the resulting popularity of broadcast radio – due to its cost (it's free!), community-focus, and of course the product, which often includes music – has contributed to a U.S. recording industry that dwarfs the rest of the world both in terms of size and scope. This output of diverse and high quality musical works and sound recordings unquestionably benefits the public and flows from the current legal regime.

The existing U.S. system of "free airplay for free promotion" has served both the broadcasting and recording industries well for decades. The U.S. is the most significant exporter of music and the largest creator for recorded music sales world-wide. Further, the mutually beneficial relationship between broadcasters and the music industry, enabled by the existing law, has incentivized a U.S. recording industry is larger than that of the U.K, Germany, France and Italy combined, all of which impose performance royalties on over-the-air sound recordings.

Both empirical² and anecdotal³ evidence suggest that the U.S. radio industry – the equivalent of which exists nowhere else in the world and which is directly attributable to the existing legal framework – contributes to this commercial success by providing significant benefits both to performing artists and recording companies. Indeed, listeners identify FM radio as the place they first heard the music they purchased. With an audience of 242 million listeners a week, the radio audience dwarfs the listenership of satellite radio and Internet music services.⁴ The fact is, the recording industry invests money promoting songs in order to get radio airplay, and earns revenues when radio airplay leads to the purchase of the music listeners hear. Contrasted with the varying legal regimes governing sound recordings in other countries, the U.S. system has unquestionably been a win for the U.S. recording industry, artists and the public.

Third, radio broadcasting has a profoundly positive impact on the economies and spirits of local communities. A recent study found that local radio generated a total of more than half a trillion dollars in GDP and over one million jobs in 2012 across the United States.⁵ In North Carolina and New York, local radio is responsible for generating close to 32,000 and 67,000 jobs in these states, respectively.⁶ But perhaps more importantly, the fundamental community-based nature of local broadcasting has driven extraordinary levels of public service that make our medium unique. The following are recent representative examples of local broadcasters serving their communities:

- When deadly tornadoes ripped through parts of Nebraska, Oklahoma, Arkansas, Alabama, and Mississippi 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;⁷

² Empirical analysis demonstrates that artists and record labels derive significant value from local radio airplay, ranging from \$1.5 to \$2.4 billion annually. Dertouzos, Radio Airplay and the Record Industry: An Economic Analysis 5 (https://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf).

³ See Attachment A.

⁴ 2013 NAB Annual Report at 13.

⁵ Woods & Poole Economics, Local Broadcasting: An Engine for Economic Growth 2 (http://www.nab.org/documents/newsRoom/pdfs/Local_Broadcasting_Engine_for_Growth_Publication.pdf).

⁶ *Id.* at 41, 40.

⁷ <http://www.nab.org/documents/newsRoom/PSI/052014LTS.html>

- Hundreds of radio stations across the country have helped raise more than \$385 million for the life-saving work of St. Jude, and the St. Jude family of partner stations continues to expand. *Radio Cares for St. Jude Kids* is one of the most successful radio fundraising events in America;⁸
- The North Carolina Association of Broadcasters, in a partnership with the USO North Carolina, hosted the Welcome Home Vietnam Veterans Celebration for more than 70,000 attendees including veterans, their families and community members;⁹
- In the wake of Hurricane Sandy, one of the hardest-hitting natural disasters to strike the northeast, WQHT/Hot 97's Hip Hop Has Heart Foundation was a life-line, responding to the overwhelming needs of the community. During the storm, Hot 97 broadcast steadily throughout the multiple power outages, providing for some the only connection to news and information. In the days following, Hot 97 ran continuous informational announcements providing critical information about disaster-relief locations and assistance;¹⁰
- Fifteen radio stations across Chicago are currently helping to spread a message of anti-violence with "Put the Guns Down," an initiative to promote safety through the local communities and help to lessen the senseless gun violence that has plagued Chicago. Mayor Emanuel explained why he is now using local radio stations in his fight, saying: "We do policing. We do prevention. We do penalties. We also need parenting. We're going to add a fifth "P" today... pop culture;"¹¹
- 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;¹²
- Every August, WSLQ-FM Roanoke, VA, hosts its annual *Pack the Bus* campaign distributing school supplies to children in more than 21 school systems;¹³
- WSNW-FM, Greensboro, NC and its listeners raised over \$200,000 to send more than 80 children intimately affected by illness to Victory Junction Gang Camp," a medically equipped place where children with chronic conditions get to just be kids;"¹⁴
- 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;¹⁵
- When wildfires hit San Diego in May, prompting at least 23,000 evacuations, local radio stations including KBZT, KIFM, KSON, and KFMB, jumped into action with around the clock evacuation updates, wildfire reports, school closings, and traffic information;¹⁶
- And next week, the Virginia Association of Broadcasters – with the support of more than 150 local radio and television stations – will begin a year-long campaign *Feeding Virginia*

⁸<http://www.radiocaresforstjude.org/programsites/v/index.jsp?vgnextoid=8431d8edea413210VgnVCM100001e0215acRCRD>

⁹ http://www.nab.org/documents/newsRoom/pdfs/032812_NCBA_Vietnam_release.pdf

¹⁰ <http://www.nabef.org/documents/newsroom/pressRelease.asp?id=2918>

¹¹ <http://chicagoradioandmedia.com/news/6539-chicago-radio-stations-asking-listeners-to-put-the-guns-down>

¹² <http://www.nab.org/xert/2014emails/publicservice/032014LTS.html>

¹³ <http://www.broadcastpublicservice.org/story.asp>

¹⁴ id.

¹⁵ <http://www.nab.org/xert/2014emails/publicservice/032014LTS.html>

¹⁶ <http://www.allaccess.com/net-news/archive/story/129665/radio-responds-to-san-diego-fires>

to support all seven regional food banks in Virginia through fundraising and donation drives.¹⁷

These are not isolated incidents of public service. Rather, these are only a handful of examples of what radio stations do across the country, every day, every week, every year, for their local communities.

IV. The Legal Framework Governing Webcasting Stifles It and Undermines the Public Good

I would like to echo the previous testimony of DiMA Executive Director Lee Knife which underscored the significant problems created by the current legal framework governing the webcasting space. The current webcasting compulsory license contained in section 114 of the Copyright Act has failed to achieve the balance between music licensor and licensee that is necessary to benefit the public interest. To the contrary, the current compulsory license and resulting webcasting rates work to prohibit effective competition in the webcasting space and limit consumer choice.

Under the current law, it has proven impossible to run a profitable, stand-alone, non-interactive webcasting business. The largest player in the space, a company with 70% of the non-interactive streaming audience is losing money with every listener – and that service is paying license fees at a rate that has a 45% discount compared to the fees that the Copyright Royalty Board (CRB) set as the so-called market rate that others must pay. If Pandora had to pay the rate set by the CRB, it would have closed its doors long ago. That is not truly a competitive market rate.

As a result, this space lacks effective competition to maximize consumer choice. Make no mistake – today, the only companies that can attempt to challenge this service are companies that are successful in other industries – whether it be broadcasting, Internet search,

¹⁷ <http://www.vabonline.com/news/vab-announces-campaign-against-hunger/>

or consumer electronics – and as a result can leverage that success to subsidize a long-term investment in streaming. But that leaves a limited pool of competitors in this space, and little opportunity for new entrants. Moreover, history shows that even those competitors eventually will tire of losing money and leave the field. It is not a recipe for long-term health.

For broadcasters in particular, the digital space offers an opportunity to expand the footprint of the public benefits highlighted above. But the current rate-setting standard and procedures used at the CRB have resulted in license fees that make webcasting cost prohibitive. Today, whether you are a large broadcaster or small broadcaster, or your station is based in Washington, DC or Charlotte or Casper, the revenue that can be generated from streaming simply does not, and cannot, offset the costs.¹⁸ This imbalance is impeding the growth of Internet radio among local radio broadcasters, which ultimately is not to the benefit of artists, songwriters, or most of all consumers.

Broadcasters favor abandoning the “willing buyer/willing seller” standard and transitioning to the fair value “801(b)(1)” standard for setting sound recording performance royalty rates. The 801(b)(1) standard (so named because it is found in that section of the Copyright Act) has effectively, efficiently, and equitably balanced the interests of copyright owners, copyright users, and the public for decades, in various contexts and proceedings.¹⁹ Further, changes in law that would promote increased transparency in copyright ownership, enhanced record-keeping requirements on the part of Performance Rights Organizations and other collectives, and reforms to the CRB process, would benefit webcasters and consumers,

¹⁸ This economic reality has engendered several innovative direct licensing deals between radio broadcasters and record labels that include revenue sharing agreements for both streaming and terrestrial airplay. See, e.g., Press Release: Big Machine and Cox Media Group Seal Direct Licensing Deal, June 12, 2014 (<http://www.coxmediagroup.com/news/cmj-press-releases/big-machine-and-cox-media-group-seal-direct-licens/ngJ9z/>). These agreements signify that efforts to impose a performance royalty on terrestrial broadcasters are better resolved through individualized marketplace agreements rather than a one-size-fits all legislative government mandate.

¹⁹ Instead of determining rates for the a statutory license through a hypothetical marketplace, 17 U.S.C. § 801(b)(1) sets forth four objectives to be considered: (A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return on his or her creative work and the copyright user a fair income under existing economic conditions; (C) To reflect the relative roles of the copyright owners and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communications; (D) To minimize any disruptive effect on the structure of the industries involved and on generally prevailing industry practices.”

and serve the public good.

V. Conclusion

Thank you for inviting me to testify before this Subcommittee today. I am confident that as this Subcommittee undertakes its review of music licensing, it will find that laws which promote a vibrant and competitive broadcast industry – now and in the future – benefit the public good.

I am pleased to answer any questions you may have.

Attachment A

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.²⁰
- “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,²¹
- Radio “still has massive reach in the local community” and “the top of the food chain” for making hits. - Island Def Jam’s Steve Bartels²²
- “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 RedOne²³

²⁰ <https://twitter.com/InsideRadio/status/462048988997648385?refsrc=email>

²¹ September 26, 2013, <http://www.radioink.com/Article.asp?id=2704233&spid=24698>

²² NAB Radio Show, September 18, 2013, <http://www.allaccess.com/net-news/archive/story/122418/the-2013-radio-show-kicks-off-in-orlando>

²³ 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>