



Future of Music Coalition

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Copyright Royalties: Where is the Right Spot On The Dial For Webcasting?

Testimony Submitted to the Senate Judiciary Committee

May 15, 2002

The Future of Music Coalition is a Washington, DC-based not-for-profit collaboration between members of the music, technology, public policy and intellectual property law communities. The FMC seeks to educate the media, policymakers, and the public about music / technology issues, while also bringing together diverse voices in an effort to come up with creative solutions to some of the challenges in this space. The FMC also aims to identify and promote innovative business models that will help musicians and citizens to benefit from new technologies.

The FMC is submitting testimony to the Senate Judiciary Committee regarding webcasting for three reasons. First, we believe that, as media channels continue to consolidate and program to meet bottom line expectations, webcasting is emerging as a vital new source for entertainment, music and news that can provide greater diversity and more choices for the public. Second, we believe that webcasting and other Internet technologies can increase the number of revenue streams for musicians by creating more opportunities for artists to promote and distribute their music. Finally, we contend that the existing music and radio industry structures underserve the majority of musicians and citizens, and these flawed structures cannot be allowed to replicate in a digital world. Therefore we urge members to consider the unique characteristics of webcasting and design policies and regulations that will allow this promising new medium to flourish.

In public comments recently submitted to the Copyright Office, the FMC has indicated its general support for the accomplishments of both the Copyright Office and the CARP. At a very basic level, it is critical to establish a respect for artistic creation and build models that fairly compensate musicians for the use of their works in commercial and non-commercial settings. We believe the royalty rate was appropriately determined and there is a strong opportunity to find common ground on reporting requirements. However, the FMC has urged the Copyright Office to consider the following five exceptions:

1. Establishment of alternative license structures for non-commercial, hobbyist and small commercial webcasters
2. Reasonable reporting requirements

3. Automation of reporting
4. Elimination of ephemeral copy logs
5. Elimination of the threat of perjury through reporting

The Value of Radio

The importance of webcasting is best viewed in the context of radio. Radio is a public resource that has been managed on the public's behalf by the Federal Communications Commission since 1934. According to the FCC there are currently over 13,000 radio stations in the United States; 11,000 commercial and 2000 non-commercial or public stations. In a country as large and culturally diverse as America, radio remains an important localized medium for the transmission of news and entertainment, and reaches over 95 percent of adults on a weekly basis.¹⁰

Radio is also important to the music industry. In the traditional music business model, radio is seen as the best – and possibly only – way to “break” a record. Except in some rare cases, breaking a record on commercial radio is prerequisite to the sale of the millions of copies that are needed for labels to recoup costs.

For musicians and songwriters themselves, radio is not only a vehicle for promotion, but serves as a viable revenue stream in and of itself. Songwriters and composers are eligible to receive performance royalties based on airplay, which are collected and distributed on their behalf by the performing rights organizations – ASCAP, BMI and SESAC. For the handful of songwriters that garner chart-topping airplay, these royalty payments can skyrocket to the hundreds of thousands of dollars.

In addition, commercial radio airplay imprints a sense of cultural and financial legitimacy on a band or artist. While this may be an imperfect measure of “success” or “good music”, it does mean that musicians who are played on the radio will not only have a better chance of selling more records, they will also have access to larger concert venues, bigger tours, and lucrative advertising and movie deals, all of which mean more revenue for the select group of artists, songwriters, labels and publishers that have access to commercial radio.

The Impact of Market Consolidation

Despite its importance to broadcasters, advertisers, musicians, labels and the listening public, there is mounting evidence to support the theory that the traditional commercial radio model is broken.

The consolidation of radio station ownership that has occurred since the 1996 Telecommunications Act has had a dramatic effect on the state of radio for musicians and the American public. While the definitive results are still under consideration, the anecdotal effects are:

¹⁰ “NAB Radio Facts Page,” National Association of Broadcasters, <http://www.nab.org/radio/radfacts.asp>

- less community-based programming,
- more advertising per broadcast hour,
- continued reliance on payola-like practices of questionable legality, and
- oligopolistic levels of control over the most popular programming formats.

While some of these may be good for the radio business, the FMC questions whether any of these developments benefit musicians and the public.¹¹

Commercial broadcasters would probably counter our criticisms by pointing to the industry's impressive revenue gains over the past ten years, which topped \$19.8 billion in 2000.¹² They might also highlight the positive benefits that the 1996 Telecommunications Act reaped for their industry, including the ability for radio groups to streamline their back-office operations, combine sales departments, and capture national ad accounts. They might even point to the financial benefits of voice-tracking systems, which create customized programming that is beamed to regional stations from a centralized location, thus eliminating the cost of paying the salaries of hundreds of local on-air DJs and production staff. These structural changes are smart business moves that create more profitable bottom lines for those radio station groups that are in the position to consolidate, but there are two other stakeholders that have a vested interest in the state of radio – musicians and the listening public. It is on behalf of these two groups that we stake our claim that alternatives to the current radio structure need to be embraced.

Despite its perceived success over the past six years, the radio industry itself may be pondering its own long-term survival. First, statistics indicate that the audience for commercial radio is shrinking. Total radio listening has dropped by 9 percent from 1993 to 1999. The greatest reduction has occurred in listeners aged 12-24 where the drop in listenership is greater than 12 percent.¹³ It's interesting to note that this is the same age group that turns to the Internet in the greatest numbers as a primary source of news, information and entertainment. According to a June 2000 study, nearly half of all teens and 39 percent of 18-24 year olds have listened to Internet radio. Rather than be satisfied with traditional radio, young Americans are turning to the Internet for different sources of music and news.¹⁴

There are other puzzling disconnects in radio when marketing decisions overrule public opinion. Take, for example, the incredible success of the Grammy-winning *O Brother Where Art Thou* soundtrack. Even after topping the sales charts with sales of 4.4 million copies, the tracks remain virtually unheard on country radio. In a *New York Times* article, Paul Allen of the Country Radio Broadcasters Association noted, "The recording academy recognizes the work of its artists and their music, from the standpoint of art, which is considerably different from what country radio is about. Country radio is purely about mass appeal music, and it has some very defined limits because there

¹¹ The FMC is currently conducting a multi-faceted research project on the effects of consolidation on these two stakeholders that will be completed in the next few months.

¹² Radio Advertising Bureau.

¹³ "Will your Audience be Right Back After These Messages?", Edison Media Research/Arbitron, June 1999.

¹⁴ Corporation for Public Broadcasting. CPB Scan, December 28, 2000, page 30. "Radio's Future – Today's 12-24 Year Olds", study conducted by Edison Media Research/Arbitron, June 2000.

are some very defined demographics that the owners are trying to find through that music. Where the Grammys are about art, country radio is about the Benjamins.”¹⁵

The Future of Music Coalition recognizes radio as a vital public resource for news and entertainment, but one that has been hijacked in recent years by corporate interests. We have supported efforts to create alternative radio structures such as Low Power FM stations, but the coalition of grassroots organizations that have supported LPFM have been only partially successful in their quest.

We are now standing at a crossroads regarding the future of webcasting. If rules and reporting requirements take the unique assets of webcasting into consideration, diversity and consumer choice can be strengthened. If the proposed policies place undue financial and staffing burdens on webcasters, we will surely lose this opportunity to support viable new sources for citizens to access a diversity of music and information, and for artists to benefit from new revenue streams.

The Value of Webcasting

In this increasingly consolidated and concentrated radio marketplace, webcasting represents an opportunity to break the bottleneck. While it's natural to think about Internet radio as merely a newer delivery mode of terrestrial radio, there are some distinctions between the two mediums that must be recognized as policymakers design rate and reporting requirements for webcasting. Webcasting has three unique assets that must be acknowledged and protected:

1. the opportunity for programming diversity;
2. the low barriers to entry and legitimate competition; and
3. the global reach of the Internet.

Limited Terrestrial Bandwidth Means Limited Programming Choices

Terrestrial radio is fundamentally constrained by limits on available spectrum. That means that there's a finite limit to the number of radio stations that can exist in a marketplace. Because of this scarcity, the radio spectrum has become increasingly valuable in the marketplace. Furthermore, since the passage of the 1996 Telecommunications Act, we've seen existing, locally owned stations purchased by corporate radio groups, with the average transaction value of \$14 million for an FM station in 2000.¹⁶ The forced scarcity of bandwidth combined with the proven value of radio to music labels and advertisers have created a situation where only those with vast capital resources can enter this market. Even more compelling is the fact that limited spectrum and high barriers to entry have decreased legitimate market competition, where multiple owners are able to compete fairly in the marketplace. Contrary to the stated goals of the Telecom Act, there is considerable evidence that deregulation allowed a small number of companies with deep pockets to purchase

¹⁵ Neil Strauss, "The Country Music Country Radio Ignores", *New York Times*, March 24, 2002.

multiple stations in various markets, effectively squeezing out competition while creating more leverage for themselves over advertisers, music labels and smaller competitors.

The Internet is Unlimited

Contrast this with the limitless “spectrum” of the web. The Internet, by design, allows for multiple streams to be broadcast simultaneously and globally. Unlimited streams means that there’s also unlimited opportunities for webcasters to offer just about any possible mix of music and information that can be heard simultaneously virtually anywhere in the world. Webcasters can not only specialize in underrepresented genres such as classical, New Orleans jazz, punk rock, or bluegrass, but for the first time they can legitimately make a business out of aggregating small numbers of fans of these niche genres all across the world. This possibility is strengthened by the relatively low barriers to entry for webcasting, where individuals can create and launch a webcasting station with just a handful of affordable resources; access to bandwidth, some computers, software, and a little bit of know-how. They don’t need signal towers, or satellite dishes, or even an office to start webcasting. In fact, many small webcasters are running their operations out of a home office, basement or garage. The limitless spectrum and low barriers to entry not only allow for programming diversity, it also means that there’s a better chance for legitimate market competition – a marketplace with a great number of competitors – to flourish on the web.

Webcasting creates a wealth of new choices for music lovers and information seekers that, until now, have had their choices restricted to what’s being broadcast in their local area. It is abundantly clear that webcasting can give those with access to the internet a rich and diverse set of listening opportunities that are basically nonexistent in the terrestrial world.

The Value of Webcasting for Musicians

While it’s clear that webcasting can benefit citizens by offering more listening choices, it’s also true that webcasting will benefit musicians and artists. The Internet has already created new ways for artists to promote and distribute their music, to connect directly with music fans, and build communities outside of the constraints of commercial business models. The FMC believes that webcasting can play a vital and growing role in this area, both as a new mode of promotion that encourages music sales and builds fan bases, and as a new source for public performance royalties.

Building Better Models: Developing Alternative Licensing Structures

As stated above, FMC believes that the outcome of the CARP is fundamentally sound. It does not, however, reflect the reality that many webcasters are not large corporations or broadcasters with the financial and staffing resources to handle the proposed rates or reporting requirements. It is

¹⁶ “State of the Radio Industry: Radio Transactions 2001: Where Did All the Deals Go?” BIA Financial Networks 2002, page 11.

important to recognize the distinctions between various webcasters and divide the community into four general classes:

1. Corporations
2. Small businesses
3. Non-commercial broadcasters
4. Hobbyist webcasters

The FMC hesitates to specifically define these classes in this document, but we generally recognize the differences. Corporations and small business webcasters have revenue streams that are generally commercial in nature. What distinguishes them from one another are qualities such as gross annual revenue, corporate backing, staff size, and audience size. Non-commercial webcasters could include federally-registered nonprofits like the majority of college and community stations, which are often run by a handful of volunteers and rely on public donations, grants, and outside funding as revenue sources. Hobbyists can be described as webcasters who stream for various non-commercial reasons, and may often be financing their operations out of their own pockets. Once again, we are not here to determine the class distinctions, but only to note that there are at least four general categories that are operating under unique circumstances. As a result, we believe the licensing and reporting requirements should be scaled accordingly to ensure that the greatest number of webcasters have the ability to operate.

The Incubator License for Small Commercial Webcasters

In particular, the FMC recommends at least two new grades of licenses. First, we would support the creation of a transitional or “incubator” license, under which small commercial webcasters would pay reasonable licensing fees and royalty rates and meet realistic reporting requirements for a specified period of time. This incubator license would recognize the start-up nature of many small commercial webcasters and would give them the time and financial latitude to build a revenue-generating business model. Note that this incubator license should be carefully crafted and only made available to independent webcasters that have no connections to larger corporate structures, thus avoiding the chance that larger webcasters will use the incubator license as an opportunity to circumvent their obligations. If the station is successful in building revenue and audience size in the time allotted, it will transition to the standard rates and reporting structures established by the Copyright Office and the CARP.

A Noncommercial/Nonprofit/Hobbyist License

One of the potential unintended consequences of the CARP decision and Copyright Office proceeding regarding rates and reporting requirements is the economic burden that it places on non-commercial webcasters. If these rules are adopted without modification, there’s a strong chance that many community broadcasters would simply stop webcasting. Considering the value of noncommercial voices in our culture, we think this would be a terrible consequence. In an increasingly homogenized marketplace of broadcast radio, this sector of webcasters has guarded and nurtured America’s musical heritage and offered a platform for new and emerging recording artists.

Radio stations like WWOZ in New Orleans have provided unique programming that shares our nation's rich culture with listeners throughout the world. It would truly be tragic if such stations were no longer able to share their mission due to the implementation of the proposed rates.

To avoid this outcome, the FMC has encouraged the Copyright Office to establish non-commercial licenses and reasonable reporting requirements for webcasters who are not aiming to run a commercial venture through their service. The FMC proposed that the modified rate offered solely to noncommercial/ nonprofit/college/hobbyist webcasters should be based on existing precedents that have served non-commercial radio well for decades.

We do believe it is important that beneficiaries of this non-commercial license should be required to adhere to reasonable reporting requirements so that performance royalties can be disbursed properly. However, this license would recognize the financial and staffing realities of these nonprofit stations and be scaled accordingly. Again, we encourage members and the Copyright Office to look to existing nonprofit/community broadcasters for guidance on the creation of this license.

2. Reasonable Reporting Requirements

The FMC also urged the Copyright Office to revise the reporting requirements to eliminate the collection of information that is redundant, unnecessary or has not been provided webcasters for reporting.

It is important that webcasters thoroughly report what music they have played so that songwriters, performers and labels can be accurately compensated for the non-interactive digital performance of their copyrighted works. As advocates for musicians, we do not question this priority. The FMC is concerned, however, that the quantity of fields and the sheer volume of data that webcasters will each be required to report will unfairly burden small webcasters. Furthermore, we are concerned that in some cases the stated reporting requirements demand that webcasters track and report copyright related information that they have not been given.

For example, it is standard music industry practice for labels to send webcasters advance copies of CDs before the final album artwork is completed. Often these CDs are minimally labeled with little more than a band name and a song title. In these cases webcasters would clearly be unable to report any information beyond the artist and title track. It is also standard practice for labels to hole-punch the barcodes on completed promo CD artwork to make them impossible to scan. In these cases webcasters would be unable to accurately report bar code information.

Considering the fact that the proposed reporting requirements would require that webcasters file their report records under the threat of perjury we believe it is critical that these requirements are reasonable. Therefore, we urged the Copyright Office to revise the reporting requirements to ensure that this process does not overly burden small webcasters.

In consideration of being granted this favorable rate, the non-commercial broadcasters would report all of the recordings that they play each calendar year. Therefore all payments distributed to recording artists and labels would be based on actual playlists rather than sampled data. This would ensure Sound Exchange payments would not run the risk of the obvious data distortions that have occurred in the AHRA royalty pool, where the use of SoundScan data has skewed the distribution monies towards a handful of prominent recording artists and major record labels at the expense of independent artists. This proposal would result in more equitable distribution and eliminate the distortions that occur when weighted systems using extrapolated data from limited sources are the sole criteria that determine which artists are paid.

3. Working Toward Automated Reporting Structures

Existing copyright data should be used to create an automated reporting database technology that will be made available to licensed webcasters to help them fulfill their reporting requirements. There are numerous public benefits to the creation and maintenance of a publicly held authentication database, including more accurate reporting, less staff burden on webcasters, and full documentation of those works that have fallen into the public domain. Everyone will benefit from open and collaborative observation. While some argue that the marketplace will take care of this need, it is the FMC's contention that, in the long run, the most efficient means to build and manage such a database is through a combined effort of artist groups, webcasters and labels under the oversight of the Copyright Office.

In the short term, the most accurate database of information regarding the ownership of copyrights and musical performances is the database that SoundExchange has been using to distribute digital royalties for the past year. Many of the numerous fields which webcasters would each be required to enter according to the proposed reporting requirements are already recorded into this database. We therefore suggest that the information from this database be made available in some form that would allow webcasters and technology developers to create an authorized automated reporting system. By creating and standardizing this reporting process, time-consuming data entry work can be minimized and information collection can achieve an increased level of sophistication, efficiency and immediacy.

4. Elimination of Ephemeral Copy Logs and Restrictions

The FMC believes that the requirement to periodically destroy ephemeral copies should be eliminated. Music licensed to be streamed in a non-interactive manner is only valuable if it is broadcast and heard. The ephemeral copies that are stored on webcasters' hard drives are merely an intermediate – but necessary – step in the webcasting process. According to the current law, all webcasters are required to destroy their ephemeral copies every six months. Not only is this counterproductive, but also technically unfeasible in many cases.

The FMC does not understand the rationale for this requirement, which would force small webcasters to incur unnecessary additional expenses in the never-ending destruction and re-creation

of the ephemeral copies. Plus, in many webcasting architectures it is impossible to track ephemeral copy creation and destruction; many are being created and destroyed all the time. Ephemeral copies are created to facilitate legitimate webcasting, therefore all requirements regarding the creation, destruction, and tracking of ephemeral copies to be used in the process of legally webcasting should be eliminated.

5. Elimination of Reporting under Penalty of Perjury

It is in the best interests of all parties to ensure that the essential framework under which webcasters operate is clearly understood and reasonable. Given the concerns stated above about the potential impracticality of certain reporting requirements, and given the reality that any new process like this will take time to become standardized, it seems unduly harsh to require webcasters to sign their log sheets under the penalty of perjury. For some, this alone may be a disincentive for them to continue webcasting. The FMC believes that there may be more appropriate precedents in place at the FCC regarding broadcasters' obligations to be truthful in their filings.

Conclusion

The Future of Music Coalition would like to thank the Senate Judiciary Committee for organizing today's hearing. Webcasters, copyright owners, musicians, and the public are all passionate about their interests, and share a common goal that webcasting should be viable in the future. We urge the members to consider the following modifications to the proposed rate and reporting requirements that have been suggested by the CARP tribunal:

1. Establishment of alternative license structures
2. Reasonable reporting requirements
3. Automation of reporting
4. Elimination of ephemeral copy logs
5. Elimination of the threat of perjury through reporting

The FMC recognizes that building better models for webcasting could be a long and involved reformation process. In order for licensing rates and reporting requirements to be scaled to meet the realities of different classes of webcasters, there will need to be further discussions between various parties to first distinguish the four classes of webcasters and then come up with rates and requirements that are in line with their unique characteristics. The FMC is more than willing to take part in these discussions if they ensure that webcasting can continue to offer diverse and creative programming to the public, and serve as an new revenue stream for musicians.

Respectfully Submitted,

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