



Hearing on “The Future of Audio”

**United States House of Representatives
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Communications and Technology***

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**On behalf of the
National Association of Broadcasters**

Good morning, Chairman Walden, Ranking Member Eshoo and members of the Subcommittee, and thank you for inviting me to testify today. My name is Steve Newberry, and I am President and CEO of Commonwealth Broadcasting Corporation, which operates 24 radio stations in Kentucky. I am testifying today on behalf of the free, local, over-the-air radio members of the National Association of Broadcasters.

Introduction

For 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.

Technological changes over the past decade have led to exciting new developments in the radio industry. Streaming, podcasting, HD radio, mobile devices and other new platforms present both opportunities and challenges for radio broadcasters. Digital distribution is still only a small part of overall audio consumption, but it is providing innovative ways for us to reach and serve our listeners.

One thing that has not changed is America's love for radio and all that the word "radio" embodies. More people are listening to broadcast radio than ever before. According to 2012 Arbitron data, approximately 241 million persons aged

12 and over listen to radio each week, a number that continues to increase.¹ Indeed, that number is some 2 million higher than in Arbitron's 2010 study, which found at that time, that broadcast radio reached more than 93 percent of persons aged 12+ each week and about 91 percent of young listeners aged 12-17.² This last percentage is particularly interesting since teens in this age group are the most accustomed to using new technologies and media platforms. The data also show radio's universal appeal, with more than 93 percent of African Americans and 95 percent of Hispanic persons tuning in to radio each week.³

Given this evidence of broadcast radio's continuing appeal, I am not at all surprised that new digital music services endeavor to style themselves as "radio." They want to claim our heritage, but the concept and reality of the radio industry that I represent before you today is much more than the mere audio transmission offered by many services. We are part of the fiber of our local communities, and we intend to stay that way.

The radio industry looks forward to a robust future that embraces the fundamental nature of broadcasting, as well as new opportunities arising from evolving digital technologies. In that regard, however, broadcast radio today faces numerous challenges, and I would like to mention just a few of them here.

¹ *The Infinite Dial 2012, Navigating Digital Platforms*, Study, Arbitron Inc. and Edison Research, available at http://www.arbitron.com/study/digital_radio_study.asp.

² *More Than 239 Million Listen to Radio Every Week According to the Arbitron Radar 105 Report*, News Release, Arbitron Inc. (June 15, 2010), available at <http://arbitron.mediaroom.com/index.php?s=43&item=693>.

³ *Id.*

Broadcasters Should Not Be Subject to a New Performance Tax

Efforts to encourage Congress to establish a new performance fee, what we call a “performance tax,” come at a volatile time for both the radio and recording industries. Both industries are fighting intense competition for consumers through the Internet and other new technologies, and both industries are experiencing changes to their traditional business models. These technological and marketplace developments, however, do not justify a government-mandated shift in the relationship between radio and the recording industry.

From the very first days of commercial radio, broadcasters and the music and recording industries have enjoyed a well-balanced relationship that has benefited all parties. Record labels and performing artists profit from the free exposure provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services. Despite the many dramatic changes that have occurred in the digital music industry over the past decade, this interdependent relationship between radio and the music and recording industries remains fundamentally the same.

What has changed is the financial dominance of the four (perhaps soon to be three) major record labels.⁴ Digital audio transmission services abound, offering nearly unlimited opportunities for consumers to listen to music on-

⁴ Universal Music Group's proposed merger with EMI Music (subject to U.S. and E.U. regulatory approval) will give Universal roughly 40% of the U.S. market for recorded music.

demand, to make digital copies of songs, and to create personalized listening experiences for themselves and others.

In contrast, while making many technological improvements, radio broadcasting retains the same basic character that it has had for decades. It is local. It is free to listeners. It is supported by commercial advertising. Local stations use on-air personalities and DJs to differentiate their programming, including by commenting on the music they play. While increasing, there are not an unlimited number of radio stations in the U.S., and stations still expose listeners to new and varied songs by choosing what to play. In addition, radio is characterized by its public service to local communities and is subject to numerous Federal Communications Commission (“FCC”) restrictions and obligations.

As I mentioned, many digital audio transmission services are eager to associate themselves with radio’s rich history, consumer familiarity and affection. They often style themselves as offering “radio” services. But simply marketing digital audio transmission services as “radio” does not make them so. In fact, in 1995 and 1998, Congress recognized the vast differences between digital audio transmission services and local radio when it created a limited digital sound recording performance right for those new services that diverged so dramatically from the nature of traditional radio.

Prior to 1995, U.S. copyright law did not recognize any public performance right for owners of sound recordings. The narrow digital performance right Congress created in 1995 was intended to address very specific concerns about

copying and piracy issues. This limited right did not attach to a wide variety of recorded music, including radio, hotels, restaurants, bars, nightclubs, sporting arenas, shopping malls, retail stores, health clubs, etc. As explained in the Senate Report accompanying the Digital Performance Rights in Sound Recordings Act of 1995, “The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmission.”⁵ Consistent with Congress’s intent, the DPRA expressly exempted non-subscription, non-interactive transmissions, including “non-subscription broadcast transmission[s]” – transmissions made by FCC-licensed radio broadcasters, from any sound recording performance right liability.⁶

Despite the advent of new technologies and digital audio transmission services that permit sophisticated user manipulation of music in on-demand and customized ways, the impact of the promotional value of traditional local radio remains strong. The fact that consumers have new ways in which to locate and obtain music does not diminish the value of over-the-air radio’s marketing and promotion to the recording industry.

In the new, fragmented world of the digital environment, in which millions of bands are vying for the attention of hundreds of millions of fans, on millions of websites, one of radio’s greatest strengths is that it cuts through the clutter.

⁵ S. Rep. No. 104-128 (1995) at 17 (emphasis added).

⁶ 17 U.S.C. §114 (d)(1)(A).

Radio exposes listeners to new music and new artists and drives listeners to the websites where their desire for the music that they heard can be monetized.

Congress has repeatedly rejected calls by the recording industry to impose a tax on the public performance of sound recordings. In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, over-the-air radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities;⁷ (4) promote, rather than replace, record sales; and (5) do not constitute “multichannel offerings of various music formats.”⁸

Although NAB vigorously opposes the imposition of a Congressionally-mandated performance tax as it has been set forth in previously proposed legislation, in 2010 NAB engaged in discussions with the recording industry in a

⁷ Radio broadcast stations provide local programming and other public interest programming to their local communities. In addition, there are specific requirements that do not apply to Internet-only webcasters. See 47 U.S.C. §§ 307, 309-10 (1998). See, e.g., 47 C.F.R. § 73.352(e)(12) (requiring a quarterly report listing the station’s programs providing significant treatment of community issues); 47 U.S.C. . § 312(a)(7) (requiring a station to allow reasonable access to federal candidates); 47 U.S.C. § 315(a) (requiring a station to offer equal opportunity to all candidates for a public office to present views, if station affords an opportunity to one such candidates); 47 C.F.R. § 73.1212 (requiring identification of program sponsors); *id.* § 73.1216 (providing disclosure requirements for contests conducted by a station); *id.* § 73.3526 (requiring maintenance of a file available for public inspection); *id.* § 73.1211 (regulating stations’ broadcast lottery information and advertisements).

⁸ S. Rep. No. 104-128 (1995) at 15.

good faith effort to resolve this issue in the best interests of both radio and the music industry. NAB's Board of Directors subsequently endorsed a thoughtfully-drafted compromise based on those discussions, which was peremptorily dismissed by the recording industry without any constructive comment.

Radio broadcasters continue to oppose any performance tax like those previously proposed because such a tax would undermine local station viability and harm the public's free radio service. As local radio broadcasters have demonstrated on many occasions, stations serve the public interest by airing local and national news and public affairs programming and a variety of other local programming that serves the needs and interests of their audiences, including weather, emergency information, sports, religious and other community-oriented programming.

It goes without saying, however, that maintaining this high level of local programming and other services requires radio stations to be economically sound. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the FCC concluded two decades ago, the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."⁹ Anyone concerned about the service of radio stations to their local communities and listeners must necessarily be concerned about these stations' abilities to maintain their economic vibrancy in light of new fees that could be levied through the creation of a new performance

⁹ *Report and Order*, 7 FCC Rcd 2755, 2760 (1992).

tax. Clearly, these local and community services could be jeopardized by imposition of new fees, especially during difficult economic times.

Broadcasters Urge the FCC to Implement Low Power FM Legislation Consistent with Congress's Balanced Approach

Radio broadcasters are also addressing questions about the relationship between low power FM radio ("LPFM") and full power FM stations as the FCC implements the Local Community Radio Act of 2010 ("LCRA"). My view of the relationship between full-power radio and LPFM is that both services provide value to the American public, and both should be preserved and promoted through appropriate interference protections.

Broadcasters worked closely with Congress to help craft the LCRA in a manner that reasonably balances the needs of both full power FM stations and LPFM stations. The LCRA reflects our common understanding that both full-power FM and LPFM stations serve the public interest, albeit in different, but complementary, ways.

Full power radio broadcasters provide a free, over-the-air service that reaches virtually every household in America, keeping local communities – and your constituents – informed and connected. Local broadcast stations are committed to providing a wealth of local and national news, public affairs programming, political information, vital emergency information, music, sports and other entertainment programming. These broadcasters are also committed to community service as evidenced by billions of dollars annually of free air time

devoted to public service announcements, and monies raised for charities and other local causes.

Broadcasters' commitment to public service is particularly evident in times of crisis, such as the ongoing wildfire in New Mexico, and the recent tornado outbreaks in Missouri and Arkansas, during which radio stations delivered life-saving information around the clock, commercial free. Even Federal Emergency Management Agency Chief Administrator Craig Fugate recognized broadcasters' unique role during disasters when he instructed Americans to turn to their local radio station as Hurricane Irene approached the East Coast last year. In addition, through our participation in the Emergency Alert System (EAS) and additional coverage of emergencies, full power radio broadcasters help save lives with extensive, timely emergency information. Coordination with local law enforcement via Amber Alerts has led to the recovery of 584 abducted children.¹⁰ In fact, the Amber Plan was originally created by the Association of Radio Managers with the assistance of law enforcement agencies in the Dallas/Ft. Worth area.

The service that LPFM stations provide is also valuable. LPFM can serve very localized, niche audiences. LPFM stations provide a hyper-local signal, sometimes covering an area no more than a few miles in diameter, with niche programming serving limited sections of a market. Indeed, the FCC created LPFM to "serve very localized communities" and to allow small groups and

¹⁰ See http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=4319 (last visited May 31, 2012).

organizations, such as schools and churches, to provide programming.¹¹ LPFM stations simply cannot provide the same kinds of community service – especially during emergencies – that full power stations provide. Nor should it be expected to, given their geographic constraints. In addition, as a noncommercial service serving very small geographic areas and discrete audiences, LPFM stations lack the resources to provide the extensive community-wide service offered by full power stations. Few LPFM stations broadcast 24 hours a day, like most full power radio broadcasters.

Nevertheless, both full-power radio and LPFM stations serve the public interest, and the value of each service, as well as their differences, are clearly recognized in the LCRA. The LCRA seeks to balance the dual goals of providing additional licensing opportunities for LPFM stations while preserving the audio quality of full-service FM stations. Specifically, the LCRA eliminated third-adjacent channel minimum distance requirements between LPFM and FM stations, while reaffirming the interference protections of FM stations by prohibiting any changes to the FCC’s current second-adjacent spacing requirements. The LCRA permits waivers of these latter requirements, but only under strictly defined, truly unusual circumstances. We have urged the FCC to take a cautious, careful approach to any grant of such waivers, and suggested several reasonable steps designed to ensure that LPFM stations that operate on second-adjacent channels do not inadvertently cause interference to full-service FM stations. For instance, we have proposed that a potentially short-spaced FM

¹¹ Report and Order, *Creation of a Low Power Radio Service*, 15 FCC Rcd 2205, 2208, 2213 (2000).

station given an opportunity to review the engineering showing of “no interference” required to be submitted by any LPFM applicant seeking a second-adjacent channel waiver. Such a process would help preserve the integrity of the FM band, and also prevent situations in which an LPFM station must cease operations because it has caused interference to a full-service FM station.

Broadcasters have sought to preserve the carefully designed, balanced approach set forth in the LCRA. For example, we have opposed LPFM advocates’ proposal to create an entirely new class of LPFM stations that could operate at a maximum of 250 watts. The LCRA is based explicitly on the FCC’s current regulations and technical requirements, all of which reflect the long-standing LPFM maximum power limit of 100 watts. Moreover, the LCRA’s legislative history, including representations by LPFM advocates themselves, shows that Congress enacted the LCRA based on an understanding of LPFM as a 100 watt service. Accordingly, authorization of 250 watt LPFM stations would not only be contrary to the Congressional basis for the LCRA, but it would change the fundamental, highly localized nature of LPFM service.

Both full power FM and LPFM stations provide valuable service, and the LCRA seeks to preserve and foster both services. Broadcasters believe that if the Commission implements the LCRA in a manner faithful to Congressional intent, thereby preserving the integrity of the FM band, then both services should be able to prosper and serve their listeners going-forward.

The Standard and Procedures Used To Set Streaming Rates Discourage Streaming and Should Be Changed

A significant ongoing impediment to broadcasters' ability to innovate in the digital arena is the current rate-setting standard under the statutory licenses for streaming. Rates that have resulted from proceedings by the Copyright Royalty Board ("CRB") under the so-called "willing buyer/ willing seller" standard have been artificially high, to the detriment of both services that wish to stream and the songwriters and performers who would benefit, in the form of increased exposure and royalties, from increased streaming.

Broadcasters favor abandoning the "willing buyer/willing seller" standard and transitioning to the "801(b)(1)" standard for setting streaming 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.¹²

As currently codified, this standard considers the interests of all stakeholders and the public, recognizes the value of all contributions of licensors and licensees and has long been accepted and ratified by Congress. It reflects a Congressional intent not to set rates so onerous that they would stifle new businesses and uses of creative works, or disrupt structure of existing industries.

¹² 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."

The 801(b)(1) criteria are particularly appropriate where, as now, there are essentially four companies controlling the majority of the distribution of sound recordings.¹³

The “willing buyer/willing seller” standard was perhaps most obviously inadequate when it led to rates for the 2006-2010 license period (set by the CRB) that were so egregious that webcasters directly appealed to Congress. Passage of the Webcaster Settlement Acts of 2008 and 2009 provided an opportunity to negotiate more appropriate arrangements with the recording industry.

Recent developments have further illustrated the dysfunction of the current rate setting procedures. The constitutionality of the appointment of the CRB itself has recently been called into question with an appeal before the D.C. Circuit Court of Appeals. And an additional complication to the broken CRB/SoundExchange system came when SiriusXM recently filed a lawsuit against SoundExchange and A2IM (American Association of Independent Music) claiming antitrust violations. This suit essentially alleges that SoundExchange and A2IM conspired to prevent SiriusXM from negotiating direct licenses with musicians (which would take music out of the statutory royalty scheme administered by the Copyright Royalty Board).

¹³ Significantly, the 801(b)(1) standard has a history of yielding results that are more equitable, effective, and predictable than those supposedly based on market or “fair” value. The relatively uncontroversial and unchallenged results demonstrate the equity of the standard. In each of the four proceedings that have occurred under the 801(b)(1) standard since 1976 (two involving the recording industry as licensor and two involving the recording industry as licensee), not only have the royalty awards been upheld by the courts, but none of the parties have felt compelled to ask Congress to remedy any of the determinations.

In short, the royalty rate setting process has become a royal mess, and an opportunity to remedy that process would be embraced by all who stream music. NAB would welcome an opportunity to discuss reform of this dysfunctional process in greater detail.

Conclusion

Thank you for the opportunity to testify before the Subcommittee. I believe radio broadcasting will remain strong, and our commitment to our local communities will keep our industry vibrant.