



**Hearing on  
“Music Licensing Part One: Legislation in the  
112<sup>th</sup> Congress”**

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

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

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**Statement of Bruce Reese  
Hubbard Radio, LLC**

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

Good afternoon, Chairman Goodlatte, Ranking Member Watt and members of the Subcommittee on Intellectual Property, Competition, and the Internet. Thank you for inviting me to testify today. My name is Bruce Reese, and I am President and CEO of Hubbard Radio, LLC, which operates 20 radio stations in five national markets. Before Hubbard made its April 2011 purchase of certain Bonneville International stations in Chicago, Washington, D.C., St. Louis, and Cincinnati, I was President and CEO of Bonneville International Corporation. I also chaired the Joint Radio and Television Boards of the National Association of Broadcasters (NAB) from 2004 through 2006. I am testifying today on behalf of the free, local, over-the-air radio members of the NAB.

### **Introduction**

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.

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 digital 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.

I am here today to talk to you about a significant ongoing impediment to broadcasters' ability to innovate in the digital arena – namely, the current rate – setting standard and procedures used at the Copyright Royalty Board (CRB) under the statutory license for streaming.

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

In the broadcast community, there is a wide array of opinions as to the viability and value of streaming. Some broadcasters see streaming as an essential, burgeoning revenue stream. Others regard it as tangential but also important to their core business of over-the-air broadcasting. Still others consider it as being not worth the investment, since it is nearly impossible for broadcasters' streaming revenue to exceed the associated costs and royalty payments. Regardless of the camp, every broadcaster's expansion into Internet radio is impeded by the unreasonable costs of webcasting royalties. 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 offset the costs. This imbalance is impeding the growth of Internet radio among broadcasters.

Hubbard Radio streams our stations primarily as a service to our over-the-air listeners. We stream all our stations in all our markets. We believe that listeners expect to be able to access our stations through the Internet in addition to listening to their radios, and in a way we consider the cost of streaming a promotional expense. Nevertheless, we work very hard to monetize the streams.

Generally speaking, on a cumulative fiscal basis, we break even, with modest profits from the revenue from streaming our non-music stations offsetting the losses from streaming the music stations. Each year we revisit our streaming strategy and consider anew whether it's worthwhile to continue the service.

Since webcasting began, the chief obstacle to developing a profitable streaming model has been the egregiously high royalty rates for sound recordings. The 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 inflated, 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. The "willing buyer/willing seller" standard has increased royalty rates to levels that are suffocating radio streaming services. This is likely true because absent any specific rate setting guidance, the theoretical "free market" in which willing buyers and willing sellers can freely negotiate does not actually exist.

Broadcasters favor abandoning the "willing buyer/willing seller" standard and transitioning to the "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.<sup>1</sup>

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<sup>1</sup> Instead of determining rates for 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

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. The 801(b)(1) criteria are particularly appropriate where, as now, there are essentially three companies controlling the majority of the distribution of sound recordings. Despite their recent disapproval of the standard in the context of this statutory license, now that they are in the position of licensor, the recording industry does not complain about the 801(b)(1) standard in the context of another statutory license, when they are acting as a licensee.

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 were forced to directly appeal to Congress. Passage of the Webcaster Settlement Acts of 2008 and 2009 provided an opportunity to negotiate more appropriate arrangements with the recording industry.

But the flaws in the CRB rate-setting process go beyond the excessively high royalty fees themselves. Broadcasters cannot create predictable business plans for streaming if we don’t know with any reasonable degree of certainty

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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.”

what future rates will be. Further, the broadcasting business has been one built on fixed costs. It costs a radio station very little more to reach its millionth simultaneous listeners than it costs to reach its first. The statutory streaming fees, which increase on a per person, per listener basis, with none of the advantages that scale brings to most business models, are difficult to reconcile with the standard business practices of the broadcast industry.

There is also a clear need to improve and update some of the CRB rules and procedures. This includes how stations report their music usage and how evidence is presented in CRB rate-setting proceedings. Another significant concern is the lack of Congressional oversight in the appointment process of the judges.

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

If anything, efforts should be made to facilitate and encourage direct licensing between the recording industry and those streaming music. Certain

performers have recently argued that direct licensing would reduce their compensation. However, I would respectfully submit that, to the extent this Subcommittee might consider this to be a significant issue, it is imperative to evaluate performers' royalty payments in the larger context of their various streams of income, including how they are compensated by record labels.

### **Congress Should Not Impose a Performance Tax on Broadcasters**

In beginning this important dialogue over how best to encourage the growth of Internet radio, Congress should not allow this debate to be bogged down by past fights over the performance tax, to which NAB remains staunchly opposed. For eighty years, American radio broadcasters and the music and recording industries have enjoyed a well-balanced relationship that has benefited all the 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.

Despite 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 is not an unlimited number of radio stations in the U.S., and listeners cannot choose what songs they will hear next, with the

exception of call-in and request lines. In addition, radio is characterized by its public service to local communities and is subject to numerous Federal Communications Commission (FCC) restrictions and obligations.

Many digital audio transmission services are eager to associate themselves with radio's rich history and consumer familiarity and affection, styling themselves as offering "radio" services. But simply marketing digital audio transmission services as "radio" does not make them so.

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.

Now challenged by the economic downturn and financial threats posed by the rapidly changing digital environment, the recording industry is in search of additional revenue streams. But it is important to recognize that broadcasters are not responsible for the recording industry's financial woes. Broadcasters have continued to do their part in presenting music to the public in the same manner that they have done for decades. Particularly in the current highly competitive environment, where broadcasters are struggling to adapt their own business models to address the realities implicit in new media, it makes little sense to siphon revenues from local broadcasters for record labels to prop up the recording industry's past failings and ill-advised business decisions.

## **Conclusion**

The relationship between the radio industry and the recording industry in the U.S. is one of mutual collaboration, with a long history of positive economic benefits for both. Without the airplay provided by thousands of local radio stations across America, the recording industry would suffer immense economic harm. Local radio stations in the U.S. have been the primary promotional vehicle for music for decades; it is still the primary place where listeners are exposed to music and where the desire on the part of the consumer to acquire the music begins.

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. But as we seek to develop business models that include streaming, we are continually thwarted by one consistent problem – statutory royalty rates and the dysfunctional rate-setting system and procedures.

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