

## **United States Copyright Office Roundtable**

### **Panel I**

Friday, May 10, 2002  
Washington, D.C.

### **Proceedings**

(9:15 a.m.)

MS. PETERS: Good morning and thank you for agreeing to participate in this roundtable, whether you are at the table or you are in the back. The whole goal is to try to see if consensus can't be reached on a number of issues.

I want to start by saying my name is Marybeth Peters. I am Register of Copyrights, which means Director of the Copyright Office.

Most of you know the person to my right who is David Carson, who is the General Counsel. To my left is Bill Roberts who is Senior Attorney for compulsory licenses. To David's left is Tanya Sandros who is also a Senior Attorney for compulsory licenses.

Let me start by saying that we did the best we could to accommodate everybody. But obviously with the amount of interest that this subject has generated we were not able to do that.

There were many people from many companies and organizations who wanted to participate. What we had to recognize is if everybody was at the table or had the opportunity to be at the table, each person could make a six-minute speech. That was really not the goal of this exercise.

So, we hope that everybody feels that the way that we have done this, that they are able to, through somebody who was at the table or through the opportunity to basically at the end of each of the sessions, to make a point that hasn't been made so people will feel that they have had full participation.

The purpose of this roundtable is to discuss the proposed rules for notice and record keeping for the statutory licenses under Section 114 and Section 112. I think most people who are here know that 114 provides that the sound recording copyright owner has the exclusive right to perform the sound recording publicly by means of digital audio transmissions, but there are certain exceptions and there is also a statutory license and we are focused on that statutory license.

Section 112 provides for a statutory license that permits services operating under Section 114 to make so-called ephemeral copies, server copies that are being transmitted pursuant to the 114 license.

What we are not here to discuss, even though we know that it is a topic that is near and dear to many of your hearts, is the proposed royalty fees that were recommended by the copyright arbitration panel that was submitted in its February 20th report.

I want to tell you that there is no purpose making a comment at this time. It is under the review proceeding that is anticipated by the statute.

What we are here for, and we need all the time that we have allotted, is to have you

educate us on the issues that are related to the notices and the record keeping regulations that we have to promulgate.

I want to do a little background. Many of you, but maybe not all of you know that in 1995 Congress passed the Digital Performance Rights Act for Sound Recordings. That was the very first time in the United States that we recognized a public performance right for sound recordings, even though it's a critical right and even though this right is limited to digital and it's more limited than even just digital.

But, it was 1995 that Section 114 was amended to provide a basic right. That provision of Section 114 is a very complicated provision. There is the statutory license. In the very beginning it was limited to subscription services.

That basically transmitted performances to their subscribers, but a key piece of it was that you complied with all of the requirements of the statutory license. They are fairly complicated. One of the key pieces has to do with the performance complement, which is a limitation with regard to the number of performances by the same artist or from the same album that can be performed during a three-hour period.

Obviously, we are here because in 1998 Section 114 was amended in the Digital Millennium Copyright Act and it expanded the compulsory license and the liability outside the compulsory license for performances by eligible non-subscription services, i.e., Webcasters.

I'll start with the basic. The basic is that Section 114 provides that the statutory royalty payments are to be made to copyright owners. Taken literally, that means that each webcaster must pay royalties directly to each copyright owner whose sound recordings that webcaster performs.

Even before Section 114 was expanded to cover webcasting, it was recognized that direct payment from each service under the statutory license to each copyright owner would be unbelievably burdensome and in fact unworkable.

Identifying and locating each copyright owner is a monumental task and making separate payments would be difficult. So, Sound Exchange was born and we do have the opportunity of collectives.

Before we go to the substance of the first panel, I just want to make two statements. One is that I listened yesterday and I have heard it before that there has been a lot of concern about listener logs.

As you know, in the reply comments RIAA took that off the table. We certainly recognize the concerns and it is off the table. It's over.

The second piece before we start is that we basically set out a proposed rule-making that was almost equal to a notice of inquiry. It was to get comment on how this was to work.

So, basically, nothing is set. Everything is open and we really want a solution that works for the recording industry and that works for the webcasters. So, you should know that what was in the proposed regulation is not necessarily where we will end up.

We are listening to everything you have to say and hopefully we can come to an accommodation that meets the needs of all.

With that, let's start. All of you should have a list of the people who are on the first panel. This is a panel that is dedicated to focusing on the reporting that is to be done in order to determine the allocations of royalties. Since this is not a hearing, each one of us is not going to ask questions. I'm just going to throw out a basic first question.

What we hope is that all of you start jumping in. You can't all jump in together. You have to basically raise your hand and I'll recognize you. Otherwise, we will in fact have chaos.

Bill just reminded me that we are in fact transcribing this and that it would be helpful to the transcriber if we went around the room and everybody identified themselves by their name and their association. So let's start with you, Gary.

#### PANEL I - ROYALTY ALLOCATION

MR. GREENSTEIN: Gary Greenstein, Recording Industry Association of America.

MS. KESSLER: Barrie Kessler, Sound Exchange.

MR. MARKS: Steven Marx, RIAA.

MR. PAPISH: Michael Papish, WHRB.

MR. JOSEPH: Bruce Joseph, Wiley, Ryan and Fielding for the National Association of Broadcasters, the National Religious Broadcasters Music License Committee, Clear Channel Communications, Susquehanna-Cox, basically a lot of radio broadcasters on this panel.

MS. TOOMEY: Jennifer Toomey from the Future of Music Coalition.

MR. SHIVLEY: Kevin Shivley, Beethoven.com.

MS. ATKINSON: Wanda Atkinson, 3WK.

MR. MAZER: Elliot Mazer, Radio Computing Services.

MR. KNITTEL: Barry Knittel, DMX Music.

MS. GREER: Cynthia Greer, Shaw, Pitman, representing XM Satellite Radio and Serious Satellite Radio.

MR. POTTER: Jonathan Potter, the Digital Media Association.

MR. MAGHEN: Alex Maghen, Yahoo.

MS. POLACH: Patricia Polach from Bredhoff & Keiser. I am here today for the American Federation of Musicians, the American Federation of Television and Radio Artists and the AFM and AFTRA Intellectual Property Rights Distribution Fund which is the entity that distributes to non-featured vocalists and non-featured musicians.

MR. KASS: Fritz Kass from the Intercollegiate Broadcasting System, a 773, 62-year old organization of college broadcasters.

MR. FISHER: Glenn Fisher with Web sound, Incorporated.

MS. PETERS: Thank you. Before we start, let me mention the problem with the microphones. Because of the audio facilities in this particular room, we were not able to accommodate more than eight microphones.

What that means is that everybody is going to have to share. We need to work out a way in which it can happen fairly smoothly. So, you need to get friendly with your neighbors. If they don't pass it over gently, you know, take it if you need it.

Let's start with Section 114, F-4(A), which basically says the Copyright Office must establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section. That is one part.

They also must basically establish requirements under which records of such use shall

be kept and made available by entities performing sound recordings. So, you heard "reasonable" before the notice of use. Then the question is: Does reasonable also apply to the records of such use that shall be kept and made available?

The question is: Is there authority or how do you see whether or not the records that have to be kept, that the provisions related to those records and our provisions related to them must be reasonable?

Does anyone want to jump in?

MR. POTTER: Is there is a suggestion on the table that there is even a slim possibility that the records requirement can be unreasonable?

MS. PETERS: There were people who made that argument, not that it is unreasonable, but whether or not the standard is in fact reasonable.

MR. POTTER: The requirement, whether or not the requirement is reasonable, doesn't implicate whether or not the standard of the requirement is one of reasonableness or unreasonableness.

The suggestion that it might not be reasonable is the idea that it is unlimited, unreasonable and I guess if we are focusing on the standard in the law, then let's not go to the application of it yet. Let's talk about whether there is a suggestion that in fact the requirement could be unreasonable of if by implication, whether by the words of the statute or by APA or by just standard public policy we all might agree that in fact a reasonableness requirement is naturally in the law.

MS. PETERS: All right. Well, let's flip it the other way. Let's flip it to in this context what does reasonable mean? Yes, Alex?

MR. MAGHEN: Well, I think just for the sake of bringing it to an actual application, my understanding here is that what we are talking about is reporting on the actual use of sound recordings, discreet items that we are going to refer to as sound recordings.

If the idea is that each service is responsible for identifying and only for identifying for the sake of royalties and ephemeral copies the number of times that a sound recording was delivered over a given period of time for each service, then the real key issue here is not the discreet piece of information that indicates the number of times that it was delivered.

I think it is understood that that is a goal and that that needs to be done.

The question is how you identify what a sound recording is. To me, saying whether it is 1,000 times or 10,000 times over a given period of time, I think Yahoo can understand and accept. I think it makes sense.

The question is: How do you identify what a sound recording is. I think a lot of the discussions about how you get down to that unique item and asset that is a sound recording is what is at issue here.

It's a complicated problem, but I think it needs to be solved universally instead of being done by each service individually.

MR. CARSON: Let me just ask for some clarification around the table now. I think what Alex said basically was at least from Yahoo's point of view, you accept the notion that it's a goal for each service using this compulsory license to identify each sound recording that is performed and the number of times it is performed.

The question is: What information is needed to do that. Is that basically what you said?

MR. MAGHEN: Just to clarify, when you say identifying the sound recording and the number of times, the number of times, there is no question. But the key is what does it mean to identify a sound recording and the difficulty, the expense and onerousness of identifying the sound recording is in fact our issue in the course of this particular panel.

MR. CARSON: Well, before someone else jumps in, I want to explore that with you for a second, Alex. Are you saying that there is an issue whether you should have to identify each particular sound recording or are you saying there is an issue with respect to how much information you must provide with respect to each particular sound recording?

MR. MAGHEN: I'll put it like this: If we can identify a unique code or ID that establishes that sound recording and there's no complexity of data entry and the confusion of multiple pieces of information that will establish uniqueness, then we are comfortable with the idea that, yes, two columns of information need to be delivered, one that establishes the unique sound recording and one that establishes the play count.

The crux of the matter is that if establishing unique sound recording means providing four, eight, eleven, 75 columns of other information that are, you know, very susceptible to data entry difficulties et cetera, that is when we have trouble.

MR. CARSON: Is there anyone who has a different point of view than that? I know we have many people with lots of points of view. Is there anyone with a different point of view?

MR. JOSEPH: Very specifically in response to what Alex said, a very significant different point of view. I'm Bruce Joseph for a variety of radio broadcasters.

Let me go back to the question that Marybeth asked and in doing that I will comment on what Alex said, not on his question of how you identify, but on the question of what it is that you need to identify.

The standard of reasonableness, I think there is very important guidance in law and practice already. You have exactly the same language with maybe one word different, but a word that is not material to this proposition, appearing in Section 118, for example.

The reasonable notice of use and records language appears in Section 118 B(3) of the Copyright Act and has been there for many, many years.

Congress didn't coincidentally take that language, you know, like the monkeys at the typewriter with the Ode on a Grecian Urn, didn't come up with exactly the same language in Section 114. The language consciously is the same as the language in Section 118.

In Section 118 the practice, well known, clear in Copyright Office regulations for farther back than I have been a copyright lawyer, has been a sample basis, a sampling of performances to be reported. I believe if you look at the Copyright Office Regulations, in construing that particular statutory language in Section 253.3, for example, applicable to NPR, you get a period of up to one week in each calendar year for performances up to 50 percent of the NPR broadcast stations.

So, it is absolutely clear that the reasonableness standard that Congress was writing, at least to me, contemplates a cost-benefit analysis, looking at the relevant industries. More than that, it certainly is understood to contemplate reporting and record keeping of less than a census of each and every performance of a sound recording that is made during the relevant period of time.

I think that is the guidance that we need to look at. On behalf of broadcasters, I'll say that it is absolutely essential. You will not get census reporting. It's simply not going to be

consistent. We can go into that in greater detail.

But I do disagree with Alex on that issue. We can talk about his identification point later.

MS. PETERS: A lot of people are trying to jump in. Bill was going to say something in response to what Jonathan said. I think we are all on the same point. I think we just need to identify.

MR. ROBERTS: To get started off here, I just want to clarify really what the question is. The statute says "reasonable notice" and then it says, "and records of use."

The question is: Is the word "reasonable" to be imputed to records of use or is it just simply "records of use?" "Reasonable notice" is one. "Records of use" is the other. Not "unreasonable records of use," but just simply no modifier, just "records of use." That is the question that we really are trying to answer.

MR. CARSON: Let's stick to the point that Alex and Bruce addressed.

MS. PETERS: Okay. Let's go to Patricia.

MS. POLACH: Well, I wanted to comment on something that Alex said because I think he was right to start with first principle. The first principle he was talking about is, you know, the real question is how do I identify the unique sound recordings?

What I want to add on to that is that that question has to be considered in the light of what the purpose of identifying the sound records is and what the purpose of the notice of use is.

You know, the purpose of notice of use isn't just abstract or esoteric or just to make services unhappy or just to make other groups happy because they are accumulating data.

The purpose of the notice of use and the purpose of identifying the unique sound recording is to affect the distribution of the income stream to the people who are entitled to get it.

Obviously, my concern in particular is that 50 percent of the income stream is to go to artists, 45 percent to the featured artists, two and a half percent to the background singers and two and a half percent to the background musicians. And I think that has to be the lodestar.

What do we need to get to identify unique sound recordings so that we can in fact affect fair and accurate distributions to the rights holders and to the performers?

MS. PETERS: Bruce, did you already speak on what you were going to say because you were next on the list.

MR. JOSEPH: Yes, at least on this one. Obviously, the whole question that Patricia is now raising of what constitutes identification and what the purpose of identification is, I get the impression that David wanted to reserve on it.

I have plenty to say on that. But on the question of what is the reasonableness standard and what guidance can you draw from the law and are we talking about is it each and every report, yes, I have said my piece on that.

MS. PETERS: Michael, did you want to speak on this point?

MR. PAPISH: This is on this point, yes. Actually, I am going to agree with Patricia. The belief that we have to look at the statute as to how it is applied, obviously, this works in a real world situation where we are taking money and distributing it to a large number of people.

The point I would like to make is that in many instances it seems sort of ludicrous to spend so much time and so much effort collecting so much information when the money you

are distributing could be pennies.

In the instance of WHRB, which is a nonprofit educational broadcaster, and I think this point falls for many broadcasters, profit and nonprofit, that have very large catalogs, they play a large amount of material and they don't pay that much in royalties because in general they are smaller broadcasters.

For example, WHRB pays the \$500 minimum fee. We play 70,000 to 90,000 unique sound recordings each year. So, if you divide \$500 by something along those numbers, you are basically distributing .07 cents on average. I mean, yes, we do play certain sounds, you know, 20 or 30 times when they first are released and we'll talk about how that might affect sampling. I'm sure we are going to get to those points. I know a lot of people are interested.

But my major point is that it seems wrong to apply a standard across the board to certain instances which just don't make any sense. Also, for stations such as WHRB where doing this record keeping, coming up with a way to clarify this catalogue which is 750,000 sound recordings, that is how many we, we have a fraction of those in a database. The rest are just stuck in the library.

To come up with a way to clarify those in any sort of digital system and then a way to come up with reports of use in real time, because remember, we use actual humans to play these albums on a turntable. I have actually brought a number of seven inchers which I can distribute.

I will actually enter into the record as an example of some of the things we play and the difficulties in trying to figure out the name of the piece, the fact that in many cases these albums were put out, you know, 20 or 30 of them total. Some of these I got from my roommate. You can try to track him down and give him a check. He would be extremely happy to get a check and so will I.

My major point here is I think we need to look at how this is used in practice, specifically when we go about making the statutes.

MS. PETERS: Jenny?

MS. TOOMEY: Well, I would like to agree with Alex, Patricia and Michael to a degree and disagree with Bruce. I think the sampling standard where you look at what a radio station is playing for one week has reasonableness maybe when you look at radio stations that have a play list of 50 records that stay on the play list for a quarter of the year. We are seeing that happen more and more with the consolidation of radio.

That said, when you are looking at stations like Michael's, which actually I have actually performed on his station, so it's a place close to my heart, there is a lot more diversity there.

I think sampling was an interim step. It was a substitute way that we dealt with the fact that the data collection would be so onerous that there was absolutely no way to connect it.

That said, if I took all of you out to lunch today after this wonderful hearing and then I went back to my house, I probably could see that charge, that American Express charge, on my computer. That means that record keeping is becoming automated in a way that people are getting used to seeing what is happening a lot quicker than they were before.

Waiting for a BMI check a year down the pike for something that was played on his station a year ago, that is a model that we are beginning to move away from.

I think it is frightening how expensive it would be to build an automated system that actually was working around original numbers as Alex suggested. People usually just turn their

brain off when they think about how difficult that is.

But we have always been saying at the Future of Music considering the fact that we are a think tank and we like to think big, is what is lost when we stay with the system that will balance, which works. It is a square proceeding for a round hole. It worked with commercial broadcasting for years when we didn't have an automated way to actually collect the data.

Now that we have that way, I think just because musicians aren't American Express doesn't mean that we don't deserve clear reporting requirements.

For a final thing, to Michael's point with regard to just the fact that it's only pennies, sometimes the information that someone is playing your song is as valuable as any money you get from it.

So, if I know that Harvard is playing my song, I can go and play a show there. If people are listening in Boston, I can make money from a show. So, that information is very, very valuable and we shouldn't lose it just because it seems like a burden to actually figure out how to collect it.

MS. PETERS: Steve.

MR. MARKS: Let me try and respond to a few of the points that have been raised. First, with respect to the question that initiated the conversation, I honestly don't have an answer to that because we never really focused on it, although we would be happy to look at it in more detail.

But I think from our perspective our purpose here has really been very simple. That is to obtain the least amount of information that would enable us to collect and distribute to those recipients who Congress has determined should receive royalties for the performance of their music.

It is not in our interest to receive more information than necessary because it would, you know, burden our systems. I mean we have an interest in having it be the least amount of information. We have laid out those specifically and I'm sure we'll get into that kind of detail later on in our filings.

We therefore think that our proposal is reasonable regardless of what the ultimate decision is on the standard statute.

I do think that Jenny's and Tricia's points were very important. That is that the context and the purpose is very important in evaluating what is reasonable or what is appropriate under these circumstances. I think both of them laid out those reasons, some of those reasons, very well.

I would point out that 500 divided by 90,000 may not be a lot, but we are not talking just about that. We are talking about the aggregate of information and the aggregate of royalties. So, it may be .07 cents for Harvard, but the check may ultimately be a lot more than that because there are a lot more stations that are playing that.

Therefore, having that information from Harvard is important when including it in that check.

Also, to respond to Bruce's point about looking at Section 118, I don't believe the fact that the same word, "reasonable" is used in that statute necessarily means that the outcome for that different license for a different copyrighted work in a different context means that the outcome is the same here.



I think if Congress really meant for that to happen they would have just written in that outcome to section 114. They wouldn't have just used the word "reasonable." I'm sure we will get to many of the other issues in terms of census versus sample here.

MS. PETERS: How about Frederick?

MR. KASS: When RIAA filed their original comments, I thought they really got to the point on Page 4 when they said we should follow history instead of hysteria being our guide.

I think clearly, as Bruce said, the history is that in 118, which we have operated on for over two decades, sampling is the case, not census. That is certainly very clear for our educational broadcasters in 235.5(e) where it says you can check ten broadcasters for some period of time.

I think this is even more important because record keeping itself, if it becomes too onerous for student broadcasters with very, very small staffs, all student operated, the record keeping then causes the webcaster to go off the air. In reality, the record keeping in itself restricts free speech that these students have.

I'm sure we don't want the sons and daughters of America to be put off the air by record keeping that they can't comply with.

Again, I think the RIAA recognizes what are the four main elements that we certainly need to have in order to properly pay Jenny and Patricia. That is certainly the title, the album, the artist, and the labels. That is the kind of information that we need to collect.

But we also have to remember in the case of educational broadcasters, our average station only has, in any given time, five listeners. So, if you forget the minimums and talk about the small fractions of assent, maybe a proper fee would be \$25 or \$50 for an entire year for that.

How much cost do you want to give to this college broadcaster to dispense the \$25 or \$50 out to the very deserving artist?

Another question I certainly would love to address to Sound Exchange in particular, there is certainly in our case of educational broadcasting, we have NPR, which is largely -- and you signed a contract with CPB and money got spent or sent to Sound Exchange. All right, how did that get distributed or did it get distributed?

Are the artists benefiting or not? Maybe it didn't get distributed.

MR. MARKS: The answer to your specific question is that the money has not been distributed yet, but it will certainly be distributed.

MR. KASS: You are thinking of it?

MR. MARKS: We are not thinking of it, your sarcasm aside, the money will be distributed. There is no question about it. We have been in a process where the rates are not yet finalized. The record keeping requirements are not yet finalized.

Therefore, building a system around distribution doesn't make a lot of economic sense when you have just one very small piece of the puzzle. At that time would only result in having fewer royalties to the people who get it, as opposed to building a system that is going to accommodate everybody in distributing that money.

So, that's the answer to your specific question. Let me just say a couple of other things on non-commercial. Despite a lot of the things that are said in the filings and even by Michael this morning, I mean here is a play list for Harvard for the next month.

So, the notion that these things are happening in real time and there aren't people to type in play lists, it obviously doesn't have all of the information we are asking for, but it certainly belies the fact that there aren't people available to do some of this. There are many others.

MR. GREENSTEIN: If I may be permitted, in preparation of the meeting -- and this is Gary Greenstein from the RIAA -- what we did was, we looked at certain of the non-commercial college stations that either filed comments individually, like Harvard, or as part of some of the different collegiate groups or parties that were going to be participating on the panel who did not file comments.

With the Copyright Office's permission I've got copies for ten different collegiate broadcasters which show, ex, KVRX in Austin, Texas provides a top 39 list for the week of 4-19 to 4-26. They list artist, album and label. I've got 20 copies of this.

There is a station, WCPE out of Raleigh-Durham- Chapel Hill, which is a non-commercial independent station that provides on their play list for May 9, 2002, so this is yesterday, a sheet that lists the program name, the start time, the composer, the title of the work, the performers, the record label, the stock number, which may be a catalog number, and the bar code, which I am assuming is the UPC.

This was done yesterday and it is all here. We have examples from ten stations, from KGNE in Crete, Nebraska, from KYSN in San Antonio, Texas, WSIA in Staten Island, KDRX in Austin, WKSW, KTUH, University of Hawaii.

There is an indication that these stations record what they play, not necessarily with all the identifying information that's needed for distribution purposes, but they will list things such as the top 20 or top 10. They will do it this week and they will compare it with where the song was last week, which means that they keep historical records.

There was one non-commercial station which has play lists going back to at least 1996. You can go back and you can flick on a URL and it takes you to a Web page for the different DJs and then you go to the DJ and you see what they play.

The information has been kept. These stations are typing it up. They are making it available. There is no need for handwritten logs. With the Office's permission, I can either hand them out now or hand them out later or at least submit them into the record.

MR. MAZER: Can I say one short thing?

MS. PETERS: Wait. Yes you can. There are people whose hands are up. I have on my list Patricia, Alex, Jonathan, Michael, Bruce, Kevin and Jenny. So, we will go in that order.

MR. MARKS: I think that the non-commercial stations represent kind of an interesting issue or problem here. On the one hand, they admittedly play a very diverse amount of music and therefore the revenue stream that would be produced as a result of those performances to individuals or small labels that don't necessarily receive royalties otherwise like a large commercial simulcast, for example, is obviously very important.

We can talk a lot later about the importance of these revenue streams in the future separately.

On the other hand, we do recognize that non-commercial educational stations, for example, have been treated differently in a number of fora in statutes and elsewhere, regulations, et cetera.

We have attempted to sit down with a number of these folks. I would say I would have to express my disappointment because we have reached out to Mr. Kass and he flat out refused to

sit down with us unless we cut a rate deal with him, which we viewed as unfortunate.

But we have had some discussions with some of the others who have put in comments who actually organized and they included Harvard and others. I won't go into the detail of those discussions now, but they have been somewhat productive.

Our hope would be that we would be able to reach some kind of agreement that balanced those interests. Our deep concern, however, is that any relaxation or any deal that we reached that was predicated upon this difference between non-commercial and commercial would somehow become precedent or be used by the commercial interests and entities that are here.

Therefore, that is frankly an impediment for us in reaching an agreement with some of these stations. I'm not sure what the solution is to that, but I am just speaking in terms of being frank as to where we are and what we view the issues as.

MS. PETERS: Patricia.

MS. POLACH: I wanted to go back a couple of speakers, I guess, and respond to the intercollegiate broadcasting system. Fritz, I think you said really three things and I want to respond quite specifically to two of them. One was the issue about Sound Exchange and is Sound Exchange going to distribute the money and where is the money going and is it really going to get out to record companies and to artists.

I think that ought to be cleared up kind of right from the get-go. There ought to be a clear understanding at least of Sound Exchange and how Sound Exchange is operating. The licensing revenue stream is not going to the RIAA. It is going to Sound Exchange. Although I'm sure a lot of people in the room do understand this and are aware of this, there are probably also a lot of people in the room that don't understand this and are not aware of the structure of Sound Exchange and the fact that Sound Exchange is, pursuant to an agreement with artists' groups and with record companies, going to be and very shortly will be finalized into a separate organization that is jointly controlled by artists and by record companies.

So, there are now represents of artists that compose half of the governing board. Those people are certainly not going to stand for money not being distributed and the copyright owner members of the board would not stand for the money not being distributed. There is kind of no room in the debate for aspersions on whether the money is going to be distributed or now, I guess, is my point.

The second thing he said that I wanted to respond to was about the four items. I think in all of the comments to date there has been a recognition that there are certain fundamental items that have to be reported in order to effect a distribution. Everybody says over and over again, title, album, artist and label or various versions of that.

That's good and that's fine. I think that certainly forms a common basis here. The rub is that there are a lot of situations where that is not enough to identify the unique sound recording and effect a proper distribution.

I just want to give two examples from our point of view. That is that there are often different background artists and different versions of the recording. For example, the new Sting album is a live album. It contains songs from previous studio albums and the session people are not the same. I mean the session people are not the same as the people who accompanied on the live performances.

There are many, many examples of that kind of situation.

The other example that I think is important and one that doesn't get thought about very much is classical music where the symphonies and operas are played on classical stations and get reported as "Artist Wagner, Artist Beethoven." You know, you have to try to figure out, was it the Cleveland orchestra? First of all, did they correctly identify a piece? But even if they identified the piece, if you have the piece and the composer, it could be one of many, many, many different recordings with different artists.

I am here to tell you that the symphonic musicians out there who play in the Philadelphia orchestra and the Cleveland orchestra and all the fine orchestras around the country really want to see their share of this money.

That is an example where catalog or UPC, the other kinds of data fields are really the practical way to identify, you know, which is the orchestra and which is really the sound recording.

I will say just one more short thing and then give other people a chance. That is, one of the differences here, I think, is that when we are talking about distributing money to the songwriters for the songwriter right, it's so much simpler because no matter what version of the recording, there is one songwriter that you have to find.

But the problem that we are facing, and you folks have to come up with a solution for us, I guess, is that when it comes to a sound recording, there can be many, many versions of the song involving different personnel.

You know, we have to find a way to really be able to collect enough information in a practical way to be able to distribute to those personnel.

MR. MAGHEN: First of all, I'm actually really happy to hear what Patricia said, because I think it does very much drive to the point that I started out talking about.

You know, with the two caveats, one that whether or not it is different to provide this reporting for a small station or not is not something I'm going to get into, with that caveat that what Jenny was talking about before, about the value of knowing how many times a song was played, regardless of royalties, is actually, to my understanding, not my responsibility as a service.

Regardless of how valuable it might be, I have a feeling at least Yahoo, but certainly other companies, would be thrilled to provide you that information for a small fee.

When Jenny takes us all out to lunch after this and we go to Arnie Morton's and she puts it all on her credit card, what I want to point out that is really important is that when the waiter punches in the information, he or she is not going to be typing in "Arnie Morton's on the corner of 11th and H, you know, the one on the northwest corner, not the one on the southeast corner. All of that text is not going to go into the system.

What is going to happen is that a central Organization, let's take American Express, will have actually identified a unique code for that organization, and in fact, for that specific location.

The idea will be as specific as it needs to be in order to distribute the funds. What is not going to happen is that Arnie Morton is not going to say, "I would like my information to be as follows." They are going to receive a code and that is the one that they are going to use.

In addition, you as the cardholder are going to receive a code, too. You don't get to choose your credit card number, nor do you just use your name and your address each time.

I guess what I'm driving at is this. There is an organization that is responsible for cleaning up this mess. I have been dealing with databases of music information in addition to

my desperate attempts to try to figure out classical music for years.

We have been dealing with this for the long, long time and it isn't easy. But what makes it even more difficult is decentralizing it in such a way that every service is responsible for reproducing the same information. The smaller the service, the more onerous the task. It means that each individual organization needs to punch in all of the information that you are describing.

We find ourselves actually typing text off of the backs of CDs. They frequently use typefaces intentionally difficult to read because they are trying to be cool.

So, as a result, we end up trying hard to get it right and getting it wrong.

My proposal is this: We have an entity that exists that was created to in order to facilitate this industry. That is Sound Exchange. They have an opportunity to provide a central database of this information. They have an opportunity to provide unique identifiers that will get down to the level of what it is that you are describing, Patricia, and that is needed in order to properly distribute the funds.

Then even smaller organizations that don't even do this using computers and software will be able to generate reports that make sense in a concise fashion and that are not ambiguous. So, that is what I had hope we can try to achieve here.

MS. PETERS: Thank you. Jonathan?

MR. POTTER: Alex, thanks for the lead-in. I think that the America Express example is useful because American Express has two sets of clients. Their clients are the consumer who carries their card and their clients are also the restaurant that needs to get paid.

It strikes me that Sound Exchange is sitting between two Recording Industry Association lawyers. As independent as they may suggest that they are going to be, the Sound Exchange partner still hasn't spoken. The Sound Exchange officers or however they are called, they are a wholly owned subsidiary of only side of this table. Their job does not seem to be, "make this easy for both sides. Make this work for both sides."

So, that is a striking example of whatever one intends, and whatever one intends the facilitative activity to be, it doesn't seem to be in reality, in practice, occurring.

Second is the interesting distinction between small stations and non-commercial stations, public stations, college stations and larger stations that has been provided by the recording industry.

In one sense the suggestion is that larger, more popular stations, if you will, many of which are represented by the Radio Broadcasters Council, might play the same number of songs over and over and over again. Well, then sampling might work really well for those folks. But they could also afford to do more.

But sampling might work really, really well for those folks. Okay, now let's move aside. Let's move over to the college stations with the very diverse play list, so revenue streams to individual artists are small which requires them to track them more closely, but they can't afford it.

We have a real problem here. The guys who were playing the music, which is really diverse, to create, hopefully in the aggregate, modest, reasonable, maybe ever-growing revenue streams for the smaller artists, people who are promoting the smaller artists, can't afford to build a data base, are using volunteer time.

I've got to tell you, if I'm a college radio station or a non-com at WCB or somewhere else, you know, and a volunteer comes in and wants to work at the radio station, he is a volunteer.

Saying to the volunteer, "Here, listen through the headphones and type eight hours a day. Have a nice day. Thank you for volunteering. We'll see you later."

That just doesn't cut it. So, we have a problem. Now, my understanding, and anybody can correct me if I'm wrong, is that in the CBP with Sound Exchange there is a waiver of reporting requirements for companies that have under ten employees.

My guess is that the Harvard Radio Stations has under ten employees. My guess is a lot of small webcasters, commercial or none commercial, community broadcast or otherwise, have under ten employees. They might have a lot of volunteers. They have under ten employees. I promise you.

Now how does that permission or waiver of the representing requirement, with their extraordinarily diverse play list that needs to be aggregated in order to get any revenue streams to the small and medium-sized artist who clearly deserve it. Jive, with a total waiver.

It's like they are trying to inflict to those who can afford it to make up for the waivers of those who can't. So, how does this all fit together?

MS. PETERS: Do you want to respond to that?

MR. MARKS: First, I'm interested, John, to hear you take up the charge for the non-coms. I didn't think there were any new members.

MR. POTTER: He's a nice guy.

MR. MARKS: I guess so. We've got a very simple response to the NPR.

MR. KASS: Who is "we," by the way? Who are you speaking for again?

MR. MARKS: I am speaking for the RIAA right now.

MR. POTTER: And it's wholly owned subdivision, sound exchange?

MR. MARKS: I think Trish explained that very well. If you want to address that, I can address that in a second. But I think the more important issue is that with regard to NPR, if everybody here wants to live with the rest of what is in NPR, let's call it a day and I'll go home. Do you want to agree with that right now?

MR. POTTER: I frankly haven't seen the NPR agreement, except I know there is a waiver of the record keeping requirements which is the subject matter of this roundtable.

MR. MARKS: Okay. If you want to agree to the rest of it, we can all go home.

MR. POTTER: Agree to the rest of what?

MR. MARKS: Given the confidentiality agreements that are part and parcel of most Sound Exchange or RAIL agreements, and given the fact like it is not like you are sending it out -- I don't see the handout, Gary. You might have it.

MR. POTTER: I would certainly be interested in seeing it.

SPEAKER: How condition we discuss it until you give us the handout.

SPEAKER: What are the reporting requirements, since we are discussing the reporting requirements.

MR. GREENSTEIN: Let me first say that the NPR- RIAA agreement, is, as are many

agreements that you read about in the Wall Street Journal, the terms of which are not disclosed. It was subject to a confidentiality agreement and NPR has said that they will not -- and they were asked by a board member to disclose the agreement.

I think the point that Steve was trying to make and it is a valid one and it happened in the car and it seems to be happening here. It is that people hear a little nugget about an agreement and then they want to bootstrap on to that agreement without looking at all of the other terms and conditions of the agreement.

MR. POTTER: Can we get an answer whether there is a waiver of the reporting requirement in your agreement with NPR?

MR. KASS: What do you have to hide?

MR. POTTER: What is the scope of the waiver and how many stations get covered by the waiver and how does that differ from all the other non-coms.

MR. GREENSTEIN: As I was saying before I was interrupted, what people are trying to do is to bootstrap on to some provisions thinking that that is all that is required without agreeing to everything else.

I think what Steve was saying was that if you were trying to do the bootstrapping, let's forget about that. But if you were willing to, sight unseen, because if you believe that NPR got a better deal.

(Laughter)

MR. POTTER: You know, you guys are specialists in sight unseen and one-sided confidentiality clauses. We see that in other contexts. Is the answer yes or no? Is there a waiver of reporting requirements for the public broadcasting stations and how does that differ from anybody else in this room?

MR. GREENSTEIN: I don't think we need to be responding to those kinds of accusations, John, and I don't think it's helpful.

MR. CARSON: Let somebody else ask the question. First of all, is RIAA bound by this agreement not to disclose?

MR. MARKS: Yes, we are. So, we are not in a position to reveal anything today without getting a confidentiality waiver.

MR. CARSON: Is there any reason to think NPR would object to that disclosure?

MR. GREENSTEIN: Yes. Denise Leary from NPR, I had a discussion with her. When she was asked by a board member of NPR, and I'm not sure if they are in the audience, wanting to disclose that deal, NPR's response was that they are not prepared to disclose terms of a confidential agreement because they believe that when they enter into an agreement and if they are then put in the position of making it public, then it calls into question whether or not a deal with them in the future can be confidential.

So, private parties frequently enter into those types of agreements.

MR. CARSON: Is anyone from NPR here today?

MR. MARKS: I think to clarify Gary's response, it is that we really don't know.

MR. KASS: I have news for you, an agreement, at least for reporting requirements, is on the Internet. I've got a copyright here. I would be happy to give it to you and you can mark it and enter it.

MR. MARKS: That was unfortunately made available on a website that was supposed to be confidential.

MR. CARSON: I gather I just heard an acknowledgement that what Fritz is holding in his hand is accurate?

MR. KASS: It's absolutely accurate. It's off of the CPB/NPR website. I would be happy to give you a copy of it and enter it into the record.

SPEAKER: We could even make it a handout.

(Laughter)

MR. KASS: I'm sure you will be happy to know that you are absolutely right, Jonathan. Surprise, surprise. One size fits all for RIAA and under ten employees, very limited or not reporting.

MR. POTTER: Why don't we send that up for xeroxing distribution and putting in the record.

MR. GREENSTEIN: What was disclosed on the NPR agreement was, as Steve mentioned, was intended to be for NPR stations alone. Notwithstanding the disclosure, I will comment that that is not the entire agreement. It is not all of the provisions. As I mentioned, it is attempting to bootstrap on some provisions without acknowledging all of them.

If everyone wanted to agree to all of those provisions and just go home, that was the proposal. But to just talk about one issue that is in a complex agreement that was negotiated at the insistence or urging of the CARP, we think is inappropriate.

MR. KASS: Stop. For all I know you have 27 times the value you should have got because you agreed not to have reporting requirements. But don't you agree that it is pertinent for us to know if you didn't insist on reporting requirements for the folks who were affiliated with NPR? Doesn't that tell us something about how crucial it is to have reporting requirements for the other folks around this table?

(Applause)

MR. POTTER: First of all, there are very detailed reporting requirements in there. I can say that and still feel very comfortable that we are not disclosing anything confidential.

I can tell you that we will speak to NPR or discuss internally making that available, maybe in an in camera review to you or publicly.

MR. CARSON: I'm not sure we can do it in camera. We'll think about that. But you can certainly tell NPR that we would be grateful if they would waive that.

MR. POTTER: We will discuss that with them. I mean there is a confidentiality agreement and as much as John wants to make fun of those, those are typical. I think virtually every company here that enters into contracts that relate to their business usually have confidentiality clauses.

MR. POTTER: But we don't usually go to the government and ask them to impose other terms on other parties merely because they didn't get a sweetheart deal.

MR. GREENSTEIN: David, if I may just say that if the Copyright Office is going to be asking two private parties to disclose a confidential agreement that they may feel is relevant, that the Copyright Office consider asking all of the webcasters who file comments for their confidential agreements with service providers, for ACAMI, for streaming service providers -- let



me finish -- what their deals are with companies such as RCS Selector, with Microsoft and RIAA, to talk about what they are paying for the technologies to be in this business, what they are paying for access to data bases, what they are paying for access to clips, what they are paying to be able to link to Amazon or what those arrangements are.

We feel it is a little unfair to put the spotlight solely on the RIAA when there are many other agreements that exist in the marketplace that are confidential that relate to what companies pay for that provide.

And if companies are investing hundreds of thousands of dollars, DEMA put out that notice yesterday on the Hill about what companies are spending. I think it would be helpful for the Copyright Office to also know what those companies are paying to be in this business, to get at the issue of whether or not this is burdensome.

MR. POTTER: When the Copyright Office gets in the business of regulating industry in any of those subject areas the Copyright Office can ask for relevant documents.

When others go to the Copyright Office and ask the Copyright Office to impose regulations on business and suggest what is necessary and required in what are arguably sworn statements and suggest what is necessary and required in what is arguably sworn statements and implicate that or try to impose that on the rest of industry, whether the industry or the rest of the entities, whether they are commercial or not, commercial, public or otherwise, tax supported or not, and have secret agreements that happen to pop up on Web sites that other people find, that is an unfortunately circumstances for you.

But I think you have to answer the question. Yes or no, did you waive all reporting requirements for any subset of stations, what is the volume of those stations? What is the volume of those stations and did you also offer a looser set of requirements and another increment for perhaps modestly larger stations and what is the level of requirement there?

MR. MARKS: I think we have already said we can't answer that right now.

MR. POTTER: What do you have to hide?

MR. MARKS: We have already said we can't answer that right now.

MR. POTTER: Yes or no?

MR. MARKS: We abide by the confidentiality and other provisions of our agreements. We can get into whether some of those around the table are abiding by, for example, some of the terms of the statutory license. We take our legal requirements very seriously, so we cannot at this point do that.

I would like to respond to the last comment. I think the way it was characterized really crystallizes a certain burden shifting issue, that it is us who are imposing something. For every entity that operates under the statutory license, they do so knowing that they are going to give certain records of use. Everybody here knew that. This is not something that is being imposed later or retroactively.

Indeed, there were interim regulations that existed at the time that arguably gave very detailed notice of what at least existed at that time with regard to certain services.

The entities at this table, despite that obligation, despite being in operation for more than three and a half years, never made any proposal about what kinds of records of use should be made.

So, the burden is not on us to impose anything, okay? It is a condition of a statutory

license, a condition of law that exists and it's an issue that needs to be resolved by all of the parties together.

MS. PETERS: Thank you. Actually, that is a good point. Statutory licenses typically are more onerous than negotiated licenses and actually they serve as kind of an incentive to reach negotiated licenses.

The list that I have now is Michael, Bruce, Kevin, Jenny, Fritz, Elliot and Barrie. Mike.

MR. PAPISH: Thank you. I'm going to go back a bit and then go forward and respond to some comments. I'm going to underline all this by saying that I think everything we talk about should be looked at in the sense of how this actually operates. I think we speak in theoreticals very often and in reality this is a specific issue with specific stations and specific songs. We are sort of looking at some cases in a very theoretical light, I think.

To begin with, I'm going to get some background on college radio stations, how they operate and to respond to some of the comments that the RIAA brought forward about reporting and how much reporting they have been doing.

College radio stations in general, WHRB falls on the end of a larger station with a larger budget and more people.

But in general their programming falls into two kinds of categories. One is pre-programmed shows. These are shows that are thought out ahead of time, programmed and that is what you see on WHRB's play list that you commented on. You actually put in your reply comments at the letter N which you can find in the record.

That only takes up, actually, in WHRB's case, a very small amount of programming and actually for most stations, none at all. Actually, it is only WHRB's classical programming and you can imagine for a college radio station that there are a small number of college students interested in classical music. There are some, but it's a small amount of programming which occurs.

The second type of show is a free flow show. This occurs where a DJ basically picks a large mail crate of records, goes into the studio and plays them in real time succession with no plan or thought ahead of time and no record keeping or logging as to what they have played.

In WHRB's case, 77 percent of our programming or 130 out of the 168 hours every week are for free flow shows. So the reporting that you see in our play list guide is from those remaining 38 hours. That's all we are reporting.

The reason why we have that information is because we have gone and catalogued this, only our classical library. So, out of our 750,000 sound recordings, only 47,000 do we have information on. We have been doing this since the 1960s. We have been trying to enter information about classical music since the 1960s and only have 85 percent of our classical library catalogued.

We began in the 1960s using punch machines actually, large mainframe computers. We have been going at it since then and we still have a small amount of our catalogue actually in operation.

So, to begin with, that's two ways the college radio stations broadcast.

Another important thing which has been brought up is that there are logs of what we call top 30s, top 20s, information that radio stations keep as to the amount of material they are playing most often.

This normally comes from a small subset of music, new releases. At WHRB in the rock department we put on a group of about one thousand sound recordings into a heavy rotation for about the first three to four months that it comes out. We have record keeping of this that we can report to the college music journal every week what we have played and then we report to them as a top 30.

So, one example, and I'm trying to look for a solution here for a real world situation, is to look at the college music journal and the information that they are collecting from college radio stations about how often they are playing songs and what they are playing most often.

They give you a list broken down by different genres from one to 100, the number of spins a record has and where it is on the play list from week to week. It would seem like this information would be really useful for determining in a sampling way the way to distribute royalties for those artists that are getting a large amount of plays.

We still submit that for sampling purposes at WHRB the information not in heavy rotation, the things that make up the bulk of our 70,000 to 90,000 unique sound recordings really, we share very little commonality, I think, with other stations. Those are not being played very often.

I think even in a sense, you are going to find those artists are not going to receive much money. Again, I think that sampling is going to be the correct way in order to keep the burden down.

I've estimated in our comments that we filed with the cadre office that the burden for creating a digital service to understand and track all the information that WHRB has is going to cost between \$100,000 and \$150,000. This is to distribute \$500 annually. We believe that the burden there is just tremendous and that there is no way that we can really comply with that.

MS. PETERS: Bruce, yes.

MR. JOSEPH: Thank you. I think I'm going to find myself going both backwards and forwards also and I hope I don't run into myself in the course of that activity.

First, actually, I'm going to respond, at least I hope and it's always at some risk when one responds to an expert, to the Register's comment that it's not uncommon for statutory licenses to be more onerous. That's sort of chilling thought to me as we sit here with a Congressionally mandated obligation to figure out what's reasonable and appropriate.

Our job here is not to put the thumb on the scale and your job here is not to put the thumb on the scale so that people will go off and try to negotiate agreements.

Your job here is to figure out what is necessary and reasonable for the function we are talking about and that is particularly true in this case where I think Congress made it very clear that in enacting this particular statutory license, which, of course, was not a statutory license enacted after the fact where a right had been long-standing and existing in the law, but rather where a statutory license was enacted as part of the overall legislative balance that said this right is going to be created in the first place, then it would be very wrong to do anything other than decide what is reasonable and necessary for the purpose of performing the functions that we are talking about here.

Second of all, coming back to reasonable, there's just a couple of points about commercial broadcasters as opposed to non-commercial broadcasters that I would like to make. As John said and as Jenny said when she was speaking, for most commercial broadcasters that is precisely the circumstances where a sampling would be most appropriate.

Let's put all of this in context for radio broadcasters. We start with the dog. The dog is over-the-air broadcast radio. Then perhaps we get to the tail, although given the relative size of audiences and importance, I submit it may be more the hair on the tail and that is streaming.

Now we are talking about record keeping requirements relevant to streaming. I would submit that if you impose burdens that are large with respect to record keeping requirements for the hair on the tail of the dog, you are now at the level of even below a flea on the hair of the tail of the dog and you've got to keep that in context.

When you are thinking about what is reasonable, you don't want the record keeping requirements to drive the radio broadcaster off of streaming on the Internet. Remember, its primary business is radio broadcasting and the Internet activity is an ancillary activity at best.

That, I think, brings me on the going forward point. I think given that this panel was supposed to be about the facts that are necessary, Patricia started down this road and some others have picked up.

I want to make some comments that first put it in context and then get down to specifics. There are different functions, and Patricia, I thought, did a very interesting job of commenting from both functions together.

One of those functions is the identification function, identification of the performance. The other function is the distribution function. You should not confuse or conflate the two. They are different functions.

If you want an example of how they are different functions, you should look at footnote 41 of RIAA's reply comments where RIAA says, "We are not going to give our database to the services. We don't want to give our database to the services. That is proprietary information."

But they also go further. They say, "We don't need to give our database to the services because the only requirement, and all we are talking about here is identification."

So then you need to look at the question of what is necessary for identification. Distribution is different. Distribution is the responsibility of the designated agent. Identification is what reporting is all about so you can tell what sound recording was performed.

Now, I'll give an example. Perhaps I'm not articulating it well, but if you look, RIAA says, "All we are really talking about here is identification."

But then you look at their argument for why they need P-line copyright owner and you look at Patricia's arguments for why she needs to know who the background artists are. They say, "Well, how do we know who to distribute to?"

The answer there is simple. You know who to distribute to because once you have identified the sound recording that is performed you have your own database to tell you who to distribute to. You are not going to rely on my listing of the background artists to decide who to distribute to.

RIAA and Sound Exchange isn't going to rely on my identification of the copyright owner off of a P-line from an album. That changes over time in any event. They will have their own records and they have even said in Footnote 41 that they have their own database. That's what their database is for.

So, all you need and all we should be reporting is that which is reasonably necessary for identification. Now, what is reasonably necessary for identification? We start with artist. We start with title of the sound recording. We'll give that.

Well, what's next? The next most significant point on unique identification is album title. I would submit that even in Patricia's examples of multiple recordings on different albums, once you have artist, title and album, you have a unique identification.

Now most of the services before you have said they are prepared to the extent they have album, and by the way, there is an issue with album, to give artist, title and album.

Radio broadcasters have come to you with a specific problem and that is that they typically and often get the sound recordings on promotion lists before the album information is available in many cases. Their business traditionally -- remember we are talking the hair of the flea on the tail of the dog -- has been to not track album information.

So, then you have to look at the question and RIAA has brought you no evidence to show why they need more, of how much, what the marginal cost and the marginal benefit of reporting more than artist and title is. How many sound recordings can you properly identify with artist and title alone?

The answer is, I submit, is the overwhelming majority of sound recordings. There will be some, yes. You know, Prince will go off and record 1999 a second time with a different copyright owner. But there are ways other than actually reporting album title to figure out how to distribute. You can look at proxies for that. But bottom line, artist and title give you the overwhelming majority of what you need to make the identification. If you have album, you have locked it; you've got the identification of the sound recording.

Distribution, picking up on what Alex says, it doesn't make sense for thousands of services to be reporting possibly erroneous, possibly accurate information for the purposes of facilitating distribution. That's what the agent's database is for. They have that database. They are the agents of the copyright owners. They are the agents of the principals.

Let's have it done once or, if we have two agents, let's have it done twice with the principals of the agents who have the information. They know who the band is. They know who the background artists are. They know what the catalog number is. They know what the UPC code is. They know the release year. Let them give the information to the agent and then all we then need for distribution purposes, all we need then is enough to make a reasonable level of identification. I submit that that is artist and title, with album behind that.

(Applause)

MR. CARSON: Just so we are clear, I just want to make sure I understand what Bruce is saying on behalf of his clients. I am hearing from you that your clients would find it acceptable to be required to give artist and title information for each performance that is played; is that correct?

MR. KASS: On a sample basis.

MR. JOSEPH: On a sample basis. That takes me back to the position that I started with. For radio broadcasters, sampling is enough and should be enough. If you look at RIAA's comments talking about where sampling falls short, it's not really in the radio broadcast context.

So, on a sample basis, yes, their position was artist and title. That, by the way, if you ask the people here who work in radio, is typically what radio stations have traditionally tracked for their primary business, over-the-air radio.

MS. PETERS: Before we go to Kevin, I'm going to ask over here, do you want to respond?

MS. KESSLER: Yes, I would like to say a couple of things. First of all, it is the licensees, it is the services that are in control of what they are performing. The Sound Exchange is not in

control of that information. So, anything that they are performing would have to be reported to the Sound Exchange.

Inasmuch as there may be a matching exercise between what is reported and what we have in our database in order to effectuate payment is a different matter. We don't know what you are performing until you tell us what you are performing.

The other thing is that the Sound Exchange doesn't have some magical database that can do all of this instantaneously. We need to receive in a standard format the notice of use. We believe that vendors in the marketplace will provide the solutions to the data that we need to effectuate payment. We believe that there are vendors in the marketplace that provide scheduling software, audience measurement and so on, that can step into this space and provide this service.

The Sound Exchange, you know, doesn't want to be in the business of cleaning up your logs. We would like your logs to be reported perfectly. And for us, we have to expend the resources to differentiate one sound recording from another based on the limited information that we were given in the original determination.

We spent an entire year cleaning up historic data. Now, we have some of it cleaned up, 20 percent of it we could not distribute because we could not differentiate one sound recording from another. That does not mean we will not distribute that money. It means that we need more time to conduct the research to find it.

In the meantime, copyright owners and artists who may become dependent on this royalty stream for their income are not receiving their money.

Now, it is in an interest-earning bank account and they will get their money at some point in the future. But just to summarize, the Sound Exchange believes, as we have seen with the preexisting services, that there are software and data solutions in the marketplace to bring this reporting conundrum to a solution.

MR. MAGHEN: The software exists. It's a question of the data that goes into the software. I am so happy to hear that you guys have a database. I don't care whether it is 20 percent or 80 percent accurate. If it is five percent there, that means that you guys are building something central that is incredibly valuable to facilitating this industry.

Let's share that process instead of saying that we are going to lob textual information over a wall which anyone in the information architecture world would say is a horrible waste of mutual energies.

(Applause)

MR. GREENSTEIN: One thing I would like to say, and Alex, you made a point earlier to Jenny that for a small fee you will provide the information. We are not asking for a fee because we are not in the business. Sound Exchange is not in the business of providing data.

Ron Girtz, who is sitting in the audience, has a company and testified in the CARP about his Songdex Database with millions of sound recordings. That was in our filing and it was quoted. It is also part of the public record to the CARP.

If companies like Yahoo or 3WK or Beethoven.com was access to a database, I propose that the government not be in a position to take property that copyright owners may be paying for, because remember, a database, if one eventually exists, and as Barrie said, it does not exist, copyright owners are paying for that because it comes off the top of their royalties.

RLI, RCS, Loudeye, these are commercial enterprises, Muse, AMG, you can go and

negotiate with them to get access to data.

MR. MAGHEN: But we won't have the same numbers.

MR. GREENSTEIN: Alex, it is commercially available. I propose that when these regs come out there will be providers. Maybe Mr. Girtz wants to sign up clients today, because he does have those millions of sound recordings.

But I propose it is not for you to demand that some other party pay for a database that you may get to use. Leave it to the market because that's how these solutions will come about.

MR. MAGHEN: Tell you what, that's okay. That's fine. Let's do that. Mr. Girtz can get right here in the middle of the table as long as you guys and we and everybody else say that number, not text, that number that is used to identify uniquely a sound recording shall be accepted by everybody as the global identifier.

When you go to a store and you buy toilet paper, the thing that is reported, the thing that indicates the price is a UPC that the industry worked out together in order to avoid confusion. Let's work together to make that happen.

It's not an issue of the money Indian the cost. Maybe you are right. Maybe you guys shouldn't just do all the work and provide it to us. But can we at least arrive at a conclusion here that instead of passing text back and forth we'll all agree to a number. That is all I'm saying.

MS. PETERS: Bruce, you have spoken and some people haven't. I'll come back to you. The order now is Kevin and then Jenny and then we'll go to Frederick, Elliott, Barrie and back to Bruce and I see Cynthia. Okay.

MR. SHIVLEY: Thank you. As a small commercial Web caster whose entire dog is streaming, it may be just a puppy or it may be a freshly born puppy or maybe a not even born puppy, I don't know, but all we're really asking for at this point is to allow it a chance of being born, a chance of growing up to be a healthy dog. I think that's in everybody's best interest.

There are a lot of things I would like to respond to. First of all, in terms of the burden of proving exactly what sound recording royalties should be distributed to whom, you know, the way we look at it on our end, as a radio broadcaster, when I am the billing agent, when I'm billing a client it's my responsibility to install the billing systems and to pay for those billing systems and to set up a system by which I can keep track of what is owed to me.

It would be very unreasonable, and I certainly would not have very many clients if I asked my clients to keep track of the information that they owe to me and make sure that they are paying me. So, to start off with, I think that is an important distinction right off the bat.

In addition, it has also been suggested by our friends over here from RIAA that there are some stations out there that have varying degrees of auditing systems in place.

I would submit to any degree that any station, large or small, is able to report some information does not suggest that that information is required by the statutory license. The statutory license itself is not saying that it needs to go that far, that deep, drilled down into the data.

Our position as a small commercial Web caster is those that I have talked with and worked with in getting an opportunity to speak before this panel all feel that, are in agreement with Mr. Kass that it is the ASALL, the artist, the song title, and in some cases, the label, that would clear up everything.

If we basically provided this information, if you look at it, this is basically our inventory that

we are purchasing the right to use to build our business. We are purchasing it at a wholesale level, obviously. This inventory that we are purchasing, if I provide in any given reporting period, whatever that reporting period is, these are the pieces of music that I purchased during this time to use, that should be complete enough to be able to take that information, compensate the people who I purchased that information from and anything that I do with that information, if I am able to stream that to 100 people or 1,000 people or 10,000 people, that is my business acumen and my marketing ability, my brand name that got me that ability to present that before that number of people.

So, I'm simply asking for the opportunity and I think it is our position that the statutory license provides us this opportunity to purchase this at a fair market price that we can compensate the artist and the copyright holders for the use of that material as we see in our business model.

I would also like to point out, just because I felt compelled to respond as someone obviously streaming classical music with a graduate degree in classical music from a conservatory, if you ask me who the artist is on the Tannhauser Overture, I am not going to tell you Reichardt Wagner. I will tell you the symphony or the orchestra that is performing. I could probably even tell you the conductor that is doing it. This is information that all of our live D.J.s that are taking requests on a live basis, playing music on the fly very often have and can keep track of this artist, song title, album and label.

SPEAKER: But your precursors in the preexisting services didn't and weren't as sophisticated as you and a lot of people aren't as sophisticated.

MR. SHIVLEY: Well, that may be. I can only speak for my company and what my company's ability is to do.

MR. MARKS: Unfortunately, we are talking about a statutory license and that means a one-size-fits-all. That is part of the problem here. If, for example, you were in a position where you thought that, well, gee, the requirements here, I can give better data at lower cost or something like that, you would have the option to negotiate outside that.

We are collecting data not just from you, and believe me, we wish everybody was like you in terms of being able to get that kind of data, but it's just not the case. That is just one of the realities of a statutory license.

MR. SHIVLEY: Well, I would suggest that a statutory license does not suggest that it has to be a one-size-fits-all. A statutory license could indeed have different levels for different categories or different opportunities based on whether or not it's more amenable to the broadcasters to provide a sample because it fits more into their business model.

I don't think that the statutory license suggests anywhere that it has to be a blanket approach to anything. In addition, I would also go so far as to suggest that the government would put us in a position that we would have to go out and spend more money to hire or to contract systems to get the information.

I have to ask these companies, where are they getting that information. I can only assume that they are getting the information from the information that the copyright holders are providing with their recording.

I mean, the copyright holders are printing that information on the CD or whatever, as you pointed out in your exhibits and your comments. So, you obviously have that information at some point. Whether or not you are communicating between the people who are printing the CD and Sound Exchange is another matter. But that information is certainly being provided at



some level by the copyright holder and the record label.

MR. MARKS: But again, you need to know what you are playing. Even if we had a database that had all that information, it wouldn't tell us anything about what you are playing. You still need to provide us enough information where we can.

MS. ATKINSON: But 22 pieces of information? That's what we understand.

MR. SHIVLEY: I think we just offered to provide it.

MS. PETERS: I am just going to say, I heard three or maybe four elements. We haven't got to one of the absolute critical pieces that you have to have in that question. But I think that yes, you did agree that you have to tell him at least what you are playing in sufficient detail. The question is, what is sufficient detail.

MR. SHIVLEY: I mean if I am purchasing inventory I have to have a communication with the person I am purchasing that inventory from of what that inventory is.

MR. KNITTEL: Marybeth, Sound Exchange and RIAA does have such a database that was mainly created off of the residential license agreement and mainly created in part by DMX Music and they have a database that has 12 parts to it in which they, by their own request and the kindness of the hearts of DMX have expanded by three areas.

We can go through that chapter and verse. I can tell you, I have been contacted personally by someone representing the RIAA saying that they have such a great database they are trying to "commoditize" it and would I be interested in buying it.

I said I would be, but I damn well would consider it my intellectual property and I'd better get some money back for developing that database. I know I jumped ahead.

MS. PETERS: We'll come back. Jenny.

MR. KNITTEL: Call it exuberant youth.

MS. PETERS: We're delighted that you have exuberance.

Jenny.

MS. TOOMEY: First of all, two side points. First of all I'm concerned about the moment where you said, "Okay, John, if you agree to that we can take this thing out of the room," because that is exactly what this roundtable is not about. It's not about two people getting together and fixing this. It's about making sure all these points get taken.

So, I just hated hearing that, even as a joke.

MR. MARKS: That wasn't my suggestion either.

MS. TOOMEY: Well, the second thing is with regard to the flea on the dog, which is too great a metaphor to let pass, we have to remember that the flea carried the plague.

(Laughter)

MS. TOOMEY: Just to assume that the dog is the only dog in the room now doesn't mean it's going to be the only dog in the room in the future or even if there is going to be a dog. There might be a whole lot of fleas living in the room and we might like the fleas.

I just want to emphasize those two points. That's why it's so important that we listen to what the webcasters need, which goes to my overall point which is we don't want onerous reporting requirements.

We want the broadest diversity of webcasters and actually suggest the creation of three and four different licenses that would allow that to exist in this testimony. It's not testimony, but we wrote up some statements that we'll hand out.

We have to keep in mind what the ultimate goal is here. That is the most information collected most accurately within reason. Having that information benefits everyone so the burden can't fall just on the webcasters who are creating the database. It can't just fall in Sound Exchange and I think the whole idea of what Alex is saying is that everybody needs to get together and build the automation database which really isn't a luxury.

If there is one thing you come away with today, you shouldn't be asked to choose between access to an audience and the ability to get paid. Those are not mutually exclusive things. Right now it's food and water. We need to figure out a way to build something where they can get the right amount of both.

I emphasize that the automation would ensure compliance. If you actually look at the kind of people that are volunteers that work at radio stations, a lot of people call them train spotters. They do it because they love the music and they love the artists.

I worked at WPRB at Georgetown and that station only played to the cafeteria. I would spend two hours programming a station that some people who were eating at two in the morning might have heard.

The point I'm making is that if there was a system in place the DJ's could trust that was easy to use, there is no question in my mind that they would rush to put this information. Can I look at the singles for a second? Look at these singles, they have notes about why these songs are great written on them by the people who were playing them.

In every single small radio station that I go to, they have these notes. So, the idea that these people wouldn't type in three bits of information to an automated database is wrong. Will they be able to get 90,000 things in 12 weeks? No, they won't be able to, but we start with what we can do. We start with the biggest database we have and then we begin to add to it and we have some way to authenticate it.

The final thing I want to say is who is responsible. Is it just Sound Exchange? I don't think so. It's probably everyone. If they have the best database, they have a huge incentive of actually building this because they will actually be using this data and they are asking for all these categories. So they have a real incentive to do it.

I want to say also disclosure, Future of Music is on the Board of Sound Exchange, as is AFTRA, as is the RAC and the AFofM. We are all working together to try to make it more of a representative organization. That said, this is not a very good showing. This will only get fixed when the perception is removed that that organization is within the pocket of the industry.

Thank you.

MS. PETERS: Fritz.

MR. KASS: Well, I'm delighted to hear that Jenny is from college radio and I think she has in many ways described the 700 to 1,000 college radio stations that are out there with a \$9,000 average budget and \$500 annually invested totally in webcasting.

So, at this point in time the regulation or lack thereof and a system that can be purchased and utilized by volunteers, student volunteers like Jenny for \$500 a year stands between us and our free speech and our educational opportunities of the sons and daughters of America.

It's very, very critical that these things be so simple that a student volunteer can in fact

comply. We have been doing it for years. This is the second time the intercollegiate broadcasting system is at the table. We were here with 118. Fortunately, we and the small broadcasters weren't excluded from the rate process in 118.

But the bottom of the line is we have the history. It worked. Under 118 we have a sampling. It's set up in 235.5(e). It works. It's affordable even by college broadcasters and volunteers that may only be broadcasting to their cafeteria, but also have the educational opportunity to learn how to stream, to learn how to use the Internet, to learn how to focus on the different technologies that are involved.

It would be a very, very, very bad mistake to put hundreds of college broadcasters off the air and not allow hundreds more to come on the air because the rule-making and even the rates are just too much for a station that's got \$500 a year to spend.

I also am very happy to hear about the possibility of RIAA sharing the CPB agreement because the Copyright Office, as you know, is required to consider private agreements when you're setting reasonable rates and reasonable regulation. And so it would be very helpful if those agreements weren't secret, especially when they're involving public funds, which the CPB agreement does.

MS. PETERS: Elliot.

MR. MAZER: Hi, I'm Elliot Mazer. I'm also from college radio.

MS. PETERS: All right.

MR. MAZER: I helped found two college radio stations in the New York metro. I also produced records for many years. I'm a copyright owner and holder, and I collect royalties. But I am really a -- with radio -- radio computing services and our goal is to help the radio stations, the webcasters, comply with whatever changes are created by this new law.

We're not taking any position about the data. We have over 3,000 clients using our software scheduling product in the U.S. And Selector is a database management program, like Access of Sequel. It's not a -- we don't supply data, we supply a tool to many of the broadcasters. In fact, in this room we have a representative from Clear Channel, who is our biggest client in the U.S. We have many other clients on either side that use our software.

And we have -- our commitment is to help our clients modify the software and make it as easy as possible to comply with new database requirements. We have a product that, in fact, is used by Barry's company, DMX, called Selector Enterprise, which is an enterprise-wide database product that consolidates the songs from many, many channels. And this is the beginning of a product that can allow an easy reporting system.

Our idea is to sell a Selector Enterprise database with Ron Gertz or with SoundExchange or with a body that's defined, and help create a massive database that radio stations and webcasters can reach through the Internet and how that database and our tools do the matching and create the required reports.

MS. PETERS: Thank you.

MR. SHIVLEY: Am I hearing this correct? Am I hearing that you have these systems that you've worked with DMX to build a database, which worked with the RIAA to build the database?

MR. MAZER: Yes, sir. No, no, no. DMX uses our scheduling software to program their many, many channels. We have -- they have another product that runs on top of that that consolidates the data within the DMX systems --

MR. SHIVLEY: Which the DMX systems were built in coordination with the RIAA.

MR. MAZER: I don't -- I wouldn't be able to answer that question.

MR. MARKS: No, that's not correct.

MR. SHIVLEY: Well, I thought that's what we --

MR. KNITTEL: It was built as a reporting mechanism under the residential agreement in accordance with the guidelines from the Copyright Office.

MR. MAGHEN: Again, it's important to distinguish between the software and the data.

SPEAKER: Absolutely.

MR. MAGHEN: And that the key here is not actually how many wonderful pieces of software are out there that allow you to generate reports. The key is how can we actually make sure that we're all speaking the same fundamental electronic language.

MR. POTTER: With the fewest words possible.

MR. MAGHEN: With the fewest words possible.

MR. MARKS: You know, it may be possible to see if DMX will make its database available to everyone here for a fee.

MR. MAGHEN: Would you guys -- let me ask you this question. Hold on, let me just ask this question. If -- I know that DMX has keys, they have database IDs. If there was, and I -- forgive me for not knowing exactly, but if there was, in fact, an entity in your database that equated to the industry- understood sound recording --

MR. MAZER: There is.

MR. MAGHEN: -- would you guys be willing to say that if we reported and said whether it was -- we'll get to the issue of whether it's sampling or not, whatever, that X-number of plays of a given song -- song -- actually identified by that number, would you guys be willing to say that would be a clever and clean way of providing the information that you need? Because that would be great.

MR. GREENSTEIN: Alex, I -- and Barrie can address this, but I think what you're asking for is something that is impossible to create due to the large number of copyrighted works that exist throughout the world and that can be performed.

MR. SHIVLEY: But how could we create it?

MR. MAGHEN: Yeah, but how can we create it? So we should create it a thousand times over?

MR. GREENSTEIN: Actually we're not asking you to create a database of all the works in the world. We're asking you simply to report what you play.

MR. MAGHEN: We're . . . . .

MR. GREENSTEIN: Alex, no, there is a big difference. Harvard Radio made the statement that they have 700,000 -- 750,000 works. We're not asking for all of that data. They perform 70- to 90,000 in a year, that's what we're asking. They are in possession, Yahoo's in possession, DMX is in possession of what you play. There is no universal database .

MR. MAGHEN: So let's make one.

MS. ATKINSON: No, that's retroactive when you play them; is that correct?

MS. PETERS: Well, no, that's going to be another question.

MR. JOSEPH: Let me ask Elliot his experience. I mean, Selector even today has a number of fields for any given performance. But I ask Elliot what in his experience radio stations have traditionally and typically tracked with respect to any given compositions? Title and artist, right?

MR. MAZER: Yeah. The radio stations -- and this is -- the tradition of this creates a problem for creating a universal database because every radio station that adds a new sound recording to their library manually enters two fields: The name of the song and the name of the artist. They do not use the timing supplied by the record company because radio stations adjust the timing for their own purposes, and that's it. Even if the radio station -- radio stations would like to add an album name, but most of the music that's received at radio today does not -- is not associated with an album.

There was an electronic distribution of a new release recently by one of the major labels and I think it's the first time that a lot of meta data was supplied by the radio stations to a broadcaster or to the broadcasters. And I personally see from our relationship with the radio stations and the labels the possibility that the labels will start delivering more data to the radio stations, which is helpful. And our systems will help deal with that, but it certainly doesn't answer the big question of how you deal with every sound recording prior to these new changes.

MR. POTTER: Elliot, are you saying that right now the entries are limited to artist and title of the song?

MR. MAZER: Oh, no, there are 26 fields I think in Selector, but --

MR. SHIVLEY: But with stations in it.

MR. MAZER: -- but the stations and --

MR. POTTER: The stations enter artist and song.

MR. MAZER: That's correct.

MR. POTTER: The artist and name of song.

MR. MAZER: That's correct.

MR. POTTER: Then generates and output.

MR. MAZER: Yes.

MR. POTTER: And how accurate is that output?

MR. MAZER: In terms of what, sir?

MR. POTTER: Just the -- in terms of the aggregated -- for example, if I put in an artist and a song, what's the probability that your output from that would -- the other 26 fields or however many are in your system would be an accurate output of which album, which work, you know, what other -- what's the probability of that?

MR. MAZER: You know, it'll be accurate of which audio file the database is associated with. So if they add Neil Young "Heart of Gold" and connect that to an identifier in a digital database, it will report when it's played that it played that sound recording.

MR. POTTER: But what I -- hold on. Hold on.

MR. PAPISH: Elliot's software doesn't output other fields because you have to link it to another database.

MR. MAZER: No, our software can output any fields that the client wishes to, but at -- to emphasize the point that the tradition in the broadcasting industry with all 3,000 clients is that the only data that they enter are data that's related to the request from the RIAA would be the sound recording, the name of the song, and the name of the artist.

MR. MAGHEN: And how many times have they screwed up Puff Daddy and Prince? I mean, for God's sake, the number of artists who seem to be focusing on just how to make my life difficult is incredible. Okay, they change their names every week. This is -- I'm, of course, kidding because I love them all, but the point is that this is an incredibly difficult task. All the more reason why instead of each of us trying to do it individually, it makes sense to do it together.

MR. POTTER: I think because it's so difficult we need to have 18 fields of data instead of 2 so we could have better accuracy.

(Laughter)

MR. MAGHEN: Well, I believe that was sarcasm, right?

MR. POTTER: Oh, I'm sorry.

MR. MAZER: Because yes, that's exactly true, it just makes it all the more difficult. And I guess it's like this. You look at other industries. You look at the people who stock the shelves in a supermarket. I don't know how many product codes there are in the world of supermarket items relative to how many songs have been produced, but I'm guessing it's a big number and it's really complicated to separate toilet paper out from facial tissue. But somehow or another, because they want to make a lot of money, the entire industry -- the suppliers, the consumers, and the retailers -- have figured out how to arrive at a universal system for achieving this.

So I understand that that will take time. I understand that there may need to be interim measures to accomplish it. But why are we saying from the outset you know what, it's too hard. Let's keep doing this thing as confusingly as possible. Let's keep rolling it up on sheets of paper and faxing it to each other because that's so digital millennium to do it that way. I mean --

MR. MARKS: Alex, let's let the free market -- let's do away with the compulsory license and just let the free market work the way that --

MR. MAGHEN: No, bad idea. No, what I'm actually saying is that within -- I'm saying that within the context --

MR. MARKS: You never even tried.

MR. MAGHEN: I'm saying that within the context of the compulsory license we still have the wiggle room to allow just what you're saying. I'm not saying that we -- I think it would be great if the -- if SoundExchange, who is, in fact, responsible for the distribution of the royalties which is the purpose of this conversation, should be the source of that information. But I'm also okay with the idea that SoundExchange merely accepts a standard. That's also okay. What I'm not okay with is the idea that we all speak a similar, but not identical language as we will not properly be communicating with each other. Obviously that's an example that we can see right here.

But the problem is that in the world of technology and, more importantly, in the world of money that's what you need to be striving towards, is incredible clarity in communication. And there are experts in the world who actually focus on doing that all the time, and I'm not sure that those people are all represented very clearly here. So we should work with the people who know how to pass money and information around and work towards a solution that way.

MS. PETERS: Did you want to add anything?

MR. MAZER: There are -- if everybody in the room wrote down the name of the band Boyz II Men, I'd like to see, you know -- we at one time counted 46 different ways of writing that out. Manual entry at a record company or a radio station is the same: People make mistakes. I think the good news is that the recording industry, the labels that I know, that I see, are working towards the inclusion of good numbers and good database structures within the context of the CD itself. And it might be possible in the future for software to go put a CD in a machine and have a data record extracted from that CD that properly spells Boyz II Men and gives whatever numbers are required by the copyright owner for reporting. That's something I believe the labels are working on. I know two labels that really want to do that.

MS. PETERS: Thank you. Yes.

MS. KESSLER: Elliot, you know, there are many things that are possible in the future, but the situation that exists today is there is no such database, there is not a unique identifier for each and every sound recording that exists in the world, there is no central place to go and get the meta data for that information. The only thing that SoundExchange can do is receive reports from the users of the music and then we match it to our information to pay out that information. We don't know what you are performing until you tell us.

MR. MAZER: You have the same problem that everybody has basically.

SPEAKER: That's right.

MR. JOSEPH: The SoundExchange is the --

MS. KESSLER: Right. We don't --

MR. JOSEPH: The SoundExchange is the agent of the copyright owner. The easiest way to get the information that they need for distribution is from their principals who have that information, the copyright owner, not from the --

SPEAKER: But we still don't --

MR. JOSEPH: May I finish? May I finish? -- the services. I agree, the issue that we should be discussing and the only issue that we should be discussing here is not what is necessary for distribution and who the copyright owner is and how we figure out who the copyright owner is, it is what is necessary to identify the sound recording that has been performed with reasonable accuracy?

MS. PETERS: Okay. There are a number of people who are on my list and we have a couple of questions that we really do have to get through, and it is now 5 after 11 and we need to open it up to the general audience. So people on my list are basically Barry, Bruce, Cynthia, Patricia, and Wanda. So let's go.

MR. KNITTEL: Okay, great. Thank you very much. Steven, I will tell you, since you made the statement and it really doesn't have to do with today so I'll do 8 seconds and move on, I would gladly do away with the compulsory license tomorrow because I can feel the -- in the air, Mark Samino (phonetic) of Sony in this room, and I'd rather have him gnaw on me for a few hours a day and get a deal that we both can walk away from and don't like than have a third-party panel give me a deal that I can't live with.

That aside, I'm going to go around the room, a little left, a little right, and we'll mix this thing up a little bit. Came out of college, worked at a broadcast place, feel very much your pain. It's a great place for people to learn a lot about music and for people who appreciate music and I thank you very much for that.

I'm going to just talk about DMX because it's not my responsibility to put burdens on other people or to walk in their shoes since I have a pair of shoes that I need to fill for myself. DMX, if I could, is a mixture of two companies merged last year, May 18th, a company called AEI Music Network, Inc., and DMX Music, Inc. AEI Music Network, Inc., was founded 30 years young; first company to walk away from the term "background music," create the term "foreground music." And with that, started a deal with record labels -- I'm going to keep it short.

MS. ATKINSON: That's okay.

MR. KNITTEL: Okay, you looked at your watch. People look at their watch and fall asleep I think it's time to move on.

MS. ATKINSON: No, no, no, no, I was just calculating out.

MR. KNITTEL: Okay, okay, okay. Started by dealing with record companies and was the first company, to the best of my knowledge, in the world who actually secured license agreements directly with the labels and today, has license agreements with nearly 1,500 labels and distributes royalties to those labels every 6 months like clockwork. So I'm going to jump to one side that was mentioned before. If, in fact, we didn't pay royalties at that 6-month period and waited for 5 years, we would get a lot of cease-and-desists and cancellations. I'm not sure why the record labels and the artists feel that that kind of float is acceptable. End of that point.

Move across over here. "Sting Live," Tricia, feel a lot of your pain on this one, but "Sting Live" has an album title of its own. And it's very easy to pick up what that title is versus "The Rose" or anything else.

SPEAKER: Thank you.

MR. KNITTEL: And so, therefore, I think that shouldn't be a problem. It's interesting that when we look around at all the rights organizations, and, God, I look at them throughout the world, that they sell something that they don't really know what they're selling. Now you say I go into buy a car or toilet paper, I know what the heck I'm getting. I can get cheaper and it falls apart or I can get a car that runs faster, but I know what I'm buying. And I think it's not much for this group to ask the RIAA to tell us what we're buying or other rights organizations by giving us a database for which we can reply back to; a standard, systemized database that works for everyone that's paying under this compulsory license.

Now let's move to, as we go through the history, DMX started a residential service and under a court proceeding was told to pay royalty fees under that proceeding and to furnish certain information in a field that was agreed to by the Copyright Office. Those fields, I don't think, differ too much from what we're talking about here today, but if we take a few minutes and walk through we may be able to get through the crux of most of these problems.

Name of licensee? Doesn't bother me. DMX, Harvard, WHRB I mean, that seems to be simple enough. Number of channels? In our case we have a number of channels, so we'd say which channels they are. Track and title as it appears on the label? Doesn't seem to be too hard, that's the music we're playing; should be able to be tracked back by both SoundExchange and anyone else that's paying the royalties.

Name of the artist? We used to like to refer to them as "Formerly Known as Prince," that way we knew it was he. Puff Diddy, Puff Daddy, it all works the same for us. Album title? Now again, this is very interesting because we work so closely with the record labels. In many cases, such as radio, we get releases far before they're made available to the public. And we've taken that burden upon ourselves because of the way we deal with the labels -- both majors and, Jenny, independents -- that where, in most cases, on the independent side we get CDs, not



singles. But when we get singles we input the single information and then wait for the album to be released and then go back or if we get the album up front we put it in. So there is a piece where you go back a little bit later and that has not been a problem for us.

Marketing label is number six, and that's just, I guess --

(Recess)

MS. PETERS: Okay. We are starting and we're back to Barry.

MR. KNITTEL: Okay. And I won't go back to the very beginning, but we were talking about a reporting system that is in place already having to do with the residential side. And the last section that I was on was six, which is the -- what is referred to as the marketing label or the record label. Seven, catalog number, which comes from the album. The eighth is the ISRC code, which we don't give. There's software that you need to be able to give that and the RIAA has said that that's not a problem.

And I think when you have that kind of information it addresses all the needs of SoundExchange as well as all the other people in the room that should receive their royalties from their works being used. And I think that's the point that we want to make, that we seem to have a tendency to bicker or - over definitions of things.

When I looked at this the thing that came out to me most importantly was what are we here for? To get a uniform reporting system. We have a system that's being used in another section. Why shouldn't we keep that as being uniform? It addresses the needs of SoundExchange I believe, I'm speaking again for DMX; addresses the needs of AFTRA and its members; and above all, should get the royalties back to the people who's created the works that should be compensated for.

MS. PETERS: Thank you. We're going to do Bruce, Cynthia, Patricia, and Wanda, and then we're going to go to another question.

MR. JOSEPH: Thanks. I think what Barry was just saying highlights the fact that what works for DMX does not necessarily work for everybody else. DMX had a particular business model. They were created with that business model in mind. They built their systems around that business model. Others, particularly those that have streaming and recordkeeping as the flea on the hair and the tail of the dog, don't necessarily have that. So if anything I think should come through from the various discussions that we've been having here today is that one size really doesn't fit all. And that what we should be looking at is the minimum set of information that's necessary to make the identification, not some expanded superset of that information.

And the burdens beyond that should be placed where they economically, efficiently, and rationally belong. They should be placed at a single point on the group that is responsible for making the distribution. But beyond that, it's identification and one size doesn't fit all.

MS. PETERS: Thank you. Cynthia?

MS. GREER: Thank you. I wanted to make the point that, like DMX, XM and Sirius are in a somewhat different position. They, in fact, do have systems in place currently that they designed before going into operation and that they feel adequate and notice that is required of the statute. So they did step up to their obligation and create their own systems.

And this marketplace solution that Gary mentioned, XM and Sirius have both contracted with companies to provide their own solution. They shouldn't now have to go back out and purchase something else. And in XM's experience at least those marketplace solutions are often inaccurate, as well. Some of the vendors that Gary mentioned are providing inaccurate

data that the companies then have to go back and recode themselves having access to an approved database where all the information is accurate would be the most efficient way to handle the reporting.

MS. PETERS: Okay, thank you. Patricia.

MS. POLACH: I wanted to say that, first of all, I think one of the common grounds should be, and I think it is, that everybody does want there to be webcasting and people want there to be simulcasting, and artists want that and it's good. And it's good in a large measure because it gives some promise to the potential for diversity and more cultural and creative development and more cultural and creative appreciation, and that's good for everyone. It's good for artists and, you know, nobody I think really wants to create a system that is burdensome in a harmful way, you know. That is not what this is all about. And we do all want there to be webcasting.

And I also want to say that the comments about I guess what I would call Alex's visionary system, and Jenny, too, what you're talking about in terms of a single number, a technological solution, a new system, it is visionary. And it's always sort of wonderful and also a little scary when you when you have a visionary in the room. The notion of there being a new and complete data system that's there for everybody to use for all their purposes is a wonderful one and a valuable one. And I would say that not only do all the featured artists, you know, belong in that system, but also all the nonfeatured artists belong in that identification system.

But what concerns me, though, is that in between there and where we -- you know, how do we get there? And is this really a proceeding that can make that system, that new thing come into place? And I don't know that it is. And it seems to me that in the ideal world where we're creating that kind of system, it really almost has to be a cross-industry, multi- interested party effort. It's got to be, you know, the webcasters and it's got to be the broadcasters and it's got to be the copyright owners and the artists and the union, and everybody's got to, you know, work together if we're going to build something that is that comprehensive.

But what concerns me is not Alex's high level of vision, but the sense that for some people it just could look like an easy way out of saying, well, SoundExchange has this or SoundExchange can make something that's going to make it easy for us. And I want everybody to remember that what -- you know, in the real world right now, trying to actually get money out as soon as possible and for the artists to receive money as soon as possible we're sort of dealing with the less than perfect and not the vision. We just have what we have now and it is artists and copyright owners that are paying for it. Artists are paying 50 percent of, you know, the efforts to put together what we have now.

And I think in the interim and in the dirty real world, you know, I just want to make the pitch again for what we need to have. We have to have enough information to identify unique sound recordings. And Bruce, I did mean identify, I didn't mean to distribute. And I was very glad to hear Barry say "album title," because not everybody in the comments really acknowledge that album title was crucial. There was a lot of, you know, song title and artist, and it's an advance to say album title and that's important. And then beyond album title to the extent that there are more things that are needed to identify unique albums, I think that is important, you know. If it's Brahms First Symphony and that's an album title, but it doesn't tell us, you know, which symphony and which recording and which conductor, that, you know, that is not adequate. You know, Sting, yes, the "Sting Live" album has its own title, but there are going to be a lot of situations where things are not so clear and we just need enough so that we can do the distribution.

And I think if we're going to really live up to the promise of the diversity of webcasting, it's got to be information that allows us to distribute to all the performers that are contributing. You

know, if you sample data that is going to leave out the niche artists and the lesser known people and the up- and-coming people that really is not what the system is all supposed to be about.

So I guess that's my point, you know. It's easy to get sort of trapped in the, you know, one industry that doesn't like another industry and all the bitternesses and, you know, feelings and whatever of the big players, but down underneath it all there are the artists who are creating the art and, you know, got to fundamentally be about finding a way to get the money to us.

MR. MAGHEN: You know, because I don't want to scare anybody and I just want to --

MS. POLACH: And make us wonder?

MR. MAGHEN: I just want to -- you know, and visionary is one of the most terrifying things to be called when you're in, you know, product and business and technology. I just want to say this, I fully recognize that this is not something that one turns on tomorrow, and that if we want to achieve it what's incredibly important is there has to be a pathway for getting there.

And I also believe that based on what Steve said earlier today, industry-wise, somehow or other, this is going to happen. It's going to happen. It has to because it's, frankly, just dumb to do it any other way. But the question is just is there a way to establish some motivation or goal that goes beyond saying we're going to write down on a piece of paper that you must provide these pieces of information -- artist, album, whatever other text -- in such a way that it precludes the establishment of a more reasonable, meaningful system?

So, you know, would I like it if the Copyright Office actually came back and said that the copyright holders and the royalty payers should, in fact, put together over a period of time a globally accessible database that is used for the payment of these royalties? Yes, that is what I would like. Does that mean that we don't have an approach to -- that we can't take an approach to an interim solution that is more like some of the things that you're saying? Yeah, absolutely. I just don't want to miss the opportunity to push that forward.

MS. PETERS: Well, the good news is that you were thinking ahead of where the next question is going. But before we go there, let's go to Wanda.

MS. ATKINSON: First of all, I want to thank you for allowing us to attend this. It's an honor to be able to -- that you allow a small commission of webcasters to finally get their voice heard in this process.

3WK is absolutely what the Future of Music Coalition describes as a small commercial webcaster. We are two people. We operate out of the front half of our house. We got our furniture from garage sales. I have pictures of it if you'd like to see it.

And yet we were the number seven measurecast (phonetic) webcaster in 2001. We have a big audience.

We have a huge potential and we don't want to destroy our chance to gain that potential. I know Kevin said we're like the puppy in the industry. I like to consider myself as Clear Channel when they bought their first radio station. That's where I think we're going to go. So I don't want to lose any opportunities here based on a rate or based on reporting requirements.

That said, we need a compulsory license. We have to use one. Last week -- excuse me for being nervous. Last week, our station added 50 songs. We added -- that's over 35 labels or self-produced labels. If we have to provide information, you know, however many pieces of information for every single one of these, if we had to go out and negotiate individual contracts with these labels, it would be a very difficult process for two people to do.

A unique identifier is a great idea. I won (phonetic) the idea. I will -- if you tell us we need

to start inputting a unique identifier, I'll do it tomorrow. We don't have that system yet. What we have, what most small webcasters have right now in our systems that we can give you tomorrow is ASAL: Artist, song title, album, label. We have it in our systems. I've had it in my system since '97. We could have been paying artists since '97. Okay?

But one other thing -- one other point I want to make is I think the RIAA actually agrees with those four pieces of information. They have it in writing. In their replies, the reply comments of the Recording Industry Association of America, on April 26th, they have Section P, examples of instances where artist name and sound recording title is insufficient for royalty distribution purposes, and they list a whole bunch of artists with a whole bunch of song titles. As their supporting evidence of the stuff that they actually need, they list artist, sound recording title, album, and label. They agree with us. They agree with us on paper, and I think that's all we need to have.

MS. PETERS: Thank you very much. Do you want to say anything before we close this out?

MR. GREENSTEIN: Yes.

MS. PETERS: Okay.

MR. GREENSTEIN: There are a number of issues that have been talked about that I just want to touch on very briefly. The first is this concept of the nirvana, the day when there is a single identifying number that can apply to all sound recordings. It just doesn't exist. If Alex is talking about the son of SDMI and recreating a multi- industry standard --

SPEAKER: I hope not.

MR. GREENSTEIN: -- multiple corporations around the globe setting up a standard, meeting around the world, distributing this information, and Yahoo wants to pay for all of that, or Yahoo and some of the broadcasters and other parties, you know, that may be a wonderful idea, but it does not exist, it is not on the horizon, it will not happen. The ISRC number has been an effort for 15 years to get companies to use that. It is principally the major labels that are using it, independent labels, lots of companies that are not part of RIAA.

And remember when people talk about either the recording industry or SoundExchange, we don't represent everybody. We do not cover the universe of copyright owners. We do not represent all artists. We are, for the purposes of webcasting, distributing to nonmembers. And -- but those nonmembers are not part of the RIAA and they are not part of SoundExchange. So I just want to make that clear.

There is no magic bullet here to be able to do this.

MR. MAGHEN: Other industries have them.

MR. GREENSTEIN: Well, there's another issue here in that Yahoo, Clear Channel, the big players, and then small players like 3WK and Beethoven, and then XM and Sirius that have raised in the capital markets and it may be hundreds of millions of dollars.

(Laughter)

MR. GREENSTEIN: The one thing that all of these companies have in common --

SPEAKER: It's not 1999, it's 2002, pal.

MR. GREENSTEIN: What they have in common is that they have all chosen to enter into this business. They have all invested. As 3WK pointed out yesterday in the DEMA (phonetic) handout, they've got \$9,000 in revenues, but they've spent \$74,000 getting into this business. I

can't even imagine how much Clear Channel has spent to get into this business. People know how much Yahoo spent to acquire broadcast.com. Whether or not that was wise, you're talking about \$5.6 billion.

This is not radio. This is something very new, very different. It is not musical works. They talk about -- Elliot talked about what RCS, what radio stations provide. They list artist and song title, but in the statements that were submitted by the broadcasters, they have screen shots of RCS Selector. And what does it have? It has information to identify musical works. And do we know why? Yes. Because musical works copyright owners have been paid and have enjoyed an exclusive right for many years. The sound recording copyright owner and the artist, the performer on a sound recording, this is the first time that they are getting paid.

Things are different. This is a new work that is being compensated. It is not a musical work. It is a sound recording. This is not an analog broadcast. This is a digital audio transmission. It is not the flea on the hair of the dog.

Clear Channel has chosen to get into webcasting. They put their signal on the Internet. What did they do? They invested probably millions of dollars to do that to aggregate all of their stations. They chose to do this. But now what people are asking, they want burden shifting plain and simple. Everyone out there wants to enjoy the benefits of a statutory license. It is already a burden on copyright owners.

We have to license our works. We have no choice. But we don't have to pay for people to webcast. Artists choose to do that. Similarly, we don't have to pay and shouldn't be forced to pay for people to enter data properly. What Alex is asking for is a magic bullet because people at Yahoo don't enter an artist name properly when it is available on a sound recording. That's what's going on. You want copyright owners and artists to do your work for you. But I submit that you've chosen to get into this business and SoundExchange is serving a function that artists and labels have chosen to underwrite. The fees to operate SoundExchange don't come from you all, they come from the royalties. The royalties are owed to the label and the performer and that amount is reduced.

So let's not forget what's going on here. You're asking copyright owners and performers to subsidize even further your current business and that's not appropriate. Artists and labels are entitled to be compensated for your exploitation of their works.

MS. POTTER: Who chose for you to get into the business of SoundExchange? Ron Gertz could have done that business. RCS could have done that business. ASCAP and BMI could have done that business. Harry Fox would probably say they could have done that business.

MR. CARSON: None of them came forward several years ago when we were . . .

MS. POTTER: I'm not suggesting that. What the suggestion is, is you are taking on this enormous burden, which you would prefer not to have, and how dare we suggest that you have to build your business. This is a revenue-producing business. The RIAA chose --

MS. POLACH: SoundExchange isn't a revenue-producing business. It's a nonprofit.

MS. POTTER: The RIAA chose to get into a business.

MS. PETERS: I just was given a gavel just in time. I think what we're going to do is close this part out and I want to go to another question.

SPEAKER: Excuse me.

MS. PETERS: We'll get to you. There will be time for people to come to the mic. The

question that is troubling us and that we've been struggling with amongst ourselves is what do we do about past performances, the ones that were made in 1998, 1999, 2000? And what happens when people tell us that they don't have the records or the information that ultimately may be part of any regulation? That's one piece.

And the second piece, which is related, is what about going forward? And it really goes to what Alex was saying. If we were to put out a regulation tomorrow, most people could not basically accommodate what that regulation required. And you talked about an interim and a pathway. And I guess we're interested in hearing about what people think should be done about past performances where clearly, from the moment that anyone webcast, there was, in fact, a duty to pay. There is a statutory license and there is a duty to pay, but how does the recordkeeping piece get handled? And then what about the right-after period, the period after? So anyone.

All right, I'm just going to take names. Let's start with Elliot and I'll -- put your hands up and I'll -- oh, my God, all right. All right.

MR. MAZER: I think the biggest problem is that you've got two industries that are basically, you know, stuck together and work together really well in most cases. You have the radio industry that is able to expose new music to the masses and you have the labels that are making recordings that they wish to sell to the masses. And I think that's -- I think we forget that.

I think the webcasting, the new technology, the people, and the business opportunities are different from the basic understanding that musicians, songwriters, singers are making records. Record companies are paying for them. They're paying a massive amount of money to manufacture and market them, and other people want to use them. Both those industries are also very different than they were when they were invented.

Randy Michaels, a great radio guy, invented the whole Jacor/Clear Channel business. He spawned the idea of mass radio. Clive Davis, Ahmet Ertegun, and Jerry West and those folk created labels, small labels. At 2002, that's all gone because now both industries are controlled by Wall Street numbers, Wall Street rules. And the idea that either industry has the cash, the funding, the ability to create massive databases, to create infrastructure to allow webcasting to happen I think is a big stretch.

And I would assume that since we believe that with our software most of this can happen, we have a global identifying number. We have a patented fingerprinting system where we say the sound recording is the fingerprint number. And we have that for 60-, 70-, 100,000, some number of titles, but not the 700,000 titles. And we don't have the means of connecting that to every recording that Barry has in his system or Wanda has in her system or they have at Harvard.

So the pieces, all of us as independent companies, vendors, have pieces of this puzzle that can be put together to achieve this. Achieving this is a bigger problem. And the -- one of the -- it's really interesting, something we didn't mention earlier.

The current state of the radio and the record industry, which I think is much closer and tighter -- I know labels that work very tightly with radio all the time, there are sound recordings, singles that might have six or seven different versions. The same song, the same artist, six or seven different versions because the way the music industry works today, a label releases a record, goes to radio, it doesn't get a lot play, doesn't get a lot of reception from the audience. The record company goes back, remixes the record, and puts it out again, same title, same artist.

MS. PETERS: Same owner.

MR. MAZER: Same owner. It gets worse because the ownership could be different because they might be different performers on the new mix as well, but that's a separate issue.

SPEAKER: It's a different sound recording?

MS. PETERS: It is.

MR. MAZER: Yeah. It's a different sound recording with the same title.

MS. PETERS: Right.

MR. MAZER: So the notion of saying Jennifer Lopez, this song, this album doesn't really necessarily connect to what Barry's playing on his pop channel right now because he's got a different mix than what's on the album that's put out.

MS. PETERS: Yeah. You're kind of still focusing on identifiers and we're trying to figure out what do we do about the past and --

MR. MAZER: No, I apologize and I do understand that.

MS. PETERS: Okay. That's all right, okay.

MR. MAZER: But I think that it speaks to the biggest issue because if you could go and gain cooperation from the labels to the radio industry, and we'd help make that happen, and get all the information about new recordings into databases at radio stations that's easier to do. Dealing with the historical information is very difficult and that's commerce. And I don't -- I think that Barry's businesses have pieces of those solutions. We don't have that solution in terms of database.

MS. PETERS: Okay. I'm going to call on Jenny next, but I have Kevin, Wanda, Bruce, Michael, Steve, Fritz, Glenn. And anyone else before we start? All right, Jenny.

MS. TOOMEY: Okay. At the risk of sounding visionary, I'm also going to look to the big picture of this. And first, I want to put it in context because if you read what we have here, we talk about creating four different licenses that have different levels. We have hobbyists; we have noncomm licenses, noncommercial licenses; we have incubator licenses, which are small commercial licenses that allow people to get in the business and compete; and then there's commercial licenses. And at the risk of sounding like another musician, Bono, I would say with regards to the three smaller classes of licenses we should forgive the debt in order to allow for there to be real diversity in the space.

And I know in some ways that there are some people who will benefit from this in a knowing way. It was a strategy of theirs to say they were going to pay and then not pay. And you know, and to bring another hero of mine to the fore we have Steve Martin saying I forgot that armed murder was illegal, you know. Clearly these people have signed the statutory licensing agreement, they knew they were supposed to pay, they're not going to pay.

The question is what's the big picture here? Do we want to have a diversity of webcasters out there competing? And I think it's not a complete free forgiving the debt, but it's forgiving the debt as a condition of future compliance and in the face of legitimate and reasonable requests, which, hopefully, this panel will come forward with.

MS. PETERS: Okay, heard you. Kevin?

MR. SHIVLEY: Thank you. First of all, I feel, again, compelled to respond to something that was said earlier when it was suggested that this streaming, webcasting is not radio. What we do at beethoven.com is radio. The only thing that's different is the medium by which we transmit our signal. That's the only difference.

In fact, the same -- we take the same on- the-air programming on beethoven.com and syndicate it to an AM radio station in Hartford who've gone the other way around. And it's a 490-watt AM station that was able to get a 1.1 share in certain demographics in a mid-sized city market. But it is radio. It has live deejays. It is radio all the way through and through.

And I also want to make it clear that music is not the radio business. Music itself is the product by which we have built our business, but it's how we package that product, we produce our programming, how we market that product, how we brand our image and our company that draws people to that product and which exposes those people, not exploits, exposes those consumers to that music.

We even go one step further in providing, and our and most other webcasters, commercial especially, do this as well, some noncommercial as well, provide a legal opportunity for them -- for our listeners to purchase that music. We encourage it, we promote it. We drive people to purchase this music legally. Some have even gone so far as to put little things on their -- things saying, hey, don't steal music, buy it here.

Now having said all that, addressing your direct concern about retroactive reporting, I was trying to look through the -- we have a collection of some of the different press things. Now I want to give fair opportunity to our friends at the RIAA to respond to comments that have been made in the past so that we don't just blindly believe everything we read. But it has been suggested in certain press publications that the RIAA have made overtures to hobbyists and nonprofit webcasters suggesting a low fee -- low flat rate license and forgiving certain, if not all, reporting requirements.

I would suggest and propose that any commercial webcaster, going back to 1998, which can show that we have not yet been able to feasibly find a profit in this business, effectively making us nonprofit during this period of time, could take part in that proposal and be forgiven those reporting requirements and settle the back issue. And then work together as partners, which we, unfortunately, naively believed we were up to a point. Work as partners to develop a way together that we can eventually move towards a unified system that makes it work for everyone, as has been suggested, with a uniform code or something similar to the ISBN numbers that publishers have for books. Something along those lines where -- as if there is one type of identifier for this thing, for this piece of music, this sound recording, any of us, including the pros, the ASCAPs and the BMIs, the artist organizations, the copyright holders, even myself as not only an Internet broadcaster, but someone who wants to be able to build into my business model the E-commerce opportunities of promoting and selling their works, can all build our own -- use that and build our own databases with the information that we need attached to that number.

MS. PETERS: Let me ask you a question. Assume that it is not forgiven, this is a statutory license, what kind of records do you have for the previous period? Could you --

MR. SHIVLEY: I could not -- beethoven.com could not tell you exactly what we played during that period of time. I could provide a sampling. I could an overall idea of our programming, which has not changed during that time. I could provide evidence that this programming was in place all along, that we have not changed the number -- typically the number of pieces that we play per hour, the types of works that we play. I could provide something like that that could be used as a model.

MS. PETERS: But you really don't know what was played on any given day?

MR. MAZER: No more than our friends at Sirius could -- or I mean, at Clear Channel could go back, you know, in some -- one of their smaller stations in some small market and find



out what they played in 1999 or in 2000.

MS. PETERS: Have you started collecting that data now, though?

MR. MAZER: We have.

MS. PETERS: Okay.

MR. MAZER: We've collected it --

MS. PETERS: What's the magic date when you started?

MR. MAZER: I'd have to -- I don't have that information as far as what's in my database, but it would have been sometime last year.

MS. PETERS: Okay.

MR. MAZER: It was before -- it was definitely before any recommendations had been made, either on the royalties or on the reporting requirements. It is something that we've always wanted to do anyway because we -- it made sense for us in our E-commerce opportunities moving forward. And quite frankly, it's also -- it's part of our service. It's part of our service we see, especially in -- well, it's beethoven.com and the classical music, we see ourselves as trying to provide classical music that is not very easily found these days on the AM and FM signals.

MS. PETERS: I appreciate that.

MR. MAZER: And there are a lot of people that feel the way you do that are struggling to find it in the traditional medias. And that --

MS. PETERS: Okay. You answered the question. Wanda?

MS. ATKINSON: We -- I've been informed by Elliot here that RCS, which we use and we love it, has a system whereby you can go back and gather the information. We also have playlists that my husband has kept diligently and he gives them to me. I have to admit I throw them away, I don't need that stuff on my desk.

We can probably come up with a model at least. But the problem is, we've known about this since '98.

SPEAKER: Right.

MS. ATKINSON: We've been planning on it since '98, but nobody said we needed 18, 22, you know, 10 pieces of information for every song we played.

MR. SHIVLEY: We always assumed it would be more if we asked that reports.

MS. PETERS: So what did you keep?

MS. ATKINSON: We have playlists. We produce weekly playlists that have artists. I think it has artist, song title, album, and label on it. I think it has that information.

RCS, I'm not sure what's in the system. It might only be artist and song title. I would have to double-check with Jim on that one.

MR. GREENSTEIN: We have some handouts of your playlists --

MS. ATKINSON: Okay.

MR. GREENSTEIN: -- saying it does have the artist and song title, at least on your Web site for --

MS. ATKINSON: Oh, now that's --

MR. GREENSTEIN: -- April 29th.

MS. ATKINSON: -- the printed. We also have a published one that goes out to the labels, too, that has plays on it, too. So we do have that kind of information, but I got to say we need to not have -- we actually put money away for this, too, until we find out it would have to be, you know, 300 percent of our revenue, which I'm sorry about that, I apologize.

MS. PETERS: Thank you for apologizing.

MS. ATKINSON: Okay. But I have -- so I can satisfy the retroactive in that I have -- I owe my mother-in-law, Gary, \$300,000 at this point. I don't have investors except for her. I would rather have it forgiven because if I have to go back and say I need this much more money, I'm probably -- if it's based on what it is right now, I'm gone. I would close.

MS. PETERS: Okay. I don't think you need to tell us any more that you would like to see it forgiven. I think everybody has gotten that point.

MS. ATKINSON: Okay.

MS. PETERS: Next? Bruce.

MR. JOSEPH: There are approximately 13,000 radio stations in the country. They all operate differently, many of them at least. I can't say they all, but the great majority operate unlike others. They operate in a relatively unsophisticated way. I don't remember Brian Parson's exact description, but even his description of typical Clear Channel stations was in the context of Elmer's Glue-All and baling wire. And they have records that will vary.

My sense, and we obviously have not conducted a -- not obviously, I will tell you we have not conducted either a survey or a census, is that most radio broadcasters do not have specific records of what they streamed when from 1998. We believe the past is necessarily going to be an exercise in estimation. The Copyright Office made it very clear when it adopted the interim regulations that it applied to the pre-existing subscription services. I thought Steve's comment earlier of it made no sense to develop a distribution system until we saw what the regulations were applies equally to users. It made no sense to keep records until you knew what those records were obligated, were going to be obligated to be.

In terms of identifying and determining fee, there are ways to perform such estimates. Stations that are streaming probably have ATH information that will give you average numbers of users. They know from their format on average how many sound recordings per hour they stream. You can do that now. That's on the fee side.

On the distribution side that doesn't give you a lot of information. And from there, I think it will require looking to see in individual cases what they have. Do they have playlists going back? Some will, some will not. And to the extent that there are fees collected from stations that don't have playlists, you can then look to proxies. You can look to record sales. You can look to other standard industry measures of what was performed when. But that's, unfortunately, I think where the situation is.

MS. PETERS: Thank you.

MR. JOSEPH: I'm sorry, you were also asking about going forward.

MS. PETERS: Sure.

MR. JOSEPH: And on a going-forward basis I think really the question of what's needed will depend on what you do. If what you do is, say, title and artist, there are a great many radio stations that will be able to start complying and start reporting very quickly. If what you do is

significantly beyond that, I would venture to say there are a great many radio stations that will stop streaming so that there won't be anything to do on a going-forward basis. But those that don't stop streaming I think will need time to see whether they can put systems in place to capture the additional information in an economically reasonable way.

MS. PETERS: Thank you. Michael.

MR. PAPISH: So WHRB started webcasting on November 18, 1999. And there are two types of records that we keep and we keep this for our FM station. And so, incidentally, we obviously has it as well for our webcast since we just simulcast what we have. And again, I'll caution this by saying this is what WHRB as one college station has. Fritz maybe can talk a little bit later about the majority of other stations and where they sit.

We have, as was referenced in our comments and in Exhibit N from the RIAA's reply comments, we have -- we put out a play guide, a playlist, and that includes all the classical work we're going to play. And so that's 23 percent of our transmitted songs by time, not necessarily by duration. Now one can see that most classical works are longer than the average rock song, so you're going to see most likely that on volume this is much less than 23 percent of what transmitted. These are in analog format, so we can give you a bunch of booklets. It's possible that some of this might be in an SQL (phonetic) database, which we use to populate our Web site, but I'm uncertain that that's actually being stored anywhere. That we can look at.

Secondly, there are some logs that we keep totally by hand. And this is as a deejay goes about putting together free-flow shows. This is a deejay on the fly writing down. And what we write down in the book are four things: Artist, track, and -- oh, actually I guess three things, artist, track, and a flag. And this flag can either be a P for it's a new release, a playlist item; or a C for a compilation, it comes from a compilation. And you're supposed to then record, if it's the compilation, what album it comes from. This, again, only refers to about 30 percent of WHRB's total programming time, which is included by the rock department, which is the overnight time that the station broadcasts.

This is totally analog format, totally written by hand, including very interesting doodles and pictures inspired at 3 a.m. playing music over the radio. They actually go back 20 years and we actually did try to look at how useful this is. We put together an extended piece of programming. We actually played the top 20 pieces on the radio for every week for the last 20 years in one big block of programming, and determined that it was very, very difficult to make much sense of what the doodles were and what the actual writing was in the logs.

(Laughter)

MR. PAPISH: And again, this is not in digital format in any way.

There are some records of the specific top 20s or top 30s that we report to CMJ. And those you could probably get and we probably have them in digital format somewhere. But again, that's only the top 30 items that was played on the radio station that week. It doesn't include anything else as to when it was played, how many listeners.

MS. PETERS: How far back does your reporting to CMJ go?

MR. PAPISH: We've been a member of CMJ I think for more than 8 years. However, there have been lapses in that. As this is being a voluntary organization, when the staff turnover occurs there are times when obviously that's not kept up.

And so those would be the reporting that we have going retroactively. So you can make sense of this, but, again, there'd be a lot of burden and a lot of work I think on the collective to figure out how to make sense of it. It'd be very difficult for us to put this in a format that's very

useful.

Going forward, I think I am going to agree that it probably depends on what kind of interim period you have as to what the regulations are. We estimated that if the proposed rule-making went through it would take us 10 years to get there. Obviously that's one far end of the scale and we can ratchet that whatever way it goes. But I think it would take a lot of time and that's not including the cash that it's going to include to make that happen as well.

And also, I guess Jenny opened up the idea also that maybe the interim period, and as the RIAA said in the reply comments, could be based upon different criteria. Like if they had an extension for stations that were nonautomated and affiliated with educational institutions, they were given an extra 3- month period. I like this idea of making it multiple different steps for the webcasters so that instead of having a one-size-fits-all for everyone, we can have different degrees.

I haven't had a chance to look at what Jenny has put around today, maybe that's a really good first step. But I mean, just looking at it there's automated versus nonautomated stations, there's profit versus nonprofit, commercial versus noncommercial. They have both types of those. Small businesses you can define by number of employees, the amount of revenue, et cetera. There's a lot of different ways to slice and dice it. And it seems like that probably makes the most sense is to look at specific cases.

MS. PETERS: Thank you. Do you want to go now or last?

(Laughter)

MR. MARKS: I guess we'll go last.

MS. PETERS: All right. Let's go again. Oh, wait a minute. Yeah, Fritz and then Glenn.

MS. KASS: We'll share the mic here. The good news is that at least in the case of educational radio there's several hundred radio stations and for the most part their simulcast Web signal, that at least for the small artists, perhaps not the big five members of RIAA, but the hundreds of other members of RIAA, there has been a tremendous promotional value of the signal. So in effect, as Congress recognized under Part 18 that there was a promotional value for educational broadcasting in the case of the copyrights, that, in fact, has been paid. I would say that many, many sales occurred at the smaller labels because they heard the performance on a college radio station.

As to the records, obviously we don't have 13,000 stations, but we certainly had many hundreds, 800, 1,000 stations, and each of them are different. And I think the other thing to remember is that, by and large, all volunteer operations, and since the barrier of entry -- in other words, what it cost us to put a station on the air, a webcasting station on the air -- is approximately \$500, not the millions that Gary was referring to. Actually many of these stations have gone back to '96, '95, in areas like that and were experimental and experimental radio and trying out these new technologies. And Real Audio came along and said, hey, we'll give you software for free, the educational stations, and you can broadcast up to 20 people at a time. And our stations could afford to pay free and they went on with this. And hundreds went on and perhaps even more would have gone except for the fear of exactly what we're discussing now, and that's possible retroactive payments.

It's very -- we don't have -- when you've got these small stations that are only on 6 or 8 hours a day, only on during the times when there's no holidays, remember the Federal Communications system only requires a noncommercial station or a college station to be on during the school year. So if there's spring break, they turn the key off, they turn off the

Macintosh computer, and we're not streaming during that period of time.

So the stations, by and large, the educational stations, are a different class, they're a different group. They don't have a lot of records, by and large, going back on what they did play. But the reality is they don't have any money at all or not much money that they've had to put into this. It's an educational experience. And I would certainly hope that we wouldn't put off -- we wouldn't limit the artists and the small record labels opportunity to have that value of the performance by putting whole bunches, hundreds of educational radio stations off the air by saying you owe X-amount of dollars retroactively to 1998.

I think another thing which I've heard throughout the morning, the reality is the educational and perhaps noncommercial, like in Part 118, is a separate group. And at one point or another we're going to have to recognize that there's an educational benefit and that there is a benefit of free speech and of the young people of America, America's sons and daughters to having webcasting available to them and not prohibiting them from webcasting and taking them off the air. So perhaps both in rates and in performance and retroactive and other things, we will have to set them apart as a separate class, essentially what was done in 118.

The other thing to particularly remember as far as retroactive payments is there's just not going to be a lot of dollars. It's going to be very --

MR. CARSON: Hang on a for second --

MS. KASS: Yeah.

MR. CARSON: -- because you're talking about payments. That's not the topic here. The topic is retroactive reporting. If you could address that, that would be helpful to us.

MS. KASS: Absolutely, David, although they tend to be the same in reality. The retroactive reporting for us is virtually impossible on the average station. They were volunteer stations. They went on the air for \$500. They went on and off the air, and they continue to go on and off the air. And there's very little reporting that can be done in the past in our stations.

MS. PETERS: You need to pass the mic.

MR. FISHER: Websound is a webcaster, pure and simple. We started streaming audio in November of 2000. We actually signed a license with the RIAA in September of 2000. We have been providing reports to the RIAA since November of 2000.

To discuss the issue of back-filling reports, that's really not a problem since we've been reporting on an ongoing basis. I can imagine that it would be a horrendous problem for anyone that hasn't been keeping records.

To address the issue of going -- what we do going forward, since we have had to provide these reports monthly and it has been a challenging process to continue to provide those, we, out of necessity, developed a system to streamline and automate the process of recordkeeping and reporting. To that end, we have a system now running that combines a song-specific database that reads a common log format file from the streaming server and combines that with playlist information and automatically submits a universal report of performances directly to SoundExchange. And this system is up and running now and, in fact, we're sending our report in right now as I'm sitting here.

And when we developed this system, we -- it was really developed just for our own use, mainly because if we were going to continue to grow as a webcaster and these reporting issues would continue to expand, then we needed a way to provide that data and not have it take up all of our time. After developing the system, we saw in these -- in the Carp (phonetic) releases and

reports that this was a major problem for all of the webcasters.

And we looked at our system and thought, well, I wonder if there's some way that we can apply what we've developed to the rest of the industry and make it available. And towards that end, we've developed a Web-based user interface that will allow a webcaster to log into the system and enter some very simple information and, from that point on, their reporting would be completely automated.

MS. PETERS: Okay, thank you. Since you developed this for feeding into RIAA, the question we didn't ask, but is it in the format like ASCII and do you have -- is it the kind of format that's been proposed?

MR. FISHER: Yes, it is exactly that. What we do is we take in a common log format file like this and we spit out a URP that looks like this.

MS. PETERS: So you do the carrots, the no carrots, the single line?

MR. FISHER: Yes, exactly as is specified.

MS. PETERS: Okay, thank you.

MR. MARKS: I think all of us have some comments --

MS. PETERS: Okay.

MR. MARKS: -- so if you can bear with all of us just so we can respond to some of these things. On the past performance issue, this is one of those issues, like the noncomm issue that we talked about earlier, that obviously is a difficult issue, and we recognize some of the difficulties. I think our initial reaction is one of being unfortunate that some of these records apparently don't exist because that means that artists and record labels won't be compensated.

And frankly, you know, we keep coming back to the fact that there was an obligation under the statutory license, a very clear one, whenever an entity filled that notice out and sent it into the Copyright Office with their \$20 check, they were taking on the obligation to report something that they were using. And at that time, there were interim regs that exist. And while they did not apply to webcasting, they certainly were the only thing that existed as to what kinds of things under this statutory license, you know, were appropriate for reporting. And you know, therefore, we do think that there was some obligation and burden for some of the entities at this table and others to have tried to keep some of that information.

That being the case, we're realistic. If there's no data, there's no data. And we're kind of left with, you know, you can't get blood from a stone. We do think, however, that to the extent that the data can still be retrieved, maybe in another form, maybe it's not readily available to be spit out today, but it can be retrieved through Selector or something else, that there should be some obligation to retrieve whatever is retrievable. And that may vary from company to company and I'm not sure sitting here today how we would express that in a regulation. But as a principle, I think that that would be a fair principle.

And I think the other thing is that to the extent there is some relaxation of reporting going back, given these realities, we would -- you know, our firm belief obviously is that those should not extend to the future, that the future should be different. We can argue I guess about who was on notice at what time about things, but I think the one thing that is clear is that we're all here today. We've all be involved in this process for the past several months at least. And on a going-forward basis there should be adequate information, even if that information differs on a going-back basis. And I think that Barrie and Gary have some additional responses.

MS. PETERS: Okay.

MS. KESSLER: I just want to talk a little bit about operationally how we would deal with the historic data issue. What I'm hearing is that there are no records for some, some records for some, maybe very comprehensive records for others. But what doesn't exist in the past is any kind of standard around the way that that data was stored and that could be delivered to SoundExchange.

Now when Bruce said that just like the SoundExchange didn't develop a system in advance of a standard of regulations, they didn't record the history of their performances. Well, when the SoundExchange built its system, we knew that webcast administration was coming. And so, of course, we built our system with hooks to the future to anticipate the administration and the processing of the information around the license. So while we don't have a completed system to distribute the webcasting royalties, we do have the core of a system that now needs some augmentation to get the distribution out. So we anticipated this and we prepared for it.

My belief is that webcasters and simulcasters knew that regulations would come around reporting of some kind and they should have been keeping this information for the purpose of paying the royalties to the record companies and to the artists, small, medium, and large, to get the money to those who create the content that they are building their businesses on.

So what is our choice? Well, we can do a number of things. We can accept the data that you have and spend time and money and energy trying to create a standard out of a variety of formats and get the distribution out, but try to approximate what was actually performed. The objective of the SoundExchange is to be transparent and to pay labels and artists for what was actually performed. And to the extent possible, we would be committed to doing that for the historic period. But we have to balance that with the cost of bringing together disparate forms of information to accomplish that distribution.

We could identify a proxy. That proxy may be going-forward performances. I do believe that the radio stations do have to report ASCAP and BMI and SESAC in a survey and maybe that is another proxy that -- I haven't given it a great deal of thought and consideration, but there are options available. And also, there are monitoring services out there like BDS. And while I understand that BDS doesn't cover a lot of the stations that are simulcasting over the Web, it is another option for us to use that as a substitute data.

But again, you know, this shouldn't come out of the royalty stream. We've been waiting for a long time to receive this money and distribute it. And it's 3-1/2 years' worth of information and money and it shouldn't come out of those streams to address the issues of poor recordkeeping from the past.

MR. GREENSTEIN: With your permission, I'll just throw out a few quick points. I think it's right, from what we've heard, that different types of reports exist for many different types of services. And in the copies of the screen shots that we've prepared from college broadcasters there is a variety of information, historical data. One station, KFJC, which is out -- it's a community college and it's part of the college and university radio broadcasters, has playlists that go back, and I referenced this earlier, to 1995, I believe it is. And what you do is they give you a date range, you click on the date range, you go to a calendar which gives you the week of information, and then you can click on the deejay. You click on the deejay's name and then you get the playlist from the deejay of artist, track, and album. So that is a college -- a community college that has this type of information. I think that there is information out there for some and not information that's out there for others.

One of the things that I think needs to be clear, though, at least if we're trying to get as much money as possible to the creators of the works and the performers, is the fact that SoundExchange should not have to digitize reports of use. If Harvard has handwritten logs, or

other stations or even commercial broadcasters, it is not appropriate for copyright owners and artists to incur the expense of typing that information into a database to distribute royalties. It really is something that the user and the beneficiary of the statutory license, who should have been keeping those records of use -- as Steve pointed out, they're on notice if they read the statute that they had an affirmative obligation to provide notice of use of the sound recordings. The interim regs were also out there. But we should not have to go back and do the work for them.

And then finally, I think an important point is if an accommodation is made for the past, there needs to be an understanding that there is a real cost to this, that artists who had their sound recordings played during that historical period -- whether they were new releases that may have been popular, one-hit wonders, they may have been played quite a bit, but are no longer in rotation -- those are people who are entitled to share in statutory royalties. And what will happen is, if you make an accommodation and don't require data to be provided those people will not be compensated. That may be because of the lack of data that services fail to keep. That may be something we have to live with, but I think on a going-forward basis, people should not have to suffer.

Copyright owners and performers should not have to miss out on royalties because services don't provide that data. So I think if you are going to draw a line there should be a clear delineation between accommodations made for the past, but then efforts made going forward to really get the money into the hands of the people who are entitled to it.

MS. PETERS: Okay. Before we do that, how many people in the audience want to make statements? One, two, three, four, five, okay, six. The question is -- seven. Maybe we'll start. You can say one little statement and then -- the time is now almost 5 of 1:00. We need to break for lunch. We have two panels coming up.

Actually, the people in the audience are absolutely critical. The rules are that you are adding something that hasn't already been covered. There is a lot that hasn't already been covered. But let's go for a little while. We do have a cafeteria here. We probably do need to break by shortly after 1:00.

But you can say your few words and maybe a couple of you should just line up. What you need to be prepared to do is tell us who you are and who you represent and then speak as concisely as possible.

SPEAKER: We weighed this against what we saw at ASCAP and VMI who were offering digital licenses as well. And there were reporting requirements behind those. We assume that since there was no one representing FM radio stations and no one was representing small entities such as ourselves, that it would make sense and we thought that when the record keeping actually came to pass they would most likely work like ASCAP and VMI worked. That's why we went ahead and kept records.

SPEAKER: That is reasonable. The only thing I would ask is why nobody stepped forward to try and clarify that. I know the answer can take a while.

MS. PETERS: The thing is, it's past, it's gone, so let's turn to the audience.

MR. NEWKIRK: My name is Brian Newkirk. I'm from the Progressive Policy Institute, representing, I suppose, visionaries, but we are also a practical think tank.

I am also representing the digital generation here, I suppose, not to make that relevant.

What I'm seeing here is there is a solution. What we need to do is lower the cost of reporting for both the reporters and the people receiving the information.



What we have is a tragedy of the costs though because obviously Gary is not willing to pay for some sort of central database to establish this information, nor are John or Alex.

We also have an institution called the Library of Congress, which has a tradition and is charged with cataloging every single book, every single piece of media published in the United States. Granted, they do not have a system of numbering the individual sound recordings by track now, but what we need to do is establish some sort of public initiative to have cooperation between the RIAA and the webcasters which would enable this type of database to be produced, you know, through either a massive intern program or through licensing products such as we have represented here. There is the technology to put this in use. What we need is some sort of public body to take the initiative to actually put that in the marketplace and have people be able to access that.

MS. PETERS: Thank you. Next.

MR. WALKER: My name is Chuck Walker with Muzak. Mr. Greenstein, you said that the information to be reported is available. Barrie, you and I have had discussions about this also.

You have seen our reports. We report every month volumes of information, some of which data fields are empty. I'm telling you, that information is simply not available from the data available from the sound recordings that we get from your members.

MS. KESSLER: That's why we asked for other fields that augment the information that you are not providing to us. Our only remedy is to come back at you and say, "Fill all of this out." We don't do that. Instead, we take it upon ourselves to do the research and these expanded reporting requirements are such that we get more pieces to the puzzle so that we end up paying the correct copyright owner and the correct artist.

MR. WALKER: And where do we get that information that is accurate? There is no way to do that. I think it would be a big mistake to have a regulation codified that told the services to report information that they cannot report. It is absurd.

MR. GREENSTEIN: Chuck, I think one of the things that we showed in our filing, in our initial filing and then more comprehensively in our reply comments was the fact that the identifying information that we have requested is available almost universally, well certainly on commercial releases.

On the promotional releases that go to stations, we included a lot of images of that promotional property.

MR. WALKER: For major labels, that is true. For independents and small boutique labels that is not true.

MR. GREENSTEIN: That is one of the problems in getting money to those people as well, is we need information in order to get that. Once the Copyright Office puts out regulations, just as we think the market will create technology solutions to help companies provide reports of use, we also think that the smaller labels that you are talking about or the gentlemen from Harvard, his roommate who may have put out his own album and who knows how that was identified, there will be an incentive for companies to provide that information on their physical product.

MR. WALKER: That may or may not happen, but in the interim there is no information to report.

MR. GREENSTEIN: Well, when there is no information to report, and I'm not familiar with your logs, the field would be left blank. I can also tell you that I don't believe Sound Exchange

has taken any enforcement action of alleged copyright infringement by services, the preexisting services that are not providing the information.

Sound Exchange has undertaken the effort to identify those recordings on its own dime. Actually, it's the dime of the copyright owners and performers, to do that work.

That is why we are requesting fields because if you cannot provide a certain field, then hopefully some of the other fields will give us enough identifying information.

MR. WALKER: So that any field could be deemed, if available, or how would you say it? Feasible?

MR. GREENSTEIN: Well, there's a big difference between feasible and available. There is a very big difference.

MR. WALKER: It's inconsistent across all the data that becomes available to Muzak.

MR. GREENSTEIN: But have you ever been told by Sound Exchange that for a blank field you are doing it wrong, you are in violation?

MR. WALKER: Well, you just mentioned enforcement. At what point should the regulations become law and who would enforce these and at what point would we be in violation of them?

MR. GREENSTEIN: I don't want to answer questions of law that may be properly addressed by the Copyright Office, but on the fields of use, on the uniform report of performances that Sound Exchange has put forward for how to process information, if you notice in the reply comments, it is ten fields that identify sound recording. It's not 20. It's not 45 as was mentioned yesterday at the conference that was webcast. It's ten fields for sound recordings, four of which fall into this "either/or."

It's to report either the ISRC or the duration of the sound recording. So that's two fields, only one of which has to be reported. UPC or catalogue number, two fields, only one of which has to be reported. Then there are the other fields.

As for enforcement, my understanding is the Copyright Office doesn't go about suing anybody for violation of a statutory license.

MS. PETERS: Yes. We do sue people once in a while, but not in this area.

MR. GREENSTEIN: The issue of enforcement, whether it's in this light for the cable compulsory license, for the satellite compulsory license, that burden, and it really is a burden and there is a cost to that, falls upon copyright owners and performers. If they take enforcement, it comes off the royalty pool.

They will make a determination as to whether or not it is beneficial to either go after someone or what is most likely to happen is Barrie will pick up the phone or some of the people who work for Barrie at Sound Exchange will call a service and say, "You know what, you sent us this log. Unfortunately, we are having a lot of problems with it. There are fields missing. Please give it another go-around."

MS. PETERS: Ron.

MR. GIRTZ: My name is Ron Girtz. I'm with a company called Music Reports which represents the broadcast industry and Web services and various others and also our sister company is one of the designated agents to collect royalties for copyright owners.

I think you started this conversation with a question of reasonableness, what is that and

what is it applied to? I think for identifying sound recordings, I think it is reasonable for services to provide the basic core set of data that allows the vast majority of sound recordings to be identified.

Certainly, along with visionary and Utopian ideas, identifying everything as wonderful, but it simply not available today, which also speaks to the fact that perhaps what the Copyright Office should be considering is a new set of interim regulations rather than final regulations because the marketplace will develop solutions over time.

Certainly, if the reasonable goal is to identify the vast majority of sound recordings, that can be done by having those services that have intended play lists submitting those intended play lists. That can be done by having, for those services who don't have intended play lists, by using sampling technologies and sampling methodologies.

There are lots of statisticians in this world and they have been around for a long time. They can tell with great degrees of confidence how to describe a population. There is a cost-benefit analysis that has to be gone into here.

Finally, with regard to the information necessary to actually pay the proper copyright owner, some of that responsibility has to be born between the copyright owner and their collective. Frankly, a copyright owner signing up with a collective has to figure out how to let the collective know what catalogue that copyright owner represents.

It would be nice to have the Copyright Office create a complete database, but as many people in this room know, not everything gets registered. I daresay that sadly our data indicates that of the sound recordings and musical works created after 1978, less than 25 percent of them have ever been registered. So that is not a good solution.

Marketplace solutions are the answer and those will happen over time.

MS. PETERS: Thank you. Next.

MS. PROCTOR: I'm Deborah Proctor from WCPE Radio. I'm proud that you guys wanted to mention us earlier on today.

With respect to your comment about the burden should not be on you to take our backlogs and key them in and we should give them to you in a definite format such so it is easily read by your computer, I would just like to draw your attention to the parallel of me filling out my taxes and my 1040.

The law only says that I need to keep accurate records so I can accurately give the government my tax information. I am, however, allowed to fill it out by hand and I am allowed to round it out to the nearest dollar. I think the parallel should apply.

Also, you mentioned WCPE as being a typical public radio station. I think that does a great disservice to most of the public radio stations. You are holding up what we do as a standard that the average community radio station can easily meet because here's one that's already doing it.

We're almost 30 years old. When we began we were looking at the Web as a future, the future of broadcasting. We started working on our music library database 20 years ago. It went from card catalogue scanned into the computer over the past five years.

We have tens of thousands of paid staff hours and possibly 100,000 volunteer staff hours going into that website that you are holding up to everyone and saying, "This is very easily done."

We are a member of the National Federation of Community Broadcasters. Our station is

the only one that NFCB could not include in their comments because we're very fortunate enough to outrank all of their members. It takes more electricity to light up the tubes in our transmitter than the average commercial station broadcasts with.

Please don't use us as an example of what community radio can do and how community radio can report. I like that you like looking at our website. I also understand, though, that you made some copies from our website to distribute to this committee.

You, being a lawyer, should have noticed that our website is copyrighted.

(Laughter)

MS. PROCTOR: I don't remember giving you authorization to copy our material.

MS. PETERS: Thank you.

MR. MIDLEN: Good morning. I'm John Midlen. I'm here on behalf of the First Baptist Church of Dallas and its wholly owned subsidiary which runs a college and a seminary, and an FM radio station in Dallas that is Dallas-Fort Worth's most powerful.

Now, you have not considered a constituency here to day. That is churches and religious schools that operate radio stations and webcast. First Baptist and its affiliated Chriswell Center for Biblical Studies does both.

I filed reply comments and I would urge you to read them. But my purpose in being here is to call to my attention the fact that as churches and religious schools there is another statute on the books that protects us. It protects us insofar as how far you may go in regulating what we do as an exercise of our religion.

That is the Religious Freedom Restoration Act, which I set out in the reply comments, which apply wherever it is proposed that the government would place a substantial burden on the observation of a central religious belief or practice.

I set out in the reply comments how webcasting and broadcasting is such a thing. Where it is applicable, it prohibits any branch, department, agency, instrumentality or official of a State or Federal government from substantially burdening a person's exercise of religion unless the government demonstrated that the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.

I would submit to you that we as churches represent probably the lowest common denominator and that in regulating if you go beyond what you can do to us, you will be on the losing end on appeal.

Thank you.

MS. PETERS: Thank you.

MR. MASSARSKY: My name is Barry Massarsky. I am an economist and consultant for the RIAA. I have been around the area of sample surveys for PROs for some 21 years.

I would caution anyone to consider the variabilities of music use in drawing a fair and proper sample. Certainly that is the concern of most webcasts whose *raison d'etre* is the diversity of their programming, drawing a sample to be a proper representative of a larger pool of data really kind of hopefully estimates that sample correctly. The variability issue sort of complicates that in great detail.

That variability issue does extend to commercial radio broadcasters, too. I had a large amount of time to study certain formats such as country and Latin, and so forth, and I am

concerned also that samples in those areas, too, could tend to either over-estimate performances that are occurring once or twice and brought up in the sample or the error of omission, not being included at all.

Yes, there are some formats that are more appropriate for sample such as top 40 and rock. But one has to be very specific and look at the individual formats to take good care of how samples should be drawn. Thank you.

MS. PETERS: Thank you.

MR. SIMSON: I'm John Simson, the Executive Director of Sound Exchange. There was one point that didn't come up this morning that I thought was important to address.

But first, Fritz, I need to tell you I am the father of the sons and daughters of America who are paying tuition to many of your colleges. And I think you can afford these rates.

(Applause)

MR. KASS: I'm sure you don't want to put us off the air.

MR. SIMSON: No. I was on the air at Cornell University Carrier Current myself. I don't want to tell you when.

In any event, one of the unique things about Sound Exchange, unlike ASCAP, unlike VMI, unlike PPL in the United Kingdom is we pay everyone in the industry. We don't just pay our members. It's very easy if you are just paying your members. You know who they are. It's very simple. We have been asked to pay everyone. That's a much more difficult task.

So what happens is our members are actually subsidizing the finding of the non-members. I think we need to not burden our members with more expense. I think you have to keep that in mind. And again, these are the people who are harder to find.

You are the best people to help us find them because you are the ones playing the recordings. You know, when we get reports that come in and the artist is listed as "various artists," I'm really annoyed. I wish there was an enforcement provision so that we could get some fees or penalties for the work we have to do.

You know who the artist was when you played the track. You didn't have to put "various artists" on the sound track. Yes, we can figure it out if we look at the title or we look at the sound track, if we get the sound track title.

But please, be complete, give us information. We are just trying to pay the right people the right amount of money. Thank you.

(Applause)

MS. PETERS: Thank you. Yes.

MS. McDONALD: I am not here to make a comment. I'm actually going to ask a question. I'm an attorney, not a tech partner. Fortunately, I wasn't smart enough to be a tech person, so I had to go to law school.

(Laughter)

MS. McDONALD: It's actually for the gentleman from Web Sound.

I'm interested in, you were speaking about how you designed your program by which to report to them. What I was trying to figure out is, in having done that, was that something where you all had to write your own specific code for your own specific systems or is that the kind of

thing that would be able to be utilized in a top shelf type of technology that could be made available for --

MR. FISHER: No, we developed this system from scratch. We wrote our own code. It's completely proprietary and in fact we've submitted a patent on the process.

MS. McDONALD: Maybe I can help you with that then.

MR. FISHER: But that said, it is designed to be scalable in several directions. We can access several different types of databases. We have been doing research to try and answer the question on is there a single database that contains all of the song specific data.

In doing that research, we have been supplied with samples of these databases in various formats and have built our system to work with a variety of different song specific databases.

MS. McDONALD: You said that you all have applied for a patent, so I would assume that you all have a cost assessment of, you know, what this would be if it were made available as top shelf technology where people could go and buy this.

MR. FISHER: Yes, we do.

MS. McDONALD: Do you have any of that information pulled together?

MR. FISHER: Yes, we do. As a matter of fact, we have done some very detailed research on what it would cost the typical webcaster. We are estimating that it would cost approximately \$100 a month for them to use our service and provide the reporting.

That said, that covers the majority of webcasters. There webcasters on either end of this bell curve; some that would be so large like perhaps Yahoo where the reporting would be --

MR. MAGHEN: It might be a little more difficult than \$100 a month.

MR. FISHER: Exactly, and we can work with you on that.

(Laughter)

MR. FISHER: Then, on the other side there's some webcasters that are perhaps so small that they couldn't even afford \$100 a month.

MR. KASS: And you'd give us a break?

MR. FISHER: Well --

MR. PAPISH: Does this offer apply to analog, I mean where you are not storing these song titles in digital format; you are actually playing them in real time and analog format? How would you identify the works with this?

MR. FISHER: Well, we have made some phone calls to the NAB to try to understand how radio stations around the country record what they play. It's a nightmare. There's a lot of different of formats. Some people are just writing down on a scrap of paper what they happen to play that evening.

That would have to change if you are webcasting. You would have to be able to supply that information in some format that would be entered into our system. I'm not saying that it's extremely difficult. It would be a matter of probably the same things that you are writing down now, but it would be typed instead.

MR. PAPISH: So, the system is not automated in the sense that if you are not doing automated broadcasting there is going to be a burden on the broadcaster to enter information at

some stage here.

MR. KASS: The system is designed, the automation is, in that it will at a scheduled time go out and read your play list information as well as your streaming log and compile that with the song specific data to generate the reported performances.

MR. PAPISH: How does that work if it's a live broadcast? I mean they are not --

MR. GREENSTEIN: I'd like to say that just because we are doing it on the fly does not mean you don't have an obligation to report what you are performing. So, if you are making transmissions in that way and Web Sound isn't the solution, then I submit you have to find a solution.

MR. PAPISH: I would just like to make the point.

MR. JOSEPH: I mean, Gary, the whole question we are debating here is what is a reasonable reporting obligation. So, your answer is sort of circular in that regard.

SPEAKER: Actually, guys, I was just trying to ask a question about the technology so we could all go to lunch. No, but really, I did want to know that question or for example, if you were a person, you are at your computer and you have an uplink only going, is it feasible to utilize that type of a program and if it is, what is the cost, feasibility, et cetera. But I think you have answered my question.

SPEAKER: Let me just ask you, if you have an uplink on the east coast and Real Audio in Seattle is getting an analog feed from an uplink in central United States, can your program interface with a stand along computer that's not networked?

MR. MAGHEN: Wow, that would be cool.

MR. FISHER: If you are streaming audio, at some point you are on the network and at some point there is a log being kept. We use Real Audio for our streaming also.

MR. POTTER: The simple fact is the software can do whatever you want the software to do.

MR. FISHER: Exactly.

MS. ATKINSON: But is it necessary? We are already collecting the amount of information necessary to identify 99 percent of the artists' songs out there. ASAT, artist, song, album, title.

MR. GREENSTEIN: What is that 99 percent?

MS. ATKINSON: If you have those four pieces of information, you can identify most --

MR. GREENSTEIN: Have you ever attempted to distribute, have you run a collective and have you tried to do that on that information? I further submit that these proposals for surveys, that if the copyright office were to look at doing that it would need to test the statistical validity by first doing a census in order to make a reasoned decision.

MR. KNITTEL: I would say, I don't look at former AEI reports DMX today to be a collective. The fact of the matter is we know every song that we use and we pay royalties back on all of the songs to the record labels, whether there is nearly 1500 of those labels, majors and independents, from 8th Avenue Lounge to Columbia. We do it every six months like clockwork. You know what, once you have the system in it's not a problem.

MS. PETERS: I'm going to cut this right now because it is now 1:20. We are significantly late. I'm going to suggest that if you go out of the building you do it at your peril

because you have to come back in through security.

(Recess)