

Testimony of
Mr. Dan Navarro

May 15, 2002

Introduction

My name is Dan Navarro. I am a recording artist and a member of the American Federation of Television and Radio Artists (AFTRA) and the American Federation of Musicians of the United States and Canada (AFM), the two labor unions that represent both featured and non-featured recording artists. On behalf of the over 80,000 performers and newsmen in AFTRA and the over 100,000 musicians in the AFM, I appreciate the opportunity to submit this testimony in order to speak for recording artists and to explain the importance of the digital performance license income to us. The law mandates that 50% of digital performance royalties must be distributed to recording artists. This income is critical to our livelihoods - and to our ability to continue to create and record meaningful music.

I would like to acknowledge my fellow performers in the audience, who have all come to Washington to show how important this income is to working performers.

For more than a decade, my partner, Eric Lowen, and I have written, recorded and toured. We have released six albums. Two of them were originally released on major labels, and a third independent release was subsequently purchased and rereleased by a major label. One album was released on an independent label, and we have self-produced and released two albums on our own label. We have had a number of Adult Rock radio hits - you may have heard "Walking on a Wire", "All Is Quiet," "Constant As The Night," "Just to See You" or "Rapt in You." To supplement my income, I also perform as a non-featured artist on others' recordings. I sang background vocals on numerous albums, including releases by Susanna Hoffs, Clint Black, Julio Iglesias, Enrique Iglesias, Luis Miguel and Jose Feliciano, among others, and performed as a background musician on albums by Whiskeytown. I am a songwriter and member of Broadcast Music Inc. Our songs have been recorded by artists as diverse as Pat Benatar (we wrote the worldwide top 5 hit "We Belong"), The Bangles, Dionne Warwick, The Four Tops, Dave Edmunds, The Temptations and a host of others. I am also a member of the Board of Governors of the Los Angeles Chapter of the National Academy of Recording Arts and Sciences.

I belong to both AFTRA and the AFM. AFTRA is a national labor organization that represents over 80,000 performers and newsmen in the news, entertainment, advertising and sound recording industries. Our membership includes television and radio performers and approximately 11,000 singers, rappers, narrators and other vocalists on sound recordings. These artists include "star" singers who have royalty contracts with record labels and session singers who are not signed to royalty contracts. AFTRA negotiates the AFTRA National Code of Fair Practice for Sound Recordings (the "Sound Recordings Code") with the record labels. The Sound Recordings Code sets the minimum terms and conditions for all vocalists, both royalty and non-featured. We begin negotiations for this Code tomorrow, and I am the chair of AFTRA's

negotiating committee, some of whom have come to Washington for this hearing. The Sound recordings Code has been signed by approximately 1200 record labels, including all of the major labels.

The AFM is an international labor organization composed of 260 affiliated locals throughout the United States and Canada. The AFM and its locals represent approximately 110,000 professional musicians. AFM members make their living by recording music for record albums, films, television, radio and commercial announcements, as well as by performing live music in concert halls, lounges, theaters, orchestra halls and every kind of large and small venue. The AFM negotiates the Sound Recordings Labor Agreement, an industry-wide contract that sets terms and conditions for musicians in the recording industry. It also negotiates industry wide agreements that set terms and conditions for recorded music in the motion picture, television, radio and advertising industries.

Both unions' members include many preeminent recording artists who earn significant incomes from record deals and who are star attractions wherever they go. They also include performers who never gain fame but who are talented and dedicated professionals who earn their livings as "background" or "session" recording players and singers.

In addition to collective bargaining, AFTRA and the AFM also actively participate in all facets of public policy development that affect our memberships. Both unions frequently pursue national and international legislation and treaties that protect artists' rights, as well as joining issues in litigation and Copyright Office proceedings that are critical to our memberships' interests.

The Work of a Performer

The recording process is involved and rigorous, and I will try to explain the process in the hopes that it will help you understand the recording artists' work.

First, Eric and I have to decide the kind of record we want to make and the sound we want. Then we must compose or select the material that reflects our artistic vision, sometimes following ideas down blind alleys, until we are satisfied we are saying what we mean to say.

Next, we create arrangements, select musicians, secure funding, select studios, set a working schedule, and rehearse. By the time we begin recording, we have already been working for months on the project. When we record and mix the album, it is a logistical and technological obstacle course that requires patience and stamina, not to mention openness and technical skill. It takes years of training and ongoing maintenance to become a facile, expressive singer and instrumentalist, much like an athlete must do.

Later, we supervise the mastering, create the cover - indeed, I have designed our last three album covers myself - and do all the clerical work necessary, such as union reports and budget management. It is an overall process that requires long hours, day after day, for months on end, all with the goal of conveying a unified and universal expression, from song to song, throughout the course of an album that is more than a mere collection of tunes. And when we're done, if we're lucky, we get to go back to square one and do it all over again.

However, we are not paid for each of the many jobs we perform on a record. If we had built a house instead of an album, and had worked as architect, contractor, carpenter, mason, plumber, electrician, landscaper and interior decorator, we would have been paid for each task. But the music business doesn't always allow for such varied compensation.

Although some recordings are made by time honored formulas with clear job descriptions, some are group efforts and some recordings require that the performer guide and influence every aspect of the recording. Performers are asking, in the interest of fairness, that, as artists intricately involved in the creation of valuable recordings, we be compensated accordingly.

One would expect that performers would be compensated handsomely for the level of talent and effort required. That perception, however, does not reflect the actual practice. It isn't widely known that artists are required to finance their own recording projects. When I was on a label, it did not pay me to make an album. Rather, it advanced the cost of the recording to me, and sometimes, but not always, included a modest artist advance. Later, those monies are recouped from my sales royalties. In most cases, the additional costs of marketing and publicity, videos, tour support and other promotions are recouped as well, all from my small share of the pie. It's nearly impossible to recoup a midsize music budget unless a record company sells millions of copies of an album. Therefore, most artists go into debt to make albums. In twelve years of making records, I have never recouped or received a royalty check, even though many of my records have gone into profit.

I discovered early on that there's little money to be made from recording albums, and I learned to place my musical aspirations alongside more practical realities in order to supplement my income. No matter what royalty arrangement I made with a record label or even when I produced my own recordings, I never made a livable income from my recording projects alone. So I wrote songs for other artists, toured extensively, sang as a background singer and instrumentalist for other artists, and marketed merchandise. How ironic that, after years of developing my skills and honing my creativity, I generate greater profits selling T-shirts.

Importance of A Performance Right

A peculiarity of U.S. copyright law has had the effect of depressing the income of recording artists. Unlike the rest of the world, the over-the-air broadcast radio industry in the U.S. has the right to broadcast sound recordings without paying any royalty to the musicians and singers whose recorded work the public wants to hear. As a result, broadcast companies built profitable industries by using our product for free. Since the 1960s, AFTRA and the AFM have fought for the creation of a performance right that would provide royalty payments to musicians and singers when their recordings were broadcast on the radio. All other types of copyrighted work in the U.S. enjoy a right of public performance, and there is no reason why sound recordings should be treated differently. But the powerful broadcast lobby defeated all efforts to create a performance right in sound recordings. We believe an over-the-air performance right for sound recordings should be created. Of course, as with the digital performance right, performers must receive 50% of the royalties generated by the over-the-air performance license.

The creation of a full-scale performance right would benefit the U.S. economy as well as artists. Intellectual property is America's leading export, and our music is the most demanded music in

the world. Hundreds of millions of dollars are collected by foreign rights societies for the broadcast of American recordings overseas, but those societies refuse to pay the money they collect to American performers because there is no reciprocal performance right in the U.S. It is time to correct this grave injustice so that U.S. performers can reap the international benefits flowing from our creations.

The Digital Performance Right

Congress redressed a small part of the unfair position to which American performers had been relegated when it passed the Digital Performance Right In Sound Recordings Act. For the first time, Congress required that at least some public performances of recorded music require payment to the creators of that music for the right to perform our work. Congress created a compulsory license for some of these uses, and mandated that performers must receive 50% of the compulsory license income. Congress acknowledged the importance of all of the performers' contributions to sound recordings and required that featured performers receive 45% of the license income and that non-featured performers - backing singers and instrumentalists - receive 5%.

I cannot overestimate how important this new income stream will be to both royalty artists and session singers and players. For most of us, there is no one project, job or recording that provides an adequate living all by itself. The performance license fees will be an important component of our income. It is necessary in order to enable US performers to continue to create great albums

There has been a great deal of publicity lately about the plight of webcasters, who say that as new and small businesses they cannot afford to pay the digital performance royalty rate set by the CARP last February. Truly, fostering the growth of these new outlets for our music is of the utmost importance to performers. As the breadth and diversity of what is played on over-the-air radio shrinks, webcasting potentially offers a greater variety of music and a new way for us to reach an audience. The truth is, however, that we are also small businesses, and unless there are income streams that we can rely on to make a living, we will be unable to continue to create the sound recordings that the public wants to hear.

The Copyright Arbitration Royalty Panel (CARP)

In spite of our desperate need for the new digital performance royalties, artists are still waiting to be paid by webcasters. Although webcasters have been liable for compulsory license payments since 1998, they have paid nothing while they awaited the outcome of the Copyright Arbitration Royalty Panel, or CARP, preceded that Congress designed to set the license rate. The CARP held over forty days of hearings, heard from approximately 80 witnesses, reviewed thousands of pages of exhibits and evidence, including evidence about the webcasters' businesses, and heard legal arguments on all facets of the license question. The AFM and AFTRA participated in this litigation and offered evidence about the need of artists for this new income and about the creativity, artistry and hard work that artists contribute to make sound recordings valuable. The webcasters also participated. They were ably represented by counsel and offered substantial evidence about their businesses.

No party to the CARP was completely satisfied with the recommendations that the arbitrators made to the Librarian of Congress last February. Both sides have appealed the decision. But, Congress must allow the statutory CARP procedures to conclude and the final determination to stand, or it will undermine the integrity of the system it established. Congress recognized that a CARP participant might not agree with the decision and, therefore, provided appeal procedures of the final determination to Court.

Another important and often overlooked point is that the CARP established payment terms as well as rates. The CARP adopted a payment term requiring the artists' share of royalties to be paid to them directly. Fighting for direct payment to artists has been a top AFTRA and AFM priority. We are thrilled that the CARP has adopted terms that will assure that artists receive their royalty shares in the quickest, most efficient and most accurate manner.

The CARP also designated SoundExchange as the collective agent for unaffiliated copyright owners. The full CARP Report acknowledges that artists have a "direct and vital interest in who distributes royalties to them and how that entity operates." In particular, it acknowledged AFTRA's and the AFM's expressed preference for SoundExchange due to the collective's non-profit status and experience with similar royalties, as well as the role of artists in SoundExchange governance. Contrary to the unions' view, the webcasters and broadcasters had requested the CARP to designate Royalty Logic Inc., a for-profit collective in which artists have no control, as the collective for unaffiliated copyright owners. This term has been appealed.

Other Important Issues

We may be visiting you again soon to address other performer issues. Five issues stand out to me. First, artists must be able to control their Internet domain name, and record labels should not be permitted to own an artist's domain name when that artist is no longer with the label. Most of Eric and my album sales are made at live performances or through our website, and we are lucky that our contract with a major label was pre-internet era, or the label would have insisted on owning our domain name. Second, the record companies should not be permitted to deduct things like "breakage" for digital transmission. This needs no explanation, as there is no product to break. Third, and perhaps most important to me, is that artists should have the right to reacquire and exploit recordings if the copyright owner is no longer exploiting the recording in the relevant territory. This is a proposal in AFTRA's negotiations, and if we are unable to achieve it there, I'm sure you'll see me again on Capitol Hill. For example, one of my records, entitled "Pendulum," which was released on a major label, is no longer manufactured or sold by the label. Eric and I would like to manufacture and sell this recording ourselves but are unable to do so. Fourth, the Internet promises to provide new opportunities for artists to reach an audience and to break the major labels stranglehold on distribution. Some argue that new legitimate services' licensing efforts are stymied by the major record labels in their effort to perpetuate their control and prevent competition. Without legitimate services to compete, piracy thrives. We believe that the Internet should be encouraged to fulfill its promise of providing competition and new business models. Congress must watch carefully, and if competition is being stymied, action should be taken.

Finally, we welcome Congressional and Department of Justice investigation into the vertical and horizontal integration in the radio, television and concert promotion industries, especially the

conduct of Clear Channel Entertainment. This is a very important issue to artists and the public, and we urge Congress to enforce rigorously the anti-trust laws. Congress must also continue to urge investigation of and hold hearings about ways that radio group owners and record labels circumvent the current laws prohibiting payola.

Conclusion

Our work provides the backbone of these new industries, which pay for everything else such as bandwidth and electricity. The electric companies are not being asked to provide free or discounted electricity. Webcasters are not entitled to get, and are not asking for, free bandwidth. There is no more reason for them to get the benefit of our music for free. And let there be no mistake -- it is our music that they, and the public, want. The webcasters could get content for free by making their own recordings, but they do not, because what their listeners want is our music.

The process Congress established to set a fair rate is still in progress. Neither side is pleased with the rate, but Congress cannot interfere without undermining the integrity of the very process it created to set the rate.

In conclusion, I wish to remind that you this is not simply one business versus another. At the heart of this are the individuals whose talents create the sound recordings. Digital performance royalties will provide critically important income to famous and ordinary musicians and vocalists. Without us, there would be no music on any station on the dial or Internet. Please don't make us wait any longer for fair compensation for the use of our music on the Internet.