

Testimony of
Mr. Don Henley

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Mr. Chairman and Members of the Committee:

I am grateful to have the opportunity to present the views of the Recording Artists Coalition (RAC) on the issue of CARP webcasting rates. My comments, while focusing on the webcasting issue, also touch upon other unresolved issues affecting recording artists. All of the problems and issues of the music business are interrelated. We hope that while the Committee searches for an answer to the webcasting conundrum, it will also help resolve other lingering problems facing recording artists.

The Digital Millennium Copyright Act ("DMCA") provides to recording artists, for the first time, a public performance right for digital transmission of sound recordings. Before passage of the DMCA, recording artists were precluded from receiving royalties for public performance of their sound recordings. While songwriters receive public performance royalties for radio airplay of their musical compositions, recording artists receive nothing for radio airplay of their sound recordings.

Broadcasting interests have always argued that a sound recording public performance right for radio airplay is not warranted because radio airplay helps sell records. While that may be true to some extent, the Copyright Law does not provide for a "promotional" exception. Arguably, radio airplay helps songwriters sell sheet music. No one argues that it is inherently unfair for songwriters to receive income from both sources. But for the recording artist, the rules are different. The public performance right that was established for all other creators of copyrighted works does not apply to the recording artist for radio airplay. This inequity must not be forgotten when contemplating the fairness of webcasting rates.

Furthermore, performers all over the world collect for all public performances, not just for webcasting, and that because the United States does not have such a right beyond webcasting, American recording artists are denied substantial income for overseas performances. Now that recording artists have finally been granted, in the digital world, what should have been granted to them in the analog world decades ago, there is a strong movement to restrict these new rights. Nothing could be more unfair and unsympathetic to the recording artist.

Regarding the CARP webcasting rates, it is important to separate the process from the result. While the CARP process is not perfect, it is the best method devised so far to overcome the seemingly inevitable gridlock between content creators and content users. This arbitration system, when working correctly, will ensure that music is readily available for Internet usage, even in the face of ongoing animosity such as exists between the webcasters and the record industry. At times, a party submitting to the CARP process may feel wronged by a decision, but that is the nature of arbitration. The parties present their case and a decision is rendered. At

times, the parties may have a right to appeal but, overall, the integrity of the system is based on submission to the result.

If the webcasters agreed to arbitration and took part in the arbitration, they should, in principle, abide by the arbitrator's decision. The viability of any arbitration system would be severely diminished if every decision was contested and the process always attacked. Neither side totally received what it requested in this particular CARP proceeding, but at least a rate was set.

Nevertheless, some valid concerns have been raised by the smaller and less commercially driven webcasters. There is much to be said for the viability of small, independent webcasters as they offer varied musical genres and introduce new recording artists to the public. In some instances, relief should be granted, but only through direct negotiation with the recording artists, the record companies, or SoundExchange. When webcasters seek congressional intervention every time a CARP decision is not to their liking, it brings into question the entire validity of the process., Congressional intervention at this time would set a very bad precedent.

A balance must be struck between the right of a recording artist to be fairly compensated and the desire of a webcaster to create a new business. In some instances, the two may be mutually exclusive. If a webcaster can survive by paying the recording artist only a nominal or relatively non-existent royalty, then perhaps the webcaster's business model is not viable. Amazon.com lost money for many years before turning a profit. That company did not ask Congress to waive its responsibility to pay the manufacturers of the merchandise it sold. Amazon.com took a loss until it could turn a profit. Other e-commerce businesses went bankrupt because they could not pay their vendors. That is free enterprise. If a webcaster cannot pay a viable, fair royalty to the recording artist and the record label, then the webcaster should either be prepared to take a loss, like Amazon.com, or look for another business.

Some webcasters propose implementing a "percentage of revenue" formula. In our estimation, in most instances that is not the answer. Many webcasters have developed business models that do not foresee or even contemplate a serious stream of income, either in the short or long term. If a webcaster is a non-profit organization, then perhaps SoundExchange, the record labels, and the recording artists should entertain a request for limited licensing fees or even waiver of a licensing fee altogether, and relief from onerous reporting requirements. This type of relief should be requested on a case-by-case basis, and the negotiations should occur directly between the non-profit webcaster and the copyright holder.

However, if a webcaster is a for-profit business, then the CARP rate should apply. If a small webcaster needs relief to stay in business, the webcaster should seek relief directly from the copyright holder. RAC, as a matter of principle, wants a strong, independent webcaster presence on the Internet, and maintains that it will promote a liberal policy of webcaster exemptions or reductions in rate, as well as relief from onerous reporting requirements, based on legitimate economic need. RAC will also work within SoundExchange to promote a liberal and flexible licensing rate and reporting policy toward smaller and non-profit webcasters. Neither the Copyright Office nor Congress should micro-manage the problem. The Copyright owner is in the best position to determine whether relief is warranted and in the best interest of the music industry as a whole. Of course, no license can be more than the basic CARP rate, but the final

determination of whether the rate is less than the CARP rate is a decision only to be made by the Copyright owner.

It is premature to start changing CARP before the system is given a chance to work. If the system proves faulty after some time, then Congress perhaps should consider reform, but we are not there yet. Furthermore, Congress must appreciate the importance of the gain made by recording artists when they secured the long-sought after sound recording public performance right. A number of major recording artists, such as Mary Wells, might not have died impoverished if a viable public performance right for sound recordings had been put in place many years ago. The recording artist cannot continue on a roller coaster ride so when considering the merits of granting relief to a webcaster claiming economic deprivation, keep in mind the recording artists who have been denied income from public performances of their sound recordings for their entire careers. The gains made by the recording artists in DMCA must be preserved.

If Congress truly believes in supporting the rights of recording artists, then Congress should allow CARP to work. Congress must have faith that the common interests of the recording artist community and webcasters will compel the parties to work out their differences. Fiddling with CARP now will set a dangerous precedent and will potentially and perhaps permanently impair the viability of the CARP system. Without a system such as CARP, there will be continued gridlock and that will ultimately harm the recording artists, the webcasters, and the public.

Congress should also recognize that issues relating to music on the Internet are not unrelated to other issues affecting recording artists. If Congress truly wants to facilitate the creation of a functioning Internet music system, as well as an overall functioning music industry, then Congress needs to address other unresolved issues between the record companies and the recording artists. In particular, RAC strongly believes that Congress should call for hearings on the issues of sound recordings as "Works for Hire," unconscionable record contract provisions (including control over artist websites), the creation of an analog public performance right for sound recordings (i.e., a sound recording public performance right for radio transmission), and reversion to the recording artist of out of print catalog. All of these issues are serious impediments to the creation of a well functioning system, as they all negatively impact the interests of the recording artist and the public. Without resolution, the music industry will become even more dysfunctional than it is today. The situation requires good faith, outside intervention. Congress must play a key role.

Thank you again for the opportunity to present our views to the Committee. Congress must continue to hear from the independent voices of recording artists. RAC is dedicated to bringing issues directly affecting recording artists to your attention. Recording artists must always have an independent voice as our interests are unique, vital, and at times contrary to the interests of the mainstream, major record companies and the Internet community. Recording artists create the music that fuels these industries. Without our input, no real solutions can ever be found.