United States Copyright Office
Roundtable

Panel II

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

MS. PETERS: Starting the second panel, we see some familiar faces and some new faces. So, for the record we are going to go around and have everybody introduce themselves.

PANEL II - COMPLIANCE WITH TERMS OF LICENCE

MR. ENGLUND: I'm Steve Englund from Arnold and Porter, representing Sound Exchange.

MS. BOCCHI: I'm Linda Bocchi from Sound Exchange.

MS. KESSLER: I'm Barrie Kessler, Sound Exchange.

MS. ABLIN: My name is Karyn Ablin. I am here on behalf of the National Association of Broadcasters, the National Religious Broadcasters Music License Committee, Clear Channel Communications and a lot of other radio broadcasters.

MR. JOSEPH: My name is Bruce Joseph. I am putting on a different hat for the second panel here. I'm from Wiley, Ryan and Fielding, still, but here on behalf of Serious Satellite Radio and XM Satellite Radio, the two satellite digital audio radio services.

MR. LANDIS: David Landis from Ultimate 80s.

MS. McCANN: Mary McCann from IM Networks.

MS. BUSHYEAGER: Amy Bushyeager from Mintz Levin representing Music Choice.

MR. WALKER: Chuck Walker from Muzak.

MR. KNITTEL: Barry Knittel with the same hat, DMX Music.

MR. HAYS: Mike Hays. I'm here today representing Twangcast and I am also a recording artist, a songwriter and a copyright holder.

MR. POTTER: John Potter, Digital Media Association.

MR. MAGHEN: Alex Maghen, Yahoo.

MR. PUMPHREY: Brad Pumphrey representing the International Webcasting Association.

MR. BUCZYNSKI: Joe Buczynski. I also known as Lou Josephs in the webcasting community. I represent independent consultants.

MS. PETERS: Okay. The focus on this panel is reporting to monitor compliance with terms of the license. Specifically, what we are looking at is: Is there a requirement that information must be gathered in order for copyright owners to monitor compliance with the license?

How important is that information and if you compare the information that you would need in order to comply with the information that you need to identify, which is more important or are they both the same? How do you break it out in the hierarchy of identification versus

compliance?

Let's just start with that and see who wants Jonathan is holding up his hand. Do you want to have the microphone first?

MR. POTTER: I just want to put this in the record as we assess briefly and we will move on because this is from the last panel, really. This is a Web printoff from one of the Warren Communications publications, a magazine of general distribution in the trades of communications which describes the RIAA license with the Corporation for Public Broadcasting and specifically notes that there is no reporting requirements for folks under ten people.

So, given that it's not confidential in nature, I though I would pass it along and get it in the record.

MS. PETERS: Those who want to jump in, you haven't really been part of the panel, so let me start with you, Chuck. Those who want to talk, just raise your hand and I'll get your names.

MR. WALKER: The proposed regulations introduce additional reporting requirements in effect to the sound recording performance complement. Muzak maintains standing as an exempt transmission service through adherence to this so-called sound recording performance complement.

Also, Muzak's status as a non-interactive transmission to business establishments, there is two parts to that. Reporting would provide, in our opinion, no additional benefit beyond a notice to the copyright owners.

Muzak also provides, we wear two hats here, non- interactive digital transmissions as subscription services where Muzak maintains a standing as a non-exempt transmission service subject to statutory license, in this case residential music service.

A substitution of the intended play list in the interim regulations, reporting by some sort of post- transmission play list reporting which has been suggested, would require the construction of some method of capturing more data than we are currently providing.

Transmission management of that data and the purchase of additional bandwidth necessary to accomplish the report and the multiple redundant monitoring of the transmission to assure compliance, this, I think, wraps into the whole issue, which is difficult for Muzak to separate of both the regulations for distribution of revenues and to this issue here.

The reporting would require additional staffing, software, systems development beyond any reasonable benefit of reporting.

The intended play lists, the requirements there are that, and we have said this before during this proceeding, require us to provide the name of the service or entity quite easily, the channel, easily, the sound recording title, easily, the featured recording artist, group or orchestra, okay, that's easy to do, the retail album or in the case of compilation of albums created for commercial purposes, the name of the retail album identified by the service for purchase of sound recording, okay.

Then the recording label, that is not always available to us. The other thing is the catalogue number for that particular recording, which is a copyright and a phonogram as provided by copyright law, that is not always provided.

Should we be required to unequivocally provide that information? In order to comply with the regulation, Muzak would be required to reduce its play lists to sound recordings to which all the reporting data is available, primarily only major label releases.

This is would leave out significant independent and tertiary labels important to our clients, mostly impact Latino repertoire but our unique program style developed over time would also suffer, things like world, new age, piano and guitar, which is a program style.

This was put Muzak at serious competitive disadvantage. Our clients would seek other services with the repertoire resulting in a loss of revenue.

I think it would be a mistake to ask the services to provide a report that no benefit beyond a notice to the copyright owners would be provided.

MS. PETERS: Okay.

MR. MAGHEN: Well, Yahoo operates two different kinds of service. They operate a service which actually programs a very, very large number of music stations and it does that through automated technology back ends and it rebroadcasts broadcast radio stations.

I guess it's important to discuss these separately. With regard to the first part, many, many stations that are developed and programs by software. I guess under those circumstances I'm confused as to why in a licensing relationship it's important for us to continually identify on an ongoing basis through proof that we are satisfying the license agreement when in fact we are approaching this in good faith from both sides at the beginning, why can't we use a more established methodology which is that if for some reason the licensor determines that, you know, there is a reason to believe that we are not adhering to the performance complement, that there be a mechanism at that point for identifying whether in fact there has been some kind of non- compliance, as opposed to, again, the onerous and incredibly complicated task on, by the way, both parties' sides, of generating millions and millions of row of data about from song that was played and each listener who has heard it so that maybe somebody can come along and write some database software that will be able to go back retroactively and at any given moment determine whether or not we have, you know broken with the performance complement.

So, I guess what I'm saying on that side is that it seems first off that certification on our part that we will and that we do on an ongoing basis adhere to the performance complement should be the right start considering that it does not benefit us as a licensee in any way to break with that complement, and second, that we provide a mechanism that is much more meaningful at least for those webcasters who use software for programming, for determining under those circumstances that the licensor thinks that there is a problem.

Whether or not our systems are capable of programming music that is in some way breaking with the performance complement in the form of providing a third party software audit or something like that, as opposed to the idea of, on an ongoing basis, delivering an absurd amount of data that isn't really particularly useful to either side.

MR. CARSON: Alex, let me follow up on that. You were talking about an alternative which assumes you are going to comply, but if there is any reason to think you haven't, have some kind of way to verify retroactively, I gather.

How does that happen if you are not keeping the records, if Sound Exchange or a copyright owner thinks you have been violating the complement and they go to you and they say, "We think you have," how do you prove what happened if you don't have the records?

MR. MAGHEN: Okay. So one way that you can do that, and again, we are still sticking with the example of a webcaster that uses software to program its streams, although some of this same stuff can apply under other circumstances.

Yes, one way is to have us actually recording all of this data of what we are playing

retroactively, which, by the way, is not the same as delivering it on an ongoing basis. So, the first issue is whether or not it needs to be provided on an ongoing basis in order to determine compliance and the second is whether or not it's provided after the fact.

But another approach to take, and this is specifically in the case when we are talking about software that generates play lists, is allow a third party to come in, to get complete unfettered access to our software, to our databases, education from the people who work in our organization, to in fact indicate this is the way our systems program our music.

Now, I will tell you that software is frequently very complicated. That is true. I would argue far, far less complicated than the retroactive reviewing of millions and millions of rows of data. But nevertheless, it can be done.

There are isolated portions of software that do isolated things. It's a kind of a methodology for establishing that certain rules are affected in certain places.

In our case, for example, there are actual components of our software which review the play list as it's being generated for the listener, and throw music out that isn't allowed to be there because it would break with the performance complement.

Does everybody have that? No. So, there may need to be other ways of handling that for other programmers. But for those who do use software in order to generate these play lists, there are mechanisms that I would argue are far better if there is a determination or reason to believe that we are not depending on the performance complement for determining how our systems work and what they program.

MS. PETERS: Okay. I want to go with the list that I have, which is, Linda, Bruce, Amy, Jonathan.

MS. BOCCHI: Good afternoon. Six years ago I had the pleasure of going through something very similar before you which had to do with the subscription service and notice of record keeping.

I feel like deja vu all over again because six years ago the subscription services made the very same arguments that the webcasters are making; not one round, but two rounds. They argued that there was no right under the law. They argued that it was beyond a very limited and defined definition of what notice of use should be and the Copyright Office determined not only once but twice that the fact that Congress put into that law a very specific and defined right which, I dare say, is as important to our industry as the royalty that's being paid, is the ability to, in some way, minimize the effect to the displacement of sales, which is what all of this has to do with.

So, the minimal royalty that we get is just one part of the equation. The Copyright Office recognized that this was a very important right and without an ability for us to test whether it was being complied with, we had no right.

Then you very graciously reconsidered that when you put out the original determination. Now, this proceeding, although maybe few people were involved, went on for over two years. This was not a simple proceeding. This was not arguments that you considered off the cuff. This was something that was very carefully considered six years ago and you recognize that this was a very important right that we have. Without data to test for it, we have no right.

So, I guess I'm just a little confused right now because I don't see what new arguments are being proposed. I don't see why it is that not only do the copyright owners have to expend more resources rearguing this, but the Office has to expend more resources, rearguing whether or not we have a right to something that is so very clearly in the law.

MR. WALKER: Could I ask for a clarification? Do you mean to say that the transmissions do it, displace music sales, in and of themselves.

MS. BOCCHI: I mean the whole basis or whether it is this is what effect will it have on whether you can perform. That is where the recording complement comes in.

MS. PETERS: What Linda's probably going back to XXX BEGIN TAPE 3-B is in 1995 when the right was actually created, it was created for digital only and it was very limited in what it applied to. It was subscription services. In part the argument was that we were migrating away from just earning money from the sale of records to having these types of subscription services and on-demand streams.

As it later turns out, it is basically taking the place of purchasing records. So, that is just where the Congress intent was and that was argued at the time.

We have Bruce, Amy, Jonathan and Steve.

MR. JOSEPH: With all due respect today, it works. Prior determination, none of the clients for which any of the hats that I have on participated in that prior determination had a opportunity to make any arguments in that prior determination and moreover, we were looking at a different statute or you were looking at a different statute in that prior determination.

Right now, you have an act that has nine, count them, nine conditions on the statutory performance license. The first one, to be sure, is the sound recording performance complement. Then we see that the transmitting entity shall not cause to be published or induce the publication of an advanced program notice.

Then we have no prior announcements. That is a subheading of number two. When you look at the specific obligations, there are many more than nine. Then we have something about archived and continuous programs. Then we have a prohibition on offering visual images simultaneously in a manner that is likely to cause confusion as to the origin or sponsorship. We have cooperating to prevent scanning and the list goes on and on and on.

These are all, at least apparently, given equal weight as conditions with respect to the statutory license, all at least apparently, given equal weight as conditions with respect to the statutory license. I have not heard anyone and I have certainly not heard RIAA ask for information that pertains to anything other than the complement.

But the question isn't what people are asking for. The question is, as a matter of statutory construction, what is a reasonable construction? It is reasonable to read the complement with the other conditions.

Those other conditions have nothing to do with reports of use in many cases. In some cases perhaps you could stretch a little bit and say that a report of use might sweep up what's involved in that other condition. But to the extent that this rule making concerns a report of use and keeping of records with respect to use, it really doesn't have much to do with those conditions.

You would have thought that if Congress wanted us to be talking about conditions there would have been reports demonstrating compliance.

The last comment, although I have many others, with respect to Linda's question of what are we to do, the same thing that licensor generally do with respect to the satellite digital audio radio services, if you suspect there are violations of the complement, you listen, you take and you see whether there is a violation of the complement.

You should certainly not be in a position where the reporting obligation and the record

keeping obligation that we are talking about here is driven by compliance. That's not a notice to the copyright owner that their work has been used. It's not a record with respect to how that work was used.

MS. PETERS: I'm seeing people shaking heads, so I take it a number of you are supporting Bruce.

We are going to go Amy, Jonathan, Steve and Linda. Amy.

MS. BUSHYEAGER: It's really to underscore something that Bruce just said. In the 1998 determination, which my client, Music Choice, was a part of, the Copyright Office, I think in its order, stated that because the performance complement is so specific, Congress intended that there be some measurement tool, there be some way to monitor compliance with the performance complement. I think that was part of the rationale that the Copyright Office has given for its conclusion that monitoring compliance is a permissible able under the then DPRSRA, and I always forget the acronyms for these different statutes.

My argument would be, if Congress had meant that, it would have said so with specificity as in 1998 it amended that act to add the additional requirements that Bruce talked about. These are very granular. They detail every act that a webcaster makes and had monitoring compliance and the requirement to issue reports for compliance monitoring been Congressional intent, my argument is they would have specified it.

MS. PETERS: Okay, thank you. Jonathan.

MR. POTTER: I appreciate Linda's whimsy and her deju vu. It's a shame that you have to turn out the same papers again. Maybe your lawyers won't charge you this time.

I think that those of us who are parties today that were not parties back then plan on making probably the same arguments, but since we weren't parties back then we didn't have the opportunity to make them in perhaps the same way, or frankly to go up on appeal if we lose the same argument.

We have this strange rule in this country that you are presumed innocent until proven guilty. When we file our taxes, we don't file all the supporting document with our taxes, we sign that we are telling the truth.

When we take a traditional copyright license from ASCAP or BMI or frankly from all of the record companies that I have been representing in my past life, clients who were doing deals, it typically has an audit function in there. They have the right to come in and audit and if you are off by five percent or more than five percent, then in fact what it flips is the burden of cost on the audit.

There are all sorts of ways to manage that. On behalf of an association not willing to endorse Alex's proposal about software audits because frankly I'm just not sure what the costs of that are and the intrusiveness of it are.

I think that in a situation where we have services that have hundreds of channels, some have posed that they have thousands of channels, there is an ongoing dispute in court about things like skip buttons. One is not always in charge of what one is specifically performing.

We also have a group over at the Recording Industry Association that is proving itself very effective at policing infringement, typically through large-scale litigation, but occasional phone calls such as one which one of our members told us about where you got a phone call that said, gee, when I push the skip button 276 times in a minute in a half I can hear the same artist four times in a row, damn it, and you are violating the complement.

So, those sorts of enforcement mechanisms are already underway where they are utilizing the functionality of the service to listen to make sure that even under atypical circumstances the complement isn't being violated. They do have ears. They can listen. ASCAP listens and writes things down. Other people come in and write things down.

I frankly think it is offensive for the heavy hand of government just to be telling us we have this extraordinary reporting burden merely for taking this license which Congress has granted us. I don't see anything in that license, in the statute, about police power and I don't see anything in that license which says with great specificity that this is required.

MS. PETERS: Okay. Steve and then Linda.

MR. ENGLUND: I think it is important to recognize here that without data to test compliance there can be no enforcement of several of the conditions on the statutory license. There are several reasons for that. One is that many of the webcasters created their channels on the fly. So, no assurance that any particular RIAA or Sound Exchange person who might try to listen to his services, listening to is the same as what other people are listening to.

Maybe if you have confidence that this offer is consistently applied, to cross all the channels you might infer that, but the channels are all different. So, you can never hear a particular set of programming that is being sent to any particular listeners on one of these channels through monitoring.

Even where that is not the case and there are channels that are multi-cast to multiple listeners. There are an awful lot of webcasters out there, an awful lot of broadcasters pushing the envelope with new and different kinds of service offerings.

It would be easy for copyright owners and performers to devote all of their royalty income to trying to track down all of the different webcasters and listen to all the different channels. That is not the right answer here. It's just not economically reasonable for copyright owners and performers to be able to monitor even the substantive channels that they could monitor.

But beyond all that, David, you kind of hit on this a few minutes ago, I think. Our morning's discussion demonstrates that if the Copyright Office does not require, in the words of the statute, that "records be kept," webcasters will not keep them.

That means that even if a copyright owner had reason to believe that the complement was being violated, it sued the webcaster and it subpoenaed the webcaster, there wouldn't be records. So, unless the Office requires that records be kept that demonstrate compliance and that they been made available to the copyright owners, there can be no enforcement.

Alex's suggestion of software audits, I think, is not a sufficient substitute because it's very hard for any third-party auditor to get into the software. But then, how do you demonstrate that that's the software that has been culled from elsewhere in your software?

MR. MAGHEN: That's what a software audit is.

MR. ENGLUND: And how do you demonstrate that that software has been used continuously since 1998?

MR. MAGHEN: So, let me see if I understand, your proposal is that because you don't want to spend all of your copyright holder's money on sitting and listening to stations to determine whether or not there has been a violation, you are going to spend the hundreds of thousands of dollars per technologist that it's going to take you to hire all these people to process all of these reports on an ongoing basis where a bell will go off when one of the companies of which you just said there so many around the world, is in some way in violation of the

performance complement?

MS. BOCCHI: No, that's not what we are saying. What we are saying is that your companies are choosing to take a statutory license, okay, a requirement of which is, in addition to paying royalties, certain other requirements, a very one of which is the sound recording complement.

In order to make your use a permitted use under the law, you not only pay royalties, but you also abide by these other requirements. This is what the Copyright Office said six years ago. I'm just using your words.

So, when the statute says we need a notice of use, it is a notice of permitted use, which means that we have to be able to ascertain whether, not only you paid your royalties, but also whether you satisfied these other requirements.

Six years ago, the Copyright Office found, after listening to all these arguments, that the subscription services with something between 30 to 90 channels, that it was impossible for us to be able to monitor three services with 30 to 90 channels, but you would now have us believe that it is more possible for us to monitor how many thousands of webcasters with how many thousands of on-the- fly channels, et cetera, et cetera.

MR. MAGHEN: But now it's my turn to say "No, that's in fact not what I'm suggesting and I would never expect that you would be able to do that either."

What I'm saying is that this is a new business, it's a new medium. As a result, you guys, as well as we, face a lot of new challenges. One of those new challenges, yes, is that there are thousands and thousands of stations that cross many different company boundaries, many different licensees.

But what I'm not hearing from your description is how this new situation with a much larger body of licensees should actually dictate that you need to receive the incredible volume of data that we are talking about because it is in some way going to assist you in achieving your goals. It is not.

MR. CARSON: Let me interject. I've got a question for Linda and Steve and for the people on the user side.

For Linda and Steve, since 1998 you have had this requirement. I would like to have some sense of what you have done with it. What have you been doing up until now with the information you received that is there to assist you in monitoring compliance.

MS. BOCCHI: I think I'll have to pass this to Barrie.

MR. CARSON: Okay, great.

MS. KESSLER: I think I would like to address this from what our system does with regard to the sound recording complement and how we test for compliance. We have received logs from the preexisting services and they are date time-stamped by channel. The reason for that is specifically to test for the sound recording complement.

We have written a software program that is part of the loading of the logs and part of our data clean-up exercises around those logs to verify that the information that has been reported has in fact identified the copyright owner, the artist, the album and the title correctly.

We don't test for the complement until after we have gone through that data quality cleanup exercise. The reason for that is it's possible that by virtue of misreporting that there is a violation inadvertently in the log that isn't a true violation. So, we go through this data cleanup

exercise.

Then, once that data cleanup exercise is complete, we do what we call "finalize the log." Part of "finalizing the log" is running our sound recording complement algorithm on the data. This does not require human intervention. This is a software program that analyzes the data and checks for the various components of the sound recording complement in a three-hour period across the log.

When there is an apparent violation in the log, the system extracts the portion of the log that is the apparent violation. At that point there are some additional tests that are done to verify that it wasn't a violation that was introduced by virtue of our cleaning up the data.

When a violation is identified, it could be because the services did not provide the album. Instead, they put the words "CD single" on the album and we would get thousands of violations based on the entry of a CD single.

So, of course, there are certain key words that we exclude from our test of the complement so as not to have the voluminous violations that are spurious. When a violation is identified, it is the policy of the Sound Exchange that we would discuss the situation with the licensee, alert them that -- do you know that you are not complying with the complement? Here is the period, here is the log where you are non-compliant. And we give the licensee the opportunity to address the violation. We don't want to shut you down. We don't want to sue you. We want you to be compliant.

The only recourse that we have, correct me if I'm wrong, Linda, around a violation, is sue. So, it's in our interest to get the logs compliant.

MR. MAGHEN: Do you do this on every single log that you guys have received?

MS. KESSLER: We do this on the detailed logs that we load and finalize.

MR. POTTER: Have these guys all gotten phone calls about violations? I just want to make sure it's all of them, so it's not sampling.

MR. MAGHEN: No.

MR. POTTER: We've got the three preexisting services here. I'd be interested in sort of the practical, I mean you guys get this huge data dump every month. You assume that they go through this wonderful data thing, exercise. How many phone calls do you get about violating a complement?

I mean you can say "I pass," but is there a practical issue here?

MR. WALKER: I've received no phone calls on that particular issue.

MR. POTTER: Anybody?

MR. KNITTEL: No one has contacted me to say that we received this.

MR. POTTER: So, you have gone through this massive data exercise of writing code and putting together terrabytes and computers strung together to make no phone calls to anybody. I mean it just seems to me if we are worried about violating the complement and worried about sales displacement, because that is the basis of the complement, and I recall this exquisitely.

MS. BOCCHI: Deja vu all over again, right?

MR. POTTER: But if we are worried about a sales displacement, if we are worried about making sure that traditional revenues streams aren't undermined by the new media and that this

is complementary and incremental benefit to the recording artists and to the recording companies, accidental violations, or even ministerial violations, the amount of resources put in there, I mean if somebody's playing a Bruce Springsteen channel, you are going to know it in a matter of minutes, if not days, in the worst case. I mean it's just going to be so obvious.

When Napster went up, you guys knew it. When Kazan went up, you guys knew it. If somebody is intentionally doing this in ways that are harmful, you are going to find out. Because the artist is going to find out or the manager is going to find out. It's not like you are worried about some little tiny webcaster who might be playing a Bruce Springsteen channel to his nine friends and damn it, those nine people have stopped buying Springsteen albums.

You are talking about large-scale commercial piracy or commercial violations that undermine the traditional revenue streams of your clients. It just seems ludicrous that you are talking about legitimate companies who are in business to do the right thing. I mean you are tarnishing us all as criminals for this.

MR. KNITTEL: If I'm a record label or an artist, I would be perplexed over the fact that you are spending any money to do this. The fact of the matter is that these rights or these services are reporting and paying royalties and furnishing information for distribution.

What you are looking for is to find someone, you know, they are guilty and we have to prove ourselves innocent.

MR. POTTER: And if you are really lucky you can screw us out of the compulsory license and bring us to court. The fact that somewhat would run a Bruce Springsteen channel or by mistake the software would trigger two tracks in a row, you know, that is Sony's problem to come and sue for it, not yours. It is there they hold the copyright. You are only administering on their behalf.

I'm telling you, if I wrote music and it was a record label, I would be out of my mind here wasting that kind of money.

MS. BOCCHI: Well, first of all, as I said earlier, that is one of the requirements for the statutory license. That is one of the things that this industry fought for is the sound recording complement and some of the others ones. But obviously the sound recording complement is nearest and dearest to my heart.

That is one of the things that we found important, so, to have someone on the other side who is supposed to be providing this information tell us that it's not important, maybe that argument should have been made on the Hill before it was passed.

MR. KNITTEL: You know, that was before my time, so please don't paint me with that brush. I don't want to go back to deja vu any more. I don't want to go back to six years. I want to talk about today and going forward and I want to talk about today and going forward in a business fashion that's cost effective so that the record labels and the artists secure the royalties that are being paid and they do it in an efficient fashion.

MS. BOCCHI: Okay. And today in going forward in the law there is a right to, there is a restriction with regard to the sound recording complement. Therefore, there is a right.

MR. POTTER: When the Food and Drug Administration, which I would argue is a more important agency in terms of regulating than Sound Exchange and probably more important than the U.S. Copyright Office to the health and welfare of Americans, when the Food and Drug Administration imposes on manufacturers of pharmaceuticals good manufacturing practices or GNP, it doesn't require that every single pill that comes off the assembly line has a certification with it that goes to the consumer, that goes to the regulatory agency that says "This pill is good."

They don't require manufacturing runs to spit out data that says, "Yup, another good day. We didn't have any mistakes today."

Instead, every year, typically, actually the truth is every two, three or four years, given the limitations of the regulatory agency, they go in and they check. They go in and they check. And we are talking about drugs here, we are talking about things that can kill you.

But here we are talking about massive amounts of self-reporting every single day, every single hour, every single moment and it's ludicrous to try to catch something for a meaningless violation. If a violation is going to be meaningful, you'll know it.

MR. CARSON: Can I follow up on something that Alex said? I'm probably going to overstate what he said, but I'd like to get the reactions of the other people who are on the users' side to this. That is the difference between maintaining the records and reporting the records. I'm wondering how significant that is. What I'm really getting at is how many of you are comfortable with keeping the records that if asked you could produce so that compliance could be verified. Is that a significantly lower burden than the burden of producing the records on a regular basis and is it a burden you can sustain?

MR. MAGHEN: Two things: One Oh, I'm sorry, I thought you were asking me.

MR. CARSON: I'm primarily interested in other people's reactions because I sort of got yours, although yours is of interest as well. But I would like to hear the others.

MS. PETERS: Mary has been trying to jump in.

MS. McCANN: Yes. My comment is directed to that kind of record keeping. My background comes from commercial radio. I was in commercial radio my entire life until getting into IM Networks and Sonic Box in the last two and a half years. I was brought on board there because I am a radio expert.

One of the things in radio is if your ratings go down, who's the first person that gets fired? Anybody know the answer to that? The program director. Programming is the business of radio. When we report a log that says what we played, in what order we played it, we are giving away our business plan.

I have no objection to keeping the records, maintaining the records, but I have a massive objection to reporting the records all the time of what we are playing. If we are suspected of being in violation, come on down and audit me. Come on down and look at my logs. We'll keep the logs. We'll pay the fees. We are not objecting to that.

But to give away my programming, to give away my business plan, it just seems like a most unreasonable thing for the government to require of me because just as it's been mentioned, you know radio is not the music business. The music business is not radio.

While as much as we are cited for paying our bills for our bandwidth, you know, for our business expenses and such, you know, and I do believe the artists deserve their royalties. As much as we are cited for that, licensing the music is another business expense for us. It is not our business. To report the nature of our programming is objectionable, completely objectionable.

MR. WALKER: Can you restate your question?

MR. CARSON: Yes, I'll restate the question. The question was, I'm drawing a distinction which I think I first heard Alex make, between maintaining records which, if someone came and looked at them, one would be able to determine whether you violated the complement.

It is essentially that you are maintaining a log of your play list, what you have actually played, not turning them over, just maintaining them, and there would be a requirement that you keep them for some period of time so that if there is any question, you produce them or you let someone come in and look at them so they can confirm that; that, as distinguished from actually turning over on a regular basis your records of everything you are playing.

MS. McCANN: May I illustrate how that is? We would turn over a log of what artists we played and the number of spins, much like Coca-Cola lists the ingredients in their product, but to give away the formula for Coca- Cola, you know, one of the biggest corporations in the United States, is to give away their programming.

MR. WALKER: David, are you suggesting --

MR. CARSON: No, no. What Alex suggested, it may not fly and I may be told by a number of people it doesn't work, but what he inspired in my mind was a notion, well, fine, we don't have a regulation that requires you to turn this information over, every bit of it, to Sound Exchange. But we might have a regulation that says "You will maintain those records."

Copyright owners may demand the right to inspect them on a limited basis and you will have them available so copyright owners may inspect them in order to verify compliance.

MR. KNITTEL: I would think on that, you know, we could probably -- I won't like it because I think that you would be sort of pounded to death on it, but the fact that you are not turning it over every month but you just stand there and take a whiff every other month when somebody asks for the information.

I think one of the points that you made to me is most important. You said the copyright owners. The fact of the matter is that Sound Exchange is not a copyright owner. So, if Sony or 7th Street Lounge wants to see what we are doing and they call up, then that may be very different. We send those reports out to the labels anyway when we pay their royalties.

So, I wouldn't mind keeping up with that, but the fact is Sound Exchange is not the copyright holder.

MR. CARSON: What I'm getting at is the burden. There is a big burden in producing this stuff. My question is: What kind of burden are we talking about in terms of maintaining the records?

MR. POTTER: It is a massive burden.

MR. KNITTEL: You are producing it and it's going to cost you.

MR. POTTER: The terrabytes of storage that would accumulate over time, because one could imagine what the requirement is going to be. It's going to be you have to maintain it for three years on an ongoing basis and they can come in for an annual check once a year and maybe there are five major labels and five or ten other indys who come in once a year. It is a massive storage problem.

If you are talking about a music match with hundreds, in fact thousands of channels, Yahoo broadcasts. It can be personalized or consumer influence channels combined with band-oriented channels, you know, all sorts of channels that are created with software.

You go on one of these stations and you say, these are the five bands I like. They will produce a channel for you. All of a sudden, they to have an automatic storage facility that lists the play lists for that channel forever. It's a massive storage problem.

MR. WALKER: David, I have problems now getting my programmers to keep historical

data. They don't like to do it. It takes up a lot of storage space.

MR. CARSON: It sounds like turning it over is a better solution then.

MR. WALKER: It depends.

MS. BUSHYEAGER: One idea that might actually cut the burden as well as allow the copyright owners to police compliance is to set up a system whereby you sample. It's a rolling basis. It's periodic. It's every eight weeks or every twelve weeks you turn over a day and then they have a way to survey a universe of data to see if these -- and I also was to kind of refocus on something else. Mistaken excesses of the complement are not covered by the statute. That is not a violation. It's willful.

By setting up a survey whereby you have people reporting periodically, they don't have to maintain records, they are not going to be asked for them every other month, but yet you do empower the copyright owner to have the ability to police and make sure that people are by and large complying with the complement as is required.

MS. BOCCHI: Excuse me, but could I respond, please?

MS. PETERS: Okay. You haven't spoken. Dave hasn't. Bruce hasn't. The question is, do you want to hear from everybody and then respond or do you want to jump in now?

What I thought was maybe helpful was to let everybody who was on the side of providing data to have their say and then for you to respond to everybody. I know that Dave is waiting to come in and Bruce is waiting to come in and it's five minutes of three.

MR. LANDIS: I think it really depends, David, on your question, I think it really depends, and correct me if I'm wrong, what is easier. You said is it to hold the records and turn them over if required, correct?

MR. CARSON: Not necessarily turn them over. Make them available.

MR. LANDIS: Make them available. I think that really goes to the heart of it. It depends on what's being asked to report. If you are keeping the very simplistic, what was mentioned so many times back in the first panel, which Patricia really didn't answer very well and the RIAA just completely just disregarded in terms of answering, was song title, the artist, the album and the recording label. Those four requirements are very easy to keep on an updated basis all the time.

If we get to those 18 pieces because we disregarded the other seven for listener logs, it gets extremely difficult, extremely burdensome, extremely onerous. But those four pieces, those four essential pieces, that's all they need.

If I'm playing "Burning Down the House" by Talking Heads, it's on two albums within two years. It's on "Speaking in Tongues," which is a studio release and then it was followed up the next year on "Stop Making Sense," which was a live sound track to their concert film by the same title.

If I tell Sound Exchange or RIAA or Warner Brothers who released both records that I'm playing "Burning Down the House" by Talking Heads and I'm playing on "Speaking in Tongues," they should know what backup musicians were on the "Speaking in Tongues" record and they should know what back-up singers were on the "Speaking in Tongues" record.

However, if I tell them I played it on "Stop Making Sense," they should know, red flag, live record. They should know that Edna Holt and all these other people were involved in that. That should be there. We can keep that information very simplistic. But those other 18 pieces, those other 16 pieces, whatever it is, no. To answer your question, it becomes very, very difficult.

MS. PETERS: Okay. Bruce and then the Record Industry, Sound Exchange in combination or whatever and then we have to go to the next question because we have a panel after this.

Bruce.

MR. JOSEPH: My sense is that the burden difference between reporting and maintaining is sum and there is also the question of the nature of the proprietary information, the extent to which that information should be turned over.

But frankly, the bigger question is the reasonableness and the burden imposed or potentially imposed by keeping the data. For example, with the satellite digital audio radio services I believe if you look at their comments you will see that they, because of the nature of their systems that they have put in place, have agreed to provide information from which, for example, compliance with the complement could be determined, because they have that with respect to the channels that they are programming.

They do not have that with respect to the channels that third parties are programming. So, the underlying question about the burden of gathering the information is the same and needs to be looked at in the same light, whether you are saying "Keep it yourself" or "Turn it over."

I would submit that it's equally inappropriate under the statute. First of all, we are sort of singling out the complement. Are we sitting here now saying that's the universe. Is that what compliance is all about or not?

Your question seems to imply that we are talking about the complement. You've got to make the judgment as to whether based on what you have seen the data gathering and data maintaining burden is even reasonable. The first question is: Does the statute authorize it? I submit, no.

The second question, once you have concluded or while you are evaluating that, you look at the question of the burden. The burden is roughly the same, the data- gathering burden is roughly the same, whether you turn the data over or whether you maintain it.

In addition, there are additional factors that have been pointed out by others on the panel and at the table with respect to turning it over as opposed to keeping it.

So, there are burdens and problems at each step of that process.

MS. PETERS: Karyn Ablin?

MS. ABLIN: Actually, with respect to radio stations, specifically, you are going to hear from, I know, at least one on the next panel that doesn't even keep play lists. That's just not how their business over the air operates. The records that you keep is a different question than whether their actual programming practices comply or not.

The reporting requirements here, I mean the dog, to use the tail wagging the dog analogy, it should be the use of the music rather than, you know, this extra police. Should RIAA or the Sound Exchange be a police cop to enforce everything. The burden is multiplied exponentially, you know, to keep census data that some stations can't even report. Some stations currently don't report, you know, with storehouses of records just to check compliance with the complement. That is really a question of kind of the tail wagging the dog and getting out of hand.

MS. PETERS: Okay, 30 seconds.

MR. MAGHEN: Yes, I promise. For Yahoo, I think it is important to note that while proprietary issues of data passing would be saved by not having to deliver the information on an

on-going basis, specifically, with regard to the way our system works, we are talking about millions of rows of data. We are talking about tremendous storage on a daily, weekly basis. This costs us hundreds of thousands of dollars per year, if that is what we are talking about storing.

This is not a small undertaking and, you know, I think it's unduly burdensome for the income.

MR. POTTER: Once again, the public broadcasters have an exemption from all record keeping requirements.

MS. PETERS: All right. Over here.

MR. ENGLUND: So many issues. I will try to tackle a few of them and Linda can pick up the ones that I forget about.

I think it is extremely important to recognize that the performance complement was a key piece of the original Performance Rights Act in 1995, heavily negotiated among all of the effected industries.

We then went through an extensive rule-making proceeding here in the Copyright Office during which the Office, a couple of times, answered this question and determined that copyright owners and performers were entitled to information to determine compliance with the complement which we viewed as very fundamental to the Performance Rights Act.

Only then did we go through the DMCA process where we once again agreed to an extension of the statutory license, which I think it's fair to say, the record companies would only have accepted knowing that they had the complements and they had the ability to enforce the complement bolstered by the Copyright Office's previous decision.

So, enforcing the complement is a very serious point for copyright owners and performers. We think that any decision that would undermine the ability, effectively make it impossible to enforce the complement and some of the other conditions would be a decision that would undermine the ability, effectively make it impossible to enforce the complement and it some of the other conditions would be a very serious derogation of the rights of copyright owners and performers.

Second, there has been a lot of talk about the volume of data, incredible volume of data will have to be produced. I think we should think no small thoughts here. In order to effectively report use of sound recordings, a lot of data is going to have to get delivered.

Barrie has been very busy developing systems, big databases, big computers to process lots of data. I think that the data that will get reported as a result of your decision based on the conversation this morning will be a lot of data.

I think we are not talking about orders of magnitude, more data, for enforcement purposes. But if we can process it, you can find some way to deliver it.

Third, David raised a question about inspection of data. I think in assessing the burden of delivery versus inspection or access, it is important to recognize that there is a lot of data here. So, inspection isn't a matter of sending an auditor over to read the books.

It is necessary that this analysis be done by computer to process the large volumes of data, which means that the data has to be formatted. So, we think that delivery of the data to record companies in a formatted way as we proposed in our comments is an appropriate way to allow copyright owners and performers to assess compliance.

If the Copyright Office were to allow webcasters to withhold that data, it would

nonetheless have to be formatted and the records kept in a way that would be capable of being processed at some point in an audit.

Once they do that, I don't think it's so hard to physically deliver to us, which leads me to the next point, which is that the existing regulations contain confidentiality provisions, regulations proposed by the Office contain confidentiality provisions. I hope our friends, the preexisting services, would tell you that Sound Exchange has never disclosed their play list to their competitors.

So, I think the Office should not be worried here that Sound Exchange is going to take radio station's play lists and start passing them around the industry.

Finally, Bruce raised a question about the Office's authority in this area, which I think relates to his earlier question as to whether compliance is a record of use issue. I think it is. Bruce is certainly right that there are a lot of conditions. They are each different from the other. We would say they are all important. Some are more easily verified through records of use.

The complement naturally relates to records of use because once we know whether a particular song has been used, we can test for compliance. We are very interested in that cooperation with efforts to prevent scanning. It is probably not a record of use issue, but that doesn't mean that we shouldn't have access to data to determine compliance with the complement.

Linda, what have I forgotten?

MS. BOCCHI: You've covered it all.

MS. PETERS: Thank you. We do have a question that we did want to raise. We don't need to talk about it a long time, but we do need to get some input on it. It really has to do with records for the use of ephemeral recordings. This is the Section 112 license.

The question is: Why must there be records for ephemeral recordings and the issue of how necessary is it to have or is it necessary at all to have information supplied about the timing of destruction of each ephemeral.

Who wants to go? Bruce? Amy?

MR. JOSEPH: At first I noticed from RIAA's reply comments that I don't think there was a mention of the word "ephemeral recordings" or any of the requirements relating to ephemeral recordings or any of the requirements relating to ephemeral recordings anywhere in it. So, unless I missed it, maybe somebody can point to it or it may be that there is no longer any controversy over this point.

MS. PETERS: Is that right?

MR. GREENSTEIN: It may be right that it is not mentioned.

(Laughter)

MR. CARSON: Bruce, you are half right. That's better than usual.

MR. GREENSTEIN: The fact that an argument is set out in the initial comments and may not be repeated in the reply comments is designed to save the Copyright Office from having to read redundancy.

MR. CARSON: If only you had succeeded.

(Laughter)

MR. JOSEPH: But I think what this actually highlights, this and the demands that are attempting to be put on people who aren't my clients, the background music services, highlights the trap that you can get into with respect to compliance and reporting for the purpose of compliance.

There is no fee difference with respect to ephemeral recordings based on the number or the duration that you keep the ephemeral recording. Just as there is no fee difference with respect to background music services with respect to what they perform and when they perform it.

So, the question you all need to ask yourself, and by the way, we just heard a pronouncement that the complement was particularly important. But now the question is, are you going to take the principle, assuming you buy that principle vis-a-vis the complement, and extend the principle to establish an entirely independent regime of reporting with its own enormous burdens and difficulties in the name of compliance.

Because it is absolutely clear with respect to ephemerals, for example, that there is no fee impact, at least with respect to the non-subscription services, CARP, that we just finished. The fee is independent of the number of ephemeral recordings that are made. The contribution to the pool, if you will, is independent of the number of ephemeral recordings made. It would be mind boggling indeed if we were to be informed that the distribution was therefore to be different on that basis, given that the contribution to the pool was completely unrelated.

So, why put burdens on services to start reporting for issues that have no fee impact? I believe that is well beyond the scope and well beyond rationality in this context.

MS. PETERS: Amy, did you want to comment?

MR. BUSHYEAGER: I'm speaking in the context of commercial services and the ephemeral recording requirement for commercial services. The CARP has just, of course, finished on this aspect. They were working on the assumption that ephemeral recordings include all of the buffer and cash copies, the millions and million and millions of copies that it takes to render a service.

I think that Music Choice has made a filing that that assumption casts some cloud over who exactly the ephemeral recording requirement applies to in the commercial context. But leaving that aside, from a feasibility standpoint.

If that's really what ephemeral -- to date of creation or date of destruction. When it's on the intermediary servers between the service provider and the person that receives the service, I don't think anyone can certify. I would just be factually impossible to.

MR. PUMPHREY: Kind of expanding on -- Amy's point over there, I have been webcasting, I guess I got started in this industry in about 1995, actually more like 1992 if you count early experiments on what was known M-bone, before the Internet was really commercial.

Anyway, I have also along the way helped build a very large content distribution network. Basically, the way the network worked was to take a copy of a file or a stream, broadcast it over a satellite to 600 locations around the world, about half of those in North America and half outside North America.

To compound that problem with the ephemeral recordings issue, large corporations, some small corporations and most every Internet service provider in the country employees their own private caching devices which again will take a file, make a copy, nobody knows it's there, and the next time the user connects from that ISP it sends a request out to the origin server, which is usually a third party because these small and medium size webcasters outsource this

whole distribution process.

Then that request is made and that file gets served off of the local machine for better performance. That's basically what makes all this stuff work. So policing or even counting the number of copies of any given file at any given point really is impossible. That's it.

MS. PETERS: Okay. We have Alex, Seth, Joseph and Barry and we will end up over here, yes.

MR. GREENSTEIN: For Yahoo, I just want to throw in, we essentially use third-party services as well as our own. We are talking about tens and hundreds of thousands, almost a million individual songs that we have in our library.

Then, multiply that by the number of copies that are made in an automated fashion. The copies that are made in an automated fashion, for all of the examples that has been given up to this point are there to support scale. That's really important to keep in mind. We are not making copies for a good time because it actually costs money to make copies. We are making copies to support the number of streams that we are supplying. And as was evidenced by our conversation this morning, the goal was to pay for these things that were delivered.

These things are tied together in such a lockstep manner, what is the point of this extra blob of information?

MS. PETERS: Seth?

MR. GREENSTEIN: This follows up on Alex's point which is that really what's involved here is that there has to be some type of analysis of the costs involved in maintaining and collecting the information and the benefit that's derived from it.

The Copyright Office has noted in its report of August 2001 that essentially there is no value to the ephemeral recording apart from the value of the performance itself. Notwithstanding certain people have ordered, at least on an interim basis, that there is an economic value that is assigned to it.

The cost of collecting this data is huge because for each and every sound recording you are going to have to actually physically record dates, when it was first loaded, dates when it was taken off for each and every single one of the servers that may be used by a service.

It's a huge amount of information burden to input into the system. Aside from the burden of actually doing the loading and the deletion.

Alex's point is a very important one which is: Is there information that is already present that basically is a proxy for any benefit that you might get from collecting this data directly? And there is. You get the information on how many times a specific song was performed. That is very likely to closely correlate with the number of copies that are actually made to support those performances.

If you need to make extra copies to make more performances, then logically, the more performances you make, it's likely the more copies you have. So, you don't need to collect information on how many copies there are.

Going back to Jonathan's earlier point with respect to how is it that you approach this problem, do you treat everyone as an infringer and a scofflaw or do you start from the premise that if you sign something that certifies that I have complied with the requirements imposed by the statute in order to qualify for the statutory license, you should be able to sign there and make your statement under penalty of perjury. That seems to be the appropriate approach here.

Certainly the cost of collecting this data is completely disproportionate to the amount that's going to be paid under it, first of all, and second to any value that might be derived from it.

MS. PETERS: Joseph.

MR. BUCZYNSKI: When working with a cache technology, there is no silver bullet here that actually says that you can come to a common log file format from a cache. That doesn't exist. You actually have to work with the vendor who has created that cache in order to create something that will work, that will give you the information.

The other thing is, any kind of server log can be manipulated. If you want to show no listeners off a server log, it's easy. All you have to do is take your text editor and just eliminate the references.

So, what are you going to have, someone in the data center that's going to actually have to be bonded or certified to send this data?

MR. KNITTEL: The cache and buffer copies are really ubiquitous to the digital transmission. In many seconds, those copies reside for a nanosecond, a millisecond and the requirements ask for this industry to furnish the information.

I don't know, and I'm certainly not a technical expert, but would challenge that you could probably not technically be able to do that and be able to register every copy. Also, I just think that it doesn't change the rate that has been proposed and it doesn't change the way the distribution is going to be made by Sound Exchange. So, therefore, I think it's of no value at all.

MS. PETERS: Okay, we are going to end with Sound Exchange.

MR. ENGLUND: Once again, I'm afraid I have kind of a laundry list of responses. I will try to catch many of these points here.

As an initial matter, it's important to recognize that the Section 112(e), Statutory License, is a different license from the Section 114 license. In the case of webcasters, it can be taken advantage of in a way that is a derivative sense of the 114 license. In the case of business music services, it is wholly separate from the 114 license. So, there really does need to be a reporting requirement under Section 112. In fact the statute requires that the Office create notice and record keeping requirements for Section 112, in addition to those in 114.

The statute also requires that ephemeral copies be deleted after six months. I understand that there may be folks on the other side of the table who don't like the six-months retention requirement, but it nonetheless is a condition of the statutory license and a condition that we regarded as fundamental.

MR. CARSON: Can you explain why, Steve? It might help us in evaluating the importance or reporting it.

MR. ENGLUND: Server copies have value, despite Seth's assertion. With all due respect to the Office's report under Section 104 of the DMCA, there are a lot of ways that services take advantage of reproduction of sound recordings on servers to build value in a business, for example, by distributing copies geographically or by building libraries that can be used over time.

It has always been the case under Section 112 that ephemeral copies are ephemeral. Retention of copies and distribution of copies that are retained throughout a network has value in a business and builds efficiencies, let's them provide more attractive service offerings to their customers. Copyright owners ought to be able to participate in uses of their music that take advantage of reproduction of copies and long-term retention of copies because the reproduction

right is a separate right from the performance rights and copyright owners are entitled to participate in that value that is created by the use of their recordings.

MR. CARSON: And how are you participating in it by making them destroy it and then make another copy every six months?

MR. ENGLUND: If somebody would like to obtain a retention license, record companies might be happy to talk with them.

(Laughter)

MR. ENGLUND: Steve reminds me that retention licenses in fact are offered in other parts of the world and that the rate might be zero or it might be more, but it would be appropriate for the marketplace to decide that.

MR. HAYS: That is closer to zero than it has been recently here in the United States. I deal with most of the rights organizations throughout the world, just to put that on the record.

MR. ENGLUND: But retention has value. Because the reproduction right is separate right and the Section 112 license is a separate license, principles of copyright law might support distribution on a separate basis from performance. I think some of the folks here assume distribution should be made on the basis of performance.

We certainly have not reached that conclusion and in fact I don't know that the Office has reached that conclusion.

MR. CARSON: Well then, that does touch upon something very important. I have started to take more time here. But if I'm hearing that there is a view at Sound Exchange that when the Section 112 royalties are distributed, I'm not sure I know what I'm hearing. What am I hearing about the view of how those are going to be distributed?

MR. ENGLUND: I don't think we know how they will be distributed.

MR. JOSEPH: We know how they said they should be collected. They said they should be collected as a percentage of the performance fee. So, let's hear why they were actually making an argument to the CARP in terms of value that's different from how they plan to distribute to their members.

MR. CARSON: Well, what I want to hear in particular is whether there is anything in these reporting requirements that Sound Exchange believes will affect the manner in which it distributes those funds, because that's a very crucial question.

MR. ENGLUND: I didn't, unfortunately, catch the very important question.

MR. CARSON: Okay, Steve, the very important question is: Is there anything in the proposed reporting requirements which would affect the manner in which Sound Exchange distributes the royalties under the Section 112 license?

MS. BOCCHI: If you don't have a separate log for the ephemerals, you have no option to distribute based on a reproduction of the sound recording. If you only have the performance logs, then that is the only method by which you can distribute them.

MR. CARSON: Who has that option? Who has the option in deciding how to distribute those royalties?

MR. GREENSTEIN: Well, David, I think number one, Sound Exchange, for its members, its members would decide how to allocate royalties. Non-members do not have a role in that decision-making, but no decision has yet been made. But the issue, I think as Steve pointed out,

is that there are two different rights. There is the performance right and the reproduction right.

Now, a lot of the comments that were filed in this proceeding attack the RIAA and Sound Exchange, saying that the CARP, for the eligible non-subscription services determined that the ephemeral fee should be paid based upon a proxy which is the number of performances.

But that is very different than saying that the royalties for reproductions have to be paid based upon performances. They are separate rights with separate copyright owners. If the copyright owners who own the sound recordings that are reproduced decide that the royalties, the ephemeral royalties should be distributed based upon the number of reproductions separate and apart from the number of performances, then the ephemeral log will be essential for distributing those royalties. If we don't get a log for those royalties.

If we don't get a log of ephemeral reproductions, then there is no opportunity for the copyright owner of that separate and distinct right to distribute those royalties. They will be left distributing royalties on performances.

Steve pointed out there is a value in a reproduction. If a service such as Yahoo or anyone else makes a reproduction and puts it in their server, but it just so happens that a song is not played or that sound recording is not performed, that does not mean there is not value to having that sound recording available and in a database for which that copyright owner is entitled to compensation.

So, Sound Exchange has requested that data because those copyright owners may demand that the royalty distribution follow the reproduction and not some other cost.

MR. CARSON: I'm going to need a little more clarification on this, though, because I want to make sure I know what you are talking about. Are you talking about Sound Exchange's distribution of 112 royalties to all copyright owners or only the distribution Sound Exchange may make to those members of the Sound Exchange who agree to that particular mode of distribution?

MR. GREENSTEIN: Well, I think that there are complex issues regarding the way royalties can be distributed. The CARP, in the terms that were adopted in the current webcaster CARP proceeding, require that performance royalties be distributed so that each sound recording is valued equally.

Now, what that may mean is that, let's say, Sound Exchange has 90 percent of the people it is distributing to are members and ten percent are non- members. You would allocate $100, $90 to members and $10 to non-members. The $90 to the members could then be further allocated based upon however the Sound Exchange membership wants to allocate that money.

The remaining ten percent will have to get their money in some non-discriminatory way that values all of them accordingly.

How 112 royalties may be distributed, I don't think there are regulations yet, or at least I would have to go back and look at the Lancaster-CARP decision to see whether or not those terms contemplated how 112 royalties would be distributed.

If they did, you still have that same situation where Sound Exchange's members can decide that the reproduction right is separate from the performance right and therefore, in order to do such a distribution, you need information on the number of reproductions.

MR. CARSON: All right, then, let's assume that the members of Sound Exchange agree among themselves that the 112 royalties are going to be distributed by some method that

requires the services to report information you would need in order to actually use that. Let's assume that's not information that would be required to distribute those royalties to the folks who aren't Sound Exchange members and are simply getting their distribution based upon whatever principles the CARP process ultimately states you have to use.

Do you follow what I'm saying?

MR. GREENSTEIN: Yes, but I don't think the CARP addressed how 112 royalties --

MR. CARSON: I think it's going to be addressed before any final rule, so you needn't worry about that. You may recall another 114 decision a few years ago. We are not going to have a repeat of that.

So, let's assume that you want information so that your members who agree among themselves to a different means of distribution can use the information to determine how to distribute the funds. Is it appropriate for us to require the users of this compulsory license to submit to you information that is needed only because members of the Sound Exchange group have decided among themselves that they want to depart from the default distribution mode to come up with another mode of their own which requires this information?

MR. MARKS: David, let me try to answer that. I'm not sure that it's really an issue of members versus non-members. I think that the issue is the same for both, and that is whether there is going to be any information that would be made available so that those royalties which are coming in for a different right can be distributed based on the copies that are made under a different statutory license.

You know, if the Copyright Office decides, and it may well have, based on what you say --

MR. CARSON: We have decided nothing, Steve, I can assure you.

MR. MARKS: For non-members at least, it shouldn't be. I don't think at this point there is any this isn't a Sound Exchange member issue. I think it's just an issue generally for all recipients of Section 112 royalties and that question is: Is there going to be information available to make distributions based on the copies that are made and not based on a proxy, such as the performances that are made from those copies.

I don't think it's a membership/non-membership issue. I think it's a broader issue than that.

MS. PETERS: David, you have the microphone.

MR. CARSON: Since I have the microphone, I will say we do want to have an opportunity for people who are not around the table to comment. But I want to caution you, we do have to end at 5 o'clock. It is 3:30 now. We have a very important panel coming up. We want to take as little time away from that panel as possible.

So, I implore the members of the audience, unless you have something to say that A, you think is very important, or B, has not already been said, please.

Having said that, if there is anyone who has anything to say, you are invited to.

MR. ZIK: I just wanted to quickly touch on there are a lot of new technologies over the last year or two which can read a fingerprint of a stream and know what's played. So, as opposed to doing the analogy of forcing everyone to report their speedometer reading as they are driving down the road, it's very easy to monitor from Sound Exchange's end a stream to find out if they are in compliance or no.

MS. PETERS: Okay. Kevin.

MR. SHIVELY: Very quickly, in terms of reporting ephemeral copies, I for one see no difference and I would defy anyone to explain to me any difference between reporting what I have put into my servers and might play from telling you what I have on the shelf on all my CDs that I have, 5,000 of them.

I might play any one of those at any given time. They have value. They obviously have value to the record companies because they sent them to me for free so that I would play them.

To suggest that the copies that I'm making just for the opportunity to transmit this over our webcast, we may or may not transmit over our webcast, and to report that and then in effect be charged a fee for that, we are basically reporting and having to pay for what we haven't even played yet. That, to me, seems especially onerous.

MR. MARKS: That is not too different than when you go to a buffet. You pay a premium to have something available to you but you may not eat everything that's available to you.

MR. SHIVELY: I think you've made my point for how much you understand what we're doing here.

MS. PETERS: Okay. We've got to go.

MR. THOMAS: I'm not sure about the statutes, but I will say in the software industry the precedent for this has been set and there is no company currently that I know of in the United States that pays Microsoft, Enterprise or any of the other companies for copies that they maintain on servers to be installed on users' desktops.

That is paid for by a per seat license that is invoked that allows you the opportunity to use that software for an end user. But companies are free to make as many copies as they wish to store on servers wherever they would like to be able to distribution to their companies.

MS. PETERS: And last?

MR. ATKINSON: I just wanted to say, in a buffet, you don't pay by the bite, by the way.

(Laughter)

MS. ATKINSON: But this idea of the six-month copies is the most ludicrous thing I have ever heard of. I have been in radio since 1973, you know, and I know that is terrestrial radio, but we always had songs on tape cartridges and played them in the studio. The idea of me having a song in my computer and penalizing the artist for having a song that is good enough and popular enough to want to play it after six months and penalize that artist so that they are not going to be paid, I just can't believe it. This is just -- I'm sorry.

MS. PETERS: Okay, that's it. I want to thank this panel and we are going to call the third panel.

(Applause)

(Discussion off the record)