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WRITTEN STATEMENT OF BARRY M. MASSARSKY

Before the House Judiciary Committee
Respecting Artists with the American Music Fairness Act

February 2, 2022

I. Overview

I have been asked to appear before this committee to render my expert opinion as to the status of the performance rights sound recording exemption for terrestrial radio performances in the United States. I am quite familiar with both music rights economics and radio industry's reliance on sound recordings to generate a majority of its revenues.

II. Summary of Opinion

Based on my educational and economic background and my four decades of studying the music/radio industry I can share with this Committee the following four conclusions:

1. It is clear and irrefutable that music formatted radio programming generates the lion's share of station revenue for the terrestrial radio marketplace.
2. It is also clear that the huge majority of that revenue is generated by established "hit" recordings – recordings that already have a demonstrated value to audiences (and therefore broadcasters) – and not by exposing audiences to new recordings or artists.
3. Radio stations rely upon time-tested, non-current sound recordings to draw audience attention; and
4. To the extent someone argues that radio stations "deserve" a special exemption from paying sound recording performance royalties due to promotional value, that argument is based on a false premise. This is a clear and unfair paradox in the law, which radically subsidizes broadcasters for their chief input (music) for the programming associated with the majority of their revenue.

III. Background & Qualifications

I am by training and profession a music industry economist. Throughout my 40-year career in the study of music, I have specialized in performing economic and market analyses for both sound recordings and musical works.

I earned a Bachelor of Arts degree, *cum laude,* from Boston University in 1977, which included numerous courses in economic analysis. I earned a Masters of Business Administration from Cornell University in 1981. My M.B.A studies included an emphasis in managerial and industrial organization economics.

From 1977 to 1979, I was employed as a litigation economist with the United States Department of Justice. My role was to conduct economic analyses in connection with the government's antitrust suit against IBM.

I have been studying music use trends on commercial radio for four decades. From 1981 through 1992, I was employed as an economist by the American Society of Composers, Authors and Publishers (ASCAP). In 1987, I was promoted to Senior Economist, the position I held until my departure from ASCAP in 1992.

In 1992, I started an economic consulting firm named Barry M. Massarsky Consulting, Inc. My firm provided advisory consulting services to a host of music industry clientele relating to strategies affecting music licensing and royalty earnings. The firm employed three other economists including my partner, Ms. Nari Matsuura.

In 2022, I sold Massarsky Consulting to Citrin Cooperman, and I am now a Partner and co-Leader of its Music Economics and Valuation Services Practice.

Beginning in 1992, I provided consulting services for the Recording Industry Association of America (RIAA) with respect to performing rights matters. Through these consulting services for the RIAA, I have become closely acquainted with the business conditions and industry matters that affect record companies' decision making.

In 2001, I began advising a new performance rights collective, SoundExchange, which directs royalty payments to artists and recording companies. (SoundExchange was initially a division of RIAA and was spun off as an independent organization in 2003.)

My firm continues to serve several of the music publishing companies including Universal Music Publishing Group, SONY Music, Warner Chappell, Spirit Music Group, Round Hill Music, Primary Wave and Reservoir Media. My evaluation of royalty streams for these firms spans all significant music genre classifications. Further, my firm has provided consulting services for well-known composer catalogues such as Marvin Hamlisch, the Estate of George Gershwin, Diane Warren, the Guess Who, Pete Townshend, Lionel Richie, Paul Simon and Green Day among many others.

Since 1993, I have provided consulting services to SESAC, a performing rights competitor to ASCAP, including the economic appraisal of music repertory valuation and the modeling of innovative music license approaches.

From 2000 to 2013, my firm had also directly consulted for Nielsen BDS and SoundScan and continues to be familiar with their services for the music industry.

In 2015, I presented evidence and did testify in Sydney, Australia representing the copyright interests of the Australian recording industry in a radio simulcast rate setting case opposing the Australian radio industry.

I have also testified in the following cases: *United States v. ASCAP, In the matter of the Application of Salem Media of California, Inc. and New England Continental Media, Inc.* [Civil Action No. 13-95 (WCC)]; and *In Re Determination of Statutory License Terms and Rates for Certain Digital Subscription Transmissions of Sound Recordings* (Copyright Office Library of Congress) (CARP DSTRA Docket No. 96-5).

My firm is also recognized as a premier music catalog valuation firm for all forms of music asset transactions within the music industry. The lending capital sources for these transactions, the commercial banks, hold us on their short list as "a preferred valuation team for the music industry." A significant portion of all music publishing copyright transactions are handled by my office including overall portfolio valuations of the enlarging music investible funds marketplace such as Hipgnosis Songs, Reservoir Media, Spirit Music Group, Round Hill Music, Primary Wave, Influence Media, Shamrock Capital and Peer.

I have authored "The Operating Dynamics behind ASCAP, BMI and SESAC, The U.S. Performing Rights Societies," which appeared in *Technological Strategies for Protecting Intellectual Property in the Networked Multimedia Environment*, Volume 1, Issue 1, January 1994, pp. 217-225.

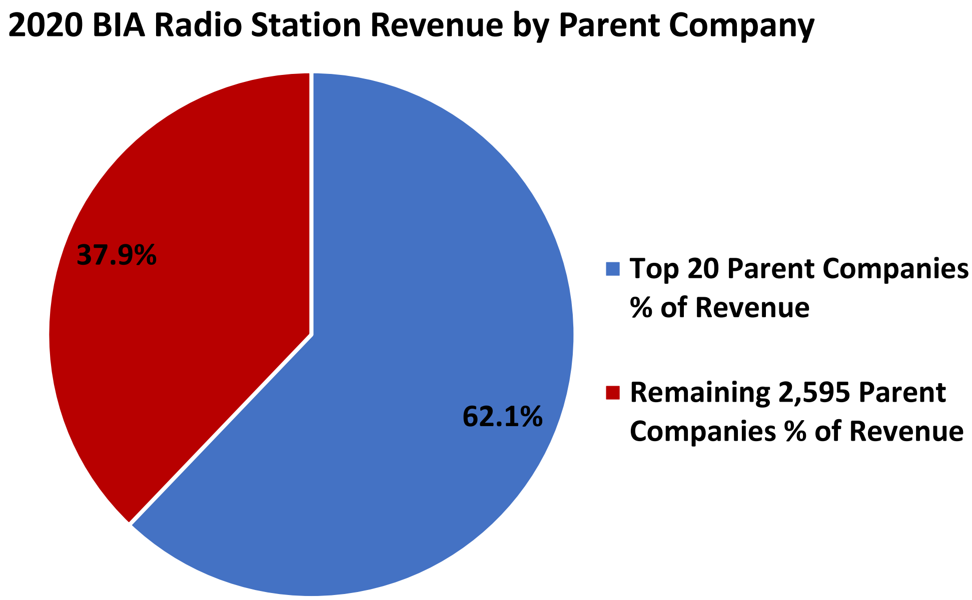
I have been often quoted in the media concerning business developments and transactions within the music industry, including as recently as 2018 in *The New York Times* and was quoted in *Forbes* as well as being interviewed on *The Today Show* regarding the value of the Michael Jackson estate. I also frequently appear as a speaker at educational events about the music industry. As recently as January 19, 2022, I was featured in the Wall Street Journal.

I had been asked to speak at several professional seminars including the Copyright Society of the South, the Association of Independent Music Publishers (AIMP) for both the Nashville and Los Angeles branches, the CMJ Music Forum in New York and The Hollywood Reporter/Billboard Film/TV Music Conference in Los Angeles, as well as private bank presentations for SunTrust and City National Bank. I have been asked to speak at the South by Southwest music festival in Austin, Texas. I continue to be sought out for public speaking on issues concerning the music industry as well as being quoted by national media covering the music industry.

IV. Radio Revenue is Concentrated Among Relatively Few Companies

I reviewed 2020 radio station revenue (as measured by BIA Kelsey), and found that 62.1% of revenue comes from just the top 20 parent companies. The remaining 37.9% of revenue is spread amongst 2,595 smaller parent companies. See Table #1 below:

Table 1.



V. Terrestrial Radio Relies on Sound Recordings to Generate Revenue

It is beyond dispute that the overwhelming majority of the broadcast radio business is based on playing music. This is clear in the number of stations dedicated to music programming and the revenues generated by music as opposed to nonmusic stations.

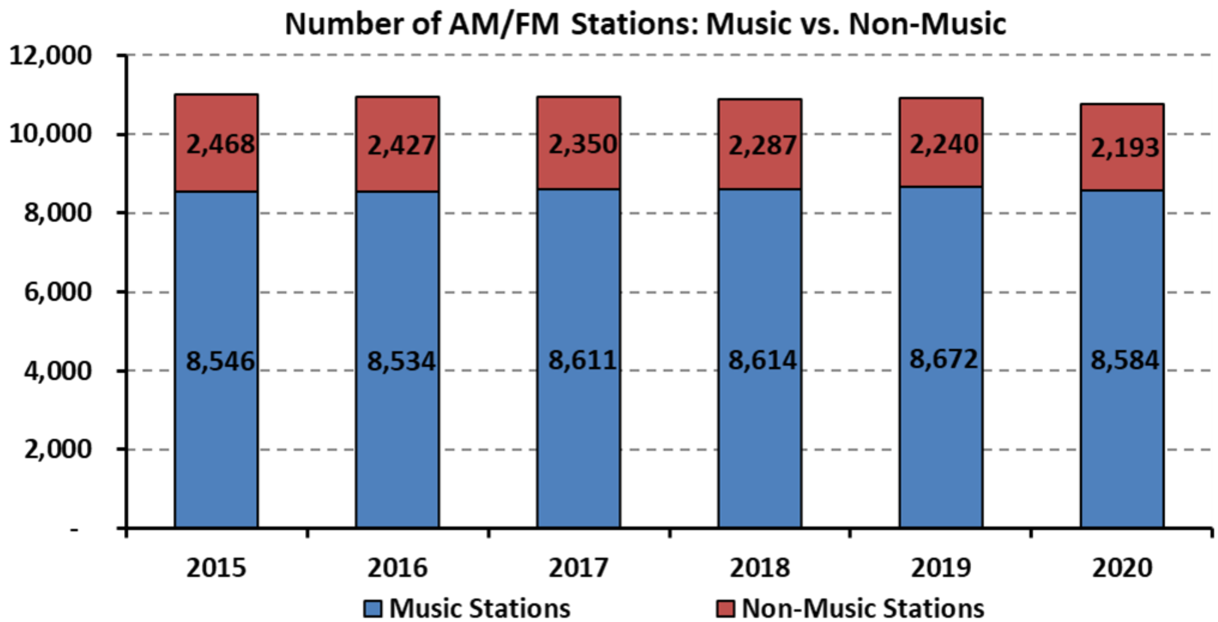
There are significantly more music stations than non-music stations. What's equally interesting is the number of stations concentrating on music as their primary source of content delivery to radio listening audiences. From data obtained from BIA Kelsey, I traced the number of stations with a primary designation as music format and contrasted to those stations with a primary designation other than music. The results are that 8,584 are represented as music formatted against 2,193 that are not. Again, this trend since 2015 has remained stable with the slight notation that there appears to be fewer non music stations each year. See Table #2 for my analysis on music formatted station trends.

If we were to estimate the actual number of sound recordings in play from which no compensation is provided to its copyright owners, we can assume the following:

1. Number of relevant stations: 8,584
2. Average number of hours per day of music intense programming: 19
3. Average number of sound recordings per hour: 12
4. Estimate of total sound recording plays per year: 714,360,480

This figure inexactly excludes the tally of any music in drive time programming, and artificially extends drive time to weekends which serves to undermeasure the use of sound recordings, but nevertheless illustrates the point that over 700 million uses of sound recordings are heard on U.S. terrestrial radio airwaves each year.

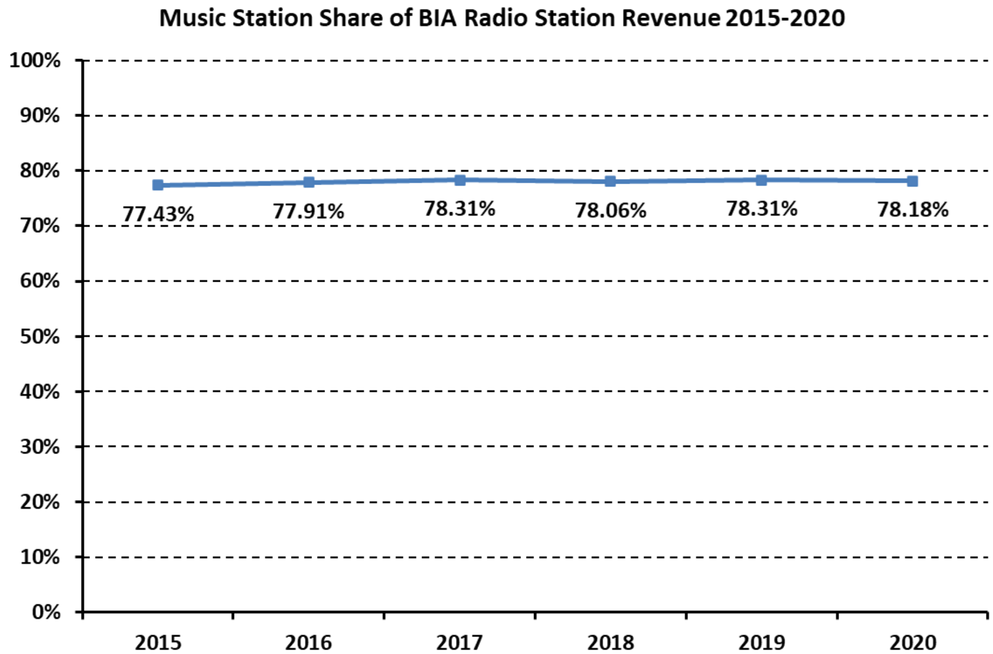
Table 2.



Broadcast radio consistently depends on sound recordings to generate local advertising revenue. Continuing this thread of radio's reliance on sound recordings, 80% of overall revenues are sourced from radio stations who provide music as its staple programming format. From the industry's recognized syndicated source, BIA Kelsey, I isolated overall reported revenues by format type and determined that since 2015 (the first year of my study), music radio represents 78-79% of all reported station revenue. Spoken word programming is a minority share of this overall pot of $9.7 billion in 2020.

See Table #3 for my analysis of local station programming revenue trends:

Table 3.



Music stations naturally and unsurprisingly promote the fact that they are a source of music, making that fact central to how they market themselves to their listening audience. A simple review I conducted demonstrated that 80.5% of AM/FM radio stations in the U.S.'s Top 20 markets featured a music identifier in their central branding slogan or tagline. The analysis of music radio station branding studied the top ten music stations by revenue within each of the top twenty revenue-generating markets. Thus, a total of 200 stations were examined. They comprised 26.5% of total United States music station revenue. This analysis was conducted by going to the website of each of the 200 music stations; identifying the slogan or tagline displayed at the forefront of the website or used in conjunction with the station name, call sign, frequency, and/or logo; and evaluating whether the station used a music phrase to position itself with its listeners and/or advertisers. If a music station did not have a website or the website was sparse and provided too little detail for an assessment to be made (39 instances), a radio aggregator website such as TuneIn was used to identify the slogan or tagline."

See Table #4 for representative examples of how stations use music to brand their message to listeners:

Table 4.

VI. Music Airplay Trends on Commercial Radio are Antithetical to Promotional Value.

Historically, many broadcasters have argued that they deserve a special exemption from paying sound recording royalties due to the so-called "promotional value" of radio. Specifically, they argue that radio promotes new artists and songs unfamiliar to a record buying audience and therefore helps sell records for the benefit of the entire music industry ecosystem. As I will demonstrate that premise is largely false.

First, and most glaring, is that the music industry is no longer a sales-based economy but rather a subscription/rental business through the explosion of digital streaming services such as Spotify, Apple, Amazon and Pandora, who are already required to pay public performance fees to the sound recording owners and artists.[1]

Second, radio doesn't focus on new music; rather, the majority of airplay is dedicated to established hits. (And new music is chosen based in significant part on success on streaming platforms.) To analyze music airplay on terrestrial radio, I sponsored a test study with Nielsen Music whose Broadcast Data Services (BDS) tracks the top 1,000 songs in each format across all stations monitored by BDS in the first half of 2018 with comparable study conducted for the first half of 2017.

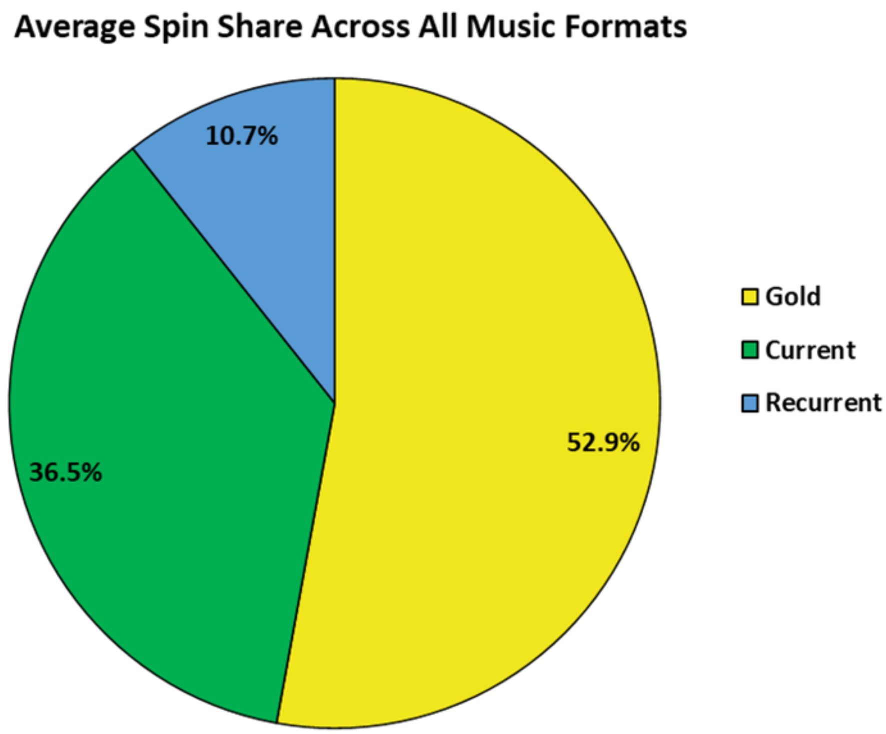
[1] According to the RIAA's Mid Year 2021 RIAA Music Revenue Statistics, streaming makes up 83.76% of recorded music revenue.

BDS, taking definitional terms from the terrestrial radio business, classifies songs whose release dates are two or more years old as “Gold.” They classify titles that fell below a designated chart threshold within the last year as “recurrent.” Finally, any titles that are still on its chart system and younger than two years are referred to as “Current.” This last designation, “Current” is newly released music supposedly promoted by radio for the benefit of the record industry.

The results of this study are illuminating: Nearly 53% of all airplay is gold – i.e., established hits -- and therefore, not of any promotional value to the music business, only 36% of airplay is deemed current.[2]

See Table #5 for the overall results of my airplay inventory analysis.

Table 5.



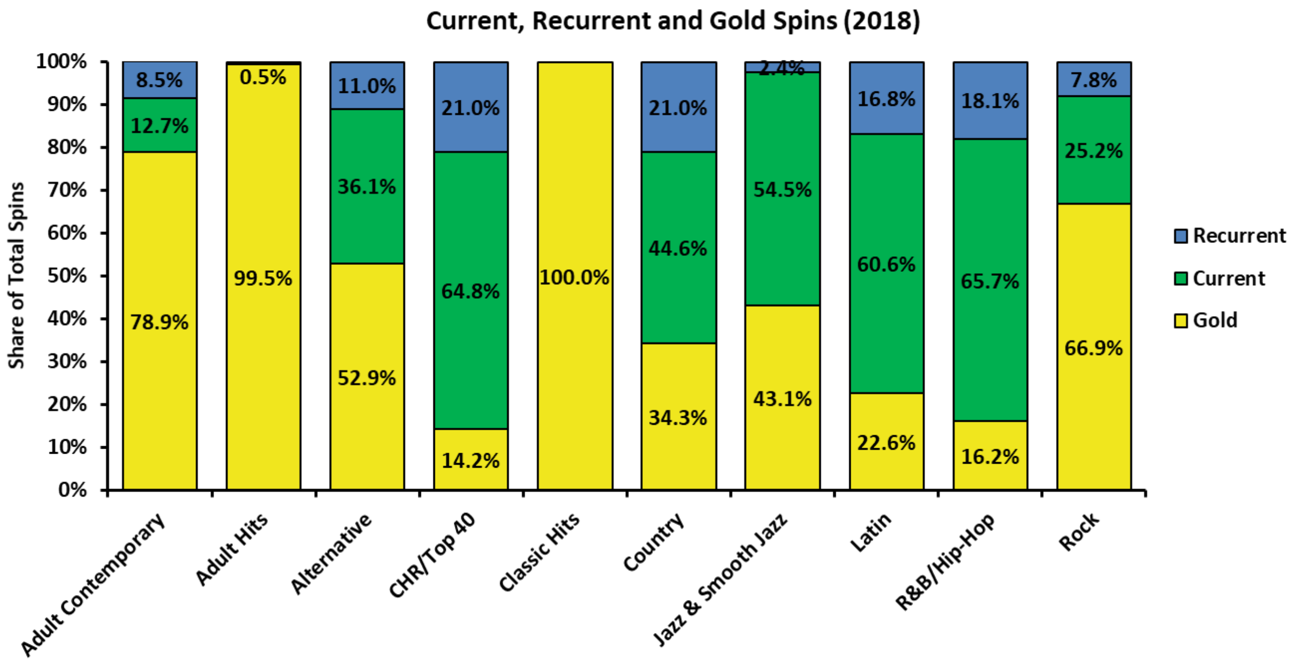
What is actually more revealing is a closer inspection of the music formats under this inventory age microscope. Drawing even closer inside two formats in particular which are thought to be strictly new hit driven, country and Top 40, I learned that only one-third of country airplay is comprised of current songs. Similarly, fully one-third of so-called “Top 40” radio airplay is noncurrent music – i.e., established hits instead of new Top 40 tracks.

[2] We note that in MRC Data’s recently published 2021 U.S. Year End Report, 69.8% of total music consumption in the U.S. is attributable to catalog music - tracks that are not new or subject to promotional efforts by record labels.

Since terrestrial radio is focused on playing music that is of an older vintage, assuming to fit with its aging demographic trend, it is no longer rational to consider radio of any significant promotional consideration as used to justify their privileged no-fee fly zone.

See Table #6 for my results of airplay inventory analysis by major format type.

Table 6.

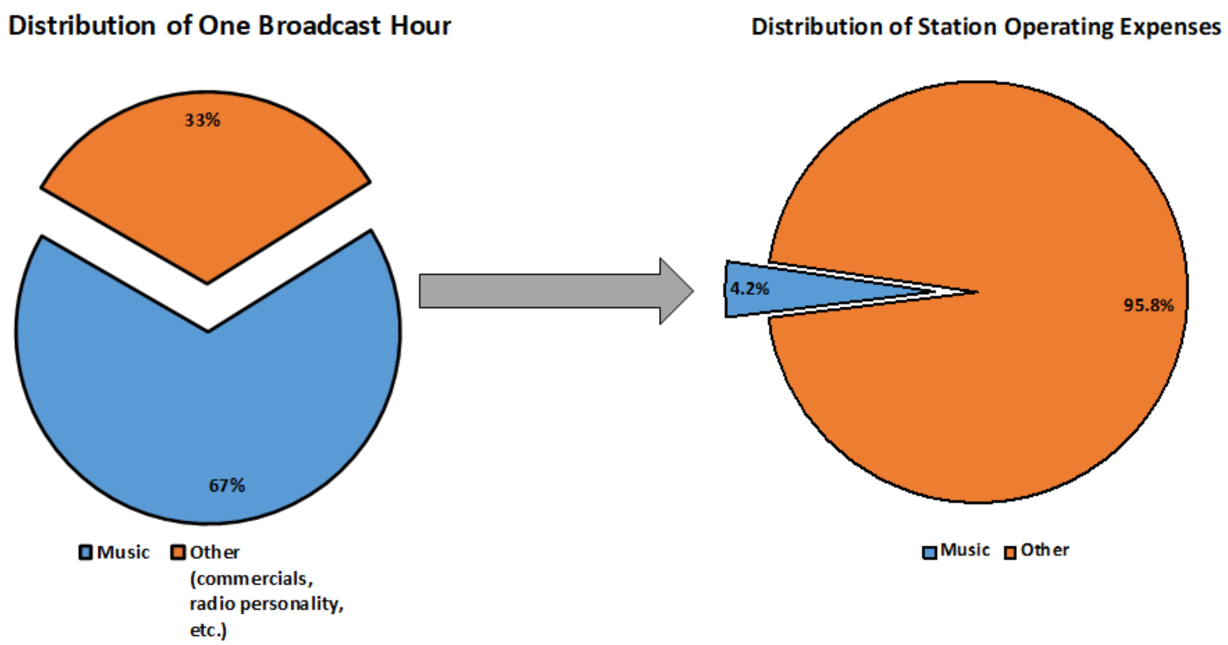


VII. While Terrestrial Radio is Dependent on Music Content, A Study of Internal Operating Costs Reveal Relative Fee Insignificance

In order to further test the asymmetric relationship between value and cost, I wanted to study how much broadcast time is occupied by the playing of a sound recording. Again, utilizing Nielsen BDS, and crossing formats for samplings of per song time, I learned that an average song length was 3 minutes and 21 seconds and there were 12 songs on average played on a per hour of broadcast time. On a 60-minute clock basis, that amounts to 67% of time---clearly, radio's chief content input. Typically, such a commanding content value would demand very high leverage on operating costs as it does for terrestrial radio's nearest competitors, satellite radio and digital service providers such as Spotify. After all, music is the primary content that attracts and retains music stations' listenership.

And yet, broadcasters pay an extraordinarily low amount for their chief input. Based on a study of operating costs for stations revealing enough granularity for this review, I compared music licensing to all other costs. Only 4.2% of the stations' operating costs relate to this 67% chief input value. (Those costs are for the licensing of the musical works and are solely relatable to agreements on the composition or work side of the copyright as represented by ASCAP, BMI, SESAC and GMR.) It's a rare occurrence for an industry to have such a minimal cost of core input to their business.

Table 7.



In short, there is no reasonable economic basis for broadcast radio to continue to enjoy its exemption from the sound recording terrestrial performance right.

Respectfully submitted,

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