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In the Matter of }
}
Public Performance of Sound Recordings: } **Docket No. RM 2000-3C**
Definition of a Service }
____________________________________}

ORDER

On December 11, 2000, the Copyright Office issued a final rule to clarify that the transmission of a sound recording as part of a retransmission of an AM/FM broadcast signal over a digital communications network, such as the Internet, is subject to the limited digital performance right provided by section 106(6) of the Copyright Act, title 17 of the United States Code, and is not exempt under section 114(d)(1)(A)–the provision that specifically exempts a "nonsubscription broadcast transmission." 65 FR 77292 (December 11, 2000).

Broadcasters have challenged the Copyright Office's final rule and its interpretation of the relevant statutory provisions. On January 25, 2001, Bonneville International Corp., Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corp., Entercom Communications Corp., Susquehanna Radio Corp. and the National Association of Broadcasters filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking a declaratory ruling that the Office's rule was invalid. On cross summary judgment motions, the district court upheld the Copyright Office's interpretation of the statutory exemption, finding the interpretation both reasonable and permissible. Bonneville International v. Peters, 153 F.Supp.2d 763 (E.D. Pa. 2001). An appeal of the district court's decision is currently pending in the Third Circuit. See Bonneville International v. Peters, Case No. 01-3720 (3d Cir.).

Under the Office's interpretation of the section 114(d)(1)(A) exemption, FCC-licensed broadcasters who retransmit their AM/FM programming over the Internet may publicly perform the sound recordings that are part of that programming under the section 114 statutory license provided that the licensee pays the appropriate copyright royalty fees and abides by the terms of the statutory license. The rates and terms for use of this license and for the statutory license for making ephemeral phonorecords for the purpose of facilitating digital transmissions were recently adopted by the Librarian of Congress. See Final Order and Rule, Docket No. 2000-9 CARP DTRA1&2, 67 FR 45239 (July 8, 2002). Under these rules, the first payment of copyright royalty fees for those operating under the section 112 and section 114 statutory licenses is due October 20, 2002.

On September 11, 2002, Bonneville International Corp., Clear Channel Communications, Inc., Cox Radio, Inc., Emmis Communications Corp., Entercom Communications Corp., Salem Communications Corp., Susquehanna Radio Corp. and the National Association of Broadcasters (hereinafter, "Broadcasters") filed with the Copyright Office a motion for stay asking

> the Register of Copyrights to stay the Register's December 11, 2000 final rule, 65 FR 77330 (December 11, 2000), to the extent that its application would otherwise require thousands of radio stations across the nation to pay retrospective royalties covering a four year period on October 20, 2002 and thereafter to make royalty payments on a monthly basis for broadcasting transmissions that Broadcasters contend are exempt from any such obligation pursuant to 17 U.S.C. § 114(d)(1)(A).

Motion at 1.

Because this rule was promulgated through a notice and comment proceeding in accordance with the Administrative Procedure Act, title 5 of the United States Code, Chapter 5, Subchapter II and Chapter 7, the Copyright Office published a notice in the **Federal Register** seeking comment on the motion to stay from any person with an interest in this proceeding. 67 FR 58550 (September 17, 2002).

Comments opposing the motion were filed by The Recording Industry Association of America ("RIAA") and Gary Chapman ("Chapman"). Comments in support of the motion were filed by the National Federation of Community Broadcasters ("NFCB"); IOMedia Partners, Inc., Beethoven.com LLC, Chatmaster Streaming Network, ClassicalMusicDetroit.com, Digitally Imported Radio, Flaresound, iM Networks, Inetprogramming Incorporated, Internet Radio Hawaii, Internet Radio, Inc., Live365.com, Inc., Pacific Internet Broadcast Services, Radio Paradise, SomaFM, LLC, Ultimate-80's, Virgin Audio Holdings, LLC, Wherever Radio, Wolf FM, and 3WK, Inc. (collectively "Webcasters"); WCPE(FM) ("WCPE"); and Intercollegiate Broadcasting System, Inc. ("IBS") and Harvard Radio Broadcasting Co., Inc. ("WHRB"), jointly. Reply comments were filed by Collegiate Broadcasters, Inc. ("CBI"); the American Federation of Musicians of the United States and Canada ("AFM") and the American Federation of Television and Radio Artists ("AFTRA");[1] and Broadcasters.

Section 701(e) of title 17 of the United States Code provides that "all actions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended." Since the Final Rule for which the Broadcasters seek a stay is an action taken by the Register of Copyrights, the motion is made pursuant to section 10(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 705. Section 705 of the APA provides that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705; <u>cf</u>. F.R.A.P. 18(a).

Broadcasters' motion is, to the best knowledge of the Register, the first time that a party has petitioned the Register to stay implementation of a final rule. Parties have, however, petitioned the Librarian of Congress to stay a final order in rate setting proceedings on two prior occasions. Order, Adjustment of Rates for the Satellite Carrier Compulsory License, Docket No. 96-3 CARP SRA (November 14, 1997); Order, Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA1&2 (August 8, 2002).

Merits of Broadcasters' Motion

The factors to be considered in determining whether a stay is warranted are: 1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; 2) the likelihood that the moving party will be irreparably harmed absent a stay; 3) the prospect that others will be harmed if the court grants the stay; and 4) the public interest in granting the stay. <u>Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.</u>, 559 F.2d 841, 843 (D.C. Cir. 1977). These four considerations are factors to be balanced and are not prerequisites to be met. <u>Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n</u>, 812 F.2d 288 (6th Cir. 1987).

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[1] AFTRA and AFM's reply comments oppose the Broadcasters' motion for stay for the reasons set forth in RIAA's comments and thus will not be discussed hereafter.

Discussion

A. Likelihood of Success on the Merits

The United States Court of Appeals for the District of Columbia Circuit has said that

> [t]o justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa.

Cuomo v. Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985). However, "the movant is always required to demonstrate more than the mere 'possibility' of success on the merits." Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991).

The Broadcasters assert that they have shown more than the "mere possibility of success" on the merits because the issue before the Third Circuit is "novel,"is subject to de novo review and poses a "serious, litigable issue." Motion at 5. CBI agrees that the Broadcasters "are likely" to succeed in their appeal, but fails to articulate any reasons for their position. CBI reply comment at 2.

The comments filed by WCPE, IBS and WHRB, and Webcasters in support of the motion do not address this factor.

Both RIAA and Chapman argue that the Broadcasters fall far short of showing that they have more than a "mere possibility of success." Both note that both the Copyright Office and the United States District Court for the Eastern District of Pennsylvania have "thoroughly analyzed" and conducted "searching and careful examinations" of the question of whether AM/FM webcasting is exempt under section 114(d)(1)(A), and each have concluded that such webcasting is not exempt. Chapman comment at 1; RIAA comment at 5. RIAA goes on to state that granting the motion to stay would "interfere with the Copyright Office's administration of the Section 112 and 114 statutory licenses by delaying the Office's determination that royalties for such licenses must be paid starting October 20, 2002." RIAA comment at 6.

Broadcasters counter that the "bases and rationale for" the Office's and district court's prior decisions "are not what is before the Third Circuit." Reply comment at 5. Rather, they assert that the Office and RIAA have presented the Third Circuit with a "'new theory of [the] case"; consequently, the Office's and district court's "prior decisions are of no consequence in evaluating the likelihood of success of this new theory." Id. at 6.

Ruling: The Broadcasters have not demonstrated that their appeal of the Office's Final Rule has more than a "mere" possibility of success. As RIAA and Chapman point out, the question of whether AM/FM webcasting is exempt under section 114(d)(1)(A) has been thoroughly and carefully examined by both the Copyright Office and the United States District Court for the Eastern District of Pennsylvania, and both have ruled against the Broadcasters. Indeed, the district court stated at every turn that it would have reached the same conclusion as the Office even absent Chevron deference. Bonneville, 153 F.Supp.2d at 779, 781, 783 (E.D. Pa. 2001). Given the district court's whole-hearted endorsement of the Office's ruling, the Office is confident that the Final Rule will be upheld on appeal. The Broadcasters have presented no new argument that shakes this confidence.

Nor is the Office persuaded by Broadcasters' argument that their Third Circuit appeal poses a "serious, litigable issue." Even when a movant presents a serious legal question, a stay will not be granted unless the other three factors "strongly favor interim relief," Washington Metro., 559 F.2d at 844, or "weigh heavily" in a movant's favor. McGregor Printing Corp. v. Kemp, 811 F. Supp. 10, 12 (D. D.C. 1993). For the reasons discussed below, the other three factors do not weigh heavily in the Broadcasters' favor.

Thus, this factor weighs against the granting of a stay.

B. Irreparable Harm

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). "[T]he injury must be both certain and great; it must be actual and not theoretical." Id. The party requesting the stay must show that the "[i]njury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).

> Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.

Wisconsin Gas, 758 F.2d at 674.

Further, it is "well established that economic loss does not, in and of itself, constitute irreparable harm." Id.

> [T]he key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974), citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). "Recoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas, 758 F.2d at 674, citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 n.2 (D.C. Cir. 1977).

Broadcasters state that such irreparable harm will occur if AM/FM streaming is found to be exempt because "almost 2000" radio stations "will have dedicated substantial resources to undertake complex royalty calculations covering a four-year retrospective period as well as ongoing royalty obligations. These are sunk costs that cannot be recovered...." Motion at 5. Furthermore, since no formal refund procedure is provided in the Office's regulations, "a real risk" exists that these radio stations will not be able to recover their royalty payments once distributed to "potentially thousands of copyright owners . . . [and] many more performers." Id. at 5-6. In fact, they argue, it would be "practically impossible" to recover such royalties once distributed to "such a large and disparate universe of recipients." Id. at 6. Should radio stations be unable to "obtain accurate refunds of all royalties paid," a "proliferation of legal claims against potentially thousands of parties" will be spawned and "floodgates to further litigation" will be opened. Id.

NFCB echoes Broadcasters' concerns. Without a stay of the Office's Final Rule, a NFCB member will be required to pay "roughly a minimum of $2,000 by October 20, 2002." NFCB Comment at 2. Such amount, while not significant to many, is "important to a small, non-profit, noncommercial station that relies on listener donations." Id. Irreparable harm exists because royalties once paid are "unlikely" to be recovered, especially as "no mechanism" for refunds currently exists. Thus, there is "no assurance" that these fees once paid will ever be recovered. Id. "A non-profit station would hardly be able to afford to pursue a refund....Such stations could not even afford to participate in the CARP rate proceeding that now governs their fate." Id.

Likewise, CBI asserts that for the majority of its members the "cumulative retroactive fees required by the Librarian's Order represent a major portion of each station's annual operating revenue." CBI reply comment at 2. Further, since such stations are prohibited from carrying over funding from one fiscal year to the next, the retroactive royalty fees due ($2,500) "will be subtracted from funding intended for all station operations for but a single year." Id. Lastly, CBI members will be hampered by their "inadequate resources" in their efforts to recover such funds; indeed, "[t]he legal costs of recovery would likely far outweigh any" refunds obtained. Id. at 3.

WCPE argues that funds donated for public broadcasting will be "unduly encumber[ed]" should Broadcasters' motion be denied and Broadcasters prevail on appeal. Furthermore, such an outcome would "cause an unneccessary financial hardship to the various public radio broadcasting stations." WCPE comment at 1.

The comments filed by IBS and WHRB and Webcasters in support of the motion do not address this factor.

RIAA and Chapman argue in their comments in opposition to the motion that Broadcasters fail to show irreparable harm. Chapman argues that the harm asserted by Broadcasters is monetary harm only, and thus provides "no grounds for issuing a stay." Secondly, Broadcasters should have started to make arrangements for paying royalties, given that the Office issued its Final Rule "*nearly two years ago*." Chapman comments at 2. Chapman also questions the "administrative burden" placed on the Broadcasters in paying royalties as the "thousands of radio stations" referred to in Broadcasters' motion are owned by a limited number of companies. In addition, Chapman alleges that Broadcasters will not suffer any unrecoverable monetary loss: "if Broadcasters can find owners to make payment, they can find them to recover mispaid royalties." Id. Finally, Chapman argues that Broadcasters "have no standing to complain about 'administrative chaos,' and any 'proliferation of lawsuits' will be spawned by them." Id.

RIAA points out that while Broadcasters acknowledge that irreparable harm is evaluated according to its substantiality, likelihood of occurrence, and adequacy of proof, "Broadcasters' showing of harm fails on all three accounts." RIAA comments at 8. First, Broadcasters offer no proof of irreparable harm, as they provided no evidence of harm in the form of affidavits or otherwise. Second, Broadcasters allege "only economic harm, in the form of 'substantial resources' and 'sunk costs' and broadcasters like Clear Channel Communications, Inc. . . . certainly cannot assert that such economic costs 'threaten the very existence' of their businesses." Id. Such alleged harm is theoretical and not actual, as "there will be some necessary delay in the distribution of royalties after the first payments are received in October"; thus, should the Third Circuit find in favor of Broadcasters and issue its ruling promptly, any royalties paid would be available at the time refunds would become necessary. Therefore, such royalties are recoverable. Id. at 9. Because the calculation of royalties here is straightforward, there would be no difficulty in calculating the amount of a refund. Further, "[t]here is no reason to think the Copyright Office could not implement a refund procedure in this situation in the highly unlikely event that the need arises." Id. at 10. Finally, RIAA argues that Broadcasters have known for almost two years that they would be required to make royalty payments, that they proposed a royalty rate calculation in the CARP proceeding 17 months ago, and that they have known the payment amount and its deadline since June 20; therefore, "most responsible broadcasters . . . have already expended the costs necessary to calculate and make royalty payments." Id. As such, any costs incurred thus far did not result from the lack of a stay.

Broadcasters counter all of these arguments. First, while RIAA asserts that there will be a delay in the distribution of funds received on October 20, 2002, RIAA fails to offer any "prediction or speculation about distribution schedules whatsoever" and makes "no commitment not to distribute [the funds] whenever it chooses." Reply comment at 3. Second, RIAA fails to address the lack of a reimbursement mechanism. Rather, RIAA discusses only the calculation of royalties but proffers no explanation of "how the potentially thousands of broadcasters would contact and extract refunds from the thousands or tens of thousands of parties to whom the royalties had been distributed." Id. Further, RIAA's assertion that the Copyright Office could easily implement a refund procedure is also flawed. RIAA's reliance on the cable refund procedures as support for its assertion is misguided because cable systems submit and report royalties to the Copyright Office, and the Office controls the distribution of those royalties. Here, RIAA's "sister entity, SoundExchange," collects and distributes the royalties. Therefore, the suggestion that the Office be asked to "clean up the refund mess" is a "hollow" one. Id. at 4.

Ruling: As Cuomo makes clear, "[a] stay may be granted with either a high probability of success [on the merits] and some injury, or vice versa." Cuomo, 772 F.2d at 974. Because the probability of success on the merits of its appeal is low, Broadcasters must demonstrate a high probability of irreparable harm in order to sustain a stay of the Office's Final Rule. Broadcasters have suggested some possibility of harm, but not a high probability of harm that is sufficient to support grant of a stay.

Irreparable harm is determined according to its substantiality, likelihood of occurrence, and adequacy of proof. Wisconsin Gas, 758 F.2d at 674. The injury must be "both certain and great," and bare allegations of what is likely to occur are of no value since the decisionmaker must decide whether the harm will in fact occur. Id. The Broadcasters have not met their legal burden of providing the Office with sufficient proof that the alleged harm will in fact occur. The Broadcasters provide no "specific facts or affidavits supporting assertions that [this factor] exist[s]." Michigan Coalition, 945 F.2d at 150. Instead, Broadcasters have provided the Office with arguments and assertions of outcomes that are speculative and far from certain.

First, Broadcasters argue that absent a stay radio stations will expend "substantial resources" to calculate the royalty payments due and that such "sunk costs" cannot be recovered. Such expenditures do not rise to the level of irreparable harm. In A.O. Smith Corp. v. FTC, 530 F.2d 515 (3d Cir. 1976), the Federal Trade Commission ("FTC") ordered 345 of the nation's largest corporations to complete and file reports which required the reporting of detailed sales and cost data to be broken down into line of business categories as defined by the FTC. Id. at 518. Such reports were to be filed within 150 days of receipt of the orders. Several corporations filed suit seeking a preliminary injunction[2] against enforcement of the FTC Order on the grounds that the FTC had no statutory authority to issue the Order and that the corporations would suffer irreparable harm without the injunction. Id. at 519. The corporations asserted that irreparable harm would occur because of the "unrecoverable costs and commitment of diverse business resources . . . incident to preparation and compliance with the Commission orders" which the corporations asserted were invalid. Id. at 526.

The Third Circuit found that such "unrecoverable costs" and commitment of resources did not rise to the level of irreparable harm. The court stated:

> [N]o contention [is made] that compliance with the LB program would render any appellee unable to meet its debts as they come due. Nor is there any contention that the cost of compliance would be so great *vis-a-vis* the corporate budget that significant changes in a company's operations would be necessitated....If, in the final analysis, the Commission's authority to order the reports is upheld, the cost of compliance will have to be considered a necessary business expense, albeit government mandated ..."

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[2] The factors considered in deciding whether to grant a preliminary injunction are the same as those in deciding a motion for stay pending appeal. *Compare*, A.O. Smith Corp. v. FTC, 530 F.2d 515, 518 (3d Cir. 1976), and Virginia Petroleum Job. Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958).

Id. at 528. Likewise, Broadcasters have not asserted here that any radio station will be unable to pay its bills or that significant changes in a station's operations will be necessary absent a stay. Therefore, should Broadcasters be unsuccessful on appeal, the "substantial resources" expended to calculate the royalty payments due "will have to be considered as a necessary business expense." A.O. Smith, 530 F.2d at 528. Similarly, NFCB and CBI argue that payments of $2,000 and $2,500, respectively, are "significant" portions of their member's budgets; however, neither claims that their members will be unable to meet their debts as they come due nor that their members will be forced to operate differently. To the contrary, CBI admits that its members will be able to continue their operations, albeit on "paltry funding." CBI reply comment at 2.

Further, as RIAA and Chapman point out, the Office issued its Final Rule nearly two years ago; therefore, Broadcasters, including members of NFCB and CBI, have known since then that they were going to be required to pay royalties once the rates were set. Even though Broadcasters maintain that they are exempt from the section 114 license, both the Copyright Office and the United States District Court for the Eastern District of Pennsylvania have concluded that they are not. Although the rates were not set until June 20, 2002, prudence would dictate that Broadcasters set aside sufficient funds to pay the royalties in the event that they are unsuccessful on appeal. If Broadcasters chose not to entertain the possibility that the Third Circuit could rule against them and did not plan accordingly, they cannot complain now that they will be irreparably harmed by their failure to do so.

Broadcasters next argue that irreparable harm will result absent a stay because no formal refund procedures are currently in place; therefore, a "real risk" exists that Broadcasters will be unable to recover their royalty payments once distributed to the "large and disparate universe" of copyright owners and performers.[3] Consequently, radio stations may be forced to sue "potentially thousands of parties" in order to recoup royalties paid. NFCB and CBI further assert that the costs of pursuing a refund may be prohibitive to their members and that the "legal costs of recovery would likely far outweigh" any refunds obtained. NFCB comment at 2; CBI reply comment at 3.

The threat of such unrecoverable economic loss might qualify as irreparable harm, provided that the movant has demonstrated likely success on the merits and/or that movant has no adequate remedy at law. See, Iowa Utilities Board v. FCC, 109 F.3d 418, 426 (8th Cir. 1996); Baker Electric Co-Op, Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994); Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987). In Iowa Utilities, the court found that in addition to showing likely success on the merits, the movants, existing local telephone service providers, had shown that the FCC's pricing rules would force them to offer their services to newcomers to the local telephone service market at prices that are below actual costs, resulting in "irreparable losses in customers, goodwill, and revenues" that go "beyond those inherent in the transition from a monopolistic market to a competitive one." 109 F.3d at 426. The court found

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[3] The Office notes that the Broadcasters have consistently maintained throughout the entire CARP process that they are exempt under section 114(d)(1)(A). However, at no time during the CARP proceeding did they address the need to obtain refunds as a term of payment should their appeal to the Third Circuit be successful.

that movants "would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned" nor would they be able to "fully recover such losses merely through their participation in the market." Id. Similarly, the movants in Baker Electric could not sue the North Dakota Public Service Commission because the Commission had "Eleventh Amendment sovereign immunity in federal courts in suits requesting money damages." 28 F.3d at 1473. Finally, in Airlines Reporting, movants conceded that they could sue for damages and such damages would constitute an adequate remedy. However, the court found irreparable harm because movants demonstrated that the defendants, because of their criminal backgrounds and lack of financial resources, would "not be able to satisfy an award of adequate damages." 825 F.2d at 1227. Thus, in order to preserve movant's remedy at law, the court granted the motion for preliminary injunction. Id. In each of these cases, the court found irreparable harm because the movants were able to show that they had no adequate remedy at law. Here, Broadcasters have not demonstrated that they have no adequate remedy at law. Presumably, if they were to prevail in the Third Circuit litigation, they could request the voluntary return of royalty payments, and in any instances where voluntary repayment was not forthcoming, they could file suit for return of the royalty payments against SoundExchange and/or the copyright owners and performers who receive any of the royalties in a distribution. As such, they have not met their legal burden in demonstrating irreparable harm.

For the reasons discussed above, the Broadcasters' likelihood of success on the merits is very low. Therefore, the alleged harm is more theoretical than actual. As RIAA points out, there will be "some necessary delay in the distribution of royalties after the first payments are received in October," RIAA comment at 9; however, RIAA offers "no prediction or speculation about distribution schedules." Broadcasters reply comment at 3. While the Office agrees that such information would be helpful, Broadcasters bear the burden of showing that such distribution is "of such imminence that there is a clear and present need for equitable relief to prevent the irreparable harm." Ashland Oil, Inc. v. FTC, 409 F.Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976).[4] Broadcasters have not met this burden, as they assert that such distribution "could" take place prior to the Third Circuit rendering its decision. Given the fact that the Broadcasters' likelihood of success on the merits is so low, Broadcasters must do more than make "bare allegations" about what "could" happen; rather, they must show that such distribution will occur prior to the Third Circuit issuing its ruling. Wisconsin Gas, 758 F.2d at 674.

Nor have Broadcasters shown that they have no adequate remedy at law. Broadcasters are correct that there is currently no formal refund procedure. However, Broadcasters are not left without any recourse. Broadcasters state that radio stations will sue "potentially thousands of

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[4] The Office recognizes that a distribution prior to the Third Circuit's decision is a possibility, but considers it unlikely that SoundExchange will be able to make any distributions before the Third Circuit rules. We note that oral argument is currently scheduled for December 2, barely six weeks after the October 20 deadline. We also note that, if the Third Circuit regards the matter as sufficiently urgent, it can announce its judgment even before the release of its opinion. Cf. In re Nextwave Personal Communications, Inc., 200 F.3d 43, 45-46 (2d Cir. 1999)(court issues judgment three weeks after argument and issues explanatory opinion one month later).

parties" if they are unable to obtain accurate refunds. Motion at 6. Therefore, there is a "possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation," and such possibility "weighs heavily against a claim of irreparable harm." Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). At no time have Broadcasters asserted that there is no adequate remedy at law. Broadcasters merely have asserted that "a real risk" exists that the royalties will be unrecoverable. Such unsupported assertions are speculative at best and leave it to the Office to fill in the blanks. Broadcasters shed no light on the extent to which they will be unable to recover any of the royalties paid. Rather, Broadcasters criticize RIAA for its failure to explain "such mundane details as to how the potentially thousands of broadcasters would contact and extract refunds from the thousands or tens of thousands of parties to whom the royalties would be distributed." Broadcaster reply comment at 3. Again, Broadcasters fail to appreciate that it is their legal burden, and theirs alone, to show that any royalties distributed to copyright owners and performers will be unrecoverable. Therefore, the Broadcasters have not demonstrated that they have no adequate remedy at law.

Finally, Broadcasters will not suffer irreparable harm in the absence of a stay because the granting of a stay will not relieve them of their obligation to pay the royalties due on October 20, 2002. Broadcasters are under a misimpression about what granting a stay will mean in this case. Broadcasters seem to believe that a stay of the Office's Final Rule absolves them of their obligation to make royalty payments until the Third Circuit rules on their appeal. This is not the case. It is not the Office's Final Rule which created the obligation to pay statutory royalties; that obligation is found in section 114. A stay merely means that the Office's conclusion that Broadcasters are not exempt under section 114(d)(1)(A) is not codified in the Office's regulations. A stay of the Office's Final Rule, which is simply a declaration of what the law requires, does not change a licensee's obligation under the law. The Office cannot grant Broadcasters relief from the requirements of section 114. Therefore, should the Broadcasters decide not to make the royalty payments due October 20, the grant of a stay by the Office would not relieve them of the obligation they have under the law to make royalty payments. In addition, should the Broadcasters be unsuccessful on appeal, they would be subject to lawsuits for infringement up to the time the Third Circuit renders its decision.

Therefore, this factor weighs against the Broadcasters.

C. Harm to Copyright Owners and Performers

Any irreparable harm suffered by the movant in absence of a stay must be balanced against any harm suffered by other interested parties if a stay is granted. Cuomo, 772 F.2d at 977; Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958). Harm to others is also evaluated according to its substantiality, likelihood of occurrence and adequacy of proof. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

Broadcasters argue that copyright owners and performers will not suffer "any measurable harm" if a stay is granted because the Third Circuit "likely will issue its determination in the first part of 2003." Motion at 6. If the Third Circuit rules against Broadcasters, copyright owners and performers will have to wait only a "limited additional period" before receiving their royalty payments. Such delay is a "minimal inconvenience compared with the harm that radio stations will suffer by calculating, paying and then attempting to recover royalties erroneously paid to potentially thousands of disparate parties." Id.

CBI submits that copyright owners and performers will not suffer any measurable harm if a stay is granted because the amount of royalties paid by college webcasters is so small that once those royalties are divided among the record labels and artists, the resulting distributions will be "inconsequential." CBI reply comment at 3. CBI further argues that copyright owners and performers themselves will be significantly harmed if a stay is not granted because if Broadcasters win on appeal, SoundExchange will have expended resources needlessly to collect the fees, process the recordkeeping and distribute the funds. Id. Further, SoundExchange's "sunk costs of administering the fee collection would further tax remaining royalty payments otherwise due the copyright holders and performers." Id.

The comments filed by WCPE, IBS and WHRB, and Webcasters in support of the motion do not address this factor.

RIAA and Chapman assert that a stay of the Office's Final Rule will harm copyright owners and performers. Chapman argues that such harm will be "immediate and real." Chapman comments at 2. The Broadcasters have lost "at every step of this fight," and it is conceivable that they will ask the Office again for a stay while they appeal a loss in the Third Circuit to the Supreme Court. Id. Therefore, Broadcasters should be made to pay until they "get at least one court or agency to agree with their position." Id. at 2-3. Chapman suggests that the Copyright Office consider "escrowing the royalty payments in an interest bearing account until the Third Circuit issues its decision." Id.

RIAA points out that to date copyright owners and performers have not received "a penny in royalties from the vast majority of services" that use the license and have "practically no information on how much of their recorded music has been used" or the amount of royalties to be paid under the Librarian's Order. Comment at 10-11. RIAA expects, however, that the royalties paid by Broadcasters will comprise a "large portion" of the amount to be received. A stay will further delay SoundExchange's ability to plan and implement distribution of the royalties. Id. In addition, SoundExchange will lose "any interest it could have earned on behalf of copyright owners and performers on those funds during the stay period." Id. Such harm outweighs any "theoretical harm" alleged by the Broadcasters. Id. Finally, a stay could last well beyond the date the Third Circuit issues its decision if the Broadcasters lose on appeal and seek reconsideration of the Third Circuit's decision and then seek review of that decision to the Supreme Court.

Broadcasters counter that the delay in copyright owners' and performers' receipt of royalties is due to the "mechanisms and procedures" in the DMCA which "presuppose a time consuming process of implementing an entirely new set of rights pursuant to an extraordinarily complex legislative scheme." Reply comment at 6. Furthermore, since Broadcasters believe that they are under no obligation to make royalty payments in this case, RIAA will suffer no harm by not receiving the "large portion of the royalties from Broadcasters." Id.

Ruling: Having determined that Broadcasters have not made a sufficient showing of likelihood of success on the merits and irreparable harm, this factor is not dispositive. However, after examining the harm to copyright owners and performers in terms of its substantiality, likelihood of occurrence and adequacy of proof should a stay be granted, the Office finds that this factor weighs against the Broadcasters. Cuomo, 772 F.2d at 977; see Wisconsin Gas, 758 F.2d at 674.

First, Broadcasters assert that copyright owners and performers will not suffer "any measurable harm" if a stay is granted. Copyright owners and performers acknowledge that they do not know the amount of royalties to be paid by Broadcasters, but they anticipate that a "large portion" of the royalties due will be paid by Broadcasters. Such an assumption is reasonable in light of Broadcasters' statement that in the absence of a stay "thousands of radio stations will be required to pay retroactive royalties." Motion at 5. Although it is not possible at this time to calculate the specific amount of royalties to be paid by Broadcasters, the Office finds that the amount is substantial enough, given that payment is expected from "thousands of radio stations," that copyright owners and performers will suffer harm if a stay is granted and the broadcasters withhold royalty payments in reliance on the stay. In addition, as RIAA points out, SoundExchange will lose any interest it could have earned on those funds during the stay period, thereby causing further harm to copyright owners and performers.

Second, there is no question that such harm will occur in the event a stay is granted. Broadcasters have stated that they will not make royalty payments on October 20, 2002, if the Office grants its motion.

Likewise, Broadcasters' admission that "thousands of radio stations" will not make the royalty payments due on October 20 if a stay is granted serves as adequate proof that such harm will come to copyright owners and performers.

The Office recognizes that such losses are recoverable should the Broadcasters be unsuccessful on appeal; however, the Office sees no reason to delay receipt of the royalties in light of Broadcasters' failure to demonstrate a likelihood of success on the merits and to show irreparable harm.

D. Public Interest

Broadcasters assert that the public interest would be served by granting a stay because then the Office will not have to expend its resources to "untangle administrative chaos." Likewise, a stay will best serve the public interest by preventing "unnecessary litigation from clogging the courts because radio stations could not obtain restitution" of erroneously paid royalties. Motion at 7.

NFCB and CBI assert that small, noncommercial broadcasters provide a public service with their streaming. NFCB comment at 2; CBI reply comment at 4. In fact, "many" college and university stations have already "ceased operations on the Internet." CBI reply comment at 4. Without a stay, other such broadcasters may not be able to continue to provide that public service. NFCB comment at 2; CBI reply comment at 4.

The comments filed by WCPE, IBS and WHRB, and Webcasters in support of the motion do not address this factor.

RIAA and Chapman argue that the public interest favors denying Broadcasters' motion. Chapman asserts that the public interest favors compensating copyright owners and requires "FCC-licensed broadcasters to serve the public interest beyond all others." Chapman comment at 3.

RIAA argues that the congressional directives that the Office administer the statutory licenses and that royalty payments be made pending appeal would be thwarted by the granting of a stay. RIAA comment at 11-12. In addition, a stay would lead to more, not less, litigation. Finally, the public interest would not be served by allowing the Broadcasters to "lengthen the nearly four-year delay in implementing the statutory licenses." Id. at 12.

Ruling: The purpose of section 114(a) is to compensate copyright owners when their sound recordings are publicly performed as part of a nonexempt eligible nonsubscription transmission. 17 U.S.C. § 114(a). The Office and the United States District Court for the Eastern District of Pennsylvania each have determined independently that FCC-licensed broadcasters who retransmit their AM/FM programming over the Internet do not fall within the section 114(d)(1)(A) exemption and are, therefore, subject to the section 114 statutory license. Because Broadcasters have not demonstrated a high probability of success on the merits of their appeal or that they will suffer irreparable harm absent a stay of the Office's Final Rule, the public interest in the smooth administration of the statutory licenses overrides any countervailing public interest proffered by Broadcasters. Therefore, after balancing all of the factors, the Office concludes the granting of a stay in this case would be contrary to the public interest.

For the reasons discussed herein, Broadcasters' motion for stay of the Office's Final Rule pending judicial review is denied.

SO ORDERED.

Marybeth Peters

Marybeth Peters,
Register of Copyrights.

DATED: October 10, 2002