

**WEIL, GOTSHAL & MANGES LLP**

767 FIFTH AVENUE · NEW YORK, NY 10153-0119

(212) 310-8000

FAX: (212) 310-8007

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September 11, 2002

**BY HAND DELIVERY**

Ms. Marybeth Peters  
Register of Copyrights  
U.S. Copyright Office  
101 Independence Ave., SE,  
Room LM-403  
Washington, D.C. 20559-6000  
Copy to: Counsel on Service List

**Re: Motion For a Stay Pending Judicial Review**

Dear Ms. Peters:

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"), by and through their undersigned counsel, hereby move 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).

Broadcasters seek a limited stay on the grounds that there is an appeal pending in the Third Circuit Court of Appeals that shortly will determine whether or not an FCC-licensed broadcaster's simultaneous, nonsubscription, digital transmission over the Internet of its AM/FM broadcast signal ("AM/FM Streaming") is exempt under Section 114(d)(1)(A) of the Copyright Act from the limited digital sound recording performance right provided by Section 106(6) thereof. See Bonneville, et al. v. Peters, Case No. 01-3720 (3d Cir.). Thus, the issue at stake is not how much, or the terms under which, radio stations should be paying royalties for engaging in AM/FM Streaming.

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Rather, the issue is whether or not radio stations engaging in AM/FM Streaming are subject to the digital sound recording performance right at all.

If AM/FM Streaming later is found to be exempt by the Third Circuit, and this application for a stay is not granted by the Copyright Office, thousands of radio stations will suffer irreparable harm in that they will have been required to dedicate substantial resources to the complex task of calculating, preparing statements of account and making royalty payments covering a four-year retroactive period as well as ongoing monthly royalty payments before the Third Circuit rules. Moreover, unless a stay is granted, there is a very real spectre of administrative chaos for all parties involved given the inevitable proliferation of refund claims and practically impossible task of tracing royalties that may have been distributed among thousands of copyright owners and performers. The difficulties posed by this eventuality are compounded by the fact that there is no formal refund scheme in place to administer radio stations' refund claims should AM/FM Streaming be found to be exempt, a procedural gap that will inevitably spawn multiple law suits.

Copyright owners and performers will not be harmed by the stay, which, at most, will result in a limited extension of time before the first distribution of radio station royalties. Indeed, copyright owners and performers will benefit from a stay insofar as they will avoid the liabilities and burdens of refund claims if AM/FM Streaming is found to be exempt. In these circumstances, the balance of equities clearly favors a limited stay until such time as the Third Circuit rules on the Bonneville appeal.

Accordingly, for the reasons set forth more fully below, Broadcasters respectfully request that the Office grant this Motion by staying the obligation of radio stations to pay royalties pursuant to 17 U.S.C. § 114(a) and § 112(e) for AM/FM Streaming transmissions pending the outcome of the Third Circuit appeal.

### **BACKGROUND**

On December 11, 2000, following a Rulemaking proceeding, the Copyright Office issued a final rule (the "Final Rule"), which amended 37 C.F.R. § 201.35(b)(2) to reflect the Office's determination that AM/FM radio broadcast signals transmitted simultaneously over a digital communications network, such as the Internet, are subject to the limited public performance right in sound recordings. 65 FR 77330.

On January 25, 2001, certain radio broadcasters filed a declaratory judgment action in the Eastern District of Pennsylvania seeking judicial review of the Final Rule. On cross summary judgment motions, the district court issued a Memorandum and Order on August 1, 2001, upholding the Final Rule. Bonneville Int'l, et al. v. Peters, 153 F. Supp. 2d 763 (E.D. Pa. 2001). On October 1, 2001, the plaintiffs-

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appellants appealed that determination to the Third Circuit.<sup>1</sup> Bonneville, Case No. 01-3720. Briefing on the appeal will conclude this month, and the Third Circuit already has indicated that oral argument will be scheduled as early as the week of November 4 or the week of December 2, 2002. See letter from Marcia M. Waldron, Clerk for the Third Circuit, dated August 19, 2002, attached hereto.

On July 30, 2002, the Copyright Office convened a Copyright Arbitration Royalty Panel ("CARP") proceeding, Docket No. 2000-9, CARP DTRA 1&2, to set reasonable rates and terms<sup>2</sup> under the § 114 and § 112 statutory licenses for nonexempt "eligible nonsubscription transmissions," which, by virtue of the Final Rule, include AM/FM Streaming. A number of Broadcasters participated in the CARP without prejudice to their position that their AM/FM Streaming transmissions are exempt.<sup>3</sup> On June 20, 2002, the Librarian of Congress, upon recommendation of the Register of Copyrights, issued a Final Order and Rule, which was subsequently published in the Federal Register on July 8, 2002. 67 FR 45239 (July 8, 2002).

Pursuant to 37 C.F.R. § 261.4, eligible nonsubscription services are required to pay all royalties due under § 261.3 for transmissions covering a four-year retrospective period<sup>4</sup> to the Receiving Agent, SoundExchange, by October 20, 2002. See also 67 FR at 45271. Thereafter, services are required to make monthly royalty payments due under § 261.3 to the Receiving Agent by the forty-fifth (45<sup>th</sup>) day after the end of each month for that month. Id. SoundExchange is required to allocate the royalties

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<sup>1</sup> 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 are all parties to the Third Circuit appeal.

<sup>2</sup> The Copyright Office consolidated two CARP proceedings into a single proceeding in which one CARP set rates and terms for the two license periods - October 28, 1998 through 2000, and 2001 through 2002. See Order in Docket Nos. 99-6 CARP DTRA and 2000-3 CARP DTRA 2 (December 4, 2000).

<sup>3</sup> Clear Channel Communications, Inc., Entercom Communications Corp., Salem Communications Corp. and Susquehanna Radio Corp. all participated in the CARP proceeding. In addition, Salem Communications Corp. has appealed the Final Order and Rule of the Librarian of Congress to the D.C. Circuit Court of Appeals. IO Media Partners, Inc. et al. v. Librarian of Congress, Consolidated Cases Nos. 02-1244, 02-1245, 02-1246, 02-1247, 02-1248 and 02-1249 (D.C. Cir. filed Aug. 7, 2002).

<sup>4</sup> The retrospective period covers transmissions made between October 28, 1998 and August 31, 2002.

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collected between itself and the other Designated Agent for distribution to thousands of individual copyright owners and performers according to the percentages set forth in 17 U.S.C. § 114(g)(2). The Copyright Office regulations do not provide any procedure for the refund of royalties paid by entities subsequently found to be exempt from the digital sound recording performance right and thus not liable to pay royalties under the statutory licenses.

### JURISDICTION

Because the December 11, 2000 Final Rule was an action taken by the Register of Copyrights, this Motion is made pursuant to section 10(d) of the Administrative Procedure Act, 5 U.S.C. § 705, which is made applicable by 17 U.S.C. § 701(e).<sup>5</sup> Specifically, section 705 states that an agency may postpone the effective date of an action taken by it, pending judicial review, when it finds that "justice so requires." 5 U.S.C. § 705.

### ARGUMENT

For the reasons described further below, Broadcasters submit that the circumstances in this case warrant a motion to stay pending judicial review, balancing the four factors that the Copyright Office must consider: (1) the likelihood that the party seeking the stay will succeed or prevail on the appeal; (2) the threat of irreparable harm to the movant 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. Michigan Citizens for An Independent Press, 1988 WL 90388, \*3 (D.C. Cir. 1988). McGregor Printing Corp. v. Kemp, 811 F.Supp. 10, 12 (D.C. Cir. 1993); Washington Metropolitan Area Transit

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<sup>5</sup> Thus, the circumstances in this case are entirely different from Intercollegiate Broadcasting Co.'s ("IBS") Motion for a Stay Pending Appeal that was denied by the Copyright Office. See Copyright Office Order, dated August 8, 2002, Docket No. 2000-9 CARP DTRA 1&2. Insofar as IBS relied on 5 U.S.C. § 705, the Order that was the subject of IBS's motion for a stay was an Order of the Librarian of Congress, which the Copyright Office indicated might not be subject to the Administrative Procedure Act. Unlike IBS, Broadcasters are not requesting a stay of the Librarian's determination, but rather, a stay of a Final Rule issued by the Register of Copyrights, and therefore the jurisdictional issues identified by the Copyright Office in that context do not apply. Nor do any standing issues arise. Unlike IBS, there is no question that Broadcasters have standing to seek this stay, since they include among them all of the parties that have sought judicial review of the Final Rule issued by the Register of Copyrights. Moreover, as indicated in note 1 above, several of the Broadcasters participated in the CARP proceeding and one of them, Salem Communications Corp., is seeking direct review by the D.C. Circuit of the Librarian's June 20, 2002 Order relating thereto.

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Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).<sup>6</sup> The factors do not function as “prerequisites” but as “interrelated considerations that must be balanced together.” First Savings Bank, F.S.B. v. First Bank System, Inc., 163 F.R.D. 612, 615 (D.Kansas 1995)(citing Michigan Coalition v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). The weight accorded each factor is not necessarily the same, and no one factor is determinative. Id. (citing Standard Havens Products v. Gencor Industries, 897 F.2d 511, 512 (Fed. Cir. 1990); Constructors Ass’n of Western PA v. Kreps, 573 F.2d 811, 815 (3rd Cir. 1978).

A movant need not establish a high probability of success on the merits (Cuomo v. United States Nuclear Regul. Comm’n, 772 F.2d 972, 974 (D.C Cir. 1985)), but must show more than the mere “possibility” of success. Michigan Coalition, 945 F.2d at 153. In this case, the issue pending before the Third Circuit is novel, and as the Register of Copyrights recognized in its appellee brief, the Third Circuit is required to review the issues presented de novo. Moreover, the appellee briefs filed by both the Register of Copyrights and the Recording Industry Association of America demonstrate at the very least that the appeal poses a serious, litigable issue. In this context, and with the Register of Copyrights being an interested party in the very proceeding at issue, it would be inappropriate for the Copyright Office to deny this Motion on the basis that there is no more than the “mere possibility of success.”

The second factor, 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). Almost 2000 radio stations have filed notices to avail themselves of the § 114 statutory license for their AM/FM Streaming activities. See <http://www.copyright.gov/licensing/notice/index.html>. In the absence of a stay, thousands of radio stations will be required to pay retroactive royalties over a four-year period to the Receiving Agent, SoundExchange, by October 20, 2002 and if they continue to stream, ongoing monthly payments thereafter. If AM/FM Streaming is found to be exempt, radio stations will suffer irreparable harm because they 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 if radio stations’ AM/FM Streaming activities are found to be exempt.

Furthermore, there is a real risk that radio stations will not be able to recover royalty payments that may well be distributed to potentially thousands of copyright owners (SoundExchange itself has over 2100 record label members<sup>7</sup>), and

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<sup>6</sup> The test for granting a stay is the same whether the motion is made pursuant to 5 U.S.C. 705 or Fed. R. App.P. 18. See Michigan Citizens for an Independent Press, 1988 WL at \*3; Branstad v. Glickman, 118 F.Supp.2d 925, 934 (N.D. Iowa 2000).

<sup>7</sup> See <http://www.soundexchange.com/membership.cfm>.

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possibly to many more performers. The regulations do not provide any formal refund procedure and it would be practically impossible for each individual radio station to recover royalties paid erroneously to such a large and disparate universe of recipients.

Indeed, the Copyright Office previously has expressed serious concerns about the difficulties of refunding royalties paid even when only the methodology for calculating royalties was in dispute. See 51 FR 30214 (August 25, 1986) "Compulsory License for Cable Systems; Interim Rules" (recognizing that refund issues posed serious problems for cable systems as well as copyright owners). In that case a Copyright Office regulation defining "gross receipts" for purposes of calculating cable copyright royalties was being challenged in a pending federal appeal. In recognizing the complicated refund problem, the Office stated that "[t]he current situation creates considerable confusion which could easily lead to chaos for the Copyright Office in receiving and processing requests for refund based on a court decision that may be altered or overturned on appeal..." Id. at 30215. While the Copyright Office was able to address concerns about effectuating refunds in that case without a stay because there was a formal refund procedure and the Office could extend the period for licensees to make refund claims, no such possibility exists here. Indeed, the concerns expressed by the Copyright Office are magnified many times over in the present case where the issue is not how much royalties are owed, but whether radio stations are required to pay any royalties at all.

If radio stations cannot easily obtain accurate refunds of all royalties paid, this will spawn a proliferation of legal claims against potentially thousands of parties. Such disputes may open the floodgates to further litigation between copyright owners and performers and their Designated Agents as to the extent of their respective liabilities for refund claims<sup>8</sup> – an outcome that easily could be avoided with a limited stay.

Turning to the third factor, copyright owners and performers will not suffer any measurable harm if a stay is granted. The Librarian's Final Rule and Order provides that the first royalty payments fall due in October 20, 2002 and the first distribution will take place some time thereafter. 67 FR at 45271. The Third Circuit likely will issue its determination in the first part of 2003, since oral argument is scheduled for either November or December of this year. The limited additional period that copyright owners and performers will wait before receiving royalty payments from radio stations, if such royalties are determined to be due, 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. In actuality, as discussed supra, all parties surely would prefer to avoid the

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<sup>8</sup> In this regard, it is relevant that the Librarian, in its June 20, 2002 Order (67 FR 45239, 45268-69), rejected the term proposed by the CARP limiting the liability of Designated Agents with respect to disputes between or with recipients of royalties.

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administrative burdens and legal disputes arising from refund claims if the stay were not granted and AM/FM Streaming is found to be exempt. Certainly, the harm that is likely to occur in the absence of a stay clearly outweighs any possible harm to copyright owners and performers in the event a stay is granted.

Finally, the limited stay requested is in the public interest because it would avoid the Copyright Office having to divert its resources to untangle administrative chaos and would prevent unnecessary litigation from clogging the courts because radio stations could not obtain restitution of royalties erroneously paid under the statutory license.

### CONCLUSION

For the reasons stated above, Broadcasters respectfully request that the Copyright Office grant the relief sought by this Motion.

Respectfully submitted,

A handwritten signature in black ink that reads "R. Bruce Rich / smw". The signature is written in a cursive, slightly slanted style.

R. Bruce Rich

cc: David O. Carson, Esq.  
General Counsel  
U.S. Copyright Office  
James Madison Building  
Room LM-403  
First and Independence Avenue, S.E.  
Washington, D.C. 20559-6000

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**CERTIFICATE OF SERVICE**

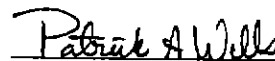
I hereby certify that on September 11, 2002, I served the foregoing MOTION FOR A STAY PENDING JUDICIAL REVIEW by causing copies to be sent by federal express delivery service to the following counsel:

Mark B. Stern  
Scott R. McIntosh  
Attorney, Appellate Staff  
Civil Division  
U.S. Department of Justice  
601 D Street, N.W., Room 9550  
Washington, D.C. 20530-0001  
(202) 514-4052

Marguerite S. Walsh  
Andrew W. Allison  
Littler Mendelson  
1601 Cherry Street  
Three Parkway, Suite 1400  
Philadelphia, PA 19102  
(267) 402-3000

Robert A. Garrett  
Ronald A. Schechter  
Arnold & Porter  
555 12<sup>th</sup> Street, N.W.  
Washington, DC 20004  
(202) 942-5444

Vincent V. Carissimi  
Pepper Hamilton  
18<sup>th</sup> & Arch Streets  
3000 Two Logan Square  
Philadelphia, PA 19103  
(215) 981-4472

  
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OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

Marcia M. Waldron  
Clerk

FOR THE THIRD CIRCUIT  
21400 United States Courthouse  
601 Market Street  
Philadelphia PA 19106-1790

Telephone  
267-299-4939

[www.ca3.uscourts.gov](http://www.ca3.uscourts.gov)

August 19, 2002

R. Bruce Rich  
Mark A. Jacoby  
Caroline R. Clark  
Andrew W. Allison  
Marguerite S. Walsh  
Scott R. McIntosh  
Robert A. Garrett  
Vincent V. Carissimi

RE: Bonneville Intl Corp vs. Peters NO. 01-3720

TO BE ANSWERED BY COUNSEL, ASSOCIATE ATTORNEYS, OR A MEMBER OF YOUR SUPPORT STAFF, WITHIN FIVE (5) DAYS OF THE DATE OF THIS LETTER.

The above-entitled case(s) is(are) currently considered for listing on the merits during the weeks of 11/04/02 and 12/02/02 in Philadelphia, PA.

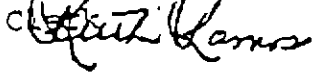
If you are aware of any substantial reason why you or the attorney to argue this matter will not be available during the above weeks; you, an associate attorney, or a member of your support staff are directed to advise this office immediately in writing within 5 days of the date of this letter. THEREAFTER, REQUESTS TO CHANGE THE DATE OF ARGUMENT WILL BE ENTERTAINED ONLY IN THE EVENT OF AN EMERGENCY THAT WAS NOT, AND COULD NOT, HAVE BEEN REASONABLY ANTICIPATED. You, an attorney from your firm, or other counsel will be expected to present argument if directed by the Court.

The reasons which the court considers substantial enough to reschedule argument from the proposed dates listed include pre-paid vacations and family obligations. Such reasons normally do not include scheduling conflicts for purposes of conducting court proceedings or discovery in trial courts absent extraordinary circumstances or some showing why a continuance could not be obtained. Normally counsel in firms will be expected to have another member of the firm argue, rather than request the Court to reschedule arguments.

Any response indicating that you or a member of your firm are not available during this period must be served on opposing counsel. Counsel may respond by facsimile machine for this purpose only; 215-597-2643. In the event this case is not scheduled for the above week(s), you will receive a similar letter inquiring about your availability. Nothing herein relieves counsel of the obligation to respond to pending motions.

If you have any questions about whether your case is listed, please call this office.

Very truly yours,  
MERCIA M. WALDRON  
CLERK



Ruth Ramos  
Calendaring Clerk