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THE PERFORMANCE RIGHTS ACT AND PARITY AMONG MUSIC DELIVERY PLATFORMS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

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THE PERFORMANCE RIGHTS ACT AND PARITY AMONG MUSIC DELIVERY PLATFORMS

TUESDAY, AUGUST 4, 2009

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 2:34 p.m., in room SD09226, Dirksen Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Leahy, Feinstein, Durbin, Klobuchar, Specter, Franken, and Cornyn.

OPENING STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. This hearing will come to order.

Today's hearing represents the continuation of work that Senator Leahy and I have been engaged in for some time aimed to protect and promote the work of musical performers, while at the same time resolving inequities that are currently created under copyright law.

Copyright protection, as I think everybody in this room knows, has its foundation in our Constitution, and our copyright industries—music, movies, books, software—are a major contributor to our economy.

A report released 2 weeks ago found some interesting things. One of them was that core copyright industries contributed over 22 percent of the United States economy's growth; and, secondly, copyright industries grew at twice the rate of the United States economy as a whole. I think that indicates how important these intellectual property areas are. But as the technology for delivering creative works has grown and evolved, especially so in the case of music, copyright law has become more and more complex.

Music was once only available live at concerts or in small gatherings. Then, with the dawn of recordings and transmission, radios were born. But a radio used to be as large as a piece of furniture. Now music radio programs are provided in our autos, on MP3 players that are barely larger than a postage stamp, and we can access radio programming over the Internet, from cable, and from satellites.

The availability of music in clear digital formats has grown from compact discs, to the Internet, and now to broadcast radio transmissions. As the availability and technical quality of music has increased, however, so has the ease of freely recording, copying, and sharing this music, without compensating the artist whose genius

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created the music to begin with. In fact, the United States is the only industrialized nation that does not provide performers a full performance right.

Let me say that again. We are the only industrialized nation on Earth that does not provide performers with a full performance right.

At the same time, the incremental evolution of music delivery technologies has led to a hodgepodge of different copyright royalty schemes and rates. Playing the same piece of music to the same listener and even in the same place, such as their home, workplace, or car, can lead to significantly different royalty payments, or none at all, depending upon whether the listener receives the music via a satellite transmission, via a high-definition digital radio broadcast, or via the Internet, which itself can be accessed by copper wire, by satellite transmission, or by fiberoptic cable.

Thus, innovative new businesses, which often have the benefit of exposing consumers to a broader array of artists, benefiting both the listener and the artist, compete at a disadvantage with other music delivery services. So the challenge facing us as lawmakers is how to encourage innovation, growth, and competition while at the same time protecting artists, musicians, and authors.

Last Congress, I introduced bipartisan legislation, The PERFORM Act, that tried to accomplish these goals, and chaired a hearing on the bill and the surrounding issues that I have just discussed.

We have just been joined by the Chairman of the Committee, the distinguished Senator from Vermont, Pat Leahy, who asked me if I would chair this hearing, and I am very pleased to do so.

But following the earlier hearing, my staff have been working with the interested parties in an effort to bring them together and to clarify the differences that still exist.

It appears that some significant progress has been made during that period of time. Building upon the work begun by the staff here in the Senate, the House Judiciary Committee has reported out counterpart legislation that appears to represent a significant step forward.

For example, I understand that the recording industry and the webcasting industry actually are in agreement on a new rate standard. This is terrific and mildly surprising. I look forward to discussing this with their representatives who are here today.

The House Judiciary Committee also made a number of accommodations to broadcasters to address criticisms and concerns that they have raised. I also look forward to hearing the views of the witnesses today on those accommodations.

As our Committee takes up this legislation, further changes or additions will be necessary, but today's hearing I hope will be a catalyst for clarifying and resolving what changes there may be.

Music, I think, is an invaluable part of all our lives. New technologies and changing music platforms provide exciting new options for all consumers. As the industry continues to march forward into new frontiers, we have to ensure that our laws can stand the test of time and be fair to all.

So I look forward to working with the Chairman and working with my colleagues to pass legislation and to hear the witnesses' thoughts on these issues.

Now I am just delighted to recognize the distinguished Chairman of this Committee, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Well, I want to first thank Senator Feinstein both for chairing this hearing today—she is also the chair of one of the most critical committees in the Senate, the Senate Select Committee on Intelligence, which takes a great deal of her time—and I want to thank her for her leadership on content protection issues. There is no way I could have done this hearing today. We have a significant Judiciary nomination on the floor—that New England understatement—and I am going to be heading for that very soon.

But I think the issue is very simple, even if the solution can be complicated. Broadcast radio stations use the work of recording artists, and they profit from it. But, unlike webcasters, broadcast stations do not compensate the artists. Maybe the broadcasters might not like this, but it appears that they are using somebody else's property without compensation. That may be okay in other countries, but it is not consistent with American property laws. It means that American artists do not receive millions of dollars each year that are collected in European allies' countries and other countries to pay for the use of their music on their broadcast radio stations. They can do it. I do not know why we cannot do it.

We are hearing from hard-working musicians across the country. The president of the Vermont Musicians Association recently wrote in the Burlington Free Press: "I am one of many hundreds of Vermonters employed in the music community. We are not celebrities; we are regular folks who work hard to help provide a decent living for our families, and we simply seek to be fairly compensated for our work."

I have also heard from radio stations in Vermont concerned about the impact of giving performing artists the same rights on broadcast radio that they have on the Internet. I would add that, unlike a State like Senator Feinstein's, one of the most magnificent States in this country, Vermont is a very small State. I actually know most of the performers, and I know most of the radio station owners. And so I am making sure that the Performance Rights Act protects smaller broadcasters while providing fair compensation to artists and musicians.

The House Judiciary Committee approved companion legislation with an amendment that would permit small stations to use sound recordings for a flat rate of $500 a year. That is less than they have to pay in dues for lobbyists to lobby against this bill. We are going to need to consider similar amendments to address the legitimate concerns of smaller broadcasters when the Committee turns to the Performance Rights Act.

I say this not to beat up on the National Association of Broadcasters, an organization that has done a great deal of good in this country. But I think they have got to finally sit down and work

with us. We have invited them to work with us and work with those on the performer side to see if there is a way we can address the needs of both smaller broadcasters and performers. To date, that has not been done.

This is legislation that is going to move. The time to sit down and talk is now. We have to ensure that songwriters remain protected. Songwriters are properly compensated by radio stations through private licensing agreements with ASCAP, BMI, and SESAC. A performance rights for recording artists should not come at the expense of songwriters, and we should establish parity across all music delivery platforms.

I will put my whole statement in the record, but I think that it is time for the parties to sit down and talk because this is going to be legislation that will move. I appreciate that the Register of Copyrights submitted testimony today in support of ending the current inequity, but I cannot praise Senator Feinstein enough, who has talked to me considerably when we are not in the Committee about the importance of this, and I appreciate you holding this hearing.

Senator FEINSTEIN. Thank you very much. Thank you very much, Mr. Chairman, and I very much agree with your comments, and I do agree that the time is now and that we need to know what the concerns are, and we need, more importantly, to have people who are willing to reconcile those concerns so that we can move forward.

So, with that, I will enter into the record the statement of Mary Beth Peters, the Register of Copyrights, and the statement of Pandora Media as well, without objection.

[The statements appear as a submission for the record.]

Senator FEINSTEIN. The way I would like to proceed, ladies and gentlemen, is to ask each witness to confine your opening statement to 5 minutes, just state your point as clearly—you do not have to be fancy about it—and succinctly as you can, and that will provide more chance for us to answer questions. And I will go down the line and, beginning with Sheila, introduce each person prior to their 5 minutes.

Let me begin with Sheila E. She hails from the San Francisco Bay Area. She is an award-winning singer, songwriter, and performing artist. She has recorded several top singles and has performed with some of the biggest names in music. She is also the president of Heaven Productions Music and a co-founder of the Elevate Hope Foundation, which is a charitable foundation that assists the needs of abused and abandoned children through music therapy. Sheila E has received the Imaging Foundation's Humanitarian Award, the Angels Across America Award, and the Prism Lifetime Achievement Award for her charitable and humanitarian work.

Welcome, Sheila, and we will begin with you.

STATEMENT OF SHEILA ESCOVEDO, GRAMMY AWARD-WINNING ARTIST, ON BEHALF OF THE MUSICFIRST COALITION, SHERMAN OAKS, CALIFORNIA

Ms. ESCOVEDO. Thank you, Chairman Leahy and Senator Feinstein. I am really, really honored to be here to today to represent

the hundreds of thousands of working musicians who seek one simple right—that is, to be compensated for their labor.

My name is Sheila E., and I am here today on behalf of the MusicFIRST Coalition. I am also a member of AFTRA and AFM, as well as a board member of the Los Angeles Chapter of The Recording Academy, which represents thousands of music creators across the State of California.

I want to talk about music and radio but, first, let's talk about music.

I was born into a musical family, the daughter of the legendary band leader Pete Escovedo, so music is truly my destiny. I started playing an instrument at age 3, and once I made my concert debut—a seasoned 5-year-old—I knew I wanted to be a musician.

As I matured as a musician, I had many wonderful musical experiences, from earning multi Grammy nominations for my solo work, to performing with such artists as Lionel Richie, Gloria Estefan, Beyonce, Ringo Starr, and, of course, Prince. And speaking of Prince, the other Senators from Minnesota who are not here right now, I am sure that they know that the "Minneapolis Sound" is still very influential today.

During that time, I began to discover much about the music business itself, and I was always at a loss to explain why one industry—traditional broadcast radio—is allowed to profit from the artists' work without compensation to those artists.

As I toured around the globe and I saw that broadcasters in every other developed nation in the world compensate their artists, the lack of payment in America became more puzzling to me. As Internet radio developed and recognized their obligation to pay artists, the lack of terrestrial radio's payment became unacceptable.

For all of the complex legal and legislative discussions that have taken place around this topic over the decades, the issue for musicians is really quite simple. We believe that being paid for one's work is a basic American right. Whether your workplace is an office, a classroom, a factory, or a recording studio, every American worker deserves to be compensated for his or her labor. And any business that profits from another's work should share some of that profit.

All right. So let's talk about radio. Artists love for their records to be played on the radio. That is a given, but that is not the point.

Artists love to get bookings for live gigs, but we get paid for those live gigs. Artists love to get songs placed in movies and TV shows, and we get paid for those uses. Artists love to sell records, and we get paid for those sales. Radio is the only part of the music business where our work is used without permission or compensation. So when the National Association of Broadcasters tells us that they are a true friend of artists, we respond by saying, "Friends don't let friends work without compensation."

Radio's argument that a "promotional effect" exempts them from payment is a tired argument that will not hold water in any other context. Imagine the radio industry withholding payment from popular talk radio hosts claiming that they promote their book sales and TV ratings. Imagine the radio industry withholding payment from sports teams because airing the games promotes ticket sales. The talk show hosts and the sports teams will simply say, "No

broadcasting without fair payment." But until the Performance Rights Act is passed, artists have no such right.

Radio's other arguments are just as worn out. The House version of the bill addresses the concerns of broadcasters, and we support the adoption of these provisions in the Senate bill. "Worried about small broadcasters?" The bill lets them play all the music they want for as little as $1.37 a day. "Not the right time in the economy?" The bill defers payment for up to 3 years. "Concerned about public service announcements?" To use public airwaves for free, the stations must air them and that won't change.

One new argument I have heard has caused me particular disappointment: that the Performance Rights Act will hurt minority broadcasters. As a Latin artist, I want minority stations and minority artists to be able to thrive in this business. Many minority-owned stations are small and would rightly receive a special accommodation for the lower payments in the bill. And at the same time, the bill would allow Hispanic and African American artists their due payment for their important contributions to our American music mosaic. It is a sad irony that artists living throughout Latin America benefit from a radio performance right while their counterparts in the U.S.—the leader in intellectual property—do not. It is time to bring the U.S. in step with the rest of the developed world.

So we have talked about music. We have talked about radio. Let me close by talking a little bit about the past and the future.

First, the past. Last month my father, Pete Escovedo, turned a youthful, handsome 74. In addition to his own legendary band Azteca, he was a member of the group Santana and performed on a number of their records as well as other artists still heard on radio today. One of the most gratifying aspects of this legislation is that it will compensate so many great artists of my father's generation and those who have contributed so much to our musical heritage. Every single participant—featured artists, background singers, session musicians, and producers alike—will all benefit from this bill.

But this bill is just as much about the future.

One of the great honors in my life was to co-found a charity called Elevate Hope Foundation, and we provide abused and abandoned children an alternative method of therapy through music and the arts. The magnitude of music becomes such a inspiring force in the lives of these children that I have seen firsthand—and I get emotional because I see what music does for these kids. And they say that I cannot get emotional up here, but I will, because music is my life. And it is not fair. It is not fair what is happening.

We must encourage our youth through music and the arts. Through music, they learn how to respect themselves, and I teach them that they deserve respect as individuals and as budding music creators. What I ask of you today, distinguished Senators, is to ensure that the next generation of musicians will enjoy the respect that they deserve by simply being compensated by the businesses that use their creations for profit. Through the passage of the Performance Rights Act, musicians and broadcasters will enjoy a relationship of mutual respect that will allow both to flourish.

Thank you.

[The prepared statement of Ms. Escovedo appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Sheila.

Our next speaker is Bob Kimball, and he is the Executive Vice President for Corporate Development, the General Counsel, and Corporate Secretary of RealNetworks, Inc. Mr. Kimball currently serves on the boards of directors of the Digital Media Association and the European Committee for Interoperable Software. Prior to joining RealNetworks, Mr. Kimball was a senior attorney and manager of business relations for IBM Global Services and an attorney with the law firm of Sidley and Austin in Senator Durbin's country, Chicago, Illinois. And we welcome Senator Durbin to these hearings.

Mr. Kimball, would you proceed? Five minutes, please.

STATEMENT OF ROBERT KIMBALL, EXECUTIVE VICE PRESIDENT, REALNETWORKS, INC., SEATTLE, WASHINGTON

Mr. KIMBALL. Thank you. Chairman Leahy, Senator Feinstein, Senator Durbin, thank you for the opportunity to speak today. I am Bob Kimball, and I currently serve as Executive Vice President at RealNetworks.

As the creator of the streaming technology that made Internet radio possible and as the operator of one of the largest Internet music services, RealNetworks is deeply interested in sound recording performance rights and royalty parity.

First, I want to thank you, Chairman Leahy and Senator Feinstein, for championing royalty parity and fair competition, both of which will foster innovation and provide greater benefits to music fans and recording artists alike. Parity would mean that royalties for cable, satellite, Internet, and even broadcast radio would be established for the first time by using a single, uniform standard. Parity would establish royalties that do not discriminate against or favor competing technologies or business models. Parity would also have Congress provide small webcasters similar discounted royalty caps that the Performance Rights Act provides small broadcasters.

As part of establishing a uniform standard, there should be one consolidated rate proceeding that includes all radio services. This would create substantial efficiencies and ensure fair application of the standard.

Mr. Chairman, today a single device like the radio I have here—not quite the size of a piece of furniture but, still, it weighs a ton—this can play the same music program on FM radio, satellite radio, and Internet radio. How this works is invisible to the user. I simply push a button, and the radio plays.

But, inexplicably, the current system imposes dramatically different sound recording royalties, or none at all, based solely on which button I happen to push on the device or what technology delivers the song. This makes no sense. The Copyright Act should not decide technology winners and losers.

The most difficult question you face, I think, is deciding what uniform standard will ensure royalties that fairly balance the interests of copyright owners, licensees, and the general public. For two reasons, I suggest using the royalty arbitration standard in Section

801(b)(1) of the Copyright Act, which was carefully calibrated by Congress when it was enacted in 1976.

Most importantly, the four objectives outlined in Section 801(b)(1) equally balance the interests of copyright owners, licensees, and the general public. As a result, the royalty determinations that applied this standard have been fair and have avoided above-market pricing that characterizes the current Internet radio standard.

I think the Committee will agree that the benefits of a statutory license almost disappear if the rate-setting standard actually drives companies out of the market rather than empowering the rate setter to protect against that very harm by balancing all interests.

Second, 801(b)(1) is the right standard because on each occasion that Congress has introduced a new standard, such as the willing buyer/willing seller or fair market value standards that have applied to webcasters and satellite television services, the resulting royalties have threatened or actually forced companies out of business, requiring remedial congressional action.

My final point concerns Section 5 of the Performance Rights Act, which is intended to protect songwriters from harms that could result from the imposition of sound recording royalties.

Section 114(i) of the Copyright Act already establishes a complete evidentiary bar against the use of sound recording royalty information to set rates for musical works. This bar applies equally to composition licensors and licensees, meaning songwriters cannot use this information to argue for high rates and radio services cannot use this information to argue for low rates.

Unfortunately, Section 5 may convert this evenhanded evidentiary shield into a unilateral litigation weapon for music licensors. One interpretation of Section 5 would allow the use of sound recording royalties to argue for increasing musical works royalty, but forbidding consideration of the same information to argue for lower royalties. Turning this balanced shield into a one-way sword is fundamentally unfair and certain to lead to irrational royalty results.

A related issue is the Webcasters Settlement Act's provisions allowing SoundExchange to cherrypick licenses that can be used as evidence before the Copyright Royalty Board. When SoundExchange negotiates a deal it likes, it shows the deal to the CRB. When the deal is less favorable, SoundExchange makes the deal confidential, and the board cannot consider it. Congress should no longer condone this practice and should require the copyright royalty judges to consider all relevant deals when setting royalties.

In closing, I am sincerely grateful for the invitation to participate today, and I am encouraged that a level playing field might be in sight for Internet radio. I would be happy to answer any questions you may have. Thank you.

[The prepared statement of Mr. Kimball appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Kimball. And I assume when you refer to Section 5, the section you are referring to is Section 5(b).

Mr. KIMBALL. Yes. I believe that is correct.

Senator FEINSTEIN. Thank you.

The next person is Marian Leighton-Levy. Marian Leighton-Levy is the co-founder and co-owner of Rounder Records in Burlington, Massachusetts. Her areas of specialty include publicity, promotion, and artist relations. She has served on the board of the Blues Foundation, the Advisory Board of the Rhythm and Blues Foundation, and is presently on the board of the International Bluegrass Music Museum in Owensboro, Kentucky. She is a graduate of Clark University in Worcester, Massachusetts, and we welcome you today.

STATEMENT OF MARIAN LEIGHTON-LEVY, OWNER, ROUNDER RECORDS, BURLINGTON, MASSACHUSETTS

Ms. LEIGHTON-LEVY. Thank you. Senator Feinstein, Chairman Leahy, and other distinguished members of the Committee, I am pleased to be here today to speak on behalf of so many talented and hard-working people in the music industry, and to voice the support of thousands of us who have waited so long for the fair treatment embodied in the Performance Rights Act. My name is Marian Leighton-Levy, and 39 years ago, two college friends and I founded Rounder Records, one of America's largest independent labels.

We at Rounder are extremely proud of the breadth and depth of our catalog because so much of it embodies our country's cultural and musical heritage, from Alan Lomax's seminal field recordings from the 1930s, to the complete recorded work of Jelly Roll Morton, from the Library of Congress, to the Woody Guthrie set coming out next month comprised of newly discovered old masters. Many of our most critically acclaimed releases will never sit at the top of the Billboard charts, or chart at all, for that matter. But they are, nonetheless, important recordings. Some will also receive significant airplay on radio stations both here but even more, in some cases, in other countries which revere and enjoy American music and culture.

Perhaps Rounder's approach gives us a unique perspective and view. Many of our artists are largely middle-class, hard-working singers and musicians, as Chairman Leahy referred to earlier from his home State, trying to make a living doing what they love. That is why the Performance Rights Act has tremendous support from labor groups across the country. This is not just about superstars and big-name acts.

This legislation will provide significant revenue to many of the working artists and musicians we have recorded for the last 39 years. Many have already seen significant checks from satellite, cable, and Internet radio play. If the PRA is passed, they will also benefit for the first time from overseas broadcast royalties, as well as royalties generated by specialty shows in the U.S. and from public and non-commercial radio play, too.

You have undoubtedly heard the broadcasters' primary rationale for not paying: that they promote our music. While this excuse may have had more significance 80 years ago when it was first used, it is much less meaningful today. Now, radio is just one way—admittedly an important way, but just one way—music is promoted. There are dozens of new platforms and businesses that reach con-

sumers which also promote music, but with one significant difference: that they do pay a performance royalty.

Only broadcast radio gets this free pass from decades ago. Even using their own numbers, the value proposition offered by the broadcasters does not add up. Mr. Newberry has testified in the past that they provide as much as $2.5 billion in promotional value to performers. Meanwhile, they generated $14 billion from the use of our music last year. Does that sound like equal value to you?

Anyway, the truth of the matter is, as an independent label focused on Americana, bluegrass, folk, blue, and similar niche musics, we may get less airplay here in the U.S. than others who release more mainstream recordings. But our music fills the airwaves overseas, so this performance royalty is as important to us for these reasons as for American radio. American music accounts for 30 to 50 percent of all music broadcast on foreign stations. Yet, given our current law, because our stations do not pay a performance right, those foreign stations do not have to pay us either. Each year, there are tens of millions of dollars being left on the table—millions of dollars for compensation and for further investment that will flow to artists, musicians, and recording company owners when the Performance Rights Act finally becomes law. Denying American creators and copyright holders money they deserve from overseas so that broadcasters can receive a subsidy in the form of our property is fundamentally unfair.

A striking example of this inequity can be found in the case of the recent Robert Plant and Alison Krauss record "Raising Sand," which we released last year. It won five Grammy Awards, including Album of the Year and Song of the Year. Since Robert Plant is a U.K. native, he will be able to receive payment for his work on the recording when it is played around the world, but Alison Krauss will not be paid because she is a U.S. citizen.

As I have become more involved in the fight for a performance right, I am continuously amazed at the broadcasters' misinformation campaign on the Performance Rights Act. They state that this legislation is the evil brainchild of foreign-owned record companies when, in fact, the fight for a performance right was started by performers with the National Association of Performing Artists way back in 1936. They say that we are just looking for a bailout from our failed business model in the digital age when they have fought this right for more than seven decades, through up and down cycles, before anyone knew what the word "digital" was. They warn that more than half of the royalties are directed to record labels when neither the word "record" nor "label" appears anywhere in the bill. In reality, the legislation directs royalties to be split down the middle: 50 percent directly to artists and musicians, and 50 percent to the copyright holder. And since many artists own their own master recordings, artists and musicians will actually get more than 50 percent of the payments. There are currently 1,200 artist-owned independent labels signed up with SoundExchange, which collects and distributes the royalties already from digital and Internet radio.

So, in closing, this is not an easy business, now more than ever. Imagine working in such a challenging industry. Imagine investing, as we do, in a volatile and unpredictable market. Now imagine

someone taking your product without consent and using it to profit his or her own business without so much as a penny in return. "Unfair" is not the word. It is "unconscionable."

But that is the scenario of our current law, and that is the reality for all of us in the recording industry—labels, producers, managers, performers, and musicians. Today we stand united in seeking a right that should have been afforded to us decades ago.

In the end, harming broadcasters is the last thing we want to do. They should be our partners in the music business. All we are asking for is fair compensation for use of our work. The Performance Rights Act provides us with the framework to secure that compensation and sets in place the proper balance of interests between creators and broadcasters.

We sincerely look forward to working with broadcasters in the future—as lovers of music, as supporters of musicians, and as true partners in commerce and in art.

[The prepared statement of Ms. Leighton-Levy appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much.

And now we will move to Steve Newberry. He is the president and chief executive officer of Commonwealth Broadcasting Corporation, based in Glasgow, Kentucky. He is also currently serving as the Joint Board Chair for the National Association of Broadcasters. Mr. Newberry entered radio ownership at the age of 21 and has done just about every job around a radio station that one can do. He is a graduate of the University of Kentucky, and he resides in Hyattsville, Kentucky, with his family.

Please go ahead, Mr. Newberry.

STATEMENT OF STEVE NEWBERRY, JOINT BOARD CHAIRMAN, NATIONAL ASSOCIATION OF BROADCASTERS, AND PRESIDENT AND CHIEF EXECUTIVE OFFICER, COMMONWEALTH BROADCASTING CORPORATION, GLASGOW, KENTUCKY

Mr. NEWBERRY. Thank you very much. Good afternoon, Chairwoman Feinstein, Chairman Leahy, and other members of this very distinguished Committee. My name is Steve Newberry. I am the owner and operator of Commonwealth Broadcasting, which does operate 23 small-market radio stations, based in Glasgow, Kentucky. I am testifying today, however, on behalf of the 6,800 members of the National Association of Broadcasters, of which I do have the privilege of serving as joint board chair.

I am sure it comes as no surprise to anyone in this room when I say that these stations across the country oppose the performance fee legislation that we are considering here today.

I believe this legislation will up-end local radio broadcasting as you have known it. I have been a part of the radio industry for over 30 years, and I can honestly tell you that I have never seen the economic pain the radio industry is currently experiencing. And as challenging as radio's current economic landscape is, it will deteriorate even further if a performance fee were to be enacted. Already this year, publicly traded companies are reporting revenues down 24 percent, down 20 percent, down 24 percent, down 25 percent, and the numbers continue.

But beyond radio's economic landscape, we strongly believe that local radio stations do indeed provide compensation to the record labels and artists today. The artist is paid with free advertising and free exposure every time a station plays their music. Local free radio is a unique developer, exposer, promoter, and the great populizer of new and old music to multiple new and old generations of listeners. There is a value to radio's promotional—to the promotion of radio that we provide to the labels and the artist. But how do we qualify it? How do we quantify it?

Economist James Dertouzos has determined that radio airplay is directly responsible for $2.4 billion a year in music sales. By the way, that figure does not include the additional billions that are earned in concerts, merchandise sales from radio promotions, artist interviews, CD and concert ticket giveaways.

Additionally, every day radio stations are flooded with calls, with e-mails, texts, and visits from record label promoters trying to get a song on the radio or to increase the number of spins or plays that a station will give a particular song. One station in Salt Lake City actually kept track of the number of calls and e-mails received from record labels. Between August 1st of 2008 and July 14th of this year, one radio station received 9,597 e-mails from the labels, 755 calls—that is a total of 10,352 contacts in the course of a year. That is an average of 28 contacts per day 7 days a week. And that is one radio station in Salt Lake City, Utah.

Free airplay is important enough for record labels to send gold and platinum albums, just as the one that I have here. This plaque was presented to radio station WIHT: "To commemorate RIAA's certified multiplatinum sales of more than 9 million copies of 'Confessions,'" Usher's 2004 release.

Finally, getting artists airplay on local radio is apparently valuable enough that record labels continue to spend thousands of dollars inviting radio program directors to hear private showcase concerts by recording artists. I would ask that this stack of e-mails demonstrating that practice be entered into the record.

Senator FEINSTEIN. So ordered. It will be. Thank you.

[The information appears as a submission for the record.]

Mr. NEWBERRY. Thank you, ma'am.

These private concerts offer a real glimpse into how much record labels need radio airplay.

Chairman LEAHY. Excuse me. Could we just have—what was it you wanted entered in the record? You mean that whole stack or just the——

Mr. NEWBERRY. No. This stack.

Chairman LEAHY. Okay. Thank you.

Mr. NEWBERRY. At a later point in the hearing, yes, sir.

Chairman LEAHY. At a later point in the hearing, if that request is made, what we will do is keep the stack available in the Committee room for anybody who wants to read it. The whole stack will not be part of the record.

Mr. NEWBERRY. This is for a different topic later in the hearing, Mr. Chairman.

Chairman LEAHY. All right.

Mr. NEWBERRY. This is the reference that I was making in my oral argument.

It is true: Radio competes with other listening platforms. But this competition has not diminished the extraordinary value of radio. Satellite radio has 18.6 million subscribers. Satellite radio and Internet radio are certainly a growing media. Internet radio has approximately 42 million listeners, many of those paying for their services. But these numbers are dwarfed by the fact that 235 million listeners receive free, over-the-air radio every week. Radio is the number one way to expose, promote, and get music into the lives of listeners who fund the recording industry through the sales of music, concert tickets, and merchandise.

At the end of the day, no one has been able to prove that the value of music is always worth more than the value of radio's promotion. None of the witnesses here today can tell you that. And before this Committee passes legislation that will have a devastating impact on the radio industry, it seems to me we should know the answer to that question.

Competing resolutions opposed a new performance fee in the House and the Senate have garnered significant congressional support. S. Con Res. 14, introduced by Senators Lincoln and Barrasso, has collected 23 bipartisan cosponsors, and H. Con. Res. 49 in the House has 246 cosponsors, well over a majority of the House.

Thank you for inviting local radio to tell our story. We are part of the engine that drives our economy. We are free, we are local, we are community based, and we are fighting to stay afloat in this very tough economy.

Thank you, and I will be happy to answer any questions that you may have.

[The prepared statement of Mr. Newberry appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Newberry.

I would like to acknowledge that we have been joined by Senator Klobuchar and Senator Franken. I would acknowledge Senator Durbin and Senator Cornyn, so we are delighted to have you here.

We will now move on to Mr. Oman. Ralph Oman is the Pravel Professor of Intellectual Property Law at George Washington University Law School, and he is a senior fellow at the Creative and Innovative Economy Center. From 1985 to 1993, he served as the Register of Copyrights for the United States. He has experience working for this Committee, having served as chief counsel on the Subcommittee on Patents, Copyrights, and Trademarks from 1983 to 1985, and chief counsel of the Subcommittee on Criminal Law from 1981 to 1983.

Welcome back, Mr. Oman.

STATEMENT OF RALPH OMAN, ADJUNCT PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Mr. OMAN. Thank you very much, Senator Feinstein. It is a pleasure to be here, and members of the Judiciary Committee. For me, today's hearing is deja-vu all over again. I have been involved in this issue since 1975 when my old boss, Hugh Scott of Pennsylvania, the Senate Minority Leader, scheduled and chaired a lively hearing before the Subcommittee on Patents, Trademarks, and

Copyrights that featured sultry Julie London singing the Mickey Mouse Club theme song as a steamy love ballad.

[Laughter.]

Mr. OMAN. It demonstrated the importance of the performer's contribution to the success of music. It was a great success.

Chairman LEAHY. I came to the Senate too late.

[Laughter.]

Mr. OMAN. In fact, the issue reaches far beyond my brief tenure in the Senate Judiciary Committee, all the way back to the 1920s, when radio was in its infancy. The first performance rights legislation for sound recordings was introduced in 1926. Since that time, dozens of bills have been introduced, several of them by Hugh Scott of Pennsylvania, trying to create the right for the performers and labels, but none of them has been able to finally get across the finish line. There has been strong support in the bar. The American Bar Association adopted its first resolution—the first of many—urging adoption of a public performance right for sound recordings in 1938.

It comes down to this, in my opinion. As a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid for it by the people who use their works. That is the basic premise of copyright protection.

Nowhere else in copyright law—and nowhere in American jurisprudence generally—can one business take another's private property without permission or without payment because the user concludes unilaterally that long term it would be in the interest, the long-term interest, of the property owner's business, even if the owner does not agree, does not think it would be so. In our case, some broadcasters think that they are doing the performers and the labels a favor by creating promotional value. Who, I ask, is the best judge of this quid pro quo—the broadcasters or the creators?

Over the years, Cabinet Secretaries, Trade Representatives, many Members of Congress, and many Registers of Copyrights have argued that we have no legal or economic justification for this anomaly in our law.

The bipartisan performance rights legislation introduced in this Congress in both the House and the Senate really bends over backwards to provide unprecedented accommodations to the broadcasters. The bill sets low flat fees for most broadcasters, some as low as one-half of 1 percent of a broadcaster's revenue. There is a delay in the implementation of the legislation to allow broadcasters relief during these hard economic times, and there is a long phase-in period that gives them the chance to ease slowly into their new partnership with performers.

Promotional value cannot justify free use. Instead, it should be a factor in determining the appropriate royalty. We use that factor in market negotiations for other content that radio stations use, and we use it setting the rate for statutory licenses for other platforms, such as Internet radio.

True parity requires equal footing when it comes to figuring out how we should set the rates for these different platforms. It also is important in the ongoing negotiations in the private sector. Today, because of the patchwork or, as you said, Madam Chairwoman, the hodgepodge of provisions in the Section 114 license, we

have a confusing system of rate standards among the various radio platforms. This is unnecessary and unfair. Of course, different platforms reflect different business models and may wind up paying different rates ultimately, but the standard used to derive those rates should be uniform or standardized and reflect the fair market value for the use of these works.

The statutory license was never intended to provide music at below-market rates. The best rate standard for all radio platforms is fair market value, as you proposed, Madam Chairwoman, in the Perform Act. Copyright owners and performers deserve nothing less for their works—especially when they have no choice but to allow their use. Because of the statutory license, what some call a "compulsory license," they cannot just say no. They cannot walk away from the bargaining table. That makes the negotiation one-sided right from the outset.

As you mentioned, Senator Feinstein, you and Senator Graham asked the stakeholders to get together and formulate a new rate standard. That effort led to a compromise provision adopted by the House Judiciary Committee in H.R. 848. That standard is a modification of the standard used today for satellite and cable radio proceedings. While I would prefer the language of your bill, Madam Chairwoman, I find the compromise language reasonable, and I would urge its adoption by the Committee?

One last point, if I may. As you mentioned, Madam Chairman, this lack of a public performance right for sound recordings is a huge international embarrassment. The United States loses millions of dollars a year to foreign markets. I urge you to consult with the U.S. Trade Representative and get his take on the many advantages that would flow to the United States if we joined the almost unanimous international consensus in granting a public performance right for performers and sound recordings.

Thank you very much for the opportunity to testify. I would be pleased to answer any questions.

[The prepared statement of Mr. Oman appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Oman, and thank you for your service to this Committee. It is very much appreciated. I want you to know that.

And, finally, we have Mr. Winston. James Winston is the Executive Director and General Counsel of the National Association of Black Owned Broadcasters, a position he has held since 1982. He is also a partner in the firm of Rubin, Winston, Diercks, Harris, and Cooke. From 1978 to 1980, Mr. Winston served as legal assistant to Commissioner Robert E. Lee at the Federal Communications Commission.

Thank you and welcome, Mr. Winston.

STATEMENT OF JAMES L. WINSTON, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC., WASHINGTON, D.C.

Mr. WINSTON. Good afternoon, Senator Feinstein. I wanted to note at the outset that my light does not work for the time, so if I go over, it is only ignorance of the actual time. But I thank you

again, Senator Feinstein, Chairman Leahy, members of the Committee. Thank you for inviting me to testify this afternoon.

You have invited me today to discuss imposing additional copyright royalty obligations upon radio broadcasters. In the discussion of additional copyright fees, the broadcasting industry has consistently been portrayed as one in which all of its participants make fat profits. Therefore, imposing additional copyright royalty payments on the industry merely skims a little off of those fat profits.

For minority broadcasters, there are no fat profits to skim. In fact, most minority broadcasters today are struggling to survive. Therefore, I come before the Committee today to describe the current state of minority broadcasters and the issues that threaten to further erode minority broadcast station ownership. As a result of these threats, as I shall explain below, NABOB requests that the Committee consider investigations of the principal lenders to the broadcast industry and of the Arbitron ratings company which has a monopoly over radio ratings. It is my hope that once you understand the current plight of minority broadcasters, you will understand why it is impossible for us to agree to pay additional copyright royalties.

Broadcast station advertising revenues have fallen drastically this year, and many minority broadcast companies find themselves unable to maintain these minimum cash position required by their bank loan agreements. This situation has been made worse because of a new breed of lender in the broadcast industry today: hedge funds. Therefore, I am here today to request that this Committee investigate the practices of the leading lenders to the broadcast industry, lenders such as Goldman Sachs, GE Credit, the combined Wells Fargo-Wachovia Bank, JP Morgan, and Bank of America. These banks have allowed hedge funds, such as Guggenheim, Fortress, Silver Point, and DB Zwirn into their consortia. Now they are acting at the behest of the hedge funds in refusing to enter into workout arrangements that will provide minority broadcasters an opportunity to keep their companies intact and restructure their loans for a brief period until the economy turns around.

The reasonableness of this request is underscored by the fact that the banks listed above are all beneficiaries of Government relief through billions of dollars of Troubled Asset Relief Program—TARP—funds. Alternatively, NABOB requests that the company help NABOB seek assistance from the Treasury Department or Federal Reserve under one of their programs, such as the Term Asset-Backed Securities Loan Fund or the Commercial Paper Funding Facility.

Minority broadcasters face an additional threat that is equally important for us to bring to your attention. This second threat is posed by Arbitron, Inc., an audience measurement company that maintains a monopoly in the measurement of radio audiences. Recently, developed the Portable People Meter, an electronic tracking device which records signals from the radio stations to which the wearer is exposed. Initial results from the PPM measurements have shown such huge rating declines for stations serving Black and Hispanic audiences that the financial survival of these stations is at stake. The damages to minority broadcasters that I am refer-

ring to are not theoretical. They are real, quantifiable, and devastating.

Since PPM became operational in New York City in October 2008, Spanish Broadcasting System has been forced to reduce staff by 37 percent. Inner City Broadcasting Corporation reports that in New York revenues are down 58 percent. And Inner City's San Francisco station has been forced to lay off 13 percent of its staff and cut salaries by 10 percent.

In Los Angeles, the situation is just as grim. KJLH, owned by Stevie Wonder, has seen its revenue fall over 48 percent, and it has been forced to lay off 13 percent of its staff.

Arbitron has been sued over PPM by three Attorneys General, investigated by a fourth, and is currently being investigated by the FCC. In addition, this new PPM product has been denied accreditation by the Media Rating Council, the MRC. The MRC was created at the urging of Congress to prevent the kind of situation we are faced with today. NABOB, therefore, requests that the Committee investigate the PPM methodology and obtain information on the PPM accreditation process from Arbitron and the MRC.

In conclusion, these two problems—the refusal of lenders to restructure broadcast loans to allow these otherwise healthy businesses to weather the current recession, and Arbitron's abuse of its monopoly position in the radio ratings industry—are more than an antitrust issue for this Committee. They are more than a business crisis for African American and Hispanic station owners. They are a civil rights crisis for all of America. Without minority communities with strong, vibrant, independent voices, America loses an important part of what makes our democracy great—a Government in which all of its people participate and are heard.

I thank you for the opportunity to appear here today.

[The prepared statement of Mr. Winston appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Mr. Winston.

Before going to questions, I would like to recognize a distinguished artist in the audience. She is Gloria Gaynor. She gave birth to the era of disco, moving into the mainstream dance scene, when her song "Never Can Say Goodbye" debuted at number one on the charts in 1973 and became the first dance song to reach number one status in dance music. Today, she is a very important part of music and has come to Washington to commemorate the 30th anniversary of her hit "I Will Survive." If you would stand, we would like to give you a round of applause.

[Applause.]

Senator FEINSTEIN. Welcome. We are delighted to have you here. Thank you. Thank you.

Let me begin the questions. I am really perplexed. Let me tell you the kind of communication I have from the Southern California radio broadcasters: "I know you like to think you are protecting intellectual property, but in your attempt to protect the performers, you are trampling on the intellectual property rights of thousands of radio station brands, and actually in the long run, you will be hurting the performers, too."

And so I am reading Mr. Kimball's testimony, and I come upon a chart, and the chart is on page 6 of his testimony. It is "2008

Radio Revenues and Royalties," and at the right it says "Broadcast Radio (Music) 2008 Revenue, $16.5 Billion." At the bottom is "Songwriter Royalties," and as you go over to that same "Broadcast Radio (Music)," 3 percent of revenue.

Let me ask this question: Do you believe these are fair and accurate figures, Mr. Kimball?

Mr. KIMBALL. Yes, I do believe they are fair and accurate figures to the extent they can be compiled from public sources, which is not always the easiest thing to do. But to the best of our ability, using the sources available, I believe these are certainly roughly accurate figures that give you a perspective of the size of the economics involved and the amounts actually being paid.

Senator FEINSTEIN. Thank you.

Mr. Newberry, I do not know specifically about the problems Mr. Winston was elucidating, so let us put them over here for a moment. Take a look at the figure that was just $16.5 billion in profit——

Mr. NEWBERRY. That would be gross revenue, not profit.

Senator FEINSTEIN. All right, whatever it is. Gross revenues to songwriters, 3 percent. And you made an eloquent argument, I think, as to why we should protect the status quo. I come from California. We are a big intellectual property State, and I have found over many decades that protecting copyright and patent interests is really important because it encourages the development of the industries that these copyrights and patents relate to.

Mr. NEWBERRY. Yes, ma'am.

Senator FEINSTEIN. You are saying that is not necessarily so. You are saying it is okay for us to take the content. You are saying it is okay for us to play them without recompense to the songwriter.

I have a hard time understanding this. Can you explain why?

Mr. NEWBERRY. Certainly. With all due respect, that is not what I was intending to say, and I do not believe that is what my testimony says.

Senator FEINSTEIN. Okay. Fair enough. Explain it.

Mr. NEWBERRY. We are saying that there is a difference in the way we compensate the composers of the music and the way we compensate the performers. We compensate the composers through ASCAP, BMI, and SESAC, and that is what equated historically to 3 to 4 percent of the gross revenues of our industry, which is obviously a much higher percentage of our profit. We compensate the composers because they are not known. They do not have generally the benefit of celebrity. I can tell you that Jeffrey Steele is a songwriter in Nashville, Tennessee. Many of you may not know that name. But if I told you that he wrote the song "What Hurts the Most" for Rascal Flatts, you would certainly recognize that song. But you associate it with Rascal Flatts.

We compensate the songwriters so that they have the ability to earn a living, their intellectual property, to create those great songs that America has.

Senator FEINSTEIN. But not the performer.

Mr. NEWBERRY. The performers are compensated through this partnership that we have had that has lasted for over 80 years, that has been one that while the record industry wants to change it now, they have spent millions of dollars to get their songs aired

on the radio because they know that creates money for them. It creates the sale of music. It creates the sale of concert tickets. It creates the sale of T-shirts. And that is how they have been compensated historically.

Senator FEINSTEIN. Well, let me ask you this: Why are we the only industrialized country that does this?

Mr. NEWBERRY. Well, we have an entirely different structure. In many——

Senator FEINSTEIN. How so? I mean, why are we separate from Europe or any other nation?

Mr. NEWBERRY. First of all, I think without argument people would argue that the U.S. music industry is the most vibrant in the world. But there are also different copyright protections that occur here. Songs here are protected for copyright for 95 years. In many countries, it is 50. And if you were to apply that same standard, many of Elvis Presley's, the original rock songs that came out in the 1950s would now be public domain. Soon, within the next 10 years, all the Beatles songs, all of the Motown songs, all those songs would become public domain if we had the 50-year structure that a lot of European countries do.

We protect those copyrights for 95 years so they are not public domain and they can still be monetized by the artist.

Senator FEINSTEIN. Okay. I just must tell you—all right. Let me ask you another one. The National Association of Broadcasters is running ads across the country referring to this legislation as a tax. However, we all know taxes go to a government. Doesn't the performance right royalty this legislation would establish go to the recording artists and their contractual partners, the record labels, and not to Government?

Mr. NEWBERRY. Yes, ma'am, it does.

Senator FEINSTEIN. Okay. Thus, isn't it misleading to call this a new tax?

Mr. NEWBERRY. You can call it a tax. You can call it a fee. You can call it whatever you want it to be called. There is no question that it is a movement of money from one industry to another, without a—if it is being done by the Government, without it being a fair market transaction.

Senator FEINSTEIN. Do you consider the copyright royalties you collect from cable companies to be taxes?

Mr. NEWBERRY. I do not collect any royalties from the cable companies, ma'am.

Senator FEINSTEIN. You do not?

Mr. NEWBERRY. No, ma'am.

Senator FEINSTEIN. Okay. Then my information is wrong.

Senator Cornyn, would you like to go next? And then we will go to Senator Leahy.

Senator CORNYN. Thank you, Madam Chairman, and thanks to each of you witnesses for being here today.

Mr. Oman, based on your testimony, it sounds like this fight has been going on a long, long time, and I do not know if we are any closer to resolution than we were when it started, but let me just suggest an idea. I think it was Ralph Waldo Emerson that said, "To the person whose only tool is a hammer, that person tends to regard every problem as a nail." And I would like to suggest maybe

the possibility of a different tool to address your concerns and see from the various witnesses whether there is any interest in this, any viability, because it strikes me that both parties to the debate are arguing that they confer value on the other, and to me it seems pretty obvious, that there is value being conferred both ways. The recording industry argues that music drives advertising revenues for radio stations. The broadcast industry contends that radio airplay drives sales of songs, albums, and concert tickets.

One of the main complaints I have heard from the recording industry is that record companies and artists do not have any choice as to whether their music is played on the radio. I think, Mr. Oman, you mentioned that this is the taking of intellectual property. And I understand the frustration of artists having no say in whether their music is being played.

But I wonder if one way, maybe another way of restoring choice to the performers who own their intellectual property without imposing a compulsory license, one possible way of accomplishing that would be a "Do Not Play" list under which artists could opt out of allowing their catalog to be played on terrestrial radio. This would give artists full control over their work. If an artists believed that the promotional value of being on the radio was not enough to make the radio play worthwhile, then the artist could take his or her songs out of circulation. So instead of the radio station having a unilateral option to play music, the radio station and artists would have to agree that free airplay is in their mutual interest.

Would there be any, do you see any—well, let me just ask: What do you think about that kind of proposal? Mr. Winston, would you care to offer an opinion on that?

Mr. WINSTON. I have heard that proposed, and I would have to see the structure that you are proposing. But I think if you make it a situation where the artist can opt out per station, what you are going to do is drive all small stations out of music because the artists will only do business with the big stations. So I think that, you know, if they are going to do a "Do Not Play" list, it has got to be nationwide, that they are going to say we do not want to be on the radio nationwide. Otherwise, they are only going to do business with the big stations.

Senator CORNYN. That is an interesting perspective. That would not have occurred to me.

Mr. Oman, would that address some of your concerns about taking of the intellectual property of the performers without compensation?

Mr. OMAN. The copyright law has traditionally protected the small and the powerless against the powerful and the rich. By suggesting that we create a playlist, you would be in some ways forcing the unknown, the powerless new performers to give their rights up in exchange for this chance of exposure, this chance of air time that is so valuable to develop their careers. So I think that would be contrary to the approach of copyright, and it would also not serve the public interest.

I think it is well established that the listening public generally has a preference for established performers, established repertoire, and if this system encouraged the radio stations to take only the new and hungry performers, it would not serve the public interest.

Senator CORNYN. Well, if I am the relatively new artist trying to get my music promoted by a radio station, I may well decide that it is in my personal financial interest to do so. But if I am perhaps a more accomplished artist that you do not need that kind of promotional airplay in order to—I am talking about something I do not know much about—to promote your music, then you could choose to do that.

What do you think, Mr. Newberry? Would that work?

Mr. NEWBERRY. Senator, I had not heard this concept until today. I think that it certainly draws a line and says if performers or record labels feel that there is not adequate value in the promotional level, then they would be saying, "Sure, do not play our songs," and they would have to take the chances.

I agree with Mr. Winston that if it is negotiated individually with each radio station, I think you would really do terrible harm to small independent radio stations, and you would probably have effects that you would not want. But if it is a blanket prohibition on radio, I can certainly see that that would force an artist or a label to say, "Is there value to radio or not?"

It is an interesting concept. I would want to think about the ramifications of it before I said whether it would be something I could support or not. But it certainly does draw the line in the sand and say, "Is there value to what radio does or not?" And if an artist wants to take that chance, certainly it would put their money where their mouth is.

Senator CORNYN. Thank you. My time has expired.

Senator FEINSTEIN. Thank you very much, Senator Cornyn.

Senator Leahy.

Chairman LEAHY. I just want to make sure I fully understand. Mr. Newberry, you said if they were to negotiate with each single radio station, radio station by radio station. Another way could be for them to simply say any radio station that wants to play our music is going to have to negotiate with us. What do you think of that?

Mr. NEWBERRY. Well, I think what——

Chairman LEAHY. I mean, are you saying the radio station, if we were to pass something, would be free to use any recording unless the artist has specifically called that radio station and said, "I do not want you using mine"?

Mr. NEWBERRY. No, I am not saying that because it is a proposal I heard just moments ago. But the concern that I have in that is, as a small-market broadcaster, a recording label or artist may say, "It is not important to us whether our songs are played on stations in markets 100-plus; we just want to have our music played in the top 50 markets or the top 100 markets." So I think that harms rural America's exposure to the arts.

The second thing that I would say is problematic to this is that——

Chairman LEAHY. What if they said they will play it only in those top stations unless they paid for it in the other stations at a rate, say, based on the size?

Mr. NEWBERRY. I think when you move to where those artists and those labels with the most money get their songs played most,

you are setting up a very bad precedent for the way the music industry works and for new and evolving artists.

Chairman LEAHY. Yes, but what I hear in the letters that your organization asks people to send to me, and several—and before you suggest they are all spontaneous, I have called several of these people, and they say they have gotten the form letter from you.

Mr. NEWBERRY. I was not going to suggest that, Senator.

Chairman LEAHY. All right. I was just trying to keep you from making a bad mistake here. But I hear that they say, "Well, of course, the music, the radio stations are doing the artists a service by playing their music." You are not suggesting, I am sure, that people otherwise would be turning on the radio station in the interest of hearing the commercials.

Mr. NEWBERRY. I am saying that our radio stations are much more than simply the songs we play, absolutely, sir. I think that there are local personalities. I think our commitment to our community——

Chairman LEAHY. I will grant you that. I will grant you that. And we have two or three radio stations or several radio stations in our State where I have complimented them over and over again because they actually care about the local area. One is just 5 or 6 miles from where I live in Vermont. It is the only way you can actually find out if there has been a flood or if a bridge is out or a road during bad weather, and I have complimented them on that. I have even helped them on different things. But they do have radio personalities.

We also have other radio stations where it is kind of a format, click in, one, two, three, four, speak, speak, speak, ad, ad, ad, one, two, three, four, speak, speak—I mean, you know those. And I think that music is a very significant part of their success.

Mr. NEWBERRY. Yes, sir.

Chairman LEAHY. But radio play, whether satellite radio, Internet radio, broadcast radio, does promote sound recording. But if you have the promotional value of that, if that is considered, why are you concerned that the royalty rates would be too high?

Mr. NEWBERRY. Well, as a small-market broadcaster, I can tell you that I do not think the average small-market station in the country is going to see income from the record labels. And I realize that in the House there was a proposal for a flat fee for smaller amounts. I think as with any fee that I have ever seen, it grows over a period of time.

Chairman LEAHY. Do you have a problem with the fee as it is now, the $500 fee?

Mr. NEWBERRY. Yes, sir. In principle, I have a problem with that. Five hundred dollars for a station——

Chairman LEAHY. In principle or amount?

Mr. NEWBERRY. Sir?

Chairman LEAHY. What would that same station pay in dues to your organization?

Mr. NEWBERRY. $500, $600, $60 a month.

Chairman LEAHY. Okay. Over the last several years, the NAB argued that XM and Sirius should not be permitted to merge because radio stations compete with satellite radio and XM and Sirius would have an unfair advantage in the marketplace. So broadcast

radio competes with satellite radio, and I presume Internet radio. Why is it fair for competition that broadcast radio is the only media that does not pay for the sound recordings it uses to compete? XM and Sirius have to pay for it. You speak of them as being—you have argued against their merger because they are competition. But if they are paying for that, why shouldn't you pay for it and you are competing with them?

Mr. NEWBERRY. Well, there are two reasons that I would address particularly. Number one, they are competing for ears. They are competing for listeners.

Chairman LEAHY. They are competing for what?

Mr. NEWBERRY. Ears. They are competing for an audience. But their business model is one that is based on subscription. They get to charge their listeners for their product. I am very proud to be a broadcaster that has community service obligations. I am proud to serve my community. I am proud to have the restrictions on it that we do. But it is an entirely different model.

When my fellow panelist here talked about you turn on the radio and the listener cannot differentiate between XM or Sirius or AM or FM or Internet, the listener may not differentiate. But when you press the button and you come to one of America's licensed broadcasters, we have obscenity regulations, which I certainly am not advocating are removed; we have political requirements——

Chairman LEAHY. Because you would not get a very eager audience up here.

Mr. NEWBERRY. But, sir, I would not get my audience in Glasgow, Kentucky. I am not pandering to this distinguished panel. I am saying——

Chairman LEAHY. I understand. No, I understand. We both agree on that.

Mr. NEWBERRY. But we have a totally separate set of regulations, expectations, and obligations that over-the-air broadcasters have. So when we talk parity, we are not really talking parity. We are talking parity on the fee, but we are not talking parity in terms of operating requirements.

Chairman LEAHY. Thank you. Thank you, Senator Feinstein, and I will work with you and Senator Cornyn on this, but I would urge your association to sit down and negotiate with the artists and talk with us, because legislation will move. I would rather have legislation move that reflects your interests as well as their interests. But that is only going to happen if you are sitting there at the table. Thank you. And thank you for answering my questions.

Mr. NEWBERRY. Thank you, sir.

Senator FEINSTEIN. Thank you very much, Senator Leahy.

Senator Durbin, you are next up.

Senator DURBIN. Thank you, Madam Chairman.

Madam Chair, in my callow, reckless youth, I owned a restaurant/night club with live music. I learned more about music copyright law in one phone call than I ever learned at Georgetown Law School. A fellow called me and said, "I was at your club on Saturday night. It was really great. Nice crowd. Loved the music. And, incidentally, you played 22 ASCAP-licensed music selections, and so we are going to send you a bill."

[Laughter.]

Senator DURBIN. And I said, "Wait a minute. I paid the performers." He said, "No. The law is written that you have got to pay us now, too. It is not just enough to pay the performers. You have got to pay the owners of the music that was played in your establishment. After all, you sold a lot of beer because of that music, right?"

Well, I learned a little bit about copyright law there. But I learned that it just was not enough to be satisfied with the obvious, and that is why I cannot quite grasp this particular issue from the viewpoint of radio stations. If you do not want to pay the performers, do not play their music. I mean, these folks have put their life into it, and they have created this music.

Mr. Newberry, you referred to a partnership. A partnership suggests an agreement. You do not have an agreement with these performers not to pay them. You happen to have the protection of the law, which does not seem fundamentally just to me, that your radio station can make whatever profit it makes, in good and bad times, at the expense of performers and not compensate them.

Mr. Cornyn's suggestion—I am sorry he has left, but I think there is one element that raises doubt in my mind—you would have to have both the composer and the performer say "Do not play," because they both have a property interest in the performance. The composer is being paid for it. And if the performer simply said, "Do not play," the composer is going to say, "Wait a minute. I want them to play it because I get paid for it." So it seems that there is some problem there in terms of what he is suggesting.

Mr. Newberry, how do you come up with this partnership if, in fact, it is imposed on performers by law? Was there a sit-down agreement with performers?

Mr. NEWBERRY. I was not here for that meeting, and so I cannot say there was. But I would say that it has been a partnership because for many years the record labels and radio stations worked very closely in breaking new artists, worked very closely in establishing those great catalogs that are there.

So is there a formal agreement, to your point? No, sir. But there has been a demonstrated partnership.

But you raise a point that I have a question with that I can understand. You talked about your night club where you paid the performers. But in restaurants, in ballparks, we have performances that occur every day, but yet this bill does not want to address that. It just wants to address radio stations.

Senator DURBIN. That is a separate fight. I will say it.

Mr. NEWBERRY. I understand, but for us it is difficult for us to understand why if it is about the principle of this argument, why is this not a comprehensive——

Senator DURBIN. We may be forced to visit that, as painful as it will be. And I have been in on this conversation. But, really, I do struggle with this notion that the radio stations can pick anybody's performance and use it to their benefit and not compensate them.

Mr. NEWBERRY. As can a restaurant, as can a ballpark.

Senator DURBIN. But this is your business, the selling of music, and advertising to go with it.

Mr. Oman, let me ask you this: I think you make a compelling argument in your statement here in just a few sentences, and I do

not have enough time to repeat all of them. But you say: "It comes down to this. . . . As a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid . . . by the people who use their work. . . . Who is the best judge of the quid pro quo—the broadcasters or the creators?"

So can you—I mean, since you have witnessed this debate for decades, can you rationalize how we have come to the point that Internet, satellite, and cable radio stations have to pay for their songs and terrestrial radio stations do not? What is the logic behind that?

Mr. OMAN. The new technologies were addressed by Congress in a comprehensive way, and liability was imposed where it should have been. The history of the public performance right vis-a-vis the broadcasters goes back into the mists of time, and there have always been efforts to impose a royalty on them. But for a variety of reasons—one of which was the political power of the broadcasters, another was originally the opposition of the songwriters—that confused the issue and encouraged Congress to continually put the issue off to another day.

But I think we have reached the point where postponement is no longer the solution. The market has changed so dramatically. The public performance right looms so large in the eyes of the performers and the record companies, the reproduction right having diminished over the years, that now is the time to finally impose liability on the broadcasters and have them pay for the music they use.

Senator DURBIN. Thank you.

Let me close, Madam Chair, by just thanking Ms. Gaynor for being here. You have survived well. There are many disco fans among Senators.

[Laughter.]

Senator DURBIN. And we are glad you are here. Thank you.

Senator FEINSTEIN. Thank you very much, Senator Durbin.

Let us see. Senator Klobuchar was next, then Senator Franken.

Senator FRANKEN. Thank you, Madam Chair.

I am in an interesting position because I have been in radio, working for a radio network that has had some problems surviving.

[Laughter.]

Senator FRANKEN. And I also am someone who is keenly interested in intellectual property. I do not know if I am intellectual, but I have created some intellectual property.

It seems to me Professor Oman, who has been in this a long time, makes some very powerful arguments, and, on the other hand, we have these stations that are—there are stations that are struggling to survive. So I have a question for Sheila E. The House version of this, as the professor referred to, contains provisions that allow broadcasters who make less than $100,000 or $500,000 in revenue to pay a lesser amount in performance royalties. It also contains a 1- to 3-year grace period for some broadcasters.

As a representative of a coalition of performers and record labels, would you support these kind of measures in the Senate bill?

Ms. ESCOVEDO. Yes, I think that it is fair. I think that we are at a place that changes need to happen, and I do not think that it is fair that radio uses the music that I have played on, performed

on, and not pay me for that. I do not think it is fair to all the other musicians that have performed on millions and millions of songs.

I think it is fair for some of the smaller radio stations to pay a small fee, and $500, if it may be, or $1.37 a day, if that is what it may be, $500 for a year, you got to be kidding. I do not understand the logic behind saying that is too much money to pay us, a small fee. We are just asking to be fair.

So I think it is disrespectful for the radio to not want to sit down with us and have a conversation about—we are partners. I depend on radio. I really do. And I want to sit down and talk with them. I just think that it is wrong that they do not want to talk, and I do not think there is a partnership right now. There is not.

I think that one of the issues brought up about having the artist make a decision whether or not we would want radio to play our music I think is not a good thing, because that would absolutely shut music down, because I think the majority of—I am also not just a musician, but I am also a songwriter, and I own a lot of my masters as well. So I would choose not for radio to play my music because they are not paying me, and let my fans go to the other radio stations, digital, and I would get paid for that, and that would move the whole fan base. That would move everybody away from radio.

So that is not a really good plan, but I still think——

Senator FRANKEN. I do not think that plan is really——

Ms. ESCOVEDO. No, it does work.

Senator FRANKEN.—going to happen.

Ms. ESCOVEDO. But also—yes. I just think that there needs to be a partnership. Right.

Senator FRANKEN. As Mr. Newberry said, I think we all heard it for the first time today, and it was a nice try.

Ms. ESCOVEDO. Yes, a nice try.

Senator FRANKEN. But I do not think that is probably going to happen.

Ms. ESCOVEDO. No, not a good——

Senator FRANKEN. You know—sorry to interrupt you, but actually radio stations already do have no-play lists. I know that. The radio stations already have those.

How will this affect new artists? Because Mr. Newberry is making the argument that new artists want radio play, and is this going to make it harder for them? I mean, I do not buy Mr. Newberry's argument on, say, Roy Orbison. Maybe you would make the argument you would pay Roy Orbison because his estate would get money, but you are certainly not promoting Roy Orbison concerts, right?

Mr. NEWBERRY. No, sir.

[Laughter.]

Senator FRANKEN. So that part of the argument goes once the artist is not performing anymore, shall we say.

Mr. NEWBERRY. May I make a statement to that, Senator?

Senator FRANKEN. Sure.

[Laughter.]

Mr. NEWBERRY. Certainly in cases—Mr. Orbison, I do not know his particular case, but there are estates, there are ways that those monies can still be monetized. It is not a concert, but there are

items based on the familiarity and the play that do get purchased even after the artist has——

Senator FRANKEN. Okay. Fair enough, fair enough.

Let me go back, I am sorry, to Sheila E. Will this have an effect on new artists?

Ms. ESCOVEDO. I think right now in the position that we are in, it is going to affect everyone, like it has been for the last 80 years, that we need to make a change. Of course, there are tons of radio stations that play old music, you know, 1970s—well, 1960s, 1970s, 1980s. I am in that category. But it is affecting not just the past but the future as well. So we do need to change this now and make a change so that we all get paid for past and future. You know, it is—I think the industry right now for the kids, the youth, they are looking at it, and they have said to us, you know, "Wow, you must make millions of dollars performing on all these songs. Radio plays you all the time." No, I do not. I make the money as a songwriter but not as a performer.

Senator FRANKEN. Thank you.

Ms. ESCOVEDO. You are welcome.

Senator FRANKEN. Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Franken.

Mr. Oman, something that you said piqued my interest. You know, I am concerned that we are the only nation in the industrialized world that does not provide these performance rights. And you mentioned, you know, we might want to talk to USTR about this. What exactly were you referring to?

Mr. OMAN. Under the international regime of copyright, American artists are not entitled to collect royalties in foreign countries unless we provide reciprocal protection for the foreign artists.

Senator FEINSTEIN. So they lose foreign royalties as well.

Mr. OMAN. They lose foreign royalties, and that amounts to millions and millions of dollars every year.

Senator FEINSTEIN. Thank you. I did not realize that. That is, I think, a very important point in all of this.

Supposing they record in a foreign country, what happens then to their performance rights?

Mr. OMAN. They would be entitled to payments by the broadcasters from that particular country, but not from the rest of the world. If they recorded their music in Great Britain, they could get royalties from the broadcasters for the use of that music in Great Britain, but they would not get that throughout Europe or in Japan or the other major markets in the world.

Senator FEINSTEIN. Well, wouldn't this encourage some of them to record in other countries? Which is not too difficult today to do.

Mr. OMAN. I am not aware of that being done myself, but it certainly would be a temptation. American authors in the 19th century moved to Great Britain to get copyright protection for their works in Great Britain. It would be a shame if our copyright laws encouraged American artists to go overseas to record their works.

Senator FEINSTEIN. It certainly would. Thank you.

Ms. Leighton-Levy, you know both the House and Senate bills provide discounts for small broadcasters, those with annual revenues of $1.25 million or less, and offer them an option of a very

low fixed annual royalty of $5,000—or even lower for smaller broadcasters, and that is the House bill.

In contrast, the license offered by SoundExchange to small webcasters with the same threshold of $1.25 million in annual revenues is 12 percent of revenues; thus, a small broadcaster at the threshold would pay $5,000 in annual royalty, while a small webcaster at that same threshold would pay an annual royalty of $150,000. Now, that is a big discrepancy, 30 times more.

How is this fair? Doesn't equity and a level playing field require that small webcasters receive the same discount structure that small broadcasters do?

Ms. LEIGHTON-LEVY. There may be others here on this panel who would be better qualified to address this, to answer this than I, but I will say that off the top of my head it does seem to me that it is—I mean, that there is a rationale for having there be at least some disparity between the two because, of course, there are different responsibilities and obligations for the small broadcaster in a small market, and——

Senator FEINSTEIN. As opposed to the webcaster?

Ms. LEIGHTON-LEVY. Exactly, yes.

Senator FEINSTEIN. Okay. Anybody else have a view on that?

Mr. Newberry.

Mr. NEWBERRY. I would just point out that one significant difference, the small-market broadcasters are obligated to, among many other things, FCC regulations, FCC reporting, equal opportunity outreach, annual fees that are charged by the Federal Communications Commission, so there is an entirely different cost structure for a broadcaster versus a webcaster.

So we are a fixed-cost business. I am certain that many in our industry would argue that if we could rid ourselves of all of the regulations and requirements, they would be glad to take a higher percentage on a fee. But it is apples and oranges. You cannot make the correlation between the two because we have an entirely different business structure.

Mr. KIMBALL. Well, I very fundamentally disagree that you cannot make a correlation between the two. You can make a correlation between the two. These small broadcasters are all reaching out to niche audiences, exposing new artists that could not be exposed through big radio, through big commercially programmed radio. They are actually trying to achieve many of the same functions. And although their cost structures may be somewhat different, they are nowhere close to 30 times different. That is fundamentally unfair.

Senator FEINSTEIN. Let me call for Solomon here. Dr. Oman, do you have a point of view on this?

[Laughter.]

Mr. OMAN. I hesitate to get between the two titans at the table, but the conclusion I draw from the exchange is that there seems to be no recognition by the broadcasters that they are getting a tremendous public subsidy in terms of free spectrum, that they do not have many of the other expenses that are borne by their competitors, and that they have a public obligation. And I think at the top of that list of public obligations is paying for the materials that they use fairly, and they are not doing that now.

Senator FEINSTEIN. Mr. Newberry, 30 seconds.

Mr. NEWBERRY. Yes, ma'am. I will make it very quick. I said in my opening comments that I absolutely support, embrace the responsibilities and obligations that I have as a broadcaster that comes with my license. Mr. Oman—I do not know where he picked up that we were not acknowledging that. We have a public trust with our listeners, with our communities. I am very proud to be a local broadcaster, and we pay every day the opportunity to be——

Senator FEINSTEIN. I do not believe he was in any way impugning you. What he was saying——

Mr. NEWBERRY. I just want to be of record.

Senator FEINSTEIN.—is that you have the airwaves, which technically do not belong to anybody.

Mr. NEWBERRY. They belong to the public.

Senator FEINSTEIN. That is correct.

Mr. NEWBERRY. Yes, ma'am.

Senator FEINSTEIN. And that is a big deal.

Mr. NEWBERRY. Absolutely, and we embrace that, and I am proud of the record of service that the Nation's broadcasters have provided as trustees of those airwaves.

Senator FEINSTEIN. Okay, fine.

Let me ask, Dr. Oman, webcasters argue that the songwriter protection provisions in both the Senate and the House bills would tilt the playing field in royalty rate proceedings between songwriters and webcasters, allowing the songwriters to introduce evidence of the rate for performance right royalties, which to date have been significantly higher than the songwriters' rates, and to argue that songwriters' rates should be increased but would not allow webcasters to use that same evidence to argue that they could not afford to pay more to songwriters because they are already paying so much of their revenues to performers. That is the argument. What do you think the validity of this argument is?

Mr. OMAN. The parties are actually engaged in an ongoing discussion of that particular point right now, and I think the misunderstandings and the suspicions on both sides are about to be allayed, and I would not be surprised if we did not have an agreement on that point in the very near future.

Senator FEINSTEIN. Good.

Mr. OMAN. I think the fact that there is good faith on both sides is going to help reach the solution. It is a very complicated issue, and I would hope that, Madam Chairwoman, you would give me the opportunity to provide a more formal written answer after the hearing to supplement my oral commentary.

Senator FEINSTEIN. If you would, it would be very much appreciated. I think your views are very much respected, so we would like to have them.

Senator Franken, do you have other questions?

Senator FRANKEN. No, I do not. I want to thank you, everyone, and, Solomon, thank you.

[Laughter.]

Senator FEINSTEIN. First of all, let me thank everybody who is not on the dais here, but who is working to try to bring the industries together and come to some conclusions about what is fair. It is very much appreciated. I would like to echo what Senator Leahy

said. I believe we will have a bill. So I think the degree to which you can sit down and solve the problems is very much appreciated. Then we will not have to. But if you do not, we certainly will try. And I want to thank our witnesses today. We very much appreciate their testimony.

We will leave the record open for 1 week, and we appreciate your written comments. Thank you very much. The hearing is adjourned.

[Whereupon, at 4:06 p.m., the Committee was adjourned.]

[Questions and answers and submissions follow.]

QUESTIONS AND ANSWERS

Question asked orally of Ralph Oman, by Senator Feinstein

"The Performance Rights Act and Parity among Music Delivery Platforms"
Hearing
August 4, 2009

Q: "Webcasters argue that the songwriter protection provisions in both the Senate and the House bills would tilt the playing field in royalty rate proceedings between songwriters and webcasters allowing the songwriters to introduce evidence of the rate for performance right royalties [for sound recording owners], which to date have been significantly higher than the songwriters' rates and to argue that the songwriters' rates should be increased but would not allow webcasters to use that same evidence to argue that they could not afford to pay more to songwriters because they're already paying so much of the revenue to performers. What do you think the validity of this argument is?"

Answer:
As I understand it, in drafting this provision, the Senate sponsors have a specific objective in mind. They want to ensure that a new sound recording performance right does not adversely affect the royalties now paid to songwriters. I haven't studied the issue in great detail, but I agree with the concept that songwriters shouldn't be hurt. The parties should all share the same goal—that the provision be fair in carrying out the congressional objective. As I mentioned at the hearing, I understand that the various interest groups are discussing this issue informally.

As the Committee knows, a similar provision already appears in current law, and in some ways the new provision plows the same ground. I'm uncertain how the existing provision has worked in practice and what effect it has had on negotiations and rate-setting procedures. As the Committee also knows, the House has adopted new language on this issue in its version of the bill. I cannot predict how the Copyright Royalty Judges and, ultimately, the federal courts would interpret this House language, and I have no way of knowing if it would actually have the effect that Mr. Kimball of Real Networks predicted in his testimony. Perhaps the songwriters asked the House to add the new language to cure a defect in current law, to clarify a point of confusion, or to address some other problem of which I am unaware. The Committee might want to consult the songwriters to better understand the purpose of the new House language in order to determine whether clarification of the language is appropriate.

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SUBMISSIONS FOR THE RECORD

U.S. Senate Committee on the Judiciary
Hearing on

"The Performance Rights Act and Parity Among Music Delivery Platforms"

Statement of the
Digital Media Association

August 11, 2009

On behalf of our member companies that offer or support Internet radio programming, the Digital Media Association is pleased to offer this supplement to testimony of Bob Kimball, RealNetworks' Executive Vice President who testified last week on DiMA's behalf.

The purpose of this submission is not to repeat Mr. Kimball's articulate written and oral presentations, but rather to offer additional concerns with respect to current law in the area of sound recording performance rights that we suggest the Committee consider prior to a markup of S. 379 or related legislation. This submission is also not intended to substitute for or otherwise supplement DiMA's letters to Senator Feinstein regarding the appropriate standard the rate-setters should apply when deciding sound recording performance royalty disputes.

Digital Radio Statutory License Qualifiers Should be Updated.
17 U.S.C. 114(d)(2) includes several characteristics that qualify a digital radio program to utilize the statutory sound recording performance license. These provisions were enacted in 1998 with the intention of limiting the likelihood that digital radio would substitute for purchased sound recordings. Several could usefully be modified .

1. Pre-Announcements. 17 U.S.C. 114 (d)(2)(C)(ii) prohibits radio services from publishing or pre-announcing upcoming works to be performed, while allowing only the pre-announcement of artists whose works will be performed. As Internet radio adopts the audio advertising model of traditional broadcast radio, it is becoming more important to persuade listeners to not change stations when an advertisement is about to break up the music. Moreover, it is similarly helpful to have the ability to pre-announce a song or two so that listeners who dislike one song are less likely to change channels.
    - DiMA Proposal: Generally authorize digital radio services to announce what song will be performed "next", and prior to an advertisement authorize services to announce two songs that are upcoming "after the break."

2. Unreleased Sound Recordings. (d)(2)(C)(vii) prohibits stations with statutory licenses from performing sound recordings that have not been publicly released or otherwise specifically authorized to be performed by the copyright owner. This prohibition limits digital radio services from performing uncopyrighted sound recordings, e.g., concert or rehearsal recordings or in-studio recordings, though these types of recordings are

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cherished and are often included in terrestrial radio programming that features historical or unique recordings, and their performance generates musical works performance royalties.

- DiMA Proposal: Generally authorize the performance of all sound recordings, regardless of whether they have been released or authorized by the copyright owner.

3. Sound Recording Performance Complement. The sound recording performance complement limits the number of times that a statutorily licensed digital radio service can play songs by a single artist or from a single album within certain amounts of time. Generally this is not problematic for Internet radio services, except on the occasion of a memorable event that justifies unusual programming, e.g., the death (or anniversary of the death) of a famous recording artist or the anniversary of a prominent album's release. It is also notable, however, that many broadcast radio stations have programs such as "Breakfast with the Beatles" or "Album Sides Sunday" with no apparent undermining of sales of sound recordings.
   - DiMA Proposal: Generally authorize 2 hours of weekly programming that exceeds the complement, which programming can be archived for up to three days. Authorize up to two additional hours of programming in a given month that exceeds the complement, but only when the additional two hours marks a recognized special occasion.

The Ephemeral Sound Recording License is an "Aberration" That Should be Eliminated.

As the Copyright Office noted in a 2001 Report to Congress, there is an imbalance between the legal and financial treatment of so-called ephemeral (or "server") copies of compositions in the broadcast radio context, and similar copies of sound recordings utilized by Internet radio.

Since 1976 broadcast radio has enjoyed a statutory exemption to make reproductions of compositions so long as the reproduction remains within the station's possession and is used solely to facilitate licensed performances of the same music. Internet radio services also require ephemeral recordings (or server copies) to enable their webcasts, but while broadcast radio typically requires a single ephemeral copy, webcasters require several copies to accommodate competing consumer technologies (e.g., Windows Media or RealNetworks or Adobe's Flash formats), services and Internet access speeds. Each of a webcaster's server copies resides on a server that is under the control of the webcaster (either directly or through a contractor/vendor relationship), and each recording functions precisely like the copy exempted for radio broadcasts. Internet radio, however, is required to pay royalties for these copies, rather than enjoying an exemption.

In the first Internet radio royalty arbitration the recording industry was awarded nearly a 9 percent bonus on top of the performance royalty for the making of these ephemeral recordings which have no independent economic value – they are simply a by-product of digital streaming technology. In more recent proceedings the ephemeral recording was not assigned an additional

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royalty, and in fact the Copyright Royalty Judges have ignored it and in one instance the D.C. Circuit Court of Appeals remanded a CRB decision as a result.

In its 2001 Section 104 Report to Congress the Copyright Office stated that the compulsory license for sound recording ephemerals, found at 17 U.S.C. 112(e), "can best be viewed as an aberration" and that there is not "any justification for imposition of a royalty obligation under a statutory license to make copies and that . . . are made solely to enable another use that is permitted under a separate compulsory license." Section 104 Report, p.144, fn. 434.

To the extent that an additional royalty is assigned to these server copies, this provision exacerbates the unfairness of Internet radio royalties and should be repealed. To the extent that this provision is ignored, it also should be repealed so that the Copyright Act is not devalued. To the extent that the provision requires parties to make legal and economic arguments about a conclusively valueless set of reproductions, all interested parties' resources are being wasted.

- DiMA Proposal: As the Copyright Office urged repeal of this licensing obligation, DiMA urges that such an amendment be made a part of the PRA.

Confidential Business Information Should be Guaranteed to be Protected from Disclosure

In recent proceedings, the CRB has made it difficult for the parties to enter into Protective Orders that are aimed at keeping proprietary information confidential. Even when all of the parties have submitted joint, agreed-upon Protective Orders, the court has rejected and/or modified them, in what the Copyright Royalty Judges have announced as an effort to allow the public access to as much of the proceedings as possible. This has created and unjustifiable and extremely burdensome additional cost and additional exposure of proprietary information for all parties to CRB rate-setting proceedings.

CRB Proceedings are not typical public proceedings. They necessarily involve the presentation and detailed analysis of economic and business information of the businesses subject to the royalties for which the rates are being set. It is very difficult for the parties to present all of the information that they might need to have considered for the purposes of a complete record in the proceedings to set rates fairly, if they are unsure if some of their proprietary economic and business information might be compromised, be acquired by business rivals or adversaries, or known to potential competitors, customers and others.

- DiMA Proposal: Require the Copyright Royalty Board to defer to parties' assertions of confidentiality, and to accept and apply any jointly submitted Protective Orders that have been agreed to and proposed by all parties.

The CRB Should Not be Permitted to Require Parties Appearing Before It to Engage Outside Counsel

The CRB has indicated that it would like to impose a threshold on who can represent parties to copyright royalty rate-setting proceedings that is not supported by the rules governing the Copyright Royalty Board. The Copyright Royalty Judges seem to be requiring the retention of

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outside counsel for any non-individual party that wishes to participate in CRB proceedings. Title 37, Section 350.2 of the Code of Federal Regulations requires that all parties, other than individuals "must be represented by an attorney," but it does not require an independent, outside attorney. Companies, organizations and associations should be permitted to have staff attorneys represent them in copyright royalty proceedings.

- DiMA Proposal: Clarify that Section 350.2 of the Code of Federal Regulations does not require outside attorneys and allows for attorneys who are employed by a corporation, organization or association or other entity to represent such corporation, organization or association, subject to applicable requirements with respect to confidentiality and the terms of any Protective Order or Order of Confidentiality that might be in place.

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Testimony of Sheila E.
Hearing on The Performance Rights Act and Parity among Music Delivery Platforms August 4, 2009
Senate Judiciary Committee

Thank you.

Chairman Leahy, Senator Feinstein, Ranking Member Sessions and members of the Committee, I am honored to be here to today to represent the hundreds of thousands of working musicians who seek one simple right—to be compensated for their labor.

My name is Sheila E. and I'm here today on behalf of the musicFIRST Coalition. I am also a member of AFTRA and AFM, as well as a board member of the Los Angeles Chapter of The Recording Academy, which represents thousands of music creators across the state of California.

I would to talk about music and radio. First, let's talk about music.

I was born into a musical family, the daughter of the legendary band leader Pete Escovedo, so music is truly my destiny. I started playing an instrument at age 3, and once I made my professional concert debut – a seasoned 15-year-old—I knew I would be a musician.

As I matured as a musician I had many wonderful musical experiences, from earning multiple GRAMMY nominations for my solo work, to performing with such renown artists as Lionel Richie, Gloria Estefan, Beyonce', Ringo Starr, and of course, Prince.

The experience I had with Prince being his drummer, percussionist, and musical director taught me that a vibrant musical scene can and does take one's music anywhere in the world. With the creation of "the Minneapolis Sound," the eyes - an ears - of the musical world were on Minnesota. When I lived in Minnesota, many great talents, including the Recording Academy's own Chair Emeritus, Jimmy Jam emerged. In fact, "The "Minneapolis Sound" with its creative cultural symmetry, is still very influential today.

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During that time, I began to discover much about the music business itself. I was always at a loss to explain why one industry—traditional broadcast radio—is allowed to profit from the artists' work without compensation to those artists.

As I toured around the globe and saw that broadcasters in every other developed nation in the world compensate their artists, the lack of payment in America became more puzzling.

And as Internet radio developed and recognized their obligation to pay artists, the lack of terrestrial radio's payment became unacceptable.
For all of the complex legal and legislative discussions that have taken place around this topic over the decades, the issue for musician is really quite simple. We believe that being paid for one's work is a basic American right. Whether your workplace is an office, a classroom, a factory or a recording studio, every American worker deserves to be compensated for his or her labor. And any business that profits from another's work should share some of that profit.

OK, so let's talk about radio.

Artists love for their records to be played on the radio. That's a given, but it's not the point.

Artists love to get bookings for live gigs—but we get paid for those gigs. Artists love to get songs placed in movies and TV shows—we get paid for those uses. Artists love to sell records-we get paid for those sales. Radio is the only part of the music business where our work is used without permission or compensation. So when the National Association of Broadcasters tells us they are the true friend of artists, we respond: friends don't let friends work without compensation.

Radio's argument that a "promotional effect" exempts them from payment is a tired argument that wouldn't hold water in any other context. Imagine the radio industry withholding payment from popular talk radio hosts claiming that they promote their books sales and TV ratings. Imagine the radio industry withholding payment from sports teams because airing the games promotes ticket sales. The talk show hosts and the sports teams would simply say, "no broadcasting without fair payment." But until the Performance Rights Act is passed, artists have no such right.

Radio's other arguments are just as worn out. The House version of the bill addresses the concerns of broadcasters and we support the adoption of these provisions in the Senate bill. "Worried about small broadcasters?" The bill lets them play all the music they want for as little as one dollar and thirty-seven cents a day. "Not the right time in our economy?" The bill defers payment for up to three years. "Concerned about public service announcements?" To use the public airwaves for free, the stations must air them and that won't change."

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One new argument I've heard has caused me particular disappointment: that the Performance Rights Act will hurt minority broadcasters. As a Latin artist, I want minority stations and minority ARTISTS to be able to thrive in this business. Many minority-owned stations are small and would rightly receive a special accommodation for lower payments in the bill. And at the same time, the bill would allow Hispanic and African-American artists their due payment for their important contributions to our American musical mosaic. It is a sad irony that artists living throughout Latin America benefit from a radio performance right, while their counterparts in the U.S.--the leader in intellectual property--do not. It's time to bring the U.S. in step with the rest of the developed world.

So we've talked about music. We've talked about radio. Let me close by talking a little about the past and the future. First, the past.

Last month my father, Pete Escovedo, turned a youthful 74. In addition to his own legendary band Azteca, he was a member of the group Santana, and performed on a number of their records as well as other artists still heard on radio today. One of the most gratifying aspects of this legislation is that it will compensate so many great artists of my father's generation who contributed so much to our musical heritage. And every participant —featured artists, background singers, session musicians and producers alike—will ALL benefit from this bill.

But this bill is just as much about the future.

One of the great honors in my life was to co-found a charity called the Elevate Hope Foundation. Elevate Hope is dedicated to providing abused and abandoned children an alternative method of therapy through music and the arts by creating, funding, and sponsoring music based programs that assist using these fundamental methods.

I can tell you from my first-hand experience working with these kids, the power that music has to teach, to heal and to build confidence. In fact, the magnitude of music becomes such a inspiring force in the lives of these children, that many of them choose to pursue music as a career. We must encourage our youth to follow their dreams.

Through music, they learn to respect themselves, and I teach them that they deserve respect as individuals and as budding music creators. What I ask of you today, distinguished Senators, is to ENSURE that **the next generation of musicians** will enjoy the respect they deserve by simply being compensated by businesses that use their creations for profit. Through the passage of The Performance Rights Act, musicians and broadcasters will enjoy a relationship of MUTUAL respect that will allow both to flourish.

Thank you.

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The Performance Rights Act and Parity among Music Delivery Platforms
Hearing before the Senate Judiciary Committee

Statement of Sen. Russ Feingold
August 4, 2009

Thank you, Mr. Chairman, for holding this hearing, and thank you to all of the witnesses for making the effort to appear here today.

Whether to create a performance right for music played on traditional radio is not a simple question. I have met with people on both sides of this issue, and I can appreciate the strong views that the issue inspires.

Radio always has been -- and continues to be, despite competition from assorted new technologies -- nothing less than the soundtrack of American life. Whatever our different experiences, we are all the beneficiaries of radio's direct and vital delivery of information and entertainment. Radio is a public medium that can and does serve the public good. And so, it is not my intention, or the intent of the proponents of a performance right, to support legislation that would harm radio.

But it is also critically important that Congress ensure that musicians are being adequately compensated for their work. I generally believe that this should include some kind of performance right. What we need to do is strike the proper balance, being careful not to take action that will have the unintended consequence of further reducing the number of local voices on the radio. Given this need for a balance, I am encouraged that additional carve-outs for small broadcasters, and a delay on the imposition of fees, to help the broadcasters negotiate these difficult economic times, were added during House consideration of this legislation.

As I understand it, under the current House version of the legislation, the rate that a station will pay for the unlimited use of music, and when performance right fees will kick in, are determined by the annual gross revenue of that station. These fees range from $500 to $5,000 for all stations with gross annual revenue of less than $1.2 million. Any station with more than $1.2 million in gross annual revenue will pay a rate to be set by the Copyright Royalty board. Additionally, if a station makes less than $5 million in gross annual revenue, payments from that station will not be expected for 2 full years after enactment. For those stations bringing in more than $5 million, payments will not be due until one year after enactment. I hope and expect that similar provisions will be included if the Judiciary Committee takes up the bill.

According to estimates, the changes in House bill will mean that 85% of Wisconsin stations would fall into one of the flat rate categories, and 97% of stations would not have

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to make payments until two years after enactment, with the remaining 3% beginning payment after one year.

I look forward to the testimony of today's witnesses as we continue to analyze this legislation to ensure an appropriate balance between payment to artists and ensuring diversity on the radio.

Mr. Chairman, thank you.

Hearing before the
Senate Committee on the Judiciary

on

"The Performance Rights Act and Parity among Music Delivery Platforms"

Tuesday, August 4, 2009
Dirksen Senate Office Building Room 216
2:30 p.m.

Opening Statement
Senator Al Franken

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Thank you, Mr. Chairman. Let me also say thank you to each of our witnesses, thank you for traveling here today to meet with us.

This is a tough issue. But I think it boils down to a simple question of fairness. Every single time a song is played on internet, satellite or cable radio, a bunch of people get paid. As well they should. The songwriter gets paid—that's the person who wrote the notes. The "music publisher" gets paid—those are the folks who promote the musical composition to artists. The owner of the recording gets paid—that's usually the record label. The internet, satellite or cable radio stations get paid by ads they play during their programs. Most importantly, however, the artist, the musician gets paid.

This makes sense. But it's different for radio—the platform that most of us use to listen to our music. Every time a song gets played over the radio, the songwriter and the music publisher still get paid. The radio stations still make money off of ads. But the musician and the owner of the recording don't see a dime.

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We can debate how this came about, or why this is, but I think it's unfair. Under the current system, when a radio station plays a song, almost everyone but the artist gets paid. This bill will fix that, and I appreciate that.

Like I said, however, I recognize that this is a difficult issue. Adding a new expense to *any* business, in these times, is risky. It is my understanding that the overwhelming majority—87%—of Minnesota radio stations would fall under the $1.25M cutoff, allowing them to pay a flat fee of $5,000 for the "performance rights" of all the music that they play in one year.

I think this is a good start. I will gladly support further measures to limit the economic impact of this bill. The House bill, for example, creates more divisions in the royalty payment scale, such that stations making less than $100,000 annually will pay only $500 per year, and stations that make between $100,000 and $500,000 pay only $2,500. The House bill also has a 3 year grace period on *any* payments from radio stations that gross less than $5M annually, and a 1 year grace period for all radio stations, period. Given our economy, I would support the addition of each of these provisions.

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I am not deaf to the 13% of Minnesota radio stations that will be subject to higher royalties rates. My understanding is that these stations, which have revenues greater than $1.25M, will set their royalty rates through negotiations with performers and their record labels. If that fails, they will be set by the Copyright Royalty Board. I'll be particularly interested in hearing what standard the Board will use, and how we might be able to ensure that it is reasonable and predictable.

Thanks again to all of you. Thank you, Mr. Chairman.

U.S. Senate Committee on the Judiciary
Hearing on

"The Performance Rights Act and Parity among Music Delivery Platforms"

August 4, 2009

Testimony of Robert Kimball
Executive Vice President for Corporate Development & General Counsel
RealNetworks, Inc.

Senator Feinstein, Senator Sessions and Members of the Committee:

On behalf of RealNetworks and the Digital Media Association (DiMA), thank you for inviting me to testify today regarding digital radio and the Performance Rights Act, and specifically to focus on the hardships facing Internet radio as we compete against more established platforms to offer consumers and artists a better radio experience.

As the Committee considers alternative approaches to revising the Copyright Act with respect to sound recording performance rights, RealNetworks and DiMA ask you to ensure fair and equitable treatment for all participants in the music industry ecosystem:

1. Establish a level playing field by legislating royalty parity across all forms of radio, including with respect to large and small broadcasters and webcasters, so that the government is not picking winners and losers when broadcast, cable, satellite, and Internet radio compete; and

2. Adopt a single, uniform royalty-setting standard for all radio services – specifically, the standard found at 17 U.S.C. 801(b)(1) – that consistently yields reasonable results for sound recording producers, artists, songwriters, music publishers, and radio services.

If these goals are accomplished, RealNetworks and the Internet radio industry – along with our partners in the online music retail community – will continue to innovate, grow, and deliver new opportunities for tens of thousands of artists and record companies that historically have been stifled by distribution bottlenecks and other limitations of analog radio and physical media. Legislation ensuring that all radio competitors pay royalties and that the royalty amounts are both fair in and equitable among competing technologies and business models will unleash robust innovation and competition that will generate substantial value for creators and the public alike, just as our Constitutional framers intended.

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RealNetworks Invented Internet Radio and Created an Industry

In 1995, RealNetworks invented the first Internet media "streaming" software, known as the RealPlayer, which powered the first Internet radio offerings and other audio broadcasts over the internet. Today, RealNetworks is a leading provider of Internet media delivery software and services, online games, ring-back tones and mobile media services. Rhapsody, our leading online music subscription service, legally offers consumers millions of songs on-demand for a monthly fee. For today's hearing, of course, it is notable that RealNetworks provides Internet-only radio services that offer extraordinarily diverse programming to millions of listeners. Our music customers will play billions of songs this year and RealNetworks will pay millions of dollars in music-related royalties to recording artists, record labels, songwriters and music publishers.

Internet or online radio is simply radio programming broadcasted over the Internet. Several hundred broadcast radio stations simulcast their primary programming online; additionally, several services offer many Internet-only stations and several thousand independently programmed web-based "stations" offer Internet-only original programming, though the number of large services and independent stations is declining due to the royalties. RealNetworks offers hundreds of professionally-programmed stations in dozens of musical genres, from Afro-Pop through Christian Country, Latin Dance to West Coast Jazz and beyond. In addition, our technology allows us to deliver stations based around any of the hundreds of thousands of artists in our system. If you're a Johnny Cash fan, our "Johnny Cash Radio" will intersperse his songs with music by contemporaries such as Carl Perkins and Roger Miller, plus followers like Kris Kristofferson and Waylon Jennings. As a result, RealNetworks offers literally hundreds of thousands of different stations to satisfy fans of any musical style, no matter how niche or obscure.

Internet radio is not confined by radio spectrum limitations. The ability to offer an unlimited number of stations enables Internet radio to provide a much more diverse and rich experience, which benefits consumers and artists. For example, while a traditional radio station may have only 30 songs regularly rotated through its playlist to ensure that listeners hear one of a handful major label "hits" during a short car ride, an Internet radio station might have over 650 songs in rotation, including many more independent artists. It is notable that the Association of American Independent Music applauds Internet radio for playing more than 40% independent label music, compared to broadcast radio which plays less than 15% Indie music. Internet radio provides airtime to the broadest possible range of music and artists – not only to established stars and big labels backed by big money. This results in royalties flowing to a larger group of artists.

Advertisers and paying subscribers generate revenue for Internet radio, which in turn is used in large part to pay royalties to record labels and artists. Most Internet radio stations also link to album art, artist biographies, editorial reviews, music videos, tour information and opportunities to purchase digital downloads, CDs, performance tickets and related merchandise. This value-added content provides listeners with opportunities to explore the music more deeply and enables artists to connect more directly to their fans. Of course the purchasing opportunities directly benefit recording artists, labels, songwriters and music publishers in ways that simply do not

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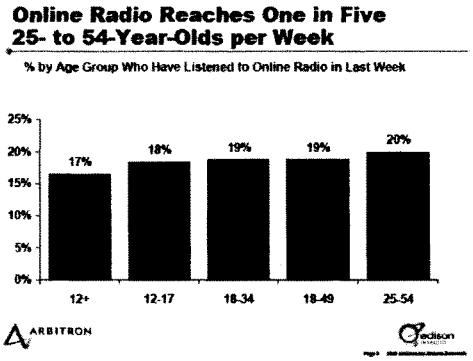
exist in traditional terrestrial radio. Internet radio is increasing the size of the music market to the direct benefit of musicians.

The Internet Radio Audience

Internet radio is a mainstream, popular activity. Studies by Arbitron and Edison Research conclude that 69 million Americans listen to Internet radio monthly, an increase of 17 percent from 2008 to 2009. Twenty percent of 25-54 year olds listen to Internet radio weekly.



Americans are increasingly enhancing their use of traditional media with new ways to control how, when and where they consume information and entertainment. The use of online radio, in particular, is on the rise and consumers say that flexibility, variety in music, clearer transmission signals, and less DJ chatter all drive their adoption of greater Internet radio options.

Fortunately for advertisers, artists and copyright owners, Internet radio attracts upper-income, tech-savvy listeners. Internet radio listeners are 50 percent more likely to live in a household with an annual income of $100,000 or higher, when compared to the general U.S. population aged 12 and older:

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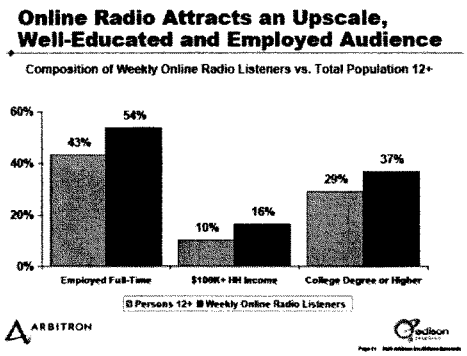
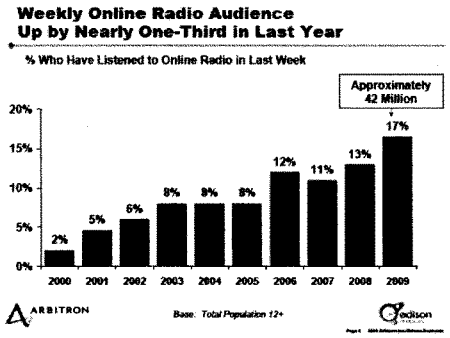


In the last year, weekly Internet radio listening increased dramatically, up 17 percent to 42 million listeners tuning in weekly.



And Internet radio listeners are nearly 60 percent more likely to purchase digital music online, compared to the general U.S. population age 12 and older. This highlights that an important value Internet radio delivers to artists is not simply the royalties that we pay, but also the related marketing opportunities and revenue streams that Internet radio enables and promotes.

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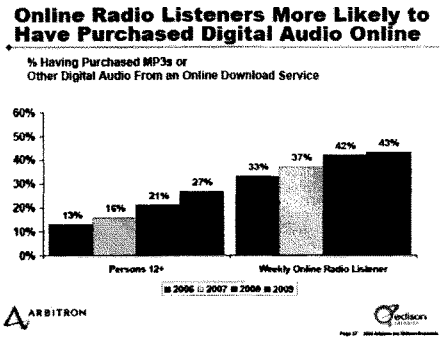

Internet Radio Benefits Consumers and the Music Industry

Internet radio's growth has been driven by our ability to use technology and consumer input to create a radio experience listeners love, which directly benefits copyright owners and advertisers.

As the Committee is aware, AM-FM music programming is generally limited to repetitive hit-driven playlists, which makes it hard for new artists to find an audience and for consumers to discover new music they enjoy. Anyone listening to a typical terrestrial radio station knows how little variety exists regardless of where you listen across the country. The homogeneous playlists are created at the corporate level and broadcast in every market, limiting the ability of independent artists to break through. Even satellite radio is limited to several dozen music channels and limited playlist diversity. But Internet radio reverses the hit-driven equation favored by traditional terrestrial radio stations. The flexibility and diversity enabled by the Internet benefits artists and consumers:

- One DiMA radio service, Live365, reports that its listeners enjoy the music of more than 50,000 artists each week, more than half of whom are not signed by major labels. This alone demonstrates the value of Internet radio to artists challenged by the short playlists of terrestrial radio and even of satellite radio.

- A second DiMA service reports that its average station has a playlist of between 500 and 700 songs, which compares dramatically to KROQ, one of the biggest music broadcasters on the West Coast which reportedly has fewer than 40 songs in heavy rotation.

By offering a wide variety of programming, Internet radio services virtually guarantee that everyone will find a station they enjoy. This makes listeners more likely to continue listening through commercials rather than flipping channels, and to stick around for the next song. By measuring constant consumer feedback, Internet radio services learn more about what types and combinations of music consumers enjoy, which enables Internet radio to provide eclectic unpredictable song mixes that promote music discovery by consumers. This music discovery

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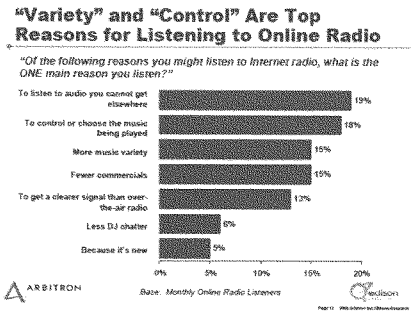
feature is critical to helping smaller bands find an audience for their music which otherwise is ignored by "big radio."



Congress Should Legislate Royalty Parity – A Matter of Basic Fairness to Creators and Digital Radio Competitors

RealNetworks and other Internet radio services have paid more than one hundred million dollars in royalties to recording companies and artists since we started webcasting radio. In part, these payments reflect widespread consumer adoption of Internet radio. But when compared to the revenues received and royalties paid by our competitors on other radio platforms, they demonstrate the fundamental unfairness created by the Copyright Act's discrimination against Internet radio solely because we deliver radio via the Internet, rather than using broadcast, cable or satellite technologies. This following chart says it all:

2008 RADIO REVENUES AND ROYALTIES

	Internet Radio	Satellite Radio	European Broadcast Radio (Music)	Broadcast Radio (Music)
2008 Revenue*	$275-325 Million	$1.9 Billion	unknown	$16.5 Billion
Sound Recording Royalties	47-300% of Revenue	6-8% of Revenue	4.3% of Revenue	0% of Revenue
Songwriter Royalties	4% of Revenue	4% of Revenue	5.2% of Revenue	3% of Revenue

* Various sources including "Communications Industry Forecast 2008-2012," Veronis Suhler Stevenson; "Radio Revenue drops 10% in 2008," Radio & Records; and, "The State of the News Media," the Project for Excellence in Journalism 2008.

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Even today, in 2009, Internet radio revenue is measured in hundreds of millions of dollars, while broadcast and satellite radio revenue is many billions. Despite this massive revenue generating disparity, the largest Internet radio services are paying extraordinarily high Internet radio royalties while broadcasters pay zero and satellite radio pays 7.5% of its revenue. A prominent recent example of the continuing unfairness is the recent agreement between SoundExchange and several "pureplay" Internet radio services. Pandora announced that it would sign onto the settlement and have the opportunity to survive as a major Internet radio service because its royalties would now be reduced from a stunning ***70%*** of revenue as required by the Copyright Royalty Board to a merely extraordinary ***50%*** of revenue. This is a deeply unfair result that is only worse for Internet radio services that don't even qualify as so-called "pureplay" radio services. These non-pureplay Internet radio services are required to pay even higher rates, solely because those companies sell more than just Internet radio. Congress cannot have intended such irrational and anti-competitive results from the Copyright Royalty Board proceedings.

Somewhere between the absurd amounts of Internet radio royalties and the zero royalties paid by broadcast radio is a rational royalty level. We believe that amount should approximate what European broadcasters pay artists and labels – generally 3-8% of revenue – or the amount that all radio platforms pay songwriters and music publishers – generally 3-5% of radio revenue.

It is important to note that Internet radio also pays public performance royalties to songwriters through our licenses with ASCAP, BMI and SESAC. However, these royalties for Internet radio are set at a level that is consistent with royalties historically paid by broadcast and other forms of radio – between 3 and 5 percent of revenue – further highlighting the absurdity of the disparate sound recording royalty rates.

How is it possible that broadcast radio pays zero, satellite radio pays 7 percent of revenue and Internet radio pays many more multiples of that? Because Congress has set different royalty rules for different radio delivery methods, and then has set different royalty-setting standards for different forms of royalty-paying radio. The result is a motley variation of royalties that has essentially created winners and losers among radio programmers based only on the technology they use to distribute programming.

The lack of royalty parity among radio delivery methods is particularly destructive in today's technologically converging world. A single device can receive an identical radio program delivered by terrestrial stations, satellite or the Internet. Yet, the price paid by the service provider for playing a song will vary dramatically simply because the song was delivered over WiFi versus a terrestrial station or satellite. The very same SiriusXM channels are delivered to subscribers by satellite and over the Internet, and the Internet-delivered songs cost SiriusXM much more in royalties then do the satellite-delivered songs. The Copyright Act is placing a huge thumb on the scales to favor some delivery methods over others. We believe robust competition on a completely level playing field is the correct – and only – way to ensure maximum innovation and economic gain for both music creators and radio services.

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Congress Should Pick the Best Royalty Standard

Assuming that the Committee agrees that royalties should be set evenhandedly, the next issue is what rate-setting standard should apply to all radio programmers.

DiMA is pleased that the standard which has historically applied to Internet radio – a unique statutory standard known as "willing buyer – willing seller" – is no longer being supported by any stakeholder. This standard has proven to be a disaster, as each Internet radio rate proceeding has resulted in royalties so high that companies – including very large services such as AOL and Yahoo! – have been forced by high royalties to shut down their radio services, and Congress has felt the need to legislate in order to promote remedial industry negotiations resulting in royalties lower than those proscribed by the CRB. The standard has resulted in numerous unintended consequences that distort the marketplace.

DiMA believes that parity and fair competition can best be achieved by applying to all radio services – regardless of underlying technology or business model -- the standards set forth in Section 801(b)(1) of the Copyright Act. These standards were adopted by Congress in 1976 to ensure that royalties would be fair both to creators and to licensees. When setting royalty rates under 801(b)(1), judges set rates to achieve the following objectives:

> (A) To maximize the availability of creative works to the public.
>
> (B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.
>
> (C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.
>
> (D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

Since 1976, in each of the four proceedings that have occurred under the Section 801(b)(1) standard, the royalties awarded have been upheld by the courts, and in none of the cases have the parties felt compelled to ask Congress to remedy the determination or to shut down their business.

Senator Feinstein has in the past proposed that "fair market value" is the correct standard. While we applaud Senator Feinstein for recognizing that "willing buyer-willing seller" should be replaced, DiMA's concern is that the "fair market value" standard has also been tried, but it too warranted Congressional remedy after royalty arbitrators set satellite television royalties fully 11 times higher than were being paid by cable television programmers for analogous rights to retransmit audiovisual programming; they same type of distortion currently prevailing in the radio business.

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A "fair market" standard is particularly inappropriate when a true competitive benchmark does not exist for the rate-setting tribunal to use. In the highly concentrated sound recording market, the statutory license affords even more concentration in a single licensor – SoundExchange. In this type of monopoly licensor market, it is impossible to achieve undistorted market rates. The system's efficiency benefits theoretically should accrue to both licensors and licensees, but for antitrust and royalty fairness reasons it is critical that the SoundExchange system is backed by a fair-minded and evenhanded Copyright Royalty Board which is itself governed by a fair and balanced standard. Under the present Internet radio royalty standard, SoundExchange is obtaining a traditional monopolist's share of the benefits. We need the new standard to balance those benefits among all industry participants.

Four proceedings have been conducted under the 801(b)(1) standard successfully and without controversy – two by the Copyright Royalty Tribunal,[1] one by a Copyright Arbitration Royalty Panel[2] and one by the Copyright Royalty Board.[3] The latter two proceedings determined sound recording performance royalties just as we are discussing today.

In the performance right rate-setting proceedings, typically the first factor strongly favors recording artists and producers. The second factor assures that the royalty payments will equitably compensate artists and producers, while providing a fair return to those services that perform the sound recordings. The third factor assesses the relative strengths and value contributed by each industry. The fourth factor takes into account the economic situation facing each industry and the need for rates or terms to avert potential instability to an industry in flux.

As a result of these balanced factors, the rates awarded under Section 801(b)(1) have consistently yielded reasonable royalty payments of between 6 and 8% of radio revenue to artists and the recording industry, without jeopardizing the future economic health of digital music services. These decisions were appealed, but the parties were not so aggrieved that they sought Congressional relief or shut down their businesses.

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[1] Adjustment of the Royalty Payable Under Compulsory License for Making and Distributing Phonorecords, 46 FR 10466 (February 3, 1981); Adjustment of the Royalty Rate for Coin-Operated Phonorecord Players, 46 FR 884 (January 5, 1981).

[2] Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings (Final Rule and Order), 63 FR 25394, 25406 (May 8, 1998), *aff'd in part, rev'd in part sub nom Recording Industry Ass'n of America, Inc. v. Librarian of Congress*, 176 F.3d 528, 532 (D.C. Cir. 1999).

[3] Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 FR 4080 (January 24, 2008).

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Small Webcasters Deserve the Same Protections Against High Sound Recording Royalties that the Performance Rights Act Extends to Small Broadcasters

In addition to ensuring general platform parity under a reasonable and uniform royalty rate standard, Congress should ensure evenhanded treatment of small broadcasters and small webcasters.

Section 3 of the Performance Rights Act recognizes that small broadcasters would be particularly challenged by the amount of royalties that could be required when this law is enacted, and so it provides relief in the form of a $5,000 royalty cap for all broadcasters with revenue of less than $1.25 million. DiMA appreciates that the bill's sponsors have accommodated small broadcaster concerns by providing a royalty cap, but in furtherance of the parity desired by this Committee it would be fair to also enact a similar royalty cap for small Internet radio services.

Under the present system, a commercial webcaster making $1.25 million in annual revenue pays $150,000 in sound recording royalties, compared to the $5,000 that the PRA would have a similarly-sized broadcaster pay. This disparity is unfair, so DiMA urges the Committee to extend PRA small broadcaster royalty caps to similarly-situated small webcasters, and to also proportionately reduce the revenue limits and royalty caps so they apply fairly to very small webcasters which often have revenue of less than $100,000 and even $10,000.

In an Effort to Protect Songwriters, Congress Should Not Legislate Anti-Radio Unfairness into the Musical Works Performance Royalty System

As the Committee may be aware, songwriters and music publishers have for decades been of two minds with regard to recording companies' and artists' efforts to legislate a sound recording performance royalty. In one sense, songwriters and music publishers sympathize with their copyright owning brethren whom they agree should be paid for performances of their sound recordings. However, songwriters and publishers are also concerned that if broadcast radio pays very high sound recording royalties like prevailing Internet radio rates, there will be no money available to pay songwriter royalties.

In 1995, when enacting the Digital Performance Right in Sound Recordings Act, Congress sought to protect songwriters by including 17 U.S.C. 114(i), which prohibits the use of sound recording royalty data to be considered in proceedings to determine copyright royalties associated with the performance of musical works. This was, and is, unfair to licensees and to the federal judges who are charged with enforcing ASCAP and BMI consent decrees and the arbitrators who are occasionally called upon to determine SESAC royalties, because this provision requires them to establish reasonable royalties without knowledge of important facts. It is impossible to set a fair royalty for use of copyrighted works without considering ***all*** other costs of the business, including sound recording royalties being paid for the use of the work. Turning a blind eye to that significant expense is certain to yield unfair results.

In S. 379 (and even more pointedly in the House bill H.R. 848) the Committee is contemplating exacerbating this unfairness. Specifically, the Senate bill seeks to embellish the current

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prohibition by noting that sound recording royalty data cannot be used to "adversely affect" musical works royalties, which suggests that the data can be used by a decision maker to increase musical works royalties. In the House bill, the proposed amendment would be even more one-sided, as it would overtly prohibit the use of sound recording royalty data to reduce royalties, and thereby implicitly permit use of the very same data to increase royalties. Thus, for example, in an effort to reduce their musical works royalties a radio service could not tell the rate-setting judge that it pays 50% of revenue to sound recording copyright owners. But ASCAP and BMI could submit the very same facts to the court as evidence of why musical works royalties should be increased. This result would be patently unfair and one-sided and should not be condoned by this Committee or Congress.

Similarly, it is important that Copyright Royalty Judges who are charged with determining reasonable royalties and who struggle to identify rational marketplace benchmarks, be permitted to look at all royalty agreements between rightsholders and radio services without regard to parties' desire for confidentiality. In the last several weeks SoundExchange has signed royalty agreements with several Internet radio industry segments, and as it serves SoundExchange's purpose several of those agreements are admissible as evidence in future royalty proceedings and several are not. SoundExchange, as the monopoly licensor, should not be allowed to hide its agreements from consideration by the Copyright Royalty Board. Congress should mandate that all agreements reached by SoundExchange be included in the royalty review process, and not permit confidentiality clauses to undermine judges in their desire to set fair rates.

* * * *

Mr. Chairman, Senator Sessions, Senator Feinstein and Members of the Committee, for several years DiMA has sought to equalize the royalty standards that apply to radio so that fair competition prevails and so that RealNetworks and other DiMA member companies can grow and realize the full potential that Internet radio offers.

There is a great deal of opportunity for this Committee to promote the mutual interests of creators, consumers and radio innovators. We look forward to working with you to accomplish that goal.

Thank you.

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Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
August 4, 2009

Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
Hearing On "The Performance Rights Act And Parity Among Music Delivery Platforms"
August 4, 2009

I want to first thank Senator Feinstein both for chairing this hearing today, and for her leadership on content protection issues. While the Senate this week is considering the nomination of Judge Sotomayor to be a Justice of the Supreme Court, the subject of today's hearing remains an important issue to me and to many members of this Committee.

The issue is simple, even if the solution may be complicated. Broadcast radio stations use the work of recording artists and profit from it. But, unlike webcasters, broadcast stations do not compensate the artists. They use the property of another without permission or compensation. While that may be okay in countries like North Korea and Iran, that is not consistent with American property law or the laws of most countries around the world. Compounding the problem, this anomaly in our law means that American artists do not receive millions of dollars each year collected in European and other countries to pay for the use of their music by broadcast radio stations there.

We are hearing from hard working musicians across the country. The president of the Vermont Musicians Associations recently wrote in the Burlington Free Press: "I am one of many hundreds of Vermonters employed in the music community. We are not celebrities; we are regular folks who work hard to help provide a decent living for our families and we simply seek to be fairly compensated for our work."

I have heard from radio stations in Vermont concerned about the impact of giving performing artists the same rights on broadcast radio that they have on the Internet. In response, I am making sure that the Performance Rights Act protects smaller broadcasters while providing fair compensation to artists and musicians.

The House Judiciary Committee approved companion legislation with an amendment that would permit small stations to use sound recordings for a flat rate of $500 a year. That is less than most radio stations pay their lobbying organizations. We will need to consider similar amendments to address the legitimate concerns of smaller broadcasters when the Committee turns to the Performance Rights Act in the fall.

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I hope the National Association of Broadcasters will finally begin to work with us and assist us in addressing the needs of smaller broadcasters while recognizing the rights of recording artists.

As the Committee prepares to consider this legislation, we must also ensure that songwriters remain protected. Songwriters are properly compensated by radio stations through private licensing agreements with ASCAP, BMI, and SESAC. A performance rights for recording artists should not come at the expense of the songwriters.

Finally, the legislation should establish parity in rate standards across all music delivery platforms. Webcasters, like Real Networks and Pandora, recognize they should compensate performing artists, and have made that part of their business models. They legitimately question why they are subject to a standard different than satellite radio and why broadcast radio stations, against which they compete, are able to exploit music for free. Through this hearing, I am optimistic that we can move toward a parity standard across platforms.

I thank our witnesses for being here today and look forward to their testimony. I appreciate that the Register of Copyrights submitted testimony today in support of ending the current inequity.

# # # # #

Statement of Marian Leighton-Levy
Rounder Records
Before the Committee on the Judiciary
United States Senate
on
"The Performance Rights Act and Platform Parity"
August 4, 2009

Senator Feinstein, Ranking Member Sessions, Chairman Leahy, and members of the Committee, I am pleased to be here today to speak on behalf of so many talented and hard working people in the music industry, and to voice the support of thousands of us who have waited so long for fair treatment embodied in the Performance Rights Act. My name is Marian Leighton-Levy, and 39 years ago, two university friends and I founded Rounder Records, one of America's largest independent labels.

We at Rounder are extremely proud of the breadth and reach of our releases because so many are part of America's cultural and spiritual fabric: our work with the Lomax Family to release Alan Lomax's seminal field recordings from the 1930's, our work with the Library of Congress, our Jellyroll Morton set highlighting the work of another American icon and our recent support of a PBS Great Performance special "Three Pickers" featuring the stellar work of Doc Watson, Earl Scruggs and Ricky Skaggs. Many of these releases will never sit at the top of the Billboard Charts but they are still important recordings, and some will also receive significant airplay on many radio stations here and in other countries which revere American music and culture.

Perhaps Rounder's approach gives us a unique perspective and view: many of our artists are largely middle class, hard working singers and musicians

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trying to make a living doing what they, and their fans, love. That is why the Performance Rights Act has the tremendous support of labor groups across the country. (With your permission, I would ask that letters signed by the American Federation of Teachers; the Communication Workers of America; the Service Employee International Union; the American Federation of State, County and Municipal Employees, the United Steelworkers; and the International Association of Fire Fighters be made a part of the record.) This is not just about superstars and big name acts. While many of you are familiar with one of our most successful artists, Alison Krauss, you may not know the many talented musicians who work with her and help make her distinguished sound. The band, Union Station, is world-renowned and they, too, will benefit from this legislation, sharing in the royalties that they all deserve.

This legislation will provide significant revenue to many of the bluegrass artists, singer-songwriters and folk musicians that we release. Many have seen significant checks from satellite, cable, and Internet radio play and they will benefit from overseas royalties as well as royalties generated by specialty shows in the U.S. and from public and non-commercial radio play too.

You have undoubtedly heard broadcasters' primary rationale for not paying: that they promote our music. While this excuse may have had more significance 80 years ago when they first used it, it is so much less meaningful now. Today, radio is just one way – admittedly an important way – but just one way listeners get their music. There are dozens of new platforms and businesses that reach consumers. They also claim to promote music – but they

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do pay. Only broadcast radio gets this free pass. Even using their own numbers, the value proposition offered by the broadcasters doesn't add up. Mr. Newberry has testified that they provide $1.5 - $2.4 billion in promotional value to performers. Meanwhile, they generated $14 billion from the use of our music last year. Does that sound like equal value to you?

Anyway, the truth of the matter is, as an independent label focused on Americana, bluegrass, folk and similar genres, we probably get less airplay here in the U.S. than others who release recordings in more popular genres. But our music fills the airwaves overseas. American music accounts for 30-50% of all music broadcast on foreign stations, and the appetite for our artists there is significant. Yet, given our current law, because our stations don't pay a performance right, those foreign stations do not have to pay us either. There are tens of millions of dollars being left on the table – millions of dollars for compensation and for further investment that will flow to artists, musicians, and recording owners when the Performance Rights Act finally becomes law. Denying American creators money they deserve from overseas so that broadcasters can receive a subsidy in the form of our property is fundamentally unfair.

A striking example of this inequity can be found in the case of the recent Robert Plant/Alison Krauss record we released here in the U.S. Just last year it won a Grammy for Album of the Year while receiving almost NO commercial radio play. Since Robert Plant is a UK native, he will be eligible to receive

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payment for his work on the recording when it is played around the world, but Alison will not be paid because she is a U.S. native.

As I have become more involved in the fight for a performance right, I am continuously amazed at the broadcasters' misinformation campaign on the Performance Rights Act. They state that this legislation is the evil brainchild of the record companies, when in fact the fight for a performance right was started by performers with the National Association of Performing Artists (NAPA) in 1936. They say that we are just looking for a bailout from our failed business model in the digital age, when they have fought this right for more than seven decades, through up and down cycles, before anyone knew what the word "digital" was. They say they can't afford to pay right now, when they are paying multi-million dollar bonuses to their CEOs. We are willing to negotiate with the broadcasters to accommodate valid economic concerns. They will not come to the table.

They warn that more than half of the royalties are directed to record labels, when neither the word "record" nor "label" appears anywhere in the bill. In reality, the legislation directs royalties to be split down the middle: 50% directly to artists and musicians, and 50% to the property owner. And since many artists own their own master recordings, artists and musicians will actually get more than 50% of the payments. (There are currently 1,200 artist-owned independent labels signed up with SoundExchange, which collects and distributes the royalties.) But this is and has been broadcasters' mission: to obfuscate and divide, stall and scare. In truth, record labels discover, nurture, and risk our own

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capital on the art of music. We are investors and, like any investor, we try to make a profit. Without that opportunity to make a profit, there is no incentive to invest. As we move into a performance-based world, if we cannot be compensated for performances, we will not be able to invest in the new art that drives everyone in the music business, including radio. That's bad for us, that's bad for our artists, that's bad for the public, and that's bad for the broadcasters. This is not an easy business. The vast majority of artists do not make it. It is the rare success that not only covers the losses from those that fail, but also funds our search for, and support of, new talent. Frankly, it also funds our ability to release recordings that are important culturally and historically. Sometimes these recordings influence a younger generation who "re-discover" the Blues or writers and poets who discover the lyrics of great American artists from years past.

Imagine working hard in such a tough industry. Imagine investing as we do in an unpredictable market. Now imagine someone taking your product without consent and using it to profit his or her own business without so much as a penny in return. Unfair is not the word. It's unconscionable.

But that's the scenario of our current law. And that's the reality for all of us in the recording industry – labels, producers, managers, performers, and musicians. Today we stand united in seeking a right that should have been afforded to us decades ago.

In the end, harming broadcasters is the last thing we want to do. They should be our partners in the music business. All we are asking for is fair

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compensation for use of our work. The Performance Rights Act provides us with the framework to secure that compensation and sets in place the proper balance of interests between creators and broadcasters. We sincerely look forward to working with broadcasters in the future – as lovers of music, as supporters of musicians, and as true partners in business and art.

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Joyce Moore

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August 10, 2009

The Honorable Diane Feinstein
U.S. Senate
331 Hart Senate Office Building
Washington, DC 20510-0504

Re: Correction of written testimony dated August 4, 2009 submitted by Steve Newberry, Joint Board Chairman National Association of Broadcasters and President and CEO Commonwealth Broadcasting Corporation in opposition to The Performance Rights Act (S. 379) and relating to Legendary Recording Artist, Sam Moore.

Dear Senator Feinstein:

Thank you so much for time, trouble and efforts you and the entire Senate Judiciary Committee have afforded all parties concerned and effected by The Performance Rights Act (S 379).

I appreciate the opportunity to clarify and correct the reference Steve Newberry made on his written testimony to the Committee dated August 4, 2009 about my husband, whose career I also manage.

Mr. Newberry attempts to distract the Committee from the real issues of concern to millions of American artists and musicians addressed by S. 379 by lobbing contrived and misinformed barbs at sound recording copyright holders, who, in many instances are record labels while in numerous others are the artists themselves, including my husband. Mr. Newberry states:

"Artists routinely sue their record labels for unpaid royalties. Soul legend Sam Moore and other artists previously sued record companies and the AFTRA Health and Retirement Funds (a separate entity from the union) for pension benefits. Moore's record label, which sold his music for over 30 years, had never deposited a nickel into his pension because of convoluted formulas tied to royalties."

The inaccuracies in the above paragraph are numerous but no less so than several other passages throughout Mr. Newberry's written testimony submitted to the Senate in opposition to S. 379. If Mr. Newberry was an actor and I a casting director, I would hire him instantly to play "The Wizard" whose most famous line was, "*pay no attention to the man behind the curtain*".

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I attended the hearing in person and made him aware of my displeasure at his attempt to somehow adopt my husband as an NAB "Poster Child" and use Sam to vilify the record industry. To add insult to this injury, Mr. Newberry, concerned by my displeasure with him, contacted John Simson, Executive Director of Sound Exchange via email seeking to understand why I was so upset with him. He expressed in that writing that he believed his testimony to be accurate while in that same writing making reference to me as Sam Moore's "widow". Mr. Newberry's lack of due diligence on the simple and easily verified issue of my husbands vitality is par of the course.

I assure all concerned and would like the record to reflect that my husband is very much alive and plans to be for a long time to come! Had the shoe been on the other foot, I would not have been so careless, disrespectful and reckless with my words, especially under the circumstances, but then, this isn't the first time that NAB station owners have been careless, disrespectful and, for lack of a better term, ignorant.

After Sam testified on behalf of H.R. 848 on July 31, 2007 (Sam Moore's written testimony attached as Attachment "A"), Bob Neil of Cox Communications who owns a number of radio stations in urban communities around the country made statements that easily could have been termed "racist" in response to Sam's testimony when he said,

"I saw the (congressional) testimony yesterday, and the reality is a lot of those people would be sitting in a shack somewhere in a small town if it wasn't for the fact that radio supported their music when it was coming up"

Mr. Neil, who seems to be the standard bearer of the NAB's disregard for musicians and artists as a group, in an interview with Roger Friedman then of Fox411 (Attachment "B"), also went on to say,

" The reality is that if radio doesn't play their music, they're not gonna sell their recordings..."

Sam Moore's career again provides the perfect context to this wild and offensive claim made by the NAB. Sam's recording of "Rainy Night In Georgia" with Conway Twitty is considered one of the top 100 country duets of all time and one of the top 10 country videos. When MCA/Universal tried releasing it as a "single" for radio airplay in 1994 there were no stations that would consider adding it to their play lists and give it any rotation. This song got **no** support from

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radio whatsoever, but, there was a video and it was embraced on both the country television outlets such as TNN and CMT as well as VH-1 and other outlets available at the time. It became a huge hit and is considered a classic. The video is still shown on CMT and the recording is literally played in every grocery store and elevator around the United States all the time 15 years later.

But back to Mr. Newberry's "insult to injury". Had he simply Google-ed Sam Moore he would have discovered that in February of this year Sam participated on a panel at The Grammy's and in June he was in Detroit to support of House Judiciary Committee Chairman John Conyers after Cathy Hughes of Radio One tried to brand the Chairman Conyers as a turn coat, sellout and a villain stating her mission to have him unseated next election cycle.

Mr. Newberry's words are, unfortunately, par for the course. But they do amplify, in my opinion, the lack of care, due diligence and decency expended by Mr. Newberry and the NAB staff in general on this issue which is so important and potentially "life-changing" for every artist and musician in this country.

The specific inaccuracies raised by Mr Newberry are worth noting despite the fact they are merely an ad hominem attack that has absolutely nothing to do with finally correcting a hiccup in the copyright laws which should have been rectified decades ago.

SAM MOORE et. al. VS. AFTRA H & R ("The Funds") et.al., was filed in 1993 as a class action ERISA/RICO pension fraud case because of the collective bargaining agreements between AFTRA (The Union) and the bulk of the recording labels (major and minor) "The Phono Code". This code obligated the labels to make pension and welfare contributions to "The Funds" for each individual royalty recording artist with whom they had contracts. The case targeted "the Funds" for their numerous collection failures from inception of "The Phono Code" in 1957, as well as the labels, did include in the filed pleadings the statement that Atlantic Records had failed to make or report pension contributions on behalf of Sam and his former partner Dave Prater, Jr. for approximately 30 years of their contractual relationship with them. The individual artist recording contracts contained language that reflected the label's obligation under the collective bargaining agreements. This failure to report and pay, (e.g. the accounting and accountability of the labels), was to a great respect a failure of the systems at The Funds coupled with the record company's policies and practices but not the "convoluted" scheme Mr. Newberry asserted.

The claim by Mr. Newberry that there were no pension contributions to Sam's pension because of, "convoluted formulas tied to royalties" is misleading

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and uninformed. What's curious about the NAB choosing to raise the AFTRA litigation is the fact that the bulk of the "on air" personalities and announcers on both radio and television are AFTRA members who benefit from the same AFTRA Health and Retirement Funds as the phono-recording artists. The settlement of that case resulted in millions of dollars flowing into The Funds to correct longstanding collection process and procedural accounting problems that specifically related to the recording community. This in turn has given the "The Funds" the ability to collect and process millions more dollars from all of the record labels making "The Funds" and the services of health insurance, pensions, drug and alcohol abuse treatment and death benefits for its members including all NAB "on air" personalities stronger and substantially more solvent. The attempt by the NAB to use Sam Moore's strength, integrity, and moral code - that made him brave enough to serve as the "lead plaintiff" in the AFTRA Case - as a weapon against him to further their attempt to defeat the legislation is, at best, shameful.

No one, including Sam Moore has ever said that recording artists and record labels are in lock step on all issues. They are bound to each other by contracts that are enforceable and provide recourse. No one had ever said or implied that artists haven't had to assert and/or exercise all of their contractual rights to audit and litigate vigorously against some, any or all of the record companies. This is, however, simply irrelevant to the matter at hand!

However, because the NAB and the National Association of Black-Owned Broadcasters (NABOB) can offer no plausible justification for their opposition to fairly compensating artists, they continue to try and deflect the spotlight that needs to shine brightly on them. They therefore resort and attempt to confuse the issue by misappropriating facts regarding Sam and lift other statements from other timeframes out of context by other artists mentioned in Mr. Newberry's testimony including Don Henley, another champion of artists' rights.

As it relates to getting royalties for the broadcast of sound recordings on terrestrial radio, the NAB would try and convince the Committee that the only beneficiaries would be record labels, most of whom are foreign owned and not the artists. That's actually the most blatant of lies they could tell except perhaps for the commercials that are playing around the country that claim that S. 379 would institute a "performance tax" that will cause millions and millions of dollars to be sent overseas to foreign owned record labels and force the end of "free" radio in the United States.

My husband and each and every other phono-recording artist will get at least 50% of the money paid under S. 379. The record labels will NOT take one

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penny of that money into their coffers to distribute or re-distribute, period! The labels, if they, not the artists themselves are the copyright holders in the sound recordings, will not be able to cross-collateralize any of this money, they will not be able to reduce debit balances on any artist accounts because they cannot touch the artists share of the money under any circumstances whatsoever. In addition, the impact of the repatriation of royalties now collected around the world would be huge for artists. One hundred percent of the monies that are currently being collected around the world, that our American artists can't touch at this time because of the NAB blockade to a terrestrial radio performance royalty right, would flow back to U.S. artists. Presently, American artists cannot collect one penny of this money, and therefore have lost *hundreds of millions of dollars* in collected royalties for broadcast and additional presentations globally[1]. Taking this repatriation into account, it is critical for the Committee to understand that American recording artists would be the beneficiaries of, at minimum, 75% of all the royalty income streams created and paid as a result of the Performance Rights Act. This will indeed by "life changing" for so many artists, musicians and their families including my husband, Sam Moore.

Thank you again for your most gracious opportunity to correct the record.

Respectfully and proudly,

JOYCE (Mrs. Sam) MOORE

[1] It is believed that there has been substantially more than ONE BILLION DOLLARS lost because of the lack of reciprocity to date. Since Sam testified two years ago more than Two Hundred Million Dollars was collected overseas but will not be paid over to American Artists.

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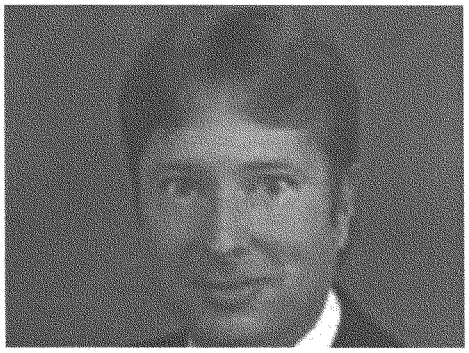

From: Roger Friedman's Fox411 column dated August 2, 2007

Cox Radio Possible Racist Remarks Spark Fury

It wasn't tough enough for Judy Collins and Sam Moore, two famous and popular singers, to testify in front of a Congressional committee on Tuesday about the need for a performance royalty on radio stations. (Singers on hit records aren't paid when a record is played on the radio; only the writers are.)

Now **Robert Neil**, the head of Cox Radio, which owns 80 stations in 18 markets, has infuriated them with what some consider to be racist remarks regarding their right to earn a living. And R&B legend Moore, for one, is demanding that he be fired.

Neil said: "I saw the (congressional) testimony yesterday, and the reality is a lot of those people would be sitting in a shack somewhere in a small town if it wasn't for the fact that radio supported their music when it was coming up."

Moore is furious. He feels the term "those people" is pejorative. At first he wanted an apology. Now he wants Neil's head. Cox Radio owns R&B stations and oldies stations that Moore says have made their money from black artists for 40 years.

Neil doesn't take this seriously. "The reality is that if radio doesn't play their music, they're not gonna sell their recordings. And if we have to pay tons of money to do that, then what you're going to see is fewer and fewer music stations because nobody

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is willing to pay it. It would be absolutely deadly to small radio stations. It's just silly. It's absolutely silly. There's no other word to describe it."

When I spoke to Neil Thursday, he told me his comments weren't intended as racist. What about "those people"? "I didn't even know who testified," he said, "I just read about it in the wire reports."

He told me that if the performance bill passed, he would charge artists to play their records. "That's not payola, because it's out in the open. It's perfectly legal," he said. And what if they didn't want to pay? "It doesn't matter to me," Neil said.

Neil told me that the 'symbiotic relationship" between radio stations and record companies was built on this structure. "The songwriters may make a million dollars over a lifetime on their royalties," he said. "But the performers made a hundred million dollars up front on record sales and concerts. Now they're coming back and telling us to pay them. We won't."

In other words: it was up to the record companies to pay the artists. If they didn't, or the money was squandered years ago, too bad.

Just a refresher: Singers who never wrote their own songs but had hit records are not paid a royalty when the songs are played on the radio or anywhere else. So Collins singing "Both Sides Now" or "Send in the Clowns"— radio staples — or Moore's voice on "Soul Man" or "Hold On! I'm Coming" — it's all free to radio stations. The singers derive no income from this at all.

Other singers who don't write their own songs but had many, many hits include Linda Ronstadt and Whitney Houston. Celine Dion doesn't write, but she insists on taking a cut of songwriters' royalties. Elvis Presley used to do the same thing, courtesy of his manager Col. Tom Parker.

Many of the "oldies" that populate the radio fall into this category. And many of the artists, like Moore, are black.

Among Cox Radio's best known stations are WBLI and WBAB in Long Island, NY and six stations in the Tampa, Florida area. All of them play music by "those

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people," many of whom will be as mad as Moore when they find out the CEO thinks of them has having been rescued from a life in shacks in exchange for receiving no remuneration for their work.

"B"

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Committee, July 31, 2007. The Written Testimony of Sam Moore submitted to the House Judiciary

Good Morning Mr. Chairman, Ranking Member Coble, and distinguished members of the Subcommittee.

As a recording artist, I've toured all over the world for decades and performed for many types of audiences. In fact, I performed for many of you this past December at the Kennedy Center Honors. But I must tell you my "performance" here this morning for this unique audience is probably the most important gig of my life. I am so grateful to the subcommittee for holding a hearing on this vital issue facing our nation's recording artists—and issue my wife and I have been championing for the past 15 years.

If you'd allow, I'd like to tell you a little bit of my career history, and I promise to be brief no matter how long it takes. More than 45 years ago I formed a duo that made it pretty big in the mid 1960's. Our famous Sam and Dave records were released on the legendary Stax Record Label from Memphis, TN. With my then partner Dave Prater Jr., Sam and Dave had a series of top ten pop and soul hits including "Hold On! I'm Comin," "I Thank You," and of course "Soul Man,". You can still hear those songs today on radio stations across the country and around the world.

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I'm proud to be a Founding Member of the musicFIRST Coalition and a member of AFTRA, SAG, RAC and The Recording Academy.

I've been fortunate in my career to have gone on to record with giants like Conway Twitty, Bruce Springsteen, Don Henley, Sting, Jon Bon Jovi, Vince Gill, Eric Clapton and Billy Preston. My most recent album released this last year, "Overnight Sensational," was nominated for a GRAMMY, but at 71 years old I find I still must tour through much of the year to support myself and my family.

To shed light on the issue of broadcast performance royalties for artists, let me tell you about something I frequently hear from fans around the country. They'll say, "Sam, I love this song or that song of yours and I always request your music on the radio." They tell me this because the public believes I'm getting paid when my songs are played on the radio. You would be amazed at how shocked people are when they learn that whenever one of my recordings is played on the radio, I receive absolutely nothing, no royalty whatsoever from the broadcaster. Even though hundreds of oldies stations and some other formats play my records so they can

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sell advertising on their station, I do not share in any of that income.

The radio industry thinks they're doing me some kind of a favor by playing my recordings. They claim they are promoting me through my music so I can sell records and concert tickets. Well, may I please enlighten you and tell you in no uncertain terms without a huge promotional budget and massive marketing support, radio does absolutely nothing to promote sales of my records. People can hear my songs so frequently on oldies stations that they don't have to buy my records at all.

Broadcasters also claim they are serving the community. Well let me tell you: WE are the community. We are the artists—who along with the talented songwriters—created the songs that drive their business. They cannot claim to support their community while exploiting my community without fair payment.

And as for radio "allowing me" to tour: well, thank you, but at almost 72 years old I'd rather be spending time with my grandchildren. If broadcasters shared any of the money they earn from playing my recordings, I would not have to continue to spend so much of my life running up and down the road. I don't have the

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private jets and the extravagant tour buses with aides and staff to make my life comfortable. I don't have a posse unless you count my wife Joyce who often does bag schlep for the both of us.

So, while my records continue to bring joy to music lovers worldwide, and continue to help the radio business become a $20 billion industry, I struggle to make a living. Those recordings are my legacy! They--and I as the artist--deserve to be protected with a full performance right. In every other developed country, artists have such a right. And to add insult to injury, when my recordings are played on stations overseas, I cannot claim any of the funds paid for my songs there, simply because the U.S. does not require payment here. Without reciprocity, US artists are losing millions of dollars that rightfully belong to them.

I'm fortunate that I'm still here, and knock wood in good enough health to be able to continue working, and to share my story with you. But, many recording artists are no longer with us--great artists whose lives ended without enough money to take care of themselves or their families.

I remember Mary Wells coming to my house after she was diagnosed with cancer. Mary brought so many great songs to life,

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including the number one hit "My Guy." And yet, she told my wife and me that she didn't know what would happen to her little girl Sugar after she died. In 1992, with no income earned from decades of radio airplay, Mary died without being able to provide for her daughter who spent several of her younger years sleeping on a pallet in the kitchen of her older sister's one bedroom apartment shared with the sister's husband and young children.

And there are so many others.

I think about the late Junior Walker who I did a movie "Tapeheads" with going out on tour sick with cancer, needing to earn income. Bo Diddley, today is still recovering from a stroke he suffered last year while performing—at nearly 80 years old. As frail as he was he needed to work. Many of our greatest artists, who created the recordings that are the soundtracks of our lives, must tour until they die because they are not fully or fairly compensated for the performances of their work. They're not compensated at all for their radio airings in our great country.

Mr. Chairman, this is about basic fairness and equity. American broadcasters earn billions by playing our records. All we ask is to receive what artists in every other developed country around the

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world receive when their recordings are broadcast: fair compensation for the performance of our work. As recording artists, our legacy is our music. Now this subcommittee can leave an equally important legacy by fixing this historic injustice.

I am grateful for your invitation to share my views with you today. Artists have sought a performance right for more than 50 years. I hope to see this important legislation pass in my lifetime and I'm looking really hard at 72.

Thank you.

"A"

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Hearing on "The Performance Rights Act and Parity among Music Delivery Platforms"

United States Senate
Committee on the Judiciary

August 4, 2009

Statement of Steven Newberry
Commonwealth Broadcasting Corporation

On behalf of the National Association of Broadcasters

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Good afternoon, Chairwoman Feinstein, Ranking Member Sessions and members of the committee, and thank you for inviting me to testify today. My name is Steve Newberry, and I am President and CEO of Commonwealth Broadcasting Corporation, which operates 23 stations in Kentucky. I am testifying today on behalf of the free, local, over-the-air radio members of the National Association of Broadcasters.

Introduction

Free. Local. Over-the-air. Radio. These are important words, important concepts. They are a substantial part of what makes radio unique among music delivery platforms.

For eighty years, American radio broadcasters and the music and recording industries have enjoyed a well-balanced relationship that has benefited all the parties. Record labels and performing artists profit from the free exposure provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services.

Despite the many dramatic changes that have occurred in the digital music industry over the past decade, this interdependent relationship between radio and the music and recording industries remains fundamentally the same.

What has changed is the financial dominance of the four major record labels. Digital audio transmission services abound, offering nearly unlimited opportunities for consumers to listen to music on-demand, to make digital copies

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of songs, and to create personalized listening experiences for themselves and others. For example:

- The subscription service Rhapsody offers unlimited access to millions of songs, allowing users to choose a song and play it on-demand, or to listen to commercial-free channels based on personalized playlists.
- Live365 permits individuals to program their own channels to be enjoyed by themselves and others, featuring over 260 genres of music. It also offers so-called "professional broadcasting services" and boasts over 6,000 customized channels.
- The Internet service Pandora offers each of its users the ability to create up to 100 individualized channels. Users can "thumb up" or "thumb down" particular songs to design a channel that grows increasingly personalized over time.

In contrast, despite technological improvements, radio broadcasting retains the same basic character that it has had for decades.[1] It is local. It is free to listeners. It is supported by commercial advertising. Local stations use on-air personalities and DJs to differentiate their programming, including by commenting on the music they play. While increasing, there is not an unlimited number of radio stations in the U.S., and listeners cannot choose what songs they will hear next, with the exception of call-in and request lines. In addition, radio is characterized by its public service to local communities and is subject to

[1] By definition, "radio" involves the use of electromagnetic waves to transmit information and entertainment. Encarta World English Dictionary, 2009.

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numerous Federal Communications Commission (FCC) restrictions and obligations.

Many digital audio transmission services are eager to associate themselves with radio's rich history and consumer familiarity and affection, styling themselves as offering "radio" services. But simply marketing digital audio transmission services as "radio" does not make them so.

In 1995 and 1998, Congress recognized the vast differences between digital audio transmission services and local radio when it created a limited digital sound recording performance right for those new services that diverged so dramatically from the nature of traditional radio.

Now challenged by the economic downturn and financial threats posed by the rapidly changing digital environment, the recording industry is in search of additional revenue streams to make up for its losses. But it is important to recognize that broadcasters are not responsible for the recording industry's financial woes. Broadcasters have continued to do their part in presenting music to the public in the same manner that they have done for decades. Particularly in the current highly competitive environment, where broadcasters are struggling to adapt their own business models to address the realities implicit in new media, it makes little sense to siphon revenues from local broadcasters to prop up the recording industry's past failings and ill-advised business decisions.

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Promotional Value of Radio Airplay to Performers and the Recording Industry

Despite the advent of new technologies and digital audio transmission services that permit sophisticated user manipulation of music in on-demand and customized ways, the impact of the promotional value of traditional local radio remains strong. The fact that consumers have new ways in which to locate and obtain music does not diminish the value of over-the-air radio's marketing and promotion.

Over the past few years, a plethora of new digital channels are giving consumers the opportunity to acquire music legally in many new ways, but the sheer volume of music available online creates a cacophony of voices. In the new, fragmented world of the digital environment, in which millions of bands are vying for the attention of hundreds of millions of fans, on millions of websites, one of radio's greatest strengths is that it cuts through the clutter.[2] Radio exposes listeners to new music and drives them to the websites where their desire for the music that they heard can be monetized. For example, Douglas Merrill, president of digital business at EMI Music and former Google employee, recognized that labels need to focus not on consumers' destination sites but on the ways they actually discover music: "Social networks have been terrific for fans looking for bands they know, but far more challenging as a way of finding new bands."[3] As

[2] MySpace, for example, lists more than 2.5 million hip hop acts and 1.8 million rock artists alone.

[3] Digital Music Report 2009, International Federation of the Phonographic Industry (IFPI), p. 5.

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singer-songwriter Jewel observed on *Nashville Star*, "That's what our job is, to have a radio hit. Without radio, we couldn't do what we do, but the job is to have a radio hit that sounds unique."

As Congress has repeatedly recognized, the radio industry provides tremendous benefits both to performing artists and to record companies. The recording industry invests money promoting songs in order to garner radio airplay, and receives revenues when audiences like and purchase the music they hear. Artists consistently recognize the fact that radio airplay is invaluable. On behalf of the Recording Artists' Coalition, Don Henley candidly admitted in his 2003 testimony before the Senate that getting a song played on the radio is "the holy grail" for performers and record labels.[4] Simply put, when audiences hear music they like on the radio, they are likely to purchase that music.

In fact, the promotional value of radio airplay is tangible and quantifiable. Data from the Nielsen Company clearly demonstrates that artists and record labels derive significant value from local radio airplay. The data shows that the when music airs on the radio, record sales go up.[5] Moreover, a recent study by economist Dr. James Dertouzos indicates that radio airplay increases music sales. A significant portion of industry sales of albums and digital tracks can be attributed to radio airplay – at minimum 14 percent and as high as 23 percent.

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[4] Transportation Committee Hearing on Media Ownership: Radio Industry, January 30, 2003.

[5] Music airplay and sales were analyzed for 17 artists covering all genres and varying levels of success such as Velvet Revolver, U2, Rascal Flatts, Linkin Park, Green Day, Bruce Springsteen, The White Stripes, Taylor Swift and Josh Groban.

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Local radio is providing the recording industry with significant, incremental sales revenues or promotional sales benefit that ranges from $1.5 to $2.4 billion annually.[6]

Indeed, the vast majority of listeners identify FM radio as the place they first heard music they purchased.[7] With an audience of 235 million listeners a week, a figure that dwarfs the reach of satellite radio and the listenership of Internet audio services, there is no better way to expose and promote sound recordings.

Local radio stations provide new and emerging artists with needed exposure and access to a listening audience. Record companies and their artists benefit not just from radio airplay, but also from on-air interviews and promotions of local concerts and new albums. Similarly, established artists with classic hits benefit from radio airplay, as well.

Record labels use their catalogs of recorded music as a source of material for re-releases (in traditional or digital formats), compilations, box sets and special package releases. The sale of catalog material is typically more profitable

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[6] This study was limited to the effect on sales of sound recordings and does not address promotional value for other revenue streams, such as concert sales.

[7] Bridge Ratings has examined where media consumers go to find new music and has found that terrestrial radio comes out on top. In a 2006 survey, sixty-one percent of those aged 35-54 said that terrestrial radio was their primary source of new music. Even among younger consumers with stronger affinities for P2P networks, terrestrial radio was still the leading source for discovery about new music. For consumers aged 12-54, Bridge found that terrestrial radio was the preferred source of new music for 45 percent of those surveyed, beating out both Internet services and P2P networks. *See* Bridge Ratings, *Bridge Ratings Industry Update – New Music Discovery*, July 21, 2006, http://www.bridgeratings.com/press_07.21.06.New%20Music.htm.

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than that of new releases, given lower development costs and more limited marketing costs. In the first three quarters of 2008, according to SoundScan, 43 percent of all U.S. album unit sales were from recordings more than 18 months old, and 31 percent were from recordings more than three years old.[8] For example, Warner Music Group's music catalog generates approximately 40 percent of its recorded music sales in a typical year.[9] It is also important to remember that sales grow with each advance in technology. Many consumers have likely purchased the same music multiple times as the phonogram market moved to cassette tapes, them moved to CDs, and now has migrated to digital downloads.

The Evolution and Nature of the Digital Performance Right

The recording industry characterizes its attempts to develop a new revenue stream at the expense of broadcasters by mischaracterizing it as the closing of a "loophole" and the ending of a "decades' long exemption." But the fact that the U.S. does not have a general sound recording performance right is not an inexplicable inconsistency in the law. Prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings. And at that time, Congress created only a narrow digital performance right, in order to address very specific concerns about copying and piracy issues. This limited right did not attach to a wide variety of recorded music, including radio, hotels,

[8] 2008 Annual Report, Warner Music Group, p. 18.

[9] *Id.*, p. 8. "Relative to our new releases, we spend comparatively small amounts on marketing for catalog sales."

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restaurants, bars, nightclubs, sporting arenas, shopping malls, retail stores, health clubs, etc.[10] Thus, the Performance Rights Act, which is specifically targeted at over-the-air broadcasts of local radio, is not intended to close "loopholes," but to create a new entitlement for the recording industry.

For more than 80 years, Congress has repeatedly rejected calls by the recording industry to impose a fee on the public performance of sound recordings. While composers have long enjoyed a right of public performance in their musical compositions – for which over-the-air radio broadcasters pay annual royalties of $550 million to the performing rights organizations (*e.g.,* ASCAP, BMI and SESAC) – prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings embodying such musical compositions. As explained below, even that right was very limited.

Congress has considered and rejected proposals from the recording industry for a broad performance right in sound recordings since the 1920s. For five decades, it consistently rebuffed such efforts, in part due to the recognition that such a right would disrupt the mutually beneficial relationship between broadcasters and the record labels.

Congress first afforded limited copyright protection to sound recordings in 1971, in the form of protection against unauthorized reproductions of such works. The purpose of such protection was to address the potential threat such reproductions posed to the industry's core business: the sale of sound

[10] According to IFPI, the restaurant and hotel sector is valued at US$2.3 trillion internationally in comparison to US$32.5 billion for radio.

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recordings. And, while the record industry argued at that time for a public performance right in sound recordings, Congress declined to impose one. Had Congress believed that record companies and performers were at risk of not being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings. However, Congress wisely realized that the recording industry was already adequately motivated to serve the public interest and thus did not grant those additional rights.

During the comprehensive revision of the Copyright Act in 1976, Congress carefully considered, and rejected, a sound recording performance right. As certain senators on the Judiciary Committee recognized:

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.[11]

Congress continued to decline to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records. Indeed, copyright protection of any sort for sound recordings is of relatively recent vintage. It has been marked throughout by careful efforts by Congress to ensure that any extensions of copyright protection in favor of the

[11] S. Rep. No. 93-983, at 225-26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

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record industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades."[12] As to performance rights in sound recordings in particular, Congress has explicitly recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[13]

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmission."[14]

Consistent with Congress's intent, the DPRA expressly exempted non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmissions made by FCC-licensed radio broadcasters, from any sound recording performance right liability.[15] Congress again made clear that

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[12] S. Rep. No. 104-128, at 13 (1995) (hereinafter, "1995 Senate Report").

[13] Cf. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary, Performance Rights in Sound Recordings, at 37, 48, 49-50, 54 (Comm. Print 1978).

[14] *Id.* at 17 (emphasis added).

[15] 17 U.S.C. §114 (d)(a)(A).

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its purpose was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[16]

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[17]

In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, over-the-air radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment

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[16] 1995 Senate Report, at 15.

[17] *Id.*

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programming and other public interest activities to local communities;[18] (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[19]

It should also be noted that even though the Copyright Office has argued for a performance tax, Congress has strongly and consistently refused to adopt these recommendations.[20]

Broadcasters' Public Service Is Part of What Makes Radio Unique

As local radio broadcasters have demonstrated on many occasions, stations serve the public interest by airing local and national news and public affairs programming and a variety of other locally produced programming that

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[18] Radio broadcast stations provide local programming and other public interest programming to their local communities. In addition, there are specific requirements that do not apply to Internet-only webcasters. *See* 47 U.S.C. §§ 307, 309-10 (1998). *See, e.g.,* 47 C.F.R. § 73.352(e)(12) (requiring a quarterly report listing the station's programs providing significant treatment of community issues); 47 U.S.C. § 315(a) (requiring a station to offer equal opportunity to all candidates for a public office to present views, if station affords an opportunity to one such candidates); 47 C.F.R. § 73.1212 (requiring identification of program sponsors; *id.* § 73.1216 (providing disclosure requirements for contests conducted by a station); *id.* § 73.3526 (requiring maintenance of a file available for public inspection); *id.* § 73.1211 (regulating stations' broadcast lottery information and advertisements).

[19] 1995 Senate Report, at 15.

[20] *Id.* at 13. ("Notwithstanding the views of the Copyright Office and the Patent and Trademark Office that it is appropriate to create a comprehensive performance right for sound recordings, the Committee has sought to address the concerns of record producers and performers regarding the effects that new digital technology and distribution systems might have on their core business without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.")

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serves the needs and interests of their audiences, including sports, religious and other community-oriented programming.[21] Through our participation in the Emergency Alert System (EAS) and additional coverage of natural disasters and other emergencies, broadcasters help save lives with extensive, timely emergency information. Coordination with local law enforcement via Amber Alerts has led to the recovery of 467 abducted children. In fact, the Amber Plan was originally created by the Association of Radio Managers with the assistance of law enforcement agencies in the Dallas/Ft. Worth area. No other music delivery service, including satellite or Internet, provides this tremendous level of service to communities across the country.

The commitment of local radio broadcasters to public service and their local communities can be further measured by their tangible community services. In calendar year 2005, the average local radio station ran 169 public service announcements (PSAs) per week. This is the equivalent of $486,187 in donated airtime per radio station per year, or a total for all radio stations of $5.05 billion.[22]

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[21] *See, e.g.*, FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Alan Harris at 2 (May 26, 2004) (three Wyoming radio stations broadcast 72 local newscasts every week, about 40 sportscasts, and a daily public affairs interview program); FCC Broadcast Localism Hearing, Monterey, CA, Statement of Chuck Tweedle at 3 (July 21, 2004) (three Bonneville radio stations in Bay area broadcast more than four hours of locally produced newscasts every week); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry Hanszen at 2-3 (Jan. 28, 2004) (on a typical day, two small market Texas radio stations broadcast five local newscasts).

[22] National Association of Broadcasters, *National Report on Broadcasters' Community Service* (June 2006) (available online at http://www.nab.org/publicservice) (*2006 Broadcast Community Service Report*).

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Sixty-one percent of the PSAs aired by the average radio station during 2005 were about local issues, and 71 percent of radio stations aired local public affairs programs of at least 30 minutes in length every week during the year.[23]

Moreover, about 19 out of 20 radio stations reported helping charities and needy individuals, and supported disaster relief efforts in 2005. Radio stations across the country raised approximately $959 million for charity and additional sums for disaster relief.[24] Awareness campaigns organized and promoted by local broadcasters covered the full range of issues confronting American communities today, including alcohol abuse, education and literacy, violence prevention, women's health, drug abuse, and hunger, poverty and homelessness. Local stations further supported and organized community events such as blood drives, charity walks and relays, community cleanups, town hall meetings, health fairs and many others.[25] To illustrate the service provided by radio broadcasters to their communities, in just one day, Dick Purtan, the morning host of WOMC-FM in Detroit, raised a stunning $2,398,783 in his annual radiothon for funds for the homeless and hungry via the Salvation Army's Bed and Bread Program.[26]

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[23] *2006 Broadcast Community Service Report* at 5

[24] *Id.*

[25] *Id.*

[26] John Smyntek, Purtan/Salvation Army Radiothon Passes $2 Million Mark in Spite of Tough Economy, Detroit Free Press (Feb. 23, 2007).

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Additionally, broadcasters provide a unique community service – when a broadcast station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. A broadcaster can help an organization make its case directly to local citizens, to raise its public profile and to cement connections with in local communities. As a trusted source, a broadcaster can help an organization better leverage its fund raising resources and expertise, its public awareness and its educational efforts.

It goes without saying, however, that maintaining this high level of local programming and other services requires radio stations to be economically sound. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the FCC concluded nearly two decades ago, the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[27] Anyone concerned about the service of radio stations to their local communities and listeners must necessarily be concerned about these station's abilities to maintain their economic vibrancy in light of new fees that could be levied though S. 379. All of these local and community services could be jeopardized under this bill.

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[27] *Report and Order*, 7 FCC Rcd 2755, 2760 (1992).

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Comparison with Other Countries' Laws Does Not Justify the Imposition of a New Performance Fee in the United States

While proponents of a new U.S. performance fee for sound recordings often point to the laws of foreign countries to justify a performance fee, such an argument ignores key differences in the American legal and broadcast structures. To compare one feature of American law with one feature of analogous foreign law without taking into account how each feature figures into the entire legal scheme of the respective country produces exceedingly misleading results. For example, many foreign legal systems deny protection to sound recordings as works of "authorship," while affording producers and performers a measure of protection under so-called "neighboring rights" schemes. While that protection may be more generous in some respects than sound recording copyright in the United States, entailing the right to collect royalties in connection with public performances, it is distinctly less generous in others.

For example, in many neighboring rights jurisdictions the number of years sound recordings are protected is much shorter than under U.S. law. Although U.K. copyright owners have a right of remuneration for the performance of their sound recordings, protection in the U.K. extends only 50 years after the date of the release of a recording, as compared to 95 years in the U.S. This was no oversight or anomaly on the part of the British Government, which recently considered and declined to extend the term past its current 50 years, despite fierce lobbying from the British music industry. In many countries, the royalty rate paid to music composers and publishers is significantly higher than that paid for

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sound recordings, yet the Copyright Royalty Board decisions in the U.S. have provided rates for performing digital audio transmissions several times higher than rates paid to the composers.[28] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

Governments in many foreign countries adopt policies to promote local artists, composers and national culture through a variety of means, including imposing performance fees on recordings and exercising control over broadcasting content. For example, the Canadian Broadcasting Act states that the purpose of the Canadian broadcast system is to provide "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,"[29] and that it should "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[30] Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.[31] French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.[32]

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[28] Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).

[29] Canadian Broadcasting Act, § 3(1)(b).

[30] *Id.* at § 3(1)(d)(i).

[31] https://www.cab-acr.ca/english/keyissues/primer.shtm.

[32] https://www.cab-acr.ca/english/keyissues/primer.shtm; see also, http://www.mediaawareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm.

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The U.S. has the most robust and diverse radio system in the world which, among other things, has helped spawn the most lucrative recording industry in the world. The American commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not, and do not, receive any subsidy from the government or their listeners. Many, and in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government and tax dollars. The fact that under those systems the governments also chose to subsidize their own recording industries and national artists by granting performance fees and paying royalties from government-owned or subsidized stations does not mean this is an appropriate system for the U.S.

Under the Constitution, copyright protection is designed: "To promote the progress of science and useful arts."[33] There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound recordings in this country.[34] To the contrary, while many countries have such a tax and the United States does not, we are the most prolific producers of sound recordings in the world. In fact, the U.S. recording industry is larger than that of

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[33] U.S. Constitution, Article I, Section 8.

[34] A government study in New Zealand found that the extension of performers' rights by adding a right of equitable remuneration for performers like the one currently proposed, was unlikely to provide further incentives for those performers to participate in and create performances. Office of the Associate Minister of Commerce, Cabinet Economic Development Committee, Performers Rights Review, paras. 41-45 (NZ).

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the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance fee regimes.[35]

Proponents of a performance tax suggest that U.S. nationals can secure access to foreign revenue pools that sit overseas, just waiting for Americans to come claim them. But the idea that taxing broadcasters will somehow release these pools of royalties is a mere mirage. Countries that currently choose to deny the U.S. royalties on the grounds that the U.S. does not have a reciprocal right of public performance will likely continue to do so. Foreign nations that have a performance right in sound recordings generally have implemented a full performance right, which includes hotels, restaurants, nightclubs, etc. Expanding the current narrow U.S. performance right in sound recordings to include terrestrial radio broadcasts will significantly damage American broadcasters, but will not go far in achieving the full sound recording performance right that other countries are likely to demand before paying out any potential royalties.

The Recording Industry's Flagging Revenues Provide No Basis For Adopting a Performance Tax

The recording industry represents a classical oligopoly, where a small number of firms dominate the revenues of a particular industry. There are four major companies in the worldwide recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only U.S.-

[35] An Examination of Performance Rights, Albarron & Way, July 6, 2007 (hereinafter "Performance Rights Study") at 2.

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based company; the other three major players are foreign-owned.[36]

All countries have experienced a decline in physical music sales due to, among other factors, the growth of the Internet, peer-to-peer file sharing and piracy.[37] Although all of these factors have hurt the recording industry, there are no facts that suggest that radio broadcasters are to blame for the economic problems in the recording industry, nor that a performance fee on radio will in any way address the factors that have contributed to declining record sales.[38]

Moreover, things are starting to look up for the recording industry. The most recent report of IFPI takes a more optimistic tone than it has in years, as Chairman and CEO John Kennedy reports that "[t]he recorded music industry is reinventing itself and its business models. Our world in 2009 looks fundamentally different from how it looked five years ago."[39]

Many sectors of the music industry have experienced strong growth. According to the IFPI, digital shipments (the legal sale of online music, such as

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[36] Universal Music Group, a subsidiary of the French corporation Vivendi, is the dominant player in the recording industry, with a 31.6% market share in 2006. Sony/BMG, which is owned 50/50 by Sony of Japan and Germany's Bertelsmann, is second at 27.4%; Warner Music Group of the U.S. is third at 18.1% and the U.K.'s EMI is fourth at 12.2%. Together, these four companies control 87.4% of all of the revenue in the recording industry; a number of smaller, independent firms together account for just 12.6% of revenues in 2006. Performance Rights Study.

[37] Performance Rights Study at 3.

[38] Radio stations provide the recording industry with substantial additional revenues through fees they pay for simultaneously streaming their signals on the Internet.

[39] Digital Music Report 2009, International Federation of the Phonographic Industry (IFPI).

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through iTunes and other legal download services) grew by 85 percent in 2006 to $2.1 billion. In 2008, the digital music business internationally saw a sixth year of expansion, growing by an estimated 25 percent to $3.7 billion in trade value. According to Pollstar, U.S. concert industry ticket sales climbed steadily from 1998 to 2008 from slightly over $1 billion to over $4.2 billion. Single track downloads were up 24 percent in 2008 to 1.4 billion units globally, and digital albums were up 37 percent. The top-selling digital single of 2008 was Lil Wayne's *Lollipop,* with 9.1 million in unit sales. In fact, after the Grammy Awards, Universal Motown Records sent an email blast thanking local radio stations for contributing to Lil Wayne's success and helping him earn four Grammys -- "Thank You Radio" "4 Grammy Awards Last Night!!!"

In its 2008 Annual Report, Warner Music Group reported that its revenue grew by 39 percent to $639 million in fiscal 2008, and that the proportion of digital revenues continues to grow. Most significantly, IFPI reports on the "unflagging consumer demand for music." In the U.S., research by NPD Group found that total music consumption (both licensed and unlicensed) increased by one third between 2003 and 2007. According to Nielsen SoundScan reports, overall sales in the U.S. hit an all time high in 2008, with music purchases across all formats totaling $1.5 billion, up 10.5 percent.

What this data suggests is that the recording industry is finally beginning to adapt to changes in production, distribution and consumer behavior patterns. The explosion of digital sales, the proliferation of MP3 players, Internet activity and the comfort of younger generations with new technologies all suggest that

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new opportunities for profit abound. Profit margins generated by digital sales are actually larger than those associated with physical CD sales, and there are no longer physical constraints on inventory. Thus, independent artists are no longer restricted by a store's ability to carry expanded inventories that may or may not include their recordings. Combining these new opportunities for artists and record labels to succeed in the competitive marketplace with cost savings due to digital distribution, it is easy to conclude that potential revenue from paid downloading bodes well for the future of the recording industry.

The Impact of a New Performance Fee on Local Radio Broadcasters Would Harm the Health of Local Radio Stations Across the Country

Any past or current failings of the recording industry in adjusting to the public's changing patterns and habits in how it acquires sound recordings or difficulties with piracy were not problems created by local radio broadcasters, and local radio broadcasters should not be required, through a new tax or fee or royalty, to provide a new funding source to make up for lost revenues of the record companies. Indeed, the imposition of such a new fee could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the fee, stations could cut back on the amount of pre-recorded music they play or change formats to news, talk and/or sports, ultimately providing less exposure for music. This could not only adversely impact the recording industry, but the music composers and publishers as well.

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Sixty-eight percent of commercial radio stations in this country are located in Arbitron markets ranked 101 or smaller.[40] Many radio stations, especially in these small and medium sized markets, are struggling financially. It is these stations on which a new performance tax would have a particularly adverse impact. Were such additional fees imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

This would be the worst time to impose additional fees on local radio stations. As an industry totally reliant on advertising revenues, radio is feeling the impact of severely reduced advertising budgets that are a direct result of the current economic recession in the country. Across the industry as a whole, radio revenue fell by 9 percent in 2008.[41]

According to BIA, radio station revenues were $16.7 billion in 2008, the lowest in more than five years and part of a downward spiral that is now projected to be $14 billion in 2009. This compares to a high of $18.1 billion in 2006. To put this in perspective, there are approximately 13,000 radio stations in the U.S. that will share in that $14 billion in revenues. In the recording industry,

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[40] *Media Access Pro, BIA Financial Network Inc.*, data retrieved July 25, 2007.

[41] Analysts have recently forecast a 13 percent drop in radio revenues in 2009, and even that prediction may be "too optimistic." Radio Ink, *Analyst: Radio Revs Will Fall 13 Percent in 2009. Or More*, radioink.com (Jan. 7, 2009).

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the $10 billion in U.S. revenues is primarily split between only four large corporations.[42]

A performance tax would result in significant cuts at local radio stations, which would directly impact diversity of music played and diversity of station ownership. The recording industry and some Congressional supporters have argued in the past that, if a performance fee was adopted, stations could simply raise their advertising rates to get the money to pay for it. But that assumption was faulty then (if broadcasters could get more money for their advertising spots, why wouldn't they already be doing so to maximize revenues?), and it is even more faulty in today's radio environment. With the current recession, radio is reporting sales declines of as much as 20% from the prior year. Layoffs are hitting stations in almost every market. In this environment, it is difficult to imagine how any significant royalty could be paid by broadcasters without damaging their fundamental ability to serve the public – and perhaps threatening the very existence of many music-intensive stations.

Any Undercompensation of Performing Artists May Be the Result of Their Contractual Relationships with the Record Companies

Advocates for a performance tax often raise the specter of overworked and underpaid performers as the supposed beneficiaries of such a fee. The history of the treatment of performers by recording companies makes any assumptions that performers meaningfully would share in any largess created by

[42] According to a July 31, 2009 Recording Industry Association of America (RIAA) press release, "RIAA members create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States."

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a performance tax highly dubious at best. That history is replete with examples of record company exploitation of performers. Artists routinely sue to obtain royalties and benefits.

For example, the labels now insist on so-called "360 deals" between record labels and performers. These contracts allow a record label to receive a percentage of the earnings from all of a band or artist's activities (concert revenue, merchandise sales, endorsement deals, fan clubs, websites, artist management, publishing rights, etc.) instead of just record sales.[43] Any revenues that performer collect from a Performance Rights Act will simply go to offset what record labels are now acquiring through 360 deals.

Artists routinely sue their record labels for unpaid royalties. Soul legend Sam Moore and other artists previously sued record companies and the AFTRA Health and Retirement Funds (a separate entity from the union) for pension benefits. Moore's record label, which had sold his music for over 30 years, had never deposited a nickel into his pension because of convoluted formulas tied to royalties.

Musicians have declared bankruptcy not only because of lack of royalty payments from record labels, but also to free themselves from one-sided, byzantine contracts and accounting practices. The singing group TLC declared bankruptcy after they reportedly received less than 2 percent of the $175 million earned by their CD sales. Toni Braxton also declared bankruptcy individually in

[43] *See* http://www.economist.com/business/PrinterFriendly.cfm?story_id=9443082.

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1998. She had sold $188 million worth of CDs but received less than 35 cents per album.

Moreover, artists sign away all rights to their master recordings and rarely get the opportunity to reacquire them. Indeed, Sen. Orrin Hatch previously described the musicians' predicament with major labels as follows: "it's kind of like paying off your mortgage, but the bank still owns the house."[44]

Following are just some sample quotes from artists:

> "The recording industry is a dirty business – always has been, probably always will be. I don't think you could find a recording artist who has made more than two albums that would say anything good about his or her record company. . . . Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured. The record company gets all of its investment back before the artist gets a penny, you know. It is not a shared risk at all." (Don Henley, The Eagles, July 4, 2002, http://www.pbs.org/newshour/bb/entertainment/july-dec02/musicrevolt_7-4.html.)

> "What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts. . . . A bidding-war band gets a huge deal with a 20% royalty rate and a million dollar advance . . . . Their record is a big hit and sells a million copies . . . . This band releases two singles and makes two videos . . . . [The record company's] profit is $6.6 million; the band may as well be working at 7-Eleven . . . . Worst of all, after all this the band owns none of its work . . . . The system's set up so almost nobody gets paid . . . . There are hundreds of stories about artists in their 60s and 70s who are broke because they never made a dime from their hit records." (Courtney Love, Hole, 2000, http://archive.salon.com/tech/feature/2000/06/14/love/.)

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[44] See http://www.usatoday.com/life/music/news/2002-09-15-artists-rights_x.htm.

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> "Young people . . . need to be educated about how the record companies have exploited artists and abused their rights for so long and about the fact that online distribution is turning into a new medium which might enable artists to put an end to this exploitation." (Prince, 2000.)

Often the royalty distribution system for performance rights in sound recordings is skewed to the record companies as opposed to performers, and often the performers' allocation is heavily skewed to the top 20 percent of the performers.[45] A performance tax will take money out of the pockets of local radio stations and other business, and put it in the hands of record companies and a few top-grossing performers.

Even those countries with sound recording performance rights, which proponents of a performance tax often point to as models, have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists.[46] Imposing a new performance tax would not

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[45] AEPQ-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement - Summary, June 2007 at II.1.5.a.

[46] "Indeed, in the past ten years, there has been a growing mount of evidence to confirm that the economic status of artists has diminished under the prevailing copyright regimes, not only in the new countries of the EU25, but also in the north and east of Europe. They show that, with the exception of a few big stars, the majority of contemporary artists in Europe can not live from the supposed economic returns on their professional activities provided to them through copyright instruments." European Institute for Comparative Cultural Research, The Status of Artists in Europe, November 2006, p. 51. Not only this cited study but many other studies and evaluations undertaken since the 1980s, including more recent ones of the European Parliament in 1991, 1999 and 2002, have all recommended addressing the precarious socio-economic status of artists through other means, such as tax relief, labor laws, tailored social security frameworks, and unemployment benefits. *Id.* at 51-52. "[O]ne can wonder if performers' protection will really be increased where they are granted exclusive rights. Whereas the introduction of new rights provides for an improvement of the

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alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.[47] Moreover, creating new rights will never provide enough revenue to support artists, as the record labels continue to encroach on revenue streams that were once the dominion of artists (touring, merchandise, sponsorships, etc.).

As the labels insist on sharing in revenues that previously went solely to artists, the artists' share of the pie has decreased substantially. Now we are seeing both the record labels and performers searching for new sources of revenue. Both are trying to convince Congress to use the Copyright Act to impose a new obligation on local broadcasters, in the form of an additional fee for playing recorded music on free, over-the-air radio.

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legal protection, it remains unsure whether it achieves the cultural policy objectives of improving the socio-economic status of performers." Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, p. 64.

[47] "[D]espite the beneficial aspects that specific collective agreements introduced in some performers' contractual clauses, for most performers common use consists of having no alternative but to waive all their exclusive rights at once, for a one-off fee, on signing their recording or employment contract... [I]n practice most performers have to renounce the exercising of these rights to the benefit of those who will record and make further use of their performances." AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement - Summary, June 2007, p. 3. Germany has amended its law on copyright for the purpose of strengthening the contractual position of authors and performers, and France has considered the integration of labor law in copyright as a means to increase contractual bargaining power. Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, pp. 70-71.

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Conclusion

The relationship between the radio industry and the recording industry in the U.S. is one of mutual collaboration, with a long history of positive economic benefits for both. Without the airplay provided by thousands of local radio stations across America, the recording industry would suffer immense economic harm. Local radio stations in the U.S. have been the primary promotional vehicle for music for decades; it is still the primary place where listeners are exposed to music and where the desire on the part of the consumer to acquire the music begins.

Efforts to encourage Congress to establish a new performance fee come at a volatile time for both the radio and recording industries. Both industries are fighting intense competition for consumers through the Internet and other new technologies, and both industries are experiencing changes to their traditional business models.

A new performance fee would harm the beneficial relationship that exists between the recording industry and the radio industry. Together, these two industries have grown and prospered. The current frustrations of the recording industry in its ability to create new revenue streams are not sufficient justification for imposing a wealth transfer at the expense of the American broadcast industry, which has been instrumental in creating hit after hit for record labels and artists, and whose significant contributions to the music and recording industries have been consistently recognized by Congress over the decades.

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Statement of Ralph Oman

Pravel, Hewitt, Kimball and Kreiger Professorial Lecturer

in Intellectual Property and Patent Law

The George Washington University Law School

Before the Committee on the Judiciary

United States Senate

On

"The Performance Rights Act and Platform Parity"

August 4, 2009

Senator Feinstein, Senator Sessions, Chairman Leahy, and Members of the Committee, thank you for asking me to participate in today's hearing on an across-the-board public performance right for sound recordings, and on platform parity within the Section 114 statutory license. My name is Ralph Oman and I have taught copyright law at George Washington Law School for 16 years. Before my tenure at GW, I had the honor of serving as the Register of Copyrights of the United States for more than eight years. Before that assignment, I was the Chief Counsel of the Senate Subcommittee on Patents, Copyrights, and Trademarks. I am also the Chair of the Copyright Division of the ABA's Intellectual Property Law Section.

For me, today's hearing is déjà vu all over again. I have been involved in this issue since 1975, when my old boss, the Senate Minority Leader, Hugh Scott of Pennsylvania, supported a public performance right for performers and sound

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recordings and chaired a lively hearing that featured the sultry Julie London singing a cappella the Mickey Mouse Club theme song as a steamy love ballad. In fact, this issue reaches all the way back to the 1920s, when radio was in its infancy. The first performance rights legislation for sound recordings was introduced in 1926. Since that time, dozens of bills have been introduced to create this right, but none of them has made it across the finish line. In 1938, the ABA adopted its first resolution—the first of many—urging adoption of a public performance right for sound recordings.

Historically, one of the reasons that we have not enacted the public performance right for sound recordings has been the concerns of the songwriters, and the resulting unwillingness of Congress to pass a measure that could diminish their revenues. The songwriters, with good reason, were concerned that the broadcasters would try to evade any new obligation by simply dividing the royalties that the broadcasters currently pay to the songwriters for the public performance of the music, and giving one half to the songwriters and the other half to the performers and labels. Some of the broadcasters actually endorsed that idea, not recognizing that the two separate payments are intended for two distinct uses of two different copyrighted works. Happily, in the current draft of the bill, Chairman Leahy makes clear that the cut-the-baby-in-two approach will not be permitted. The bill explicitly states that the new public performance right for sound recordings will not in any way adversely affect the royalties payable to the songwriters.

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The fact that the NAB and the NABOB representatives are arguing so strongly against the measure indicates to me that they realize that they will not be able to simply divide the current royalty between the songwriters, on the one hand, and the performers and labels, on the other. So we are at least operating with a common understanding of the nature of the new right that Congress is about to create.

The songwriters have another legitimate concern—that the higher cost of recorded music will force some radio stations to dump their music formats and switch to talk radio, which would reduce the current income of the songwriters, and the potential income of the performers and labels. The accommodations made in the bill to assure low payments for a supermajority of the broadcasters in the country will help to address this concern and it should be noted that broadcasters do have to pay for talk programming -- unlike music today. Music is also by far the biggest draw for ad revenues. These factors, along with keeping the costs reasonable, ought to address this concern. No one has an interest in shutting down the broadcasters or limiting their programming options—not the songwriters, not the music publishers, not the performers, not the labels, not the Copyright Royalty Board, and certainly not Congress. All of them have an interest in keeping the over-the-air broadcasters strong and competitive. And that is very much in the public interest.

For more than 80 years, the arguments by broadcasters against this right have remained pretty much the same. They argue that by giving the sound recordings air time, they give the labels and the performers free publicity, which in turn leads to

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greater record and CD sales and a bigger box office for live concerts. But this broadcaster rationale is only superficially persuasive. It comes down to this: as a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid by the people who use their work. That's the basic premise of copyright protection.

Nowhere else in copyright law – and nowhere in American jurisprudence generally – can one business take another's private property without permission or payment because the user concludes unilaterally that long term it would be good for the property owner's business, even if the owner, because of blindness or stupidity, doesn't think so. In our case, some broadcasters think that they are doing the performers and labels a favor by creating promotional value. Who is the best judge of that quid pro quo, the broadcasters or the creators? The broadcasters' exemption runs counter to all other rules of business, and it runs counter to our legal system.

Over the years, Cabinet Secretaries, Trade Representatives, many Members of Congress, and many Registers of Copyrights have argued that we have no legal or economic justification for this anomaly in our law. Certainly, radio broadcasts promote other types of programming--such as sporting events—but the broadcasters do not argue that they need not negotiate and pay for a license to broadcast baseball games because the broadcasts help build a team's following and sell tickets to the game. They negotiate licenses in the normal course of business. The same practice makes sense for their use of sound recordings.

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Today, as in years past, broadcasters are claiming an inability to afford to pay any royalty to the performers, no matter how small. I do not mean to minimize the impact of a new performance right on broadcasters. Certainly, all businesses would prefer to get the products they use for free by claiming their particular use provides an indirect benefit to the maker of the product. But that rationale cannot excuse the failure to compensate the owner for the use of his or her property – especially when you are using it to make a profit for yourself. In addition, the bipartisan performance rights legislation introduced in this Congress bends over backwards to provide unprecedented accommodations to the broadcasters, including low flat fees for most broadcasters, some as low as one half of one percent of a broadcaster's revenue, with a delay in the effective date to allow broadcasters relief during these hard economic times, and long phase-in to give them the chance to ease slowly into their new partnership with performers.

In 1923, broadcasters refused to pay songwriters for the use of their compositions, just as they refuse to pay performers today, citing the now familiar "promotional value" argument. They lost that argument in court because the songs they used were protected under the Copyright Act. Today, the broadcasters do pay the songwriters, and rightly so. The promotional value argument rings just as hollow for recordings today as it did for musical compositions in the 1920s.

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Promotional value cannot justify free use. Instead, it should be a factor in determining the appropriate royalty, just as it is in market negotiations for other content that radio stations use, and as it is in the statutory licenses for other platforms, such as Internet radio. A broadcast performance right will finally put over-the-air broadcasters on the same level playing field as satellite, cable and Internet radio. All four should pay a reasonable royalty for the use of sound recordings, and the parties will take promotional value into consideration. This solution will establish the parity we need to ensure a competitive and robust marketplace for the distribution of music, and give consumers a rich menu of services from which to choose.

True parity also requires equal footing when it comes to figuring out how the rates for these different platforms should be determined. Today, due to a patchwork of provisions in the Section 114 license, we have a system of disparate rate standards among radio platforms. This is unnecessary, confusing, and unfair. Of course, different platforms reflect different business models and may wind up paying different rates, but the *standard* used to derive those rates should be constant and reflect the fair market value for the use of those works.

It is important to consider the goals of setting a royalty rate. Under normal circumstances in the marketplace, a user of property would negotiate terms of use with the owner and pay the market price. If the user provides promotional benefits, the parties would negotiate a price that takes that benefit into account. The Section 114 statutory license that governs satellite, cable and internet radio (and would be extended

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to cover over-the-air radio under the bill being considered today), was developed for the benefit of the users, the performers and labels, and, ultimately, the public. Instead of negotiating with individual copyright owners in the marketplace, the user would invoke the Section 114 license and save on transaction costs and pass on those savings to the public. In that way, music would be more broadly available.

But the statutory license was never intended to provide music at below market rates. The best rate standard for all radio platforms is the "Fair Market Value" standard proposed by Senator Feinstein in the PERFORM Act. Under the bill, the parties are encouraged to negotiate a royalty privately (which is always the preferred solution). If they fail to reach agreement, the Copyright Royalty Board steps in and does its best to estimate "Fair Market Value" by looking at marketplace evidence. Copyright owners and performers deserve nothing less for their works – especially when they have no choice but to allow their use. Because of the statutory license, they cannot just say "No" and walk away from the bargaining table, and that makes the negotiation a bit one-sided from the outset.

I understand that you, Senator Feinstein, and Senator Graham asked the stakeholders to get together and formulate a new rate standard. That effort led to a compromise provision adopted by the House Judiciary Committee in H.R. 848. That standard is a modification of the standard used today for satellite and cable radio. While this language is not ideal, it is a reasonable compromise that I would urge the Committee to incorporate into the Senate bill.

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One last point, if I may. This lack of a public performance right for sound recordings is a huge international embarrassment for the United States, and it costs us millions of dollars a year in lost revenues in foreign markets. I would urge you to consult with the U.S. Trade Representative as to the many advantages that would flow to the United States if we joined the almost unanimous international consensus in granting a public performance right for performers and sound recordings.

Congress has worked on the issue of performance rights for over-the-air broadcasts for many years. Finally, after decades of reflection and debate, we recognize the importance of balance in the allocation of rights among users and creators. The Performance Rights Act recognizes and protects the rights of creators, treats the broadcasters fairly and sympathetically, helps us meet our international obligations, and promotes the public interest. I would urge its early adoption.

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PANDORA

created by the Music Genome Project

U.S. Senate Committee on the Judiciary
Hearing on

"The Performance Rights Act and Parity among Music Delivery Platforms"

August 4, 2009

Statement of Pandora Media, Inc.
Oakland, California

We are writing to offer our support for the Performance Rights Act, legislation which addresses the fundamentally unfair radio royalty system currently in place.

As background, Pandora is the country's most popular Internet radio service. Since launching in the fall of 2006, over 30 million Americans have registered as users of our service.

The radio royalty system as it stands today is fundamentally unfair both to Internet radio services such as Pandora, which pay higher royalties than other forms of radio, and to musical artists, who receive no compensation at all when their music is played on AM/FM radio. We very much believe that artists should be compensated for the use of their product; however, it is terribly unfair that even under the recent pureplay settlement agreement a radio service such as Pandora has had to pay $35 million in Section 114 sound recording performance royalties in the less than four years since our launch while the vast majority of the radio business has paid nothing. We strongly support the establishment of a level playing field, a truly fair system, which would ensure fair competition among broadcast, satellite, cable and Internet radio by including a uniform royalty standard that applies to all radio services and all radio delivery technologies.

When deciding what royalty standard to include in S. 379, Pandora suggests adopting a standard that for 33 years has consistently yielded reasonable royalties for creators without threatening the economic survival of licensees. That standard, found at 17 U.S.C. 801(b)(1), requires royalty-setters to consider four factors that carefully balance the interests of creators, technological and business innovators, and the public. The House version of the PRA, H.R. 848, has already incorporated a modified version of this 801(b)(1) standard and we join the many constituencies who have expressed support for this compromise solution and urge its incorporation into S. 379.

We are pleased to see this Committee consider its support for the Performance Rights Act and address the closely related issues of platform parity and fair compensation for musical artists. We look forward to working with all parties to ensure that all platforms have an equal opportunity to grow, and to finally provide consumers with a fair and balanced marketplace.

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United States Copyright Office
Library of Congress • 101 Independence Avenue SE • Washington, DC 20559-6000 •www.copyright.gov

Written Statement of

Marybeth Peters
The Register of Copyrights

Committee on the Judiciary
United States Senate

111th Congress, 1st Session
August 4, 2009

"The Performance Rights Act and Parity among Music Delivery Platforms"

I appreciate the opportunity to submit my views in support of S.379, the Performance Rights Act. I believe that this legislation is long overdue and I urge the Committee to approve it. The Copyright Office has a long history of recommending extension of full performance rights to sound recordings.[1] While S.379 would not give sound recordings full performance rights similar in scope to those given to other categories of works, it would expand the performance right by requiring broadcasters to compensate performers and sound recording copyright owners for broadcast performances of sound recordings. Such an expansion is fully justified.

In 1995 Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[2] which, for the first time, granted to copyright owners of sound recordings a limited

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[1] For an account of the history of the efforts to recognize a public performance right for sound recordings and of the Copyright Office's recommendations on that issue over the past several decades, see *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary,* 108th Cong. 8-22 (July 15, 2004) (statement of David O. Carson, General Counsel, Copyright Office), also available at http://www.copyright.gov/docs/carson071504.pdf.

[2] Pub. L. No. 104-39, 109 Stat. 336 (1995).

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public performance right. While this was a good first step toward recognizing a public performance right for sound recordings, the scope of this right is not nearly as extensive as the scope of the public performance right we offer to literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works. Our treatment of the public performance right for sound recordings falls short of prevailing international norms as well. The United States is probably the only industrialized country that does not recognize performance rights for sound recordings, including performances made by means of broadcast transmissions.

In 2007, I urged Congress to expand the scope of the performance right for sound recordings to cover all analog and digital transmissions, including over-the-air transmissions, by broadcasters. I explained why the current exemption for terrestrial broadcasters is not justified in this day and age and recognized the need to establish parity among those commercial competitors who depend upon the use of sound recordings. I concluded that the best approach would be to grant copyright owners of sound recordings a performance right for all audio transmissions, both digital and analog, subject to a statutory license.[3] That is the approach taken in the proposed Performance Rights Act.

I would be pleased to assist the Committee in any way as it considers legislation that will address this important issue.

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[3] *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 111th Cong. 13-30 (July 31, 2007) (statement of Marybeth Peters, Register of Copyrights), also available at http://www.copyright.gov/docs/regstat073107.html.

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Dear Senator Sessions:

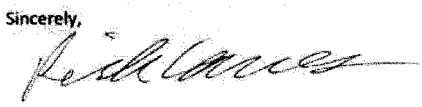
I write to you as president of the Songwriters Guild of America, the nation's longest established organization run by and for the benefit of American songwriters. Our members are extremely concerned over reports that certain amendments are about to be advocated by the Digital Media Association in hearings before the Senate Judiciary Committee on the proposed Performance Rights Act (S. 379) that would be extremely harmful to the interests and livelihoods of American songwriters. As such, we write to urge the Committee not to entertain such changes.

For many decades, songwriters and composers, through their performing rights organizations ASCAP, BMI and SESAC, have had in place a well-established regime for licensing the public performance right in musical works to terrestrial radio broadcasters. This income steam is of vital importance to the American songwriter community, and it is imperative to us that any legislation not jeopardize this existing licensing regime.

To that end, from the very beginning of this legislative process, the position of the American songwriter community has been that the Performance Rights Act must include ironclad -- and enforceable -- language guaranteeing that songwriters' livelihoods will not be harmed as a result of the proposed new public performance right in sound recordings. Songwriter support of the bill is conditioned on the inclusion of the protective language currently included in S. 379.

Thank you for you kind consideration, and please feel free to call upon SGA to address any questions you may have.

Sincerely,



President

Songwriters Guild of America

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Testimony
of
JAMES L. WINSTON
Executive Director and General Counsel
of the
NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS, INC.

Hearing on
"THE PERFORMANCE RIGHTS ACT AND PARITY AMONG MUSIC DELIVERY PLATFORMS"
Before the
Committee on the Judiciary
of the
United States Senate
August 4, 2009

Good Morning Chairman Leahy, Senator Feinstein and members of the Committee. My name is James Winston, and I am the Executive Director and General Counsel of the National Association of Black Owned Broadcasters, Inc. ("NABOB"). I thank you for inviting me to testify this morning.

NABOB is the only trade association representing the interests of the 240 radio and 10 television stations owned by African Americans across the country. The association was organized in 1976 by African American broadcasters who desired to establish a voice and a viable presence in the industry to increase minority station ownership and to improve the business climate in which these stations operate. Throughout its existence, NABOB has been involved in Congress's efforts to promote diversity of ownership within the broadcast industry. Unfortunately, in recent years we have seen a substantial decline in the number of minority companies owning broadcast stations.

You have invited me today to discuss imposing additional copyright royalty obligations upon radio broadcasters. The radio industry currently pays approximately $550 million in copyright royalties to the music industry for the right to play music on our stations. I do not have figures specifically for minority owed stations, but we pay our fair share of that amount.

In the discussion of additional copyright fees, the broadcast industry has consistently been portrayed as one in which all of its participants make huge profits, and imposing additional copyright royalty payments on the industry merely skims a little off of these fat profits. For minority broadcasters there are no fat profits to skim. In fact, most minority broadcasters today are struggling to survive.

Therefore, I come before the Committee today to describe the current state of minority broadcasters and the issues that threaten to further erode minority broadcast station ownership. As a result of these threats, as I shall explain below, NABOB requests that the Committee consider

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investigations of the principal lenders to the broadcast industry, and of the Arbitron ratings company, which has a monopoly over radio ratings. It is my hope that once you understand the current plight of minority broadcasters you will understand why it is impossible for us to agree to pay additional copyright royalties.

I. Minority Broadcasters Need Relief from Lenders Unwilling to Enter Into Fair and Reasonable Loan Workout Arrangements

The economic recession has hit minority broadcasters hard. Advertisers have substantially cut their advertising budgets, which means that these companies are spending less money advertising on most radio and television stations. Stations serving minority audiences are most affected by this, because advertising targeted toward minority audiences has historically been a secondary advertising consideration for most major advertisers. When advertisers cut their budgets, they frequently begin with the budgets targeting minority audiences.

As advertising revenues fall, the broadcast companies soon find themselves having difficulty with their lending institutions. Most broadcasters have substantial amounts of debt incurred in acquiring or upgrading their stations. The loan agreements entered into when the debt is acquired usually contain covenants which require the broadcast companies to maintain a specified minimum amount of cash on hand as a ratio to the amount of debt, and to maintain other specified ratios. When revenues fall, companies often find themselves unable to maintain these minimum cash positions, and they become in technical violation of their covenants. These loan agreements define failure to maintain these covenants as an event of default, which means that a company can be placed into default even though it has not missed making a single loan payment.

When a broadcast company is in default under its loan agreements, lenders have the right to initiate litigation to foreclose on the loan and seize the broadcast company's stations. Technical defaults are not something new in broadcasting. Broadcast companies and lenders have gone through these periods during previous recessions. However, the situation today is quite different from prior periods in several major respects.

There is a new breed of lender in the broadcast industry today – hedge funds. Historically banks have been the primary lenders to the broadcast industry, and when making substantial broadcast loans banks have formed consortia, with one bank acting as the lead, getting other banks to make part of the loan to distribute the risk. In recent years, banks have brought in hedge funds to make part of the loan. In good times, the existence of hedge funds in the consortia was of no consequence. However, now that we are in the worst recession since the Great Depression, the existence of hedge funds in these broadcast loan consortia has had a very negative effect.

Hedge funds tend to operate with very short investment horizons. With the stock market at a very low level, hedge funds are no longer providing the high returns that drew investors to them, and the hedge funds are being pressured by investors demanding their money back. This causes the hedge funds to look for quick liquidity and changes the traditional relationship between broadcasters and lenders. Historically, in a recession, banks have been willing to engage in workouts, which

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restructured loans with broadcasters. Such restructuring frequently extended the term of the loan and adjusted interest and principal payments so that the broadcast company could reduce its payments until the economy improved.

Hedge funds, because of their interest in gaining quick liquidity in the current recession, are refusing to make the traditional loan workout concessions needed for broadcast companies to weather the recession. Instead, minority broadcast companies find themselves being threatened with foreclosure unless they sell stations at fire sale prices or turn over ownership and control of their companies to the lenders. For some minority owned broadcast companies, a filing under Chapter 11 of the Bankruptcy Code may be their only defense. Obviously, none of these options serves the goal of diversity of ownership in the broadcast industry.

Therefore, I am here to request that this Committee investigate the practices of the leading lenders to the broadcast industry: lenders, such as Goldman Sachs, GE Credit, Wachovia Bank, Wells Fargo, J.P. Morgan Chase, and Bank of America. While these companies are not hedge funds, they have allowed hedge funds into their consortia and now are acting at the behest of the hedge funds in refusing to enter into workout arrangements that will provide minority broadcasters an opportunity to keep their companies intact and restructure their loans for a brief period until the economy turns around.

The reasonableness of this request is underscored by the fact the companies listed above are all beneficiaries of government relief through billions of dollars of Troubled Asset Relief Program ("TARP") funds. The purpose of TARP was to provide these banks some relief so that they could return to financial stability and begin making reasonable lending decisions again. The relief NABOB is seeking today is exactly the result TARP was intended to provide. Thus, it is reasonable for the Committee to investigate why these TARP beneficiaries are unwilling to restructure the loans of minority broadcasters in accordance with the objectives of TARP.

Alternatively, NABOB requests that the Committee help NABOB seek assistance from the Treasury Department or Federal Reserve under one of their programs, such as the Term Asset-Backed Securities Loan Fund or the Commercial Paper Funding Facility, which provide loan guarantees for businesses.

II. Minority Broadcasters Need Fair and Accurate Ratings from Arbitron's New PPM Audience Measurement System

If financial relief were the only major problem threatening the survival of minority broadcasters, I would be here today asking for your assistance, because this single problem has the potential to decimate the ranks of minority broadcast station owners. Unfortunately, minority broadcasters face an additional threat that is equally important for us to bring to your attention. This second threat is posed by Arbitron, Inc., an audience measurement company that for decades has been the sole provider of audience measurement data for the radio industry.

Arbitron maintains a monopoly over the business of measuring the audiences of radio

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stations, which means that, if radio stations do not subscribe to the Arbitron ratings service, those stations will have no ratings data to present to advertisers who purchase advertising time on radio stations.

Recently Arbitron developed the Portable People Meter ("PPM"), an electronic tracking device (slightly larger than a pager) that persons who agree to participate in their survey panel carry with them throughout the day – generally clipped to a belt – which records signals from the radio stations that they encounter. At the end of each listening day, panelists are required to place their PPM device into a docking station that transmits the recorded data to Arbitron for tabulation. Arbitron compiles PPM data on a weekly basis and then releases ratings reports based on a four week average approximately two weeks after the close of each month. Arbitron intends to replace its existing Diary service with PPM in the top 50 radio markets in the U.S. by the end of 2010.

Under the Diary system respondents are provided paper "diaries," in which panelists confidentially record their radio listening habits by hand. In contrast to PPM, where panelists remain in the sample for up to two years, in the Diary system, respondents are mailed a log in which to write down the radio stations they listen to over a one week period and then return their diaries to Arbitron at the end of the week. The next week, Arbitron uses an entirely different sample group. Arbitron mails diaries to thousands each week and tabulates the results of the diaries over a 12 week ratings period; then it compiles the information in ratings books which are released each quarter.

Arbitron's ratings are the "currency" that is used by commercial radio stations to price and sell advertising time and sponsorships to media buyers.

The problems created by inaccurate audience measurement services are not new to Congress. In 1964, Congress created the Harris Committee which held hearings to address the issue of research auditing. Seeking to avoid a legislative intervention, Congress asked the advertising and media industries to develop a voluntary organization to ensure fair and accurate ratings. In response, the industries created a nonprofit organization called the Media Rating Council ("MRC").

The MRC conducts audits designed to scrupulously analyze every element of an audience measurement service and employ stringent safeguards, including specific voting policies, staff executed process controls and formal appeal procedures, to ensure that accreditation decisions are based only on merit. To that end, participating audience measurement firms are required to provide full transparency to the audit team and staff of the MRC.

Accreditation by the MRC is intended to ensure that an audience measurement service and its implementing methodology have met the minimum standards for reliable audience measurement research as established by the industry itself. Yet, in the two and a half years since Arbitron prematurely released PPM into the market, Arbitron has failed to achieve accreditation in almost all markets in which PPM has been released. PPM initially did receive MRC accreditation in the Houston-Galveston market utilizing a different recruitment methodology with an address-based sample. Subsequently however, Arbitron abandoned address-based sampling and in-person recruitment in all other PPM markets. In all other PPM markets, Arbitron has deployed a sampling

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methodology predicated on telephone-based recruitment which is cheaper to implement than Houston's accredited, address-based recruitment methodology.

Arbitron's telephone-based methodology is entitled "Radio First." Radio First relies on random digit dialing, which is a computer process that generates landline telephone numbers based on known area codes and exchanges for the relevant market area. Of the 15 markets where PPM is now in commercial use, Arbitron's Radio First recruitment methodology has achieved accreditation in only *one* of those markets, Riverside-San Bernardino, a relatively small market. In all other markets, including the top five markets of New York, Los Angeles, Chicago, San Francisco and Dallas-Fort Worth, Arbitron has not yet received accreditation by the MRC.

Initial results from the PPM measurements have shown such huge rating declines for stations serving Black and Hispanic audiences that the financial survival of these stations is at stake. Moreover, the financial survival of every minority station in future PPM markets could be at stake if Arbitron is allowed to continue the rollout of PPM across the nation in the form it has been initially introduced.

The damages to minority broadcasters that I am referring to are not theoretical – they are real, quantifiable and devastating.

Since PPM became operational in New York in October 2008, minority broadcasters have experienced an average 40 – 60% drop in their average quarter hour ratings ("AQH"); coupled with a corresponding drop in the average rates minority broadcasters are able to charge to advertisers who have been unwilling to accept higher ad rates to reach what appears to be a smaller audience. Spanish Broadcasting System ("SBS") owns two stations in the New York market: WSKQ reports a 55% decline in its AQH Rating year-to-year; and WPAT has experienced a 67% decline in its AQH Rating year-to-year. In the New York market alone, SBS has been forced to reduce staff by 37% as a result of corresponding revenue declines.

Recent estimates indicate advertising revenue in the New York market is down on average by approximately 28%. However, while radio industry revenues as a whole are down given the current economic crisis, NABOB member Inner City Broadcasting Corporation estimates that the introduction of PPM is responsible for an *additional* 30% revenue loss for its stations as compared to the general market. Since the introduction of PPM in New York, Inner City has significantly reduced the staff of its programming departments. And Inner City's San Francisco station, KBLX, has been forced to lay off 13% of its staff and cut salaries by 10%.

In Los Angeles, the outlook is just as grim. NABOB member KJLH(FM) in Los Angeles, owned by Stevie Wonder, has seen its revenue fall dramatically, over 48% year-to-date since PPM was introduced in LA, almost twice the average revenue decline in the overall Los Angeles market, which is estimated at approximately 29%. Shrinking cash flow has forced KJLH to lay off 13% of its staff, the majority of whom have been cut from its programming department, including the elimination of news segments, traffic announcers, promotions coordinators, producers, a co-host and overnight disc-jockeys. Under the Diary system, the station's audience share was around 1.3 percent,

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but dropped to 0.4 percent when PPM came into the market. As a result of Arbitron's switch to its PPM ratings service, KJLH lost over 70 percent of its market share – (representing approximately 100,000 listeners) essentially overnight. The financial impact of such ratings declines is huge. The Southern California Broadcasters Association indicates that under the Diary service, a rise or drop of just 0.1 share points translated into a corresponding increase or decrease of $1.2 million in annual revenue.

Because of the disproportionate impact that PPM has had on minority owned broadcasters, the Attorneys General of New York, New Jersey and Florida have sued Arbitron for implementing its PPM system in those states. The Attorneys General alleged fraud, a deceptive business practice, false advertising, and discrimination on the basis of race and national origin. The suit in Florida is pending. The Attorneys General and Arbitron settled the law suits in New York and New Jersey, and the Maryland Attorney General also entered into a settlement with Arbitron, prior to actually filing suit. The settlements require Arbitron to make improvements in the PPM service. Unfortunately, the settlements only apply in the states in which they were entered. In addition, Arbitron still lacks MRC accreditation for PPM in each of the states in which it has entered into settlements as well as almost all other markets in which it is being used.

Recognizing the potential negative impact upon its statutory obligation to promote diversity of ownership in the telecommunications industry, the Federal Communications Commission ("FCC") has initiated a Notice of Inquiry to investigate PPM. However, the FCC has only limited regulatory authority, and the problem created by PPM may need Congressional action to be adequately addressed.

After hearing that PPM has been investigated by four attorneys general and is currently being investigated by the FCC you might ask, "Why is Arbitron putting out a product that is receiving such a negative reaction from government investigators and its own customers?" This is a good question and the answer will not surprise you – money. Many independent researchers have examined the PPM system and determined that Arbitron has attempted to create a product that can be produced cheaply instead of producing an accurate product. (Of course, the product is priced 65% higher than Arbitron's Diary service.) Arbitron's PPM system uses a telephone-based system directed at landline phone numbers. However, many Americans no longer use landline telephones, they only use cell phones, and those cell phone only households are not ordinarily picked up in Arbitron's sample. In addition, the sample size of panelists being used by Arbitron is too small to adequately represent minority groups.

While Arbitron claims to be taking measures to sample more cell phone only households, the cell phone only problem highlights the fundamental problem with Arbitron's PPM system – it does not use address-based sampling and in-person recruitment. Address-based sampling and in-person recruitment have been demonstrated to be the most effective ways to reach young and minority audiences. However, these sampling and recruitment methods are more expensive to implement than PPM's landline telephone sampling and recruitment.

Thus, Arbitron has gone for a "quick and dirty" approach, as opposed to the most accurate

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approach, and Arbitron continues to roll-out a sub-standard product with a flawed sampling methodology to the detriment of the radio broadcast industry and the radio listening public. Additionally, Arbitron has continually failed to meet its own self-established benchmarks for improving its PPM sampling of minority radio listeners and continues to take lackluster steps to offer improvements to its recruitment methodology. As a result, minority radio stations continue to experience precipitous declines in ratings and above average revenue losses as compared to the overall market.

NABOB is not opposed to the introduction of electronic measurement for radio. Let me repeat --NABOB is not opposed to electronic measurement. Arbitron contends that NABOB is opposing progress, which is a disingenuous assertion intended to deflect attention from NABOB's true objection -- the faulty implementation of electronic measurement. NABOB believes that, if implemented properly, electronic measurement could indeed lead to improved information and data. However, Arbitron has not implemented PPM correctly, and the refusal of the MRC to accredit it only reinforces the accuracy of NABOB's assessment.

Arbitron has rolled out an electronic measurement system established by taking short cuts and cost-saving measures that have compromised the potential of its product and the information and data it has released into the marketplace – all at the expense and harm to minority broadcasters.

The failure of Arbitron to obtain MRC accreditation in 13 of the 15 markets in which it is being used calls for investigation by this Committee. NABOB therefore requests that the Committee investigate the PPM methodology and obtain information on the PPM accreditation process from Arbitron and the MRC. (There is precedent for such a request. Congress requested such information from the Nielsen rating company and the MRC when Nielsen's Local People Meter was being investigated by Congress in 2004.)

If Arbitron is allowed to move forward issuing flawed reports on African American and Hispanic audiences, it will result in huge financial losses for the radio stations serving those audiences and might even force some stations out of business. This would be a tremendous loss for the communities that rely on those stations. The stations serving the African American and Hispanic communities are the voices of those communities. They carry the messages of those communities on social, political, economic, health, and all other issues of concern to those communities. Without stations serving them, the African American and Hispanic communities will become even more isolated and ignored by mainstream media than they are already.

III. Conclusion

These two problems, the refusal of lenders to restructure broadcast loans to allow these otherwise healthy businesses to weather the current recession, and Arbitron's abuse of its monopoly position in the radio ratings industry, are more than an antitrust issue for this Committee, they are more than a business crisis for African American and Hispanic station owners; they are a civil rights crisis for all of America. Without minority communities with strong, vibrant, independent voices, America loses an important part of what makes our democracy great – a government in which all of

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its people participate and are heard.

I hope that this insight into the current state of our industry will help the Committee understand why it is impossible for minority broadcasters to consider paying additional copyright royalties at this time.

Thank you for the opportunity to appear before you today.

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