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MUSIC LICENSING UNDER TITLE 17 (PART I & II)

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

JUNE 10 AND JUNE 25, 2014

Serial No. 113–105

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MUSIC LICENSING UNDER TITLE 17 (PART I)

TUESDAY, JUNE 10, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, the Honorable Howard Coble, (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Smith of Texas, Chabot, Issa, Poe, Chaffetz, Farenthold, Holding, Collins, Nadler, Conyers, Chu, Deutch, Bass, DelBene, Jeffries, Cicilline, Lofgren, Jackson Lee, and Cohen.

Staff Present: (Majority) Joe Keeley, Subcommittee Chief Counsel; Olivia Lee, Clerk; (Minority) Heather Sawyer, Minority Counsel; and Jason Everett, Counsel.

Mr. COBLE. Good morning, ladies and gentlemen. Welcome to the first of two hearings on music licensing issues. Probably everyone here knows that I am an avid bluegrass fan, and country music, as long as it is old-time country. I am dating myself chronologically when I say that. I know that many of you will welcome our new and veteran witnesses today.

Although every industry goes through changes over the years, I think everyone would agree that the music business has seen more than its share of changes over the past decade or two. Many of us grew up in a world where we looked forward to buying our favorite albums at the local record store. Today's youth may not even know what a record store looks like, since they prefer to download from iTunes or stream it on Pandora.

However, times change, and I am glad to see that the music industry continues to adapt to the preferences of its fans and making new music available. However, the current licensing system hasn't changed. Many feel that our music licensing laws were designed for a world that existed decades ago and have become outdated. Music lovers can now access music virtually anywhere on an ever-changing variety of devices.

I may be old—I am old—but I am also old-fashioned in my view our copyright laws should provide access to music and still protect the interest of copyright holders. This is a traditional view of compulsory licenses, and I see no reason why we cannot restore this

balance. If not, we know consumers will resort to pirate sites on the Internet for their respective music.

Finally, there are some longstanding issues in the music business that I feel are important for Congress to address, how royalty rates are determined, who pays music royalties, and how older music works are treated under Federal copyright law.

I have also been a friend of broadcasters for some time, and I hope that the broadcasters and the music industry can find a way to work together to resolve their common issues.

In closing, I did want to thank our panel this morning for making time available for this hearing. While I would prefer to spend the next few hours learning about how to make bluegrass music more popular, I will instead spend the next few hours learning about how to make all music more popular.

Again, I thank you, the panelists, and those others in the audience for your presence today.

I yield back, and I recognize the distinguished gentleman from Michigan, Mr. Conyers, for his opening statement, and then I will get to the gentleman from New York.

Mr. CONYERS. Well, thank you, Mr. Chairman and Ranking Member Nadler. This is an important hearing and it is good that everyone is here. I worked with Congressman Holding of North Carolina to introduce H.R. 4772, the RESPECT Act, which addresses a loophole that allows digital radio services to broadcast recorded music before February 15, 1972 without paying anything to the artists and labels that created it. This bill would assure that legacy artists and copyright owners of all works, whether recorded before or after February 15, 1972, are compensated by those who benefit from the Federal statutory license.

The current failure to pay these legacy artists is shameful, and it is harmful to communities like mine, Detroit, which has so many artists who were at the forefront of the industry and should be compensated fairly for their groundbreaking work. Taking someone else's labor and not paying is simply unfair, and this bill seeks basic fairness for artists who created sound recordings before 1972.

A related issue that must be examined is whether our efforts to improve the music licensing scheme will be, in fact, truly fair if it does not include performance rights for some recordings. It is no secret I am a strong supporter of artists and believe that the current compensation system on terrestrial radio AM and FM isn't fair to artists, musicians, or the recording labels.

When we hear a song on the radio, the individual singing the lyrics or playing the melodies receives absolutely no compensation. Every other platform for broadcast music, including satellite radio, cable, Internet, web casting, pay a performance royalty. Terrestrial radio is the only platform that doesn't do this. This exemption from paying a performance royalty to artists no longer makes any sense, if it ever did, and unfairly deprives artists of the compensation they deserve for their work.

We have a diverse panel of experts. I join with our Committee in welcoming them and look forward to hearing them and to working with my colleagues to ensure that the music licensing process is fair and does not have unintended consequences that harm artists or producers.

Thank you for allowing me to make this statement at this time.

Mr. COBLE. I thank the gentleman from Michigan.

The Chair now recognizes the Chairman of the full Judiciary Committee, the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman, and good morning to everyone. Welcome to the Subcommittee's first copyright review hearing on music licensing.

Last Monday, the Subcommittee traveled to New York City to learn about the first sale doctrine. One of the issues we discussed was the applicability of first sale to the digital environment, including music. As we heard at that hearing, consumer expectations have changed substantially in the digital era. Probably in no other area of copyright law have consumer expectations changed more than in how consumers access music.

In a world of instant and constant access to entertainment options on Internet-connected devices, laws that hinder or stunt access to legal music not only hurt consumers, but also the artists and the services that provide music to consumers. Unfortunately, consumers who want to be able to easily access their favorite songs anytime on all of their digital devices face a legal framework written for the world of vinyl albums and 8-track tapes.

Problems that have emerged from this current legal framework include, among others: a lack of a unified, robust, and easily accessible source of ownership records upon which music delivery services can be built; uncertain dividing lines between mechanical and performance rights; artists being treated differently under the law depending upon when a work was created; artists and music delivery services being treated differently under the law depending upon how music is delivered; artists and music delivery services being treated differently under the law depending upon when a music service first began operation; and an overall lack of transparency in the industry regarding how revenue is accounted for.

During today's hearing, we will primarily focus on the rights and legal regime associated with musical compositions. We will hear from a broad spectrum of stakeholders, from songwriters to those who collect revenues on their behalf to those who deliver the musical works to consumers in new and innovative ways.

Interested parties from across the spectrum have recognized a need for changes in how our nation's copyright laws, as they pertain to music, are structured. Some have called for tweaks to our current licensing regime, while others have called for more fundamental changes, such as moving toward a more free market approach. I look forward to learning more about both the problems plaguing the current framework and possible solutions to these problems.

And I thank you all again for making the time to be here this morning, and I yield back.

Thank you, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The Chair now recognizes the distinguished gentleman from New York, Mr. Nadler, for an opening statement.

Mr. NADLER. Thank you, Mr. Chairman, for holding this hearing on music licensing under Title 17 as part of the Committee's comprehensive copyright review.

I am sorry this hearing, as well as the last, is not in New York, because everything is better in New York, but we have to make due.

This is the first of a two-part hearing, which is fitting, as these sections of the Copyright Act are very much in need of scrutiny. It is often said that if we started from scratch, nobody would write the law as it stands today. Music copyright and licensing is a patchwork of reactions at different times to changing technologies. From the development of player pianos and phonograph records to the advent of radio and the Internet, the law has constantly been playing catch-up, and quite often failing.

Today, terrestrial satellite and Internet-based radio stations deliver music to listeners in their cars, homes, and at work. Each of these uses of music require licenses from copyright owners for both the underlying musical work and the sound recording, with the rights to each often owned or managed by different individuals or entities. Over time and in an effort to help ensure equity and access in this complicated universe, Congress has created a statutory licensing scheme. Unfortunately, the existing landscape is marred by inconsistent rules that place new technologies at a disadvantage against their competitors and inequities that deny fair compensation to music creators.

Under current law, for example, the rules vary from payment of royalties by Internet broadcasters, cable radio and satellite radio providers. Internet broadcasters like Pandora pay royalty rates set to reflect a willing buyer and willing seller model. By contrast, the rate for cable and satellite providers is established through factors set in 1998 that predated the development of Internet radio and that many believe results in a below-market royalty rate.

As a result, Pandora has fairly complained that it is at a competitive disadvantage, and creators whose works are accessed through cable or satellite receive less than when a consumer streams that same work over the Internet.

During the last Congress, I circulated draft legislation, the Interim FIRST Act, to establish parity among all digital radio services. The Songwriter Equity Act, recently introduced by Representatives Collins and Jeffries, would similarly modernize the law to ensure that the same willing buyer/willing seller standard governs songwriters' and music publishers' mechanical reproduction royalties.

Other provisions of the Copyright Act prevent songwriters and publishers from providing evidence in Federal rate court under consent decrees governing licensing of their works that came into existence in 1941. The Songwriter Equity Act would remove that evidentiary ban, thus helping songwriters obtain a fair market value for their work.

In the meantime, the DOJ, the Department of Justice, just announced a much-needed review of the consent decrees that govern ASCAP and BMI, two of the performance rights organizations responsible for collecting and distributing royalties.

Meanwhile, nobody is paying artists who recorded many of our culture's greatest musical classics before 1972, like Aretha Franklin or the Birds or the Temptations. The RESPECT Act, recently introduced by my colleagues, Representatives Holding and Conyers,

would close an existing loophole in the law that has allowed digital providers to argue against paying any royalties for these great legacy artists.

Of course, one of the most glaring inconsistencies and injustices is that our performing artists, background musicians and other rights holders of sound recordings receive absolutely no compensation when their music is played over the air on terrestrial—meaning AM/FM—radio. Congress required payment when sound recordings are transmitted digitally in 1995, but we have yet to extend this basic protection to artists when their songs are played on FM or AM radio.

This is incredibly unjust. The bottom line is that terrestrial radio profits from the intellectual property of recording artists for free. I am aware of no other instance in the United States where this is allowed, and it needs to be remedied. We are on a very short list of countries, a list that includes such wonderful models as Iran, North Korea, and China, that do not pay performing artists when their songs are played on the radio. And when American artists' songs are played in Europe or any other place that does provide a sound recording right, these countries withhold performance royalties from American artists since we refuse to pay theirs.

This Committee's copyright review and the parallel proceedings at the Commerce Department and the Library of Congress have revealed an extraordinary and bipartisan consensus in favor of performance rights. As Registrar of Copyrights Maria Pallante testified earlier this Congress, this issue is ripe for resolution.

Although the existing music licensing and copyright scheme can be difficult to understand, the solution is quite simple. If Congress is going to maintain compulsory licensing, then any statutory rate standard should attempt to replicate the free market to the greatest extent practicable, and the same rules should apply to everyone. The law should be platform neutral and all music created should be fairly compensated.

It is well past time to harmonize the rules and put an end to Congress creating arbitrary winners and losers. There have been several proposals to address individual inequities in the music landscape, some of which I just outlined that I support. But if we are to rationalize the law and level the playing field, we should take a comprehensive approach.

At this year's Grammys on the Hill event, Neil Portnow, who is here with us today, called for the industry to coalesce behind the music omnibus or MusicBus. This call for unity was later echoed by Republican Whip Kevin McCarthy and Democratic Leader Nancy Pelosi, who agreed that the time has come for Congress to address these issues in one package. I agree, and I plan to take up their charge. With colleagues on both sides of the aisle, I am developing legislation to address the various problems in existing law in one unified bill, bringing fairness and efficiency to our music licensing system and assuring that no particular business enjoys a special advantage against new and innovative technologies.

Consumers don't know that the button they push on their car dashboard or smartphone arbitrarily determines how much artists and songwriters will be paid, assuming they will be paid at all. We can create a better system for radio competitors, for artists and

songwriters, and for fans, all of whom depend on a vital, healthy market for music and music services.

We have a wide range of witnesses here today and at our second hearing scheduled for June 25th. I look forward to their testimony, and I hope that we can all come together to agree on and pass meaningful, comprehensive reform.

Thank you, Mr. Chairman, and I yield back the balance of my time.

Mr. COBLE. I thank the gentleman.

All other opening statements, without objection, will be made part of the record.

We have a distinguished panel today, seven in all, and I will begin by swearing in our witnesses prior to introducing them.

So if you would, gentlemen, please stand, and I will submit the oath to you.

[Witnesses sworn.]

Mr. COBLE. Let the record show that all answered in the affirmative.

I will now introduce the witnesses.

You may be seated, gentlemen.

Our first witness this morning is Mr. Neil Portnow, President and Chief Executive of the Recording Academy. Prior to joining the Recording Academy, Mr. Portnow served as Vice President of the West Coast Division of Jive Records. Mr. Portnow received his degree from George Washington University.

Mr. Portnow, good to have you with us.

Our second witness is Mr. Lee Thomas Miller, Songwriter and President of the National Songwriters Association International. Mr. Miller is a three-time Grammy Award nominee and has written country singles that have reached Number 1. He received his Bachelor's degree in music theory and composition from Eastern Kentucky University.

Good to have you, Mr. Miller.

Our third witness is Mr. David Israelite, President and Chief Executive Officer of the National Music Publishers Association, where he protects and advances the interests of music publishers and songwriters in matters relating to domestic and global protection of copyrights. Mr. Israelite received his B.A. in Political Science and Communication from the William Jewell College, and his J.D. from the University of Missouri Columbia Law School.

Our fourth witness is Mr. Michael O'Neill, Chief Executive Officer of BMI, also known as Broadcast Music, Inc. In his position, Mr. O'Neill oversees all of BMI's domestic and global business operations and directs the company's strategic growth. Mr. O'Neill received his undergraduate degree in Business Administration from the Mt. Claire University and his MBA from Rutgers University.

Our fifth witness is Mr. Lee Knife, Executive Director of Digital Media Association, also known as DiMA. Prior to joining DiMA, Mr. Knife practiced entertainment law in New York for 20 years, representing individual songwriters, recording artists and producers. Mr. Knife earned his B.A. from St. John's University and his J.D. from the Brooklyn School of Law.

Our sixth witness is Mr. Will Hoyt, Executive Director of the TV and Music License Committee. Prior to joining the Television and

Music License Committee, Mr. Hoyt spent 25 years as the executive for Nationwide Communications, Inc. He was graduated from the Ohio and Western University and received his J.D. from Ohio State University School of Law.

Our seventh and final witness is Mr. Jim Griffin, Managing Director at OneHouse LLC. Mr. Griffin consults extensively on digital music, media registries, and scholarly publishing. Prior to OneHouse, he served as President of Music Licensing at Warner Music Group. Mr. Griffin received his degree from the University of Kentucky.

Gentlemen, we have a full roster here today. Good to have all of you with us.

To assist you, there will be a timing panel on your desk reflecting certain lights. When the light goes from red to yellow—strike that. When the light goes from green to yellow, that is your warning that you have 1 minute remaining and the ice on which you are skating is becoming increasingly thin. You won't be keel hauled, however, but when that yellow light appears, that gives you notice that 1 minute is upcoming. So if you all would comply with that, we would be appreciative.

Mr. Portnow, we will now commence with you.

And again, thank you all for being here.

TESTIMONY OF NEIL PORTNOW, PRESIDENT/CEO, THE RECORDING ACADEMY

Mr. PORTNOW. Thank you, Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee. My name is Neil Portnow, and I am President——

Mr. COBLE. Mr. Portnow, you might pull that mic a little closer to you, if you would.

Mr. PORTNOW. My name is Neil Portnow, and I am President and CEO of the Recording Academy. Known internationally for our Grammy Awards, the Academy is the trade association that represents music's creators: songwriters, performers, and studio professionals.

I thank you for the opportunity to address the Subcommittee this morning. And since I have the honor of being the first witness, let me start at the beginning, with the copyright clause of the Constitution.

The Framers gave authors the exclusive right to their works for a time in order to promote the progress of science and useful arts. As today's hearing is focused on music licensing, we should at the outset remember who the authors of music are. They are the songwriters and composers who create the very DNA of music. They are the featured and background performers who perform those songs and bring them to life. They are the producers and engineers who create the overall sound of the recordings that we love.

Over the next two hearings, I urge you to keep music creators foremost in your mind. They are the authors our Founders expressly protected.

Of course, the Framers intended copyright to be an incentive to create, but today we have a patchwork of laws that do not address the challenges of the digital marketplace and often create a disincentive to make music. Low streaming rates prevent creators

from making a living, performers and composers must police the entire Internet to take down infringing works, and traditional radio continues to use artists' recordings without compensation while leveraging this unfair advantage as they move into the digital world.

This last point is most glaring. Terrestrial radio is the only industry in America that is built on using another's intellectual property without permission or compensation. Broadcasters in every other developed country in the world compensate their performers.

The National Association of Broadcasters have spent a lot of money lobbying to maintain their free ride. Since they are not on the panel today, allow me to recount the history of their failed argument on their behalf.

First they said the radio-artist relationship is "symbiotic," but even their own biased study found the benefit to radio is 10 times any perceived promotional benefit to artists.

Then they said they are different because radio is free, until they remembered that most Internet radio is free but still pays royalties.

Then they said a royalty will put small stations out of business, until we offered the smallest three-fourths of all stations a flat royalty rate of as little as a few bucks a day.

Then they said the free market would take care of the issue, until they opposed the Free Market Royalty Act that would have actually created one.

Finally, they said it is a tax, until Grover Norquist said it is not, and Grover knows a tax when he sees one.

The NAB has run out of arguments and run out of time. The White House, the Copyright Office, and political groups ranging from the AFL-CIO and the NAACP to Americans for Tax Reform and Tea Party Nation, they all agree with us.

And while radio touts a nonsensical and non-binding resolution, Congressional leaders from both parties are working on real legislation to resolve this issue. Any copyright reform simply must include a radio performance right.

To resolve this and other issues, we support several thoughtful bills. The Songwriter Equity Act would allow songwriters to be paid fair market value. The Protecting the Rights of Musicians Act would insist that if broadcasters value their own content, they must value the content of others. The RESPECT Act would remove a loophole that denies older artists royalties.

But now it is time for a unified, holistic approach to music licensing. It is time for a music omnibus bill, or MusicBus for short. With copyright review under way, we need our industry and Congress to be visionary and create a unified approach for the future of our business, and the MusicBus idea is really simple: fair market pay for all music creators across all platforms. And a music omnibus bill need not wait for the entire Copyright Act to be revised. As Congress' own advisor on copyrights, Registrar Maria Pallante, noted, "These issues are ripe for resolution."

Mr. Chairman, a legal framework that includes compulsory licenses, government rate courts, and consent decrees already diminishes the Framers' vision of exclusive rights. If music makers must be subject to these restrictions, let's at least assure them that the

result will represent what a free market would have provided. We are not asking for special treatment. We are simply asking for what is fair, fair market pay for all music creators across all platforms, a simple concept, a single bill, a just framework for music licensing.

Thank you very much.

[The prepared statement of Mr. Portnow follows:]

Statement of

Neil Portnow

President/CEO of The Recording Academy

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing on
"Music Licensing Under Title 17 Part One"

June 10, 2014

Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee: My name is Neil Portnow and I am President and CEO of The Recording Academy. Known internationally for our GRAMMY Awards, The Academy is the trade association that represents music's creators: songwriters and composers, vocalists and musicians, and record producers and engineers. I thank you for the opportunity to address the Subcommittee this morning.

The Framers' Vision: Protecting Music's Authors

Perhaps a good place to begin my testimony is literally at the beginning – with the copyright clause of the Constitution. In Article I, Section 8, the Framers gave authors the exclusive right to their works, for a time, in order to promote the progress of science and useful arts.

As today's hearing is focused on music licensing, we should, at the outset, remember who the "authors" of music are. They are the songwriters and composers who create the very DNA of music. They are the featured and background performers who bring those songs to life. They are the producers and engineers who create the overall sound of the recordings we love.

Over the next two hearings, you will hear from many interests in the music space. But I urge you to keep foremost in your mind music's creators, the authors our founders expressly protected.

Copyright Law No Longer Serves as an Adequate Incentive to Create

Of course, the Framers intended copyright to be an incentive to create. And for the next two centuries, Congress passed bills that mostly accomplished that vision. But today, we have a patchwork of laws that do not address the challenges of the digital marketplace and often create a *dis*incentive to make music as a career. Low streaming rates prevent creators from making a living. Performers and composers must police the entire internet to take down infringing works. And traditional radio continues to use artists' recordings without compensation, while leveraging this unfair advantage as they move into the digital world.

Recently, one of our elected Board leaders of The Academy's New York Chapter testified before Congress regarding Section 512 of Title 17, the so-called notice and takedown provision. The multiple-GRAMMY-winning composer Maria Schneider noted the extensive amount of time required to take down all of her recordings from online sites, stating:

> "The *majority* of my time is now spent on activities that allow me some chance of protecting my work online. Only a fraction of my time is now available for the creation of music. So instead of the Copyright Act providing an *incentive* to create, it provides a *disincentive*."

But even on sites with legally acquired content, it is important to note how large technology businesses are being built upon the aggregation of recordings, and how little of that revenue returns to creators. As streaming becomes the dominant consumption model, these services must provide meaningful and fair compensation or few will be able to make a living as an artist, writer or producer.

The Corporate Radio Loophole Must Be Closed

There are many serious discussions about music royalty rates today: which are too low, which are too high, and what is fair. Yet AM/FM terrestrial radio broadcasters continue to deny musicians *any* right whatsoever to performance royalties for the use of their music, which radio giants use to make billions in annual advertising revenue.

Terrestrial radio is the only industry in America that's built on using another's intellectual property without permission or compensation. Broadcasters in every other developed country in the world compensate performers. The result is that the U.S., which should be the standard bearer for intellectual property rights, is among such countries as China, North Korea and Iran which do not recognize these fundamental rights.

The National Association of Broadcasters (NAB) has spent a lot of money lobbying to maintain their free ride. During each session of Congress, they spread myths that never stand up to any reasonable assessment of the facts. For example:

NAB Myth: A performance right is a money grab from record labels.

Fact: Artists would be the main beneficiaries of a performance right. Artists would receive 50 percent of royalties for their creative contributions, and an increasing number of artists are also copyright owners and would, therefore, get the other 50 percent too. When the performance right campaign launched, hundreds of artists signed on to join. This quest is about them.

NAB Myth: The campaign started because piracy hurt the record business, so record labels needed to look elsewhere for revenue.

Fact: Artists have been fighting for this basic right for nearly 90 years. Legends such as Bing Crosby and Frank Sinatra have spoken on the issue. The renewed focus on the issue is a result of "new" radio (Internet and Satellite) paying this royalty, exposing the hypocrisy of exempting "old" radio from paying their fair share.

NAB Myth: Promotional support by radio creates a "symbiotic relationship" with artists.

Fact: Even by the NAB's own (dubious) study, the benefit to radio outpaces the benefit to artists by 10 to 1. And any promotional effect would be taken into account by the rate-setting body. Internet and Satellite radio also provide promotion, but pay a royalty. Further, a GAO study found "no consistent pattern between the cumulative broadcast radio airplay and the cumulative number of digital single sales." Even Clear Channel CEO Bob Pittman admitted that, "clearly [promotion] is not enough, or there wouldn't be a decades-long battle over [performance royalties]."

NAB Myth: The royalty would put small stations out of business.

Fact: The last legislation introduced on this subject exempted every small radio station and even medium sized ones, requiring 75 percent of stations to pay as little as a few dollars a day for music.

NAB Myth: The free market is addressing the issue with private deals.

Fact: There is no "free" market when one side of the transaction does not have a right to its property. Without a performance right, there can be no "free" negotiations. And when a bill was introduced to create a free market where musicians would have a chance to negotiate for fair compensation (the Free Market Royalty Act), the broadcast lobby opposed it.

NAB Myth: A performance royalty is a tax.

Fact: In Civics 101, everyone learns that taxes go to the government. Paychecks go to people who provide goods or services for money. Performance royalties would not go to the government, but rather to those who created the sound recordings. Therefore, they are not a tax. This obvious point was made clearly in a letter signed by seven free-market organizations, including Americans for Tax Reform: "A performance royalty is not a tax.... Paying a private citizen or business for the use of their property is clearly not a tax."

The NAB has run out of arguments and out of time. The White House, the Copyright Office, and political groups ranging from the AFL-CIO and the NAACP to Americans for Tax Reform and Tea Party Nation all agree with us. And while radio touts a nonsensical – and nonbinding – resolution, Congressional leaders from both parties are working on *real* legislation to resolve this issue. Any copyright reform simply must include a radio performance right.

Songwriters Suffer Under Rates Set Below Market

The Recording Academy believes the current mechanical rate as set by the CRB under Sections 115(c)(3)(D) and 801(b)(1) is substandard. These provisions direct the CRB to apply a standard that does not reflect fair market value, but rather a standard based on a collection of vague objectives. The application of these antiquated standards has resulted in depressed mechanical license rates relative to other non-compulsory royalty streams, which have increased at greater rates over the same period of time. The CRB needs to have the authority to recognize and apply fair market standards.

The Songwriter Equity Act ("SEA"), H.R. 4079/S. 2321, is an important step toward modernizing the music licensing system. In particular, SEA would amend Sections 115 and 801 by directing the Copyright Royalty Judges to apply the following standard with respect to compulsory mechanical license rate-setting:

> The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In establishing such rates and terms, the Copyright Royalty Judges shall base their decision on marketplace, economic, and use information presented by the participants. In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable uses and comparable circumstances under voluntary license agreements. Further, The Recording Academy believes that the current implementation of 17 U.S.C.

> 114(i) creates an unacceptable, uneven playing field which results in songwriters and composers receiving royalties that are substantially less than fair market value.

In addition, SEA would amend Section 114(i) to allow federal rate courts to consider all relevant evidence, including sound recording royalty rates, when establishing royalty rates for songwriters. How the rate court would apply the evidence is left to the discretion of the court.

Accordingly, The Recording Academy supports SEA. Like other property owners, songwriters and composers deserve to be paid the fair market value for their intellectual property. The enactment of the Songwriter Equity Act would ensure that songwriters and composers are appropriately compensated for the use of their musical compositions without impacting artist royalties.

Record Producer Payments Must be Streamlined and Consistently Applied

It must be noted that the third, equally important author in the sound recording process (along with the artist and songwriter) is not mentioned at all in statute. Record producers provide the overall creative direction for a recording project (similar to the role of a film director on a motion picture) as well as the overall sound of the recording. Not represented in Washington in 1995, producers were not granted a statutory share of the royalty in the Digital Performance Right in Sound Recordings Act of that year ("DPRA"). Without a statutory share established in the DPRA, producers (and royalty-earning engineers) earn royalties based on contract (usually with the featured artist).

To provide the same fair, direct-payment option of performance royalties available to artists, the agency SoundExchange currently offers a still developing service for producers whereby SoundExchange, upon direction by the featured artist, will process the share owed to producers by contract with the featured artist. The Recording Academy appreciates SoundExchange's ongoing efforts to develop an efficient system for direct pay for producers.

However, producers should be assured that this process will be consistent and permanent, applied by SoundExchange and any successor or competing agency in the future.

The Recording Academy is continuing productive dialogue with SoundExchange and others on this matter and looks forward to resolving this issue with all relevant stakeholders.

Music Issues Should be Resolved in One Music Omnibus Bill

To resolve some of the above issues, several thoughtful bills have been introduced this Congress. The Songwriter Equity Act as noted, would allow songwriters to be paid the equivalent of fair market value for their work. The Protecting the Rights of Musicians Act would insist that if broadcasters value their *own* content, they must value the content of others. The RESPECT Act would remove a legal loophole that denies royalties to older artists.

But now it is time for a unified, holistic approach to music licensing. It's time for a Music Omnibus Bill, or MusicBus, for short. With copyright review underway, we need our industry and Congress to be visionary and create a unified approach for the future of our business. For all the complexities of the MusicBus concept, its goal is actually simple: Fair market pay, for all music creators, across all platforms. And as as a united music community, we can more effectively work with other stakeholders in the music ecosystem – who connect the music maker to the music fan – and create a licensing regime that works for all.

A music omnibus bill need not wait for the entire copyright act to be revised. As Congress' own advisor on copyrights – Register Maria Pallante – noted, "Congress already has had more than a decade of debate on the public performance right for sound recordings, and has given serious consideration to improving the way in which musical works are licensed in the marketplace. These issues are ripe for resolution."

The Recording Academy strongly urges Congress to pass music omnibus legislation that treats all authors fairly.

Mr. Chairman, a legal framework that includes compulsory licenses, government rate courts and consent decrees already diminishes the Framers' vision of exclusive rights. If music makers must be subject to these restrictions, let's at least assure them that the result will represent what a free market would have provided. We are not asking for special treatment. We are simply asking for what is fair. Fair market pay, for all music creators, across all platforms. A simple concept. A single bill. A just framework for music licensing. Thank you.

Mr. COBLE. Thank you, Mr. Portnow.

Mr. Miller? Pull that mic closer to you, Mr. Miller.

TESTIMONY OF LEE THOMAS MILLER, SONGWRITER AND PRESIDENT, NASHVILLE SONGWRITERS

Mr. MILLER. I am a writer, not an artist.

Good morning. My name is Lee Thomas Miller. I grew up on a small tobacco farm in Jessamine County, Kentucky. I started playing piano by ear when I was 11. By the time I was 15, I was writing bad songs and playing them with my even worse band. But we were just kids, so the people cheered, if only out of pity.

I went to college to study Music Theory and Composition and graduated with a Bachelor's degree from Eastern Kentucky University. That simply meant that I was now over-qualified to play in the honkytonks where I had been singing. I was formally educated in classical music composition while writing country songs on the side, and these are two very different things according to my professors. My parents were thrilled when I finished college and mortified when I saved $1,000 and immediately moved to Nashville.

For years I wrote songs, hundreds of songs. I played in bands and took temporary jobs to pay the bills when needed. I studied the songs I heard on the radio and began meeting and learning from the songwriters who wrote them. On September 1st, 1996, I became a full-time songwriter, and then the real work started. Eleven years. From the day I moved to Nashville it took 11 years to have a hit song on that radio.

Since then I have been lucky and I have been blessed. I have had hits, and I continue to earn a living by walking into a room where there is nothing and making up something out of thin air, something that is real, something that is tangible, something that creates commerce. What I make is the seed that fuels the entire music business. It generates thousands of jobs and shapes the very culture we live in because, let's face it, nearly everybody loves music. But I am one of the remaining few. Since I started, nine out of ten of my colleagues don't write songs as a profession anymore, because their royalties can no longer feed their families.

This is an unjust system that must be changed. Rules established in 1909, largely to prevent one player piano roll company from becoming a monopoly, require me to grant a compulsory license paying 9.1 cents for the sale of a song, which I split with my co-writers and our music publishers, regardless of what the marketplace might say my song is worth. That is not much of a pay raise from the original 2 cents paid in 1909.

Then royalties from my song performed on an Internet radio station are set under consent decrees from World War II. The judges who determine those rates are forbidden from considering what the marketplace says my song is worth. Consequently, I only receive thousandths of a penny for those performances.

I appreciate the luxury of the Internet as much as you do, and I suppose I am as much of a slave to my smart phone as anyone. But the current system has devalued the musical composition to the point where songwriters are being crushed. It is bad enough that it is so easy to steal the music today, but a legal framework

that allows songs to be streamed for nearly free will destroy the livelihood of the American songwriter if it is allowed to continue.

An important piece of legislation called the Songwriter Equity Act has been introduced that would allow my copyright's value in the modern marketplace to be considered in rate-setting proceedings. I want to thank introducing sponsors Congressmen Doug Collins and Hakeem Jeffries and all of the co-sponsors of this legislation.

While it is a great start, even bolder revisions to the current copyright law and music licensing rules are necessary to establish true equity for today's songwriters and composers. It is time for Congress to eliminate the compulsory license. It is time for Congress to eliminate or drastically alter World War II-era consent decrees.

Also, in the future, songwriters should be represented on the governing bodies of music licensing and collection entities and dispute resolution committees. Future licensing and collection agencies should be able to compete with those with large market shares. There should be true transparency throughout the entire collection and payment process.

I am America's smallest small business. I sit down and make stuff up. I do not succeed if my songs are not recorded, sold, and played; and when I do get paid, I pay self-employment income tax. With the money that remains, I raise babies. I buy bread, gasoline, anniversary flowers, cough medicine, braces, and guitar strings.

I can make you laugh or cry. I can make you do both inside the same 3-minute story. That is the power of music, and it all begins with a song. Congress, today I ask you, on behalf of my family and the families of all American songwriters, to change the archaic government regulations that prohibit us from pursuing a fair market opportunity for the songs we create.

Thank you, Mr. Chairman, and Members of the Committee.

[The prepared statement of Mr. Miller follows:]

Testimony of

Lee Thomas Miller
Songwriter
President, Nashville Songwriters Association International

on

"Music Licensing under Title 17 Part One"

before the

United State House of Representatives Committee on the Judiciary,
Subcommittee on Courts, Intellectual Property, and the Internet

June 10, 2014

My name is Lee Thomas Miller. I grew up on a small tobacco farm in Jessamine County, Kentucky. I started playing piano by ear when I was 11. By age 15 I was writing bad songs and playing them with my even worse band. But we were kids, so the people cheered, if only out of pity.

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For years I wrote songs -- hundreds of songs. I played in bands and took temporary jobs to pay the hills if needed. I studied songs I heard on the radio and hegan meeting and learning from the songwriters who wrote them. On Septemher 1st, 1996, I hecame a fulltime songwriter. Then the real work started. Eleven years. From the day I moved to Nashville it took 11 years to have a hit song on that radio.

Since then I have been lucky and blessed. I have had hits and continue to earn a living by walking into a room where there is nothing and making something up out of thin air -- something that is real and tangible -- something that creates commerce. My craft fuels the entire music business. My songs generate thousands of jobs and shapes the very culture we live in because let's face it- nearly everybody loves music. But I am one of the remaining few. Since I started, nine out of ten of my colleagues don't write songs as a profession anymore, hecause their royalties cannot feed their families.

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I can make you laugh *or* cry. I can make you do both inside the same 3-minute story. That's the power of music, and it all begins with a song. Congress, I ask you on behalf of my family and the families of American songwriters to change the archaic government regulations that prohibit us from pursuing a fair market opportunity for the songs we create.

Thank you Mr. Chairman, Ranking Member Nadler and Members of the Committee.

Mr. COBLE. Thank you, Mr. Miller.
Mr. Israelite?

TESTIMONY OF DAVID M. ISRAELITE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, NATIONAL MUSIC PUBLISHERS' ASSOCIATION

Mr. ISRAELITE. Good morning. I would maybe rather give Lee 5 more minutes to talk, but as the principal trade association of music publishers and their songwriter partners in the United States, NMPA thanks you for the opportunity to testify.

The Committee is well aware that there are two different copyrights involved in music, the copyright for the underlying musical composition, which is the half of the music industry that I represent, and the separate and distinct copyright for any sound recording of that song. What is striking is just how different these two copyrights are treated under the law and through government regulation.

First, copyright law contains antiquated regulations that unfairly distort the value of a songwriter's work. The copyright in a song is a property right and should not be regulated by the government unless there is a compelling reason to do so. Songs should be valued in the free market just like sound recordings.

Second, if there is to be regulation, then at a minimum songwriters deserve to be paid a fair market value. There is no intellectually honest objection to this point.

Third, Congress should reject any attempt to expand compulsory licenses. Any additional regulation could have long-term harmful consequences for creators.

Songwriters attempt to earn a living through three primary means: mechanical reproductions, public performances, and audiovisual synchronizations. Mechanical reproductions used to represent our dominant income stream but today comprise only about a quarter of our revenue. Section 115 of the Copyright Act imposes a compulsory license that dates back to 1909. As a result of this World War I-era law, songwriters and music publishers are denied the right to negotiate the value of their intellectual property in a free market.

In 1909, the rate for mechanical licenses was set by Congress at 2 cents per song. Today's mechanical rate would be more than 50 cents if adjusted for inflation. Remarkably, the current statutory rate stands at 9.1 cents, and for those who tire of hearing that statistic, imagine the fatigue of songwriters being paid something less than a fair market value.

This paltry number is due to the Copyright Royalty Board using an antiquated, below-market standard when setting rates known as the 801(b) standard. It is a rate standard that is harmful to creators. As former Register of Copyrights Marybeth Peters argued so eloquently, "While the Section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century, it is no longer necessary and unjustifiably abrogates copyright owners' rights today."

Fortunately, legislation has been introduced to begin to address this inequity, and I thank Representatives Collins, Jeffries, and

other Members of the Subcommittee, including Chairman Coble, for supporting the Songwriters Equity Act.

Public performance royalties represent the largest income stream for songwriters. The songwriter's public performance right is inherently a free-market right. It is not regulated by law. But because the Department of Justice imposed consent decrees on ASCAP and BMI in 1941, incredibly those consent decrees are still in effect today. They do not sunset.

Under these World War II-era consent decrees, songwriters and publishers may not negotiate the value of their intellectual property in a free market. Instead, a Federal judge in the Southern District of New York dictates how much a songwriter is paid. Last week, the Department of Justice announced it is undertaking a review of these consent decrees, and we hope they will act quickly to ensure that songwriters can receive fair market compensation.

Synchronized music represents the third significant source of revenue for songwriters. This includes using music in movies, television shows, as well as newer forms of this writing, including music videos and YouTube. This is a free market right. It is not regulated by law. It is not regulated by consent decrees. Because the sync market is a free market, it is the useful barometer for assessing the fair market value of songs.

Not surprisingly, given both copyrights are negotiated in a free market, the common industry practice is to pay both copyright owners under the same terms. There is an amazing amount of digital content available to consumers on the iTunes Store, Google Play Store, Amazon Store. Movies, books, video games, magazines, television shows, recorded music are all available, and all of those copyrights are negotiated and licensed in the free market. Only the content produced by songwriters is uniquely singled out and subject to heavy regulation.

On behalf of those songwriters, I ask you to let them be paid fairly by letting them be free. Thank you.

[The prepared statement of Mr. Israelite follows:]

Testimony of David M. Israelite
President and Chief Executive Officer
National Music Publishers' Association
Before the House Judiciary Committee
Subcommittee on Courts, Intellectual Property and the Internet

June 10, 2014

Good morning Mr. Chairman, Ranking Member Nadler and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss the impact of current copyright law on music publishers and their songwriter partners and to support legislation that would begin to remedy the pay inequity that today's law creates.

I serve as President and CEO of the National Music Publishers' Association (NMPA), the principal trade association of music publishers and their songwriter partners in the United States. The NMPA's mandate is to protect and advance the interests of music publishers and songwriters in matters relating to the domestic and global protection of music copyrights.

I urge the Subcommittee to consider several important points as you review the music licensing landscape.

First, copyright law today contains antiquated regulations that unfairly distort the value of creators' work. Provisions of the law – some of which were enacted more than a century ago – are in dire need of reevaluation to determine whether they are still necessary in the digital age. The copyright in a song is a property right, and should not be regulated by the government unless there is a compelling reason to do so. There should be a presumption that a property right should be valued in a free market.

Second, if any part of a songwriter's creative process must be regulated by government, then at a minimum creators deserve to be paid a fair market value. Congress should look first and foremost at ways to eliminate government regulation in the songwriting business. But in the absence of a free market, the processes that determine what creators are paid must be improved to attempt to reflect fair market compensation.

Third, Congress should reject any attempt to expand compulsory licenses, which would further erode the ability of creators to negotiate the terms under which their works are used. The music industry operates in a dynamic marketplace and Congress should exercise restraint when it comes to any additional regulation that could have long-term consequences for creators. Instead, Congress should allow private negotiations to dictate the terms of existing and future music offerings. There will be a great deal of debate about what would make it easier for a licensee who wants to use the works created by a songwriter. Those interests should be subservient to the property rights of those who create the works.

Finally, I thank Representatives Doug Collins and Hakeem Jeffries as well as the members of the subcommittee – including Chairman Coble – for supporting H.R. 4079, the "Songwriter Equity Act" (SEA). The introduction of this bill marks an important step to ensure that the interests of songwriters and publishers – which are too often overlooked – are at the fore of the discussion on music licensing. I will discuss the details of the legislation later in my testimony.

Two Separate Copyrights

As you know, there are two separate and distinct copyrights involved in music.

- The first copyright is for the underlying musical composition created by one or more songwriter, and often owned or represented by a music publisher. I am here representing that half of the music industry;

- The second copyright is for any recording of that song – commonly known as the sound recording copyright – and often represented by a record label.

It is crucial to appreciate that these two different copyrights are controlled and represented by different interests, and are often treated very differently under the law and through government regulation.

As the Subcommittee continues to review the Copyright Act, I trust you will recognize and address the inherent unfairness of today's status quo on songwriters and publishers. That gross unfairness is reflected in two simple yet striking data points:

- Seventy-five percent of the income for songwriters and publishers is regulated by outdated laws and antiquated government oversight, which has for too long resulted in devalued intellectual property rights and undervalued royalty rates;

- We estimate that songwriter and publisher revenues are significantly below what they would be if fair rate standards and free market negotiations were used to determine such royalties.

It is long overdue for Congress to consider seriously why the price for other forms of intellectual property such as movies, books, video games, magazines, television shows and recorded music are all properly negotiated in the free market, while songwriters remain uniquely singled-out and subject to heavy regulation. If this does not change, the ultimate outcome will be fewer professional songwriters and fewer songs, as many established songwriters will simply stop writing. Others will never start.

The Role of Music Publishers

A music publisher is a company or individual that represents the interests of songwriters by promoting and licensing the use of their songs. Music publishers are often involved at the very beginning of a songwriter's career. After signing a writer to a publishing deal, a publisher will do everything from helping the writer find co-writers to securing artists to record the writer's songs. Frequently, when a songwriter enters into a relationship with a publisher, the publisher will advance desperately needed money to the writer to help pay living expenses so the writer can focus on what he or she does best: write music.

Songwriters and music publishers attempt to earn a living through three primary means of utilizing their separate copyright – mechanical reproductions, public performances, and audio-visual synchronizations. The ratio of how much each contributes to the bottom line has been in flux in recent years as listeners move away from ownership models such as CDs and downloads toward streaming and video as their preferred mode of music consumption.

It is important to note that songwriters and publishers depend on royalties for their livelihood. Unlike recording artists, most songwriters cannot supplement their income through touring, merchandise sales, or endorsements.

Mechanical Reproductions – Section 115

The mechanical reproduction right affords songwriters and publishers a royalty when a musical composition is embodied in a physical format such as a record, CD or – more commonly in the digital age – when a consumer downloads a song from iTunes or streams music through an interactive service like Spotify.

The mechanical reproduction right is regulated by Section 115 of the Copyright Act, which imposes a compulsory license system that dates back to 1909. At that time, Congress

chose to regulate the mechanical reproduction of musical compositions embodied on player piano rolls to prevent exclusive deals between music publishers and player piano makers that might lead to a monopoly in the player piano roll market. While player piano rolls disappeared long ago, this outdated regulation continues to undermine the exclusive rights of music publishers and songwriters. As a result of this Congressional decision that pre-dates World War I, songwriters and music publishers have been denied the ability to negotiate the value of their intellectual property in a free market.

Instead, this statutory mechanism allows anyone who wants to use a musical work to obtain a license to reproduce and distribute copies of the work, in exchange for paying a royalty set by the government. In 1909, the rate for mechanical licenses was set directly by Congress at 2 cents per song. Today, rates are set by a three-judge panel called the Copyright Royalty Board (CRB). Based on the initial price set in 1909, today's mechanical rate would be more than 50 cents if adjusted for inflation. Remarkably more than 100 years later, the current statutory rate stands at only 9.1 cents.

This paltry increase is due to the fact that the law directs the CRB to apply an antiquated, below-market standard when setting mechanical rates. This standard – known as an 801(b) standard – requires the CRB to ensure "[the] copyright user a fair income under existing economic conditions," and to "minimize any disruptive impact on the structure of the industries involved...." In other words, the law not only dictates that songwriters and publishers must license their songs to everyone, but also imposes the price they will receive based on what the CRB thinks potential licensees can pay without any disruption to their businesses. Without question, the law's emphasis on the interests of users depresses the rate that music publishers and songwriters might otherwise be able to negotiate in a free market.

On the other side of the music business, the recorded music industry has been able to thrive in the marketplace and negotiate freely without suffering under the burden of a compulsory license regime. When it comes to the use of master recordings to make and

distribute CDs or digital downloads, there is no compulsory license or obligation to license whatsoever. As a result of exercising their unfettered right to license master rights for reproduction and distribution, a record label receives approximately 81 cents of the $1.29 charged by Apple for the typical iTunes download. This is approximately nine times as much as the 9.1 cents that a songwriter and publisher must split when the very same song – the song that they wrote – is downloaded.

It is fundamentally unfair for the law to continue to subject songwriters and music publishers to BOTH a compulsory license and a below-market rate standard. This review presents the perfect opportunity for Congress to consider getting rid of the section 115 compulsory license. As former Register of Copyrights Mary Beth Peters so eloquently argued during her tenure:

> A fundamental principle of copyright law is that the author should have the exclusive right to exploit the market for his work, except where doing so would conflict with the public interest. While the Section 115 statutory license may have served the public interest well with respect to a nascent music reproduction industry after the turn of the century and for much of the 1900's, it is no longer necessary and unjustifiably abrogates copyright owners' rights today.

If Congress does not eliminate section 115, it should at the very least require that the CRB apply a fair market rate standard when determining the statutory rate.

Public Performance Right

Songwriters and publishers also receive royalties for the public performance of their works. Examples include when their music is publicly performed on the radio, via streaming services, and in many public venues, including restaurants and bars. Because of the large number of entities that use music, obviously it would be a challenge for songwriters and

publishers to negotiate individual licenses directly and effectively monitor all public performances of their music. Instead, songwriters and publishers generally affiliate with a performing rights organization (PRO) – ASCAP, BMI or SESAC – which negotiates blanket licenses, collects royalties, and enforces rights on their behalf.

While the performance right is not explicitly regulated by law, the onerous Department of Justice consent decrees that have governed ASCAP and BMI since 1941 result in songwriters and publishers also receiving below-market compensation for performance of their music. Under these World War II-era consent decrees, songwriters and music publishers do not get to negotiate the value of their intellectual property in a free market. Additionally, the consent decrees allow for a period of free-rate licensing during which the property of songwriters and music publishers is utilized without compensation for vast lengths of time as the parties attempt to negotiate a license. If an agreement cannot be reached voluntarily by the parties, a federal judge decides the terms of the license.

As streaming continues to cannibalize the mechanical royalties traditionally received from CD sales and downloads, compensation from the public performance right has become an increasingly larger portion of a songwriter's income. Unfortunately, the current royalties paid by digital webcasters cannot sustain songwriters who are trying to pay their rent and put food on the table for their families. To provide some perspective regarding how little songwriters and publishers are compensated by Internet radio, NMPA hosted an event on Capitol Hill in conjunction with the Subcommittee's last hearing on music licensing issues. The event featured five songwriters whose five well-known songs had been streamed on Pandora more than 33 million times in the first quarter of 2012. In return for the use of their works those writers and their publishers collectively received $2,033.

This week the Department of Justice announced it is undertaking a review to examine the operation and effectiveness of the consent decrees. It is our hope that the DOJ will act quickly to lift or significantly modify the consent decrees to ensure that publishers can continue

to affiliate with ASCAP and BMI without having to sacrifice fair market compensation. Arguably, collective licensing benefits licensees as much – if not more – as the licensors, so all parties have an interest in finding a new model that works for everyone.

In addition to the Justice Department amending the consent decrees, Congress can also help by amending section 114(i) of the law, which currently prevents the federal rate courts from considering the rates paid to SoundExchange for digital performances of sound recordings as evidence when setting rates. NMPA believes that those rates, which can be more than 12 times greater than what songwriters and publishers receive, would help the federal rate courts to determine more accurately fair rates for the performance of musical compositions.

Synchronization (Sync) Rights

The use of music synchronized with video is the third significant source of revenue for songwriters and publishers. Traditionally this has included the use of music in movies, television, and commercials. Newer forms of this right include music videos and the use of music in user-generated content such as on YouTube.

For songwriters and music publishers, this is a free market right not regulated by law. Because the sync market is unregulated, NMPA believes it is a useful barometer for assessing the fair market value for mechanical reproductions and performances of musical compositions. If an automobile company wants to use a popular song in a commercial for its new car, it must negotiate with the music publisher and the record company for the use of their respective copyrights. Not surprisingly, given that both copyrights are then negotiated in a free market, the common industry practice is to pay both copyright owners under the same terms. This free market benchmark suggests that the 9:1 split that record companies receive for downloads and the 12:1 split they receive for webcasting are simply a product of the regulation that publishers are subject to in those areas.

Some have called for compulsory licenses to include sync rights. This is the wrong approach and would only discourage investment in songwriting. The sync licensing market is operating efficiently without government regulation and currently compensates songwriters fairly for their creativity and publishers for their investment. In addition, for those who would use scare tactics regarding what would happen if regulation were lifted in other areas, the efficiency and smooth operation of the synchronization market provides a perfect illustration of how the music industry can thrive in the absence of unnecessary regulation.

The Songwriter Equity Act (SEA)

The SEA addresses two significant inequities under current copyright law that prevent songwriters and music publisher from receiving compensation that reflects the fair market value of their intellectual property.

The SEA would ensure that the government applies a market-based rate standard when setting licensing rates for the mechanical reproduction of musical compositions - the same rate standard enjoyed by artists and record labels for non-exempt businesses in the digital sound recording performance right. The SEA would also allow the federal courts that set rates for the public performance of musical compositions to look at relevant evidence, which they are currently prohibited by law from considering.

These modest changes to the law will help level the playing field in the rate setting proceedings that are currently undeniably stacked against songwriters and publishers.

Proposals to Devalue the Rights of Songwriters/Publishers

The RIAA's recent submission to the Copyright Office regarding music licensing issues suggests that licensing would be more efficient if songwriters and publishers simply allowed record labels to administer our copyrights for us. This is not a realistic or constructive proposal.

Songwriters and publishers value the ability to determine how their works are used and to negotiate the terms for their use. Having a direct relationship with licensees is also frequently an important component of understanding and advancing mutual interests. While NMPA believes strongly in a more efficient and effective licensing system, the answer is not to subjugate the rights of songwriters and music publishers to record labels.

The elimination or, at the very least, modification of the government-mandated compulsory license and consent decrees in favor of a licensing structure that more closely resembles free market negotiations favors not only music publishers and songwriters, but music services, consumers and the music market generally. The CRB proceedings that set the Section 115 compulsory license rates and categories for mechanical rights occur once every five years, far slower than the development of new technology for digital music distribution.

The government-enforced consent decrees that govern the licensing of public performance rights restrict the ability of both the PROs and music publishers to bundle the multiple, global rights that new digital music services now require to operate and compete on a world-wide scale. These restrictive and antiquated regulations result in a slow and reactive market for the licensing of songs, and do not provide the necessary flexibility to license rights properly and proactively in an ever-evolving, dynamic online music world. Only in the free market—or in a system that closely approximates free market conditions—can new music services obtain all of the rights needed as that technology develops, allowing those music services to enter the market and the ears of music-loving consumers more quickly.

Conclusion

As our global digital marketplace rapidly evolves, songwriters and music publishers will continue to embrace new delivery models and technology, but much of the copyright framework is outdated. A copyright update should build upon a foundation of intellectual property rights that enable a vibrant, legal music marketplace. Not just for songwriters, but for

all creators. Congress should review the law with a presumption against regulations that severely limit creators' property rights.

Most importantly, we must ensure that future business models fairly compensate songwriters. Licensing new business models efficiently does no good if such new business models do not allow a songwriter to earn a living. Without updates to the law songwriting as a profession will give to way songwriting as a hobby and an important American treasure will be in jeopardy.

NMPA looks forward to participating in discussions on how to work together to improve our copyright law.

Mr. COBLE. Thank you, Mr. Israelite.
Mr. Knife?

TESTIMONY OF LEE KNIFE, EXECUTIVE DIRECTOR, DIGITAL MEDIA ASSOCIATION (DiMA)

Mr. KNIFE. Thank you, Chairman, Ranking Member Nadler, Vice Chairman Marino, and Members of the Subcommittee. I thank you for inviting me to testify here today. My name is Lee Knife, and I currently serve as the Executive Director of the Digital Media Association, or DiMA for short.

DiMA is a nationally recognized trade association that represents many of the leading players in the digital music marketplace. You are probably familiar with many of our larger members which include companies like Amazon.com, Apple iTunes, Google, YouTube, Microsoft, and Rhapsody. But there are several additional companies we represent that play an equally important part in the development of the digital music ecosystem.

In little more than a decade's worth of time, the role our companies have grown to play within the music industry is simply amazing. With respect to consumers, our ingenuity has provided fans of online music with access to new services and offerings that satisfy almost every conceivable price point, from online music download stores to on-demand streaming to ad-supported Internet radio and more recently cloud-based offerings.

With respect to copyright owners, our efforts have meant the creation of new revenue streams that have handsomely rewarded content creators and their agents for their creative endeavors. Sound Exchange, for example, recently reported a 312 percent increase in the total sum of royalties it paid to recording artists and labels in 2012 versus 2008. This is thanks to monies paid by services operating under the Section 114 compulsory license, many of which we represent.

With respect to songwriter incomes, ASCAP and BMI, the two largest performing rights organizations, recently reported record high revenues of $944 million each in 2013. Meanwhile, SESAC, the smallest of the three PROs, has witnessed its revenue grow from just $9 million in 1994 to $167 million last year.

All of these accomplishments, I am pleased to report, have come as DiMA members increasingly have been able to successfully convert would-be pirates into regular users of legitimate royalty-paying music services. This task hasn't been easy, and the current music licensing regime we are asked to navigate makes it no less difficult. It is safe to say that if we were writing from a blank slate today, no one would develop the current system we are asked to operate under here.

In the remaining minutes of my time, I want to offer just a few thoughts on what essential elements should be included in any future music licensing reform package, followed by a quick evaluation of why I think two recently introduced legislative proposals in particular constitute bad public policy.

First, a 21st century licensing regime that is properly suited to handle the needs of an innovative industry and a consumer base that is consistently demanding legal access to content when and where they want it has to include: one, efficiency; two, trans-

parency; three, safeguards that adequately protect licensees from anti-competitive behavior; four, a level playing field among similarly situated competitors; and finally, five, it should shield licensees from excessive legal risks when those licensees are acting diligently and in good faith.

Greater efficiency has two immediately apparent benefits. For licensees, it guarantees new products and services can be brought to market sooner, which helps us in our fight against online pirates. For creators, greater efficiency will mean less of the royalties we pay for the right to perform or distribute content will be used to cover administrative expenses. Last year alone, more than $200 million in royalties paid by music licensees was redirected to cover PRO operating expenses. Greater efficiency would mean fewer middlemen and more money in the pockets of songwriters.

The importance of transparency is obvious. If service providers can't find the rightful owner of copyright-protected works, then they can't license and pay for them, which means the creator misses out on a royalty and the general public is deprived of the benefit of enjoying his or her creativity.

For creators, greater transparency provides full visibility into the total payments made by music services and the way those payments are administered by the agencies and affiliates that the artists rely on to administer their rights. This, in turn, will allow those artists to make better informed decisions about which agents they choose to employ to maximize the net payments they ultimately receive.

In the area of competition, the need to protect licensees from anti-competitive behavior may be greater now than any time in history due to the recent consolidation in the recording and music publishing industries. Some, particularly in the context of licensing new musical works, have taken issue with this notion and even ask that certain requirements imposed under the Department of Justice's consent decrees be modified.

Before taking this considerable step, we would strongly urge policymakers to review the history of the ASCAP and BMI consent decrees, which is attached to my testimony, and also recent Federal court cases which have made note of continuing anti-competitive behavior carried out by various parties acting on behalf of the music publishing industry.

Further on the subject of competition, a hallmark of a good competitive landscape requires a level playing field be established among similarly situated competitors. For several years now, webcasters have had one simple request—namely, that the same rate-setting standard, the 801(b) standard that is currently used to determine performance royalties for cable and satellite radio, be used to establish rates for Internet radio. Record labels have relied on the 801(b) standard while licensing their musical works since the 1970's, while cable and satellite radio providers have relied on it while licensing sound recordings since the 1990's, all without any——

Mr. COBLE. Sir, your time has about expired.

Mr. KNIFE. Excuse me?

Mr. COBLE. Your time has expired.

Mr. KNIFE. I'm sorry. I would just like to close by saying we should consider the collective issues that I raised when we consider an omnibus approach to copyright reform. Thank you.

[The prepared statement of Mr. Knife follows:]

Testimony of

Lee Knife

Executive Director of the Digital Media Association

on

"Music Licensing under Title 17" – Part One

presented to the

U.S. House of Representatives

Committee on the Judiciary

Subcommittee on Courts, Intellectual Property and the Internet

June 10, 2014

Chairman Coble, Ranking Member Nadler, Vice-Chairman Marino and members of the Subcommittee thank you for inviting me to testify today. My name is Lee Knife and I currently serve as the Executive Director of the Digital Media Association - or "DiMA" for short.

DiMA is a nationally recognized trade association that represents many of the leading players in the digital music marketplace. You're probably familiar with many of our larger members which include companies like Amazon.com, Apple, Google/YouTube, Microsoft, and Rhapsody - but there are several additional companies we represent that play an equally important part in the development of the digital music ecosystem.

In little more than a decade's worth of time, the role our companies have grown to play within the music industry is simply amazing.

With respect to *consumers*, our ingenuity has provided fans of online music with access to new services and offerings that satisfy almost every conceivable price point - from online music download stores - to on-demand streaming - to ad-supported Internet radio and more recently, cloud-based offerings.

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All of these accomplishments, I'm pleased to report, have come as DiMA members increasingly have been able to successfully convert would-be "pirates" into regular users of legitimate, royalty-paying music services.

This task hasn't been easy; and the current music licensing regime we're asked to navigate makes it no less difficult. It's safe to say that if we were writing from a "blank slate" no one would have developed the current system we're asked to operate under today.

In the remaining minutes of my time, I plan to offer a few thoughts on what *essential elements* should be included in any future music licensing reform package - followed by a quick evaluation of why I think two recently introduced legislative proposals, in particular, constitute bad public policy.

A twenty-first century licensing regime that's properly suited to handle the needs of an innovative industry and a consumer base that's consistently demanding increased *legal* access to content "*when*" and "*where*" they want it has to include:

1) efficiency;
2) transparency;
3) safeguards that adequately protect licensees from anti-competitive behavior;
4) a "level playing field" among similarly-situated competitors; and
5) it should shield licensees from excessive legal risks when acting diligently and in good faith.

Greater efficiency has two immediately apparent benefits. For licensees, it guarantees new products and services can be brought to market sooner - which will help us in our fight against "online pirates". For creators, greater efficiency will mean less of the royalties we pay for the right to perform or distribute content will be used to cover administrative expenses. Last year alone, more than $200 million in royalties paid by music licensees was redirected just to cover PRO operating expenses. Greater efficiency means fewer middle-men and more money in the pockets of songwriters.

The importance of transparency is obvious. If service providers can't find the rightful owner of a copyright protected work they can't license it and pay for it - which means a creator misses out on a royalty and the general public is deprived of the benefit of enjoying his or her creativity. For creators, greater transparency provides full visibility into the total payments made by music services and the way those payments are administered by the agencies and affiliates which artists rely on to administer their rights. This, in turn, will allow those artists to make better informed decisions about which agents they choose to employ, to maximize the net payments they ultimately receive.

In the area of competition, the need to protect licensees from anti-competitive behavior may be greater now than in any time in history, due to the recent consolidation in the recording and music publishing industries. Some, particularly in the context of the licensing of musical works, have taken issue with this notion - and even asked that certain requirements imposed under the Department of Justice's consent decrees be modified. Before taking this considerable step, we would strongly urge policymakers to review the history of the ASCAP and BMI consent decrees - which is attached to this testimony – and also recent federal court cases which have made note of continuing anti-competitive behavior carried out by various parties acting on behalf of the music publishing industry.

Furthermore, on the subject of competition, a hallmark of a good competitive landscape requires a "level playing" field be established among similarly-situated competitors. For several years now, webcasters have had one simple request. Namely, that the same rate-setting standard - "801b" - that's currently used to determine performance royalties for cable and satellite radio be used to establish rates for Internet radio. Record labels have relied on the "801b" standard while licensing their musical works needs since the 70s; while cable and satellite radio providers have relied on it while licensing sound recordings since the 90s – all without any significant issues. It's time to update the section 114 compulsory license so that the rates for Internet radio are determined under the same "801b" rate-setting standard as well.

The last element, regarding the reduction of legal risks around certain licensing activities, has been commented on extensively. Suffice it to say, a twenty- first licensing regime has to avoid adherence to a series of outdated penalties intended only as a remedy to be applied to egregious violators, which are frightening and are sometimes employed as negotiating leverage, as they chill innovation on the part of licensees acting diligently and in good faith.

Considered collectively, the elements I outline above - along with the longer set of comments attached to today's remarks - provide a roadmap to a new system for music licensing that will benefit creators and artists by allowing distributors to cater to fans of online music.

Two recently introduced bills - H.R. 4079, the "Songwriter Equity Act" and H.R. 4772, the "RESPECT" Act - take us in the wrong direction by seeking to create additional anomalies within the music licensing framework which cater to the unique interests of only a limited group of

In closing, I would like to thank you again for inviting me to testify today and I look forward to answering any questions you may have.

Attachments:

1) Comments of the Digital Media Association in Response to the Copyright Office's Notice of Inquiry on "*Music Licensing*" (May 2013);
2) Einhorn, Michael A., "*Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*". Columbia Journal for Law and the Arts, 2002.

See page 108 for Supplemental Material.

Mr. COBLE. Thank you, Mr. Knife. I appreciate that.

Mr. O'Neill?

TESTIMONY OF MICHAEL O'NEILL, CHIEF EXECUTIVE OFFICER, BROADCAST MUSIC, INC. (BMI)

Mr. O'NEILL. Mr. Chairman, Mr. Ranking Member, Subcommittee Members, thank you for inviting me today. I am honored to be here. I would also like to thank Congressman Collins for his sponsorship of the Songwriter Equity Act. It is being well received by my members.

My name is Michael O'Neill, and I am President and CEO of BMI. I have been working with songwriters, composers and publishers, and with businesses, for over 20 years while at BMI. We were founded in 1939 as a not-for-profit company, and BMI today is one of the world's leading performing rights organizations.

Under copyright law, whenever music is played in the public, the creators of that music, people like Lee Thomas Miller, are entitled to be compensated for their work. We represent over 600,000 songwriters, composers and publishers, and license their over 8.5 million works to businesses across the country. We also work with rights societies all over the world, wherever American songwriters' music is used, to make sure they are paid for it.

Today, through the marriage of technology and artistic creativity, digital media has truly democratized the industry. It has knocked down barriers and created more opportunities for creators than ever before. And while this is promising, as these new innovations come out, BMI's mission is and always has been to ensure that our songwriters and publishers are paid fairly for their creative labors. That mission, however, is being frustrated by an out-of-date regulatory framework.

BMI, like our competitor ASCAP, is governed, as you have heard, under a consent decree. Almost all of those rules in that consent decree date back to 1966 and beyond. Essentially, we are locked into a model that might have been appropriate when the Beatles first came to America, that might have been appropriate when you had to get out of your chair or your sofa to turn the channel on your television, but it is not appropriate in today's modern world.

Here are four modest proposals to bring BMI and the world of music licensing into the 21st century.

First, publishers currently do not have the flexibility to decide when they choose to utilize BMI to license their works and when they can license those works exclusively for themselves. BMI's rate court has held that publishers must choose between giving their works completely to BMI for all conceivable uses or not joining BMI at all. So a publisher that wishes to license one digital service on its own without the involvement of BMI must pull out for every other use from BMI, thus recreating what BMI does across the 600,000 businesses we license.

Publishers should be allowed to decide what businesses and what rights they wish to convey to BMI to license, and what businesses and which rights they want to license themselves. This will require a change to our consent decree.

Second, we need to be able to license more than just the performing right. Under copyright law, businesses often need multiple

rights, especially online. Why make them seek out multiple people to get those licenses? Give them the expertise and the experience and the relationships with both the business world and the creative world, the world of music. I believe BMI is positioned to be that one-stop shop, a single destination where businesses can secure every right they need, and our decree should make that clear.

Third, the BMI and ASCAP rate courts should simply be modernized. We propose replacing the current court with an arbitration model. The result we are seeking would be faster, less expensive, and be more market responsive for all parties.

Finally, the consent decrees should sunset when the basis for those decrees no longer exists. As BMI's relative strength in the marketplace is reduced by many new entrants, new participants competing with BMI, we should be allowed to operate on behalf of our writers on the same terms and conditions as our competitors do.

So in conclusion, BMI songwriters and publishers face a competitive landscape. In order to meet those challenges, all participants need to provide greater flexibility and operate more efficiently. When songwriters are unable to make a sustainable living, we are all impacted.

The Department of Justice is undertaking a look at our decree, and we are very excited and look forward to working with them to make those changes.

On behalf of all BMI songwriters across all 50 States, I thank you for your time.

[The prepared statement of Mr. O'Neill follows:]

Written Statement of Michael O'Neill before the

Subcommittee on Courts, Intellectual Property, and the Internet

of the U.S. House of Representatives Committee on the Judiciary

Hearing on Music Licensing Under Title 17, Part One

June 10, 2014

Mr. Chairman, thank you for the opportunity to present testimony before the Subcommittee on Courts, Intellectual Property, and the Internet (the "Subcommittee") of the U.S. House of Representatives Committee on the Judiciary (the "Committee") on the important subject of music licensing. I would also like to thank the Ranking Minority Member and the other members of the Subcommittee.[1]

My name is Michael O'Neill. I am Chief Executive Officer of Broadcast Music, Inc. ("BMI"), one of the world's leading music performing right organizations ("PROs"). Mr. Chairman, America's copyright laws provide a firm legal foundation to support a vibrant community of creative songwriters, composers and music publishers whose works fuel a robust and vibrant entertainment industry. After giving some brief background information about BMI's mission and the benefits of collective licensing, my testimony will address three areas of music licensing in the current digital environment: (1) modernizing the BMI consent decree to enable BMI to meet the needs of the digital marketplace; (2) the need for the Songwriter Equity Act to achieve fair market value royalties for performances and mechanical licenses; and (3) updating the public performing right for the digital age, including confirming the applicability of

[1] Neither I nor BMI have received any funds, grants, contracts (or subcontracts) from any federal agency or proceeding of any kind during this fiscal year or the preceding two fiscal years that would have any relevancy to this hearing or my testimony.

the "making available" right recognized in the WIPO Copyright Treaty ("WCT") (to which the United States is a signatory).

I. BMI and Collective Licensing.

BMI is celebrating its 75th anniversary this year. Since its incorporation in 1939, BMI's traditional role has been to license on a non-exclusive basis one of the six exclusive copyright rights identified by Congress in the U.S. Copyright Act: the right to publicly perform musical works. Public performances of musical works occur on radio, television, cable, satellite and the Internet as well as at concert halls, sports arenas, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music repertoire literally wherever music is performed or communicated to the public. BMI operates on a non-profit-making basis, distributing all income (less overhead and reasonable reserves) to its affiliated songwriters and publishers.

BMI is proud to represent the public performing rights to more than 8.5 million musical works, and over 600,000 songwriters, composers and publishers, more than any other PRO. BMI also represents the works of thousands of foreign composers and songwriters when their works are publicly performed in the United States. BMI's repertoire includes works from outstanding creators in every style and genre of musical composition. BMI provides benefits to music creators and users alike. BMI also provides viable competition and choice for America's songwriters in the licensing of the public performing right in their musical works.

For its licensed music users, BMI offers an easy and friction-free solution for clearing the public performing rights to its works through the mechanism of a blanket license for one modest annual license fee. BMI's core competency is as a trusted third party in licensing the public performing right of musical creators to a broad range of entities that incorporate music into their products or services. To be successful in this mission, we have developed an understanding of

and appreciation for the business models and programming needs of the hundreds of thousands of businesses across the nation that provide our creators' music to the public. BMI's blanket licensing has been endorsed over the decades by virtually all parties across the copyright licensing spectrum and, over the past four decades, has been embraced by Congress as a model for statutory licensing and applauded by the Registers of Copyright in several reports presented to Congress and this Committee.

BMI also plays an extremely active role in the international copyright arena, serving on many committees and in leadership capacities in CISAC, the International Confederation of Societies of Authors and Composers. BMI has over 90 reciprocal licensing agreements with foreign PROs that give users outside the United States access to perform the BMI catalog and give users within the United States instant access to a global catalog of music. In an increasingly international economy fueled by the rapid expansion of the Internet, BMI's structure and long history of cooperation with international content owners is all the more relevant and compelling.

Since the dawn of the Internet, BMI has seen opportunity both for the digital businesses using BMI-represented music as part of their offerings, and for the songwriters, composers and music publishers we represent. In many ways, digital media has democratized the entertainment industry – knocking down economic and technological barriers and creating opportunity for more creators. We believe that technology and artistic creativity are symbiotic, not antagonistic. Today, we can each walk around with access to literally millions of songs from all genres through a device that fits neatly in our shirt or coat pockets. Tomorrow, as the market continues to innovate, it will become even easier for consumers to take greater control of their content – what they see or listen to, as well as how and where and when they do it.

For 75 years, BMI has served as a bridge between the business and creative communities as new opportunities to build commercial enterprises and generate revenue from music content have emerged. BMI's roster of licensees is a "who's who" of the global digital media. From Rhapsody to Spotify, Netflix to Hulu, and YouTube to Apple, we have a strong track record of crafting commercial relationships that work for business and our writers and publishers. Through these innovative licenses, we have successfully addressed new business and content models, from ad-supported to subscription services, long-form programming to on-demand and crowd-sourced playlists. We respect the exciting innovations that our digital licensees are bringing to market. We ask in return that the services recognize the value of music and creativity in the marketplace when standards and rules are established and when royalty fees are negotiated.

Despite our impressive track record of growth, BMI, like any organization, must continue to evolve to address the needs of its customers and the marketplace. What follows are achievable suggestions of what is needed for BMI to continue to fulfill its mission of serving its affiliates and promoting the growth of music.

II. The BMI Consent Decree Must Be Modernized to Meet the Marketplace Needs of the Digital Age.

BMI's business operations are governed by a nearly 50-year-old consent decree that was written at a time when television was an adolescent industry, analog broadcasting was the norm, and most popular music was on AM radio stations and could only be purchased by fans in small mom-and-pop record stores. Needless to say, the world is a vastly different place in the early 21st century. The BMI decree is in dire need of important repair and modernizing in order for BMI to continue to bridge the needs of music users and owners.

BMI has been in discussions with the United States Department of Justice ("DOJ"), as well as music users and the music publishing industry, about ways to modernize its decree to meet the needs of the current and future marketplace. We see the need to loosen or eliminate archaic restrictions that keep necessary, in-demand products from the marketplace, or that result in fees that are not market-based, or that create an obstacle course that jeopardizes the ability of small, independent publishers (and the songwriters who have contracted with these publishers) to continue to compete with their larger publisher competitors, thereby injuring the public. I will address four areas of proposed decree reform.

A. Digital Rights Withdrawal Should Be Permitted under the BMI Decree.

Concerned that the PROs were being paid license fees that were not market-based for many digital music services, several larger publishers decided in the last few years to withdraw from BMI and the American Society of Authors, Composers and Publishers ("ASCAP") the right to license their catalogs for certain defined digital uses and instead to license those uses directly in the unregulated marketplace. Unlike many traditional media music users, it appears that there are a small number of very large digital music services that those publishers believe they can license themselves without the intermediary of BMI. Those publishers apparently believe that, if their digital rights are negotiated away from the confines of the consent decrees' compulsory license regime, they can achieve rates that more accurately reflect fair market value.

BMI believes that its consent decree permits partial withdrawal of rights (*i.e.*, permitting publishers to designate BMI to license some license categories but not others).[2] However, in separate decisions in 2013, both the BMI and ASCAP rate courts determined that the PROs'

[2] For example, as part of BMI's standard publisher affiliation agreements all publishers have for decades withheld the right to license "grand" performing rights from BMI because the market for musical theater is one that they can easily license themselves and for greater value.

consent decrees do not allow their publishers to choose to have their works licensed by BMI (or ASCAP) for certain uses while retaining their rights to license PRO customers for other uses. The BMI rate court held that a publisher must use BMI for *all* public performing rights purposes or *none*, thus putting publishers in the position of having to leave PROs entirely if they wish to retain any licensing right exclusively for themselves.

These decisions present publishers with a dilemma: "all in" or "all out." If forced into an all-or-nothing choice, publishers could be compelled to turn their backs on the efficiencies and value that BMI brings to wide swaths of the music licensing market in order to explore market opportunities for digital music rights.[3] This threatens the entire licensing ecosystem that BMI services, including the songwriters, the hundreds of thousands of music users who depend on blanket licenses to comply with the copyright law, and the international web of reciprocal license agreements. Thus, in our discussions with the DOJ we are seeking to clarify our consent decree with the DOJ to provide for partial withdrawal of rights under some reasonable structural guidelines.

B. BMI Should Be Able to License Multiple Rights.

In today's world, multiple rights – for example, performing rights, mechanical rights, lyric display, publication and reproduction rights, and synchronization rights – are often necessary in order to disseminate music. Currently, users must negotiate these complementary rights with multiple parties in circumstances where the ability to negotiate all of them with a single party would be more efficient. As the Commerce Department Internet Policy Task Force

[3] For example, if a publisher withdrew from BMI, it would either have to incur the costs of licensing, monitoring, and collecting royalties from tens of thousands of restaurants and many thousands of broadcasters, or forgo licensing them and the royalties to which it would otherwise be entitled.

recently noted, the current disaggregated system is inefficient, and bundled licensing could spur innovation.

While the BMI consent decree does not prohibit the licensing of multiple rights, ASCAP's consent decree does. However, in Europe, where collective music rights organizations handle both performance and mechanical rights, it is a common practice for PROs to offer "one-stop shop" licensing for multiple rights in musical works. Yet despite the demands of the marketplace for bundled rights solutions, BMI and ASCAP do not generally license mechanical rights or synchronization rights, either separately or as a complement to their blanket licensing of public performing rights for digital music services.[4]

For over 10 years, digital music services have complained about the difficulty of licensing mechanical rights under Section 115. The Section 115 compulsory license is a work-specific license, whereas digital music services need access to a large volume of works to launch competitive music offerings online. These services have called for a blanket license under Section 115 as well as the ability to bundle the various music publishing rights they need through "one-stop shops." PROs ought to have no restrictions on the product lines they can offer to users who need all rights.

This clarification of the BMI decree is especially critical if some publishers elect to withdraw their digital rights from BMI. If partial rights withdrawal were permitted under the BMI consent decrees, we expect that some larger publishers would take the opportunity to license – and bundle – rights to certain music users outside of BMI's licensing mechanism. However, most publishers – including especially smaller and independent publishers – would

[4] BMI has included limited sync licenses to the broadcast television networks as part of its longstanding blanket license agreements.

likely opt to remain with BMI, as they may lack the resources necessary to explore such licensing opportunities or may simply prefer to avail themselves of the value provided by BMI.

It is therefore critical that the BMI consent decree make clear that these smaller and independent publishers – through BMI – are able to bundle digital rights in the same way as their larger competitors do. In this way, smaller publishers will be able to offer the same licensing products as large publishers, and digital music services will have access to all the rights they need from BMI affiliates on a one-stop basis.

In addition, under changes to the copyright law enacted effective in 1978 and just now becoming operational, songwriters who gave their rights to publishers in or after 1978 can recapture their copyrights after 35 years. This will create an ever-growing universe of songwriters who will become, essentially, their own publishers, and, just like the small and independent publishers, will need the resources of the PROs to fully exploit their works and compete with the larger publishers who offer bundled rights products outside of the PROs.

Maintaining BMI's role as a trusted digital licensing representative for independent music publishers and songwriters also would ensure the continued diversity and competition in the music publishing sector, which has seen consolidation in recent years. PROs should be explicitly authorized to handle reproduction and distribution rights required by digital services, either separately or as a part of bundled rights offerings. Such capabilities will also bring the United States into greater harmony with global PROs.

C. The BMI Rate Court Should Be Replaced or Streamlined.

Under the BMI consent decree, a licensee has an automatic right to a blanket license to use any, some, or all of BMI's music upon written request for a license. If BMI and the licensee cannot reach an agreement on reasonable fees through negotiations, either party can petition the designated judge in the United States District Court for the Southern District of New York to

determine those fees (referred to as the BMI "rate court"). When a fee dispute is before the BMI rate court, the parties to the rate proceeding frequently cite prior PRO licenses and other marketplace deals to serve as benchmarks in order to aid the rate court in setting reasonable license fee rates for the applicant music user.

While this rate court structure may have served a purpose in the traditional, stable broadcast marketplace, the process is ill-suited to the rapidly evolving digital licensing world. In short, the BMI rate court (and the parallel ASCAP rate court) federal litigation process has become unwieldy, expensive and slow, and it has produced what we believe are below-market rates that are not responsive to changes in the value of repertoire.

We believe that replacing the current rate court with arbitration in New York under the American Arbitration Association rules would be a faster, less expensive, and a more market-responsive mechanism for all parties to obtain fair, market-value rate decisions. Congress already enacted legislation to provide an expedited litigation structure for individual proprietors in Section 513 of the Copyright Act. This can perhaps be a template for a streamlined process, (albeit with replacing federal rate courts in the various federal circuits with arbitrations). We do not believe that moving BMI to compulsory licensing before the Copyright Royalty Board ("CRB") would be a solution to this problem, as it would replace one expensive, slow system with another.

Under the current BMI consent decree, any business that wants to use our music just has to send BMI a letter asking to do so. If businesses can get instant access to our music, it is only fair that they pay us *something* from the moment they use the music, even if it may take a while to come to a final agreement on terms. Under the current decree, if the parties cannot agree on an "interim" fee, BMI must bring a motion in the BMI rate court – again, slow and expensive –

to have the court set the rate. For an interim fee to be paid from the outset would require a change in the consent decree to become a reality.

D. The BMI Decree Should Be Periodically Reviewed or Sunset.

In addition to these reform ideas, BMI also believes that the DOJ should re-examine the basis for a perpetual consent decree governing and restricting the rights of music content owners. In this regard, we should move toward a sunset of the current decree in its entirety if its existence can no longer be justified overall, or partial deregulation in any digital market in which BMI may lack the market power that was the predicate for its original regulation.

The substantive provisions of BMI's current consent decree were negotiated and entered into in 1966, with the lone change since then being the addition of the compulsory license/rate court mechanism in 1994. This nearly 50-year span is several generations in human years, but measured in digital years, it is eons removed from the current marketplace. The current BMI consent decree assumes that BMI has significant market power that needs to be curbed, but those assumptions are questionable now that digital technology has exploded in the past two decades. The Internet's worldwide reach, combined with increasing computing power and decreasing storage costs, now affords both owners and music users far greater tools and capabilities to identify, monitor and license music use than was the case a half century ago. There are many rights licensing agencies and services competing to meet the rights clearance needs in an unregulated market.

However, even if regulation still has some place in the modern era, a likely future is one in which one or many major publishers may partially withdraw their digital rights from BMI (in the event that partial grants are permitted or recognized by the courts to be available under the decree), or large publishers may have left the PROs entirely. In any market sector in which this occurs, BMI would lack the market power presupposed as a basis for its consent decree

restrictions. Why then should BMI continue to be regulated for those licensees? In short, the competitive landscape has changed so substantially that the DOJ should reexamine the justifications for the decrees and seek termination if they are no longer found to be warranted by original assumptions.

If record labels and major publishers can license in the unregulated marketplace, PROs should also be able to compete on the same playing field so that legions of smaller songwriters and publishers will not be disadvantaged. Competition from the collective body of smaller songwriters and publishers will benefit the public welfare. At a minimum, the decree should be subjected to mandatory periodic review, perhaps every five years, and terminated at a stipulated point in the future.[5]

As you may be aware, the DOJ has in the last week called for public comment on whether the PROs' consent decrees are fulfilling their purposes. We look forward to this process and are optimistic that DOJ will agree that the time has come to bring the consent decrees into the modern age in order to address the current needs of the marketplace.

III. The Songwriter Equity Act Should Be Enacted.

BMI has joined with ASCAP, SESAC, Inc., the National Music Publishers' Association and the National Academy of Recording Arts and Sciences in support of the Songwriter Equity Act ("SEA"). The SEA is a modest bill which would help songwriters and publishers obtain fair market value royalties for public performance and mechanical licensing of digital services.[6] The

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[5] On March 28, 2014, the DOJ streamlined its review process for considering modifications and terminations. *See* Antitrust Division Manual (5th ed., March 2014), *available at* http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf (last visited, Apr. 14, 2014).

[6] BMI is very pleased that this joint effort culminated in the introduction of the Songwriter Equity Act of 2014 (H.R. 4079) ("SEA") on February 26, 2014 by Rep. Doug Collins (R-GA), joined by original cosponsor Rep. Marsha Blackburn (R-TN).

SEA contains an amendment to Section 114(i) that could serve to reduce the current inequitable disparity between the low public performing rights fees paid by Internet music webcasters (such as Pandora) to songwriters and publishers for the public performance of musical works, and the far higher, fair market value fees paid by these same Internet music services to recording artists and record labels for the public performance of sound recordings.

The goal of the SEA, insofar as it relates to PROs, is simple: it removes the prohibition against the PRO rate courts' consideration of the fair market value rates set by the CRB as benchmarks. The bill, by removing the evidentiary prohibition, establishes a process that permits the rate courts to consider all relevant benchmark deals (including the CRB rates). The statutory fix would not only apply in a rate court but also in arbitration of rates if the BMI decree is amended as we propose herein.

While we believe this may lead to a more reasonably comparative valuation for music compositions, the bill is silent on the appropriate rate, and leaves all aspects of rate determination to the rate court; it does ***not*** mandate rate increases for the PROs or digital music services, nor does it even require the rate courts to give ***any*** weight whatsoever to sound recording rates. Rather, by modifying Section 114(i) in this way, Congress would afford rate courts the ability to address the rates for musical works based on a more complete examination of marketplace factors.

The reason we seek passage of this bill is because we believe that a PRO rate court, given all relevant benchmarks, would set rates that would reduce the current disparity. There is a roughly 12-to-1 disparity in the license fees paid to SoundExchange by large digital music services like Pandora compared to the license fees paid to songwriters and PROs by those same services. While ASCAP's rate court recently announced a blanket license rate of 1.85% of

Pandora's net revenues to be paid to ASCAP (for its approximate 45% share of music performances), the same licensee is paying approximately 50% of its revenues for sound recording performing rights to SoundExchange.[7] BMI has its own rate proceeding pending against Pandora and we are seeking a reasonable rate increase.

There is no basis in law or economics for the current disparity. We believe that one of the causes for this disparity is the language in Section 114(i). Indeed, this section was cited by the ASCAP rate court decision as expressly forbidding the court from even ***considering*** as benchmarks the fair market value rates paid or set by the CRB for sound recording performance rights.

Indeed, this gap in the value of sound recording and musical work copyrights is out of sync with global music licensing norms. Internationally, performance rights in sound recordings are considered "neighboring" rights that are not the same as "authorship" rights under copyright. Rights of authorship vested in such creative works as musical compositions are viewed as having equal or greater value since they represent the foundational creative elements upon which other intellectual property is derived. This approach recognizes the undeniable truth that there can be no sound recording without an underlying musical composition.[8]

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[7] License rates for "non-interactive webcasting" of sound recordings are subject to a statutory license. In the absence of a voluntary negotiation, they can be set by the CRB under Section 114 using a standard that reflects. This standard is referred to as the "willing buyer/willing seller" standard. Voluntarily-negotiated interactive licenses have been considered as benchmarks in CRB proceedings. Digital music services like Pandora are thus required to pay license fees to SoundExchange for the right to stream the sound recordings containing the underlying musical works at a fair market value. These fees are in addition to separate license fees to the PROs and/or music publishers for the right to stream the musical works contained in the sound recordings.

[8] The SEA also seeks to shift the rate standard for mechanical royalties from a hodgepodge, multi-factor test to a market-based willing buyer/willing seller standard. We fully support this goal of the bill.

IV. The Public Performing Right Should Be Updated for the Digital Age, Recognizing the "Making Available" Right in the WIPO Copyright Treaty.

In the digital era, the future of content distribution is customized programming. Consumers want their programming on any device and available at any time. They will no longer accept having to be in front of their television sets at an appointed time to watch their favorite programming.

The worldwide copyright organization, WIPO, recognized in the WCT that the number of individuals who receive a particular content transmission simultaneously is not important. Rather, the WCT acknowledged that content will be consumed individually as a result of it being made available for consumption and therefore recognized that its "making available" right covers interactive, one-to-one transmissions commonly made by Internet and mobile services. In addition, the "making available" right in both the public performing right and public distribution rights includes liability for the "mere offering" to transmit works, without the need to demonstrate that a transmission to a particular listener took place.

To be clear, BMI believes that the current U.S. public performing right already includes the full scope of wired and wireless transmissions, as well as the full scope of interactivity, and that the "making available" right is an inherent part of current copyright law.

However, two recent court decisions have concluded that at least some individually-accessed content is ***not*** protected by the public performance right, suggesting that Congress should explicitly clarify that the concepts embodied in the "making available" right are applicable to public performances. Specifically, the Second Circuit's *Cartoon Network* and

Aereo decisions have called into question whether the public performing right even applies to certain kinds of interactive transmissions.[9]

Together, these decisions have curtailed the public performing right, by declaring that one-to-one transmissions of a copyrighted work to individual members of the public are "private" (*i.e.*, outside the scope of the public performing right, and the reach of copyright law) if they are made from so-called "private locker copies." This technology-based loophole is at odds with the wide application of the performing right to one-to-one, on-demand (or interactive) transmissions. Recognizing the importance of this issue, the U.S. Supreme Court granted certiorari in the *Aereo* case (and heard oral argument on the matter on April 22, 2014). BMI submitted an amicus brief as part of a music industry coalition and we are optimistic that the high court will reverse the Second Circuit's decision.

The future of commercial music content delivery lies with highly-customized and individualized content streaming offered by cloud music services, and many of these services are already claiming to make "private" performances, in reliance on *Cartoon Network*. I would like to emphasize that cloud computing services will not be threatened by a robust public performing right. Content rights should be licensed and the marketplace will respond to the legitimate needs of cloud locker services. By contrast, if these court decisions remain the law of the land, or are not cured by legislation, we face the potential for a growing range of uses of copyrighted content that will not compensate the content's creators. Together, these decisions threaten to eviscerate the value of creativity through a technological gaming of the system, enabling engineers to configure a performance as "not public" in order to avoid paying for the use of such content.

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[9] *See Cartoon Network, LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *WNET v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013), cert. granted, *ABC v. Aereo, Inc.*, 187 L. Ed. 2d 702 (U.S. 2014).

BMI therefore believes that the "mere offering" of performances for transmission is applicable to both the public performing right and the distribution right.

In light of these recent developments, we believe that the U.S. public performing right should be clarified or confirmed to include the full scope of the "making available" right.[10]

Conclusion

Music always starts with a song, and without songwriters, there would be no music. If music licensing reform is to reach fruition, protecting the economic interests of songwriters should be a paramount concern of Congress. The laws of the United States, enacted pursuant to an express constitutional clause, are rooted in a fundamental principle that authors should be incentivized to create. PROs are key players, as they present efficient marketplace licensing solutions that deliver performing rights to users and performing right royalties to songwriters and publishers.

We believe the keys to a continuing, vibrant music rights landscape are: (1) modernizing the consent decrees to permit partial rights withdrawal, enabling BMI and ASCAP to handle the licensing of mechanical and synchronization rights to digital music services, and streamlining and otherwise modifying the rate-setting mechanism; (2) enacting the SEA to enable rate courts (and any successor arbitration panels) and the CRB to establish fair market value rates for performance and mechanical licenses; and (3) if necessary, legislatively correcting the judicial decisions limiting the public performing right by clarifying that all interactive, on-demand transmissions to the public are public performances. These goals are achievable and will promote creativity and a robust music marketplace.

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[10] On April 4, 2014, BMI joined ASCAP, SESAC, Inc. the National Music Publishers' Association and The Songwriters' Guild of America in submitting a response to the U.S. Copyright Office's Notice of Inquiry regarding its study on the Right of Making Available. *See* Joint Comments of American Society of Composers, Authors and Publishers, Broadcast Music, Inc., The Songwriters' Guild of America, SESAC, Inc., and the National Music Publishers' Association, Study on Right of Making Available, Docket No. 2014-2 (Apr. 4, 2014).

Mr. Chairman, BMI looks forward to working with you, your staff, and other Members of the Subcommittee. Under your leadership and that of the Ranking Member, BMI will continue to work closely with all sectors of the music industry in order to develop music licensing reform solutions. We are grateful to the Subcommittee for the effectiveness of the Copyright Act, which permits BMI to function, and songwriters, composers and publishers to be compensated – not only to make a living but to create small businesses in a free enterprise system. Thank you for your many years of strong leadership on these issues which has had such a beneficial impact on the livelihoods of the hundreds of thousands of individuals we represent.

Mr. COBLE. Thank you, Mr. O'Neill.
Mr. Hoyt?

TESTIMONY OF WILL HOYT, EXECUTIVE DIRECTOR, TELEVISION MUSIC LICENSE COMMITTEE

Mr. HOYT. Good morning, Chairmen Goodlatte and Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee. My name is Will Hoyt, and I am the Executive Director of the Television Music License Committee. The TMLC represents some 1,200 local commercial television stations concerning music performance rights and has, on behalf of its members, been involved in negotiations, arbitration, and litigation for decades with the performing rights collectives that represent composers and publishers, ASCAP, BMI, and SESAC.

Based on TMLC's decades of experience interacting with ASCAP and BMI, and more recently with SESAC, the consent decree restrictions must stay in place, and consideration should be given to extending these types of restrictions to any entity that aggregates or bundles the power rightfully vested in individual copyright ownership by Congress.

Local television stations broadcast network, syndicated, and locally produced programs. In most syndicated programs, stations do not select or control the music used in these programs but are required to broadcast these programs precisely as produced and recorded by third-party producers, and then required to license the public performances embedded in the program. The stations license these performances through ASCAP, BMI, or SESAC. Because these organizations have separate and distinct repertoires, each station must take a license from each PRO.

Historically, these PROs have only issued licenses that permit the use of all of the aggregated copyrights in their repertoire without regard to the number of performances actually made by local stations. This is the so-called blanket license.

Decades ago, ASCAP and BMI entered into consent decrees with the Department of Justice in order to settle antitrust actions commenced by the Department. These consent decrees have been instrumental in providing stations the right to reasonable license terms in light of the extraordinary market power that ASCAP and BMI enjoy by virtue of their aggregation of performance rights and insistence on licensing those copyrights only on a collective or bundled basis.

Independent Federal judges have ruled, for instance, that under the ASCAP and BMI consent decrees, a station is entitled to a limited reduction in blanket fees where some of the rights to perform music in the station's programming were licensed directly from the copyright owner. These judicial rulings have helped facilitate more direct licensing within the industry, and therefore more competition.

These alternative licensing arrangements and fee structures were denounced by ASCAP and BMI, fought for in litigation by stations, and would not have been possible without the consent decree provisions.

As explained in my written testimony, SESAC is not subject to these restrictions and is the subject of a class action antitrust suit

brought by local television broadcasters with support from the TMLC. The licensing practices of SESAC demonstrate what any performance rights collective or other organizations that aggregate copyrights will do without the types of restrictions contained in the consent decrees. The Federal court recently denied SESAC's motion for summary judgment in the class action antitrust case brought by Television. The judge observed, "It is undisputed that SESAC possesses monopoly power in the relevant market," and described the evidence of actions taken by SESAC in recent years that are specifically banned by the ASCAP and BMI consent decrees.

Attempts by TMLC to gain access to music performance information maintained by PROs about the music contained in television programs have often been denied on the grounds that such music information is, supposedly, proprietary. A general policy that requires collectives to publicly release usage information on which user fees and royalty distributions are based would help promote a more competitive market.

We stand ready to cooperate with creators, collectives, and other users to find common grounds on legislation that would promote competitive market values for the right to perform musical works—that is, legislation that will fulfill the constitutional provision to enhance the public interest.

Thank you all very much for your time.

[The prepared statement of Mr. Hoyt follows:]

TELEVISION MUSIC LICENSE COMMITTEE, LLC

Hearing: Music Licensing Under Title 17 Part One
United States House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
Testimony of Willard Hoyt, June 10, 2014

1. Introduction

Chairman Coble, Ranking Member Nadler, and members of the Subcommittee, my name is Will Hoyt, and I am the Executive Director of the Television Music License Committee, LLC ("TMLC"). The TMLC, an organization funded by voluntary contributions from local television stations and made up of volunteers from a wide variety of local stations, represents the collective interests of the local commercial television stations in the United States and its territories in connection with certain music performance rights licensing matters. In that capacity, the TMLC has interacted extensively, over decades, with the two larger U.S. Performing Rights Organizations ("PROs") – the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") – assisting local television broadcasters in attempting to secure fair and reasonable licenses through a combination of industry-wide negotiations and, as necessary, funding and managing antitrust and federal "rate court" litigation in order to address the systemic lack of competition in the licensing of music performance rights to the local broadcast television industry. The TMLC also has had license dealings in the past with SESAC, LLC ("SESAC") – the smallest of the three U.S. PROs, but nevertheless an organization that wields significant market power in relation to the licensing of the musical works within its repertory. The TMLC is providing financial support to an antitrust action brought by several television broadcasters on behalf of the local television industry to address SESAC's anticompetitive licensing practices.

My testimony today will address the following topics:

- how local television stations acquire the right to publicly perform the music embedded in the programs they broadcast;
- the fact that stations do not choose and do not have control over the musical works embedded in much of the programming they broadcast;
- as a result of the way the marketplace for licenses to perform the music in television is structured, stations need to take licenses from each of ASCAP, BMI, and SESAC;
- the importance and necessity of the protections for local television stations (and other music users) provided by the ASCAP and BMI antitrust consent decrees (the "Consent Decrees");

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- the continuing need for the ASCAP and BMI Consent Decrees and the need for equivalent oversight of SESAC or other aggregators of performance rights;
- the lack of transparency of information about the music embedded in television programming and how that lack of transparency hinders the development of a more competitive market for music performing rights.

2. The Goal of the TMLC

The goal of the TMLC has not changed since I last testified before this Subcommittee in 2005. As I stated then, "the ultimate goal of the TMLC is to provide a competitive marketplace for music performance rights in which local television stations (and other music users) pay a fair price for performance rights and composers and publishers receive equitable payments for the rights used by local television stations." If there were a functioning free market with competition between and among music copyright owners to license performance rights, we expect the give-and-take of the marketplace would yield reasonable fees, but as described below, such a market has never existed and does not exist now for the rights for local television stations to perform the music in syndicated programming and commercials.

3. The Local Television Music Licensing Marketplace

As discussed in greater detail in the May 23, 2014 Comments of the Television Music License Committee submitted in response to the Copyright Office Notice of Inquiry requesting public input on the effectiveness of existing methods of licensing music, *see* 78 Fed. Reg. 14,739 (March 17, 2014), ("TMLC Comments") (attached), local television stations, with limited exceptions, are responsible for obtaining licenses for the public performance of copyrighted musical works in the programming and commercial announcements they air.[1]

For the programs that local stations produce themselves, such as local news, the acquisition of music performing rights is straightforward. In these programs, the station determines what music is used and how it will be used. Because the station can obtain the music performing rights at the time it selects the music and acquires all of the other rights needed to use it, the station can ensure that the performing rights are available at a reasonable price. It is within the station's control to ensure that it does not broadcast music performances for which it does not

[1] The ABC, CBS, NBC, Univision, and Telefutura television networks clear the performances of music contained in their network programming on behalf of their local station affiliates. Accordingly, stations affiliated with one of those networks are only responsible for licensing the rights to perform the music in the "non-network" portion of their programming day. Other television networks, such as FOX, do not clear the music in their network programming, and stations must separately obtain licenses to cover their performances of that music.

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have a performance right or for which the cost is too high. The ability to select what music is used in local programming allows stations to deal directly with the creators of the music in a competitive market environment. The prices paid by stations in these competitive market circumstances have typically been significantly lower than the prices charged by ASCAP, BMI and SESAC for similar music performances. Due to the opaque systems used by PROs to distribute royalties, these lower direct payments sometimes result in higher payments to creators. This suggests that money that would otherwise flow to creators of television music in a free market is being diverted by PROs to other rightsholders or that these collectives are inefficient.

Most of the programs and commercial announcements that stations broadcast, however, are produced by third parties who select the music for the program but do not pay for the right for stations to broadcast those musical performances. For example, syndicated programming, which includes reruns of shows that were originally broadcast on the networks ("off-net") and shows that are produced and recorded specifically for broadcast on local television stations ("first run syndication") are produced by a third-party programmer and then licensed or "syndicated" to stations for broadcast in markets across the country. Examples of these "off-net" shows include *Seinfeld* and *Friends*, both of which are being broadcast years after the initial production was completed and the music embedded. *Judge Judy* and *Entertainment Tonight* are examples of "first run" syndicated shows. Stations do not control what music is in these programs, nor do they necessarily even know which music has been embedded, but the contract between the station and the syndicator typically requires the station to broadcast the program as produced without alteration. Currently, these syndication contracts convey to the station all of the rights required to broadcast the program (including those for the other creative elements, such as the script, choreography, acting and direction) except for the right to publicly perform the musical works that are irrevocably embedded in the program. These same principles apply to the network programs provided by networks such as FOX that do not clear performances by their affiliated stations and to television commercials produced by advertisers, which are often distributed as part of syndicated or network programs.

Because these third-party producers do not acquire the performing rights for the music, stations have little choice but to rely on repertory-wide coverage (typically, through so-called "blanket licenses") from each of the three U.S PROs to ensure that they do not infringe copyrights. Even for stations that have tried to deal directly with each of the composers or publishers whose music is embedded in the program, the station either has not had access to accurate, timely, and complete music use information or a significant percentage of the rightsholders have declined to deal with the station individually, preferring to license their works collectively through a performing rights organization. This reality confers significant market power on each of the PROs.

In these circumstances, a station is left essentially with two hypothetical choices: either pay the fee demanded by the PRO or do not broadcast a program in which the station has made an economic investment that far outweighs the value of the music performance rights in the program. This assumes, contrary to fact, that a station knows what music has been used in a program before it airs and which PRO controls the respective performing rights. The

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extraordinary leverage this provides the PROs forces most stations to purchase blanket license coverage as insurance against the risk of copyright infringement liability.

Individual rightsholders could instead negotiate directly with program producers and advertisers over the value of performance rights at the time music is selected or commissioned for use in third-party produced programming and commercial announcements. Those rightsholders already negotiate with such producers and advertisers, both to contract for any new music to be created and to convey a separate copyright right – a synchronization or "sync" right – a variant of the reproduction right that permits the producer to reproduce the musical work in timed relation to the audiovisual images of the program. Rightsholders and program producers can bargain over music performance rights as part of the transaction for the sync rights. Such a transaction would place music performance rights on the same footing as all other rights embedded in the programming, namely, they would be secured by the producer on the local stations' behalf at a time when meaningful negotiation over their fair market value can take place.

These competitively negotiated rights would then be included in the price of the contract between the syndicator and the local station that permits the station to broadcast the program. The cost of this broadcast syndication license is, in turn, determined in a competitive market that includes other local stations, cable networks and other new media delivery systems.

This approach to licensing non-dramatic public performance rights has been in place and has operated seamlessly for more than 60 years in the motion picture industry.[2] Motion picture exhibitors have thereby avoided being subject to the very predicament that local television stations find themselves in – bearing the legal responsibility themselves to clear performance rights in music they neither select nor control the ability to exhibit. To be sure, there are challenges in shifting the television industry to a system where program producers clear all downstream music performance rights. Producers and creators will need to develop new compensatory systems that recognize the greater value of performances that are more frequently transmitted or broadcast to a greater audience. At least until that system is in place, PROs will

[2] This competitive market for the music performance rights in the movie industry was brought about in large measure by a private antitrust lawsuit. In *Alden-Rochelle Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), operators of motion picture theatres challenged certain provisions of ASCAP's by-laws which prevented ASCAP members from conveying directly to movie producers music performance rights, notwithstanding that they were already engaging in negotiations with such producers over synchronization rights in the same musical works. This artificial "splitting" of the licensing of copyright rights forced theater exhibitors to obtain blanket licenses from ASCAP in order to lawfully exhibit the motion pictures. A federal court concluded that ASCAP violated the antitrust laws and issued an injunction stopping ASCAP's members from licensing music performance rights to the music embedded in movies to anyone but the movie producers. 80 F. Supp at 900 & n. 2; (*See also M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948)).

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continue to play a prominent role in licensing performances of music on television, and ongoing government oversight will be needed to prevent abuses of the market power conveyed by collective licensing.

4. Licensing Activities of ASCAP, BMI AND SESAC

ASCAP, BMI and SESAC license the non-dramatic public performance right for musical works. Historically, local television stations were required by these PROs to accept traditional blanket licenses conveying the rights, *en masse*, to their entire repertories of music.[3] The pricing structure of these blanket licenses was not related to either the extent of a station's actual use of a given PRO's music or to a licensee's success in obtaining performance rights to a portion of the music it used through direct license arrangements with the copyright owners ("direct licenses") or the limited instances in which program producers have obtained such rights on the station's behalf ("source licenses"). This aggregation of individual copyrights gives the PROs significant market power and eliminates competition among otherwise competing individual composers and music publishers for performances of their works.[4] When combined with the fact that local stations have no control over much of the music that they publicly perform and may not know the music content of a program at the time it is broadcast, the ability of the PROs to exploit this market power is magnified.

Recognizing the inherent market power that blanket licensing affords PROs and their affiliated composers and publishers, the Antitrust Division of the U.S. Department of Justice brought antitrust challenges against both ASCAP and BMI. These lawsuits resulted in the ASCAP and BMI Consent Decrees, which impose a number of constraints upon those organizations' licensing activities designed to rein in their monopoly pricing power.

Specifically as they relate to local television broadcasters (although clearly also benefiting other music users), key provisions of the ASCAP and BMI Consent Decrees include those that:

- Require ASCAP and BMI to issue licenses on request, thereby averting threats of copyright infringement by those PROs or their affiliated publishers and composers while negotiations over fees and terms are ongoing.

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[3] The license repertories of ASCAP, BMI and SESAC are exclusive to one another; accordingly, there is no competition between and among the PROs to license a given composer's musical compositions.

[4] *ASCAP v. Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 570 (2d Cir. 1990) ("[I]n the licensing of music rights, songs do not compete against each other on the basis of price."); *see also* BMI v CBS, 441 U.S. 1, 32-33 (Stevens, J., dissenting) ("[T]he blanket license does not present a new songwriter with any opportunity to try to break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.").

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- Empower the federal court that supervises the decree to act as a "rate court" in setting "reasonable" license fees in the event of negotiating impasse;
- Bar ASCAP and BMI from obtaining *exclusive* rights to license their affiliated copyright owners' works – thereby preserving the right of users to secure performance rights licenses either directly from composers and music publishers or through program suppliers who themselves acquire those rights on the stations' behalf;
- Mandate that ASCAP and BMI offer music users economically viable alternative forms of license beyond an all-or-nothing blanket license, thereby enabling stations to secure public performance rights to at least portions of their music uses via direct and source licenses without paying twice for the same rights; and
- Require that ASCAP and BMI license similar users similarly, thereby preventing ASCAP and BMI from price discriminating within a community of users.

As discussed in greater detail in the TMLC Comments, these constraints, as enforced by the courts, have been the primary catalyst in affording local television stations and other music users critical, albeit limited, relief from the monopoly pricing power otherwise possessed by these collectives.[5] For instance, using the rate court process provided under the Consent Decrees, local television stations have been able to establish alternative license fee formulas under the blanket license umbrella to obtain limited fee credits for music licensed directly or at the source, injecting at least some competition into the music licensing marketplace.[6] As long as the alternative license structures do not provide full credit in PRO fees for direct and sourced licensed works, direct and source licenses result in double payments to creators and PROs, thereby discouraging the development of a more competitive market for local television music performance rights. Any reforms that weaken the current consent decree and rate court systems would be a step backward toward greater inefficiency and PRO market abuse.

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[5] Del Bryant, the former CEO of BMI, agreed. In his 2005 testimony he noted that "[t]he BMI Consent Decree is doing the job it is supposed to do . . . that is, afford a BMI license to those music users that want a BMI license, and afford a relief valve in the event the music user and BMI cannot agree to license fees/term."

[6] The Per Program formula requires that every music performance within a program be "otherwise licensed," so that even a one second performance of a PRO affiliate's music not otherwise licensed requires full payment for that entire program. The most recent alternative provides for a pro rata credit for each performance by a particular PRO's affiliate, but it does not provide any credit for a directly-licensed performance by a creator who is not a member of that PRO or substitution of music owned by a non-member. Neither of these alternatives provide for a reduction in the transactional fees associated with the performances that are direct or source licensed.

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Unlike ASCAP and BMI, SESAC is not yet subject to any judicial constraints on its licensing activities. Despite the fact that it is far smaller than either ASCAP or BMI, SESAC has been able to amass, through collective licensing, substantial monopoly power. With this monopoly power, SESAC today is engaging in essentially the same activities in relation to local television broadcasters that led to the government antitrust litigation decades ago that culminated in the ASCAP and BMI decrees.

These activities include: (i) extracting supra-competitive rates for its blanket license; (ii) refusing to offer any viable alternatives to its all-or-nothing blanket license; (iii) eliminating any opportunity to secure non-dramatic public performance rights for certain musical works in the SESAC repertory other than through the SESAC blanket license, including by entering into de facto exclusive licensing arrangements with its key affiliates; (iv) revoking interim licensing authorizations and then threatening copyright infringement lawsuits if stations do not acquiesce to SESAC's license fee demands; and (v) refusing to provide users with complete and up-to-date information on all of the works in its repertory in any usable form, thereby eliminating the user's ability to determine if a particular work is in the SESAC repertory.

As a result of SESAC's refusal to curtail these anticompetitive practices, broadcasters were compelled to bring an antitrust class-action lawsuit on behalf of the local television industry against SESAC in 2009. A trial date has not yet been set, but SESAC's motions to dismiss the case at the pleading stage and for summary judgment after the close of fact and expert discovery were denied.[7] In denying SESAC's motion for summary judgment, the court observed that the effective elimination of licensing alternatives to SESAC's blanket license means that "stations must pay supra-competitive prices for the one license that is available—SESAC's blanket license." *Meredith Corp., et al. v. SESAC, LLC*, 09 Civ. 9177 (PAE), __ F. Supp.2d __, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014). The Court stated that "it is undisputed that SESAC possesses monopoly power in (the relevant) market" and that "(i)t also appears undisputed that SESAC has the power to control prices over that market as currently structured. *Id.* at *36. The court also noted that de facto exclusive licensing arrangements with key affiliates "effectively eliminated direct licensing as a means by which stations could license these affiliates' music," *id* at *10 and that the penalties for direct licensing in the de facto exclusive agreements constitute "substantial evidence ... [from] which a jury could find that SESAC effectively forced local stations to buy its blanket license." *Id.* *30.[8]

In the absence of fundamental marketplace reform in the manner in which local television broadcasters acquire the rights to perform the music embedded by others in the programming

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[7] For a more detailed discussion of this antitrust action, please see Section III of the TMLC Comments, p 14.

[8] The very existence of these exclusive licensing arrangements was denied in testimony given by former SESAC CEO Stephen Swid in testimony before this Subcommittee in 2005. *See* May 11, 2005, Serial No. 109-25 (p 26) ("As Stephen Swid...stated in his oral testimony SESAC has not entered into any exclusive arrangements with composers and publishers...").

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that they broadcast, any legislative or other reform should preserve the critical protections of the Consent Decrees afforded users such as local television station broadcasters. Similar oversight should be extended to SESAC and any other entity that seeks to aggregate and collectively license performing rights on behalf of composers and publishers that would otherwise be competing.

6. The Importance of Transparency in Music Licensing

Future regulation of collective licensing of music performance rights should recognize the importance of transparency in music licensing. A modern system of data concerning the use of music in television, combined with transparent and accurate information about music rights ownership and PRO affiliation, would go a long way toward promoting competitive-market alternatives to the traditional blanket license. PROs, to varying degrees, have sought to preserve and exploit the lack of robust, accurate, and timely information available to their local broadcast station licensees to stifle competitive alternatives for the licensing of music performance rights. While it would not solve all of the problems of a music rights marketplace that has been marked by the absence of competition, transparent and standardized information would facilitate individual license negotiations between stations and rightsholders and increase the prevalence of performance rights payments that reflect fair market value.

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Mr. COBLE. Thank you, Mr. Hoyt.

Mr. Griffin? You are our clean-up today, Mr. Griffin.

TESTIMONY OF JIM GRIFFIN, MANAGING DIRECTOR, ONEHOUSE LLC

Mr. GRIFFIN. Excellent. I think I am used to doing that.

So, my name is Jim Griffin. I am a media technologist, which I think means I am the panel's geek. That is probably appropriate. Twenty years ago this coming Saturday, when I was the Director of Technology for Geffen Records, we released the first full-length song online, Aerosmith's "Head First." That was on June 14, 1994. So it has been 20 years now.

And there are so very many issues that are at the forefront of today's hearing. I am fascinated by all of them, but I am going to focus on only one issue, and that is the growing need for registries, for databases, comprehensive databases of information related to creative works, and not just music. So my remarks, while they focus on music, really span the field of copyright. I am going to make just a half-dozen fundamental points.

The first point is that our goal should be to make it fast, easy, and simple to pay for music, movies, books, art, other expressions of ideas, such that the market can work with alacrity and efficiency. If we make it fast, easy and simple to pay, more people will.

Secondly, we need comprehensive public directors. It is unnecessarily difficult to pay your license from those difficult to identify or locate. We must work to record, enumerate, and update public databases that get creators paid and works licensed, let alone provide attribution and create an historic record of our culture's heritage.

Two years ago, I co-authored a scholarly paper for the Entertainment Law Journal that we entitled "Rights Unenumerated, Rights Disrespected." The title tells the story, and that is all of the story you need to know. Without rights enumerated, they are very difficult to respect.

My third key point is that we should include all creators when we build these databases. Performers, featured artists, background artists, writers, editors, translators, owners, and all associated with the copyrights should be included in the rights to record and remuneration copyright information because they often have remuneration.

Mr. COBLE. Mr. Griffin, you may want to pull that mic closer to you.

Mr. GRIFFIN. Yes. They often have remuneration and attribution rights, and they can also help us elucidate ambiguous information. As much as we do with land records, we should welcome any claim to any work.

Well, I guess I have 2 minutes to repeat a lot of it. So I will go very, very quickly here for you. And just to repeat that my name is Jim Griffin. I am the panel's geek, the media technologist here, 20 years——

Mr. MARINO. Excuse me, sir. We heard it all. We heard it clearly.

Mr. GRIFFIN. Gotcha, then. That is just fine by me.

The fourth key point that I am going to make is that we need GUID, and that is Globally Unique Identifiers. No less than a bank

check or a credit card, we have to have a number for each song, each book, each thing that we are trying to track. Simply using the title or the artist's name is not enough. There are so many different ways to spell the creator's name or the title that it makes matching extremely difficult. And, yes, it is true, we do rely upon semantic matching absent Globally Unique Identifiers.

Globally Unique Identifiers are easy to explain. They are just like the VIN number on a car. Without a VIN number, we cannot accurately describe it. And when we have these Globally Unique Identifiers, we need to have them in a public database that is accessible to anyone to read, and we do not now have appropriate databases for music, photos, graphics, to cite just a few examples where it is not done at all.

This has many impacts. The key concern is that absent the use of these unique global numbers, money disappears along its path to its intended receiver. Where does this money go? It goes to pools of unattributed income divided through market share formulas at the organizations that collect the money and not to the specific creator for which it is intended.

Fifthly, I will say that there is a market solution, and it does not require the government to step in to fix it. The government, I think, should provide a wholesale core database that encourages retail activity at the edge of the market, no different than what happens with Internet domain names. There is a wholesale market at the center, but it encourages a retail market solution at the edge.

Sixthly, I will finish by saying that the problem is growing exponentially in front of us. In roughly the year 2000, we saw 50,000 sound recording albums released a year. By today's standards, we go through that in 4 days on Sound Cloud, on January 4th, and sometime on January 1st YouTube sees that much content ingested. We have a moving target.

If we expect respect for rights, rights need recordation and enumeration, and this issue cuts across all concerns. Regardless of how you license, you need to keep track of the stuff that you are licensing. Thank you.

[The prepared statement of Mr. Griffin follows:]

Jim Griffin
Managing Director
OneHouse
The Plains, VA

Mr. Chairman and Members of the Committee:

My name is James Hazen Griffin. I am Managing Director of my consulting firm, OneHouse, in The Plains, Virginia, where we are focused on the digital delivery of art, especially music and its monetization.

I thank you for the opportunity to appear today. My independent voice is like that of many independent creators who in aggregate outnumber the media companies that sometimes purchase their work for distribution and delivery.

There are so very many issues at the forefront of today's hearing. I enjoy discussing all of them but for clarity and purpose I will focus on just one: The growing need for registries and our need for global, comprehensive databases of information related to creative works.

Essentially, my remarks focus on half a dozen fundamental points:

1. The Goal: Make it fast, easy and simple to pay for music, movies, books, art and other expressions of ideas such that the market can work with alacrity and efficiency. Essentially, the playing field levels with global access to complete information about creative works, a prime reason this goal has not been accomplished and may never be.

In other words, public registries of creative works are lighthouses for users, creators and those who enable the connection between them. Lighthouses are classic public goods, loaded with economic externalities. Relying upon purely private efforts will not deliver a lighthouse (or its modern equivalent, the Global Positioning System).

2. Comprehensive public directories: It is unnecessarily difficult to pay or license from those difficult to identify or locate. We must work to record, enumerate, update public databases that get creators paid and works licensed, let alone provide proper attribution and create an historic record of our culture's heritage.

Last year, the United States Patent and trademark Office issued a green paper that highlighted the current problem:

> *The most basic prerequisite for obtaining licenses is reliable, up-to-date information about who owns what rights in what territories. Users need to find the rights holders from whom to obtain permission, and right holders or their representatives need to be contacted to determine terms of use. As online businesses seek licenses for large repertoires of works to be offered in multiple countries in a variety of formats, and as multimedia uses become more common, the need for comprehensive globally-linked databases is growing.*

Two years ago I co-authored a scholarly paper for the *Entertainment Law Journal* with PTO attorney Ann Chaitovitz that we entitled "Rights Unenumerated, Rights Disrespected." The title tells the story.

3. Include all creators: Performers, featured artists, background artists, writers, editors, translators, owners and all associated with a copyright should be included in efforts to record and enumerate copyright information because they often have remuneration and attribution rights, and they can help elucidate ambiguous information. Much as we do with land ownership records, we should welcome any claim related to any work.

Here's a clear example: Featured artists, background singers and studio musicians are entitled to half the money collected from non-interactive digital music services, now north of $500 million dollars, headed towards a billion in short order. These creators often have no copyright interest in their own work, but they do have remuneration rights under the law.

In addition, the moral right to attribution for creative efforts should be recognized and observed by all, a task rendered exceedingly difficult by a lack of public databases on creative works.

4. GUIDs are essential: We must support GUIDs (Globally Unique Identifiers) and public databases that include them. Semantic matches are not fit for the digital global age.

A GUID is easy to explain: It's like the VIN number on a car. It's an unambiguous description that works regardless of language, culture or character set.

Difficult to explain: In spite of the International Standards Organization (ISO) suggestion that such identifiers should be accessible through a public database, this does not now happen in the music business.

Worse still: There is no authoritative database of them, public or not. No records are kept when numbers are assigned. Private databases do exist for the use of companies and organizations, but they are neither comprehensive nor authoritative.

In short, the idea that media companies can assign identifiers in accordance with international public standards without feeling obliged to tell anyone what they have identified with the code is absurd.

My colleague Paul Jessop, amongst the world's leading experts in this field, says (according to my notes) that "For identity management to be trustworthy you need to be able to find out what something is called and to find out what lies behind something with a name. Currently there is not effective access to this information, and that's before you get to the ownership of the rights in the things identified, which cannot be managed without effective identity management.

As a result, we do not now have appropriate databases for music, photos or graphics, to cite a few examples where we do not have proper GUID implementation. Semantic match is especially challenging in a truly global, multilingual, multiple character-set world; GUIDs are essential to matching rights with works.

A client of mine recently explained that more than 90 percent of the money they receive carries no GUID for connection to downstream revenue participants. As a result, they must use semantic matching for distribution, highly inefficient, a roadblock to proper revenue sharing.

I asked a number of the music-using companies why they do not attach a GUID to music-use reports and their answers were identical: There is no authoritative database of them, let alone a public accessible database of them, so we cannot use them in commerce.

This has many impacts, but the key concern is that absent the use of GUIDs money disappears along its path to its intended receiver. Where does that money go? To pools of unattributed income, divided through market share formulas at the organizations that collect the money.

5. There is a market solution: On the Internet there are no unregistered computers. Every computer has an address registered directly or indirectly with the Internet Corporation for Assigned Names and Numbers (ICANN).

ICANN registration works in large part because it is based on the profit motive. There is a non-profit wholesale core (ICANN) to set standards and incentivize a profit-seeking retail edge (for examples, Go Daddy or ENOM). The IP world can learn a lesson here: What IP sees as cost can instead generate profits, both directly (fees) and indirectly (licensing).

In my opinion, past efforts at copyright registries fail for a number of reasons, principally because they are not market-oriented. No hands are nearly so powerful as those of Adam Smith, author of the Wealth of Nations and a principal chronicler of the free market. Many hands make light work of difficult problems, especially with registries.

Given a core, wholesale, globally accessible public registry of creative claims, I believe a powerful market will develop to fill those registries with claims from creators. Outreach is the key, with profit potential motivating marketing, advertising, outreach and education.

Equally, I feel sure that the continuation of past efforts, which center around expecting private companies to release to the public their internal information, will produce more on-going failure.

A market solution for registries requires a wholesale core, much as has ICANN created the Internet's Domain Naming System. It is profitable, reliable, globally distributed and financed through registrant fees. In my opinion, as regards music, SoundExchange could perform this role well, as could similar organizations that exist for other media types.

6. The problem grows exponentially: We are watching creative expression shift from the center of the network to its edge. We need registry services optimized for dramatic growth from the edge of networks, commonly called User Generated Content (UGC).

Examples: Soundcloud alone reports a 2014 average of 12 hours of audio uploaded every minute (every 60 seconds). YouTube reports 100 hours of audio/video uploaded every minute. These numbers will likely double bare minimum every year or two.

By comparison: When at the global music industry's height it counted roughly 50,000 albums per year, conservatively counted Soundcloud now ingests more music than this every four days. The growth is even greater as regards video at YouTube. We have inadequate registry efforts now and they're getting worse.

Conclusion

If we expect respect for rights, those rights need recordation and enumeration. The world cannot be expected to respect, pay and attribute where that information is unavailable.

This is not a subjective discussion, as is the case with licensing and the proper role of government. Respectfully, reasonable people can and do disagree on these matters.

This issue cuts across those concerns. Regardless of one's views on copyright and licensing, proper databases are essential, whether to seek permission for direct licensing, to process payment if statutorily licensed, or even if simply needed to properly attribute the work to its creators.

The irony: Writing was developed to track property, clay tablets and reeds reducing the need for walls and physical property markers. Writing has grown to express our dreams, but recording the data behind those expressions fails us, and we are the losers because without information, permission, money, incentive and more are all elusive.

My friend Daryl Friedman at the National Academy for Recording Arts and Sciences (NARAS) puts it better than me: "Artists deserve cash and credit." Well put. I couldn't agree more.

Mr. COBLE. Thank you, Mr. Griffin.

As we examine you all, we try to stay within the 5-minute rule as well, so if you will work with us on that.

I am told that Chairman Goodlatte has a meeting that he must attend, so we will let him kick it off.

Mr. GOODLATTE. Mr. Chairman, I thank you for your forbearance.

And to all of our witnesses, thank you.

The clock is ticking. I have four questions for all of you, so that is 28 answers. They need to be really short, most of them yes or no.

Number 1. We will start with you, Mr. Portnow. Would a free market model be a better alternative than the licensing system we have today?

Mr. PORTNOW. Well, it is a fair market that we need. In other words, we have to pay for——

Mr. GOODLATTE. Mr. Miller?

Mr. MILLER. Yes. That is exactly what we are here to ask you for today.

Mr. GOODLATTE. Mr. Israelite?

Mr. ISRAELITE. Yes.

Mr. GOODLATTE. Mr. Knife?

Mr. KNIFE. I think we need a fair market, as Mr. Portnow was saying.

Mr. GOODLATTE. Mr. O'Neill?

Mr. O'NEILL. Please, yes.

Mr. GOODLATTE. Mr. Hoyt?

Mr. HOYT. If you define "free market" as a competitive market, yes.

Mr. GOODLATTE. Mr. Griffin?

Mr. GRIFFIN. As much as possible, but copyright is tough because you start without one.

Mr. GOODLATTE. Don't I know.

Number 2, former Register of Copyrights, Marybeth Peters, once suggested a union of music rights so that music services can more quickly get started. Would you support such a music rights organization model rather than the current system?

Mr. Portnow?

Mr. PORTNOW. A complicated question. It would depend on what that looks like. What I would say is that our community cannot subsidize the establishment of new businesses, however, off our backs.

Mr. GOODLATTE. Mr. Miller?

Mr. MILLER. We support anything that revalues the copyright.

Mr. GOODLATTE. Mr. Israelite?

Mr. ISRAELITE. That would happen in a free market.

Mr. GOODLATTE. Mr. Knife?

Mr. KNIFE. I think we wouldn't support the addition of other layers of administration, but we do support anything that leads to efficiency in the marketplace.

Mr. GOODLATTE. Mr. O'Neill?

Mr. O'NEILL. Yes.

Mr. GOODLATTE. Mr. Hoyt?

Mr. HOYT. We don't see the necessity for a government regulated single unit, and we believe that the competitive market will work in the long run.

Mr. GOODLATTE. Mr. Griffin?

Mr. GRIFFIN. I favor the consolidation that you described.

Mr. GOODLATTE. All right. Here is the tough one. You have to do some mental calculations quickly.

What is the appropriate split, Mr. Portnow, between a songwriter and a performer for their work? And should Congress determine the split, or should someone else? And if so, who?

Mr. PORTNOW. Nobody is getting rich from the new services. We have regulatory bodies at this point who are making that judgment. If it is done on a fair market value, then that is what is important, that each of the creators have what is fair in the marketplace.

Mr. GOODLATTE. Mr. Miller?

Mr. MILLER. Well, essentially it is two different things. The underlying work is the words and the notes, and then you have a sound recording. Mr. Israelite would have to speak to the complications of that.

Mr. GOODLATTE. All right. Mr. Israelite?

Mr. ISRAELITE. A free market would answer that question, and then the one place where there is a free market for both copyrights, which is the synchronization right, it is generally split 50/50.

Mr. GOODLATTE. Mr. Knife?

Mr. KNIFE. We are generally agnostic as to what that split would be, but we are inclined to move toward a system where we would only have to pay one person, and others would define what the split is amongst their rights.

Mr. GOODLATTE. Mr. O'Neill?

Mr. O'NEILL. I have songwriters who are artists, and I have songwriters that are just songwriters, and they argue that point often. I think the free market would ultimately determine it.

Mr. GOODLATTE. All right. Mr. Hoyt?

Mr. HOYT. If you can create a truly competitive market, that competitive market will determine the rates.

Mr. GOODLATTE. Mr. Griffin?

Mr. GRIFFIN. I don't think you should compel a particular solution or percentage. I think you should allow the parties to reach an agreement. But if they cannot, there needs to be an alternate arrangement such that there is payment.

Mr. GOODLATTE. Congratulations. We are through 21 of the 28 questions, and we still have a green light.

So, Mr. Portnow, this is a little broader, but be quick. What are the less visible issues that Congress should be aware of as we review our nation's music licensing laws?

Mr. PORTNOW. I think we have our hands full with the ones that are visible. I am happy to talk about that privately.

Mr. GOODLATTE. All right. Mr. Miller?

Mr. MILLER. The current state of the digital world is so debilitating to the songwriting community that, I assure you, we cannot see beyond the obvious.

Mr. GOODLATTE. Okay. Mr. Israelite?

Mr. ISRAELITE. There has been quite a bit of focus on the market power of Lee and his fellow songwriters, as opposed to the market power of the people we license to. So I don't think that Google and Amazon and Apple need protection in their negotiations with songwriters.

Mr. GOODLATTE. Mr. Knife?

Mr. KNIFE. I think some of the issues that aren't being addressed are issues regarding the way money flows through the system. There are large amounts of royalties being paid by my member companies, and yet we still hear complaints from songwriters that they are not getting paid.

Mr. GOODLATTE. Thank you.

Mr. O'Neill?

Mr. O'NEILL. With the consent decree from 1941 augmented in 1966, there are many issues below the surface that we just don't have any time for.

Mr. GOODLATTE. Well, perhaps my opening this up will cause you or others to comment as we move forward.

Mr. Hoyt and Mr. Griffin?

Mr. HOYT. If I may, Mr. Chairman.

In the interest of public policy, I think you have to really look at the balance between the benefits of aggregation and the potential elimination of price competition.

Mr. GOODLATTE. Mr. Griffin?

Mr. GRIFFIN. I think that it is a very difficult question to answer definitively, and I will simply say that we have to maintain some kind of monitoring in order to ensure balance.

Mr. GOODLATTE. Going back to the point in your statement.

Mr. Chairman, thank you for your forbearance; 28 answers in 5-and-a-half minutes is pretty good.

Mr. COBLE. You almost prevailed over the illuminating red light, but you barely made it.

Mr. GOODLATTE. Thank you.

Mr. COBLE. The distinguished gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Portnow, you endorse a comprehensive, unified legislative approach to music licensing. What are the advantages to a comprehensive approach? Are there harms to doing it piecemeal? And what are the key elements of a meaningful comprehensive bill? Briefly, please, because I have a lot of questions.

Mr. PORTNOW. Well, I think we see the results of the band-aid approach. Over the years we have cobbled together these various different rights from different generations, and when we arrive at where we are today, they just don't work. To do it piecemeal at this point when we have a great opportunity to make a difference, you hear everybody on this panel clearly saying that we have to make some changes. I have heard most of you saying that some changes need to be made. We need to grab that opportunity. It is not certainly going to be easy. It is complicated. But that is really the way to go.

Mr. NADLER. Are there harms to doing it piecemeal? Why do we need a comprehensive approach?

Mr. PORTNOW. Comprehensive is the way to go in the long run because the piecemeal has not served us well.

Mr. NADLER. Okay. Thank you.

We also sometimes hear that a royalty for performing artists from AM/FM radio would benefit the biggest of stars, not smaller artists. What is your response, and are there studies out there showing this?

Mr. PORTNOW. The performance right, the way it would work is that it would go to the artist, and the artist, whether he is a large artist or a small artist, really is not relevant. The fact is that when somebody's work is played on the air and they are the performer, they ought to be paid. There is no example in American history of business that profits from the works of others without paying them.

Mr. NADLER. Well, actually, there is, but it is before the Civil War.

Mr. Israelite, within the compulsory music licensing system, one goal is to mirror the free market and maximize fair market value. How do you envision achieving that for all music creators? And can we do it in a comprehensive fashion so that we don't leave anyone behind?

Mr. ISRAELITE. So about a quarter of our industry is regulated by a compulsory license with a bad rate standard, Section 115. Our first preference would be to get rid of the compulsory license. We don't think the government should have any business in setting prices for songwriters. But the next best thing and the thing that perhaps is more doable is to at least give us a rate standard of willing seller-willing buyer. If that were the case, I can promise you that on a $1.29 download, a songwriter would make more than 9.1 cents. So in the absence of being given a free market opportunity, at least let the judges that set our rates try to approximate what would happen in a free market.

Mr. NADLER. What did you say that 1909 2 cents was worth today?

Mr. ISRAELITE. With inflation it would be about 50 cents.

Mr. NADLER. But it is only 9 cents. Thank you.

Mr. ISRAELITE. It is 9.1.

Mr. NADLER. Okay. Thank you.

Mr. Knife, under current law there is a different rate setting standard that is used to establish rates for cable and satellite than for Internet radio. How has this impacted your members?

Mr. KNIFE. Well, clearly the biggest issue, the biggest way it has affected them is that they pay considerably higher rates. The willing buyer-willing seller standard has led to higher rates than the 801(b) standard has led to.

Mr. NADLER. So currently some of your competitors have an advantage over you, and creating parity would at least level that playing field?

Mr. KNIFE. Absolutely, sir. Yes.

Mr. NADLER. And why should we do the 801(b) instead of the willing seller-willing buyer?

Mr. KNIFE. I think there are a couple of reasons. Probably the first and foremost is that the willing buyer-willing seller standard is relatively new. In the short tenure of its application, it has re-

sulted in some disastrous results that this esteemed House has seen fit to intervene on. Whereas the 801(b) standard has been in existence for a far longer period of time and hasn't resulted in any difficulty.

Mr. NADLER. I would quickly ask if Mr. Israelite and Mr. Portnow agree with that statement about the impact of the willing buyer-willing seller standard, quickly.

Mr. ISRAELITE. The people that use songs may find it offensive to pay a fair market rate for them. But the fact that that would be a newer standard is no argument why a songwriter doesn't deserve a fair market rate.

Mr. NADLER. Okay. Thank you.

Back to Mr. Knife, given potentially thousands of rights that must be cleared for a single song to come to production, in the free and fair market system you all favor, how do we make this work? In a free and fair market system, how do you deal with thousands of rights for a particular song?

Mr. KNIFE. Right. Well, I think those issues were addressed a little bit by Mr. Hoyt and Mr. Griffin. We have to balance the interests between an efficient marketplace, which might include the collectivization of rights licensing, with fair royalty rates. So we have to kind of balance those issues and make sure that we are controlling those monopolized interests.

Mr. NADLER. Thank you.

Mr. Griffin, my last question, obviously. You said that it is unnecessarily difficult to pay your license, so we must work to create a comprehensive registry system.

Mr. GRIFFIN. Yes.

Mr. NADLER. My first question is, do you mean going forward or going backward? How much would such a system cost? How long would it take to set up? Who would pay for it? And why?

Mr. GRIFFIN. Users should pay for it. It doesn't cost anything because it is profitable. If you look at the Internet domain name——

Mr. NADLER. It wouldn't cost anything to set up this massive system?

Mr. GRIFFIN. Well, you already have a cost at the Copyright Office. My point is that if you make it a market-based system, you invite the GoDaddy's of the world in to help you fill and populate that database, and they make money doing so. So if you build a market-based system of registration, I believe you will have the outreach——

Mr. NADLER. So it pays for itself. How long would it take to set that up do you think?

Mr. GRIFFIN. I think it could be done within a year.

Mr. NADLER. And are you talking about going forward only or going back?

Mr. GRIFFIN. It needs to go forward and backwards, and that allows anyone to register any claim related to——

Mr. NADLER. And you think that you could register every song going back to the song of Miriam and the Bible quickly?

Mr. GRIFFIN. No problem with that. I think truly it should happen that we register our heritage——

Mr. NADLER. Let me just ask, does anybody else want to comment on the practicality of that?

Mr. HOYT. I would just say that I think you can probably do it prospectively, but doing it back years I think would be extremely difficult. I think you have to leave the current system in place.

Mr. NADLER. Mr. O'Neill?

Mr. O'NEILL. There is a Global Repertoire Database that was contemplated to be built overseas that had cost estimates of between $30 million and $100 million, and it just fell apart after 3 years of service.

Mr. NADLER. Okay. Thank you very much. My time has expired.

Mr. COBLE. I thank the gentleman.

Mr. Israelite, is the Collins-Jeffries bill a comprehensive solution to your problem, or do you see it more as a first step?

Mr. ISRAELITE. It is a very important first step. So for the 50 percent of our industry that is regulated by outdated consent decrees from World War II, it would at least allow the Federal judge that sets the prices for songwriters to consider evidence in the marketplace. That is not a solution, but it is an improvement.

On the mechanical side, while it doesn't set us into a free market, it at least lets the three judges that set the price for songwriters for reproductions try to approximate what would happen in a free market. So it is a very important first step.

Mr. COBLE. And how does it affect over-the-air and digital broadcasters?

Mr. ISRAELITE. Well, for digital broadcasters, the mechanical part of it wouldn't really affect them at all. And for the other part of the bill that deals with performance, the truth of the matter is that all it would do is allow the parties to make arguments to the Federal judge. So we think that it is not really a very significant burden on any broadcaster to have to deal with the evidence of what rates would be in a free market when arguing to the judge that eventually is going to set the rates anyway.

Mr. COBLE. I was going to discuss the split, but I think you all pretty well responded to that with the Chairman's comment.

Mr. Griffin, would you elaborate on the importance of fair market value for all music performances? I think you all pretty well did that close to unanimously in response to Chairman Goodlatte's question.

Mr. GRIFFIN. It was hard for me to hear the end of your point.

Mr. COBLE. Elaborate on the importance of fair market value for all music performances. And do you feel that royalty standards are harmonized or need some massaging?

Mr. GRIFFIN. I do think that music should receive its fair market value. There is no question about that. And I think it is essential that in order to do so, we track music and its owners such that we can identify them and those who participated in them so that we can get them the money they deserve that the market provides. Today that money often disappears on its way to the creator.

Mr. COBLE. I thank you for that, sir.

Mr. Miller, I am going to put these three questions to you that may or may not be applicable to today's hearing.

Do you know bluegrass?

Do you know Tom T. Hall?

Can you play the fiddle? [Laughter.]

Well, that is ironic. I do. I grew up in Kentucky playing the fiddle. I came to Nashville as a fiddle player. My first job in Nashville was playing fiddle for Tom T. Hall. I lasted 3 days and he fired me. [Laughter.]

Mr. COBLE. So I take it that you do indeed know him. [Laughter.]

Mr. MILLER. Very well, sir. Thank you. [Laughter.]

Mr. COBLE. I think the Chairman pretty well touched on the other questions that I had.

Thank you for your response, Mr. Miller. I will tell you, I will identify and divulge the identity of the person who asked that those questions be presented to you.

Gentlemen, thank you again.

I now yield to—who is next in line?—Ms. Chu for 5 minutes.

Ms. CHU. Thank you so much.

As co-chair of the Congressional Creative Rights Caucus, I firmly believe that all artists should be fairly compensated across all platforms. That is why I am a co-sponsor of both the Songwriter Equity Act and the RESPECT Act. To me, it is just not fair for songwriters to be paid, on average, 8 cents for every 1,000 streams of their songs on digital radio. It is not fair for legacy artists who own pre-1972 sound recordings to be paid nothing for continuous streaming of their songs when entire digital stations are dedicated to the music of the '40's, '50's, and '60's. And let's not forget that recording artists are paid nothing for countless plays of their songs on AM/FM radio.

Last week I hosted a Music Leaders Roundtable in my district where I heard from local songwriters, composers and recording artists about the challenges they face trying to make a living in today's music market. One of the most legendary songwriters there, Lamont Dozier, told me about the challenges that he has having to work at age 72 because he is paid very little for songs that he has written that play on digital radio despite the fact that he has written and produced over 54 number-one Motown hits and is also a number-one Billboard recording artist.

So today's hearing comes at a crucial time for music creators. These royalty disparities are in need of attention and ultimately a resolution so that we can continue to have a vibrant environment that fosters creativity and growth.

So I would like to ask Mr. Israelite and Mr. Miller, because of a statutory mandate, songwriters and publishers are forced to grant a license to anyone who wants to use their musical work for reproduction and distribution in exchange for paying a royalty set by the government, and the rate was first set by Congress in the early 1900's at 2 cents per song. Today, in 2014, it remains painfully low at 9.1 cents per song, and let's not forget that this 9.1 cents is split by the songwriter and publisher.

Let's assume the status quo prevails. What does the world look like in 5 years for music publishers and songwriters? And how can songwriters who are not also artists make a living off of the very low rates that accompany streaming services?

Mr. ISRAELITE. Well, in 5 years, if I am fortunate enough to still represent songwriters and publishers, what I fear is that I wouldn't have a Lee Miller sitting next to me, because he wouldn't be able to make a living as a songwriter. It is simply inexcusable that you

can't at least get a fair market rate for what the property value is in a song when someone purchases a song.

So we are very thankful for your sponsorship of the Songwriter Equity Act. It is a very important step toward getting to a place where a songwriter can still make a living when successful.

Ms. CHU. Mr. Miller?

Mr. MILLER. Well, the reality is that our Songwriter's Association looks at the numbers, that we have lost 80 to 90 percent of the songwriters over the last 12 years. Five years is a long time, so I don't know. I fear what that would mean. Certainly, if we do have status quo and we ease more into a streaming model, it seems as catastrophic as we would assume that it is.

What is interesting is my wife told me this morning that late last night my 11-year-old, Noah, asked what happens after today. Are all of Daddy's problems solved? Which caused my wife to call and say I should understand more than I do, but answer that question, what happens after today, does it get better. And to her I have to say, I don't know. It is a hard process, obviously a complicated process. I am not the legal guy here. I look for words to rhyme with "love" every day. Until yesterday, I had never used the word "omnibus," okay? [Laughter.]

And that is the truth. But I will say this, I hope that you will take all of the facts into consideration and understand an American profession is in a lot of trouble. I mean, we are hurting.

Mr. ISRAELITE. I will give you a shocking statistic about the low rates paid by one particular company, Pandora. I believe one of the founders has been a witness before this body. Last year, that founder cashed out more in his stock ownership than every songwriter in the United States combined was paid from Pandora, and that just speaks to how low the rates are because we don't have a right to negotiate the value of them in a free market.

Ms. CHU. And, Mr. Portnow, could you talk about the role of producers and engineers in creating music? Why is it important that we highlight their contributions as we review the licensing scheme?

Mr. PORTNOW. Sure, happy to. I know a little bit about producers and engineers because when I was a young man in a band and playing music, I had the experience of having a recording contract and having a producer in the studio. And then I became one. I was a record producer on staff for RCA Records for years.

The producer is more analogous to what we would call a director in the film and television business. So he or she is the person that puts it all together, everything from booking the studio to finding the songs to creating the sound and the environment of those recordings, and we wouldn't have recordings without them. They are not currently covered in the statute, and that is important because they too need to be compensated fairly for the work that they do.

We are in negotiations from the Recording Academy with our friends at Sound Exchange. We think we have some good beginning solutions for that, and happy to talk about that further beyond the hearing today.

Ms. CHU. Thank you.

I yield back.

Mr. COBLE. The gentle lady's time has expired.

The gentleman from Texas.

I stand corrected. The gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

I normally don't do this, but I have a brief statement that I want to make before I ask a couple of questions.

Although there are a number of issues to work through in this copyright review process, music licensing may be one of the most complex sub-issues. I know firsthand because I have been meeting with all the stakeholders involved in this in D.C., New York, Los Angeles, and most importantly in my district. One thing is for certain, no one is happy.

Today, the current laws and consent decrees that stakeholders must operate under to negotiate their copyright licenses and royalties are simply not working. I have also found this to be an incredibly divided group of stakeholders who all seem to show some opposition to find commonalities to work toward a solution, and it is high time that we need to work harder to finding the middle ground.

Omnibus pieces of legislation—and maybe you can use this as some words in your lyrics, Mr. Miller—omnibus pieces of legislation tend to omit all of us. You see, I put that little line in there toward the end. [Laughter.]

Many of you have heard me say this, but when it comes to creating a solution, those of you in the private sector need to get more involved in the discussion for a solution, because if you can't come up with anything, you are really not going to like what we legislate.

I would like to see all sides of the music licensing issue come to the table to come up with something that works for all industries involved, as well as for consumers, so that we don't have to revisit this time and time again, and I look forward to working with you.

And I will say this in the beginning. If any of you—many of you have been coming to see me and talking about the issues, and if you care to continue that, my door is always open.

Mr. Israelite, I have a question for you, please. You stated in your testimony that your clients' revenues are significantly below what they would be in a free market. Can you elaborate on how you came up with your figures and why you believe in getting rid of Section 115 and moving to a free market would be the best solution?

Mr. ISRAELITE. Thank you for the question, and I completely appreciate your opening comment, and I would point out that when a songwriter has been underpaid for over 100 years, any solution that involves fair market compensation is going to be opposed by anyone who pays for music. So it is understandable why there are such deep divisions.

The reason why we believe that a fair market standard would lead to a significant increase in songwriter compensation is that if you look at the 75 percent of our industry that is regulated, for the 50 percent that is the consent decree with performance right, we know that the consent decrees lead to significantly lower rates than what would happen in a free market. We had a recent window of opportunity where there were free market negotiations for very

similar radio services with Apple than happened with Pandora, and the result was staggering.

On the mechanical side, the difference between a willing seller-willing buyer standard and an 801(b) standard, the Copyright Royalty Board has spoken to that issue in the past, and they have indicated that there is a significant gap between the two standards. So just by allowing us to have fair market rates in that 75 percent of our industry, we know it would lead to higher rates.

And if you look at the 25 percent of our industry that is unregulated, the rate structures are significantly higher.

So I think that there is no doubt that would happen, and it is understandable that anyone who has been benefitting from this government regulation by not paying songwriters fairly would fight hard against any change that would lead to fair market compensation for songwriters.

Mr. MARINO. Mr. Knife, although some stakeholders are urging we move to a free market system, I know others are very leery of this. Can you explain why in this particular industry the free market approach might be questionable?

Mr. KNIFE. Again, I think it has to do with the idea of some of the principles that I announced. We are talking about a marketplace that needs transparency and efficiency. A free market system would necessarily not be very efficient. When Mr. Israelite talks about the synchronization license, he is not talking about licensing synchronization rights on a wholesale basis of 30 million songs or more at once. Synchronization licenses happen individually. A song gets licensed into a movie or a television program, and it is a rather slow and laborious process.

So we have to balance the ideas of making sure we have an efficient marketplace that might include the collectivization of rights licensing and making sure that that collectivization isn't used as an undue market power.

Mr. MARINO. I yield back the remainder of my time.

Mr. ISRAELITE. If I could quickly respond to that, because while many synchronizations are done on an individual basis, that premise is completely wrong. The largest music acquisition source on earth is YouTube. YouTube needs a synchronization license. It is completely licensed. It happened in a free marketplace. And the rates, by the way, are significantly higher than other forms of competitive services that are regulated by consent decrees and compulsory licenses.

Mr. COBLE. The gentleman's time has expired.

Mr. Hoyt, did you want to respond briefly?

Mr. HOYT. Yes, quickly. I would just say that our experience in television is that when you do locally produced programming in what we would consider a relatively free market, a competitive market, those rates—we think we have a lot of evidence that those rates are much lower than they are coming from ASCAP, BMI and SESAC.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from Florida, Mr. Deutch, is recognized.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Knife, you just said that a free market system would not be efficient. The system that we have now, it seems to me, is very efficient. It is efficient at putting an awful lot of songwriters out of work. That is the system that we have now.

And just before I get into my questions, Mr. Miller, I have a question for you. We talk a lot about percentages; there are 90 percent fewer songwriters. How many songwriters were there 10 years ago, 20 years ago, versus today? How many Americans had to give up their profession because of the system as it has evolved?

Mr. MILLER. We can only speak to Nashville, which is a very tight community, so we have the luxury of kind of knowing everybody to some degree. We certainly figure based on prior to consolidation of major publishers. You can kind of quickly look at the possibility of 3,000 or 4,000 writers making a living doing this, down to 300 or 400.

Mr. DEUTCH. Which I think is a really important point for us to remember as we have this debate.

The hearing is really important, and the issues are complex, and it is hard for us to figure out how to go forward without picking winners and losers. But I was intrigued, Mr. Knife, by what you said earlier. You said—and I think we would all agree—no one would develop this system if we were starting from a blank slate. That is absolutely right.

You also spoke about the need for a level playing field, which again I think is what is really driving or what should be driving this whole debate, this whole process that we are engaged in. So if we start with that, what is a level playing field, I just would point out a couple of things in the status quo that I think are unfair and don't represent a level playing field.

Maintaining different performance rights standards for terrestrial radio and digital and its digital competitors seems unfair both to the innovative digital services and to the performers whose music is no less valuable when played over the air. That strikes me as not a level playing field.

In the same vein, holding that music recorded before 1972 should be treated differently than more recent music is disrespectful to the classic artists who have contributed so much to America's musical legacy. But most importantly, that makes no logical sense to defend differentiating the two. That is not a level playing field.

And I would also agree with Mr. Israelite's point that songwriters are too often given the short straw in this. I am proud to serve with Marsha Blackburn as co-chair of the Songwriters Caucus, and I think the Songwriter Equity Act that would allow a rate court to consider other royalty rates for establishing the digital rate and adapting a fair rate standard, those are means, again, to leveling the playing field. What we have now isn't what we would have started with, but if ultimately the goal is to level the playing field, then let's actually talk about how we do that.

Mr. Portnow, you ran through some of the unfair arguments that have been used to defend the status quo on performance rights versus terrestrial radio. For me the question isn't do we make the change, but can we really defend the system without making that change.

And again, Mr. Knife, I go to you. Is it fair to your members, who are mandated to pay for the music that they play, that broadcasters don't pay for the music that they play?

Mr. KNIFE. I think it is probably not fair as a general principle, but I would leave it to this body to determine who should be paying royalties and who shouldn't while we are leveling the playing field. And, yes, we are asking for that kind of comprehensive review.

Mr. DEUTCH. Because it certainly seems like we are saying you, new technology, you pay for both rights because you are just starting out, but a service that does the same thing over terrestrial air instead of the Internet, the status quo there is sacrosanct, so we shouldn't change it. That, I think, is my problem with so much of this debate. There is this sense that because things are the way they are, that makes them so, that makes them sacrosanct, that is why broadcasters shouldn't have to pay a performance right, that is why we continue to rely on decisions from the 1940's and as amended in the 1960's. Those are the issues we have.

Mr. Portnow—actually, Mr. Miller, let me just go back to you, because I hate to think that you would spend a second after this hearing trying to rhyme anything with "omnibus." [Laughter.]

Mr. DEUTCH. And let me tell you, there is nobody who would buy that record, listen to that record, least of all Members of Congress.

But let me just ask you, you talked about what this has meant in Nashville, and I thought the story that you told about the exchange with your wife was really powerful as well. Can you just give a little more of what this whole debate actually means to you and the thousands of Americans who can no longer earn a living because of this system that needs to be changed?

Mr. MILLER. Well, the competition to write a hit song is tough enough. I mean, it is hard to write a song. I mean, it takes us a long time to learn how to do this. So we understand that we are competing against the best in the world, and that is fine, because we go in every day and we learn our craft and we slug it out.

The problem that we are up against now where, even if we do have a hit song, it may not mean anything, but yet millions and millions and millions of people are consuming that song and acquiring that song and listening to that song and singing that song at the weddings and at their kids' graduations, I am not really sure what we are supposed to do with that, and I am very perplexed at the idea that we need to help out the entrepreneur who wants to start a business by giving him the product. I suppose if we gave the general store owner, if we asked the farmer to give the corn and the potatoes for free, he would have more luck succeeding in his business, but I am not sure what that means to the farmer.

From the way we look at it, we are running out of farmers, you know. So that part of it is very frustrating.

On the other hand, all of my colleagues are right now sitting in a room not thinking about any of this. They are concentrating on how to write the best song they possibly can to get on the album to get on the radio. Really, first and foremost, that is what we think about. We don't think about who is going to pay or who is going to cut it. All of our energy goes into writing the song because it is still art.

Mr. DEUTCH. Thank you.

Thank you, Mr. Chairman.

Mr. KNIFE. If I could take just a moment to respond to the point about songwriters.

Mr. COBLE. Very briefly, Mr. Knife. The time is expiring, but go ahead, very briefly.

Mr. KNIFE. Thank you very much, sir. I was just going to say that we keep hearing that there are less and less songwriters based on the economics of this environment, et cetera, but I think in BMI's own press releases they have indicated that their membership has increased by 100 percent between 2003 and 2013. I think ASCAP has similar growth figures. So I am not sure where the idea that we are losing songwriters is coming from.

Mr. O'NEILL. May I respond to that?

Mr. COBLE. Go ahead.

Mr. O'NEILL. Yes, we have grown in the number of songwriters. The advent of the Internet has helped us sign songwriters online more than ever before. The question of how many songwriters are still getting paid, is that number growing, and that is not growing.

Mr. COBLE. I thank the gentleman.

The gentleman's time has expired.

The gentleman from Texas, Mr. Farenthold.

Mr. FARENTHOLD. Thank you, Mr. Chairman.

I would like to take a minute just to say a word about our previous questioner was asking just because things are the way they are. Well, businesses count on things being the way that they are. The local radio station is counting on the things that will continue to be the way they are when they decide whether or not to give the morning D.J. a raise or go out and buy a new transmitter. So as we change these rules, we have to be very leery of the fact that different companies throughout the country have invested and made business decisions based on these rules. So we have to really make a clear and convincing case for that.

Now I am going to get off my soapbox. Well, maybe not. I am going to ask Mr. Portnow a question.

I am a former broadcaster, so I am pretty simple—pretty sympathetic—I am pretty simple and sympathetic to the fact that it is a tough struggle for broadcasters now. The same forces that your industry is struggling with in new distribution mediums and figuring out how to get compensation, there is no way a radio station is going to get compensation from Pandora. So they are facing a tough challenge.

You list a litany of reasons why they are not different from some of these, but I do point out that there is an historic—radio is highly regulated, a limited resource, limited bandwidth, while you have basically unlimited room for expansion in new programs digitally. So I just wanted to point out there is a uniqueness there and a synergy that radio stations have provided in allowing new music to be exposed. It is different now when you can customize almost down to the song what you listen to on the Internet. It used to be the record labels and music publishers would pay folks to try to get radio stations to play songs. So we have to keep that history in mind.

But anyway, I want to go on now to BMI. If we allow publishers to choose what they license to BMI, how do I know what I am buy-

ing from BMI, what license I have and what I don't have? In a recent ASCAP Pandora trial, a number of individual publishers withdrew licensing rights for Internet services in an attempt to negotiate more favorable royalties outside the consent decrees. When Pandora refused the higher rates proposed by two of the publishers, they asked for a list of work owned by those publishers so they could pull them from their playlists.

The publishers and ASCAP—obviously your competitor—refused to provide a list of such works. This left Pandora with the option to pay the price proposed by the publisher, not pay the price and face infringement litigation, or stop playing all music altogether.

How do you answer that when you are asking for some change there and we deal with this issue?

Mr. O'NEILL. Thank you, Congressman. I am a former broadcaster also, and I understand where you are coming from. Maybe that is why I am seated between Mr. Hoyt and Mr. Knife, now on both sides of the equation.

I can't really comment on what was done by my competitor ASCAP. I can comment on what BMI has done. I just got done with testimony in our Pandora trial, and the same question was raised to me, and we provided the information where necessary and where our customers told us to provide the information.

As far as providing the information or transparency, as we like to call it, the Department of Justice, their review of our consent decree, this is a big subject that they are looking at, and we are willing to explore that with them. We have spent 75 years at BMI building that business, that expertise, that data, and we like transparency. Our writers demand transparency. That is how we pay them.

What I don't think is appropriate is to give that same data that we have spent years and years gathering, to give it to our competitors to build their business, and I think we would fight against that.

Mr. FARENTHOLD. And how do you feel about Mr. Griffin's GUID proposal? It used to be you could go look on the label of a record and it would say ASCAP, BMI, it would have the artist's name printed right there. A lot of times in digital stuff, this isn't even available, even in the metadata.

Mr. O'NEILL. I think it has merit. BMI and ASCAP have recently formed a venture called MusicMark where we are reconciling our two databases, along with marrying it up to our partners up north in SOCAN, Canada, the performing rights organization there, to get authoritative data. So I do think the industries are moving in that direction.

Mr. FARENTHOLD. Mr. Griffin, I really do like the idea. But do you really think it could be done in a year?

Mr. GRIFFIN. Sure. Here is the irony. We already have the GUIDs. We are not recording them. We are not putting them in a database. We are not making them available to the public. And why? What kind of market could we possibly have without the information? It would be like a stock exchange without the listings.

Mr. FARENTHOLD. I see my time has expired, but I appreciate it.

Mr. GRIFFIN. I also want to say Mr. Israelite said YouTube is completely licensed, and it is not. It is licensed as regards its mem-

bers, but it is not licensed as regards small, independent, medium-sized players who YouTube can't find to clear the content, and that is obvious because the content that has no ads wrapped around it is all unclear, because they can't wrap ads around that which they haven't cleared, so an enormous amount of their content is unlicensed precisely because they cannot find the owners.

Mr. HOYT. Could I make a comment on Mr. O'Neill's answer? So that you understand, we have been trying to get transparency from ASCAP, BMI and SESAC for years. We cannot get that transparency. They refuse to give information to us. It is my view that until that information is made public, all of the details made public, you cannot attain a competitive market.

If you noticed, Mr. O'Neill's answer was ASCAP, SOCAN, and BMI. That is not the users. We don't get to participate in that. We offered to invest in a series of trying to get more QC information, which is what we have for television. They refused to allow us to participate in that whole project.

So to the extent that there is a transparency issue, I think it is as much the collective's as it is anybody else.

Mr. COBLE. The gentleman's time has expired.

The distinguished lady from California, Ms. Bass, is recognized.

Ms. BASS. Thank you, Mr. Chairman and Ranking Member.

I would like to address the Justice Department's announcement that it will review the consent decrees that govern the PROs. I know that some of you feel that these consent decrees are antiquated, and some think that we should get rid of them altogether. At the same time I also recognize, as indicated by the judge's decision in the recent Pandora ASCAP case, that there are some who feel that these consent decrees are in place for good reason and should remain.

Regardless, I think we have to ensure that the music marketplace is sustainable and works for creators, platforms, and consumers. So as the DOJ conducts its review, I wanted to know if the panel can tell me what it wants to see from the DOJ and what it thinks they can do to ensure that songwriters are protected, the legitimate marketplace is protected, and the system works for all parties. I know it is a lot to ask, but maybe we could just kind of briefly, in my time, go down the list.

Would you like to begin, Mr. Griffin?

Mr. GRIFFIN. I am going to defer because this isn't my issue as much.

Ms. BASS. Okay.

Mr. HOYT. I think that if you look at the most recent SESAC antitrust class suit against SESAC brought by television broadcasters, you will see the absolute necessity of having consent decrees in place. What happens under the current practices and law, the collectives are allowed to aggregate copyrights, individual copyrights, and then refuse to sell them in any other way than on a blanket basis.

So we have a significant problem in modifying the consent decrees because we think in the long run we will run into major antitrust problems.

Ms. BASS. Okay, thank you.

Mr. O'NEILL. I believe that there are many things that need to be addressed in our consent decrees. I actually believe the consent decree should be sunset and done away with permanently.

Mr. Hoyt earlier commented on a direct license in a marketplace that led to lower rates, but it only led to lower rates because the publisher or the writer still didn't have the power to say no. They still weren't able to get outside of BMI's regulatory framework to see what a free market could have negotiated, would have negotiated, because that buyer, if they didn't agree to the price, could have still gone back to BMI. That was the ceiling. They could have never gone below the ceiling or above the ceiling.

That is the framework that we are trying to do. We are trying to give the marketplace, the songwriters and the publishers, the power to go out and make their own deals and to see what a true free market will hold.

Ms. BASS. Thank you.

Mr. Knife?

Mr. KNIFE. It is still early. We are still evaluating what our position might be with regard to the DOJ's announcement. But I think it is safe to say that when you have a marketplace that is entirely controlled by three players, two of them being rather significant, some type of control is necessary. So I think we would probably pursue the application of the consent decrees in some form.

Ms. BASS. Mr. Israelite?

Mr. ISRAELITE. These are the longest running consent decrees in existence. In 1979, the Justice Department adopted a policy of no longer having consent decrees that don't sunset. This decree never sunsets and hasn't since 1941.

To the point of market concentration, one of the most important issues in this question is whether a rights holder can pull things out of the collective and go into a marketplace, and we are being told no. That is completely antithetical to the purpose of the consent decree. So they want to complain about having three powerful organizations, but they want to deny the ability of a rights holder to leave them and further take the market into a more decentralized way.

So there are so many things that should be changed. There is no reason why ASCAP and BMI shouldn't be able to license different types of rights. There is no reason why a rights holder shouldn't be able to leave for a limited purpose if they choose so. And the most egregious thing is there is no reason why a licensee should be able to use the music by simply asking without there being even an interim rate set, which takes all of the incentive out of negotiating a rate.

Ms. BASS. Okay, thank you.

Mr. Miller?

Mr. MILLER. Every argument and point that I have made today is due to unnecessary government restrictions on the songs that I create. I believe DOJ is decades overdue in making some of this go away.

Ms. BASS. Thank you.

Mr. Portnow?

Mr. PORTNOW. What I think is clear is that consent decrees, as currently written, don't result in fair outcomes for songwriters and

should be modified, and the Recording Academy will be filing all comments directly with DOJ on this issue.

Ms. BASS. Okay. In my time left, does anyone else want to respond?

Mr. GRIFFIN. I will add, because I deferred, that I think this is a situation much like that that is sports based, when John Kennedy introduced the Sports Marketing Act of 1961 that allowed baseball, basketball, football, hockey to work together—owners, referees, players—in order to license. We face an extraordinary time here when people are sharing the content in the main to get around licensing, and where people are sharing I think it is appropriate to allow the industry to work together to address that for licensing purposes.

So I would lean toward more freedom as regards to those consent decrees.

Ms. BASS. Thank you.

Mr. ISRAELITE. And please don't forget, the licensees are the ones that benefit the most from the collective license. So while they may complain about having to negotiate its value, the truth is that licensees are the ones that benefit the most from having the ability to have the licenses collected.

Mr. HOYT. I think there are two different opinions on that. I will leave it at that.

Ms. BASS. Okay.

Mr. MARINO [presiding]. The Congresswoman's time has expired. Thank you, Congresswoman Bass.

The Chair now recognizes the gentleman from Georgia, Congressman Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. MARINO. Doug. That is what I was going to call you.

Mr. COLLINS. I answer to one of them, any of them. Thank you so much.

As many in this room know, this is something that is close to my heart, and also the work that we are doing, and I appreciate everyone on this panel. But I do have some questions, and I want to go back because, in the end, before I ask any questions, my views on this come from one thing.

When we talk of intellectual property, when we talk of musical rights, we talk about a dream, a hope, or an emotion, and those are all valuable property rights, and they need to be compensated, and they need to be compensated fairly in a place in which we can do that.

The numbers in Mr. Israelite's written testimony point to the fact that digital music services pay songwriters and publishers significantly less than they pay for the sound recording.

Mr. Knife, do you think that a sound recording is 9 to 12 times more valuable than a musical composition?

Mr. KNIFE. Again, I think my trade organization and most of my members are agnostic on the issue. We really don't have a view as to whether or not the songwriter or the song is any more valuable than the sound recording. What we would like to see is an efficient marketplace that allows us to acquire both rights at a reasonable rate and let the parties who have interests behind that determine what the appropriate split is.

Mr. COLLINS. But you are, at this point, from your testimony today, opposed to moving to a willing buyer-willing seller standard. You are opposed to some of these things that actually would move us to there.

Mr. KNIFE. I am opposed to a willing buyer-willing seller standard that would unfairly continue to fragment the licensing landscape.

Mr. COLLINS. That is not agnostic. That is having a belief in one view.

Mr. KNIFE. I am sorry. I thought your original question was whether or not I had a view as to what the split would be between the sound recording and the composition.

Mr. COLLINS. The actual question was, was it more valuable or not, and I just followed up on what you had said.

Mr. Israelite or Mr. O'Neill, would you like to respond to that?

Mr. ISRAELITE. Well, sure. It is not surprising that people who pay for music would find it inconvenient to pay songwriters under a willing seller-willing buyer standard.

I think we look at this in a two-part question. Number one, for a service that uses music, what should they be paying for content? I think we and sound recording owners are completely aligned on that question, that music has value and that the total amount paid for the content is something that a free market should decide, and it should be significant.

But then you get to the second question, which is how you divide that revenue. The current system is so out of whack that while in every other country in the world radio money is generally divided 50/50 or better for the songwriter and publisher, in this country you have two things. One, broadcast radio doesn't pay anything to artists and record labels, which is wrong. And secondly, for digital radio, you are seeing split divisions that have been as high as 57 percent to 4 percent, which is just insane, and the only reason that can happen is because of the different rate structures and regulation that is put on the copyrights.

Mr. O'NEILL. Just to add to that, I agree with what Mr. Israelite just said. And also, to hit the willing buyer-willing seller or the free market concept, I believe everybody benefits from a free market—the songwriters, the composers, the publishers, and the businesses—because a free market breeds innovation, and a lot of the topics we talked about today would just have to come about because of the competitiveness of a free market.

Mr. COLLINS. Mr. Israelite, I want to follow up on something you said. You talked about client revenues being significantly below what they would be in a free market. For the record, and for those who may not know this, do you have evidence that supports that conclusion? And I do have another question, so if you could answer quickly.

Mr. ISRAELITE. Sure. I will offer two specific pieces of evidence that I mentioned earlier.

With regard to mechanical rates, the difference between an 801(b) standard and not even a free market but at least a willing seller-willing buyer standard, you can look to previous Copyright Royalty Board decisions where they have commented on the difference between the two rate standards and in one case suggested

that a willing seller-willing buyer standard was worth more than twice as much as an 801(b) standard, and that was from the SDARS1 case on satellite radio.

And with regard to performances, several of us have talked about that limited window where publishers tried to withdraw their digital rights, were later told that they couldn't, but in that window there was a free market negotiation with Apple Radio, and that negotiation, it was reported, presented a result that was more than twice the value of the consent decree result.

So I think it is absolutely undeniable that these two types of government regulations significantly hurt the value of our copyright.

Mr. COLLINS. Mr. Portnow, real quickly, do you think the Committee should move forward on updating our music licensing laws independent of a larger Copyright Act rewrite, or in conjunction with?

Mr. PORTNOW. We are suffering over the fact that we haven't upgraded and brought ourselves into the current environment. So we believe that the MusicBus concept is the way to go. We can get there in various different ways. The bottom line is the free market raises all boats.

Mr. COLLINS. Well, thank you. I think the biggest thing here is we are dealing with something which I want this Committee and which I believe the leadership, the Chairman and others, are looking for. We are dealing with in the past many years. We are looking at what it will look like in 10 to 15 years. This Committee has to take that up.

Mr. Chairman, I yield back.

Mr. HOYT. Could I just make a comment on that? There have been several suggestions that we operate in a free market and the free market is the way to go. Just so everyone understands on this panel that we do not believe that we are operating in a free, competitive market in television. One of the things that ASCAP said to the Copyright Office, a seller's ability to refuse to sell is a key requirement for a market transaction. On the other side of that issue, a buyer's ability to refuse to buy is a key requirement for a market transaction. We don't have that freedom, especially in syndicated programming.

Mr. COBLE [presiding]. The gentleman's time has expired.

The distinguished gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman, and I thank the panelists for their presence here today and for their testimony.

Mr. Knife, let me just begin with you. I believe in your testimony, certainly in your written submission, you indicate that the Songwriter Equity Act and the RESPECT Act take us in the wrong direction, correct?

Mr. KNIFE. Yes.

Mr. JEFFRIES. And you indicate that these two pieces of legislation seek to create a music licensing framework that caters to the unique interests of a limited group of stakeholders, correct?

Mr. KNIFE. Correct.

Mr. JEFFRIES. Now, the limited group of stakeholders that you refer to are songwriters, correct?

Mr. KNIFE. It is songwriters and their collectives, and record labels, and performing artists and their collectives, yes.

Mr. JEFFRIES. Okay. Now, in the music ecosystem that exists, you have recording artists, correct?

Mr. KNIFE. Yes.

Mr. JEFFRIES. Publishers. True?

Mr. KNIFE. Mmm-hmm.

Mr. JEFFRIES. Broadcasters?

Mr. KNIFE. Right.

Mr. JEFFRIES. You have satellite radio, correct?

Mr. KNIFE. Yes.

Mr. JEFFRIES. Internet radio?

Mr. KNIFE. Yep.

Mr. JEFFRIES. Okay. And you also have songwriters, correct?

Mr. KNIFE. Mmm-hmm.

Mr. JEFFRIES. Now, aren't songwriters fundamental to that music ecosystem that we just went over?

Mr. KNIFE. Absolutely.

Mr. JEFFRIES. Okay. So legislation designed to provide them with fair compensation, that is not a tangential legislative joyride, correct? That is an effort to deal with fair compensation for a group of individuals central to the music ecosystem. Isn't that correct?

Mr. KNIFE. I disagree. I think it continues down the road of what Mr. Portnow has complained about here, which is the kind of piecemeal approach to updating copyright, as opposed to a holistic view of making sure that we have all of the concerns that have been expressed here today addressed comprehensively.

Mr. JEFFRIES. Okay. But I think we would all perhaps agree that a comprehensive approach—and I believe testimony has been rendered to that effect by a wide variety of people with different opinions—is the preferred way to go. But we have some inequities in the system, and I am trying to get an understanding as to whether you believe there are actual inequities in the system.

So songwriters are central to the music ecosystem. We can agree with that, correct?

Mr. KNIFE. Yes.

Mr. JEFFRIES. Now, are they currently compensated in a fair fashion?

Mr. KNIFE. Obviously, songwriters don't think they are, but I think there are a lot of issues attendant to that. As I testified to earlier, there are inefficiencies in the system where my member companies pay hundreds of millions of dollars, indeed probably over a billion dollars a year in royalties for various uses of musical works, yet we still hear complaints about songwriters at the end of that system not being compensated appropriately. I think that requires us to look at the entire system and not just an individual approach.

Mr. JEFFRIES. Okay. I think there is reasonable evidence on the record—Congressman Collins referred to some of it—to indicate that songwriters are not fairly compensated under the current system, and perhaps the reason that occurs is because we are not operating in a free market context. True, Mr. O'Neill?

Mr. O'NEILL. Yes, I agree with that.

Mr. JEFFRIES. Okay. Now, you indicated, Mr. Knife, that there are inefficiencies if we move to a free market context. Is that correct?

Mr. KNIFE. No, I didn't say there were inefficiencies. What I said is that there is a large potential for inefficiencies, and what we have to do here, what this body should be trying to do is striking a very, very delicate balance between the efficiencies that are necessary for large-scale music licensing versus the potential for market abuse by creating collectives that allow the negotiation for large bodies of works.

Mr. JEFFRIES. Who could potentially abuse the system in the context of a free market? I am struggling with understanding your position here in the context of the history of the republic, which is that a free market has led to innovation, creativity, prosperity, 200-plus years of record evidence in the United States of America that a free market system is not inefficient, it is efficient when properly regulated. Who is going to abuse the system in the context of a free market designed to provide songwriters with reasonable compensation?

Mr. KNIFE. Well, I think we see that with the consent decrees. We have heard a lot of talk here today about how the consent decrees are decades old and they haven't been updated, et cetera. Yet we have a rate court decision that was rendered within this year, earlier this year, that seems to indicate that a lot of the behavior that the consent decrees were intended to oversee and to regulate still occur. So I think there are opportunities for collectives to engage in anti-competitive behavior, and that is one of the things we have to look out for.

Mr. HOYT. I think a perfect example of that is SESAC and its actions since 2008 in the television industry. If you take a close look at that, you will see that. I do not disagree with you, by the way. If there is truly a free market, that it will be efficient.

Mr. JEFFRIES. And let me also note—I know my time has run out, but in the context of anti-competitive behavior, right now we have ASCAP, we have BMI, and we have SESAC, correct? And the Supreme Court or courts in this country have consistently stated if we have three entities engaged, three entities, you do not have conditions for anti-competitive behavior to exist, and that is what exactly exists currently in the music industry if we were able to move to a free market standard, and I yield back.

Mr. ISRAELITE. And, Mr. Chairman, SESAC is not here to defend itself. But quickly, you have an organization that probably has significantly less than 10 percent of the market, and yet you have accusations that they somehow have such concentration that they need regulation. I think that is a ridiculous proposition.

Mr. HOYT. I have to respond to that.

Mr. COBLE. The gentleman's time has expired.

Mr. Hoyt, very briefly.

Mr. HOYT. I just wanted to say that it doesn't take very much in terms of copyright aggregation to be in a monopoly position. If you read the decision by the judge on the summary judgment motion that SESAC made, you will find that he very clearly believes that there is at least a potential—we haven't proved it yet, but there is a potential for violation of the antitrust law.

Mr. O'NEILL. A single copyright by its definition is a monopoly.

Mr. COBLE. The gentleman's time has expired.

The distinguished gentleman from California, Mr. Issa, is recognized for 5 minutes.

Mr. ISSA. Thank you, Mr. Chairman.

I am glad that the last words I heard were that the copyright is a monopoly. I am pretty sure that the restraint of trade is not the intention of copyright. At the time of our founding, I think it is pretty clear that the goal was to get authors, and songwriters obviously, but authors compensation to induce the creation of these useful arts. Nowhere was restraint considered to be there. So the idea that there is only one seller of an asset does not a monopoly make.

Are any of you antitrust attorneys here? I would love to have one. But let's just——

Mr. ISRAELITE. I dabble.

Mr. ISSA. Okay. Mr. Israelite, I am glad you are dabbling because I can't think of a song—and I have some songs I just dearly love. I can't think of a song that I can't live without in favor of millions of others, hundreds of thousands at least. The fact is that songs are in competition, and the author and the performer are simply people in competition to sell their wares who look at this as how they get their wares to market.

Don't strain your eyes, Mr. Hoyt. This is that sort of complex of if I have a musical work and I am a publisher, a songwriter, or I am the label and artist, how I get to what with whom—and it blows up on additional pages. It is a PowerPoint you don't ever want to spend that much time on. [Laughter.]

So I have been listening to everyone talking about free market, and the Chairman of the full Committee has absolutely said he wants to do comprehensive reform for a reason, which is: it needs it.

Every one of you has a vested interest in some part of the status quo, and every one of you is railing against some part of the status quo.

Mr. Israelite, I think some time ago—I am Chairing the Committee next door. I am double-tasking a little, or multi-tasking. But when I was here before, I pretty much think I heard you complain about how much money Pandora's founder got when he cashed out.

Mr. ISRAELITE. No. I was not complaining about how much he made. I was complaining about that amount compared to the total amount paid to songwriters. I want him to make more money, but I would like him to pay songwriters fairly.

Mr. ISSA. Well, and that is a good question. If you look at the revenue being received from SiriusXM and the revenue from Pandora, it is not insufficient if you compare it with all of AM and FM, right?

Mr. ISRAELITE. You must divide between the money paid to record labels and artists versus the money paid to songwriters and music publishers. And if you look at the totality of money paid for our performances, as I stated earlier, it is about half of our revenue. I believe it is significantly undervalued because of the way that the consent decrees work.

Mr. ISSA. Well, let's get back to that. In the real marketplace, doesn't it start off with the identity of the true owner before sublicensing? Isn't that the first question, who owns the rights, if you

will, to the song, and who owns the rights to the performance, and isn't that pretty opaque today?

Mr. Griffin, you seem to be chomping at the bit. Even though you are a technology expert, I will let you answer.

Mr. GRIFFIN. Fair enough. We live in a time of Tarzan economics. We are moving from one vine to the next. The old vine was music the product. You had to clear the rights before you sold it in the stores. In the new world, it is almost like car accidents. The use of music has become anarchistic. Mr. Hoyt points out that sometimes his broadcasters aren't even sure what they are broadcasting because it comes from third parties. New music services allow people to upload songs for which they become responsible.

Mr. ISSA. Okay. But my question—famously, I told Eric Holder here he wasn't a good witness because he didn't seem to ever answer the question asked. You are getting there. [Laughter.]

The question that I asked is, isn't there an opaqueness to who the original owners are?

Mr. GRIFFIN. No question.

Mr. ISSA. Okay. So wouldn't one of the things from a technology standpoint and from a reform standpoint be that there should be transparency as to who owns the rights and, of course, that is a lot of people in some cases, and it is only one person in some cases, and then transparency as to who has taken on that right? So the original owner, the access to the contract that gives a third party rights, shouldn't that be transparent, and wouldn't that be the beginning of empowering both the willing buyer and the willing seller to have the opportunity for the reforms that some of you are talking about?

I see a lot of heads, so I will start with you.

Mr. GRIFFIN. That was my only testimony today, was that we should build directories of these things, and we should go further than the owner because the performers have a downstream remuneration right.

Mr. ISSA. Right. I was talking about all the beneficial owners.

Mr. KNIFE. I can answer your question in one word—absolutely.

Mr. ISSA. Mr. O'Neill, your silence is golden, but——

Mr. O'NEILL. No. I believe that the blanket license has served radio since the dawn of radio.

Mr. ISSA. Radio doesn't pay a cent to the performers. They have been served well.

But go ahead, Mr. Knife.

Mr. KNIFE. Yes, I was going to say that I have made a lot about the need for transparency and also for efficiency, and higher transparency necessarily leads to greater efficiency. If we had transparency about rights at the very primary level, that would necessarily lead to a lot more efficiency in the system.

Mr. ISSA. Anyone else?

Mr. ISRAELITE. The best way to get transparency is to put us in a free market because then you will have an incentive, if you want to license your copyright, for it to be known. There is an assumption in your question that somehow a copyright owner couldn't say no, that they couldn't decide that I will create a copyright and I will keep it to myself, and I don't want to license it. That is a right that a property owner has.

Mr. ISSA. Okay. Mr. O'Neill was cut off a little unfairly. If you could just let him answer whatever he had, I would appreciate it, Chairman. I have no further questions.

Mr. O'NEILL. Thank you, Congressman. Personally, I think we have a lot to lose at BMI with a free market, but we have a lot to gain also. We are allowing our publishers to go out to license directly, or to license exclusively, and people said shouldn't you be scared of that, Mr. O'Neill? Shouldn't you be worried about that? But I think we would retain them. I think we would have to be competitive. We would have to be innovative in a way that would be different tomorrow. So, that is all I wanted to say.

Mr. COBLE. Thank you.

Mr. ISRAELITE. And Mike deserves a lot of credit for that position. It is a very forward-thinking position.

Mr. COBLE. The gentleman's time has expired. Thank you.

The distinguished lady from California, Ms. Lofgren, is recognized for 5 minutes.

Ms. LOFGREN. Well, I thank you, Mr. Chairman.

Actually, I think this is one of the better panels we have ever had on this subject, and anybody listening to this group, although we don't necessarily know the answer, we certainly know what the questions are. So that is a big advance.

I sometimes think if you just follow the money, it helps you understand what is going on. We are looking at Mr. Miller, who has a legitimate desire to be paid for his work; Mr. Portnow, who represents many, many other people in that same situation.

Just some statistics. It is my understanding that, for example, BMI reported really record-high revenues last year, a 5 percent increase over 2012 revenues. And if you take a look at revenues going to BMI just as an example, in 2003 it was $629 million; last year, $944 million. That is a 50 percent increase in revenue into BMI.

If you take a look at streaming Internet services, much has been said that maybe they are not paying enough. None of them is making a profit. If you take a look at Spotify, it just reached 10 million paid subscribers. It has never posted a profit. Pandora has 3.3 million subscribers. Last quarter it posted a $28.9 million loss.

The generator research did an analysis and said this: "No current music subscription service, including marquee brands like Pandora, Spotify, and Rhapsody, can ever be profitable, even if they execute perfectly, because they are paying 60 to 70 percent of revenue for licensing, which is unsustainable."

So when I look at these statistics, I am wondering why Mr. Miller isn't getting paid and how we fix this. As I have listened to you, Mr. Griffin, it seems to me what you are proposing basically is a transparent system that takes the middleman completely out of this scenario, potentially. Is that going to work in the Internet?

Mr. GRIFFIN. No, I don't think it takes the middleman out at all. I think they are still extraordinarily valuable for aggregation, for promotion, any of a number of roles that the societies play and that the companies play. They only grow. But it is absolutely critical that we record, enumerate, maintain updates of those who are involved with these works, those who own these works, those who we need to pay when these works are used, and we do not do that now.

So it is extraordinarily difficult to talk about a market when you cannot look up and find, say, all of the songwriters of the track. And let me tell you that there are sometimes more than 30 songwriters for a single song. And I suspect, although I am not an attorney, that if they all get divorced once, there are 60 rights holders to contact to clear that track.

Now, that is an important role for a middleman, to bring those people together, but you have to be able to split that money correctly downstream and find those who you would contact to directly license if you wish to do so under a supposedly free market.

Ms. LOFGREN. Well, it seems to me that as we take a look at—you know, nobody buys CDs anymore. Everything is going online. Everything is downloaded. And it is important that we have that digital delivery of music compensated so artists like Mr. Miller can be paid. So there is a delicate balance here where you need to actually make these services that are willing to pay profitable, because if they go away, all that is left online is pirates, and that is not a desirable outcome.

Mr. Knife, do you have any suggestions on how to deal with this?

Mr. KNIFE. That would be a very, very long answer. I guess the short version is that we should move very, very carefully, as one of the other congressmen said earlier. Businesses build their businesses based on assumptions of costs and how their business is going to run over the years, laying out as they establish their business plans. I think as we look at all of these issues—the comprehensive licensing, compulsory licensing, blanket licensing, et cetera—we need to move carefully and we need to make sure that whatever system we come up with adequately takes into account the fact that people are building their businesses based on expectations.

Ms. LOFGREN. It seems to me as we move forward, and I am sure we will, everybody has to be at the table because, although people are situated at different parts of the scene with different financial interests, in the end, if we don't have a system that works, Mr. Miller is not going to get paid, Mr. Portnow is not going to get paid, and we end up with a situation. It was 2 years ago that we dealt with SOPA that was not going to work, but all of us agreed that we ought to follow the money and make sure that we end up with a system that compensates rights holders, and this is a key element of that.

Again, my time has expired, but I think this has been an excellent panel.

Mr. HOYT. I think one of the things we should remember that you should take into account is the fact that businesses won't have as many problems with prospective change.

Ms. LOFGREN. Right.

Mr. HOYT. So if you look at what is happening, I think you should look more at the prospective rather than going backwards.

Mr. GRIFFIN. And allow me to add that as we move to international trade more and more for our music, the BRICS countries and others need to communicate with us in different languages and different character sets, and our lack of any kind of registry or any kind of unique number or respect for them makes it very difficult to get Mr. Miller his money when we are dealing with trade with

a Chinese organization or a Russian organization or anyone with a different language or character set.

Ms. LOFGREN. My time has expired, Mr. Chairman. Thank you very much.

Mr. COBLE. You will be pleased to know, Mr. Miller, mostly you have a pretty good cheering section here today, for any good that does.

Mr. MILLER. This hasn't been near as hard as I thought it would be. [Laughter.]

Mr. COBLE. The distinguished gentleman from North Carolina, Mr. Holding.

Mr. HOLDING. Thank you, Mr. Chairman.

Earlier in my career, I worked in the other body and was legislative counsel working on tax issues. And although we always kept our eye on the larger picture and our desire for a major tax reform, tax overhaul, we were often confronted by issues where a constituent or a constituent's business was being unfairly impacted by an unintended consequence of a law, rule, or regulation. We would work on a rifle-shot fix for that unintended consequence.

I think that the RESPECT Act confronts an idiosyncrasy in the law that has resulted in some of our greatest talents, just because they recorded their music before 1972, aren't getting compensated. The situation has also led to lawsuits in States under a patchwork of State copyright law. This is costly. It is complicated for everyone involved in this ecosystem, as it has been termed, and I think it is a good reason for Congress to act and provide some legal clarity not only for the artists impacted but for the growing digital music platforms.

I want to point out that the digital music services are playing an important role promoting artists of all generations, and I want to commend them. These are new technologies, new ways to enjoy music, and new revenue streams. So I wouldn't begrudge the founder of Pandora for making a lot of money because he has created a new revenue stream for artists to get revenue.

So it is a discrete problem, and I think we have a rifle-shot solution, and I think it is appropriate and a good opportunity for Congress to act to fix this anomaly in the system.

I also don't consider the RESPECT Act to be a stalking horse for the larger issues that will ultimately be considered and hopefully resolved in an overall copyright review. But I don't think waiting for overall copyright review and fix is a reason to forego fixing a discrete problem that is indeed an unintended consequence of the law.

Now, Mr. Knife, I read your testimony, so I think I know what you were laboring to get out about 2 hours ago.

Mr. KNIFE. Thank you.

Mr. HOLDING. You believe that the RESPECT Act will create an anomaly. It caters to a limited group, these pre-1972 artists. But I think the anomaly, rather than creating an anomaly, it is fixing an anomaly, that copyright law has left open this loophole which companies can exploit. Because it is pre-1972, they are playing the recordings. This is pretty iconic music. The artists that are still with us aren't getting any younger, and the services get to play this music for free.

Your members, they use the statutory license presumably because it provides a one-stop shop for all the sound recording rights that they need to operate a service, and it has also become clear that those services believe that statutory license doesn't apply to the rights that are protected only by State law and rights to sound recordings made before 1972, but rather you get the rights in some other way. These services have simply decided not to pay anyone for the rights to play the recordings.

So I recognize, from reading your testimony, that you may not believe there is a performance right implicated by the State law, and I think you are wrong, by the way. But I think it is clear that there are some reproduction rights at stake because you have to make a copy to your server before you can play it anyway, so that is one point.

It is also clear that in a private market, directly licensed services don't seem to draw a line between federally and State protected recordings in the private sector, in the private licensing that we have been talking about. In addition, it is incredibly complicated to identify whether a recording is, in fact, protected by State law. For example, if a pre-1972 sound recording has been sufficiently reengineered, it could be protected by Federal copyright law. Foreign recordings that are pre-1972 are protected by Federal law. It gets complicated.

So the agreement that you have, it seems that it would be simpler for you to pay for all the music rather than try to draw this distinction for pre-1972 music just because there is a loophole there and you can. So laying all that out there, I am just confused as to why your members haven't embraced this kind of simple, elegant, rifle-shot solution, which I think would be beneficial to your members.

Mr. Chairman, may he have just a minute to answer that?

Mr. COBLE. Granted.

Mr. HOLDING. Thank you.

Mr. KNIFE. Thank you very much for laying the issue out so clearly. The truth is that amongst my membership, some of my members do pay for pre-1972 sound recordings, as you pointed out, based on direct deals and other arrangements.

The point that I was trying to make about it establishing an anomaly was not that it doesn't attempt—that the RESPECT Act doesn't attempt to address an existing anomaly, but the problem that we have with it is that it seems to just build another anomaly onto that in that it doesn't afford full federalization of these pre-1972 sound recordings. So it leaves certain people disenfranchised and continues, as I have complained about throughout today's hearing, the fragmentation of the marketplace.

It doesn't allow libraries and archiving institutions to have their rights. It doesn't afford the public a fair use right. It doesn't apply the MCA protections. And probably most importantly, it doesn't afford those older legacy artists the opportunity to perhaps get their copyrights back or negotiate for a better deal once the term of copyright would expire.

So that is our issue. Our issue is not that it, in and of itself, is not a rifle shot or an attempt to rectify a situation. Our issue is

that it seems to be, once again, a very, very narrowly tailored remedy that ends up creating more anomalies within the system.

Mr. COBLE. The gentleman's time has expired.

The gentle lady from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Mr. Chairman and Ranking Member, let me first of all take a little bit of my time to say that this is an enormously important process. I have gone through this for maybe almost a decade, and just the idea of an omnibus approach and fixing it finally, or attempting to fix it finally, is a very crucial moment, I think, in our history for intellectual property and for all of us who enjoy over the years this thing called music.

Let me apologize on the record. We were in a meeting for the reauthorization of the Voting Rights Act, so that is why I was away from the desk, and I think all of you who represent such a diverse population understand how vital that is. So we had to divide our time.

I don't know whether anyone has gone on record for the omnibus approach, but I believe that is the right approach. What I would like to do is to get some of you who are here to indicate what would be the most important item to be an aspect of an omnibus approach. I assume we will be listening to broadcasters at some point, and others who are involved in this process.

Many of you have known that my work has included the valuing of the performance and the writer and the key element of putting together music, which I think many of the newer generation may not be familiar with, and all that it takes to get a final product, because they see it in the quickness or the twinkle of an eye.

So, Mr. Portnow, you have been with these issues for a very long time and dealt with these issues of music being played, being heard, being written. What would be the most important element that Congress should look at if we were to look at an omnibus approach?

Mr. PORTNOW. Thank you for the question, and I want to certainly take a moment to thank you for your support of the performance rights issue, which is critical to us, as I indicated in my opening remarks.

I think it is really about fair market value. If we can get our heads and arms around a fair market approach to all of the constituents here, that is going to raise all boats. We all have—whether the songwriter, the artist, the producer, the engineer, those behind the scenes that are the background musicians, all of them have a stake here. So we have to address this in a way that each one of them winds up with a fair market compensation for their work.

Ms. JACKSON LEE. Thank you.

May I ask Mr. O'Neill, if you would, I heard your testimony on BMI and the work that you are doing. What would be the most important element in a bill that approached this from an omnibus perspective?

Mr. O'NEILL. I would also agree with the fair market concept. I think the Songwriter Equity Act was a step in that direction, to allow the courts to view all rates, all rights when setting or when trying to approximate what a willing buyer and a willing seller would do. That word is still "approximate" because it is not a will-

ing buyer and a willing seller. So I believe that the fair market aspect of an omnibus bill would be beneficial to all parties.

Ms. JACKSON LEE. And if I pressed you a little further and indicated that there is this vast market of broadcast media that is not the Internet, YouTube, how would they play into an omnibus approach, so that we wouldn't have to go back down a journey of no return, as we have done in times past?

Mr. O'NEILL. I think they would be opposed to it. I think ultimately—you heard today a little bit about the performance right and sound recording, would radio be for it or against it. I think you are tied to some legacy industries that don't want to change or don't want to recognize the value of copyright going forward.

They all own copyright themselves. They all know the value of their own copyright. I think it comes down to sometimes the question of what are the scales, the balance of payments for those copyrights.

Ms. JACKSON LEE. And you don't think a deliberative approach would draw in those different elements? I am going to call them different elements as opposed to labeling them broadcast or otherwise. Bring them to the table? Because if you construct a bill that just develops a fight, you haven't advanced yourself. Do you think there is something that would draw more persons to the table?

Mr. O'NEILL. I do think that a bill—yes, I do. I think it would be beneficial to have it all in one. Again, when we started this, I preferred to keep it simple, something focusing on the songwriters. But making it broader, you bring in many more constituencies and it gets a little muddier, if you will. So my initial thought was let's protect what we had, but we also have to look at the broader, the greater good.

Ms. JACKSON LEE. It might get muddy and come out on the other side in a better perspective.

Mr. O'NEILL. And I would love that.

Mr. HOYT. Can I just suggest——

Ms. JACKSON LEE. Yes. I was trying to go down the line.

Mr. HOYT [continuing]. From a broadcaster's standpoint? I don't think there is any broadcaster in the world who doesn't want to operate in a competitive environment. It is how you get to that competitive environment that is so difficult.

For instance, the one thing that I think local television stations would benefit from would be somehow getting the copyright holder to have to clear the performance right at the time the production is made, not tying it into a what we call "in the can" product and then say, oh, you have to pay the performance rights even though you didn't have a choice as to what music was used, nor can you control—you can't get it out of the program. So you are kind of stuck with no control, and you still have to pay for it. It is a pure television problem. I am not suggesting it is a problem all over. But from a television perspective, you have to get the producer to clear the performance right.

Mr. COBLE. The gentle lady's time has expired.

Ms. JACKSON LEE. Let me, Mr. Chairman and the Ranking Member, thank you very much and just put a comment on the record as I close, Mr. Chairman. My time has expired, but if I could conclude.

I do want to say that I am fascinated with Mr. Griffin's comment. I was not able to pursue questions about the registry and how it would process into legislation, what would trigger it, so hopefully we will have an opportunity to dialogue. If Mr. Chairman will give me 30 seconds to hear Mr. Griffin's answer?

Mr. COBLE. Granted.

Ms. JACKSON LEE. I thank you.

Mr. GRIFFIN. I will just say, it couldn't be more important as your priority because we call her the Registrar of Copyrights. That is her prime function, Maria Pallante, and she is great. So you have to, in this bill, empower her, give her the resources she needs to revamp that office such that they can properly record and enumerate the rights such that they can be properly licensed, properly paid, that there can be proper moral attribution of those who did these things such that the history of our culture and our heritage are properly recorded and enumerated. The rest can, in some ways, take care of itself if we do that. But we do not do that at all.

Ms. JACKSON LEE. I thank you.

I yield back.

Mr. COBLE. I thank the gentle lady.

The gentleman from Pennsylvania had one final comment to make.

Mr. MARINO. Thank you, Chairman.

We are not going to take the time for each one of you answering, but if you care to answer this question, would you put it in writing and get it to me? Tell me what your interpretation is of a fair market compared to a free market.

Mr. COBLE. Gentlemen, this concludes today's hearing. I will thank the panelists, and I thank those in the audience. This standing-room-only audience indicates to me that this issue is not an insignificant issue, and it will be visited and revisited time and again, I can promise you.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing stands adjourned.

[Whereupon, at 12:29 p.m., the Subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

Supplemental Material submitted by Lee Knife, Executive Director, Digital Media Association

Before the
UNITED STATES COPYRIGHT OFFICE
Washington, D.C.

In the Matter of:	
Music Licensing Study	Docket No. 2014-03

Comments of the Digital Media Association ("DiMA")

The Digital Media Association ("DiMA") respectfully submits the following comments in response to the above-referenced Notice of Inquiry (the "Notice of Inquiry"). DiMA commends the Copyright Office for initiating this inquiry, and appreciates the opportunity to participate.

DiMA is the leading national trade organization dedicated to representing the interests of licensed digital media services, including many of the leading players in the digital music marketplace today. DiMA's members include Amazon.com, Apple, Google/YouTube, Microsoft, Pandora, RealNetworks and Slacker, and a complete list of its membership may be found at http://www.digmedia.org/about-dima/members. Although DiMA is submitting a single response to the Notice of Inquiry, DiMA's members operate a broad array of different digital music service types and consumer offerings with different music licensing needs. However, as distributors of copyrighted sound recordings and musical works through legitimate music services, DiMA's members share many common interests, and are directly affected by existing methods of licensing music, as well as the mechanisms for obtaining music licenses that are shaped by U.S. copyright law. DiMA has been actively involved in many of the recent studies, analyses, public inquiries and roundtables conducted by the Copyright Office on various aspects of copyright law. Through the Copyright Office's efforts, we believe that Congress has already been provided with much important background on music licensing issues.

The interests of DiMA and its members are aligned with those of the rights owners in several significant respects. First, DiMA members share the belief that rights owners should be appropriately compensated for the use of copyrighted works. Second, DiMA members also share the belief that the long-term survival of the music business depends on the ability to develop profitable, sustainable digital music services that will delight consumers for generations to come. The legitimate music services represented by DiMA's members have collectively paid billions of dollars in royalties to content owners, recording artists and songwriters in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year. In the face of this decline, digital music services, including many of the streaming services operated by DiMA's members, are generally viewed by the music business as its salvation.[1] Significantly, the delivery of engaging,

[1] IFPI Digital Music Report 2014, at 6 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.; *see also* Ben Sisario, *Spotify Hits 10 Million Subscribers, a Milestone*, N.Y. Times, May 21, 2014, *available at* http://www.nytimes.com/2014/05/22/business/media/spotify-hits-milestone-with-10-million-paid-subscribers.html?_r=1.

innovative music services by DiMA members is critical to the central public policy underlying our copyright system: affording the widest range of consumers access to the widest range of creative works.[2]

However, the complex process for music licensing in the digital landscape that exists today in the United States – the framework of which is based on U.S. copyright law – threatens to chill investment in legitimate music services, and the continued development and expansion of innovative services that are essential to the survival of the recorded music industry. Accordingly, we are pleased that the Copyright Office is continuing its examination of the effectiveness of existing methods of licensing music. We remain hopeful that, after evaluating the issues, Congress will consider ways to modernize U.S. copyright law in a manner that assures consumers continued access to a vibrant marketplace for music products and services in the digital era.

[2] *See, e.g.*, *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 558 (1985) ("the immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate the creation of useful works for the general public good." (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975))); *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[to] promote the Progress of Science and useful Arts.'").

EXECUTIVE SUMMARY

- Fragmentation of copyright rights and rights ownership. The mechanisms for obtaining music licenses in the United States are rooted in various distinct rights recognized under U.S. copyright law, where sound recordings, and the musical works embodied within them, are routinely owned by different copyright holders. In fact, the rights within the musical work rights bundle itself are routinely owned by more than one copyright holder. This fragmentation did not severely disrupt the historical business model for the sale of recorded music products because the distributors and retailers that sold and resold physical products (and promoted them) did not need to license any copyrights, and third parties (i.e., terrestrial radio broadcasters) licensed musical work public performance rights to promote the sale of these recorded music products through radio airplay.

- Shiftiug of licensing responsibility. In the digital environment, music services are functionally equivalent to the distributors and retailers that sold music under the historical business model, but licensing responsibility has shifted to them – a first in the history of the music industry.

- The impact of rights fragmentation and the shifting of licensing responsibility on digital music services. The above-referenced rights fragmentation and shifting of licensing responsibility to service providers under the current legal and regulatory framework established by U.S. copyright law has created formidable challenges for digital music services for various reasons unique to music licensing in the digital environment, including the following:

    - The need for licensing ubiquity, and the new legal uncertainties. As a result of the convergence of rights in the digital era, digital music services are subjected to legal uncertainties around the precise rights implicated for particular activities, overlapping claims for royalty payments, and significant potential legal exposure. Concurrently, as the music bnsiness has shifted from ownership models to access models, digital music services are confronted with the need to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to offer consumers commercially viable services. Failing to secure the necessary licenses is not an option.

    - The unprecedented market power of rights owners, and the "tug-of-war" over royalties. Rights owners enjoy unprecedented market power, and because each negotiation and ratesetting proceeding occurs in parallel (at different times, in different places and before different ratesetting tribunals operating under different ratesetting standards), each rights owner seeks to increase its own royalty, generally without regard to the royalties that services have to pay the various other rights owners. As discussed further below, an example of this phenomenon was seen in recent proceedings involving musical composition public performance licensing for Internet radio services. Effectively, this dynamic has resulted in a ratcheting effect whereby digital music service providers have been thrust into the middle of a "tug-of-war" among rights owners over royalties. The net result of this "tug-of-war" is royalty rates that are (i) not presented to copyright users in a unified way such that digital music services can evaluate, forecast and understand their aggregate royalty expense for all of the copyright rights needed, and (ii) in the aggregate, are unjustifiably high and, ultimately, unsustainable.

    - Interdependence of interests. Because of the interdependence of interests among rights owners, creative talent and digital music services, the conduct of any one party in the music licensing marketplace can have adverse consequences for the others, and the public interest. There is no centralized body with general oversight to effectively balance these

competing interests and minimize the collateral consequences that one "hold out" rights owner can have on all others parties in the ecosystem.

- The current music licensing mechanisms do not work well in the digital environment. The existing music licensing structures are not well-suited for the digital era, as they (i) lack necessary transparency, (ii) are not efficient, and (iii) do not provide a "level playing field" for competitors in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies. Nor do these structures often provide a suitable counter-balance to the market power of rights owners.

- Six essential pillars for modernization of copyright laws for the digital environment. U.S. copyright law is in need of modernization for the digital environment, and, as noted above, a holistic view of the entire music licensing ecosystem should be taken. For modernization to be effective, the framework for the new digital era should be based on the following six essential pillars:

  - **Continued Government Oversight and Regulation of Music Licensing Activities: A** music licensing framework that appropriately counter-balances the unique market power and negotiating leverage of copyright owners, and takes digital music services out of the middle of the rights owner "tug-of-war" over royalty rates that has driven up royalty costs to levels that are unsustainable, would facilitate a healthy and sustainable digital music marketplace.

  - **Transparency and a centralized database:** The digital marketplace needs a publicly available, centralized database that contains information about rights ownership of musical works and sound recordings on a work-by-work level and on which digital music services can rely. For such a database to be truly effective, it needs to be accurate, comprehensive and reliable, as well as use standard industry identifiers such as International Standard Recording Code ("ISRC") and International Standard Musical Work Code ("ISWC") numbers that show the relationship between the musical works and sound recordings that embody them, and vice versa. However, as experience with the development of the Global Repertoire Database ("GRD") in Europe has shown, if left entirely to private industry without government oversight, these universal standards (and the centralized database itself) are unlikely to get implemented.

  - **Licensing Efficiencies and Reduced Transaction Costs:** The music licensing marketplace would benefit from a framework that promotes licensing efficiencies and reduced transaction costs for music licensing activities, implemented through vehicles such as compulsory blanket licenses and common agents.

  - **Clarification of Rights**: A music licensing framework where rights owners are not able to drive up royalty rates based on legal uncertainties arising out of the convergence of reproduction, distribution and public performance rights in the digital environment would foster growth and promote new entry into the digital music marketplace.

  - **Reduction of Legal Risks Around Licensing Activities:** Immunity from infringement liability (including statutory damages) for copyright users that have acted diligently and in good faith based on the information contained in the centralized database would reduce risk and encourage further innovation. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- **"Level Playing Field"**: A music licensing framework that creates a "level playing field" where one music service is not advantaged over another in terms of ratesetting standards, royalty rates or functionality rules because of platform distinctions or historical anomalies would increase competition on the merits, thereby incentivizing innovation.

I. INTRODUCTION AND OVERVIEW

1. The current legal and regulatory framework was designed for a historical business model (the sale of physical products) and is ill-suited for the digital environment.

A. Licensing responsibility under the historical business model.

As the Copyright Office has noted in the Background section for this Notice of Inquiry, many of the sound and enduring principles in U.S. copyright law are challenged when applied to the music business in the digital environment. The historical business model for recorded music products was relatively simple and straight-forward. Record companies sold physical products embodying sound recordings, musical works and other copyrighted materials (including artwork) to distributors and retailers, who in turn, resold those finished goods to consumers. Significantly, these distributors and retailers did not need to obtain copyright licenses from content owners in order to *resell the finished goods* because record companies delivered them with "all rights cleared."[3] Moreover, copyright law did not require retailers to seek licenses from content owners in order to engage in activities intended to *promote these sales,* such as in-store public performances of records.[4]

Under the pre-digital model, licensing activity for the promotion of physical product sales was generally the responsibility of parties other than the retailers – such as terrestrial radio broadcasters. These parties, not the retailers, licensed the necessary rights to promote the sale of records, such as by means of terrestrial FM and AM radio airplay. Moreover, the only rights broadcasters needed to secure were public performance rights in the underlying musical works, as Congress has long refrained from recognizing an exclusive right for the public performance of sound recordings by means of terrestrial radio airplay.

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[3] This included the right to reproduce and distribute the musical works embodied in the physical products. It is worth noting that the migration from selling physical products to permanent digital downloads has done little to change this basic construct, at least in the United States. Whether sold or resold on wholesale or agency models, record labels generally still bear responsibility for acquiring and administering mechanical licenses for the musical works embodied in the sound recordings, and paying the required mechanical royalties to musical work rights owners.

[4] Congress has long exempted retailers from the requirement to license musical work public performance rights for such promotional activities under Section 110(7). In the digital environment, there is no equivalent of Section 110(7). Accordingly, for the use of sound clips to promote the sale of permanent digital downloads within the digital download store environment, digital music services are responsible for acquiring and administering musical work public performance rights, and paying the required pubic performance royalties. Congress created the exemption for the promotion of physical sales in response to *Chappell & Co. v. Middletown Farmers Market & Auction Co.*, 334 F.2d 303 (3d Cir. 1964), a case brought under the 1909 Act, which "held that the public performance of phonorecords in an establishment selling such phonorecords to be an infringing public performance for profit, notwithstanding defendant's argument that it was merely engaged in advertising the phonorecords and not in a 'public performance for profit.'" Melville B. Nimmer & David Nimmer, 2 *Nimmer on Copyright* § 5.18[F] (2013) (internal citations omitted). In the Fairness In Music Licensing Act of 1998, Congress extended this exemption beyond "copies or phonorecords of the work" to include "the audiovisual or other devices utilized in such performance." Fairness In Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (1998); *see* 17 U.S.C. § 110(7) (2012). Although the exemption set forth in Section 110(7) has not been extended to digital, and the Southern District of New York recently ruled that the public performance of sound clips in equivalent digital contexts does not constitute a fair use of the musical works, we believe that uses that do not substitute for sales, but instead, promote them, should be encouraged and not discouraged, regardless of whether they are digital or analog in nature. *See United States v. Am. Soc'y of Composers, Authors, and Publishers*, No. 41-cv-1395, 2009 WL 484449 (S.D.N.Y. Apr. 3, 2009).

B. <u>The evolution of the music business from the historical physical business model to the digital environment</u>.

Over the past ten to fifteen years, the music business has been transformed by the digital landscape. Consumers – who are intended to be the primary beneficiaries of our copyright system – have largely benefited from this transformation.[5] We have seen paradigm shifts in the following areas:

- The *way* that sound recordings and musical works are delivered to the consumer (as new digital product configurations and services replace traditional physical products);
- The *technology platforms* used to deliver sound recordings and musical works (as the Internet, mobile carrier networks, cable television networks, satellite television networks and satellite radio networks replace traditional brick-and-mortar retailers and terrestrial broadcasters);
- The *consumer electronics devices* used by consumers to enjoy sound recordings and musical works (as connected, highly portable devices such as smart phones, tablets and lightweight computers replace conventional CD players, turntables and cassette players);
- The *business models* used to create revenue-generating opportunities (as subscription, freemium, bundled and ad supported digital business models replace simple a la carte physical sales);
- Consumer expectations about *how* music can be consumed (as an array of product types, such as permanent downloads, limited downloads and streams – which often enable consumers to be in control of the media they consume by "personalizing" their experiences in a multifaceted, immersive way – replace traditional physical product types);
- Consumer expectations about *when* music can be consumed (as digital music services provide consumers with instant access to music without having to drive to brick-and-mortar stores or wait for mail order shipments to arrive);
- Consumer expectations about the *quantity of titles available* (as consumers migrate to access model services, legitimate digital music services must offer and make available a "critical mass" of licensed works to remain commercially viable, unlike the historical business model where it was acceptable for some titles to be out of stock); and
- A culture that expects licensed digital music services to provide ubiquitous access to all content at *low cost or no cost at all* (as free-to-the-user illegal alternatives are plentiful, unlike the marketplace for traditional physical products).

With respect to these paradigm shifts, DiMA's members have risen to the occasion and are responsible for much of the innovation and substantial financial investment that has transformed the music industry for the better (such as the development of the download, streaming, subscription, locker and other digital business models that represent the future of recorded music delivery). The digital music services offered by DiMA's members provide a variety of compelling, immersive consumer experiences that satisfy the needs of a highly segmented array of consumers.

C. <u>Licensing responsibility has shifted in the digital environment</u>.

In most industries, the manufacturers of products are responsible for sourcing the various components and rights necessary to deliver goods to their network of wholesalers and distributors, so they

[5] Mark Cooper, *Copyright Policy, Creativity And Innovation In The Digital Economy: Comments of the Consumer Federation of America*, (November 13, 2013), *available at* http://www.ntia.doc.gov/files/ntia/consumer_federation_of_america_comments.pdf.

may be resold to other businesses or directly to end user customers without the need to acquire additional components or rights. Under the historical business model, record companies performed the role of the manufacturer, and, as such, they delivered physical record products to their network of distributors and retailers with "all rights cleared." In the digital environment, these roles have been reversed, and digital music services (i.e., the retailers) must source many of the component parts of the product – individual copyright based rights – and bear all of the burdens and responsibilities for (i) acquiring and administering those rights and (ii) paying the required royalties out of their own share of the revenues generated.

These incremental responsibilities and burdens have vastly complicated the licensing landscape, and diminished the operating margins for digital music services that now perform these converged roles. For example, unlike the physical distributors of yesteryear, today's digital distributors must identify and locate licensors of rights associated with sound recordings, musical works and other copyrighted materials (such as artwork); negotiate and administer licenses; and navigate the complex web of rights ownership in the U.S. and global licensing paradigms.[6] Under the current licensing framework and industry structure, digital music service providers are forced to bear the entire burden of reconciling any conflicting demands from rights owners, who often assert overlapping royalty claims for the same uses of the same works.[7] This change represents a seismic shift in the distribution of recorded music product – and one with far-reaching repercussions, as detailed below.

2. The effects of the current legal and regulatory framework in the digital environment.

A. <u>The current legal and regulatory framework enhances the negotiating leverage of rights owners</u>.

The challenges faced by digital music services are formidable and fundamentally different from the challenges faced by retailers and distributors under the historical music business model. The shift in licensing responsibility from record companies to digital music services, compounded by the unique and byzantine nature of music licensing in the digital environment under the current legal and regulatory framework established by U.S. copyright law, has significantly *enhanced the negotiating leverage of right owners* (and diminished the leverage of licensees). This framework has proven detrimental to digital music service providers and actually has served to undermine the shared belief that rights owners should be appropriately compensated for the use of copyrighted works. The following attributes of today's music licensing model, as supported by the current legal and regulatory framework, are among the most problematic:

- <u>Fragmented rights ownership</u>. Based on anachronistic distinctions in U.S. copyright law, sound recording and musical work rights are markedly fragmented[8] and controlled by numerous rights owners. Adding further complication, rights within the musical work

[6] Although it is beyond the scope of this Notice of Inquiry, it is worth mentioning that many digital music service providers that operate legitimate music services in the U.S. also operate services in other countries. These services must navigate similarly complex copyright regimes on a country-by-country basis, adding further complexity to the burden of the digital music service providers.

[7] These overlapping claims stem from the convergence of various Section 106 rights in the digital era, which is discussed in more detail elsewhere in this response.

[8] Examples of this fragmentation include the separation of sound recording and musical work rights, the separate licensing structures for copyright rights within the musical work rights bundle, and the separate international licensing structures for musical work rights and certain sound recording rights.

rights bundle itself may be further fragmented across numerous rights owners.[9] Accordingly, in order to comply with their licensing responsibilities, digital music services must acquire, retain and administer licenses under copyright from a *multitude* of rights owners. The effects of this fragmentation on licensees in the music licensing marketplace are discussed in greater detail in our response to Question 4 below.[10]

- Access services, and the need for licensing ubiquity. While it might be possible to launch a digital music service with only the sound recordings owned and controlled by the three major labels and a few independent labels and aggregators, doing so would limit the service's commercial viability in light of consumer expectations that "everything" should be available. Moreover, few services can be commercially viable without musical work licenses from *all* music publishing rights owners, because musical work rights generally cut across the lines of sound recording copyright ownership (e.g., musical works in sound recordings owned or controlled by Warner Music Group are controlled by tens of thousands of music publishers and not exclusively by Warner/Chappell, its affiliated music publishing company). The need for licensing ubiquity requires services to secure licenses from tens of thousands of rights holders, covering tens of millions of tracks, in order to meet consumer expectations in the digital environment.

- New legal uncertainties arising out of rights convergence. Reproduction, distribution and public performance rights have converged in various ways, and the lines between them are often unclear. Accordingly, the multitude of rights owners with whom digital music services must secure licenses often assert overlapping claims for the same or analogous rights, which can increase a digital music service provider's overall royalty expense by requiring redundant payments for a single use of a copyrighted work (i.e., "double dipping" by rights owners). For example, the performance rights organizations (PROs) long asserted that digital downloads and ringtones implicated public performance rights in addition to "mechanical" reproduction rights; while this position was ultimately rejected by multiple legal decisions,[11] it cast a shadow of uncertainty for digital music services and led to the unnecessary payment of millions of dollars in duplicative royalties for many years. In addition, this convergence of rights increases transaction costs as digital music services must often clear, for example, both public performance and reproduction/distribution rights in a musical work for a use whose historical analog would have only required one or the other such clearance.

- Unprecedented market power of rights owners. After decades of industry consolidation, rights owners now have unprecedented market power (and significantly more market

[9] For example, the musical work "We Are Young" as recorded by the recording artist "fun." splits musical work copyright ownership among four different songwriters and seven different publishers. As a further example, the musical work "Get Lucky," as performed by Daft Punk, which won this year's GRAMMY Award for Best Pop Duo/Group, has four separate songwriters and four separate music publishers

[10] Fragmentation, in the context of musical works, also harms songwriters in that their intended royalty payments are often redirected to cover arguably duplicative administrative expenses. *See Reforming Section 115 of the Copyright Act for the Digital Age: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. of the Judiciary*, at 110th Cong. 14 (2007) (statement of Marybeth Peters, Register of Copyrights) ("The system would also offer substantial advantages to rights holders. Under a blanket license system, there are economies of scale that reduce the administrative costs associated with the collection and distribution of the royalties.").

[11] *See, e.g., In re Cellco Partnership*, No. 09-cv-7074, 2009 WL 3294861 (S.D.N.Y. Oct. 14, 2009); *United States v. Am. Soc'y of Composers, Artists, and Performers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

power than any of the individual services that require particular licenses from all of them).[12]

- Lack of a "level playing field." The complex patchwork of *laws*,[13] *regulations*,[14] *private voluntary licensing arrangements*, *collective licensing arrangements*,[15] and *court rulings*[16] that comprise the current legal and regulatory framework for music licensing have created an unlevel playing field, that unfairly tilts competition, typically in favor of legacy technologies, at the expense of innovating technologies. For example, ratesetting standards, royalty rates and functionality rules provide an advantage to some service types over others. These issues are discussed in greater detail in our responses to Questions 8 and 9 and our consolidated response to Questions 12 and 13 below.

- Lack of transparency. The lack of a publicly available, centralized database for musical works and sound recordings makes it difficult, if not impossible, for digital music services to determine what rights they do and do not have at any given time.[17] This creates a host of problems and inefficiencies which are discussed in greater detail in our responses to Questions 1, 3, 5 and 22 below.

- Statutory damages. The current risk of statutory damages under U.S. copyright law enhances the leverage and bargaining power of rights owners, because the law imposes severe economic consequences for any mistakes on the part of licensees, however technical and regardless of "fault."[18] U.S. copyright law lacks a "safe harbor" from statutory damages that would shield copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, which is often limited because of the lack of a centralized database, as noted above.

B. The rights owner "tug-of-war" over royalty rates, and its effect on the aggregate royalty expense of digital music services.

In the licensing marketplace, the fragmented rights ownership structure creates an environment in which each individual licensor negotiates for a greater share of services' revenue in separate, but parallel,

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[12] See e.g., Flavia T. Fortes, *Music Industry Consolidation: The Likely Anticompetitive Effects of the Universal / EMI Merger*, American Antitrust Institute 7 (Aug. 30, 2012), *available at* http://www.antitrustinstitute.org/sites/default/files/White%20paperEMI%20Universal.pdf. ("A hypothetical merged Universal/EMI would have had nearly 40% of the market in 2011, leaving only Sony with nearly 30% and Warner with less than 20% among rival 'majors.' This 4-3 reduction would take the market from 'moderately concentrated' to 'highly concentrated'…"); *see also* notes 36 and 37 *infra* and accompanying text.

[13] Such laws include the statutory licenses codified in Sections 112, 114 and 115 of the Copyright Act.

[14] Such regulations include the rates and terms for various statutory licenses codified in the CFR and the Federal Register.

[15] Such collective licensing arrangements include the collective licensing of musical work public performance rights under antitrust consent decrees.

[16] Such court rulings include interpretations of the laws codified in Sections 112, 114 and 115, the scope and meaning of the antitrust consent decrees, and the boundaries between rights under state laws and federal copyright

[17] It is worth noting that this information is rarely provided by rights owners to licensees in practice, even in direct deals where the information is readily available. Moreover, some of the private databases utilized by the rights owners themselves reflect conflicting ownership information. For example, the database used by a PRO may show that a musical work is owned or controlled by a music publisher, but that music publisher's own database may not include any reference to the musical work at all.

[18] *See* 17 U.S.C. § 504 (2012).

negotiations with digital music services. Understandably, each licensor focuses on its own individual self-interests – namely, how to maximize its own share of the total revenue pie. As a result of this fractured approach, these individual licensors generally have no interest in considering (i) the aggregate amount of royalties paid by distributors to all licensors, (ii) the value the service itself provides, such as the substantial investment, creativity and innovation, including patents and other intellectual property, that enhance the overall user experience, and, accordingly, the value of the music for the consumer,[19] and (iii) the costs of other inputs and participants in the value chain. Unlike the relative simplicity of the historical business model, distribution in the digital environment requires digital music services to share revenues with a wide array of other value chain participants, such as mobile network operators, Internet service providers and consumer electronics vendors, who bring much needed scale and relationships with consumers. Further, digital music service providers are often required to bear considerable infrastructure, technical and operational costs by utilizing third party vendors to provide necessary services and functions.

With all of these costs and expenses, the percentage of revenue that any digital music service can make available to all rights owners (and still turn a profit) is relatively fixed. However, when an individual rights owner successfully negotiates with a service for a greater share of the service's revenue, the resulting incremental royalty expense reduces the digital music service's share of revenues rather than reallocating a fixed pool of "wholesale costs" among the different rights owners. As a result, the digital music service provider frequently finds itself in the middle of a "tug-of-war" among the rights owners over royalties. The situation may be exacerbated in circumstances where individual rights owners enhance their negotiating leverage even further by withholding their licenses until other licensors have concluded their deals with the service.

Perhaps nowhere has this "tug-of-war" been more publicly recognized than in the recent ASCAP ratesetting proceeding involving Pandora Media. As noted by Judge Cote in a decision handed down in that proceeding in March 2014, the underlying premise for Sony/ATV's purported withdrawal of its catalog from the ASCAP repertory for certain digital uses was not that they felt the long-standing, well-established range of royalty rates for *musical work* public performance rights was unreasonable in *absolute terms*, but rather, when compared to the extraordinarily high royalty rates being paid by webcasters for *sound recording* rights under the Section 112 and 114 statutory licenses, they were not reasonable in *relative terms.*[20]

This all leads to upward pressure on royalty rates, which is entirely borne by the digital music services. Thus, much of the current debate over rates stems from disagreement among the labels, publishers and PROs about how to allocate the *content owners' fixed share of the pie*, rather than from a notion that service providers are not paying enough, in the aggregate, for content.[21] The net result of this "tug-of-war" over royalties among rights owners is aggregate royalty rates that are unjustifiable and, ultimately, unsustainable.

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[19] The value of the digital music services' contribution is discussed in greater detail in Section I.2.D below.

[20] *In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2014 WL 1088101, at *25 (S.D.N.Y. Mar. 18, 2014) ("*Pandora II*") ("In his interview with Billboard.biz, reported on January 18, Bandier explained that the rates 'are quite reasonable. When you compare it to the rate record companies are getting, it was really miniscule.'").

[21] It is not novel for the content user to pay an all-in royalty for multiple rights in the copyright bundle. For example, music services pay a total fee for the combined right to the public performance of sound recordings under 17 U.S.C. § 114 and for any ephemeral reproductions that result from such a public performance under § 112(e). 37 C.F.R. § 380.3(c) (2013) ("The royalty payable under 17 U.S.C. 112(e) for the making of all Ephemeral Recordings used by the Licensee solely to facilitate transmissions for which it pays royalties shall be included within, and constitute 5% of, the total royalties payable under 17 U.S.C. 112(e) and 114.").

C. Interdependence of interests.

On a *macro level*, each of the stakeholders in the music licensing marketplace shares a common interest in, and would benefit from, a functional licensing structure that enables and facilitates long term, sustainable and profitable digital music businesses. On a *micro level*, however, the licensing structure that exists today enables each of the fragmented rights owners to "jockey for position" in the manner noted in Section I.2.B above, without regard for the *collective effect* that these individualized negotiations have on the potential profitability of digital music services (or the shared goal of building long-term, sustainable and profitable digital music businesses for the future).

Because of the symbiotic relationship between rights owners, creative talent and digital music services, the conduct of any one actor in its individualized negotiations can have unintended collateral consequences for the other unrelated parties. For example, a musical work that is held back from a digital music service over licensing issues would not only affect the publisher and the songwriter, but the record label and featured performer in the sound recording as well, and vice-versa. Because these individualized negotiations take place at different times, in different places, with different rights owners, and under different standards, the interdependence of interests often gets "lost in the shuffle." The "common good" – as well as the long term public interest in ensuring the continued existence of a vibrant music ecosystem where digital music services can operate long-term, sustainable businesses that can delight consumers for generations to come – would be served by copyright modernization and continued government oversight over certain key aspects of music licensing activity.

D. In the rights owner "tug-of-war" over royalties, the value added by digital music service providers is often overlooked.

While DiMA's members recognize the value of music as one of the critical inputs for their innovative services, content owners have tended to ignore, or undervalue, the massive investment by digital music service providers for many of the other critical inputs that allow services to delight consumers. In fact, the innovative services that are the result of the substantial investments made by DiMA members fulfill the primary goal of the Copyright Act: consumer access to creative works. The transformation of the music business to the digital environment could not have occurred without the substantial investment, creativity and innovation of legitimate digital music providers in developing and deploying these services, but the value added is often overlooked in ratesetting proceedings under statutory licenses and in individual negotiations with rights owners. This significant inequity was pointed out by Judge Cote in an ASCAP ratesetting decision handed down in March 2014:

> A rights holder is, of course, entitled to a fee that reflects the fair value of its contribution to a commercial enterprise. It is not entitled, however, to an increased fee simply because an enterprise has found success through its adoption of an innovative business model, its investment in technology, or its creative use of other resources. It appears that Sony, UMPG, and ASCAP (largely because of the pressure exerted on ASCAP by Sony and UMPG) have targeted Pandora at least in part because its commercial success has made it an appealing target. Pandora has shown that its considerable success in bringing radio to the internet is attributable not just to the music it plays (which is available as well to all of its competitors), but also to its creation of the [Music Genome Project] and its considerable investment in the development and maintenance of that innovation. These investments by Pandora, which make it less dependent on the purchase of any individual work of music than at least

some of its competitors, do not entitle ASCAP to any increase in the rate it charges for the public performance of music.[22]

3. The need for continued regulatory oversight in the area of music licensing.

A. The purpose of U.S. copyright law, and the required balancing of interests.

The fundamental purpose of U.S. copyright law is to serve the public interest by striking the optimal balance between (i) encouraging the creativity of authors by granting exclusive property rights in works of authorship, and (ii) fostering an efficient and competitive marketplace that ensures access to those works of authorship.[23] Because the public interest is at the core of copyright protection, the rights of authors are limited in various ways (as opposed to being absolute). These limitations – which range from the finite duration of copyright protection (as specified by the Constitution) to the myriad exceptions, exclusions and limitations established under U.S. copyright laws and the corresponding federal regulations, as well as the court rulings that have interpreted those laws and regulations – serve as a critical counter-balance to the market power of rights owners in the music licensing marketplace.

B. Congress and the Department of Justice have long recognized that a music licensing marketplace cannot properly function without regulatory oversight.

Both Congress and the Department of Justice have long recognized that the marketplace for copyrights creates ample opportunities for rights owners to frustrate, rather than enhance, an efficient competitive environment for the licensing of copyrighted works. These opportunities stem from the market power of rights owners, and the lack of available substitutes for the copyright rights needed. As a result, for over a century, the various rights conferred by U.S. copyright law have been subject to a regime of regulatory oversight that supplements, and operates in parallel with, the general principles of antitrust laws that apply to every industry. Each of these mechanisms and procedures was enacted to counter-balance the unique market power of copyright owners, and to ensure that copyright users can bring innovative technologies, products and services to consumers at fair prices, without being held up by the status of rate negotiations and/or ratesetting proceedings.

(a) The compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords.

Since 1909, Congress has implemented a system that has allowed record labels to obtain compulsory "mechanical" licenses for the reproduction and distribution of musical works embodied in phonorecords, in order to ensure that there was a vibrant marketplace for the sale of recorded music.[24] As noted above, under the historical business model, retailers were also exempt from the need to secure musical work public performance licenses under Section 110(7) in furtherance of the same goal. As a

[22] *Pandora II*, 2014 WL 1088101, at *46.
[23] *See* Nimmer, *supra* note 4, § 1.03[A] ("[T]he authorization to grant to individual authors the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities." (internal footnote omitted)).
[24] *See* Nimmer, *supra* note 4, § 8.04[A] (2013) ("The Congress that enacted the 1909 Act was concerned with the possible emergence of 'a great music monopoly'. To forestall this threat, Section 1(e) of the 1909 Act enacted a compulsory license provision.").

result of this combination of regulations, retailers and record companies were free to sell recorded music without being encumbered (or potentially held back) by music licensing issues.[25]

(b) The public interest in "radio" in all of its forms, and the Section 112 and 114 statutory licenses.

In 1995 (and as further amended in 1998), Congress granted a compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and a corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112).[26] These compulsory licenses are particularly significant because they represent Congressional recognition that without them, market failures would have deprived the public of the benefits of new digital music services, including Internet radio services, satellite radio services, and radio services delivered through cable television and satellite television systems.[27]

(c) Exceptions and exclusions under U.S. copyright law.

In addition to the compulsory licenses noted above, Congress has also counter-balanced the unique market power of musical work and sound recording copyright owners through a long history of exceptions and exemptions to the exclusive rights otherwise conferred by Section 106.[28]

C. Antitrust considerations.

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[25] Since 1909, Congress has established various other statutory licenses to counter-balance the unique market power of copyright owners, including the following: compulsory license for secondary transmissions by cable systems (§ 111(d)); compulsory license for public performance of musical works in jukeboxes (§ 116); compulsory license for the public performance of musical works and display of pictorial, graphic and sculptural works by public broadcasting entities (§ 118); compulsory license for secondary transmissions by satellite carriers (§ 119); compulsory license for the reproduction and distribution of musical works in digital phonorecords (§ 115); compulsory license for the performance of sound recordings by means of non-exempt digital audio transmissions (§ 114); compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions (§ 112); and sui generis right for the importation and distribution of digital audio recording devices (§ 1004).

[26] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified at 17 U.S.C. §§ 112, 114); Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 117 U.S.C. §§ 112, 114).

[27] S. Comm. on the Judiciary, Digital Performance Right in Sound Recordings Act of 1995, S. Rep. No. 128, 104th Cong., 1st Sess. 25 (1995), reprinted in 1995 U.S.C.C.A.N. 356 ("The Committee is aware of concerns that the copyright owners of sound recordings might become 'gatekeepers' and limit opportunities for public performances of the musical works embodied in the sound recordings.").

[28] Examples of these exceptions and exemptions include the following: exemptions from the reproduction right for ephemeral recordings (§ 112(a)), computer programs (§ 117(a)(1)) and computer maintenance (§ 117(c)); an exemption from the distribution right under the first sale doctrine (§ 109(a)); exemptions from both the reproduction and distribution rights for libraries and archives (§ 108) and for public broadcasting of sound recordings as part of educational programs (§ 114(b)); an exemption from both the reproduction and adaptation rights for computer program archives (§ 117(a)(2)); and exemptions for public performances for classrooms (§ 110(1)), instructional broadcasting (§§ 110(2), 111(a)(2)), religious services (§ 110(3)), fraternal organizations (§ 110(10)), non-profit performances (§ 110(4)), vending establishments (§ 110(7)), transmissions to handicapped persons (§ 110 (8)), secondary transmissions in hotels (the *Jewell-LaSalle* exemption) ((§ 111(a)(1)); display transmissions of television and radio in small commercial establishments (the *Aiken* exemption) (§ 110(5)), non-profit secondary transmitters (§ 111(a)(5)), nonsubscription broadcast transmissions (§ 114(d)(1)(A)), and retransmission of an exempt nonsubscription broadcast transmission (§ 114(d)(1)(B)).

Antitrust laws provide another critical counter-balance to the market power of rights owners in the music licensing marketplace. The exclusive rights conferred by copyright law are often in tension with both the public interest and the interests of intellectual property rights users. In the early part of the twentieth century, the prevailing antitrust view held that the inherent monopoly rights conferred by the granting of exclusive rights under our intellectual property laws were *incompatible* with the fundamental purpose of our antitrust laws (which were designed to protect against the abuses of monopoly power).[29] The more modern view, as recently set forth by the U.S. Department of Justice and the Federal Trade Commission, is that our intellectual property laws (including copyright) and antitrust laws share the same fundamental goals (i.e., enhancing consumer welfare and promoting innovation), and "work in tandem to bring new and better technologies, products, and services to consumers *at lower prices*."[30]

Under the modern view, the purpose of our antitrust laws as they relate to intellectual property rights is to "ensure that new proprietary technologies, products and services are bought, sold, traded and licensed in a *competitive environment*."[31] However, even under the modern view, it is well recognized that a competitive environment with robust competition in the marketplace cannot exist in markets where intellectual property rights are held by rights owners with significant *market power*, and there are no *good substitutes* reasonably available to the users of those intellectual property rights in the marketplace.

(a) The ASCAP and BMI antitrust consent decrees.

The unique market power of rights owners in the context of licensing musical work public performance rights under the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") collective licensing regimes has long been counter-balanced by the antitrust consent decrees that the Department of Justice has put in place to govern the conduct of ASCAP (since March 1941) and BMI (since January 1941).[32] The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights, and are discussed in greater detail in our responses to Questions 5, 6 and 7 below.

(b) The looming specter of publisher withdrawals from ASCAP and BMI.

In 2011 and 2012, various music publishers attempted to withdraw their catalogs from the ASCAP and BMI repertory for certain digital uses.[33] In two separate legal decisions handed down in 2013 by the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings, these courts

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[29] U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 1 (2007).
[30] *Id.* (emphasis added).
[31] *Id.* (emphasis added).
[32] *See* Christopher Harrison, *You Gotta Fight for the Right to Publicly Perform*, 21 Texas Entm't and Sports L.J. 5 (2012).
[33] In May 2011, EMI Music Publishing purported to withdraw its catalogs from ASCAP's repertory for certain digital uses, effective as of January 1, 2012. Several other music publishers, including Warner/Chappell, Universal Music Publishing Group and BMG, followed with similar "partial" withdrawals. *See In re Pandora Media, Inc.*, Nos. 12-cv-8035, 41-cv-1395, 2013 WL 5211927, at *3 (S.D.N.Y. Sept. 17, 2013) ("*Pandora I*"). In September 2012, EMI Music Publishing and Sony/ATV Music Publishing purported to withdraw their catalogs from BMI's repertory for certain digital uses, effective as of January 1, 2013. Several other publishers – BMG Rights Management, Kobalt Music Group, Universal Music Publishing Group, Wixen Music Publishing and George Johnson Music – followed with similar withdrawals, effective as of January 1, 2014. *See Broadcast Music, Inc. v. Pandora Media, Inc.*, Nos. 13-cv-4037, 64-cv-3787, 2013 WL 6697788 (S.D.N.Y. Dec. 19, 2013) ("*Pandora III*").

ruled that partial withdrawals are not permitted under the antitrust consent decrees.[34] However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. It is rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. As noted in these decisions and publicly reported articles,[35] the publishers attempted to withdraw certain digital rights for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services that have no reasonable substitutes for the rights they need (musical work public performance rights). The possibility of future withdrawals (in full or, if the consent decrees were to be modified, in part) threatens to undermine the key processes and protections assured by the antitrust consent decrees. The potential effects of such withdrawals are discussed in greater detail in our response to Question 5 below.

D. <u>The unprecedented market power of rights owners</u>.

It bears repeating that the market power of musical work and sound recording rights owners is greater now than any other time in our history. A little over fifteen years ago, there were six major record labels. Today, with the recent acquisition by Universal Music Group (the largest of the major record labels) of EMI (the smallest), there remain only three. On the musical work side, a little over fifteen years ago, there were six major music publishers. Today, with the recent acquisition of EMI Publishing (the largest of the major music publishers) by Sony/ATV, there remain only three. The increased concentration of market power of the major labels and the major publishers *greatly enhances* the leverage of right owners (and further diminishes the leverage of digital music services) when negotiating licenses for sound recordings and musical works.

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[34] In a legal decision that was handed down by the federal court with jurisdiction over ASCAP ratesetting proceedings in September 2013, Judge Cote ruled that under the antitrust consent decree that governs ASCAP's conduct, if a music publisher has made its catalog available for licensing by ASCAP to the public *in any respect* (*i.e.*, partially or fully), that catalog is therefore a part of ASCAP's "repertory" for *all* purposes (thereby rendering the purported partial withdrawals for certain digital uses *ineffective* for any purpose, with the result that the publishers involved remained *"all-in"* as a result of any purported partial withdrawal of rights). *Pandora I*, 2013 WL 5211927, at *6-*8. In a separate legal decision that was handed down by the federal court with jurisdiction over BMI ratesetting proceedings in December 2013, Judge Stanton similarly ruled that that under the antitrust consent decree that governs BMI's conduct, publishers cannot effectuate withdrawals for some uses (such as certain digital uses) without withdrawing their catalogs for all uses, and therefore, a purported partial withdrawal of a publisher's catalog from BMI's repertory for certain digital uses is effectively a withdrawal of that catalog from BMI's repertory for all purposes (thereby rendering the purported partial withdrawals for certain digital uses an *effective withdrawal for all purposes and service types*, including broadcast radio stations, television networks, bars and restaurants, with the result that the publishers involved remained "all-out" as a result of any purported partial withdrawal of rights). *Pandora III*, 2013 WL 6697788, at *4

[35] *Pandora II*, 2014 WL 1088101, at *14, *35 ("[The publishers] believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."); Bill Donahue, *Judge In ASCAP-Pandora Royalty Row Spells Out Rate Ruling*, Law 360, Mar. 19, 2014, *available at* http://www.law360.com/articles/519905/judge-in-ascap-pandora-royalty-row-spells-out-rate-ruling; Ed Christman, *Why Publishers Lost Big Against Pandora*, Billboard, Mar. 20, 2014, *available at* http://www.billboard.com/biz/articles/news/publishing/5944618/why-publishers-lost-big-against-pandora-analysis ("Both of those rates [negotiated by Sony and Universal directly with Pandora after the publishers' attempted partial withdrawals from ASCAP] are substantially higher than the 1.85% royalty rate that ASCAP was being paid by Pandora and neither qualify as market rates according to the Judge, because negotiating circumstances compelled Pandora to accept such rates.").

E. **The relationship between market power and music licensing issues**.

The relationship between market power and negotiating leverage is well known to the rights owners themselves. For example, in its opposition to the merger of Universal Music Group and EMI, Warner Music Group submitted testimony to the United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights illustrating how a major label with market power can use its leverage in negotiations with digital distributors to extract economic concessions and other favorable contract terms.[36] Warner's testimony went on to explain how a combined Universal Music Group/EMI would have such unprecedented market power that it would "be able to exercise its blocking position to coerce exclusionary deals and extract higher royalties, advances and other favorable terms by virtue of its market power alone."[37]

Further, in their capacity as the *licensees* of musical work rights (for the records they create, manufacture and distribute under the historical business model), the major labels have supported the existence of the compulsory license for the reproduction and distribution of musical works on a continuous basis since 1909, and have participated in each proceeding to adjust royalty rates and terms under Section 115 ever since, including the industry-wide settlements in 2008 and 2012, respectively.[38]

4. **Copyright modernization is needed to ensure a legal and regulatory framework that will work in the digital environment**.

A. **Copyright modernization should take a holistic, rather than a "piecemeal" approach in the area of music licensing**.

As the Register of Copyrights has previously noted, Congress generally moves slowly in the copyright space for a variety of reasons, including the complexity of the subject matter, the intensity of interested parties on particular issues, general public indifference on copyright matters, and finite time

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[36] *The Universal Music Group/EMI Merger and the Future of Online Music: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. (2012) (statement of Edgar Bronfman, Jr., Director, Warner Music Group), *available at* http://www.judiciary.senate.gov/imo/media/doc/12-6-21BronfmanTestimony.pdf.

[37] *Id.*

[38] *See, e.g., Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords*, Docket No. 2011-3 CRB Phonorecords II (Feb. 1, 2011) (RIAA Petition to Participate), *available at* http://www.loc.gov/crb/proceedings/2011-3/ (stating that "RIAA participated in all previous proceedings to adjust royalty rates under Section 115 [and] has a significant interest in the royalty rates and terms that are the subject of this proceeding"); *Discussion Draft of the Section 115 Reform Act (SIRA) of 2006: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong., 2d Sess. (2006) (statement of Cary H. Sherman, President, Recording Industry Association of America, Inc.) (arguing that proposed expansions of the 115 compulsory mechanical license to new forms of digital delivery were not broad enough, and advocating further expansion by "extend[ing] the blanket license to ALL products and services covered by the mechanical compulsory license…" (emphasis in original)); *Comm. on the Judiciary, Copyright Law Revision*, H.R. Rep. No. 83, at 66 (1st Sess. 1967) ("[T]he record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate anti-monopoly condition on the grant of these rights. They argue that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice.").

given other domestic and international priorities.[39] Consequently, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups who "jockey for position" in their lobbying efforts to effectuate specific and narrow changes at any given time based on historical legal distinctions and rights recognized under U.S. copyright law.

However, the various issues and problems with the current music licensing framework have created a "perfect storm" that has led to systemic failure in the music licensing marketplace. The only way to fix this broken system and to address these issues, problems and inefficiencies is to view the music marketplace in a holistic way. Such a holistic approach should cut across the lines of traditionally recognized rights under U.S. copyright laws, and across the interests of particular groups that developed licensing practices in the pre-digital era.

Further, any solution must take into account the public interest in creating a licensing environment that allows digital music service providers to operate long-term, sustainable businesses that can delight consumers for generations to come. We could not agree more with the sentiments of the Register of Copyrights who, quoting former Register of Copyrights Thorvald Solberg, stated that "there comes a time when 'the subject matter ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.'"[40]

B. <u>The "Six Pillars" of U.S. copyright law modernization for the digital environment</u>.

As the Copyright Office considers making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars discussed more fully in the Executive Summary section above:

- *Continued Government Oversight and Regulation of Music Licensing Activities*
- *Transparency and a Centralized Database*
- *Licensing Efficiencies and Reduced Transaction Costs*
- *Clarification of Rights*
- *Reduction of Legal Risks Around Licensing Activities*
- *"Level Playing Field"*

[39] Maria A. Pallante, *The Next Great Copyright Act*, 36(3) Colum. J.L. & Arts 315, 319 (2013).
[40] *Id.* (quoting Thorvald Solberg, *Copyright Law Reform*, 35 Yale L.J. 48, 62 (1926)).

II. RESPONSES TO THE SPECIFIC QUESTIONS POSED BY THIS NOTICE OF INQUIRY

MUSICAL WORKS

1. Please assess the current need for and effectiveness of the Section 115 statutory license for the reproduction and distribution of musical works.

A. <u>The Section 115 statutory license for the reproduction and distribution of musical works is vital</u>.

First, the Section 115 statutory license provides an *essential counter-balance to the unique market power of copyright rights owners*. It does this by providing a mechanism for immediate license coverage, thereby negating the rights owner's prerogative to withhold the grant of a license. Importantly, this immediate license coverage is not dependent on the status of rate negotiations and/or ratesetting proceedings. Without the ability to obtain this immediate obligatory coverage, some of the innovative digital music services in the marketplace today may not have been able to attain a significant enough number of musical work licenses to be considered attractive by consumers, while others would have been unable to launch at all, and thus would have been kept out of the marketplace entirely.

Second, the Section 115 statutory license provides a *useful benchmark for direct deals*. The royalty rates established by Section 115 ratesetting proceedings are often used as benchmarks for direct licenses of musical work rights, especially in cases where particular consumer offerings do not squarely fit into one of the statutory license categories available under Section 115 or its rate structure.

Third, the Section 115 statutory license provides a *framework for negotiating statutory rates by industry consensus*. By providing antitrust immunity for collective licensing discussions to settle ratesetting proceedings under Section 115, this essential framework enables stakeholders to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models. This process was used successfully in 2008 and 2012, when rates and terms for a wide variety of physical and digital product types were negotiated by the relevant stakeholders, and implemented into the Code of Federal Regulations.[41]

Fourth, the Section 115 statutory license provides *necessary procedures for self-auditing and certification*. The self-auditing requirements provide rights owners with appropriate financial assurances regarding accountings.[42] At the same time, these requirements provide digital music services with appropriate protections against the possibility of direct audits by potentially tens of thousands of individual rights owners, which would be virtually impossible to administer and settle, and would significantly interfere with the day-to-day operations of digital music services.

Finally, the Section 115 statutory license provides *necessary procedures for notice and cure based on inaccurate accountings*. The Section 115 statutory license provides rights owners with appropriate opportunities to question accountings and provides digital music services with appropriate

[41] *See* Adjustment of Determination of Compulsory License Rates for Mechanical and Digital Phonorecords, 78 Fed. Reg. 67938 (Nov. 13, 2013) (final rule) (codified at 37 C.F.R. § 385) ("setting the rates and terms for the section 115 statutory license for the use of musical works in physical phonorecord deliveries, permanent digital downloads, ringtones, interactive streaming, limited downloads, limited offerings, mixed service bundles, music bundles, paid locker services, and purchased content locker services"); Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4510 (Jan. 26, 2009) (final rule) (codified at 37 C.F.R. § 385) (same).
[42] *See* 17 U.S.C. § 115(c)(5) (2012).

opportunities to rectify, clarify and/or address the concerns of rights owners without jeopardizing license coverage. This mechanism for assuring *continuous license coverage* during periods of discussion (or dispute) provides another counter-balance to the unique market power of copyright owners that is as essential as the *initial* immediate license coverage provided by the Section 115 statutory license upon service of an NOI.

B. A number of significant problems with the Section 115 statutory licensing process limit the effectiveness of the Section 115 statutory license.

Although the continued existence of the Section 115 statutory license for the reproduction and distribution of musical works *is vital*, there are a number of *significant problems* with the licensing *process* that currently *limit its effectiveness*:

- Song-by-song licensing is inefficient and expensive. The current process of song-by-song licensing has not worked well under the historical business model for a variety of reasons,[43] and is particularly ill-suited for the digital environment. While the Section 115 statutory license provides an important tool for securing licensing ubiquity, the process of securing that ubiquity is highly inefficient and costly because millions of works must be licensed individually from the tens of thousands of different rights owners who own and control the required rights. Moreover, to the extent that a service chooses to file statutory license notices with the Copyright Office for the many musical works for which the relevant rights owners cannot be identified, the costs can be overwhelming given the volume of works at issue.[44]

- The licensing process under Section 115 lacks necessary transparency. The lack of a publicly available, centralized database for musical works limits the effectiveness of the licensing process in several significant respects:
    - First, it requires each of the dozens of digital music services to dedicate separate internal systems and personnel to developing rights owner information on a song-by-song basis, or to engage third-party service providers such as The Harry Fox Agency ("HFA") or Music Reports, Inc. to do so on its behalf. In either case, the undertaking is incredibly costly, and because the same information is developed by multiple parties (including the record labels) in parallel, there is much duplication of effort.
    - Second, in cases where statutory licenses under Section 115 are supplemented with direct licenses with music publishers, it is difficult to determine what is (and is not) covered by any given direct license, since this information is seldom provided by the music publishers to their own licensees. Accordingly, it is almost impossible to ascribe an

[43] For example, Section 115 requires services to clear the underlying publishing rights for newly released sound recordings before distributing them, but such a task is nearly impossible in many cases, where there are co-writers of a musical work and those co-writers do not determine their individual relative percentages of ownership (if any) until *after* the phonorecords which embody them are commercially released. This is a challenge that the major labels themselves have faced under Section 115 when securing mechanical licenses for physical products under the historical business model.

[44] The filing fee for "[r]ecordation of a notice of intention to make and distribute phonorecords" under 17 U.S.C. § 115 is $75 for the first title and $20 for each additional title for each group of ten titles. Circular SL 4L, *Copyright Office Licensing Division Service Fees*, *available at* http://www.copyright.gov/fls/sl041.pdf (last visited May 14, 2014). Thus, the Copyright Office filing fee amounts to $255 for every ten musical works with unknown authors. For example, ten thousand (10,000) unknown authors would cost a service more than two-hundred fifty thousand dollars ($250,000) in filing fees alone to protect the service from potential statutory damages for infringement of the reproduction and distribution rights in musical works whose authors are nowhere to be found.

appropriate value to a direct license agreement, and to determine which musical works must be separately licensed through statutory licenses under the licensing process in Section 115.

- Third, despite the best intentions of a digital music service provider to identify accurately every musical work rights owner for every musical work, there are inevitably musical works whose owner(s) cannot be identified at all, or that are misidentified as a result of inaccurate information contained in the incomplete privately available databases relied upon today by digital music services.
- Fourth, the statutory licenses under Section 115 are only available if the copyright owner has already made or authorized a recording of the composition that has been distributed to the public in the U.S.[45] It is quite challenging to ascertain whether this first use has, in fact, occurred, as most of the privately available databases relied upon by digital music services (including the musical work information independently developed by the record labels themselves) lack this critical information. This problem is especially acute in circumstances where co-writers of musical works disagree about the relative percentages of their individual contributions to the work as a whole, and do not resolve these intra-songwriter and intra-publisher disputes over "splits" until long after the initial commercial release.

The risk of any resulting "rights gaps" exposes digital music service providers to the possibility of statutory damages, even in instances where the digital music service provider has acted diligently and in good faith based on the best information available to them, with limited (if any) control over how to mitigate this legal risk. This significantly limits the effectiveness of the licensing process, and exposes digital music services to levels of risk that are not equitable under the circumstances.

- The risk of statutory damages for "timing" issues inherent in the Section 115 licensing process. Given the difficulties noted above in determining whether a first use has occurred, the specter of statutory damages for failing to timely send NOIs under the Section 115 licensing process exposes digital music service providers to levels of risk that are not equitable under the circumstances.
- The lack of financial certainty caused by "timing" issues inherent in the Section 115 licensing process. For digital music services that rely on licenses under Section 115 as well as separate licenses for the public performance of musical works, it is often impossible to determine the appropriate deduction for musical work public performance royalties at the time that accountings under the Section 115 licenses are due. This is because the calculation of "mechanical" royalty rates under Section 115 requires that public performance royalties be deducted; and public performance rates are often not determined – whether by "interim agreement," "final agreement" or ratesetting proceeding – until long after the close of the month during which Section 115 royalties are due. As a result, digital music service providers must often make assumptions about how much to accrue, and then hold the accrued amounts for substantial periods of time (which is not beneficial for music publishers or songwriters who desire to get paid more quickly). Further, once the actual rates become known, digital music services must recalculate their royalties, restate their earnings for prior periods (which investors do not like), and send restated Section 115 royalty statements (which is costly and administratively burdensome).

[45] 17 U.S.C. § 115(a)(1). Section 115(b)(1) provides in relevant part as follows: "Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of intention to do so on the copyright owner."

- Monthly accountings. In direct license agreements for rights otherwise covered by the Section 115 statutory licenses, it is customary for digital music services to pay rights owners on a *quarterly basis*. Similarly, in recording agreements with recording artists it is customary for record labels to pay mechanical royalties to artists who are also songwriters on a quarterly basis, even in circumstances where the record royalties payable for the uses and exploitations of the sound recordings that embody these musical works are paid on a less frequent basis.[46] However, royalties under the Section 115 statutory licenses are required on a *monthly basis*. Because of the vast number of rights owners and musical works licensed under the Section 115 statutory licenses, each set of accountings requires administrative resources and out-of-pocket costs. The more frequently accountings are required, the less efficient and more burdensome it is for the digital music services that pay these royalties.

- "Hard-coded minima." The royalty rate structures for some (but not all) rate categories under the Section 115 statutory licenses set minima that reflect reproduction and distribution rights only,[47] rather than an "all-in" minimum that also includes the cost of royalties for public performance rights.[48] If musical work public performance rights are not available at "reasonable rates" through the processes and protections under the ASCAP and BMI antitrust consent decrees for any reason,[49] the "hard-coded minima" in Section 115 could cause the "all-in" rates to be exceeded, which was never intended by the stakeholders that negotiated the voluntary settlement of the rates and terms under the Section 115 statutory licenses in 2008 and 2012. Such a phenomenon would undermine the Section 115 ratesetting process as a whole.

2. Please assess the effectiveness of the royalty ratesetting process and standards under Section 115.

A. The royalty ratesetting process under Section 115 has generally been effective.

As noted in our response to Question 1, the royalty ratesetting process under Section 115 provides an essential *framework* for negotiating statutory rates by industry consensus, which is only possible because of the antitrust immunity for collective licensing discussions to settle rate setting proceedings under Section 115. Through this framework, stakeholders are able to negotiate rates and terms for a variety of digital music service types, consumer offerings and business models and bring them to market for the benefit of consumers.

B. The royalty ratesetting process under Section 115 could be made more effective.

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[46] *See, e.g.*, Matthew Bender, 8-159 Entertainment Industry Contracts FORM 159-1 (Exclusive Recording Artist Agreement [Long Form] with Commentary), at ¶¶ 8.01, 11.01(d) (2014).

[47] The royalty minima for the following rate categories covers the reproduction and distribution rights only, and do not cover public performance rights: "standalone non-portable subscription—streaming only," "standalone non-portable subscription—mixed," "standalone portable subscription service," and "bundled subscription services." *See* 37 C.F.R. § 385.13 (2013).

[48] The royalty minima for the following rate categories are truly "all-in," meaning that the PRO fees for the public performance rights are included in (and can be deducted from) the minimum amount owed for the mechanical rights: "free nonsubscription/ad-supported services," "mixed service bundle," "music bundle," "limited offering," "paid locker service," and "purchased content locker service." *See* 37 C.F.R. §§ 385.13, 385.23.

[49] For example, in the event that music publishers withdraw entirely from ASCAP and BMI, or, alternatively, just for certain digital uses in the event that the antitrust consent decrees were to be modified by the Department of Justice to allow for partial withdrawals.

Although the royalty ratesetting process under Section 115 has generally been effective, the fast-moving digital landscape sometimes outpaces the five year cycle for ratesetting proceedings under Section 115. The royalty ratesetting process under Section 115 would be *more effective* if it provided a mechanism for *interim ratesetting proceedings* on an as-needed basis for *new* service types, consumer offerings and business models that develop in between the regular ratesetting proceedings. As the music business continues its evolution from the historical business model to the digital environment, it is essential that digital music services meet consumer expectations, and a process under Section 115 that recognizes the pace of change could be incredibly valuable.

C. <u>The royalty ratesetting standards under Section 115 have generally been effective</u>.

Since 1976, royalty ratesetting proceedings under Section 115 have been governed by the standard set forth in Section 801(b),[50] which provides in relevant part as follows:

> (1) To make determinations and adjustments of reasonable terms and rates of royalty payments as provided in sections 112(e), 114, 115, 116, 118, 119, and 1004. The rates applicable under sections 114(f)(1)(B), 115, and 116 shall be calculated 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.[51]

The Section 801(b) standard for ratesetting proceedings under Section 115 was adopted as part of the copyright revisions implemented in 1976.[52] As previously noted, in their capacity as the *licensees* of musical work rights under the historical business model, the record labels have long argued that this standard correctly balances the relevant factors required to yield a fair and equitable royalty for the exercise of musical work reproduction and distribution rights under the Section 115 statutory licenses. The Section 801(b) standard has been time-tested to provide fair rates (i.e., "reasonable fees") that have been accepted for more than half a century in many different contexts, including ratesetting proceedings under Sections 114(f)(1)(B), 115, and 116.

3. Would the music marketplace benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities,

[50] *See* H.R. Rep. No. 94-1476, at 111 (1976) ("This [Section 115] rate will be subject to review by the [CRT], as provided in section 801, in 1980 and at 10-year intervals thereafter.").
[51] 17 U.S.C. § 801(b) (2012).
[52] *See* H.R. Rep. No. 94-1476, at 173-74.

rather than on a song-by-song basis? If so, what would be the key elements of any such system?

A. The music marketplace would benefit if the Section 115 license were updated to permit licensing of musical works on a blanket basis by one or more collective licensing entities, rather than on a song-by-song basis.

As previously noted in our response to Question 1, the current process for acquiring licenses under Section 115 on a song-by-song basis has many significant drawbacks including inefficiencies, expenses, lack of transparency, inequitable exposure to legal risk, lack of financial certainty and the possibility that all-in rates may not, in fact, be all inclusive. As discussed more fully in the next section, the music marketplace would greatly benefit from blanket licenses under Section 115.

B. The Section 115 statutory license could be made more effective.

The effectiveness of the Section 115 statutory license would be *significantly enhanced* by implementing a licensing regime that incorporated the following *key elements*:[53]

- Blanket licenses. For the reasons noted elsewhere, the music marketplace would benefit greatly from replacing the current process of licensing music on a song-by-song basis with a blanket license system (without the ability of rights owners to "opt-out"). Under this system, one license application would be served under a collective administration mechanism covering all musical works. For such a system to be effective, copyright users must nonetheless continue to have (i) payment options designed to ensure that they only pay for the rights they need (and the actual level of use and consumption), as per the current framework of Section 115, (ii) the ability to enter into direct licenses with rights owners in addition to (or in lieu of) these blanket licenses, and (iii) the ability to appropriately offset amounts paid under direct licenses from the minima prescribed by the blanket licenses.[54]

- Transparency and a centralized database. The problems and issues noted in Section II.1.B. above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.

- Collective administration. A mechanism should be established that enables the collective administration of musical work rights, in a manner similar (but not necessary identical) to the mechanism proposed in the context of the Section 115 Reform Act of 2006 ("SIRA").[55] Collective administration of musical work copyrights has worked in the context of public

[53] Several of these key elements were incorporated in the proposed Section 115 Reform Act of 2006 ("SIRA"), which was fully negotiated by interested stakeholders in 2006 but failed to be enacted into the copyright law for unrelated reasons.

[54] At a minimum, if song-by-song licensing is still required, there should be a system that facilitates an automated, electronic process for serving NOIs (in lieu of the current requirement under the implementing regulations that these NOIs be served in paper formats, which is inefficient, costly and more difficult to track and administer). *See* 37 C.F.R. § 201.18 (2013). Alternatively, if a SIRA-like structure for blanket licenses and collective administration is not implemented, there should be a safe harbor that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the centralized database, to avoid inequitable outcomes.

[55] For clarity, we are not suggesting an implementation of SIRA exactly as was proposed in 2006. However, we believe that there are many elements and components from SIRA that would serve the music licensing marketplace well today.

performance rights in musical works (ASCAP, BMI and SESAC), and reproduction/public performance rights in sound recordings (SoundExchange, Inc.), but no similar mechanism exists for reproduction and distribution rights for Section 115 licenses. Difficult logistical issues – particularly the many reporting, payment and other operational issues – should be left to implementing regulations, and not addressed in Section 115 directly. However, it is critical that any collective administration mechanism be in addition to, and not in lieu of, the recommended centralized database for musical works, as digital music services should, at all times, retain the right to pay the required royalties directly to the applicable rights owners instead of through one or more common agents.

- Legal certainty. The copyright laws should be clarified to provide that the blanket license covers all intermediate copies (e.g., server, cache and buffer copies) necessary to facilitate the digital delivery of music, and intermediate copies for non-interactive streaming should be royalty free, or exempt (to avoid "double dipping" by rights owners based on claims arising out of overlapping copyright rights).

4. **For uses under the Section 115 statutory license that also require a public performance license, could the licensing process be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner? How might such a unified process be effectuated?**

A. For uses under the Section 115 statutory license that also require a public performance license, the licensing process would be facilitated by enabling the licensing of performance rights along with reproduction and distribution rights in a unified manner.

As previously noted, the fragmentation of rights ownership and the convergence of rights increase the number of transactions that must be undertaken for the license of musical works, and each additional transaction diminishes licensing efficiencies, and increases transaction costs for both licensors and licensees.

B. How a unified process for the licensing of performance rights along with reproduction and distribution rights might be effectuated.

A process for licensing performance rights along with reproduction and distribution rights in a unified manner could be effectuated by a system that incorporated the following key elements:

- Collective administration. A mechanism should be put in place that enables the collective administration of an "all-in," combined mechanical and performance royalty. The rights owners would be responsible for allocating the aggregate "all-in" royalty among themselves (i.e., between the "mechanical" and public performance interests) based on factors that they deem to be reasonable and appropriate under the circumstances. By allowing the rights owners to make this allocation as between themselves, the digital music service providers would be taken out of the rights owner "tug-of-war" over royalty payments.

- Process for determining reasonable rates. In an ideal world, services that require a combination of musical work public performance rights, as well as reproduction and distribution rights under Section 115, would be able to acquire such rights from a single licensing source under a single statutory license and pay a single royalty to a common agent, similar to the way that SoundExchange administers the Section 112 (reproduction) and 114 (public performance) statutory licenses. However, DiMA recognizes that such a structure would require a fundamental

alteration of the existing framework for musical work licensing. To the extent that the existing framework is retained, the collective licensing agent(s) DiMA is proposing for the collection of royalties under Section 115 would be authorized to collect the "all-in" royalty payable under Section 115, and then apportion an appropriate percentage of that royalty to the PROs, thereby removing the digital music service providers from the middle of the rights owner "tug-of-war" over publishing royalty payments.[56] Digital music services that require only public performance licenses would continue to operate under the current licensing framework that governs the PROs.

- No ability to opt-out. As a further counter-balance to the already significant market power of rights owners, to ensure the essential protections of the ASCAP and BMI antitrust consent decrees it is essential that rights owners not have the ability to "opt-out" of this licensing process.

- Transparency and a centralized database. For the reasons noted elsewhere, the licensing process would be greatly facilitated by the recommended centralized database for musical works, including information about the sound recordings in which such musical works are embodied.

C. A unified licensing process for licensing otherwise fragmented rights is not new.

The use of a collective administration mechanism to manage rights that are fragmented across different rights owners under U.S. copyright laws is not new, and has already been in place for some time with respect to the collection and administration of royalties under the Section 112 and 114 statutory licenses for sound recordings. In this context, SoundExchange, Inc. ("SoundExchange"), as the collective administration mechanism for statutory royalties under the Section 112 and 114 statutory licenses, collects a single "all-in" royalty that covers both the Section 112 and Section 114 rights. The recipients of these royalties, which include the sound recording rights owners, featured recording artists, and the relevant talent unions, determined among themselves the value of the Section 112 reproduction rights relative to the value of the Section 114 public performance rights, and the digital music services that pay these royalties were not placed in the middle of this determination.

5. Please assess the effectiveness of the current process for licensing the public performances of musical works.

A. The current process for licensing the public performances of musical works has generally been effective.

As previously noted, the blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike. With regard to songwriters in particular, the process offers greater transparency in the context of performance royalty payments, as the general custom and practice in the music publishing industry is that songwriters, even if subject to arrangements with music publishers for the administration of musical work copyrights and related royalties, receive the "songwriter's share" of public performance royalties directly from ASCAP, BMI and SESAC, respectively.

The processes and protections assured by these consent decrees serve several important roles that are critical to an efficient, properly functioning marketplace for these rights:

[56] Difficult issues regarding how the licensing process would work under this structure need to be worked out, and should probably be addressed through the implementing regulations under Section 115.

- Immediate, blanket licensing. The process allows for immediate license coverage of a vast body of musical works on a "blanket" basis upon the service of a consent decree license request (and is not dependent on the status of rate negotiations and/or ratesetting proceedings). This is an essential counter-balance to the unique market power of rights owners, as it negates the prerogative of a rights owner of an exclusive right from withholding the license and enables digital music services to bring new offerings to market quickly and efficiently for the benefit of consumers.

- Non-discrimination on royalty rates. The "rate parity" concept in each of the antitrust consent decrees requires each of ASCAP and BMI to license all similarly-situated services on comparable terms. This provides another essential counter-balance to the unique market power of rights owners, and ensures that the rates set under the antitrust consent decrees are fair on a relative basis compared to comparable service types, which is essential to the "level playing field" required for services to compete with one another fairly in the marketplace.

- Reasonable rates. As a further counter-balance to the unique market power of rights owners, the process provides a mechanism that allows copyright users to resort to the federal courts with jurisdiction over ASCAP and BMI ratesetting proceedings to set "reasonable fees." This ensures that rights owners cannot use their combined market power to extract unreasonable royalty rates. The interpretation and implementation of the ratesetting standard in ASCAP and BMI ratesetting proceedings have generally been effective because the federal courts appropriately take into account several important factors when attempting to determine appropriate benchmark rates in the music licensing marketplace, such as whether the parties have equal access to information and whether both parties are compelled to act.[57] These critical factors, by contrast, are not recognized under the "willing buyer, willing seller" standard used in some ratesetting proceedings under the Section 112 and 114 statutory licenses. As discussed at greater length in our response to Question 8 below, this difference in interpretation and implementation yields vastly different economic results for copyright users.

B. Withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current process for licensing the public performances of musical works.

As noted in Section I.3.C., recent decisions by the federal courts in rate setting proceedings under the ASCAP and BMI consent decrees have clarified that as a matter of antitrust law, music publishers cannot withdraw their musical catalogs from the ASCAP and BMI repertory for only certain limited digital uses. However, both of these decisions left open the possibility that music publishers could withdraw their respective catalogs from ASCAP's or BMI's repertory for *all purposes*. Alternatively, it is

[57] These critical factors were noted by Judge Cote in an ASCAP ratesetting decision handed down in March 2014, which cited a textbook definition of "fair market value": "A widely used description of fair market value is the cash equivalent value at which a willing and unrelated buyer would agree to buy and a willing and unrelated seller would agree to sell . . . *when neither party is compelled to act, and when both parties have reasonable knowledge of the relevant available information*. . . . Neither party being compelled to act suggests a time-frame context – that is, the time frame for the parties to identify and negotiate with each other is such that, whatever it happens to be, it does not affect the price at which a transaction would take place. . . . The definition also indicates the importance of the availability of information – that is, the value is based on an information set that is assumed to contain all relevant and available information." *Pandora II*, 2014 WL 1088101, at *32 (emphasis added) (quoting Robert W. Holthausen & Mark E. Zmijewski, *Corporate Valuation* 4–5 (2014)).

rumored that the music publishers and the PROs are seeking modifications to the consent decrees to allow for partial withdrawals, which would give them the ability to withdraw their musical catalogs from the ASCAP and BMI repertories for only certain limited digital uses. If either complete or partial withdrawals were to occur, the processes and protections assured by the antitrust consent decrees – in particular, the assurance of "reasonable fees" for copyright users – would be undermined.[58] In this event, if digital music services and music publishers are unable to agree on licensing terms, certain musical works would not be available, and the commercial viability of the services that require these licenses would be threatened, as consumer expectations of licensing ubiquity could not be achieved. As previously noted, the music publishers sought to withdraw their catalogs for one simple reason – to further enhance their individual negotiating leverage to extract higher royalties (and other terms) from digital music services.

In fact, such withdrawals would be contrary to the very policies that underlie the statutory licenses under Sections 112, 114 and 115, which were designed to ensure that services subject to such licenses could efficiently attain licensing ubiquity, and lawfully operate without having to negotiate individually with tens of thousands of rights holders. When these statutory licenses were created, it was not contemplated that musical works might be removed from the digital licensing purview of ASCAP and BMI. In fact, such withdrawals would open up a "back door" for musical work rights owners to undermine the objectives of the Section 112, 114 and 115 statutory licenses, and the public interest in ensuring that "radio" in all of its forms would not be kept out of the marketplace entirely because of music licensing issues, as noted Section I.3.B(b) above.

Finally, because of the interdependence of interests among sound recording and musical work rights owners, the result of a decision made by any one rights owner *not* to grant a requested license to a digital music service has *collateral consequences* for the other rights owners that have made a decision to *grant* a requested license. Empowering a "hold out" to effectively make a decision (with economic consequences) for other third parties, such as other record labels, music publishers, songwriters, featured recording artists, non-featured recording artists and non-featured vocal performers, turns the principal of recognizing exclusive rights under copyright on its head, and should be avoided.

C. The current process for licensing the public performances of musical works could be made more effective.

The effectiveness of the current process for licensing the public performances of musical works would be *significantly enhanced* by implementing a licensing regime that incorporated the following key elements:

- Transparency and a centralized database. The problems and issues noted in Section II.1.B, above, could be greatly mitigated by the recommended centralized database of musical works and sound recordings.[59] As Judge Cote determined in an ASCAP ratesetting decision handed down in March 2014, the music publishers acted in concert with ASCAP to modify ASCAP's internal rule set (known as the ASCAP Compendium) to allow music publishers to withdraw their catalogs from ASCAP's repertory for certain digital uses, for the sole and limited purpose of "closing the

[58] Partial withdrawals would also undermine the principle of platform parity in the consent decrees, which holds that similarly situated services must be treated the same by ASCAP and BMI. *See Am. Soc'y of Composers, Authors, and Publishers v. MobiTV, Inc.*, 681 F.3d 76 (2d. Cir. 2012) ("*MobiTV*"); *Pandora III*, 2013 WL 6697788, at *5 ("BMI cannot combine with [the publishers] by holding in its repertory compositions that come with an invitation to a boycott attached.").

[59] *See Meredith Corp. v. SESAC LLC*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014) ("*Meredith Corp.*"); *Radio Music License Committee, Inc. v. SESAC Inc.*, No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013) ("*RMLC*").

gap between the composition rates and the sound recording rates" through direct licenses outside the framework and protections of the ASCAP antitrust consent decree, which they believed "stood in the way."[60] Judge Cote also found that the lack of transparency regarding rights ownership was used as negotiating leverage, because the withholding of a list of the works in question, which was "readily at hand," denied Pandora the ability to (i) remove the ASCAP repertory controlled by those music publishers from the service if the parties could not reach agreement on economic terms, (ii) apportion any payments between the catalogs of two different music publishers, and (iii) evaluate whether a substantial advance payment paid by Pandora was likely to be recouped.[61] As a result, without this critical information, a digital music service provider is unable to assess its potential legal exposure for the use of unlicensed works (and mitigate any potential exposure by refraining from using those musical works, or taking them down, as the case may be), and determine the value of the blanket licenses and direct licenses offered by rights owners for the public performance of musical works.

- Immunity from statutory damages. To avoid inequitable outcomes, there should be a "safe harbor" that shields copyright users from infringement liability if they have acted diligently and in good faith based on the information contained in the recommended centralized database. Further, any entitlement to statutory damages in other contexts should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing universal standards.

- No ability to opt out. For the public policy reasons noted above, as a further counter-balance to the already significant market power of rights owners, it is essential that music publishers not have the ability to opt out of the blanket licenses.[62]

6. Please assess the effectiveness of the royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI, as well as the impact, if any, of 17 U.S.C. § 114(i), which provides that "[l]icense fees payable for the public performance of sound recordings under Section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works."

A. The royalty ratesetting process and standards applicable under the consent decrees governing ASCAP and BMI have generally been effective.

[60] *Pandora II*, 2014 WL 1088101, at *13-*14.

[61] *Id.* At *24 ("Sony understood that it would lose an advantage in its negotiations with Pandora if it provided the list of works and deliberately chose not to do so.").

[62] By opting out, the ability of a rights owner to extract an unreasonable royalty from a digital music service is greatly enhanced, as Judges Cote and Stanton recognized in the recent ASCAP and BMI rate setting proceedings with Pandora Media. These unreasonable royalty rates, in turn, would then be bootstrapped by rights owners as the new market rate to be used in future ratesetting proceedings. As such, very few music publishers (and perhaps as few as one) could effectively control the overall market rate for musical works, and the resulting bootstrapped rate would then have collateral consequences for other publishers and the performing rights organizations, to the detriment of all similarly-situated digital music services and, ultimately, the consumers of digital music services. Further, opt outs create other unintended consequences, such as the possibility that unreasonable rates extracted for the public performance of musical works would cause the all-in rates in 37 C.F.R. § 385 "Subpart B" – which were intended to be inclusive of the aggregate royalties paid for both musical work public performance rights, as well as reproduction and distribution rights – to be exceeded, which was never intended by the stakeholders that negotiated the industry-wide settlements for rates and terms under the Section 115 statutory licenses in 2008 and 2012, respectively.

As noted in our response to Question 5, the royalty ratesetting *processes* under the ASCAP and BMI consent decrees are critical to an efficient, properly functioning marketplace for the public performance of musical works. In addition to the reasons noted above, the oversight of the federal courts to set "reasonable fees" in ratesetting proceedings has been essential. The proceedings are in front of seasoned, tenured, federal judges who are regularly assigned these cases and are able to apply the terms of the consent decrees in a consistent manner. The trials are thorough and the resulting decisions tend to be thoughtful and well-reasoned. Furthermore, the proceedings themselves are conducted utilizing the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which enable litigants to fairly and predictably obtain discovery, present evidence and rely on precedents.

The royalty ratesetting *standards* under the ASCAP and BMI consent decrees similarly provide an essential counter-balance to the unique market power of rights owners, and are equally critical. Under the consent decrees, the federal courts are required to set "reasonable fees" in ratesetting proceedings.[63] In practice, this ratesetting standard has been time-tested in numerous rate setting proceedings for more than half a century to determine rates that have been entirely consistent with this standard, and has consistently established royalty rates that appropriately approximate the "fair market value" of particular licenses in different contexts.[64]

For the reasons already noted in the context of Question 5 and elsewhere in this Notice of Inquiry response, full (or even partial) withdrawals of musical works from the repertories of ASCAP and BMI threaten to undermine the effectiveness of the current royalty ratesetting process and standards applicable under the consent decrees.

B. <u>The impact of 17 U.S.C. § 114(i)</u>.

With respect to the impact, if any, of 17 U.S.C. § 114(i), on the effectiveness of the royalty ratesetting process and standards applicable under the ASCAP and BMI consent decrees, it is worth mentioning that this provision is a good example of the type of legislation that results when special interest groups "jockey for position" in their lobbying efforts to seek specific and narrow changes to U.S. copyright law. The result is piecemeal modifications that benefit only those special interest groups, at the expense of other stakeholders and the public interest.

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[63] *See United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 41-cv-1395, 2001 WL 1589999, at *6-7 (S.D.N.Y. June 11, 2001) ("ASCAP Consent Decree") ("[T]he burden of proof shall be on ASCAP to establish the reasonableness of the fee it seeks … Should ASCAP not establish that the fee it requested is reasonable, then the Court shall determine a reasonable fee based upon all the evidence."); *United States v. Broadcast Music, Inc.*, No. 64-cv-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994) ("BMI Consent Decree") ("If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when [BMI] advises the [service] of the fee which it deems reasonable, the [service] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee … If the parties are unable to agree upon a reasonable fee within ninety (90) days from the date when [BMI] advises the [service] of the fee which it deems reasonable and no such filing by applicant for the determination of a reasonable fee for the license requested is pending, then [BMI] may forthwith apply to [the Southern District of New York] for the determination of a reasonable fee.").

[64] *MobiTV*, 681 F.3d at 82 ("When setting an appropriate rate, the District Court must attempt to approximate the "fair market value" of a license—what a license applicant would pay in an arm's length transaction. … In so doing, the rate-setting court must take into account the fact that ASCAP, as a monopolist, exercises market-distorting power in negotiations for the use of its music.") (citing *United States v. BMI (Application of Music Choice)*, 316 F.3d 189, 194 (2d Cir. 2003)); *Pandora II*, 2014 WL 1088101, at *31 (noting that Section IX of the ASCAP Consent Decree "requires the rate court to set a 'reasonable' fee for a requested license, but that [the] term is not defined in [the ASCAP Consent Decree]" and citing *MobiTV* as "[g]overning precedent" dictating that courts must approximate the fair market value in determining such a "reasonable fee").

This provision was implemented into U.S. copyright law in 1995 based on lobbying efforts by the music publishers and the PROs,[65] who were concerned that the rate for musical work public performance rights might be *reduced* if the rates for the newly created sound recording public performance rights were taken into account in musical work public performance ratesetting proceedings.[66] Remarkably, with the benefit of hindsight, the music publishers and performing rights organizations have now observed that the royalties established by the Copyright Royalty Board for the statutory licenses under Sections 112 and 114 are in certain cases incredibly high (and, as noted below, so high in some cases that they are unsustainable). Not surprisingly, music publishers are now seeking to use those rates as relevant benchmarks to *increase* the rates for musical work public performance rights. *In theory*, taking a holistic view of the total royalty expense that a digital music service provider should pay would be a positive development for the licensee, because the pool of revenue that any digital music service can make available to all rights owners as "fair compensation" (and still turn a profit) is fixed. However, the repeal of Section 114(i) would only further enhance the ability of musical work rights owners to exploit the fractured nature of rights ownership to their own advantage. Under this construct (i.e., using the sound recording public performance royalty rates as a *benchmark* for musical work public performance royalty rates), the royalty rate for musical work public performance rights would be *increased* without regard to the overall, aggregate royalty expense of the digital music service provider, since the federal courts that oversee PRO ratesetting proceedings do not have the jurisdiction to commensurately *reduce* the royalty payable for the corresponding sound recording rights.

Accordingly, *in practice*, the repeal of Section 114(i) would not result in a holistic determination of the total royalty expense that a digital music service provider should pay. Instead, it is, in a sense, a microcosm of how the current legal framework based on piecemeal changes to U.S. copyright law can serve as a vehicle for one group to take advantage of the fragmented nature of rights ownership to promote its own interests at the expense of the interests of others and, more importantly, of the whole digital music ecosystem.

7. Are the consent decrees serving their intended purpose? Are the concerns that motivated the entry of these decrees still present given modern market conditions and legal developments? Are there alternatives that might be adopted?

A. <u>The consent decrees are serving their intended purpose</u>.

As already noted in our responses to Questions 5 and 6, the ASCAP and BMI consent decrees provide an essential counter-balance to the unique market power of rights owners and are critical to an efficient, properly functioning marketplace for the public performance of musical works.[67]

B. <u>The need for the consent decrees is greater now than ever</u>.

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[65] *See Pandora II*, 2014 WL 1088101, at *12 n.30 ("Publishers lobbied for this provision in Congress because they were concerned that the sound recording rates would be set below the public performance rates for compositions and drag down the latter. ASCAP also supported the enactment of the provision, for the same reason.").

[66] *See* Nimmer, *supra* note 4, § 8.22[A][3][a] ("'[The] drafters [of the Digital Performance Right in Sound Recordings Act of 1995 (DPRA)] also wished to 'dispel the fear that license fees for sound recording performance may adversely affect music performance royalties.'") (quoting H.R. Rep. No. 104–274, 104th Cong., 1st Sess. 24 (1995)).

[67] If the threat of publishers withdrawing entirely from the PROs were to become a reality, it would upset the delicate balance of the licensing ecosystem, making it necessary to revisit the question of whether the consent decrees are serving their intended purpose.

The concerns that motivated the entry of these consent decrees are still present given modern market conditions and legal developments. In fact, as previously noted in the context of our responses to Questions 5 and 6, the unprecedented concentration of rights in the hands of an increasingly smaller pool of major music publishers makes the processes and protections assured by these consent decrees more important now than ever before. While music publishers have always been free to withdraw their catalogs from ASCAP's or BMI's repertory for all purposes, a right which has been confirmed by the recent decisions in the ASCAP and BMI ratesetting proceedings involving Pandora Media,[68] the practical impossibility of licensing performances nationwide for all purposes, including thousands of radio stations, television stations, bars, restaurants and other public venues, has effectively prevented publishers from exercising its right to do so.[69]

However, if the antitrust consent decrees were to be modified by the Department of Justice to accommodate "limited" withdrawals (such as for certain digital uses, but not for all purposes), the key processes and protections assured by the antitrust consent decrees would be undermined, and the marketplace for musical work public performance rights would be significantly compromised.[70]

The continued need for the processes and protection assured by the consent decrees was well articulated in the March 2014 ASCAP ratesetting decision involving Pandora Media.[71] Specifically, Judge Cote found evidence of closely coordinated conduct by the major music publishers and ASCAP, which was designed to undermine the core processes and protections accorded by these consent decrees that are critical to an efficient, properly functioning marketplace:

- "The publishers believed that [the ASCAP Consent Decree] stood in the way of their closing this gap. They believed that because the two PROs were required under their consent decrees to issue a license to any music user who requested one, they could not adequately leverage their market power to negotiate a significantly higher rate for a license to publically perform a composition."[72]

- "The press coverage focused on Sony's leverage in negotiations due to its outsize market power: 'Look a little closer, and this is ultimately a very lopsided negotiation .... Pandora absolutely needs Sony's catalog to run an effective radio service. And if they don't pay what Sony/ATV wants, they can't use it, by law.'"[73]

- "What is important is that ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."[74]

C. <u>The process for acquiring and administering musical work public performance rights under the consent decrees could be made more effective</u>.

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[68] *Pandora II*, 2014 WL 1088101; *Pandora III*, 2013 WL 6697788.
[69] *See* note 62, *supra*.
[70] If the antitrust consent decrees were to be modified in this way, the basic premise for allowing music publishers to withdraw should be revisited, with a view to creating a new statutory license for musical work public performance rights.
[71] The need for the protections of the antitrust consent decrees was also acknowledged by the Southern District of New York in *Meredith Corp.*, No. 09-cv-9177, 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014), and by the Eastern District of Pennsylvania in *RMLC*, No. 12-cv-5807 (E.D. Pa. Dec. 20, 2013).
[72] *Pandora II*, 2014 WL 1088101, at *14.
[73] *Id.*, at *25.
[74] *Id.*, at *35; *see also* note 59 *supra* for additional context regarding SESAC.

While the consent decrees have served their intended purpose and the need for them now is greater than ever before, for the reasons noted in our responses to Questions 1 and 5, the process for acquiring and administering musical work public performance rights would be *greatly enhanced* through the recommended centralized database.

SOUND RECORDINGS

8. Please assess the current need for and effectiveness of the Section 112 and Section 114 statutory licensing process.

A. <u>There is currently a need for the Section 112 and Section 114 statutory licensing process</u>.

In contrast to the inefficient and expensive work-by-work licensing process for musical work reproduction and distribution rights under Section 115 (which is discussed in our response to Question 1 above), the statutory licensing process under Sections 112 and 114 provides for a *blanket license* for uses of sound recordings which satisfy the eligibility criteria set forth in Sections 112 and 114. As noted in the context of musical work rights, blanket licenses promote efficiency and reduce transaction costs by making a vast body of sound recordings subject to license coverage immediately upon the service of a single notice.[75]

B. <u>There are a number of problems with the Section 112 and Section 114 statutory licensing process that limit its effectiveness</u>.

As noted in Section I.3.B, the statutory license for the performance of sound recordings by means of non-exempt digital audio transmissions under Section 114 (and the corresponding compulsory license for the making of ephemeral recordings used to facilitate non-exempt digital audio transmissions under Section 112) is particularly significant because it reflects a recognition by Congress that a compulsory license is necessary to avoid music licensing complexities that might otherwise deprive the public of the benefits of culturally important digital radio services.[76] However, as noted in our response to Question 2, and as we will discuss further in the context of our answer to Question 9, the intent of Congress has not been fully realized because the "willing buyer, willing seller" standard, which governs the royalty *ratesetting process and standards* applicable to these statutory licenses, has resulted in royalty rates that have been so high and unsustainable that (i) numerous services have exited the business since Congress first established the sound recording public performance right in 1995,[77] and (ii) Congress has had to step

[75] *See* 17 U.S.C. § 114(f)(4)(A) (2012) ("The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by entities performing sound recordings."); 17 U.S.C. § 114(f)(4)(B) ("Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording—(i) by complying with such notice requirements as the Copyright Royalty Judges shall prescribe by regulation and by paying royalty fees in accordance with this subsection…").

[76] Prior to implementation of the Digital Performance Right in Sound Recording Act of 1995, digital radio services would not have required sound recording licenses at all

[77] Both AOL and Yahoo! concluded that the resulting high royalty costs were unsustainable for their Internet radio services. In April 2008, AOL reduced its exposure to these fees by entering into an arrangement with CBS Radio to power its Internet radio service (AOL Radio). In February 2009, Yahoo! followed suit by entering into a similar arrangement with CBS Radio to power its Internet radio service (LAUNCHcast). Additional services that have exited the business since Congress established the sound recording public performance right in 1995 include, without limitation, East Village Radio, Turntable.fm, Loudcity, RadioParadise and 3Wk. *See also* Ben Sisario, *East*

in twice to mitigate the substantial economic hardships that the resulting rates imposed on digital music services.[78]

In addition to the applicability of the "willing buyer, willing seller" standard, there are a number of problems with the Section 112 and Section 114 statutory licensing process that *limit its effectiveness*, including the following:

- Expense of participating in ratesetting proceedings before the Copyright Royalty Board. Ratesetting proceedings to establish rates and terms under the Section 112 and Section 114 statutory licenses are long and complex, and the cost for any service to actively participate in this process is very high. This high cost poses a barrier to participation for many smaller digital music services, and, in some cases, larger digital music services as well.

- Evidentiary limitations. The evidentiary rules that govern ratesetting proceedings under the Section 112 and Section 114 statutory licenses prohibit the Copyright Royalty Judges from considering all relevant market data when setting royalty rates. Specifically, Section 114(f)(5)(C) expressly prohibits voluntary agreements between statutory licensees and the receiving agent for the Section 112 and 114 royalties, SoundExchange, from being considered as evidence in ratesetting proceedings, including the royalty rates, rate structure, definition, terms, conditions, or notice and recordkeeping requirements.[79] These voluntary agreements cover the rights actually being granted in the proceeding (non-interactive Internet radio services), unlike the agreements for interactive rights that Copyright Royalty Judges use as proxies to impute non-interactive rates.[80] Copyright Royalty Judges should not be required to consider rates for a *hypothetical marketplace* instead of rates for an *actual marketplace* in this way.

- No pro-ration or apportionment of annual minimum fees based on duration of operation during the applicable calendar year. The rates and terms for many of the service types operating under the Section 112 and Section 114 statutory licenses include an annual minimum fee that is due by

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Village Radio to Close, Citing Licensing Costs, N.Y. Times, May 14, 2014, *available at* http://artsbeat.blogs.nytimes.com/2014/05/14/east-village-radio-to-close-citing-licensing-costs.

[78] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 56 (2012) (statement of Joseph J. Kennedy, Chairman and Chief Executive Officer, Pandora Media, Inc.) ("Two major rate setting decisions and two congressional interventions to undo those decisions - clearly we are dealing with a broken system that needs to be fixed.").

[79] *See* 17 U.S.C. § 114(f)(5)(C). ("Neither subparagraph (A) nor any provisions of any agreement entered into pursuant to subparagraph (A), including any rate structure, fees, terms, conditions, or notice and recordkeeping requirements set forth therein, *shall be admissible as evidence or otherwise taken into account in any administrative, judicial, or other government proceeding involving the setting or adjustment of the royalties payable for the public performance or reproduction in ephemeral phonorecords or copies of sound recordings*, the determination of terms or conditions related thereto, or the establishment of notice or recordkeeping requirements by the Copyright Royalty Judges under paragraph (4) or section 112(e)(4). *It is the intent of Congress that any royalty rates, rate structure, definitions, terms, conditions, or notice and recordkeeping requirements, included in such agreements shall be considered as a compromise motivated by the unique business, economic and political circumstances of webcasters, copyright owners, and performers rather than as matters that would have been negotiated in the marketplace between a willing buyer and a willing seller*, or otherwise meet the objectives set forth in section 801(b). This subparagraph shall not apply to the extent that *the receiving agent and a webcaster that is party to an agreement entered into pursuant to subparagraph (A) expressly authorize the submission of the agreement in a proceeding under this subsection*." (Emphasis added.))

[80] *See* Section II.9.A *infra*.

January 31 of the year covered by the particular Section 112 and Section 114 statutory license.[81] However, not every digital music service has commenced its operations as of January 1 of the year covered by the license. For example, a commercial webcaster that is relying on the "default" rates and terms set forth in 37 C.F.R. § 380.3 and expects to have 100 or more channels would be required to pay an annual minimum fee of $50,000 for that calendar year, even if that commercial webcaster commences making digital audio transmissions and ephemeral recordings on December 1 of that year. The statute (or the implementing regulations promulgated under the statute) should be amended to provide an appropriate pro-ration mechanism for the minimum annual fees.

- No mechanism for recouping royalties under direct licenses from annual minimum fee. For some digital music service providers that rely on the statutory licenses under Sections 112 and 114, it is common practice to concurrently have direct licenses in place with some sound recording rights owners. However, there is no mechanism for reducing or recouping royalties (or pre-payments of royalties) paid directly to sound recording copyright owners under direct licenses from the annual minimum fee. Accordingly, the royalty framework set by the Section 112 and 114 statutory licenses should be amended to allow for recoupment or offset in these circumstances.

- Purging server copies every 6 months. As a condition of eligibility for the Section 112 statutory license, Section 112(e)(1)(C) provides that "unless preserved exclusively for archival purposes, the copy or phonorecord [must be] destroyed within six months from the date the transmission program was first transmitted to the public."[82] In light of technological developments and current practices, this requirement imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Accordingly, 112(e)(1)(C) should be amended to abolish this requirement.

- Limitations on the number of server copies. Another condition of eligibility for the Section 112 statutory license is that digital music services must make "no more than 1 phonorecord of the sound recording (unless the terms and conditions of the statutory license allow for more)."[83] The intent of this provision is to leave the question of whether more than one phonorecord is permissible to the implementing regulations promulgated under Section 112. In light of technological developments, a limitation of no more than one phonorecord imposes an unnecessary burden on digital music services without any corresponding benefit to rights owners or the public interest. Moreover, there is no benefit for leaving this determination to implementing regulations. Accordingly, Section 112(e) should be amended to allow for the creation of as many phonorecords as are reasonably necessary to facilitate digital audio transmissions under the Section 114 statutory license.

9. Please assess the effectiveness of the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

A. The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 have been generally ineffective.

[81] 37 C.F.R. §§ 380.4(d), 380.13(d), 380.23(c), 383.3(b), 384.4(d) (2013).
[82] 17 U.S.C. § 112(e)(1)(C).
[83] 17 U.S.C. § 112(e).

The "willing buyer, willing seller" standard – which only applies to a single class of services (non-interactive Internet radio services) – is codified in Sections 112(e) and 114(f), and provides in relevant part as follows:

> The Copyright Royalty Judges shall establish rates that most clearly represent the fees that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including—
>
> > (A) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise interferes with or enhances the copyright owner's traditional streams of revenue; and
> >
> > (B) the relative roles of the copyright owner and the transmitting organization in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms under voluntary license agreements described in paragraphs (2) and (3). The Copyright Royalty Judges shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept and made available by transmitting organizations entitled to obtain a statutory license under this subsection.[84]

This standard – which has consistently resulted in royalty rates that are disproportionately higher than in contexts that rely on the 801(b) standard – requires judges to set a rate based solely on *marketplace benchmarks*, but there is very little record evidence of market rates for directly licensed Internet radio services that are not tied to a separate rights grant for additional service types and functionalities (such as direct licenses for interactive services). In recognition of this fact, the standard requires the Copyright Royalty Judges to assume a *hypothetical marketplace* for the rights actually being granted, and *impute* the appropriate rate for the rights actually granted (non-interactive Internet radio services) from the royalty rates paid by digital music services for interactive rights that are not eligible for the statutory licenses under Sections 112 and 114. Once secured, the alleged precedents set by these direct licenses are then bootstrapped as the relevant benchmarks for determining the *hypothetical marketplace* assumed by the "willing buyer, willing seller" standard. Moreover, unlike the 801(b) standard, the "willing buyer, willing seller" standard fails to account for the disruptive impact that high royalty rates may have on digital music service providers, and the public interest in maximizing the availability of creative works to the public.

Another problem with the "willing buyer, willing seller" standard has been that a component of the royalty is usually calculated and determined on the basis of the number of performances, even in circumstances where the higher usage does not equate to higher revenues for the digital music service provider. The Internet Radio Fairness Act (which was not enacted) sought to mitigate this fundamental problem by eliminating the ability to use the rates paid by interactive services, or any rates agreed to by

[84] 17 U.S.C. §§ 112(e)(4), 114(f)(2)(B).

major labels, in Section 112 and 114 ratesetting proceedings.[85] As noted previously, the resulting royalty rates have been so high and unsustainable that Congress has had to step in twice to mitigate the substantial economic hardship that the resulting rates imposed on digital music services.[86] By contrast, the 801(b) standard has never required Congressional intervention in the almost half century since it was introduced.

Finally, under the "willing buyer, willing seller" standard, many Internet radio services have had to pay in excess of 50% of their revenue to SoundExchange under the Section 112 and 114 statutory licenses (of course, such royalties are in addition to those that the services must pay to publishers for the use and exploitation of the underlying musical works). By contrast, broadcast radio pays nothing to the labels for their use of sound recordings, and Sirius XM pays less than 10% of its revenue for the same rights for its satellite digital audio radio service (which rate was established under the 801(b) standard). There is no justifiable reason that performance royalties for Internet radio are determined under an inequitable ratesetting standard.

B. The royalty ratesetting standards applicable to the various types of services subject to statutory licensing under Section 114 could be made more effective.

As previously discussed, the 801(b) standard has been time-tested to provide fair rates in many contexts, including the ratesetting proceedings set forth in Sections 114(f)(1)(B), 115, and 116. It bears repeating here that the record labels have participated as *licensees* in every proceeding to adjust royalty rates and terms under Section 115,[87] and as a result have benefited from the 801(b) standard that was adopted for such proceedings under the 1976 Act.[88] It is disingenuous for the labels to suggest that a different standard should apply for Internet webcasters.

C. Additional problems with the royalty ratesetting process and standards applicable to the various types of services subject to statutory licensing under Section 114.

In addition to the application of the "willing buyer, willing seller" standard, there are a number of problems with the royalty ratesetting process and standards that *limit their effectiveness*, including the following:

- Reversed adjudication process. Under the current procedural rules that apply to ratesetting proceedings under the Section 112 and 114 statutory licenses, parties are required to submit a statement of the case prior to the commencement of discovery.[89] Moreover, the scope of discovery that is permissible is limited to non-privileged material that is the subject matter

[85] H.R. 6480 § 3(a)(2)(D)(v), 112th Cong. (2012).
[86] Congress stepped in first with the Small Webcaster Settlement Act of 2002 and then again with the Webcaster Settlement Acts of 2008 and 2009. *See also* note 78, *supra*.
[87] *See* note 38 *supra*.
[88] *See* note 52 *supra* and accompanying text.
[89] 37 C.F.R. §§ 351.4, 351.5(a) (2013); 17 U.S.C. §§ 801(b)(6)(C)(i)-(ii). Although 37 C.F.R 351.4(c) permits a participant to amend this statement based on new information received during the discovery process, up to 15 days after the close of discovery, the process is nevertheless not efficient and moreover, proves a tactical advantage to rights owners as they are aware of the direct licenses in the market place to a far greater degree than the digital music services, especially the ones who only operate music services under the Section 112 and 114 statutory licenses.

presented in the statement of the case.[90] Accordingly, in preparing a statement of the case, parties are required to *assume* what they will develop during discovery and hope that relevant information will be voluntarily revealed by their opponent in the opponent's written case, which is a significant reversal of the traditional adjudication procedures followed by state and federal courts and prejudicial to the interests of the litigants. The Section 112 and 114 statutory licenses, and the related implementing regulations governing the rate-setting procedures, should be amended to correct this procedural anomaly.

- Compressed time frame for discovery. Litigants have only 60 days in which to complete all discovery – among ALL litigants.[91] Even in the event that the Copyright Royalty Judges see fit to extend the discovery period, they have very little time to do so, after factoring in the time required for mandatory settlement periods,[92] the submission of written statements,[93] settlement conferences,[94] hearings, rebuttal, and proposed findings of fact and conclusions of law. In typical ratesetting proceedings, the schedules issued by the Copyright Royalty Judges mandate that all discovery – among all parties - must be completed in 60 days. This does not provide digital music services enough time to undertake a full discovery process, and advantages labels, who possess the lion's share of the relevant discoverable information.

- Discovery vehicles and limitations. Under the discovery vehicle limitations set forth in 17 U.S.C. § 801(b)(6)(C)(iv) and 17 C.F.R. § 351.5(2), the participants on each side are *collectively* entitled to up to 25 interrogatories and 10 depositions.[95] Because SoundExchange is the sole participant on behalf of sound recording copyright owners, it is entitled to 25 interrogatories and 10 depositions. However, all interested digital music services, collectively, must *share* 25 interrogatories and 10 depositions. In the currently pending proceeding, there are 28 such

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[90] 17 U.S.C. § 801(b)(6)(C)(v) ("Any participant under paragraph (2) in a proceeding under this chapter to determine royalty rates may request of an opposing participant *nonprivileged documents directly related to the written direct statement or written rebuttal statement* of that participant." (Emphasis added.)).

[91] 17 U.S.C. § 801(b)(6)(C)(iv) ("Discovery in connection with written direct statements shall be permitted for a period of 60 days, except for discovery ordered by the Copyright Royalty Judges in connection with the resolution of motions, orders, and disputes pending at the end of such period.").

[92] 17 CFR 351.2 (2013) ("After the date for filing petitions to participate in a proceeding, the Copyright Royalty Judges will announce the beginning of a voluntary negotiation period and will make a list of the participants available to the participants in the particular proceeding. *The voluntary negotiation period shall last three months, after which the parties shall notify the Copyright Royalty Judges in writing as to whether a settlement has been reached.*" (Emphasis added.)).

[93] 17 CFR 351.4 (2013) ("All parties who have filed a petition to participate in the hearing must file a written direct statement. The deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, *not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period* set forth in §351.2." (Emphasis added.)).

[94] 17 CFR 351.7 (2013) ("A post-discovery settlement conference will be held among the participants, within 21 days after the close of discovery, outside of the presence of the Copyright Royalty Judges. Immediately after this conference the participants shall file with the Copyright Royalty Judges a written Joint Settlement Conference Report indicating the extent to which the participants have reached a settlement.").

[95] 17 U.S.C. § 801(b)(6)(C)(iv); 17 CFR 351.5 (2013) ("In a proceeding to determine royalty rates, the participants entitled to receive royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Similarly, the participants obligated to pay royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Parties may obtain such discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party. Relevant information need not be admissible at hearing if the discovery by means of depositions and interrogatories appears reasonably calculated to lead to the discovery of admissible evidence.").

participating digital music services. This gives a decided tactical and procedural advantage to SoundExchange in discovery matters.

10. Do any recent developments suggest that the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings? Are there reasons to continue to withhold such protection? Should pre-1972 sound recordings be included within the Section 112 and 114 statutory licenses?

A. DiMA takes no view on whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings.

We take *no view* on (i) whether the music marketplace might benefit by extending federal copyright protection to pre-1972 sound recordings, (ii) whether there are reasons to continue to withhold such protection, or (iii) whether pre-1972 sound recordings should be included within the Section 112 and 114 statutory licenses.

B. Any approach taken with respect to the copyright status of pre-1972 sound recordings should be holistic: Pre-1972 sound recordings should either be "all-in" or "all-out" for all purposes, with no exceptions or exclusions.

Although we take no view on whether the music marketplace might benefit from extending federal copyright protection to pre-1972 sound recordings, we strongly believe that pre-1972 sound recordings should either:

> [1] Be covered by federal copyright protection for *all purposes* (including the statutory licenses under Sections 112 and 114, the "safe harbors" under Section 512 and each of the myriad other statutory licenses, exceptions and exemptions set forth elsewhere in U.S. copyright law), *or*
>
> [2] Not be covered by federal copyright protection for *any purposes at all*.

As noted in other places throughout this response, the current legal and regulatory framework for music licensing developed in a piecemeal manner, and is the product of accommodating the needs, goals and desires of special interest groups. We feel that this tradition should not be continued in the area of pre-1972 sound recordings; rather, this issue should be addressed holistically. Recognizing pre-1972 sound recordings for federal copyright protection for select purposes would be confusing, short-sighted, and against the public interest.

11. Is the distinction between interactive and noninteractive services adequately defined for purposes of eligibility for the Section 114 license?

The distinction between interactive and noninteractive services *is adequately defined* for purposes of eligibility for the Section 114 license. The definition of an "interactive service" set forth in Section 114(j)(7), as clarified by the Second Circuit in *Arista Records, LLC v. Launch Media, Inc.*, 578 F.3d 148 (2d Cir. 2009), provides an adequate degree of clarity regarding what constitutes an "interactive service" and a "noninteractive service" for purposes of eligibility for the Section 114 statutory license.

PLATFORM PARITY

12. What is the impact of the varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms. Do these differences make sense?

Because of the close relationship between Questions 12 and 13, we are consolidating our response to Question 12 under Question 13, below, so that the issues raised can be addressed collectively.

13. How do differences in the applicability of the sound recording public performance right impact music licensing?

A. <u>The varying ratesetting standards applicable to the Section 112, 114, and 115 statutory licenses, including across different music delivery platforms, unfairly tilts competition in favor of some digital music service providers, to the disadvantage of others</u>.

The "playing field" regarding ratesetting standards is not level, and the result is fundamental inequity. The differences between the "willing buyer, willing seller" and 801(b) standards, and their resulting impact on the royalty rates that are established under them, have been discussed in our responses to Questions 2, 8 and 9.

Beyond the inherent inequities associated with the differing ratesetting standards, lawmakers[96] and the recording industry itself[97] have recently cited the absence of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts as additional evidence that the current system lacks balance and further tilts the competitive landscape in favor of some music service providers, to the disadvantage of others. In his testimony before the United States Senate Committee on Commerce, Science, and Transportation in support of the merger of the satellite radio services Sirius and XM, the then-CEO of Sirius assured government regulators that a merged Sirius and XM would not create a "monopoly" that could harm competition or new market entrants, because the two satellite radio services do not just compete with each other; they compete head-to-head with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio, Internet radio, permanent digital downloads that are sold to consumers and enjoyed on

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[96] Jennifer Martinez, *Nadler Circulates Draft Legislation on Music Royalties*, The Hill, Aug. 20, 2012, *available at* http://thehill.com/policy/technology/244413-nadler-circulates-draft-legislation-on-music-royalties (quoting Nadler as saying, "[t]he lack of a performance royalty for terrestrial radio airplay is a significant inequity and grossly unfair."); *Blackburn, Eshoo Introduce Legislation to Protect Musicians' Creative Content*, official website of Rep. Marsha Blackburn (press release), May 7, 2014, *available at* http://blackburn.house.gov/news/documentsingle.aspx?DocumentID=379223 (last visited May 21, 2014) ("'This is a basic issue of modernizing the law to get rid of a dated loophole that only applies to AM/FM radio,' Blackburn said. … 'When Kenny Rogers "The Gambler" is played on Internet radio or satellite radio, Kenny gets paid, but when it is played on AM/FM radio, he doesn't get anything.'").

[97] *Performance Rights Act (H.R. 848): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Mitch Bainwol, Chairman and CEO, Recording Industry Association Of America); Emily F. Evitt, *Money, That's What I Want: The Long and Winding Road to a Public Performance Right in Sound Recordings*, 21 Intell. Prop. & Tech. L.J. 10 (Aug. 2009); *see also* Bruce A. Lehman, *Intellectual Property and the Nat'l Information Infrastructure: the Report of the Working Group On Intellectual Property Rights* 221-225, Information Infrastructure Task Force of the Commerce Dep't (Sep. 1995), *available at* http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf.

portable devices and mobile phones that provide access to various types of audio entertainment.[98] The merger was subsequently approved by the Department of Justice and Federal Communications Commission on this basis.[99]

The different ratesetting standards, royalty rates and functionality rules based on platform distinctions do not make sense in the digital environment where the very same consumer electronics devices – such as automobile in-dash receivers – are capable of receiving digital and/or analog transmissions of the same sound recording, yet the sound recording will bear a different royalty rate (or will not be royalty-bearing at all) depending on whether the service that delivered it is considered AM terrestrial radio, FM terrestrial radio, HD Radio, satellite radio or Internet radio under U.S. copyright laws.

B. Fair competition among digital music service providers can be restored by applying the balanced standard under Section 801(b) to all services operating under the Section 112, 114 and 115 statutory licenses.

As previously noted, the royalty standard that applies to Internet radio services (i.e., "willing buyer, willing seller") often results in a royalty rate that is demonstrably higher than the services that operate under the Section 801(b) standard. In lieu of the "willing buyer, willing seller" standard, the balanced standard under Section 801(b) should be adopted to apply to *all services* operating under the Section 112, 114 and 115 statutory licenses. And, as noted above, various lawmakers and the recording industry believe that the lack of a sound recording public performance right for terrestrial AM, FM and HD Radio broadcasts has further tilted the competitive balance in favor of some music service providers, to the disadvantage of others.

CHANGES IN MUSIC LICENSING PRACTICES

14. How prevalent is direct licensing by musical work owners in lieu of licensing through a common agent or PRO? How does direct licensing impact the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees?

A. Direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is quite prevalent* for musical work *reproduction and distribution rights*, but not for musical work *public performance rights*.

Direct licensing by musical work owners in lieu of licensing through a common agent or PRO is quite prevalent for musical work reproduction and distribution rights covered by the major music publishers, the larger independent music publishers and HFA's publisher-principals. Some digital music services have entered into direct license agreements with smaller independent music publishers, but this practice is the exception rather than the rule. Because there are a vast number of musical works that are not controlled by the major music publishers, the larger independent music publishers or the remainder of

[98] *XM-Sirius Merger and the Public Interest: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 110th Cong. (2007) (statement of Melvin Alan Karmazin, CEO, Sirius Satellite Radio).
[99] DOJ, *Statement of the Department of Justice Antitrust Division on its Decision to Close its Investigation of XM Satellite Radio Holdings Inc.'s Merger with Sirius Satellite Radio Inc.* (press release) (March 24, 2008), *available at* http://www.justice.gov/opa/pr/2008/March/08_at_226.html; *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, MB Docket 07-57, 23 F.C.C.R. 12348, 12408, 12410-11, 12434-35, ¶¶ 1, 131, 135 & App. B (July 25, 2008) (Memorandum Opinion and Order and Report and Order).

HFA's publisher-principals, direct licenses are usually supplemented with NOIs under the Section 115 statutory license process, which (as previously discussed) involves substantial administrative costs.

To perform this function, many digital music services engage the Harry Fox Agency or Music Reports, Inc. (the only private businesses that offer musical work mechanical and reproduction rights research, administration and management services in the U.S.) to undertake this NOI process on their behalf for a fee, as the services do not have the in-house resources and infrastructure necessary to undertake this process themselves. Many of the digital music services that enter into direct licenses also use these companies to administer the payment of royalties under their direct licenses, because the administration (not just the acquisition) of publishing licenses requires personnel and infrastructure that many services do not have.

However, direct licensing by musical work owners in lieu of licensing through a common agent or PRO *is not prevalent* for musical work *public performance rights*. The potential withdrawal of repertoires from the PROs would make direct licensing of musical work public performance rights much more prevalent. However, as previous noted,[100] these withdrawals would disrupt the musical work licensing marketplace and cause an array of adverse effects for digital music services and the public interest, including the extraction of unreasonable royalty rates based on a combination of market power and lack of transparency into the catalogs that were the subject of the contemplated withdrawals.[101]

For the reasons noted in the next section, it vitally important that the licensing regime maintain the right of parties to enter into direct license arrangements.

B. <u>How direct licensing impacts the music marketplace</u>.

Direct licensing impacts the music marketplace, including the major record labels and music publishers, smaller entities, individual creators, and licensees, by *facilitating the introduction of new business models* that do not fit squarely into any of the categories covered by the Section 115 licenses. This gives digital music services and rights owners the flexibility to *vary statutory requirements* and the flexibility to agree on *new and innovative license types and royalty rate models*, which ensures the ability of digital music services to license the rights they require to fit the unique needs of their businesses.

While direct licenses offer cost efficiencies and reduced transaction costs, they also pose a number of significant challenges:

- As previously noted, direct licensing results in high transaction costs to secure and administer licenses. The number of licensors is vast because of the fragmentation of rights, and it is often not cost effective to acquire rights under direct licenses from the "long tail" of independent labels and music publishers.

- Most individually negotiated agreements are long and complex. Rights owners do not share the same concerns in each individual negotiation, which protracts the negotiation period and can lead to impasses.

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[100] *See* Sections I.3.C(b), II.5.B, and II.7.B *supra*.

[101] For example, in the ASCAP ratesetting proceeding with Pandora Media, Judge Cote found that a pattern of conduct, including lack of transparency about the musical works involved, was designed by the music publishers to drive up the royalty rate for musical works by 250%. Accordingly, Judge Cote disregarded Sony ATV's direct license with Pandora Media as a relevant benchmark rate for musical work public performance rights. *Pandora II*, 2014 WL 1088101, at *36-*38.

- Direct license negotiations can take a long time, and can delay the time-to-market for innovative products and services.

- Disparate approaches taken by rights owners on key economic terms put upward pressure on royalty rates, and often include unreasonable demands on key economic terms, such as advances and minimum revenue guarantees.

- Many rights owners are concerned with parity vis-à-vis other rights owners, which results in the imposition of so-called "most favored nations" (or "MFN") clauses for the benefit of rights owners. Because there is no counter-balance to the market power of rights owners in the music licensing marketplace, these MFN clauses are usually asymmetrical in their application, and solely benefit the rights owners.

- The negotiation of direct licenses can increase overhead costs and divert key personnel away from other critical operational, marketing or management functions on behalf of the digital music service.

- Since there is no uniform standard for royalty accountings, each rights owner often imposes its own royalty reporting requirements on digital music services, frequently using proprietary reporting specifications unique to that rights owner. This reduces efficiencies, and adds to the administrative burden and expense undertaken by digital music services.

- As the music publishing industry consolidates and reduces its staffing and overhead, rights owners do not have enough personnel and other resources necessary to fully explore and assess licensing opportunities.

- The existence of the statutory rates under Section 115 sometimes serves to inhibit, rather than facilitate, the willingness of rights owners to experiment with innovative approaches on economic terms in order to avoid the possibility of setting "precedents" that would be adverse to their interests in future ratesetting proceedings.

Nevertheless, direct licenses provide a critical function for music licensing in the digital environment, and the legal and regulatory framework provided by U.S. copyright law must preserve the ability of digital music services to enter into direct licenses.

15. Could the government play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms? If so, how and for what types of uses?

DiMA takes *no view* on whether the government could play a role in encouraging the development of alternative licensing models, such as micro-licensing platforms.

16. In general, what innovations have been or are being developed by copyright owners and users to make the process of music licensing more effective?

The innovations to address the complexity of music licensing have generally been undertaken by digital music services, at their expense. In order to secure, administer and retain music licenses, digital music service providers must devote extraordinary time and resources to develop the following:

(i) Information about rights ownership (including building, or funding the building of, redundant, private databases that, for reasons already noted, are often not comprehensive, reliable or accurate);

(ii) Systems to track massive amounts of data related to the usage of content; and

(iii) The complex systems necessary to account to rights owners in a variety of different (and often conflicting) formats and specifications.

In addition to these costs and functions, digital music services must develop content hosting and infrastructure in a way that enables the terms and conditions of myriad music licenses to be satisfied, along with data analytics, management reporting, chart reporting, and enforcement of content access rules (including digital rights management systems for some service types).

17. Would the music marketplace benefit from modifying the scope of the existing statutory licenses?

Other than as discussed in our responses to other questions in this Notice of Inquiry, DiMA takes *no view* on whether the music marketplace would benefit from modifying the scope of the existing statutory licenses,.

REVENUES AND INVESTMENT

18. How have developments in the music marketplace affected the income of songwriters, composers, and recording artists?

The development and deployment of legitimate music services has resulted in *significant royalty payments* by digital music service providers to rights owners for the benefit of songwriters, composers, and recording artists. The legitimate music services represented by DiMA's membership collectively have paid billions of dollars in royalties to content owners in a marketplace where the sale of physical products – long the content owners' primary source of revenue – has continued to decline year-over-year.[102] The various forms of music streaming and so-called "subscription" services are now recognized by rights owners as a "mainstream model."[103] According to IFPI, the recorded music industry's global trade organization, the biggest growth area in recorded music has been in music subscription services, with revenues up 51.3% globally in 2013, while the sale of permanent downloads remains the largest revenue segment from digital music services, at 67% of global revenues.[104] The New York Times recently reported that while the trend for the historical business model is one of decline, streaming services around the world are expected to continue showing substantial growth in the income they generate for songwriters, composers, and recording artists: "The music business has started to see streaming as its salvation. … In 2013, streaming services around the world yielded $1.1 billion in income for the music industry, a number that has been growing fast."[105]

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[102] While the decline in physical music sales was inevitable, legitimate digital music services have created new royalty streams for the benefit of rights holders by monetizing digital music consumption and sharing the revenues with licensors.

[103] Francis Moore, *Introduction*, IFPI Digital Music Report 2014, at 5 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

[104] IFPI Digital Music Report 2014, at 17 (2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

[105] Sisario, *supra* note 1.

With respect to recording artists, SoundExchange recently reported a 312% increase in the total sum of royalties it paid to recording artists and labels in 2012 versus 2008.[106] Digital radio alone paid out $590.4 million in royalties to artists and rightsholders last year.[107] And according to a report recently released by the Recording Industry Association of America ("RIAA"), the recorded music industry's trade organization in the United States, payments to rights owners in connection with on-demand streaming services have also substantially risen, totaling $220 million in 2013.[108] The substantial royalties generated by the combination of statutory and direct licenses for the use of sound recordings has brought stability to the recording industry, which until recently had witnessed a constant decline in revenues.[109] With respect to songwriter income, royalties paid by digital music services for musical work public performance rights provide the lifeblood for most songwriters. Both ASCAP and BMI reported record high royalty payments of $851.2 million and $814 million, respectively, to their songwriter, composer and publisher members on revenues of $944 million each.[110] SESAC's revenues have grown from just $9 million in 1994 to $167 million in 2013.[111]

The substantial royalties paid by digital music services constitute new revenue streams that were unimagined just a few decades ago. The legitimate music services represented by DiMA's membership make significant royalty payments to content owners. These royalty payments are, in turn, shared with songwriters, composers, and recording artists in accordance with the terms of their respective agreements music publishers, record companies and other rights administrators. Although licensed digital music services have no control over, or insight into, the manner in which content owners share proceeds with songwriters, composers, and recording artists, it is worth noting that the current system, which is based on overlapping copyright rights recognized under U.S. copyright law – sometimes for the same uses of the same works – causes licensing inefficiencies and operational redundancies which add to the expense of administering rights on behalf of rights owners, and correspondingly diminishes the income of songwriters, composers and recording artists.[112]

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[106] *2012 Annual Review* 1, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/01/2012-Annual-Review.pdf. Between 2012 and 2013, SoundExchange reported a 19% increase in payments to artists; *Year End Recap 2013*, SoundExchange, http://www.soundexchange.com/wp-content/uploads/2014/02/year-end-recap-2013.pdf.

[107] *Music Industry Leader SoundExchange Celebrates Year of Milestones with 2013 Total Distributions Reaching $590 Million*, SoundExchange (press release), Feb. 4, 2014, http://www.soundexchange.com/pr/music-industry-leader-soundexchange-celebrates-year-of-milestones-with-2013-total-distributions-reaching-590-million/; *see also* Alex Pham, *Streaming Made Up One-Fifth of U.S. Recorded Music Revenue in 2013*, Billboard, Mar. 18, 2014, *available at* http://www.billboard.com/biz/articles/news/digital-and-mobile/5937634/streaming-made-up-one-fifth-of-us-recorded-music (last viewed May 9, 2014).

[108] Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

[109] According to the RIAA, total music industry revenues have been stable at about $7 billion for the past four years, but had been on a steady decline before that, dropping from $8.8 billion in 2008 to $7.8 billion in 2009 to the current level of $7 billion in 2010. *Id.*

[110] *ASCAP Reports Strong Revenues in 2013*, Am. Soc'y of Composers, Authors, and Publishers (press release), Feb. 12, 2014, http://www.ascap.com/press/2014/0213-2013-financials.aspx; *Broadcast Music Inc. Reports Record-Breaking Revenues of $944 Million*, Broadcast Music Inc. (press release), Sept. 23, 2013, http://www.bmi.com/press/entry/563077.

[111] Ed Christman, *SESAC Refinances Debt to Cut Interest Payments*, Billboard, Apr. 8, 2014, *available at* http://www.billboard.com/biz/articles/news/legal-and-management/6042238/sesac-refinances-debt-to-cut-interest-payments (last viewed May 9, 2014).

[112] For example, in the context of ASCAP and BMI, each PRO retains administration fees of approximately 12% of the gross royalties paid by digital music services. Based on the 2013 royalties noted above, DiMA estimates that approximately $200 million of the royalties paid by digital music services in 2013 was redirected from songwriters

19. Are revenues attributable to the performance and sale of music fairly divided between creators and distributors of musical works and sound recordings?

Revenues attributable to the performance and sale of music are *not* fairly divided between creators and distributors of musical works and sound recordings. Distributors bear a *disproportionate percentage* of the costs, expenses and related risks for the investment in and operation of digital music services, relative to the share of revenues they generally retain (after making royalty payments for the use of musical works and sound recordings). In addition to the cost of royalty payments, digital music services must bear the costs of acquiring and administering the licenses for musical works and sound recordings, as well as many other operational costs, such as those related to engineering; content hosting, delivery, and billing infrastructure; financial clearing; bandwidth; reporting; marketing; and technology, software, services, and backend infrastructure. As was made plain by the testimony of the record labels' expert witness in the last ratesetting proceeding for the satellite radio and preexisting subscription services under the Section 112 and 114 statutory licenses, digital music services pay the lion's share of their revenues over to rights owners at roughly the following rates:[113]

Digital Product Type	% of Gross Revenues Rate *Sound Recording Rights Only*	% of Gross Revenues Rate *Inclusive of Sound Recording and Musical Work Rights*
Permanent Audio Download	N/A	70%
Interactive Subscription (Non-Portable)	50% - 60%	60% - 72%
Interactive Subscription (Portable)	60% - 65%	70% - 78%

Unfortunately, the public discourse around the compensation of creators is quite misleading. For example, much publicity was recently generated about a tweet from Bette Midler, where she observed that after more than four million plays on Pandora's Internet radio service, she only received $144.21 in royalties.[114] What this publicity failed to take into account is that four million plays on Pandora's service represents the equivalent number of "impressions" (public performances) as just twenty spins on a terrestrial FM radio station that averages 200,000 simultaneous listeners. Even more significantly, this publicity ignores the fact that terrestrial FM broadcasters do not pay *any* royalties to creators for the public performance of sound recordings. Of course, there is little transparency about what happens to the significant royalties generated from digital music services *after they are paid* to record labels, music

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and retained to cover administrative expenses. *See ASCAP CEO John LoFrumento's Remarks from the 2014 ASCAP General Annual Membership Meeting*, Official Website of Am. Soc'y of Composers, Authors, and Publishers, Apr. 24, 2014, *available at* http://www.ascap.com/playback/2014/04/action/john-lofrumento-membership-meeting-remarks.aspx ("2013's operating ratio stood at 12.4%."); *FAQs*, official website of Broadcast Music, Inc., *available at* http://www.bmi.com/faq/entry/what_happens_to_the_fees_that_businesses_pay_and_how_much_profit_does_bmi_m (last visited May 21, 2014) ("Currently, more than eighty-seven cents of every dollar of your licensing fee goes to our affiliated copyright owners.").

[113] *See Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services*, SoundExchange Witness Direct Statements, Docket No. 2011-1 CRB PSS/Satellite II, at 15 (Nov. 29, 2011) (expert witness statement of George S. Ford, President, Applied Economic Studies).

[114] *See, e.g.*, Paul Resnikoff, *After 4,175,149 Plays, Pandora Pays Bette Midler $144.21*, Digital Music News, Apr. 6, 2014, http://www.digitalmusicnews.com/permalink/2014/04/06/bettemidler.

publishers and PROs, and processed under the financial terms of recording artists' and songwriters' own private arrangements with rights owners. As might be imagined, a significant portion of the royalties received are retained by these rights owners for their own account, or applied toward the recoupment of advances paid to recording artists and songwriters.

While the public is led to believe through the aforementioned sorts of publicity that digital music services do not pay significant royalties, nothing could be further from the truth. In fact, digital music services are paying more in royalties and wholesale proceeds, as a percentage of their gross revenue, than any music distributors under the historical business model.

20. In what ways are investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, impacted by music licensing issues?

DiMA takes *no view* on what ways investment decisions by creators, music publishers, and record labels, including the investment in the development of new projects and talent, are impacted by music licensing issues. Although DiMA's members have significant intellectual property portfolios of their own and have great respect for the investments made by content creators, DiMA's members do not generally perform the functions of music creators, record labels or music publishers.

21. How do licensing concerns impact the ability to invest in new distribution models?

As we have noted elsewhere in our responses to the other specific questions posed in this Notice of Inquiry, the current legal and regulatory framework provided by U.S. copyright law for music licensing has created a "perfect storm" of issues and areas of concern that have led many potential investors *to refrain from investing* in new distribution models. Such issues and areas of concern include: the complexity of music licensing caused by the fragmented nature of rights ownership; unsustainable royalty rates; the cost of acquiring and administering licenses; lack of transparency regarding rights ownership; and substantial legal risks, such as the potential liability for statutory damages for "mistakes," however innocent or unavoidable they may be.

In testimony before the U.S. House of Representatives Subcommittee on Intellectual Property, Competition and the Internet of the Committee on the Judiciary in 2012, one investor noted the following about the chilling effect that music licensing issues have had on entrepreneurship and investment in new business models:

> As venture capitalists we evaluate new companies largely based on three criteria: The abilities of the team, the size and conditions of the market the company aims to enter, and the quality of the product. Although we've met many great entrepreneurs with great product ideas, we have resisted investing in digital music largely for one reason: The complications and conditions of the state of music licensing. The digital music business is one of the most perilous of all Internet businesses. We are skeptical under the current licensing regime that profitable standalone digital music companies can be built. In fact, hundreds of millions of dollars of venture capital have been lost in failed attempts to launch sustainable companies in this market. While our industry is used to failure, the failure rate of digital music companies is among the highest of any industry we have evaluated. This is solely due to the overburdensome royalty requirements imposed upon digital-music licensees by record companies under both voluntary and compulsory rate structures. The compulsory royalty rates imposed upon

> Internet radio companies render them noninvestible businesses from the perspective of many VCs.[115]

Addressing these concerns and problems through a comprehensive modernization of U.S. copyright law for the digital environment will go a long way toward stimulating a new wave of investment in new distribution models.

DATA STANDARDS

22. Are there ways the federal government could encourage the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process?

As noted in our responses to Questions 1, 3, 5 and 8, the lack of transparency around rights ownership information for musical works and sound recordings makes it difficult if not impossible for digital music services to determine what rights they do and do not possess at any given time, which presents many adverse consequences. A publicly available, centralized database for musical works and sound recordings would go a long way toward resolving many of the problems identified in our response to this Notice of Inquiry.

The federal government *could encourage* the adoption of universal standards for the identification of musical works and sound recordings to facilitate the music licensing process by establishing a set of best practices, database standards, and a regime for enforcing participation and compliance. At a minimum, this regime could encourage adoption by incorporating the following key elements:

- Statutory damages. Without limiting the concept of a "safe harbor" from statutory damages previously suggested (i.e., one that shields copyright users from infringement liability if they have acted diligently and in good faith based on the best information available, such as the centralized database), eligibility to seek statutory damages in general should be conditioned on participation in the centralized database, utilizing the universal standards.

- Attorneys' fees. As a further incentive for participation, like the registration of copyrighted works with the Copyright Office,[116] eligibility to seek attorneys' fees in infringement cases in general should be conditioned on the registration of accurate rights ownership information in the centralized database, utilizing the universal standards.

- Economic incentives. The federal government should also encourage the adoption of universal standards by creating other economic incentives for rights owners to participate.

The federal government should develop these standards, practices and compliance regulations in conjunction with interested parties from the private sector, as much of the information required is already controlled by private parties in disparate private databases, and there are many different data standards utilized by digital music service providers and rights owners today that would need to be harmonized. However, as the experience with the development of the GRD has shown (and as previously noted), if left

[115] *Music Licensing Part I: Legislation in the 112th Congress: Hearing Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary*, 112th Cong. 71 (2012) (statement of David B. Pakman, Partner, Venrock).
[116] 17 U.S.C. § 412 (2012).

entirely to private industry without oversight from the federal government, these universal standards – and the centralized database itself – are unlikely to get implemented.

OTHER ISSUES

23. Please supply or identify data or economic studies that measure or quantify the effect of technological or other developments on the music licensing marketplace, including the revenues attributable to the consumption of music in different formats and through different distribution channels, and the income earned by copyright owners.

DiMA believes that the following data and economic studies measure or quantify the effect of technological or other developments on the music licensing marketplace:

- Michael Masnick and Michael Ho, *The Sky is Rising*, Computer and Communications Industry Ass'n, Engine Advocacy and Floor 64, Jan. 2012, *available at* http://www.techdirt.com/skyisrising/.

- Brett Danaher, Samita Dhanasobhon, Michael D. Smith and Rahul Telang, *Understanding Media Markets in the Digital Age: Economics and Methodology* (Apr. 2014), *available at* http://www.nber.org/chapters/c12999.pdf.

- *Adventures in the Netherlands: Spotify, Piracy and the New Dutch Experience*, Spotify, Jul. 17, 2013, *available at* https://spotify.box.com/shared/static/nbktls3leeb0rcyh41sr.pdf.

- *IFPI Digital Music Report 2014*, IFPI, *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf.

- Joshua P. Friedlander, *News and Notes on 2013 RIAA Music Industry Shipment and Revenue Statistics*, RIAA, *available at* http://76.74.24.142/2463566A-FF96-E0CA-2766-72779A364D01.pdf.

- Jean-Manuel Izaret, John Rose, Neal Zuckerman and Paul Zwillenberg, *Follow the Surplus: How U.S. Consumers Value Online Media*, Boston Consulting Group (Feb. 2013), *available at* http://www.bcgtelaviv.com/documents/file127046.pdf.

- Thomas Künstner, Matthew Le Merle, Hannes Gmelin and Christian Dietsche, *The Digital Future of Creative Europe: The Economic Impact of Digitization and the Internet on the Creative Sector in Europe*, Booz & Co. (Mar. 24, 2013), *available at* http://www.strategyand.pwc.com/global/home/what-we-think/reports-white-papers/article-display/digital-future-creative-europe.

24. Please identify any pertinent issues not referenced above that the Copyright Office should consider in conducting its study.

As noted in our response to Questions 12 and 13, the digital music services that operate under the Section 112 and 114 statutory licenses not only compete against each other without regard to these platform distinctions, they also compete with a wide variety of other entertainment services and products for the attention of the consumer, including AM and FM terrestrial radio, HD Radio and permanent digital downloads. Just as there is no rational basis for different ratesetting standards applicable to each of these competing services, there is no rational basis for there to be discriminatory standards for applying *the programming rules and restrictions* to these services that compete for the same users, time spent

listening, advertising dollars and subscription dollars. Yet, the standards under Section 114(d)(2), are applied in such a way as to advantage some competitors (e.g., satellite radio and digital radio that is bundled with cable and satellite television services) over others (e.g., Internet radio). For example, the following five rules apply to Internet radio services, but not any of the other service types operating under the Section 112 and 114 statutory licenses:[117]

- The service cannot "knowingly perform the sound recording…in a manner that is likely to cause confusion, to cause mistake, or to deceive, as to the affiliation, connection, or association of the copyright owner or featured recording artist with the transmitting entity or a particular product or service advertised by the transmitting entity…"[118]

- The service must cooperate in order to prevent technology from "automatically scanning… transmissions…in order to [allow the user to] select a particular sound recording;"[119]

- The service must not take "affirmative steps to cause or induce the making of a phonorecord by the transmission recipient" and must enable its own technology to the fullest extent possible "to limit the making by the transmission recipient of phonorecords of the transmission directly in a digital format;"[120]

- The service must accommodate technical anti-circumvention measures for the identification and protection of copyrighted works;[121] and

- The service must ensure that the title of the sound recording, the album, and the artist "can easily be seen by the transmission recipient in visual form" during the performance.[122]

Fair competition among digital music service providers can be restored by applying the same programming rules and restrictions under Section 114(d)(2) to all services operating under the Section 112 and 114 statutory licenses. The programming rules and restrictions under Section 114(d)(2) should apply to *all service types* that rely on Section 114 statutory licenses, such that the law creates a "level playing field" for all parties.

III. CONCLUSION

In making its recommendations to Congress regarding potential areas for the modernization of U.S. copyright law in the area of music licensing, DiMA urges the Copyright Office to take a holistic view of the entire music licensing ecosystem, and provide a framework for the new digital era that is based on the six essential pillars outlined in Section I of this Notice of Inquiry response. Because of the importance and technical complexity of the various issue involved, we respectfully suggest that the Copyright Office conduct further analysis into the current landscape with a view to [1] achieving a better understanding of the "perfect storm" of music licensing issues and problems that has created systemic failure in the music licensing marketplace, and [2] determining how the issues, problems and inefficiencies discussed in this Notice of Inquiry response may be addressed through appropriate legislative changes.

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[117] 17 U.S.C. § 114(d)(2)(C); *see* Nimmer, *supra* note 4, § 8.22[D][1][c] (2013).
[118] 17 U.S.C. § 114(d)(2)(C)(iv).
[119] 17 U.S.C. § 114(d)(2)(C)(v).
[120] 17 U.S.C. § 114(d)(2)(C)(vi).
[121] 17 U.S.C. § 114(d)(2)(C)(viii).
[122] Nimmer, *supra* note 4, § 8.22[D][1][c] (2013) (describing the requirements of 17 U.S.C. § 114(d)(2)(C)(ix)).

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ARTICLE: Intellectual Property and Antitrust: Music Performing Rights in Broadcasting

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SUMMARY:
... Since 1934, the Antitrust Division of the U.S. Department of Justice (DOJ) has concerned itself with competitive issues in the licensing of music performance rights by the nation's two major performance rights organizations (PROs), the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI).... To license alternative content to enable a radio boycott of ASCAP in 1940, the radio industry established a third organization, BMI, which picked up many country, blues, and early rock writers that ASCAP did not admit. ... The modified Consent Decree served ASCAP well in 1967, when the organization brought suit against a radio station in Washington that contended that ASCAP's blanket license was an unlawful combination in violation of the Sherman Act. ... ASCAP's blanket license for major radio stations is 1.615 percent of adjusted gross revenue.... Notwithstanding the clear requirement --- that ASCAP offer broadcasters a genuine choice between a per-program and a blanket license, ASCAP has consistently resisted offering broadcasters a realistic opportunity to take a per-program license. Among other things, ASCAP has sought rates for the per-program license that have been substantially higher than the rates it has offered for the blanket license, and it has sought to impose substantial administrative and incidental music use fees and unjustifiable and burdensome reporting requirements on users taking a per-program license [including the costs of protracted litigation].... This statement contrasts with Magistrate Dolinger's stated intent to limit exit from the ASCAP blanket license....

TEXT:
[*349] 1. INTRODUCTION

Since 1934, the Antitrust Division of the U.S. Department of Justice (DOJ) has concerned itself with competitive issues in the licensing of music performance rights by the nation's two major performance rights organizations (PROs), the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI). DOJ concerns about ASCAP and BMI led to two Consent Decrees in 1941, n1 two more in 1950 n2 and 1966, n3 and key modifications in 1960 n4 and 1994. n5 In June 2001, the DOJ and ASCAP entered into a modified Consent Decree, the Second Amended Final Judgment (AFJ2), that attempted to resolve some competitive concerns. n6 This paper reviews the improvements and possible difficulties of the new Consent Decree and its underlying rationale, as described by an accompanying memorandum released by the Department. n7

ASCAP and BMI license the rights to publicly perform musical compositions in non-dramatic settings in the United States. Licensees together now pay over one billion dollars to the two organizations for the right to use their catalogued

material, [*350] which together includes roughly 97 percent of all American compositions. Television and radio broadcasters, which are the major revenue contributors and prime focus of this paper respectively account for approximately 45 and 36 percent of total license revenues. at ASCAP. n8 Broadcast licensees include the three full-time television networks, the Public Broadcasting System, Univision, affiliated and independent local television stations, cable operators, cable programmers, and commercial and noncommercial radio stations. This group is increasingly joined by digital transmitters, which include music subscription services, digital satellite radio, and station-owned and independent webcasters now based on the Internet. General non-broadcast licensees include colleges and universities, symphony orchestras, concert presenters, and individual establishments for eating, drinking, sports, and amusement.

Performance rights organizations (PROs) provide a key administrative service for music users, who might otherwise need to deal directly with songwriters and composers to obtain the rights to perform copyrighted music. n9 PROs negotiate and establish license contracts, collect revenue, deduct overhead, and pay remaining amounts to songwriters and publishers. As the grande dame of the business, ASCAP historically has offered the larger and more prestigious catalogue, including the greatest names in American music -- Aaron Copland, Duke Ellington, Irving Berlin, Leonard Bernstein, Harold Arlen, Cole Porter, and George Gershwin, to name a few.

Since ASCAP's inception in 1914, the PROs have made pooled performance rights for catalogued works available to music users mostly through blanket licenses. Blanket licensees may perform, or convey the rights to perform, on their premises all the catalogued works of a PRO without limit. During the length of a contract, blanket fees do not vary with customer usage. Rather, blanket payments are generally fixed as an inflation-adjusted flat fee, a percentage of revenue, or a multiple of square footage, seating capacity, or some other measure of physical space. Blanket licenses economize on transaction costs, insure against involuntary infringement, and efficiently price each additional performance unit at zero, which is the immediate marginal cost of provision.

However, blanket licenses can also be deployed as anticompetitive arrangements [*351] that have attracted Justice Department attention since 1934. n10 These licenses, which had been ASCAP's sole license offer until 1941, would compel each user to make an "all or nothing" choice that would practically force acceptance of a full license contract. By limiting user choice, blanket licenses also reduced the incentive and ability of music users to choose from alternative arrangements that might otherwise decrease payments to the PRO.

The Antitrust Division of the Justice Department negotiated Consent Decrees regarding competitive practices with ASCAP in 1941 n11 and 1951, n12 and with BMI in 1941 n13 and 1966. n14 Per the terms of these Consent Decrees, ASCAP and BMI must offer to radio and television stations program licenses that make the full catalogue available on an individual program basis. The Consent Decrees specify that program licenses must provide a "genuine choice" to the blanket. Despite the stipulation, television and radio broadcasters subsequently continued to allege that ASCAP and BMI program licenses were priced anticompetitively.

On June 11, 2001, the Antitrust Division and ASCAP entered in the federal district court of the Southern District of New York a Joint Motion to enter a newly negotiated Second Amended Final Judgment (AFJ2) that resolves many outstanding issues in performance rights. n15 As discussed in an accompanying memorandum, AFJ2 generally expands and clarifies ASCAP's obligation to offer genuine license alternatives to more user groups, such as background music providers and Internet companies. n16 It also streamlines administrative provisions for resolving rate disputes and modifies or eliminates restrictions that now govern ASCAP's relations with its members.

This article reviews the economics and history of the market for performance rights and the recent Amended Final Judgment that ASCAP and the Justice Department entered. It is organized as follows. Section 2 provides an overview of the legal nature of the performance right in musical compositions and the means of its enforcement. Section 3 introduces blanket licensing and the historic Consent Decrees that the U.S. Department of Justice negotiated with ASCAP and BMI. Section 4 discusses the antitrust cases that upheld, with restrictions, the legality of blanket licensing, while section 5 considers ratemaking matters that subsequently resulted in important rulemakings in U.S. District Court. Sections 6-8 discuss AFJ2, particularly as it concerns competitive licensing and writer relations. Section 9 concludes the article.

[*352] 2. THE PERFORMANCE RIGHT AND ITS ENFORCEMENT

Copyright for the words and lyrics embedded in musical compositions is now protected by the Copyright Act of 1976, which became effective on January 1, 1978, and is codified in Title 17 of the U.S. Code. n17 Section 106 grants five exclusive rights to composers/writers who create musical works. These rights include:

1. The right to reproduce the work in copies or phonorecords,

2. The right to prepare derivative works based upon the work,

3. The right to distribute copies or phonorecords of the work,

4. The right to perform the work publicly,

5. The right to display the work publicly. n18

The fourth right, embedded in § 106(4), represents the public performance right for musical compositions that is the topic of this article. n19

Public performance rights in musical compositions should not be confused with previous rights to physically reproduce, derive, and distribute the music or lyrics of a musical composition. These rights together compose the mechanical right or, when applied to video soundtracks, the synchronization right. Writer copyright in musical compositions also should not be confused with copyrights in the actual [*353] sound recordings that are made by singers and instrumentalists and owned by their recording labels. Sound recording rights are now protected in the United States only for non-broadcast digital audio transmissions. n20

There are two general categories of performance rights. Small or non-dramatic rights pertain to compositions (including popular songs) that are performed independently of a created story (or dramatic or concert excerpt thereof). Since use here may be spontaneous, bilateral licensing between user and writer is often impractical. Consequently, the PROs reasonably act as transactions agents for licensing material, monitoring performances, and collecting royalties on behalf of their members or affiliates. By contrast, grand or dramatic rights pertain to musical compositions that are performed as part of a larger theatrical production or concert excerpt thereof. Because dramatic rights can be negotiated in advance of actual performance, PROs do not license them.

ASCAP and BMI are the two major American PROs that license non-dramatic public performances of copyrighted musical compositions. After composing a song, a writer will enlist one of the PROs to act as her collecting agent. n21 Once affiliated, a writer will enlist the services of a PRO-affiliated music publisher, to whom she passes the copyright. n22 The PROs distribute license revenues evenly to publishers and writers based on estimated number of performances. n23

Fees for broadcast licensees are negotiated periodically with individual networks/stations or their collective agents (such as the Radio Music Licensing Committee and Television Music Licensing Committee). Each radio station generally pays a fixed percentage of its adjusted advertising revenue for a blanket license. Cable channels pay blanket fees based on advertising revenues or numbers of subscribers. The three full-time television networks pay fixed fees that are adjusted annually for inflation. Local television station fees are negotiated for the industry as a whole and subsequently apportioned to each station based on estimated viewership.

In addition to blanket licenses, broadcasters have other ways of "clearing" music used on television programs. Per the terms of the relevant Consent Decrees, PRO license arrangements must be non-exclusive; i.e., licensees may directly contract with writers and publishers for usage rights for particular compositions. Direct licensing entails contracts between broadcast stations and writers for individual musical works that may be performed on station-produced shows, such as themes for local news and talk shows. Source licensing entails deals between copyright [*354] owners and program producers who hire music for prerecorded soundtracks used on network and syndicated programs. Once secured by a producer, performance rights can be conveyed with the program to station buyers. n24

Finally, each PRO must offer a program license, which is a "mini-blanket" that confers full usage rights for all catalogue music used during the presentation (i.e., non-commercial) of specified programs or day parts. Total payments for a particular licensee depend upon the total number of programs in which catalogued music is used. Program licenses

should not be confused with per use licenses that would price each individual performance. As program fees can be reduced as more programs are "cleared" through source or direct-licensing, a station can save licensing revenues if it can source- or direct-license its music at a rate that is below the prevailing program fee. Program licenses are augmented with separate commercial "mini-blankets" thatlicense off-program uses that surround the feature presentations.

A broadcast station or network can then obtain the same rights with a blanket license or a combination of direct, source, program, and commercial licenses. The licensee will then choose its most preferred licensing system by comparing blanket fees with amounts due from a modular alternative. If the market were perfectly competitive, the fee for each program license would equal the rate of the best direct- or source-license alternative, and blanket fees would differ from the sum of the composites only by the incremental administration costs that the providing PRO would save by implementing the blanket.

3. BLANKET LICENSING AND CONSENT DECREES

The U.S. Congress first extended copyright to theater music in 1856 n25 and to non-dramatic performances in 1897. n26 Since music uses in non-dramatic settings were exclusively live and often spontaneous, performance rights were difficult to enforce and unauthorized performances were frequent. Consequently, several prominent composers (including Victor Herbert, Irving Berlin, John Philip Sousa, and James Weldon Johnson) established ASCAP, the first American PRO, in order to protect the performance rights of writers and publishers in non-dramatic settings. An unincorporated collective owned and governed by its songwriters and publisher members, ASCAP instituted a system of blanket licenses that enabled music halls, movie theaters, and other licensees to perform, without infringement, any registered composition in its entire catalogue for a specified contract period. ASCAP distributed blanket revenues to its members based on a monitored count of public performances.

ASCAP's license revenues grew substantially in the 1920s, as music made its way to broadcast radio. A second PRO in the United States, SESAC, was formed [*355]in 1930. n27 Relatively small, privately owned, and for-profit, SESAC has always operated without Justice Department and court involvement. To license alternative content to enable a radio boycott of ASCAP in 1940, the radio industry established a third organization, BMI, which picked up many country, blues, and early rock writers that ASCAP did not admit. Owned by private broadcast stations, BMI is a nonprofit corporation that counts songwriters and publishers as affiliates.

Licensing 80 percent of all music performed on the radio, ASCAP attracted its first antitrust suit from the Antitrust Division in 1934. The Department contended that ASCAP dominated the radio industry and should be dissolved. n28 The case became dormant after the government received a continuance after a two-week trial. In 1941, the Department sued both ASCAP and BMI on the principal ground that their blanket licenses, which were their sole offerings, were in restraint of trade. Consent decrees quickly followed that specified, among other things, that licensing practices must be non-exclusive and that licensees and individual members/affiliates should be allowed to directly contract with one another. n29

ASCAP's Consent Decree specified that ASCAP could not discriminate in prices or terms charged to similar users, n30 stipulated that ASCAP must offer a per program alternative to the blanket license, n31 required that radio network licenses cover the downstream broadcast by local radio stations, n32 and imposed a number of membership obligations. n33 A related criminal action against ASCAP was settled immediately afterward, when ASCAP, its president, and its entire board of directors were convicted of criminal acts on pleas of nolo contendere. After signing the Decree, ASCAP immediately moved to require that all direct license revenues be pooled, thereby negating any writer incentive to pursue the alternative licenses that the Department had envisioned.

Despite the fact that accompanying music on movies had moved after 1929 from live theater instruments to pre-recorded soundtrack, ASCAP continued to license soundtrack music in movie theaters in the subsequent years. In 1948, 164 cinema owners sued ASCAP for violations of sections 1 and 2 of the Sherman Act regarding its requirement that movie producers contract only with theaters that purchased ASCAP licenses. In a key district court decision, ASCAP was found to be a combination in restraint of trade because all members were required to license works at pooled rates and could not therefore compete against one another in marketing their performance rights. n34 The district court issued an injunction against the practice. n35

[*356] With the advent of television, the Justice Department negotiated a new Consent Decree with ASCAP in 1950. n36 Under sections VII and VIII, ASCAP agreed to extend to television broadcasters the program license and to avoid any "discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees ... of a genuine choice from among such various types of licenses." n37 The Consent Decree also reaffirmed the need for license non-exclusivity (sections IV(A-B), VI), n38 banned price discrimination between "similarly situated" licensees (section IV(C)), n39 and restricted the length of each non-motion picture performance license to five years or less (section IV(D)). n40 The Decree foreclosed ASCAP from movie soundtracks by requiring that synchronization and performance rights be licensed at the same time (i.e., by the composer) (sections IV(E), V(C)). A fee-setting Rate Court was established in the U.S. District Court for the Southern District of New York for hearing license disputes, with the burden of proof upon ASCAP to show reasonableness (section IX). n41 The Justice Department and BMI modified their respective Decree in a similar fashion in 1966 n42 and instituted a Rate Court provision in 1994. n43 BMI is now litigating its first major radio license matter before its Rate Court.

The modified Consent Decree served ASCAP well in 1967, when the organization brought suit against a radio station in Washington that contended that ASCAP's blanket license was an unlawful combination in violation ofthe Sherman Act. The Ninth Circuit Court of Appeals affirmed a district court decision that upheld ASCAP because its blanket licenses were non-exclusive and its license fees were under the surveillance of the Rate Court. n44 The U.S. Solicitor General supported the decision n45 and the Supreme Court denied certiorari. n46

4. PERFORMANCE RIGHTS AND ANTITRUST

Music use on broadcast television in the 1940s and early 1950s was much as it had been on radio--spontaneous use on popular variety shows. Consequently, a blanket license here was as useful as it had been to radio stations. However, with the advent of pre-recorded programs and music soundtracks, spontaneous use declined considerably. Over 95 percent of usage minutes on television now appear on pre-recorded soundtrack. n47 Like movie producers, television producers can [*357] reasonably consider source-licenses for soundtrack music that combine synchronization and performance rights.

However, this cost-saving exercise is pointless unless reductions are made possible in the licensing fees that ASCAP and BMI charge to television stations. As soundtrack prerecording became more prevalent in the 1950s, television networks and stations came to challenge blanket licenses more aggressively than had their radio predecessors. In 1961, local station plaintiffs sued in the ASCAP Rate Court to compel a modified blanket license that would have allowed stations to carve out syndicated programs with pre-recorded soundtracks. After the district court narrowly interpreted its rulemaking authority under the Consent Decree and denied the request, the Second Circuit affirmed the denial. n48 In denying this application, the district court suggested that applicants initiate a private antitrust suit or urge the Justice Department to attempt to modify the Decree. This threw down the gauntlet for the antitrust action that would follow.

Following a fee dispute with BMI, CBS brought an action against both PROs in 1969. The plaintiff argued that blanket licensing embodied illegal price-fixing, unlawful tying, a refusal to deal, and a misuse of copyright. It therefore sought a declaratory judgment n49 that blanket licensing was per se illegal under both sections 1 and 2 of the Sherman Act. n50 The complainants sought a ruling to require ASCAP and BMI to offer a system of direct licenses where licensees and members/affiliates would individually contract with one another.

A 1972 district court ruling dismissed the tie-in and block-booking charges since PRO licenses were non-exclusive. n51 In 1977, the Second Circuit Court of Appeals reversed, holding that BMI was engaging in per se illegal price-fixing, and remanded the matter. n52 Supported by an amicus brief from the Justice Department, ASCAP and BMI appealed the decision to the U.S. Supreme Court in 1979.

In an oft-cited decision, Justice White ruled that blanket licenses were properly examined under a rule of reason that generally applied to Sherman Act cases. n53 The proper inquiry must focus on whether the effect is designed to "increase economic efficiency and render markets more, rather than less, competitive." n54 In [*358] this context, the blanket license is not a "naked restraint of trade with no purpose except stifling of competition." n55 Rather, it is greater than the sum of its parts [and] to some extent, a different producer [with] certain unique characteristics. It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations, and great flexibility in the choice of musical material." n56 Continuing, the blanket is a distinct good "of which the individual compositions are raw material" and enables a market "in which individual composers are inherently unable to compete

fully effectively." n57 On remand, the circuit court affirmed the original district court decision, finding that the blanket licenses were non-exclusive. n58

Antitrust issues reemerged in 1981 when five owners of local television stations, representing a class of 450 owners of 750 stations, sought to preclude ASCAP and BMI from issuing blanket licenses. The complainants argued that the program license was uneconomically priced. Blanket licensing was alleged to be a violation of section 1 of the Sherman Act n59 and a misuse of copyright.

The district court concurred, noting that the percentage-of-revenue in the ASCAP program license exceeded sevenfold its blanket counterpart and that only two stations conseqw ntly had chosen an ASCAP program license. n60 With this comparison, the court concluded "that the per program license was too costly and burdensome to be a realistic alternative to the blanket license." n61 The court then issued an injunction that prohibited the practice of blanket licensing.

Influenced by a seminal law review article, n62 the Second Circuit in 1984 reversed the district court, finding that blanket arrangements do not restrain trade if alternative means of acquiring performance rights are "realistically available." n63 Judge Newman ruled that the "only valid test of whether the program license is 'too costly' to be a realistic alternative is whether the price for such a license ... is higher than the value of the rights obtained." n64 The sevenfold markup of program licenses was held to be reasonable because the respective program and blanket percentages were based on different revenue bases.

5. THE ASCAP RATE COURT

The matter of rate determination for program licenses moved in 1990-91 to the ASCAP Rate Court, which conducted an administrative hearing in which 963 [*359]independent and 20 network-owned stations sought final determination of blanket and program fees for historic periods in which interim license fees had prevailed. These local stations were attempting to negotiate with ASCAP an all-industry fee aggregate that could be subsequently assigned to individual stations based on respective audience size, day part ratings, and program clearance. Hearing Magistrate Michael Dolinger issued a decision in 1993. n65

Consolidating testimony from two opposing testifying economists, the magistrate found that there is no applicable economic theory for determining blanket rates for performance licenses. Previous fee levels -- tempered by the recognition of changing circumstances-- were the only reasonable starting points for subsequently administered fee-setting. n66 The magistrate then applied -- with adjustments for annual inflation and station growth -- fee levels from a prior blanket license in 1972. This produced a serious reduction from ASCAP's requested amount for the blanket percentage.

ASCAP had urged the court to set the percentage-of-revenue for program licenses at a fourfold multiple of any blanket fee amount, together with an unspecified increment to cover additional expenses that it would have incurred in administering and monitoring the program. The magistrat•held that this proposal was designed to render the program arrangement "technically available, but practically illusory for virtually all stations." n67 It "would trivialize what was plainly not intended to be a trivial set of provisions" in the Consent Decree. n68

To resolve the problem, Magistrate Dolinger designed the program fee in a manner where the typical local television station would pay to ASCAP equal amounts under the blanket and program alternatives, exclusive of additional administration costs. To do this, the magistrate estimated that the typical local station used the ASCAP program license in roughly 75 percent of its programming. Magistrate Dolinger set the percentage-of-revenue in the program license at a 1.33 multiple of the blanket rate. This roughly ensured "revenue equivalence" between program and blanket revenues for the typical station (i.e., 1.33 x .75 = 1). n69 A 7 percent increment was then added to compensate ASCAP for the additional inefficiencies and administrative costs that inhere in program licensing. n70 Facing the retroactive application of his formula to eleven historical years, the magistrate's stated intent for the implemented program licensing system was to limit switching from blanket to program licensing. n71

[*360] ASCAP and its licensees subsequently agreed to an additionallO percent increment on the program license amount to provide a separate "mini-blanket" to cover all commercial music used during the day. This modification enabled stations to clear individual programs simply by attending to music within the actual content of the show, rather

than the more difficult process of clearing both content and commercial music. n72 However, this second rider added yet another cost to the program license compared with the blanket alternative, which automatically covers commercial uses at no additional cost.

ASCAP's present fees for program licenses for radio stations, which were established outside of Rate Court and designed with no reference to the revenue equivalence relationship, now offer even less of a "genuine choice." Commercial radio stations pay fees that are based on a percentage of adjusted station revenue; the percent fees can be negotiated individually or by an all-industry licensing committee. ASCAP's blanket license for major radio stations is 1.615 percent of adjusted gross revenue. n73 For program users, percentage fees per licensed program are set at 4.22 percent of the first 10 percent of weighted program hours where feature music is used. n74 Fees for all additional hours with feature music are set at 2.135 percent. ASCAP then adds an additional 0.24 percent for a "mini-blanket" to cover all music used on radio commercials. n75 Depending on the number of weighted hours, the markup of the program percentage above the blanket rate may range from 60 to 177 percent. The matter took a turn in 1995 when a group of radio stations unsuccessfully sought to apply Magistrate Dolinger's equivalence formula to obtain a better program license for their particular situation. n76 ASCAP's licenses for webcasters now incorporate similar discounts for blanket users. n77

[*361] 6. SECOND AMENDED FINAL JUDGMENT

Faced with the ongoing responsibility generally to enforce the nation's antitrust laws and specifically to afford to music licensees a "genuine choice" between blanket and program licenses, the Antitrust Division targeted ASCAP's licensing practices as a necessary first step to reform licensing in the performance rights industry:

Notwithstanding the clear requirement ... that ASCAP offer broadcasters a genuine choice between a per-program and a blanket license, ASCAP has consistently resisted offering broadcasters a realistic opportunity to take a per-program license. Among other things, ASCAP has sought rates for the per-program license that have been substantially higher than the rates it has offered for the blanket license, and it has sought to impose substantial administrative and incidental music use fees and unjustifiable and burdensome reporting requirements on users taking a per-program license [including the costs of protracted litigation]. In addition, ASCAP has refused to offer a per-program or per-program-like license to users other than those explicitly named in the decree, although, over time, such licenses would be practical for more and more types of users. n78

The Justice Department negotiated a second version of the Amended Final Judgment, AFJ2, which is designed to enhance competition between ASCAP and providers of direct- and source-licenses. n79

The objective is to ensure that a substantial number of users within a similarly situated group will have an opportunity to substitute enough of their music licensing needs away from ASCAP to provide some competitive constraint on ASCAP's ability to exercise market power with respect to that group's license fees. n80

This statement contrasts with Magistrate Dolinger's stated intent to limit exit from the ASCAP blanket license. n81 The Department is now negotiating a similar decree with BMI that concerns comparable perceived anti-trust difficulties.

In this pro-competitive context, Subpart VII(A)(1) of AFJ2 would oblige ASCAP to offer per-program licenses, upon request, to any requesting broadcaster. Subpart VII(A)(2) extends the application of program licenses to segment licenses that may implicate day parts (on radio), page links (on Web sites), broadcast channels (on music subscription services), or other means of breaking down music usage by time or location. With details for the Rate Court to work out, segment licenses must be offered to background/foreground music services and on-line music users. The per- segment license aims to ensure that users that do not transmit "programs" may nonetheless have access to a license that varies with music use. Accordingly, AFJ2 would allow the Rate Court magistrate great flexibility in its implementation. n82

[*362] The new segment license conceivably could enable stronger competition between ASCAP and BMI. Because music licensees generally require catalogue from both organizations, the two PROs do not compete against one another to sell blanket licenses and have no incentive to undercut the other's blanket fee. However, the two organizations could be given incentive to compete in the sale of segment licenses to broadcast and webcast radio users, who can readily bunch songs from different writers to provide exclusive "all-BMI" or "all-ASCAP" segments. In a competitive market

where license revenues depend on the number of segments actually sold, each PRO would have financial incentive to sell more exclusive licenses by cutting license fees and assisting with material designed to extend the length of the segment.

Net of a surcharge that is designed to cover the additional costs of administering the program license, AFJ2 aims to ensure that the "total license fee [including commercial uses] for a per-program or per-segment license approximate the fee for a blanket license" for a typical user. n83 Music licensees are then to be categorized in groups of similarly situated customers that operate comparable businesses and use music in analogous manners. n84 Each category must have a court-approved "representative music user"; i.e., a hypothetical licensee whose frequency and intensity of usage are typical of the license group-at-large. n85

For this representative user, the total expected payment for a necessary slate of ASCAP-program licenses should approximate its fee for the blanket alternative. n86 That is, if 50 percent of a representative station's programs use ASCAP music (defined as any music written by an *ASCiu>* composer regardless of how it is eventually licensed), the appropriate percentage multiple for the program license should be 2 (i.e., 1/.5) times the percent rate for the blanket. The representative station may pay a blanket fee of 1 percent of its total advertising revenues, or a program fee of 2 percent of advertising revenues for the particular programs that it actually licenses. Once derived, the multiple is then extended to all stations in the user group. If ASCAP were actually able to license all the programs where its music was used, payments of the representative user would be identical under the blanket and program alternative licensing systems. However, payments to ASCAP diminish as more programs migrate to competitive alternatives.

There is a significant difference between the formula described above and the Dolinger formula set out in Buffalo Broadcasting. In AFJ2, all of the station's programs that contain performances of music written by ASCAP members are to be counted as part of the 50 percent that use ASCAP music, regardless of eventual license source. This contrasts with Magistrate Dolinger's section 5 formula (supra), which bases a program multiple on the fraction of station programs for [*363] which the ASCAP program license was actually deployed. n87

To further illustrate the difference, suppose in the above example that the representative station was able to source- or direct-license music requirements in 60 percent of its music-using programs, reducing the need for the ASCAP program license to 20 percent of all programs (i.e., .50 x (1 - .6)). Dolinger's per program rate for the representative station and all users in its group would, thus, have increased to 5 percent (i.e., 1/.2), a rate that takes into account the fact that ASCAP program licenses were actually deployed in 20 percent of all programs. However, the revised fee percentage under AFJ2 would be just 2 percent (i.e., 1/.5), since 50 percent of all programs continue to use ASCAP music under one license or another. Substantial savings are evidently possible in the latter system and ASCAP can no longer increase the program rate as usage of its program license declines.

As another pro-competitive gain, AFJ2 permits to each program licensee a full offsetting allowance for the "mini-blanket" fees for commercial and promotional music that is now used outside of the program. This amendment contrasts with previous procedures (see section 5, supra) that fixed charges for the commercial "mini-blanket" as an addition to the program total. As previously mentioned, ASCAP may also fix a surcharge to compensate for its additional costs of administering the program license. n88

As an important economic matter, AFJ2 does not clearly specify whether the program/blanket multiple that is used to derive a particular station's program percent rate must be used to establish equal percent rates for each ASCAP-licensed program in the station's portfolio, or merely establish an average percent rate. Under strict nondiscrimination, the percent rate for each program licensed through ASCAP would necessarily be equal to one another. Alternatively, only the aggregate amount of program fees could be restrained as a percent of underlying program revenues, with individual discounts and upgrades permitted around the average for licenses charged to single programs. Enforced equality has been the case, but AFJ2 seems ambiguous. n89 However, to provide to ASCAP the greatest ability to match competitive providers of source and direct licenses, this strict equality should be relaxed. This point is discussed further in a technical memorandum soon to be made available by this author.

While AFJ2 provides economic incentives for a station licensee to substitute a source- or direct- alternative for an ASCAP program, the new Decree is somewhat more protective against license exit, as would result when radio stations switch from music to talk formats. In the latter case, no license would be needed at all. However, if the representative user were able to reduce its usage of ASCAP material (program, source, and direct) from 75 percent to 50 percent of all

segments [*364] in the day, its program multiple would be adjusted in AFJ2 to restore its original revenue level. n90 Upward adjustments of this nature would limit ASCAP's 1incentives to lower prices aggressively to maintain a program or segment license against exit threats. A related competitive problem will occur in the market for exclusive segment licenses (discussed above), where rate adjustments will protect ASCAP from segment shifts to BMI, and vice versa.

7. WRITER RELATIONS

As a second key modification, section XI of AFJ2 entirely dispenses with an amendment to the original Decree known as the "1960 Order." n91 Recognizing ASCAP's then-control over 85 percent of all catalogued music compositions, the "1960 Order" was designed to govern ASCAP's arrangements and operating procedures with regard to its member writers. The Order constrained principally the weights used to divide ASCAP's royalty pool among its membership for different uses of music (e.g., feature vs. commercial), but also prescribed rules for voting, performance surveys, and mechanisms for resolving disputes among members. n92 These rules were to be made public and changes submitted to the Department or Rate Court for approval. Nonetheless, ASCAP's relations with its soundtrack and commercial writers have been quite contentious and the Rate Court has often declined jurisdiction. n93

In moving to vacate the "1960 Order," the Department contended that there are no practical economic standards useful in judging the relative worth of different kinds of performance minutes and expressed clear discomfort that ASCAP claimed a Department imprimatur on the fairness of its rates. n94 Rather, section XI(B)(1) [*365] would allow ASCAP to distribute, without DOJ oversight, collected monies (less costs) to writers based on the number of ASCAP-licensed performances of their works, with varying weights for different kinds of music based on ASCAP's subjective assessment of the value. Special awards are permitted to writers of material with particular prestige value. The chosen weighting method must be consistently applied and made public; upon request, a writer may learn exactly how her resulting royalty check was determined.

For members who contend that ASCAP's payment system is unfair, AFJ2 greatly restricts ASCAP's existing ability to impede writer exit. Contingent upon the entry of a similar rule in the BMI Consent Decree (which is yet to be negotiated), Section XI(B)(3) would enable writers to leave at the end of each calendar year without penalty. The Department suggests that its surveillance of ASCAP payments can be vacated because BMI, with a market share now roughly equal to ASCAP's, and SESAC now present more substantial competitive alternatives than they did in 1960. Presumably, any ASCAP member dissatisfied with its royalty system would willingly move to another PRO having the financial means to compensate her. n95

The Department may nonetheless be relying here on untested economic theory and ignoring some important administrative considerations that now limit the financial ability of ASCAP and BMI to compete. BMI's considerable increase in market share in 1960-1994 resulted in large part from the fact that ASCAP was fee-regulated while BMI was not. Moreover, ASCAP **maintained**-- but subsequently **abandoned**-- a payment system that disproportionately favored legacy writers. The world has changed; ASCAP modified its payments system and BMI now has a Rate Court.

Despite a 1993 district court ruling that blanket fees paid to a PRO should be tied primarily to changes in usage of its particular catalogue, as adjusted for revenue growth and inflation, n96 subsequent actions have not granted to ASCAP and BMI the financial ability to compete across-the-board to attract talent from one another. In the short run, there is no administrative procedure by which either organization can adjust blanket licenses for quarterly or annual changes in catalogue size or usage. Moreover, the Rate Courts have no objective measure of "prestige" upon which contract fees can be negotiated up or down. Consequently, royalties for acquisitions of new writers and material covered by a blanket license [*366] can only be distributed by reducing payments to other writers. n97 Writers who exit from a particular PRO free up revenues that can be used to attract others. With no immediate correspondence between license fees and usage levels, a legally administered "zero sum game" of this nature evidently inhibits the players who might otherwise vigorously compete.

Presumably, ASCAP can earn more at its next major negotiation if it can attract talent from BMI. Here too there is no demonstrated dependence of contract fees upon catalogue size. Though each may pursue a limited number of "star" writers who enhance the prestige of their catalogue, the connection between catalogue prestige and actual negotiated amounts is also quite tenuous.

Aggressive competition for migrating writers would be conceivable if license payments could be adjusted immediately for changes in PRO market share. For example, if blanket licenses were adjustable for quarterly changes in market share, license amounts due to ASCAP and BMI would change periodically in appropriate and opposite directions. However, unless overall usage increased, the combined amount paid to the PROs would not change.

However, usage-based pricing would be difficult to implement for a number of practical reasons. First, under a system with two different Rate Courts, there is no single legal authority to tie ASCAP and BMI blanket rates to changes in their respective market shares. Second, there is no objective way to weigh and aggregate different music usage types. Attempts to do so introduce an arbitrary judgment element, as each advocate is likely to produce a weighting scheme that is particularly favorable to its own market position. Adjudicating between them would be a difficult administrative task.

8. OTHER SAFEGUARDS

There are a number of other provisions in AFJ2 that will also enhance the power of users to achieve a more efficient outcome.

Collective Licensing: Under section IV(B), ASCAP may not interfere with the right of its members to license compositions directly or through any agent other than another PRO. This extends member rights from the direct licensing of individually controlled compositions to contracting with agents, such as music libraries, that can negotiate and contract on behalf of a group of writers.

"Through to the Audience": Under the terms of AFJ2, ASCAP must offer to each broadcaster, background music provider, or on-line transmitter a "through to the audience:" license that automatically conveys performance rights from licensee to a secondary user; e.g., from cable network to cable operator. n98 This would allow the original entity, which controls decisions regarding the deployment and licensing of musical content, to make competitive choices and to convey savings to downstream users. "Through to the audience" licensing can represent a major [*367] competitive gain for Internet transmitters, who had no previous right under the present Consent Decree to request and contract for such licenses.

First Time Rules: Under the terms of AFJ2, ASCAP may not use license fees negotiated during the first five years that it licenses a particular industry as a benchmark for subsequent fees that it may seek later. n99 AFJ2 presumes that music users in a new industry are fragmented, inexperienced, lacking in resources, and unduly willing to acquiesce.

Digital licensing: Recognizing the potential of digital rights management to supplant the need for ASCAP monitoring and protection of digital rights, the DOJ's memorandum accompanying AFJ2 states:

Technologies that allow rights holders and music users to easily and inexpensively monitor and track music usage are evolving rapidly. Eventually, as it becomes less and less costly to identify and report performances of compositions and to obtain licenses for individual works or collections of works, these technologies may erode many of the justifications for collective licensing of performance rights by PROs. The Department is continuing to investigate the extent to which the growth of these technologies warrants additional changes to the antitrust decrees against ASCAP and BMI, including the possibility that the PROs should be prohibited from collectively licensing certain types of users or performances. n100

9. CONCLUSION

The Department of Justice and ASCAP have entered into a new Consent Decree that promises improvement in a long problematic area for television and radio broadcasters: th<presence-or lack--of a "genuine choice" between blanket and program licenses charged for the right to publicly perform music in non-dramatic settings. Extended to BMI, AFJ2 would provide broadcast licensees with a reasonable opportunity to use a system of program, direct, and source-contracts as a means of avoiding "all-or-nothing" blanket licenses that they may find overpriced. Consequently, broadcast licensees increasingly will be able to contract directly with composers rather than being required to enter into licenses with their respective performance rights organizations. ASCAP and BMI will have to offer program licenses that compete with their own members and affiliates, and broadcasters, advertisers, and the public-at-large will benefit from the outcome.

However, AFJ2 and the Rate Courts may be lacking in their governance of the competitive market between ASCAP and BMI. As all protections for payouts to ASCAP members are vacated, the DOJ now relies on head-to-head competition between the two organizations for new writers to ensure fairness and market efficiency. As explained above, ASCAP and BMI do not currently operate under administrative rules that can consistently adjust blanket license fees in response to changes in usage or catalogue size. Consequently, they do not have the financial ability to engage in the competition that the Department envisions. A technical [*368] memorandum available from the author also suggests that the competitive rules of AFJ2 are lacking with regard to selective discounting, cross-subsidization, and license avoidance.

If the courts cannot establish rules to enable vigorous across-the-board competition for songwriters and composers, the Antitrust Division might tell us what purpose is served by having two (or three) PROs, as opposed to one PRO. At the dawn of the Internet era, this is a timely issue that broadcasters, webcasters, artists, legislators, and regulators need to resolve in short order. With administrative difficulties in systematically relating blanket fees to music use and catalogue size, the most efficient means of providing a blanket license for radio and television broadcasting now appears to be an administered monopoly. Writers and publishers may benefit considerably from scale economies in litigation and administration costs that could be achieved if the blanket license for musical compositions were so operated, as is now the case in every nation except Brazil. n101 The combined overhead, negotiation, and administrative costs of ASCAP and BMI might reasonably be halved if blanket licensing of performance rights were consolidated. Legislators could then reasonably call upon the Department to state exactly where it sees workable competition emerging between ASCAP and BMI and the ways in which its new Consent Decrees will facilitate that competition.

FOOTNOTES:

n1 *United States v. ASCAP, 1941-1943 Trade Cas. (CCH) P56, 104 (S.D.N.Y. 1941); United States v. BMI, 1940-1943 Trade Cas. (CCH) P56, 096 (E.D. Wisc. 1941).*

n2 *United States v. ASCAP, 1950-1951 Trade Cas. (CCH) P62, 595 (S.D.N.Y. 1950).*

n3 *United States v. BMI, 1966 Trade Cas. (CCH) P71, 941 (S.D.N.Y. 1966).*

n4 *United States v. ASCAP, 1960 Trade Cas. (CCH) P69, 612 (S.D.N.Y. 1960).*

n5 *United States v. BMI, 1996-1 Trade Cas. (CCH) P71, 378 (S.D.N.Y. 1994).*

n6 Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. 2001) (entered June 11, 2001), http://www.usdoj.gov/atr/cases/f6300/6396.pdf (last visited Feb. 19, 2001) [hereinafter AFJ2].

n7 Memorandum of the United States in Support of the Joint Motion to Enter Second Amended Final Judgment, United States v. ASCAP, No. 41-1395 (S.D.N.Y. 2000), http://www.usdoj.gov/atr/cases/f6300/6395.pdf (last visited Feb. 19, 2001) [hereinafter AFJ2 Memorandum].

n8 In millions of dollars, a recent publicly available breakdown for the domestic aggregate is television and cable ($165.8), radio ($133.1), general ($68.0), and symphonic and concert performances ($4.3). ASCAP, ANNUAL REPORT (1999).

n9 The U.S. Solicitor General in 1967 made the case for centralized licensing.

The extraordinary number of users spread across the land,. the ease with which a performance may be broadcast, the sheer volume of copyrighted compositions, the enormous quantity of separate performances each year, the impracticality of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music. If this market is to function at all, there must be ... some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them.
Memorandum of the United States as Amicus Curiae on Petition for Writ of Certiorari in the *Supreme Court of the United States at 10-11, K-91, Inc. v. Gershwin Publishing Corp., 389 U.S. 1045 (1968)* (mem.) (No. 67-147), denying cert. to *372 F.2d 1 (9th Cir. 1967)* [hereinafter K-91 Amicus Brief].

n10 See United States v. ASCAP, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934).

n11 *United States v. ASCAP, 1941-1943 Trade Cas. (CCH) P56, 104 (S.D.N.Y. 1941).*

n12 *United States v. ASCAP, 1950-1951 Trade Cas. (CCH) P62, 595 (S.D.N.Y. 1950).*

n13 *United States v. BMI, 1940-1943 Trade Cas. (CCH) P56, 096 (E.D. Wis. 1941).*

n14 *United States v. BMI, 1966 Trade Cas. (CCH) P71, 941 (S.D.N.Y. 1966).*

n15 AFJ2, supra note 6.

n16 AFJ2 Memorandum, supra note 7, at 3-4.

n17 Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2591 (1976) (codified as amended at *17 U.S.C.§§ 101-1101*). As extended in 1998, all audio or visual works completed in the U.S. after the Act's 1978 effective date are now copyrighted for 70 years after the creator's death. *17 U.S.C.A. §* 302(a) (West Supp. 2000). Anonymous works, pseudonymous works, and works made for hire are protected until the earlier of 95 years after publication, or 120 years after creation. § 302(c). Prior to the passage of the new act, the previous 1909 Copyright Act protected works for a

period of 28 years after publication. Copyright Act of 1909, ch. 320, § 23, 35 Stat. 1075, 1080. Copyright was renewable for an additional 28 year term. Id. Through subsequent amendments, the renewal period for works completed between 1964 and 1977 was extended to 47 years and renewal for a second term was made automatic. *17 U.S.C. §§ 303-304.* In eliminating the need for renewal, the United States first adopted existing international standards established in Article 7 of the Berne Convention for the Protection of Literary and Artistic Works, revised July 24, 1971, amended Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

n18 Copyright Act of 1976, *17 U.S.C. § 106* (1994).

n19 Per§ 101 of the Copyright Act, to "perform a work" means to "recite, render, play, dance, or act it, either directly or by means of any device or process, or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible." *17 U.S.C. § 101.*
To perform or display a work "publicly" means:

(1) To perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) The right to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.
Id.

n20 See *17 U.S.C.A.* § 106(a) (effective Feb. 1, 1996); *17 U.S.C.A. § 114(d)* (West Supp. 2000) (exempting certain broadcast transmissions from the provisions of § 106(6) and providing statutory licensing for others).

n21 Dual affiliation of an individual is not permitted, but different members of a writing team may belong to different PROs.

n22 A publisher markets songs to record labels, administers the copyright, collects mechanical royalties, and sometimes edits the song.

n23 Each organization compensates its writers based on censuses or samples of broadcast airtime. Performances on TV networks, syndicated shows, and cable programs are practically surveyed by universal census, while radio and local TV stations are monitored through scientific samples of program logs, cue sheets, or off-the-air tapes.

n24 The wide majority of this material is commissioned work-for-hire. The remainder consists of prerecorded songs that may add to the background of the program.

n25 Act of Aug. 18, 1856, ch. 169, 11 Stat. 138, 139.

n26 Act of Jan. 6, 1897, ch. 4, 29 Stat. **481,482**.

n27 The full organization name, Society of European State Authors and Composers, is not relevant. The organization is quite small, numbering little more than 2000 affiliates.

n28 United States v. ASCAP, Equity No. 78-388 (S.D.N.Y., filed Aug. 30, 1934).

n29 *United States v. ASCAP, 1941-1943 Trade Cas. (CCH) P56, 104 (S.D.N.Y. 1941); United States v. BMI, 1940-1943 Trade Cas. (CCH) P56, 096 (E.D. Wise. 1941).*

n30 Act of Jan. 6, 1897, ch. 4, 29 Stat. **481,482**.

n31 Id. at 404.

n32 Id.

n33 Id. at 405.

n34 *Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 894 (S.D.N.Y. 1948).*

n35 Id. See also *M. Witmark & Sons v. Jensen, 80 F. Supp. 843 (D. Minn. 1948).*

n36 *United States v. ASCAP, 1950-1951 Trade Cas. (CCH) P62, 595 (S.D.N.Y. 1950).*

n37 *Jd. at 63, 754.*

n38 *Jd. at 63, 752-53.*

n39 *Id. at 63,* 752.

n40 Id.

n41 *Id. at 63, 754.*

n42 *United States v. BMI, 1966 Trade Cas. (CCH) P71, 941 (S.D.N.Y. 1966).*

n43 *United States v. BMI, 1996-1 Trade Cas. (CCH) P71, 378 (S.D.N.Y. 1994).*

n44 *K-91, Inc. v. Gershwin Publ'g Corp., 372 F.2d 1 (9th Cir. 1967).*

n45 K-91 Amicus Brief, supra note 9.

n46 *K-91, Inc. v. Gershwin Publ'g Corp., 389 U.S. 1045 (1968)* (mem.), denying cert. to *372 F.2d 1 (9th Cir. 1967).*

n47 Usage minutes can now be categorized as feature (1.4%), theme (3.2%), background instrumental (41.4%), and commercial (54.0%). M. Holden, ASCAP and BMI Usage Weightings --Out-of-Step with the World? 3 FILM MUSIC MAGAZINE, 345 (2000). Feature music includes compositions that are the primary focus of audience attention, theme music is used to open and close programs, background music is used to complement screen action, and commercial music includes advertising jingles, public service announcements, and promotional music that pitch other programs. Theme, background, and commercial music invariably entail pre-recorded soundtrack.

n48 "A consent decree, though it is a judicial decree, is principally an agreement between the parties ... and must be interpreted consistently with 'plain meaning' or 'explicit language'"-- *United States v. Atlantic Refining Co., 360 U.S. 19, 22-23 (1959); Suarez v. Ward, 896 F.2d 28, 30 (2d Cir. 1990); Berger v. Heckler, 771 F. 2d 1556, 1568 (2d Cir. 1985)* -- "and not by reference to what might satisfy the purposes of one of the parties to it." *Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 574 (1984)* (quoting *United States v. Armour & Co., 402 U.S. 673, 681-682 (1971)).*

n49 *28 U.S.C.§§ 2201,* 2202 (1994)

n50 *15 U.S.C. §§ 1,* 2 (1994)

n51 *CBS v. ASCAP, 337 F. Supp. 394 (S.D.N.Y. 1972).*

n52 *CBS v. ASCAP, 562 F.2d 130 (2d Cir. 1977).*

n53 *BMI v. CBS, 441 U.S. 1 (1979).*

n54Id. at 20 (quoting *United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).*

n55 Id. (quoting *White Motor Co. v. United States, 372 U.S. 253, 263 (1963)).*

n56 Id. at 22.

n57 Id.

n58 *CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980),* cert. denied, *450 U.S. 970 (1981).*

n59 *15 U.S.C. § 1.*

n60 *Buffalo Broad. Co. v. ASCAP, 546 F. Supp. 274, 289 (S.D.N.Y. 1982).*

n61 Id.

n62 Lionel S. Sobel, The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing, *3 LOY. L.A. ENT. L. REV. 1 (1983).*

n63 *Buffalo Broad. Co. v. ASCAP, 744 F.2d 917 (2d Cir. 1984).*

n64 *Id. at 926.*

n65 United States v. ASCAP (In re Buffalo Broad. Co.), 1992-1994 *Copyright L. Rep. (CCH) P27, 088 (S.D.N.Y. 1993).*

n66 Id. at 26, 370.

n67 Id. at 26, 383.

n68 Id. at 26, 385.

n69 Id. at 26, 391.

n70 Id. at 26, 395.

n71 "The hypothetical average station will find the blanket license somewhat less expensive than the per-program license, unless the station undertakes to clear some amount of its programming either by source or direct licensing, or by other methods, all of which involve their own costs. Under these circumstances, we are unlikely to see such a rush of stations seeking to utilize this license as to impose undesirable burdens and inefficiencies on the functioning of the music license market." Id. at 26, 392 (emphasis added).

n72 This "mini-blanket" was actually part of Dolinger's original decision. However, a subsequent district court disallowed Dolinger's commercial license as beyond the wording of the 1950 *Consent Decree. United States v. ASCAP (In re Capital Cities/ABC, Inc.), 157 F.R.D. 173, 204 (S.D.N.Y. 1994).*

n73 Frequently Asked Questions About Licensing, at http://www.ascap.com/licensing/licensingfaq.html (last visited Feb. 22, 2001).

n74 Id.

n75 Id.

n76 The applicants, Salem Media and New England Continental Media, included 429 local radio stations that broadcast a largely religious format featuring mixed talk and music. They argued that music use in their station group was substantially below the all-music format of most radio stations and pressed for a "genuine choice" in a per program

alternative. The applicants acknowledged that ASCAP's offered blanket fee, 1.615 percent (which was based on net advertising revenue), was reasonable. However, the applicants contended that the per-program fee of 4.22 percent was useful only to a station that used music in 33 percent or less of its programming. They felt that the per program license fee to their member stations should reflect a true percent equivalent for daily music usage for their particular station group, as in Dolinger's decision. However, the application of the equivalence formula was rejected in district court, which found that the station group was not typical of the radio group as a whole and not entitled to a separate license. *United States v. ASCAP (In re Salem Media of California, Inc.), 902 F. Supp. 411 (S.D.N.Y. 1995);* see also *United States v. ASCAP (In re Salem Media of California, Inc.), 981 F. Supp. 199 (S.D.N.Y. 1997).*

n77 Publicly available information for webcaster licenses for ASCAP and BMI are found at http://www.ascap.com/weblicense/webfaq.html and http://www.bmi.com/iamalwebcaster/faq.asp, respectively (last visited Feb. 22, 2001).

n78 AFJ2 Memorandum, supra note 7, at 24-25.

n79 AFJ2, supra note 6.

n80 AFJ2 Memorandum, supra note 7, at 32 (emphasis added).

n81 See *BMI v. CBS, supra* note 53.

n82 AFJ2 Memorandum, supra note 7, at 26.

n83 AFJ2, supra note 6, at 6; AFJ2 Memorandum, supra note 7, at 29.

n84 Among others, classifying factors include nature and frequency of performances, ASCAP's administration cost, competition among licensees, and licensee revenue source. AFJ2, supra note 6, at 5-6.

n85 *Id. at 5.*

n86 *Id. at 11.*

n87 Although AFJ2 does not specify it, program counts and proportions can be weighted by advertising revenue, which is the instrument upon which licenses are based.

n88 AFJ2, supra note 6, at 10.

n89 A clause against discrimination in Section IV(C) may be applicable to customer discrimination, program discrimination, or both. ASCAP is enjoined from "entering into, recognizing, enforcing, or claiming any rights ... of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated." *Id. at* 7.

n90 The original amount of program revenue can be restored by adjusting the program/blanket multiple from 1.33 = 1/.75 to 1.5 = 1/.67

n91 *United States v. ASCAP, 1960 Trade Cas. (CCH) P69, 612 (S.D.N.Y. 1960).*

n92 The ASCAP royalty pool is divided over sampled performances that are weighted based primarily on broadcast type, time of day, and usage category (feature, background, theme, advertising, and promotional). The weights assigned to different music uses are based upon judgments of relative worth that have no comparable market benchmarks. The ratio of most valued (i.e., feature) to least valued (i.e., commercial) music is 1:1 in the U.K., 3:1 in France, 4.5:1 in Germany, and 33.3:1 at ASCAP. Holden, supra note 47.

Because of the difficulty in assessing composer's investment and opportunity costs, a true regulatory price for musical compositions could probably not be determined .... The investment in musical compositions, however, cannot be estimated accurately .... Even if the investment could be assessed, however, a fair rate of return, or opportunity cost, for composers could probably not be gauged because of the difference in quality and popularity of various musical compositions.
John Cirace, CBS v. ASCAP: An Economic Analysis of a Political Problem, *47 FORDHAM L. REV.* 277, *305 (1978).*

n93 See *United States v. ASCAP (In re Karmen), 914 F. Supp. 52 (S.D.N.Y. 1996); United States v. ASCAP (In re Salem Media of Cal., Inc.), 739 F. Supp. 177 (S.D.N.Y. 1990).*

n94 "The Department has been unable to identify any principled way to evaluate whether the changes are appropriate and therefore has almost never objected to the changes. The requirements ... thus impose costs on ASCAP (and consequently its members), on the Department, and on the Court, but provide little if any protection to members. Yet ironically, when members do object to ASCAP's distribution practices, ASCAP frequently invokes the Department's review of its formula and rules as demonstrating that its diistribution practices are fair and appropriate." AFJ2 Memorandum, supra note 7, at 41-42.

n95 Id. at 42.

n96 "Surveying the fluctuations in the amount of music used by a network over time provides an adequate proxy by which to gauge whether the significance of music to network programming has changed relative to prior years; assuming all other factors remain constant, the direction in which a network's music use has headed should chart the course for the music licensing fees owed to ASCAP." *United States v. ASCAP (In re Capital Cities/ABC, Inc.), 831 F. Supp. 137, 156 (S.D.N.Y. 1993).* "It appears to the Court that a formula that factors into the calculation of a royalty ... the changes in both the levels of gross income earned by a network and the degree to which music is used by a network, provides an approach that addresses many of the concerns raised by the parties." *Id. at 158.*

n97 To a degree, some additional savings may be made possible by reducing overheads.

n98 *United States v. ASCAP (In reTurner Broad. Sys., Inc.), 782 F. Supp. 778 (S.D.N.Y. 1991),* aff'd, *956 F.2d 21 (2d Cir. 1992).*

n99 AFJ2, supra note 6, at 13-14.

n100 AFJ2 Memorandum, supra note 7, at 9 n.10 (emphasis added).

n101 A monopoly in performance rights, the Performing Rights Society in the U.K. shares administrative costs with the Mechanical Copyright Protection Society and most recently retained 16.9 cents from every paid out pound. PRS Year End Results 1999, at http://www.prs.co.uk/prs.nsf/sitepages/press_resuls99 (last visited Feb. 22, 2001). The organization has a long run target of 14.5 percent. In Germany, GEMA economizes by collecting royalties for both performance rights and mechanical reproductions.

Michael O'Neill
Chief Executive Officer

The Honorable Tom Marino
U.S. House of Representatives
Washington, DC 20515

June 19, 2014

Re: Music Licensing

Dear Congressman Marino:

First let me again thank you and the Subcommittee for the privilege of speaking to you on June 10 on the important subject of music licensing reform. On behalf of BMI's 600,000 songwriters and publishers, I must express our appreciation of the Subcommittee's concern to make sure that the necessary legal and regulatory changes are made. It is critical that we have a healthy system of compensation for our writers' and publishers' contribution to American culture in the digital age.

At the conclusion of last Tuesday's hearing, perhaps because the terms had been used repeatedly at the hearing, you asked witnesses, if they chose to do so in writing after the hearing, to *"tell me what your interpretation is of a fair market compared to a free market."* Please allow me to respond on behalf of BMI.

In my written and oral testimony, I stressed that songwriters and publishers should be paid *fair market value* for their efforts, as compensation for when their works are performed publicly and also whenever reproductions are made (the so-called mechanical right). I used the phrase "fair market value" according to its classic definition: the price at which an asset passes from a willing seller to a willing buyer. *See* Barron's Dictionary of Finance and Investment Terms 245 (9th ed.).[1] Copyright law creates property rights for songwriters, and songwriters should be allowed to license their rights to music delivery services who want to make use of those property rights at whatever prices the services are willing to pay, without any subsidy and without governmental price controls.

In our economy, most property transactions take place in the private sector, in the market. When there are no price controls or government regulators setting the price, I would say that buyers and sellers are transacting in the *free market.* The best way to determine the fair market value of any property is what real buyers actually pay real sellers in the free market. As you have heard, BMI's prices are subject to determination by a federal district court (acting as a "rate court") tasked with setting a "reasonable" price, which the courts have equated with fair market

[1] The definition in full reads, "price at which an asset or service passes from a willing seller to a willing buyer. It is assumed that both buyer and seller are rational and have a reasonable knowledge of relevant facts."

BMI

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value. But the court can only attempt to estimate fair market value, because a court-dictated price is—by definition—not one that is determined in the free market by actual buyers paying actual sellers.

As I testified, today some publishers want to negotiate with digital music services in the free market to set the prices for their songs without the constraint of BMI's heavily regulated environment. If permitted to do so, they will be able to achieve fair market value without the need for the court to make any estimate. In my testimony, I advocated modifying BMI's consent decree so that individual publishers can make use of the free market to set prices to digital music services where they think it efficient to do so, while still using BMI (and its rate court) where single-publisher transactions would be inefficient.

More generally, BMI believes that songwriters deserve fair market value for every use of their music. Copyright law should embody that principle, and any regulation of BMI should also be calibrated to further that goal.

Thank you again for the care you are taking with this important issue for both music creators and the American listening public.

Sincerely,

Michael O'Neill

cc: Hon. Howard Coble, Chairman
Hon. Jerrold Nadler, Ranking Member
Members, Subcommittee on Courts, Intellectual Property, and the Internet
Joe Keeley, Chief Counsel
Olivia Lee, Clerk

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June 23, 2014

The Honorable Howard Coble
Chairman
Subcommittee on Courts, Intellectual Property
& the Internet
Washington, DC 20515

The Honorable Jerrold Nadler
Ranking Member
Subcommittee on Courts, Intellectual Property
& the Internet
Washington, DC 20515

Dear Chairman Coble and Ranking Member Nadler,

I appreciated the opportunity to testify before the Subcommittee regarding music licensing on June 10. I am transmitting two items for inclusion in the hearing record in response to questions raised by members of the Subcommittee.

At the close of the hearing, Vice Chairman Marino asked witnesses to provide for the record their interpretation of a "fair market compared to a free market." I am pleased to respond on behalf of the NMPA's music publisher members and their songwriter partners who have been denied the opportunity to pursue their rights in a free or fair market.

During the hearing some members asked me to expound on the implication in my testimony that the value of the music publishing industry has been significantly undercut as a result of government regulation. NMPA recently undertook an analysis of confidential financial data provided by our music publisher members. Based on this data, we were able to quantify the current size of the American music publishing industry as well as estimate the impact that government regulation has had on songwriters and music publishers. I have enclosed a one-page summary of NMPA's findings that I ask be included in the hearing record. We welcome the opportunity to discuss our methodology with the Subcommittee members and staff.

Thank you again. NMPA looks forward to working with the Subcommittee as it continues to review our nation's copyright law.

Sincerely,

David M. Israelite
President & CEO

cc: Members, Subcommittee on Courts, Intellectual Property, and the Internet
Joe Keeley, Chief Counsel

Enclosures: Response to Marino QFR
One-page Summary of Publishing Industry Valuation

Response to Question for the Record from Vice Chairman Tom Marino
Submitted by David Israelite
President and CEO
National Music Publishers' Association

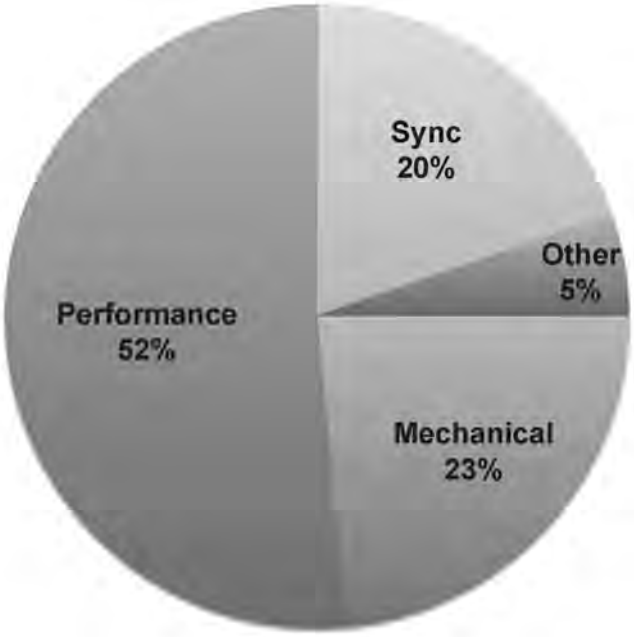
Q: "tell me what your interpretation is of a fair market compared to a free market."

The term "free market" means that individuals and companies can negotiate the terms of an agreement to exchange goods, services, or property – including intellectual property – free from government regulation or price controls. Importantly, either party can walk away from negotiations if they cannot reach an agreement that they believe advances their interests. Neither party is compelled by law to trade with one another; they do so because doing so benefits both parties involved in the transaction. This stands in contrast to the current compulsory license system contained in section 115 and the requirements contained in the Department of Justice consent decrees that govern ASCAP and BMI.

In my view, the term "fair market" is somewhat of a misnomer. The only true "fair market" is a "free market" in which the government is not involved. In the context of the discussion on music licensing, however, the term "fair market" is often used to describe the royalty rates that ought to be paid to rights holders in an otherwise regulated marketplace. Appropriate benchmarks from the free market should be the only evidence considered to accurately approximate terms that a willing buyer and willing seller would agree upon.

NMPA 2013 Music Publishing Industry Data

Music Publishing Industry 2013 Total Revenue:
$2,206,204,963



Estimated Value Lost Due to Government Regulation:
$2,312,798,524

Estimated Industry Free Market Value:
$4,519,003,487

TELEVISION MUSIC LICENSE COMMITTEE, LLC

July 8, 2014

Representative Tom Marino
Vice Chairman, Subcommittee on Intellectual Property
410 Cannon House Office Building
Washington, DC 20515

Dear Representative Marino:

This letter and the attached enclosure are in response to your invitation to witnesses attending the June 10, 2014 Hearing on Music Licensing to submit for the record comments concerning the differences between "free market" and "fair market value." Based on the testimony during the hearing, I thought the question was fair and thoughtful and deserves a reply beyond my personal expertise. I therefore requested assistance in preparing a response from a well-known economic expert, Adam Jaffe. Professor Jaffe has studied the workings of the music marketplace in depth. In that connection, he has served as an expert economist on behalf of music performance rights licensees in both antitrust and federal rate-setting proceedings. Professor Jaffe has also testified before this Subcommittee on patent policy reform.

His report includes a definition of what the term "free market" means and what government involvement is appropriate where there are "free market failures." His paper also includes discussions of the terms "fair market" and "willing buyer/willing seller" as used generally in the music licensing context and the relationship of copyright law with the current music licensing system. He concludes with a brief analysis of the experience with the current ASCAP and BMI Consent Decrees and a brief description of what might create a competitive environment for local television licensing.

In my view, any music copyright legislation should focus on allowing individual creators, without the influence of collectives or other powerful media intermediaries, to negotiate directly with the individual users of music at a time when the user can legitimately decide to use or not use the music.

Thank you very much for the opportunity to testify and respond on behalf of the local television industry. We would be happy to answer any further questions you might have.

Willard Hoyt

Willard Hoyt
Executive Director, Television Music License Committee, LLC

1483 York Avenue, #20623, New York, NY 10075 Phone: 212.308.9040
www.televisionmusic.com or www.tvmlc.com

SONGWRITERS GUILD OF AMERICA, INC.
5120 Virginia Way, Suite C 22
Brentwood, Tennessee 37027

Written Statement of the Songwriters Guild of America, Inc. ("SGA") for the hearing record of the U.S. House of Representatives Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet, June 10, 2014 hearing on *Music Licensing Under Title 17, Part One.*

I. INTRODUCTION

A. SGA

SGA is the oldest and largest U.S. national organization run exclusively by and for the creators of musical compositions and their heirs, with approximately five thousand members nationwide and over eighty years of experience in advocating for music creator rights on the federal, state and local levels. SGA's membership is comprised of songwriters, lyricists, composers and the estates of deceased members. SGA provides a variety of administrative services to its members, including contract analysis, copyright registration and renewal filings, termination rights notices, and royalty collection and auditing, to ensure that songwriters receive fair and accurate compensation for the use of their works. SGA takes great pride in its unique position as the sole untainted representative of the interests of American and international music creators, uncompromised by the frequently conflicting views and "vertically integrated" interests of other copyright users and assignees.

B. General Views Concerning the Subcommittee's Examination of Music Licensing Issues

SGA is extremely gratified by, and supportive of, the efforts of the Subcommittee in holding this hearing to examine Music Licensing under Title 17 of the U.S. Code at this crucial time of change and upheaval throughout the American and global music communities. The accelerating shift to digital distribution as the overwhelmingly preferred consumer method of accessing music has created enormous new challenges for songwriters and composers. Moreover, the ability of songwriters and composers to support themselves through income gleaned from the public consumption of their musical works has been deeply compromised, particularly by the continued, rampant theft of musical works by self-proclaimed Internet "pirates" and the failure of licensed digital sources of music to pay fair compensation to music creators at equitable, market value rates. These problems must be addressed if the American professional music creator community is to survive and continue in its vital role as one of the great sources of this nation's cultural advancement and global influence.

II. SGA's Principal Areas of Concern

SGA has identified four principal areas of greatest concern in regard to adequate protections for composers and lyricists in the licensing context. These are the indispensible needs for:

(A) fair market value compensation for the use of musical works;

(B) complete transparency throughout the licensing, use and payment process;

(C) full and equal representation of music creator interests in the management of any organization(s) legislatively or administratively created as so-called "centralized licensing" agents, and

(D) the establishment of a stable and secure digital marketplace in which the theft of musical works is diminished to a level at which commercial interests no longer have to compete against a black market economy, the rates for which are set permanently at "free."

A. Fair, Market Value Compensation for the Use of Musical Works

SGA is in accord with the views of the Performing Rights Organizations ("PROs") and others expressing the idea that the governmentally imposed consent decrees to which the PROs remain subject are severely outdated, crippling the ability of the PROs to establish fair, market value rates for the performance of musical compositions in digital environments on behalf of music creators. SGA is pleased about the U.S. Department of Justice, Antitrust Division's, recent announcement that it is opening up a review of the ASCAP and BMI consent decrees. SGA strongly believes the consent decrees need to be overhauled in ways that make it possible for American and international music creators to realize fair market compensation for the use of their works, free from the artificial devaluation of royalty rates that result from strict judicial interpretation of decades-old decrees formulated for the pre-Internet and digital distribution era.

By way of example, the untenable results of recent rate-setting decisions concerning the digital music streaming company Pandora, the entire business model of which is built upon the exploitation and distribution of musical compositions at rates far below market value, stand as a stark example of the need to address the market inequities that flow from the consent decrees before further, irreparable harm is caused to the American music creator community and to American culture.

Moreover, SGA also stands side by side with its music community colleagues in support of the *Songwriter Equity Act* currently pending in before both houses of Congress (S. 2321, H.R. 4079). This Act would direct the Copyright Royalty Board to utilize the "willing buyer – willing seller" ("WBWS") standard in setting future royalty rates pursuant to its oversight mandate under the Copyright Act. SGA believes that the WBWS formula would likely lead to far more equitable results in rate setting for the use of musical compositions, including a long overdue increase in the current statutory mechanical royalty rate. That rate has for a decade stagnated at the level of 9.1 cents per physical or digital copy made and distributed even as inflation and other devaluing factors have advanced at alarming rates.

However, we would also add that we believe that sound recording owners, as well as the creators and owners of musical compositions, deserve fair market value for their works, and the pitting of sound recording owners versus creators and owners of musical compositions is based on a false presumption that allows the distributors of

music to avoid paying fair market rates for both, with songwriters and composers suffering deeply unfair financial discrimination as a result.

SGA is a founding member of the Musical Creator North America coalition ("MCNA"), and as such, is pleased to announce that MCNA's "Study Concerning Fair Compensation for Music Creators in the Digital Age" will be published soon. This study, in its final stages of review by author Pierre-E Lalonde, will shortly be available widely on the Internet and in printed form. SGA hereby respectfully requests permission from the Subcommittee to be able to submit a copy of this study upon its publication.

B. Complete transparency throughout the licensing, use and payment process.

For close to two decades, American music creators have been assured again and again by leaders of the technology community, members of the marketplace of copyright licensees, and by its own music publisher partners, that the great benefit of the digital age for songwriters and composers is the promise of "transparency." The brave new world of immutable ones and zeros, it has been pledged to creators, will at last put an end to decades of obfuscation and uncertainty concerning the accurate payment and distribution of royalties. Unfortunately, these promises of full disclosure and access for creators in the tracking of copyright uses and the concomitant payment of royalties have so far gone largely, if not completely, unfulfilled. The issue of mandatory transparency concerning intellectual property licensing and transactions,

in fact, is one the Subcommittee should consider as part of its review of music licensing issues. Any new or modified licensing system without a requirement of complete transparency will still leave songwriters at an impossible disadvantage.

For the purposes of this hearing, SGA wishes to point out two areas of music licensing activity in the digital marketplace that currently require especially intense scrutiny if promised levels of transparency are ever to be realized.

The first category of activity concerns the so-called "pass through" mechanical license established under section 115 of the Copyright Act (through provisions of the Digital Millennium Copyright Act), whereby mechanical licensees of music (such as record companies), holding licenses permitting the manufacture and distribution of physical copies of sound recordings embodying musical compositions, may "pass through" such licenses to digital distributors of the sound recordings. This creates a situation in which the creators and owners of musical compositions have no privity of contract with online music distribution giants such as Apple iTunes. Therefore, they must rely on sometimes adversarial record company "intermediaries" for the monitoring and payment of royalties earned via online download usage. To the knowledge of SGA, not a single royalty audit of online distributors of music by the creators and owners of musical compositions has ever taken place due to this licensing anomaly. Under such circumstances, music creators simply do not have a mechanism under which they can verify that proper monitoring and payment of

royalties by online music download distributors is taking place. This manifestly unfair and opaque system should be quickly and decisively rectified.

The second category regarding the lack of transparency is even more troubling to the music creator community, as it concerns a movement away from the important tradition of collective performing rights licensing through the PROs that has benefited and given protection to the community of American music creators for over one hundred years. The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions causes grave concern to the music creator community because of the utter lack of transparency in the direct licensing process.

Since the establishment of ASCAP in 1914, music creators in the United States have been able to rely upon the PROs for licensing, collection and distribution services in the performing rights context pursuant to a one on one relationship between each creator and his or her chosen PRO. This system has not only provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO, but has also fostered the development of a robust partnership of advocacy for music creator rights between SGA and the PROs over the past eight decades.

Music publishers, however, citing the unfairly stifling effects of the consent decrees on the ability of PROs to negotiate fair market royalty rates for the performance of

musical works in the digital era, have recently begun in earnest to consider following through on their announced intentions to withdraw their catalogs from the PROs and to license performing rights directly. While, as noted above, SGA fully supports efforts to revamp the consent decrees in ways that will solve the fair market royalty rate-setting problem, it cannot and does not support a solution that will allow music publishers to partially or fully withdraw their catalogs, including the rights of both American and foreign music creators from the PROs, without formal commitment to complete transparency as well as to music creators being granted the full value of their rights.

This complex issue was recently the subject of important correspondence between SGA and its international partners in the MCNA and the European Composers and Songwriters Alliance ("ECSA") on the one hand, and the two largest PROs - ASCAP and BMI - on the other. It is SGA's firm belief that the views expressed in those written exchanges are extremely relevant and important to the Subcommittee's examination of Music Licensing issues. SGA will separately submit copies of this correspondence to the Subcommittee for inclusion in the hearing record. The content of this correspondence is self-explanatory as to the problems and issues that have arisen as a result of the accelerated movement by music publishers toward the direct licensing of performing rights.

Moreover, it should also be noted that despite announcements by some major music publishers that they may continue to utilize the services of the PROs to distribute

royalties to music creators directly, even following the withdrawal of their catalogs from the PROs, not a single such publisher has announced that it intends to share with those PROs full and complete data concerning the terms of its licensing arrangements, including fees, advances and related contractual benefits. This lack of transparency will inevitably result in music creators being denied the full value for their rights.

C. Equal representation of music creator interests in the management of "centralized licensing" organizations

SGA looks forward to the opportunity to consider and comment upon any proposals that may be forthcoming from the music and recording communities for the establishment of a more streamlined, centralized and potentially combined music and sound recording licensing system. SGA can state with certainty that in considering the merits of any such proposals, it shall be guided by many of the same essential principles that it expressed in 2006 regarding the consideration of the "SIRA" legislation. These include the sine qua non for music creator community support, namely the need for equal creator representation on the governing boards and any dispute resolution bodies of any designated licensing agent or agents. In addition, SGA will insist that prohibitions against the surrender of rights of creators through "letters of direction" will be included in any proposals. This will ensure that the rights granted to creators are not easily vitiated by the imposition of marketplace pressures by copyright administrators in inevitably superior bargaining positions. SGA reserves its right to identify other essential components of any such proposed

licensing systems, including a bar against unchecked spending authority by any designated agent or agents; transparency in providing data (at no or minimal cost) to songwriters about collections and disbursements; timely distribution of royalties; fair distribution to creators of unclaimed funds; and to express those thoughts and conditions in future comments.

D. Establishment of a stable and secure digital marketplace where the theft of musical works is diminished to a level at which commercial interests no longer have to compete against "free"

The looting of musical works on the Internet has continued nearly unabated over almost two decades, during which time the income of the music and recording industries (and especially of individual music creators and recording artists) have been diminished by as much as two-thirds. Consideration of the viability of new licensing systems and rate setting mechanisms without addressing the drastic need to curtail online digital theft of musical works is, in SGA's view, a lost opportunity.

Moreover, accepting the notion that licensed music distributors and services must be permitted to artificially depress royalty payments because they must compete against black market free goods stands the principles of fairness and the sanctity of property ownership on their heads. In considering the viability of any potential licensing solutions considered by the Subcommittee, there must be recognition that unless additional systems and laws are put in place to control or eliminate theft, no licensing scheme can possibly address the royalty needs of the music creator community.

SGA would like to emphasize its support of the work of the U.S. Copyright Office regarding the potential development of a small claims court system to address the needs of individual music creators for an affordable means of rights enforcement. SGA looks forward to working with the Subcommittee and the Copyright Office to further the discussion of the small claims issue as an important component of curbing rampant online infringement of musical works.

Finally, it is SGA's understanding based upon its international relationships with music creator organizations around the world, that a movement toward reconsideration of an enhanced system of "private copying" royalties may soon be championed by such groups in the European Community and elsewhere. SGA assures the Subcommittee that it intends to keep a close watch on developments in this area, and will inform the Members of its views on the issue as soon as the matter becomes clearer as to its potential effects on the rights of American songwriters and composers.

V. CONCLUSION

SGA applauds the Subcommittee's efforts to examine and consider needed reforms in the music licensing area and looks forward to working with the Subcommittee in helping to shape a future in which the rights and incomes of music creators are fairly and equitably protected. SGA takes note that some of the organizations represented at the June 10, 2014 hearing have recently introduced the concept of doing away with

the mechanical licensing provisions under Section 115. This would be a momentous change of a one hundred year old licensing framework, complicated enormously by extreme levels of consolidation and vertical integration that have taken place and continues to take place throughout the recording, music publishing and music distribution sectors. While SGA fully supports the concept of allowing songwriters free access to the markets to negotiate the value of their creations, it would ask the Subcommittee to consider holding a separate hearing on this crucial issue alone, at which the independent music creator community will have the opportunity to address the full range of its concerns, including, but not limited to, issues related to conflicts of interest and transparency.

June 10, 2014

ATTACHMENT

Correspondence between SGA and its international partners in the Musical Creator North America Coalition and the European Composers and Songwriters Alliance and ASCAP and BMI

Music Creators North America
European Composer and Songwriter Alliance

October 18, 2012

Via Email and First Class Mail
Mr. John LoFrumento
Chief Executive Officer
ASCAP
One Lincoln Plaza, New York, NY 10023

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear John:

This request for information is submitted jointly by Music Creators North America (Music Creators NA) and the European Composers and Songwriters Alliance (ECSA), which have recently formed an alliance to protect and advance the rights of music creators throughout the United States, Canada and Europe. Together, Music Creators NA and ECSA represent national music creator organizations and their members from over thirty nations, all of which organizations operate independently and solely on behalf of music creators and their heirs.

As you are well aware, a situation has recently arisen that is causing enormous concern to music creators throughout the world. Multi-national and local US music publishers have begun expanding the practice of licensing US performing rights directly to copyright users, bypassing the US performing rights societies. We believe that it is at best unclear that such music publishers have the rights to do so, especially in regard to works already exclusively assigned to foreign societies by music creators, issues that we are fully investigating. Such direct licensing deals are completely opaque to the composer and songwriter community and in addition undermine the exclusive assignment of the performing right that Canadian, European and UK music writers vest in their PROs. Much of what we do know about these arrangements is based upon what has been gleaned from the transcripts produced in the DMX litigations, which revealed through sworn testimony that certain music publishers may have received substantial, up-front financial benefits (among other advantages) that were neither reported to nor shared with their affiliated songwriters and composers in that instance, and potentially in many others.

It is our further belief that the DMX deal in particular --and direct performing rights licensing deals in general-- threaten to seriously diminish (and have already diminished) the value of performing rights in the US, causing the loss of tens of millions of dollars in US performing rights revenues to music creators. Our concern over this trend is heightened by our understanding that the Sony/EMI Music

5120 Virginia Way, Suite C22 Brentwood, TN 37027 Phone: (615) 742-9945

Publishing Group, whose combined catalogs we believe represents well over thirty percent of the US music publishing market, has apparently informed the US PROs (including ASCAP) of its intention to remove all new media rights from the societies starting on January 1, 2013. We are extremely concerned that this action alone will financially eviscerate the ability of the PROs to continue functioning as the guardians of songwriter and music publisher performing rights interests as they have for the past full century. If the vertically integrated broadcasting/music copyright entity Universal Music Publishing Group were to follow suit, we fear that the US performing rights collective licensing system -- established in large part to provide security to music creators -- could completely collapse.

We are aware of the complexity of competition laws in the US, and that certain sensitivities must be observed in ensuring that the antitrust laws are properly observed. We are, in fact, carefully examining those laws and their potential application to the formulation of solutions to the issues we face. Under any circumstances, however, it is clear that no law exists to prevent the disclosure of basic factual information concerning important aspects of the direct licensing issue, including the potential effect of direct licensing on (i) the rights and incomes of music creators in the US and elsewhere; (ii) the ability of the US PROs to function effectively as the guardians of US performing rights for creators; and, (iii) the ability of music creators to achieve the transparency necessary to properly oversee the licensing of their rights and the collection and distribution of their royalties.

The following questions request information from ASCAP regarding how the removal of certain rights from the organization, for the purpose of direct licensing by music publishers, may affect the organization and the music creators affiliated with it.

1) Can you provide a list of the direct licensing agreements already completed, or anticipated, that have resulted in the removal of rights from ASCAP in the last five years? Can you provide an estimate of what percentage of ASCAP's repertoire has been affected by these deals? How will this affect the ability of ASCAP to effectively operate as the representative of US performing rights on behalf of music creators, especially if the trend continues?

2) What is ASCAP's view of how the practice of direct licensing will affect the rights and incomes of music creators in the US and abroad? More specifically, how might direct licensing of performance rights by music publishers rather than ASCAP affect transparency—that is, the ability of music creators to monitor the licensing of their rights and the proper and accurate payment of royalties? Does ASCAP have any ability to assist or represent its music creator members in securing the information they need from their respective music publishers regarding the details of any direct performing rights licensing agreements secured by the publishers, so that proper royalty payments may be monitored by creators and inappropriate cross collateralizations against advances can be avoided or corrected? And how, if at all, does ASCAP intend to communicate to its music creator members information

concerning future deals involving the direct licensing by music publishers of performing rights now administered by the organization?

3) Do ASCAP's affiliation agreements with its music creator members and foreign societies impact the ability of music publishers to directly license performing rights in a work on behalf of individual music creators, or the ability of such music creators (or heirs) to demand that ASCAP license rights and collect royalties tied to the "writer's share" of such work on their behalf, whether or not a music publisher licenses their share of such work directly?

4) What policies or procedures are in place to prevent an ASCAP music publisher board member from remaining on the board when the company he or she represents removes, or proposes to remove, a substantial portion of works or of specific rights in such works from the society, giving at least the appearance of a conflict of interest with respect to both ASCAP and its music creator affiliates? Is there any prohibition in place that would prevent ASCAP from providing independent legal counsel for the music creator members of its board, the specific role of which would be to ensure that they are fully apprised of the legal rights of music creators on issues of conflict with publishers?

ASCAP is a signatory to the CISAC Professional Rules for Music Societies approved earlier this year, which stipulates as an important, overarching principle that every CISAC organization must "conduct its operations with integrity, transparency and efficiency." It is our concern that ASCAP's ability to fulfill these obligations may be deeply compromised by the recent actions of music publishers regarding the direct licensing issue, and that the answers to the above questions will assist the music creator community in understanding the facts behind the current challenges presented by the direct licensing of performing rights in the US. We are hopeful that the framing of solutions will flow from a greater understanding of the full circumstances surrounding these serious problems.

We look forward to receiving the requested information and any additional thoughts you may have on the matters raised above, and to discussing them with you. We would greatly appreciate your substantive reply to this letter prior to October 31, 2012, and we thank you for your kind assistance.

With regards,

Alfons Karabuda
Executive Chairman: ECSA
c.c. Paul Williams, ASCAP

Rick Carnes
Co-Chair: Music Creators NA

5120 Virginia Way, Suite C22 Brentwood, TN 37027 Phone: (615) 742-9945

ECSA Members

http://www.composeralliance.org/article,en,6,members_&_links.html

Music Creators North America Members
Songwriters Guild of America
Songwriters Guild Foundation
Songwriters Association of Canada
La Société professionnelle des auteurs et des compositeurs du Québec
Screen Composers Guild of Canada

ASCAP

John A. LaFrumento
Chief Executive Officer

January 10, 2013

Via Email
<rickcarnes@songwritersguild.com>
Rick Carnes
Co-Chair,
Music Creators North America

Via Email
<alfons.karabuda@skap.se>
Alfons Karabuda
Executive Chairman,
European Composer and Songwriter Alliance

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear Rick and Alfons:

Please accept my apologies for the delay in responding to your letter of October 2012. Although your letter, as entitled, seeks information on direct licensing, your letter also seeks information regarding the withdrawal of rights with respect to certain "New Media Transmissions." As the latter topic was scheduled for discussion at ASCAP's recent October and December 2012 Board meetings, I was somewhat constrained in replying until that topic had been fully vetted. Accordingly, in order to give you a complete reply, we waited until after the conclusion of those meetings.

At the outset, let me say that ASCAP embraces your organizations' missions to represent music creators and their heirs; and second, that I do regret the confusing nature of recent press coverage concerning both the issues of direct licensing and the withdrawal of certain "New Media" rights. I hope that this letter may serve to dispel some of this confusion as well as clarify ASCAP's position.

Constraints on ASCAP vis-à-vis Direct Licensing by U.S. Publishers

ASCAP devotes itself to achieving the most efficient, cost effective means of licensing and distributing the maximum royalties we can to our members. Indeed, ASCAP has achieved an administrative operating ratio of 11%, one of the lowest of any performing right organization ("PRO") in the world; and this achievement is despite certain constraints imposed on ASCAP by its consent decree or the Amended Second Final Judgment ("AFJ2"). Pursuant to Article IV of AFJ2, "ASCAP is hereby enjoined and restrained from: . . . (B) Limiting, restricting, or interfering with the right of any member to issue, directly or through an agent other than a performing rights organization, non-

AMERICAN SOCIETY OF COMPOSERS, AUTHORS & PUBLISHERS
ASCAP Building, One Lincoln Plaza, New York, NY 10023
212.621.6221 Fax: 212.721.2955 E-Mail: jlafrumento@ascap.com
Web Site: http://www.ascap.com

exclusive licenses to music users for rights of public performance." In short, ASCAP may not interfere with any members' choice to license directly. Moreover, as you know, the power to issue a direct license, here in the United States, is typically held by a publisher, either by reason of that publisher's ownership of the copyright in the musical work, or by reason of an administrative or other contractual relationship giving that publisher legal control over the licensing of the underlying musical work.

ASCAP is not privy to many or most of the terms of the contracts between publishers and their administered or controlled publishers and/or writers, nor does ASCAP, as a third party to such contracts, have any standing to enforce rights in these contracts. ASCAP is only informed as to what entity is the controlling or administering publisher and the works which fall under the contract.

DMX Direct Licenses

With respect to the direct licenses which certain ASCAP and BMI publishers entered with the entity now known as DMX, ASCAP shares in the frustration that certain publishers openly decided to license with DMX at rates, which had the net effect of lowering the rate which ASCAP (and BMI) now receive for a blanket license to their respective repertories, not otherwise directly licensed. Nonetheless, the decision by certain publishers to license directly was their own to make, and one with which ASCAP could not interfere. Both BMI, and then later ASCAP, sought in rate court to obtain a higher rate than DMX was willing to pay either of them, in light of the direct licenses. Neither BMI nor ASCAP was able to prevail. Instead, DMX's "rate," to which certain publishers agreed, was ruled by both rate courts as the appropriate benchmark; and, the Second Circuit for the U.S. Court of Appeals confirmed those rulings.

Further, because of the requirement in our respective consent decrees that US PROs, like ASCAP and BMI, license similarly situated users "similarly," the outcome of the DMX case has required that ASCAP and BMI offer lower rates to all suppliers of background/foreground music. Whether those publishers which engaged in direct licensing proceeded to distribute those royalties to their contractual partners, administered publishers and writers, is a contractual matter between those parties to which ASCAP is not privy and does not have standing to inquire. Notwithstanding this lack of insight, we believe, that overall, royalty receipts in aggregate both to ASCAP and BMI, and the direct licensees, from all these types of services will be lower going forward.

Constraints vis-à-vis DMX and foreign writers

On the specific issue of whether DMX could obtain from BMI's publishers the right to license directly foreign affiliated writers' rights, the BMI DMX rate court ruled that BMI and DMX could rely on a publisher's representation that it held those rights. ASCAP's trial followed the decision in BMI's trial, and thus, ASCAP was legally constrained in its ability to challenge those findings.

Withdrawal of New Media Transmission Rights

The act of direct licensing repertory to a particular music user should be considered separate and apart from the act of withdrawing certain rights in repertory for certain categories of music users. Here, I can confirm that ASCAP's Board, comprised of half writers and half publishers, has allowed for the possibility of the withdrawal of certain digital public performance rights to permit certain types of non-public performance rights to be licensed or "bundled" in tandem. I must emphasize to you these reflect a narrow category of rights for a defined set of music users. These categories of New Media public performance rights, – if withdrawn from ASCAP, include those New Media services – which require, in addition to a public performance right: (1) a reproduction or mechanical license (e.g., Rhapsody, Spotify); (2) a license for the public performance of a sound recording (e.g., Slacker); (3) a synchronization license or other license associated with the underlying musical composition for short-form music videos and audiovisual content uploaded by users (e.g., YouTube); or, (4) a license to transmit music via a cloud locker type service (e.g., iTunes Match, Amazon Music).

ASCAP will continue to license and distribute royalties for the many prominent online and mobile services not included in these categories, including but not limited to long form, audiovisual streaming services, such as Netflix, Hulu, and Amazon VOD (i.e., video on demand). In addition, any "New Media Transmission" services that are operating under existing licenses with ASCAP will not be affected by the withdrawal until the expiration of their ongoing ASCAP licenses.

You have expressed concern that the "withdrawal of rights" will "*financially eviscerate the ability of PROs to continue functioning as the guardians of songwriter and music publisher performing rights interests*" (quoting your letter at page 2). At this point in time, it is important to emphasize here that overwhelmingly, the vast majority of ASCAP's nearly $1 billion in revenues – 98.5% or more - are not touched by these narrow categories for which New Media Transmission licensing rights were withdrawn or may be withdrawn. Moreover, any music user that is eligible for a "through to the audience" under ASCAP's consent decree is expressly precluded from the scope of rights that may be withdrawn. This means, by way of illustration, that ASCAP will continue to license and collect for all other public performance rights, including performances on radio, satellite radio, television, cable, and those mediums' activities online (i.e., the website and mobile platform activities of these broadcast radio and television stations, cable programs and cable operators) as well live performances and any New Media services not affected by the withdrawal of rights.

The policies and procedures applicable to the modification of an ASCAP member's grant of rights for certain New Media Transmissions are set forth in Section 1.12 of ASCAP's Compendium, available at http://www.ascap.com/members/~/media/Files/Pdf/members/governing-documents/Compendium-of-ASCAP-Rules-Regulations.ashx.

ASCAP also will continue to license and distribute royalties for all New Media services on behalf of members who have not withdrawn their works from the ASCAP repertory.

Constraints on Withdrawal of Foreign Affiliates in the U.S.

Lastly, as a result of the meeting of ASCAP's Board in December, an important point of clarification was added to Section 1.12 of the Compendium: with respect to foreign PRO members affiliated with ASCAP for the U.S., they will be presumed excluded from an exercise of withdrawal of rights for New Media Transmissions unless authority to the contrary is provided. The newly added text to the Compendium shall read that any ASCAP Member seeking to withdraw rights in a work in which a writer or publisher affiliated with a foreign PRO has an interest in that work "*may not withdraw that Member's or the member of the foreign PRO's rights in that work for New Media Transmissions, unless and until the foreign PRO member has complied with the rules of the foreign PRO applicable to its members to give effect to such a withdrawal.*" (Emphasis added).

Questions Posed

Your letter posed a series of four sets of questions. While it is my hope that much of what has been set forth above responds contextually, in large part, to your questions, we will endeavor to provide some more specific answers where we can.

Question Set #1
ASCAP cannot provide you with a list of direct licensing agreements "already completed" for the simple reason that unless they have been made public through court procedures or otherwise, such as was the case with certain ASCAP publishers which entered direct licenses with DMX, these agreements are confidential, proprietary arrangements between an authorized publisher and a music user. Thus, while ASCAP may be notified of a direct license, it is not at liberty to disclose its existence to the public.

You have asked what percentage of ASCAP's repertory has been affected and how it might affect the ability of ASCAP to operate effectively. As noted above, the vast majority of ASCAP's licensing activities and resulting in nearly $1 billion in revenues last year, or at present 98.5% of which, remain unaffected.

Question Set #2
You have asked what ASCAP's view is on the practice of direct licensing's affect on the rights and incomes of music creators in the U.S. and abroad, and its impact on transparency with regard to the payment of royalties. As noted above, and again here, the vast majority of ASCAP's licensing activities, and associated revenues will remain unaffected. To the degree that ASCAP can provide transparency for its members,who may have withdrawn rights for New Media Transmissions, ASCAP's Board has authorized ASCAP to offer "back office" services for processing any New Media Transmission royalties, which may have been directly licensed, using ASCAP's databases and interfaces that are intended to be as transparent as possible, and accessible directly by all members via their online ASCAP Member access accounts.

You have also asked whether ASCAP has the "ability to assist or represent its music creator members in securing the information they need from their respective music publishers regarding the details of any direct performing rights licensing agreements secured by publishers, so that proper royalty payments may be monitored by creators and inappropriate cross collateralizations against advances can be avoided or corrected?" (quoting your letter at page 2). As discussed above, ASCAP is not privy to the contractual relations between publishers and administered publishers and writers, including whether advances may or may not be cross collateralized and if so to what extent. Therefore, it follows that ASCAP would not be in a position to provide such information. However, ASCAP's Board has authorized ASCAP to offer "back office" processing services for the distribution of New Media Transmission royalties which may have been directly licensed by publishers. To the extent that ASCAP is asked to and does render such services, ASCAP intends to render them at the highest level of transparency as possible.

Question Set #3

You have asked generally about the affiliation agreements of foreign PRO creator members with ASCAP and to what extent it impacts the ability of presumably ASCAP music publishers to license performing rights directly on behalf of these creator members or allow these foreign PRO members to demand that ASCAP license their "writer's share," regardless of whether the ASCAP publisher seeks to license directly.

With respect to the issue of withdrawal of rights of foreign PRO members affiliated with ASCAP for the U.S. via their ASCAP publishers, based on exploratory discussions with several foreign PROs, ASCAP's Board decided that the most cautious approach was to adopt a presumption that such a withdrawal for a foreign PRO member by a U.S. publisher may not be effectuated unless supporting documentation is provided. As for the right of U.S. ASCAP publishers to license directly, this again remains a matter of contractual relations to which ASCAP is not privy. Moreover, as also discussed above, ASCAP is constrained by its consent decree from interfering in attempts by its members to license directly. This has been the case for decades now. In some cases, our publishers believe that a direct license may be the only opportunity a writer member has to have his or her creation exploited, and that is a choice reserved to these contractual parties. In any event, we cannot interfere with the exercise of the exercise of these rights by our members.

In this third group of questions, you have also asked whether ASCAP could insist on licensing a foreign PRO member's writer share – via ASCAP, and notwithstanding an effort by an ASCAP publisher member to license the publisher share directly. There are two answers to this. The first, as with many other questions that you have raised, rests on the precise contractual relation between the foreign PRO writer member and the U.S. publisher, and again, that is a relationship to which we are not privy. Presumably, if such a contractual relationship prohibited direct licensing, the parties to that contract could so inform ASCAP and we would notate our records accordingly. The second is how U.S. Copyright Law operates in this context. Unlike other jurisdictions, to the extent that a

Music Creators North America
European Composer and Songwriter Alliance

October 18, 2012

Via Email and First Class Mail
Del Bryant
President and CEO
BMI, Inc.
7 World Trade Center
250 Greenwich Street
New York, NY 10007-0030

Re: Request for Information Concerning Direct Licensing of Performing Rights

Dear Del:

This request for information is submitted jointly by Music Creators North America (Music Creators NA) and the European Composers and Songwriters Alliance (ECSA), which have recently formed an alliance to protect and advance the rights of music creators throughout the United States, Canada and Europe. Together, Music Creators NA and ECSA represent national music creator organizations and their members from over thirty nations, all of which organizations operate independently and solely on behalf of music creators and their heirs.

As you are well aware, a situation has recently arisen that is causing enormous concern to music creators throughout the world. Multi-national and local US music publishers have begun expanding the practice of licensing US performing rights directly to copyright users, bypassing the US performing rights societies. We believe that it is at best unclear that such music publishers have the rights to do so, especially in regard to works already exclusively assigned to foreign societies by music creators, issues that we are fully investigating. Such direct licensing deals are completely opaque to the composer and songwriter community and in addition undermine the exclusive assignment of the performing right that Canadian, European and UK music writers vest in their PROs. Much of what we do know about these arrangements is based upon what has been gleaned from the transcripts produced in the DMX litigations, which revealed through sworn testimony that certain music publishers may have received substantial, up-front financial benefits (among other advantages) that were neither reported to nor shared with their affiliated songwriters and composers in that instance, and potentially in many others.

It is our further belief that the DMX deal in particular --and direct performing rights licensing deals in general-- threaten to seriously diminish (and have already diminished) the value of performing rights in the US, causing the loss of tens of millions of dollars in US performing rights revenues to music creators. Our concern over this trend is heightened by our understanding that the Sony/EMI Music

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Publishing Group, whose combined catalogs we believe represents well over thirty percent of the US music publishing market, has apparently informed the US PROs (including BMI) of its intention to remove all new media rights from the societies starting on January 1, 2013. We are extremely concerned that this action alone will financially eviscerate the ability of the PROs to continue functioning as the guardians of songwriter and music publisher performing rights interests as they have for the past full century. If the vertically integrated broadcasting/music copyright entity Universal Music Publishing Group were to follow suit, we fear that the US performing rights collective licensing system -- established in large part to provide security to music creators -- could completely collapse.

We are aware of the complexity of competition laws in the US, and that certain sensitivities must be observed in ensuring that the antitrust laws are properly observed. We are, in fact, carefully examining those laws and their potential application to the formulation of solutions to the issues we face. Under any circumstances, however, it is clear that no law exists to prevent the disclosure of basic factual information concerning important aspects of the direct licensing issue, including the potential effect of direct licensing on (i) the rights and incomes of music creators in the US and elsewhere ; (ii) the ability of the US PROs to function effectively as the guardians of US performing rights for creators; and, (iii) the ability of music creators to achieve the transparency necessary to properly oversee the licensing of their rights and the collection and distribution of their royalties.

The following questions request information from BMI regarding how the removal of certain rights from the organization, for the purpose of direct licensing by music publishers, may affect the organization and the music creators affiliated with it.

1) Can you provide a list of the direct licensing agreements already completed, or anticipated, that have resulted in the removal of rights from ASCAP in the last five years? Can you provide an estimate of what percentage of ASCAP's repertoire has been affected by these deals? How will this affect the ability of ASCAP to effectively operate as the representative of US performing rights on behalf of music creators, especially if the trend continues?

2) What is ASCAP's view of how the practice of direct licensing will affect the rights and incomes of music creators in the US and abroad? More specifically, how might direct licensing of performance rights by music publishers rather than ASCAP affect transparency—that is, the ability of music creators to monitor the licensing of their rights and the proper and accurate payment of royalties? Does ASCAP have any ability to assist or represent its music creator members in securing the information they need from their respective music publishers regarding the details of any direct performing rights licensing agreements secured by the publishers, so that proper royalty payments may be monitored by creators and inappropriate cross collateralizations against advances can be avoided or corrected? And how, if at all, does ASCAP intend to communicate to its music creator members information

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concerning future deals involving the direct licensing by music publishers of performing rights now administered by the organization?

3) Do ASCAP's affiliation agreements with its music creator members and foreign societies impact the ability of music publishers to directly license performing rights in a work on behalf of individual music creators, or the ability of such music creators (or heirs) to demand that ASCAP license rights and collect royalties tied to the "writer's share" of such work on their behalf, whether or not a music publisher licenses their share of such work directly?

BMI is a signatory to the CISAC Professional Rules for Music Societies approved earlier this year, which stipulates as an important, overarching principle that every CISAC organization must "conduct its operations with integrity, transparency and efficiency." It is our concern that BMI's ability to fulfill these obligations may be deeply compromised by the recent actions of music publishers regarding the direct licensing issue, and that the answers to the above questions will assist the music creator community in understanding the facts behind the current challenges presented by the direct licensing of performing rights in the US. We are hopeful that the framing of solutions will flow from a greater understanding of the full circumstances surrounding these serious problems.

We look forward to receiving the requested information and any additional thoughts you may have on the matters raised above, and to discussing them with you. We would greatly appreciate your substantive reply to this letter prior to October 31, 2012, and we thank you for your kind assistance.

With regards,

Alfons Karabuda
Executive Chairman: ECSA

Rick Carnes
Co-Chair: Music Creators NA

ECSA Members
http://www.composeralliance.org/article.en.6.members_&_links.html

Music Creators North America Members
Songwriters Guild of America
Songwriters Guild Foundation
Songwriters Association of Canada
La Société professionnelle des auteurs et des compositeurs du Québec
Screen Composers Guild of Canada

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BMI

Del R. Bryant
President
Chief Executive Officer

December 2012

Dear Alfons and Rick:

Please excuse the delay in our response to your request for information dated October 18, 2012. The weather on the East Coast of the U.S. was particularly unfavorable during the week when our response was due, and I am afraid we were caught a little off guard by the severity of the impact in lower Manhattan where BMI's offices are located. I am pleased to be able to tell you that our New York offices are once again open for business, and that all of our New York-based employees are safe. We are doing everything we can to continue to serve our writers and publishers during the recovery.

Please also accept our sincere appreciation for your efforts in reaching out to us, and for your organization's careful and thoughtful consideration and diligence in trying to understand the situation in the U.S. relating to direct licensing and rights withdrawal that seems to be a popular topic for the trade press in recent weeks. Please understand that BMI takes very seriously its responsibility under the CISAC Professional Rules that you reference at the end of your letter, and welcomes the opportunity to try to explain its perspective on these matters.

Direct Licensing in the U.S.

As you have pointed out in your letter, competition law and the operations of the U.S. PROs differ from other territories. BMI operates under a Consent Decree (a complete and accurate but unofficial copy of which is attached hereto). Pursuant to Article IV(A) of the BMI Consent Decree, BMI cannot refuse to allow its members to enter into a non-exclusive direct license with a music user making direct performances to the public in the United States, and BMI's affiliation agreements (current forms of which are also attached) expressly set forth the right to enter into direct licenses and the responsibility of affiliates to notify BMI with respect thereto.

As you know, it is customary in the U.S. for songwriters to assign their copyrights to music publishers and/or to enter into co-publishing or administration agreements with music publishers. Pursuant to those agreements, the music publisher is usually authorized to license and administer the writer's interest in the musical work. In line with this custom, and consistent with BMI's obligations under its Consent Decree and the provisions of its affiliation agreements, it follows that BMI would recognize a direct license from a music publisher to a music user as valid for both the music publisher's own

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performing right share and the share of the writer(s) it represents. Since the music publisher, not BMI, is the licensor in the case of a direct license, the writer's share in the royalties from the exploitation of the work under the direct license would flow from the publisher and not from BMI, and royalty distributions would be governed by the provisions of the agreement between the writer(s) and the music publisher, not the writer's affiliation agreement with BMI.

As you also know, direct licensing in the U.S. is not a new phenomenon. Indeed, while BMI strongly believes in the value and efficiency of collective licensing for many of our customers, there are certainly instances where a publisher might decide, at its own discretion, that a direct license is in the best interests of the publisher and its writer(s). If, for example, you are a rights owner whose music is not often performed, a direct license that includes a promise of increased usage by a customer that does not need access to the rest of the BMI repertoire could be one such instance.

The BMI/DMX Rate Case

With respect to the DMX rate cases referenced in your letter, and the BMI rate case with DMX in particular, there are two aspects worth noting. First, BMI believed, and strenuously argued in that proceeding, that individual direct licenses entered into by DMX were not proper benchmarks for determining the reasonable value of a BMI blanket license for its entire repertoire. As noted in the previous paragraph, there may be any number of reasons why an individual rights owner may make an informed decision to enter into a direct license, and may value that license in a manner differently than a PRO would value a blanket license to the works of its collective membership. BMI believes that the direct license and the collective license are two entirely different products and one should not be used to assess the reasonableness of the other. Unfortunately, BMI's rate court determined that the uniform rate for the direct licenses that DMX entered into with some music publishers in the U.S. constituted the basis for a rate benchmark for the value of all of the rights owners represented by BMI. This was the conclusion even though many other BMI rights owners expressly rejected the offer of entering into a direct license with DMX.

Second, being well-aware of the different ways in which performing rights are held and licensed in territories outside of the U.S., BMI raised the issue of whether DMX's direct licenses (including its direct license with Sony) covered the writer's share of royalties for performances of foreign works by DMX. The BMI Rate Court held that DMX was entitled to rely on a publisher's representation that it controls the writers' share to foreign works. Here is the actual text from the Court's decision:

> *"The parties dispute whether direct license credits claimed by DMX for performances of foreign works licensed by BMI through an agreement with a foreign performing rights society should be presumed to include the writer's share in addition to the publisher's share. BMI proposes that only the publisher's share be included unless DMX provided it with evidence that the writer's share was intended to be directly licensed, because there is a general uncertainty whether publishers have the right to directly license a foreign writer's share. DMX proposes that the writer's share be credited unless BMI is notified by the foreign society that the direct license does not cover the writer's share. In its pre-*

trial brief, DMX states that the publishers have represented to it that they have the right to grant DMX permission to perform the foreign writers' works. (DMX Br. at 63). The trial testimony reveals that Sony, after entering its direct license with DMX, represented to BMI that it had the right to enter into a direct license on behalf of both their domestic and foreign writers, and BMI accepted those representations. (Tr. at 608-09). DMX should likewise be entitled to rely on the representations it has received from publishers. In circumstances where such permission is not assumed as a matter of course, BMI should accept DMX's representation that it has in fact been obtained."

Our reading of this decision is that DMX was entitled to rely on the representation from U.S. publishers with respect to foreign works, and BMI was compelled to accept those representations as well. The court did not rule on the veracity of any such representations, however, and it would seem to leave open the possibility that the rights owner of a foreign work could challenge the representation. (To the extent that it is determined that performances of any foreign works were not properly covered by the direct license (or that the writer's share is not so covered), BMI should be paid for any such foreign works on behalf of the foreign writers under the DMX AFBL license crediting formula. BMI is prepared to work with DMX and/or the U.S. publishers on your behalf to ensure that your members receive the performance royalties that they are entitled to receive from BMI.)

Rights Withdrawal

With respect to the issue of the rights withdrawals that you reference in your letter, BMI respects the interests of our affiliates to seek fair remuneration for the exploitation of their musical works. BMI maintains that, through collective licensing, BMI can deliver fair remuneration through the establishment of reasonable rates for performing right licenses with our customers, the administration of those licenses with the benefit of the economies of scale inherent in representing a large amount of repertoire, and, finally, the timely distribution of reasonable royalties for the performances we license.

BMI also recognizes, however, that there has been constant downward pressure on the blanket license rates established by the U.S. PROs for the use of their respective repertoires (see, for example, the recent petition by internet music service Pandora seeking to lower the rates that it would pay to another U.S. PRO). BMI also appreciates the significant time, expense, and uncertainty of rate court litigation. Although we firmly believe that the solution for publishers is not to move away from collectively licensing, but rather, to collectively support improvements to the current process, we cannot force our vision on rights holders or fault them for pursuing alternatives.

At the same time, we recognize that alternatives to our blanket license could substantially alter both the legal and business relationships and expectations among the U.S. PROs and their respective writers and music publishers, as well as the foreign PROs with whom we have entered into reciprocal representation agreements. While it is our hope that will not be the case, we do appreciate the concerns that you are expressing on behalf of your members. As such, we welcome the opportunity to commence a meaningful dialogue with you and your members and our affiliated music publishers in order to ensure that BMI can continue to serve your mutual interests efficiently and effectively.

With these thoughts in mind, we turn to the specific questions in your letter:

Answers to Questions

1. You have requested a list of the direct licensing agreements already completed or anticipated that have resulted in the removal of rights from our repertoire[1] in the last five years. Please understand that, assuming you are referring to direct licensing agreements where a BMI affiliate decides to license a music user directly, as opposed to direct licensing that takes place pursuant to a rights withdrawal, there are hundreds, if not thousands, of such direct licenses, many of which were granted by individual composers and/or smaller music publishers for individual works or smaller catalogs and for specific uses. Accordingly, we do not believe that it is practical, appropriate or potentially even relevant, to produce such a list.

   Additionally, due to the nature of many of these direct licenses, it is impossible to assess the impact that they have on BMI's ability to effectively operate as a representative of U.S. performing rights. Some music users essentially limit their use of music to that which they can secure via a direct license. This obviously has a significant impact on BMI's ability to license these customers, but may be entirely appropriate and in the best interests of the music creators on whose behalf the direct license was issued.

   Also, some rights owners have intentionally sought direct licensing opportunities where music users have refrained from using their music if its use would give rise to the obligations accompanying a PRO's blanket license. In many cases, both in the U.S. and abroad, this has opened up an opportunity for music creators to receive royalties from performances that wouldn't otherwise have occurred.

   These examples clearly affect BMI's ability to license these exploitations, but it would not be fair to say that they have necessarily had a negative impact on our ability to effectively operate as a representative of U.S. performing rights on behalf of music creators. We believe we can and will continue to do so with the vast majority of our customers for the benefit of both the domestic and foreign writers, and the music publishers, that we represent.

   On the other hand, we recognize that the direct licenses in the DMX matter may be more relevant to your inquiry, not because they were direct licenses, but because of the impact that they have had on lowering PRO rates for commercial background music services. We also recognize that the issue of rights withdrawals could have an impact on the utility of the blanket license upon which the marketplace has relied for efficient and effective licensing. As such, we welcome the opportunity to discuss the DMX case and the broader question of rights withdrawal with you in greater detail at your convenience.

---

[1] While the questions in your letter are directed to ASCAP, we assume you meant these to be directed to BMI, and we have answered them accordingly.

2. You have inquired as to BMI's view of how the practice of direct licensing (presumably in the context of both traditional direct licensing, as well as in the context of rights withdrawals) will affect the rights and incomes of music creators in the U.S. and abroad, and in particular, how it relates to transparency and the ability to monitor licensing and the proper and accurate payment of royalties. Generally, we believe that the interests of music publishers and music creators (and indeed, BMI's) are well aligned when it comes to obtaining fair remuneration for exploitations of their musical works around the world, and we expect that we will continue to work together to ensure that will continue to be the case. We may be able to assist our writer members by obtaining the information they need from their respective music publishers regarding the details of any direct performing rights licensing arrangements and the royalties payable to the writers with respect thereto. Indeed, music publishers may welcome such a role for BMI to the extent that it may ease their burden to report and pay royalties for directly licensed performances to songwriters. Further, if BMI is retained to administer direct licenses on behalf of a music publisher affiliate as some recent reports have suggested, we will be in an even better position to ensure that our writer affiliates remain well-informed as to the relevant details of any of these direct licenses.

3. You have asked whether affiliation agreements with music creators and [reciprocal representation agreements] with foreign societies impact the ability of music publishers to enter into direct licenses. With respect to U.S. works, BMI's affiliation agreements with its writers give BMI the right to license the writer's interest in their musical works, subject to their right to enter into non-exclusive direct licenses. This is also true for BMI's affiliation agreements with its publishers. It is our experience that it is usually the music publisher that enters into a direct licensing agreement with a user on behalf of itself and the songwriter(s) it represents. In this regard, the specific terms of the publishing agreement between the writer and the music publisher will control the relationship and the ability of a publisher to directly license a writer's work.

   With respect to foreign works for which BMI obtains the right to license such works under reciprocal representation agreements with foreign societies, the ability of a publisher to directly license the music creators' interest in musical works depends on that foreign writer's and that music publisher's agreements with each other and the foreign society. While it might be difficult for BMI (due to its Consent Decree, U.S. competition law and the recent DMX decision) to independently assert its right to license the writer's interest in a foreign work irrespective of what the music publisher has purported to grant under a direct license, it does not necessarily follow that BMI would be precluded from doing so if, in fact, BMI, through its reciprocal representation agreements with foreign societies, and not the music publisher, has the right to license the writer's interest in the work(s). We would welcome your support in helping to clarify this situation so that we can ensure that BMI is fulfilling your members' expectations.

Thank you again for reaching out to BMI for its perspective on these issues. We look forward to continuing the discussion with you and our music publisher members to ensure that BMI is adequately serving its affiliates, and the foreign societies' members and affiliates that have entrusted their performing rights in the U.S. to BMI.

Regards,

Michael O'Neill
Chief Executive Officer

The Honorable Zoe Lofgren
U.S. House of Representatives
Washington DC 20515

June 19th, 2014

Re: Music Licensing

Dear Congresswoman Lofgren,

During the June 10 hearing on "Music Licensing under Title 17 — Part One," you made a statement concerning BMI's "record-high revenues" in 2013, noting that BMI reported a 50-percent increase in revenues since 2003. I did not have an opportunity to respond and would like to provide some information that sheds light on BMI's revenues and places them in the proper context.

BMI's revenues have certainly grown in the last decade-plus. This growth is a direct result of two factors: (a) BMI's successful efforts to diversify its revenue base; and (b) the dramatic growth of international revenues. Our concern, however, is that this growth disguises the fact that our songwriters, composers and publishers are not receiving fair market value compensation for their work specifically in the digital media space.

BMI represents the rights of our writers on a global basis, in every market. Where BMI once depended on traditional broadcasting for the majority of its revenues, we currently collect license fees from a vast array of industries, including not only broadcast radio and television, but satellite radio, cable television, cable systems, mobile and Internet new media services and a diverse and growing range of retail establishments, including bars, restaurants, night clubs, dance studios, retail chain stores and the like.

However, BMI's largest growth of revenue has come from sources that are outside of the United States. Internationally, BMI's revenues from overseas markets have made up an increasing share of BMI's public performance royalties in recent years, growing from 22% of total BMI revenues in 2003 to over 31% of total revenues in 2013. This growth reflects an increased use of American music overseas, but also the higher value given to the work of our songwriters abroad as compared with the value given domestically[1]. Over the past 10 years, our songwriters and BMI's domestic revenues have struggled to keep pace with inflation but overseas, we have grown revenues by almost 12% per year.

The Songwriter Equity Act (H.R. 4079) would address this issue by permitting BMI's rate court to consider the rates paid by digital services for the parallel sound recording public performing right; currently, our rate court is prohibited by the copyright law (17 U.S.C. 114(i)) from even considering such

[1] In other countries, performance rights in sound recordings are considered "neighboring" rights, a right of remuneration that is not the same as "authorship" rights granted to songwriters under copyright. The performance right in musical works that BMI licenses is viewed internationally as having at least equal if not greater value than neighboring rights for record labels, since sound recordings are built on the underlying musical compositions. This approach recognizes the undeniable fact that there can be no sound recording without an underlying musical composition.

BMI

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rates. We believe that the rates that are currently barred from being introduced in our rate court reflect fair market value because they are set under the willing buyer/willing seller standard.

Nothing in the Songwriter Equity Act mandates that performance rights be adjusted upward. It is entirely within the discretion of the court to give significant, little, or no weight to evidence of these fair market value rates. BMI believes that when presented with this sort of evidence that is currently barred from consideration, our rate court will have the information needed to fulfill its mission of replicating the rates that a willing buyer and willing seller would negotiate.

The Songwriter Equity Act could, therefore, be instrumental in addressing the disparity we see today between the royalties received for commercial uses of sound recordings as compared to the uses of the underlying words and music (the underlying work BMI represents). That disparity is marked in the relative rates paid by online music users, where the disparity can run as high as 12-to-1 in favor of sound recordings. This is contrary to international practice, as outlined above and, we believe, runs counter to what is fair.

Given (as you noted at the June 10 hearing) the continuing migration from sales of recordings to the streaming performances of those works, it is all the more critical that the creators of musical works receive fair compensation from this growing market.

In short, we acknowledge, proudly, the work BMI has done to grow revenues on behalf of the creators we represent. This revenue growth, however, should not be read to suggest that creators are receiving fair market rates for performances of their work, particularly for Internet performances. Given that the Internet will increasingly be the main source of public performances of music, it is critical that music licensing on that platform be set at rates that can sustain songwriters over the long term.

In conclusion, thank you for your interest in music licensing and for recognizing that songwriters like Lee Thomas Miller, whom you heard testify last week, should be fairly compensated for their creativity.

Sincerely,

Michael O'Neill

cc: Hon. Howard Coble, Chairman
Hon. Jerrold Nadler, Ranking Member
Members, Subcommittee on Courts, Intellectual Property, and the Internet
Joe Keeley, Chief Counsel
Olivia Lee, Clerk

Testimony of

Future of Music Coalition

On
"Music Licensing Under Title 17, Part One"
Hearing

House Subcommittee on Courts, Intellectual Property and the Internet

June 10, 2014

Chairman Coble, Vice-Chairman Marino and members of the committee, it is a privilege to submit the following testimony for the record in this important hearing on music licensing.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. For thirteen years, we have observed changes to traditional industry business models, informing artists about what these developments could mean for artists' ability to reach audiences and be compensated for their work. FMC supports artists having a choice in how they exploit their copyrights, as well as their ability to take advantage of the innovations that help them reach potential audiences. We are cautiously optimistic that the ongoing review of current copyright law will result in recommendations for updating the Copyright Act that serve the interest of creators. To this end, we will outline criterion that we see as necessary for improving conditions for creators within the context of Title 17 of the Copyright Act.

As we have described in previous written testimony before this committee, ongoing technological shifts have reshaped how music artists and rightsholders create music and bring that music to fans. Though it is true that the larger industry players were not able (or willing) to respond to the digital disruption at its onset, nearly every participant in today's music marketplace are utilizing existing and emerging technologies to realize their goals. Even the major media conglomerates have pivoted to a place where the majority of their business is digital. Independent labels and publishers are servicing music users—such as digital services, and ultimately, fans—on an impressive array of platforms. Individual artists now have the ability to publish and perform music to a global audience with the click of a mouse or swipe of a screen. Yet despite the many exciting transformations within our sector, there remain numerous frustrations that limit the kind of growth that would encourage further investment in music and those who create it. In this testimony, we will describe existing tensions and remark on the basic values that must inform any attempt at reform.

Music Licensing, Broadly

FMC has weighed in on the state current music licensing with high degree of specificity, most recently in the form of comments to the Copyright Office in their Music Licensing Study.[1] We are also participants in roundtable conversations about potential ways forward, which will hopefully inform the work that this committee undertakes in the months to come. There are a number of areas that Congress could address in legislation, and there are currently several proposed bills that focus on specific adjustments to existing law for the benefit of various parties. FMC believes strongly that the goal in optimizing the Act for contemporary and future realities must be in line with Article I, Section 8 of the United States Constitution, which is silent on the matter of intermediaries, but clearly empowers Congress to make laws that incentivize authors to benefit the public.

FMC believes that music licensing and the copyright laws that give it shape should encourage the following:

1. Transparency and leverage in compensation structures
2. Artist inclusion in music data standards and management
3. Artist access to communications platforms
4. Uniformity in rights

1. Transparency and leverage in compensation structures

The current trend of direct deals between rightsholders and services raises many questions about transparency and leverage for the broader class of musicians and composers. There are recent deals between Clear Channel and the major labels (and a couple of independents, including Taylor Swift's label) to compensate for over-the-air plays at a percentage of overall revenue. In addition, there is the preference of major publishers to negotiate digital performance licenses directly. With each approach, there is a clear danger of the marketplace being tilted to favor just a handful of power players.

[1] *Future of Music Coalition Comments in Music Licensing Study*, United States Copyright Office Cong., 23 (2014) (filing of Casey Rae, VP for Policy and Education, Future of Music Coalition). Web.

Rightsholders often make the argument that direct deals establish a higher floor for compensation, but may end up being a race to the bottom. Take for example the deals made by the bigger labels with Clear Channel to pay a portion of revenue for AM/FM broadcast.[2] In no way are these deals a substitute for a full public performance right. First off, they leave out all performers who aren't signed to the label under such a deal. Second, there is little chance for anyone but the biggest labels and biggest artists to get to the negotiation table. Third, such deals aren't at all transparent. Inasmuch as we even know the terms, there are rumors that the provisions trade *some* compensation for over-the-air plays in exchange for lowered rates around digital streams. If (and some would say when) Internet radio overtakes terrestrial broadcasting in listenership, this means that "fair market" webcasting rates may end up being *lower* than those currently negotiated under the statutory license. Lastly, there are legitimate concerns that such arrangements are a backdoor to payola-like practices.

There are similar concerns about music publishers and digital music services. While the ability for publishers to remove partial catalog from Performance Rights Organizations (PROs) have been rebuffed by the courts, there is the ever-present possibility that the biggest music publishers will withdraw all catalog from the PROs, leaving just the smaller publishers and non-commercial broadcasters covered by the blanket licenses offered by the two PROs operating under consent decrees. Again, the case is made by the bigger publishers and their trade industry representatives, that direct deals will raise the floor for compensation overall, particularly if these deals are allowed to inform rate-setting in the courts (or arbitration, as is the preference of the publishers). Whether this would be the actual result of eliminating the consent decrees is doubtful. More likely is a further fracturing of the licensing marketplace to the competitive disadvantage of independent publishers, songwriters and smaller broadcasters. The impacts would be felt well outside of the Internet and satellite radio marketplace, which is why the Department of Justice must exercise caution and restraint when reviewing the consent decrees for a

[2] *See Warner Music Group and Clear Channel Announce Landmark Music Partnership*, CLEAR CHANNEL (Sept. 12, 2013) web; *see also Clear Channel and Fleetwood Mac Sign Landmark Revenue-Sharing Agreement*, CLEAR CHANNEL (June 12, 2013) web (marking the first directly negotiated performing rights partnership between a radio company and an artist).

possible amendment.

Eliminating the rate court in favor of an arbitration process also raises concerns. Arbitration proceedings are typically sealed and do not create a record or precedent, a move away from transparency—unless the rules around arbitration include mandatory public disclosure.

There is still a need for artist intermediaries. PROs and SoundExchange in many cases represent the only leverage individual songwriters and performers have in rate-setting proceedings. We wholeheartedly agree with both camps that artists deserve to be compensated for their work at a fair rate, but we would strongly urge this subcommittee to look beyond rate determination standards and consider the frameworks under which artists are paid and through which services can quickly and efficiently perform catalog for listeners. Transparency and leverage for artists within these structures must be at the forefront of any potential solutions, followed closely by what formulas are most likely to grow the legitimate digital marketplace.

We extend our concerns about transparency and leverage to interactive streaming, in which artist compensation is complicated and uncertain. Within the current licensing framework, recording artists signed to a label are compensated based on what is in their contract. It seems safe to say that individual artists—even highly successful ones—are unlikely to make much money from these platforms, as compensation is held against recoupable costs and may already be quite low based on the artists leverage at the time of signing a contract. For songwriters, there are issues of audit rights, an issue that has been brought forward by some parties in the Copyright Office Music Licensing inquiry.[3] From our vantage point, we see the stark difference in compensation and licensing between interactive and non-interactive services as troubling for the long-term sustainability of the digital music ecosystem.

[3] "U.S. Copyright Office - Music Licensing Study." *U.S. Copyright Office - Music Licensing Study*. U.S. Copyright Office, n.d. Web. 10 June 2014.

We are sensitive to the desire of some independent artists and labels for an "opt-out" option within statutory or compulsory licensing schemes. However, we also identify with the arguments put forward by the independent label trade group the American Association of Independent Music (A2IM), which has called for an expanded statutory license for interactive services to ensure that indies can compete on a level playing field within on-demand platforms like Spotify and Beats Music. By all available metrics—Billboard charts, Grammy nominations, global demand—independent music represents an essential and growing sector. However, the heavily consolidated major labels consistently inflate their market share in order to obtain large up-front payments and equity stakes in emerging digital music platforms. This places independents at a perpetual disadvantage in terms of licensing and investment. Artists, too, are affected, as they are typically last in line for compensation and have next to no leverage within the rate-setting process for interactive services. As FMC states in our own Copyright Office filing:

> "FMC considers supporting the expansion of a statutory license for sound recordings on interactive music services for the reasons of clear and transparent creator splits and direct payments. We do, however, recognize that in an environment where on-demand listening continues to supplant higher-margin transactions such as downloads, that there are many questions regarding the return on investment in the creation, distribution and promotion of recorded music. We believe that some of these questions can be addressed by integrating higher-margin commerce—scarce goods and other unique opportunities—within existing and future access platforms."

Congress should consider enacting an expanded statutory license for interactive streaming. This would present an opportunity to establish equitable and direct payment to musicians, as well as allowing services to more efficiently obtain licenses. Currently, negotiations for major label catalog takes an average of 18 months and a tremendous amount of up-front capital[4] with no guarantee of reaching terms. More efficient licensing would allow services more room to innovate new and enticing ways to deliver music to fans, and get artists paid more quickly (and hopefully directly). It may be possible to

[4] Touve, David. "Innovation at the Edge: An Investigation of Music Licensing Efforts and the Process of Opportunity Development." Davidtouve.com. Washington and Lee University, 22 July 2012. Web. 09 May 2014.

construct this system to include opt-out provisions under an extended collective license; at any rate, Congress should closely consider how to narrow arbitrary technological distinctions between streaming platforms in order to establish a more competitive marketplace built on transparency and efficiency.

2. Artist inclusion in music data standards and management

Future of Music Coalition is on record in support of voluntary global copyright registries and/or authentication databases as a means to reduce frictions in the digital music marketplace and more efficiently compensate creators for various uses of their work. We also support metadata standardization to streamline these processes.

We wholly endorse the approach described by Jim Griffin in his testimony at this hearing,[5] particularly his call for inclusion for the recordation of copyrights and a broader availability of information about ownership and other data:

> "Performers, featured artists, background artists, writers, editors, translators, owners and all associated with a copyright should be included in efforts to record and enumerate copyright information because they often have remuneration and attribution rights, and they can help elucidate ambiguous information. Much as we do with land ownership records, we should welcome any claim related to any work."

While there are a number of such databases extant or in development, they are either lacking in accuracy or depth of information or are to one or another extent proprietary. The Copyright Office offers one example of a publicly searchable rights database, but some of its records are incomplete and not always available online.

Any comprehensive registry system or systems would benefit tremendously from metadata standardization, as would commercial platforms that sell or provide access to music. There is still much work to be done in fixing metadata—the information that accompanies a sound recording file and is delivered to download stores like iTunes and

[5] *Testimony of Jim Griffin before the House Subcommittee on Courts, Intellectual Property and the Internet*, 113th Cong. (2014) (testimony of Jim Griffin). Print.

streaming platforms like Spotify or Pandora. Metadata includes things like performer, composer, record label, and release date, but it could also include useful information like production and songwriting credits, which music professionals depend on to encourage future work.

Better data on the input side and enhanced functionality and interoperability on the output side would alleviate many of the existing frictions in the music licensing space while pointing the way towards potential solutions for other copyright sectors. The government, including the United States Congress, should encourage all parties to work towards a comprehensive, globally workable database (or databases) for music, with unique numerical signifiers and improved metadata standards.

3. Artist access to communications platforms

It may seem that we've solved the problem of access for creators, but high-quality and affordable broadband Internet service—a critical resource for music entrepreneurs—remains frustratingly out of reach for many. At the time the National Broadband Plan was published in 2010, around 100 million Americans lacked access to broadband Internet in their homes. Where broadband Internet is available, users often have only one or two choices in providers. Prices remain high for wireline Internet service, and just a few companies control the rapidly growing mobile space.[6] High consumer prices for broadband can also impact how much money consumers have to spend on legitimate entertainment offerings. An absence of competition is also a factor in the lack of incentive to build out to more communities. This encourages telecommunications carriers to enter preferred partnerships with well-capitalized companies who can afford to pay for premium access to subscribers—it's easier money and requires no new investments in or improvements to the existing network.

[6] *See* Laura Houston Santhanam, et al., *Audio: By the Numbers*, PEW RESEARCH CENTER FOR EXCELLENCE IN JOURNALISM, *available at* http://stateofthemedia.org/2012/audio-how-far-will-digital-go/audio-by-the-numbers/. Mobile and other transportable digital devices are experiencing strong listenership growth, with as many as 40% of Americans currently consuming music through a digital device and projections for 2015 double that figure. Importantly, the amount of people using a mobile device to consume online music in an automobile doubled from 2010 to 2011.

Musicians and songwriters know payola when we see it. Currently, the FCC is considering rules that would establish a "tiered" Internet service, which would allow Internet Service Providers (ISPs) to create a fast lane for content providers that agree to pay a fee. While this may make good business sense for the telecom and cable companies, it would be devastating to entrepreneurs and innovators in music and elsewhere. ISPs should not be allowed to pick winners and losers in a free market. Products, services, innovations, songs and ideas must be allowed to find their audiences without undue interference based on business or political preferences. Who on this committee has not used Twitter to reach your constituencies? Where will the next Twitter come from if the flow of information is controlled by just a handful of gatekeepers? Congress must support an Internet where creativity and commerce can flourish in a free market. Clear rules of the road for ISPs that allow any and all *lawful* online content to reach end users is the bare minimum to promote American competitiveness for future generations. This is not a partisan issue, though some would seek to make it so. It's a small enterprise issue, an innovation issue, a global competition issue and a free speech issue. It's also a music issue, and that's why we are raising it today.

Concerns go beyond the currently debated Open Internet proposals. Last year, AT&T announced a "sponsored data" scheme in which the company would charge its subscribers for data overages engendered through the use of the services and applications of its preferred partners. While such activity may be permissible under even recently overturned net neutrality rules, it illustrates how competition and clear rules of the road are necessary to innovation online. If ISPs are allowed to pick winners and losers among applications and services, artists may find themselves locked into structures that don't play to their economic advantage, thereby frustrating a key incentive of our copyright regime.

We urge Congress to consider issues of broadband competition and openness as it examines issues around copyright to ensure that the incentive to create, innovate and seek remuneration remains viable for all artists and entrepreneurs who use the Internet.

4. Uniformity in rights

There is currently much talk of "parity" in the music licensing space. While generally FMC has been opposed to "one-size fits all" solutions to licensing issues, we do recognize that the current system offers unfair advantages for some, while limiting opportunities for others. Above, we referenced the recent decision by the Department of Justice to reexamine the consent decrees that govern two of the three songwriter/publisher PROs.

In recent comments filed before the Copyright Office, ASCAP claimed the consent decrees are no longer necessary at all. Echoing separate comments filed by BMI, the organization also recommended that if the consent decrees remain, they should be entirely reshaped to allow the "bundling" of licenses beyond just public performance uses. This would allow the PROs to offer mechanical and synchronization licenses alongside those for public performance. The PROs cite efficiency and the need to be globally competitive as reasons for these tweaks, but it's clear that they also want to expand their own businesses.

Meanwhile, recent court decisions have favored Internet radio company Pandora in arguments about royalty rates and whether major publishers should be allowed to withdraw partial catalog to license directly to services. (Publishers' reason for wanting to go direct is to achieve higher rates than those set by the courts when parties fail to reach common ground.) On the rate-setting issue, the court largely sided with Pandora, scolding ASCAP for heavy-handed negotiation tactics. Ultimately, the rates stayed where they have been (1.85 percent of revenue, as opposed to a scheduled increase to 3 percent sought by ASCAP).

As to the standard for determining rates, the publishers and PROs prefer a "willing seller, willing buyer" approach, which is what labels and performing artists have for sound recordings used on Internet and satellite radio.

Songwriters are likely caught in the middle. On one hand, the consent decrees shaped the member agreements at ASCAP and BMI, which most songwriters find fair. (These agreements establish 50-50 splits between publisher and songwriter/composer for performances of musical works). If the consent decrees were eliminated, songwriters may find all the leverage for the licensing of musical works falling to just a few major publishers that can dictate what innovations can come to the marketplace and how writers get paid. Which is to say, eliminating the consent decrees (or amending them too far) is something of a Faustian bargain. Creators should not be forced to trade transparency, leverage, and direct/equitable payment for the mere possibility of rate increases.

Music services should also be nervous. The consent decrees were originally put in place to curb the anticompetitive tendencies of ASCAP and the publishers, which in the 1930s and 1940s had a monopoly on the licensing of music. Without these limits and the blanket licensing allowed by the consent decrees, it is unlikely that AM/FM radio would have ever gotten off the ground. And, considering that over-the-air broadcasters only pay songwriters and publishers (but not performers and labels), this would have meant that countless music creators would miss out on a key revenue stream. Internet and satellite radio services obviously want to pay the lowest rates possible, but apprehension about a post-consent decree world raises concerns for other reasons—namely, the ability to bring catalog to music listeners quickly and efficiently, grow the legitimate digital market and pay creators.

A bill currently before Congress, the Songwriter Equity Act, would accomplish many of the publishers' goals with regard to performance and mechanical royalties. It doesn't go as far as to eliminate the consent decrees, however, which is probably why the National Music Publishers Association has been putting pressure on the Department of Justice (DOJ).

For its part, the DOJ should proceed with caution and not simply cave to the demands of just a handful of powerful publishing companies. It's crucial that government regulators consider closely the impact of any decisions on songwriters for whom rates are important,

but who also depend on transparency and leverage in these systems. It would be a poor outcome for creators and fans if DOJ intervention resulted in a fracturing of the legitimate marketplace at a time when we should be doing everything we can to make digital music work for all parties, especially artists.

There are also efforts to resolve the issue around the digital public performance of pre-1972 copyrights. Make no mistake about it, FMC wants older artists to be paid for the use of their work, which is one of the many reasons we've supported a terrestrial public performance right—countless legendary performers who are not songwriters have been for decades unable to collect money for AM/FM airplay. Worse still, the lack of a reciprocal right means they don't get paid for overseas plays in the many nations and territories that value American expression. We believe full federalization—not litigation or stopgap legislation—is best way to ensure that all recording artists can exercise their full rights under law, from performance to rights recapture. The next move should be a complete terrestrial performance right as a first step towards parity across platforms. One thing is for certain: the major label tactic of litigation for high damages is insufficient to establishing a long-term mechanism for compensating so-called "legacy" performers. There is certainly no indication that a big win for the labels would result in a single cent going to the performers or their heirs. There is certainly no such provision to share equity with artists when a company like Beats Music gets sold for 4 billion dollars, just as no portions of the money awarded from successful filesharing lawsuits has been distributed to artists.

One reason the labels are likely keen to press their case is that if they can get a favorable ruling establishing liability around pre-'72s, this precedent might be extended to the "safe harbors" governing other internet service providers, such as search engines and user-upload sites.

Again, we think there is a better solution, and one that would result in services knowing what to pay and to whom, and where performers are directly compensated. And that solution is the full federalization of pre-1972 copyrights.

There are, of course, many other issues that Congress might consider when approaching an update of the Copyright Act, some of which we have itemized in previous submitted testimony. We expect that as proposals are formulated and introduced, that there will be further opportunities to comment on specifics.

Conclusion

FMC is committed to helping artists navigate these issues. We look forward to engaging with the subcommittee further to ensure that creator viewpoints—particularly those in the independent sector—are considered as you go about your important work. Although it isn't easy to find solutions that satisfy the many stakeholders in today's music space, we are convinced that working artists must be part of the process.

Casey Rae
VP for Policy and Education
Future of Music Coalition
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Washington, DC 20036

MUSIC LICENSING UNDER TITLE 17 (PART II)

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MUSIC LICENSING UNDER TITLE 17 (PART II)

WEDNESDAY, JUNE 25, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:01 a.m., in room 2141, Rayburn Office Building, the Honorable Howard Coble, (Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Goodlatte, Marino, Sensenbrenner, Chabot, Issa, Poe, Chaffetz, Farenthold, Holding, Collins, DeSantis, Smith of Missouri, Nadler, Conyers, Chu, Deutch, Bass, DelBene, Jeffries, Cicilline, Lofgren, Jackson Lee, and Cohen.

Also Present: Representative Gohmert.

Staff Present: (Majority) Joe Keeley, Chief Counsel; Clerk, Olivia Lee; (Minority) Heather Sawyer, Minority Counsel; and Jason Everett, Counsel.

Mr. COBLE. Good morning, ladies and gentlemen.

The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection the Chair is authorized to declare recesses of the Subcommittee at any time.

We welcome all our witnesses today.

Let me get my chair adjusted here.

Could you give me a push here, John?

That's good, thank you.

Good morning and welcome to the second of two hearings on music licensing issues. Two weeks ago, this Subcommittee heard from your fellow music industry representatives about their concerns with the state of music licensing copyright laws. Looking around the room, I think we can conclude that you all have more than a passing casual interest in this issue and we welcome all of you here today.

At the earlier meeting, I mentioned my fondness for old time, bluegrass and country. I don't know that that has bolstered the popularity across the country. It probably hadn't, but I will continue to try to do that. And I will make my opening statement very brief because we have a long day ahead of us.

Although the witnesses of this panel may not agree on everything, I believe they all agree that music enriches the world in which we live. Since this is part two of the music licensing hearing,

I won't repeat all the outstanding music issues that Congress needs to address. I simply hope that in the effort to improve the music licensing system, we don't lose sight of the fact that creators need to be paid for their work just like everyone else in this room.

Although our creative industries are the envy of the world, I'm not sure that our music licensing system is. It may well be time for a change, and that will be exposed perhaps today as we go through this, maybe arduous journey, but maybe pleasant, productive journey.

I yield back the balance of my time and recognize the gentlemen from New York, the distinguished Mr. Nadler, for his opening statement.

Mr. NADLER. Thank you, Mr. Chairman. And thank you for holding this second hearing on Music Licensing under Title 17.

At the first hearing 2 weeks ago, we heard from a diverse panel of witnesses representing performers, songwriters, publishers, television licensees, and digital music delivery services. Although there are varying points-of-view about the specific problems most in need of legislative solution, it was widespread agreement that the system is in need of comprehensive reform.

As I stated at the first hearing, the current music licensing system is rife with inconsistent rules and inequities that make no rational sense. If we started from scratch, nobody would write the law as it stands today. Terrestrial satellite and Internet radio compete against each other under different rules for compensating songwriters, performers, and other rights holders, assuming those artists are even paid at all for their works.

Several of the service providers have played an important role in the music ecosystem are with us today. Local broadcasters provide critical programming including news, weather and emergency alerts and often form strong public service partnerships with the communities they serve.

We also have representatives of digital radio, such as SiriusXM and Pandora, who are making music available to consumers in new and innovative ways. Although we may have differing views about the best way to approach these issues, I look forward to productive discussion about how to come together to improve the music licensing system.

As I noted at the first hearing, our current scheme is so haphazard because, in large part, pieces were developed at different times and often in response to different innovations in the music and technology industries. Rather than continuing to adjust the system in a piecemeal fashion, I believe we should take a comprehensive approach.

I am not alone in my belief that a comprehensive approach is need. At this year's GRAMMYs on the Hill event, recording Academy President and CEO, Neil Portnow, called for the industry to coalesce behind a single bill. His call for unity was later echoed by House Majority Leader, Kevin McCarthy, and Democratic Leader, Nancy Pelosi, who agreed that the time has come for Congress to address these issues in one package.

That is why I pledged at our first hearing in music licensing to develop a comprehensive omnibus bill, which some people have dubbed "the music bus," to update music copyright law. Congress

should get out of the business of dictating winners and losers and, once and for all, create a level playing field.

The law should be platform neutral and all music created should receive fair market-based compensation for their work.

There's a growing consensus that the system is in need of reform. In addition to this Committee's ongoing copyright review, the Copyright Office is conducting a music licensing study. Just this week, it concluded a series of roundtables held around the country in Nashville, Los Angeles, and New York. The Commerce Department issued a green paper in updating copyright including music licensing for the digital age. And the Department of Justice is conducting a much needed review of the consent decrees that govern ASCAP and BMI—two of the performance rights organizations responsible for collecting and distributing royalties.

I hope the DOJ review will be completed quickly as time is of the essence for all the parties involved.

Today's hearing is another important step in this larger effort to review and update the music licensing system. I am interested in hearing from today's witnesses about the specific issues they believe should be addressed and about how we can best enact meaningful comprehensive reform.

I have no doubt that today's discussion will be just as informative and useful as the discussion at our first hearing.

I thank you and yield back the balance of my time.

Mr. COBLE. I thank the gentleman. Is the Chairman here?

The Chair recognizes the distinguished gentlemen from Virginia, the Chairman of the House Judiciary Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Thank you for holding this hearing and thank you for your diligence in the number of hearings and the impressive array of hearings that we have held on copyright issues. And I can see we have another full house.

So good morning to you all and welcome to the Subcommittee's second Music Licensing hearing. I see the size of the witness panel has grown with interest in this issue.

Two weeks ago, a number of problems in the music licensing system that currently exists were highlighted. In reviewing the written testimony submitted in advance of this hearing, there does seem to be agreement that a more robust copyright ownership database is needed. There also seems to be an interest by many in simplifying the diverse licensing and rate-making systems. However, disagreement remains on whether all those who use music should pay for it and what specific rate standards should be used, among other issues.

As I mentioned 2 weeks, as we consider challenges and potential solutions to the copyright laws relating to music, we should keep in mind ideas that incorporate more free market principles. We should also be mindful of the tremendous role that digital music delivery services play in the music ecosystem for consumers and creators alike. I have long said that the content community and the technology community need each other. It is my hope that we can identify improvements to our copyright laws that can benefit both groups as well as consumers by maintaining strong protections for copyrighted works and strong incentives for further innovation.

Thank you and I appreciate you all making time to be here this morning. And I will yield back, Mr. Chairman.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Michigan, the Ranking Member, is recognized for his opening statement.

Mr. CONYERS. Thank you, Chairman Coble, and good morning to our distinguished panel. I see faces that I have worked with before. And we welcome all the supporters of this subject matter that are here in the Judiciary Hearing Room this morning.

Since I agree with everything that's been said by my predecessors, the gentlemen from New York and the Chairman himself, I am going to just put my statement in the record. It would be largely repetitive. Many of you know where I stand; I have supported music as an important and vital source in our national interests. And it is in that spirit that I welcome you all to the Judiciary Committee this morning.

I ask unanimous consent to put my statement in the record and yield back the balance of my time.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, Ranking Member, Committee on the Judiciary, and Member, Subcommittee on Courts, Intellectual Property, and the Internet

At our first hearing earlier this month we heard from a diverse range of key stakeholders, including songwriters, music publishers, licensing entities, and music service providers. The witnesses discussed the many anomalies in the copyright law as it applies to music licensing that need be fixed.

I am interested in continuing to hear ideas about how to fix the inconsistencies in the law and what additional steps we should take to change the music licensing system. As we continue this discussion, I hope we can keep a few guiding principles in mind.

First, I believe that all artists should be compensated fairly, and that it makes no sense to have arbitrary decisions on who should be paid for their work.

While there are benefits that some of the witnesses will note about the U.S. system for free airplay for free promotion, I continue to believe that there should be compensation for artists whose songs are played over terrestrial radio. The existing legal framework must be changed and it is long overdue.

I also believe that broadcast radio has played a valuable role in the lives of people all across this country. These broadcasts have educated listeners about emergencies and important events and have provided new music to these listeners as well. And we will hear today the great work that broadcasters continue to do in local communities.

As one of the witnesses today notes, the audience for FM radio is larger than the listenership of satellite radio and Internet music services. This is even more reason to work to achieve a performance right for sound recordings.

Every other platform for broadcast music—including satellite radio, cable radio, and Internet webcasters—pay a performance royalty. Terrestrial radio is the only platform that does not pay this royalty.

This exemption from paying a performance royalty to artists no longer makes any sense, if it ever did, and unfairly deprives artists of the compensation they deserve for their work.

I would also like to hear the witnesses discuss the bill I have introduced with Congressman Greg Holding from North Carolina—H.R. 4772, the Respecting Senior Performers as Essential Cultural Treasures Act (RESPECT Act).

The RESPECT Act would address a loophole that allows digital radio services to broadcast music recorded before February 15, 1972 without paying anything to the artists and labels that created it.

I believe that taking someone else's labor and not paying is simply unfair. And I would like to hear from the witnesses their opinions about the RESPECT Act.

Second, as I noted at the first hearing, I believe that the process for setting royalty rates should be inherently fair and competitive.

We will hear today that the current process is unfair and that, as a result, the royalty rate does not provide creators with a fair market value for their work.

This is one possible arena for legislative change and my colleagues—Representatives Collins and Jeffries—have introduced The Songwriter Equity Act to fix this particular problem. I would like to hear the witnesses discuss that particular fix and what additional changes, if any, should be made to the current royalty system to address their concerns.

Third, we should strive to adequately account for the interests of all players in the music ecosystem. As we consider changes to the law, we must ensure that the music industry can continue growing and bringing the wonder of music to the listening public, whose lives are so often transformed and enriched as a result.

The complexity of music licensing laws means that all parties must be willing to come to the table to discuss the best way to address these issues.

At the music licensing hearing earlier this month we also heard about how new technologies have transformed the way that people listen to music. The streaming of music is on the rise and people are listening to music on numerous devices. These changes in technology will also have a large impact on the decisions we will make as well. Any steps that we take must continue to encourage innovation and create basic fairness for everyone in the music world.

I look forward to hearing from this panel of witnesses and want to continue to work with my colleagues to tackle these complex music licensing issues.

Mr. COBLE. I thank the gentlemen and the statements from other Members will be made a part of the record without objection.

Let me introduce our panel of witnesses as we proceed with this business at hand. Our first witness this morning is Ms. Rosanne Cash, singer, songwriter, author and performer.

I can hardly see you because of the impediment here, Ms. Cash.

Ms. Cash has released 15 albums that have earned a GRAMMY award and nominations for 12 more including 11 number one singles. She completed her residency at the Library of Congress in December of 2013 and was given the AFTRA Lifetime Achievement Award for sound recordings in 2012. Ms. Cash is testifying today on behalf of the American Music Association.

And, Ms. Cash, as I mentioned to you earlier, your late dad also appeared before this Subcommittee and we enjoyed having him be here as well. It is good to have you here.

Our second witness, Cary, I can't see you either because of the impediment but I will hold you harmless for that.

Mr. Cary Sherman is Chairman and Chief Executive Officer of the Recording Industry Association of America. In his position, Mr. Sherman represents the interests of the 7 million U.S. sound recording industry. He received his B.S. from Cornell University and his J.D. degree from the Harvard School of Law.

Our third witness is Mr. Charles Warfield, Senior Advisor of YMF Media. Mr. Warfield is a 31-year veteran of the broadcasting industry and is here today on behalf of the National Association of Broadcasters. He received his B.S. in accounting from Hampton University.

Good to have you with us, Mr. Warfield.

Our fourth witness is Mr. Darius Van Arman, Co-Founder of the Secretly Group; a family of american independent recording labels based in Bloomington, Illinois. He is testifying today on behalf of the American Association of Independent Music, also known as A2IM. Mr. Van Arman attended the University of Virginia.

Our fifth witness is Mr. Ed Christian, Chairman of the Radio Music License Committee, also known as RMLC. He teaches courses in media management, broadcast programming and radio

operations at Central University of Michigan. Central Michigan University. He received his B.A. in mass communications from Wayne State University and his M.A. in management from Central Michigan University.

Our sixth witness is Mr. Paul Williams, President and Chairman of the Board at the American Society of Composers, Authors and Publishers. ASCAP represents hundreds of thousands of music creators worldwide. Mr. Williams is the Oscar, GRAMMY, and Golden Globe winning Hall of Fame composer and songwriter.

Mr. Williams, you will be glad to know that your friend, Congressman Gilmore from Texas, admonished me to be easy on you today. So with Gilmore looking down from his seat we will be careful to adhere to that request.

Our seventh witness, Mr. Chris Harrison, Vice President of Business Affairs and Assistant General Counsel of Pandora Media. He's also an adept Adjunct Professor, teaching music law at the University Of Texas School Of Law. Mr. Harrison received his J.D. from the University of North Carolina, I am pleased to say, and his Ph.D. in political science, also from the University of North Carolina, Chapel Hill.

Mr. Harrison, good to have a fellow Tar Heel in the room today.

Our eighth witness is Mr. Michael Huppe, President and Chief Executive Officer at SoundExchange. In his position, he is responsible for establishing long-term strategic plan and vision for the organization. He received his B.A. from the University of Virginia and his J.D. from the Harvard School of Law.

Our ninth and final witness is Mr. David Frear, Chief Financial Officer at the SiriusXM. In his position, Mr. Frear is responsible for overseeing finance, IT and satellite development operations. He received his M.B.A. from the University of Michigan at Ann Arbor.

Gentlemen, before we begin to hear from the witnesses, I'd like for each of you to stand. If you will, we will swear you in.

[Witnesses sworn.]

Mr. COBLE. Let the record show that all responded in the affirmative.

We will start with Ms. Cash.

Folks, I will remind you, if you can, try to comply with the 5 minute rule. When the timing light on your table goes from green to amber, that is your warning that you have a minute to go to reach the 5 minute pinnacle. You will not be severely punished if you don't comply with that, but if you can stay with that, we try to comply with the 5 minute rule as well. The good news is, I don't think there is going to be a vote but until after noon so that we will not be interrupted by floor votes.

Ms. Cash, you are recognized for 5 minutes.

TESTIMONY OF ROSANNE CASH, SINGER, SONGWRITER, AUTHOR AND PERFORMER, ON BEHALF OF THE AMERICANA MUSIC ASSOCIATION (AMA)

Ms. CASH. Thank you. Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, Members of the Subcommittee, thank you for the opportunity to testify on behalf of the Americana Music Association.

I want to address a few obstacles to making a living as a songwriter and recording artist today. Everything I say is guided by one principle: All creative people are entitled to fair market compensation when their work is used by others regardless of the platform.

I have been both a professional musician and songwriter for 35 years. I grew up in the music industry, in the age of major record labels and brick and mortar record stores. I have been assigned a major label since 1978 and am currently on the esteemed Blue Note label.

The climate among musicians at the moment is dispirited. We feel marginalized and devalued although our passion for our work remains unchanged. Every artist I know says, regarding their work, that they have no choice. We don't create out of whimsy, narcissism, or lack of ambition for more financially dependable professions. We are fueled by an artistic sensibility that can be ruthless in its demand for discipline. And, in some ways, we are in a service industry.

We are here to help people feel, to inspire, to reveal the secrets of the heart, to entertain, and provide sustenance for the soul. Creating music is a collaborative effort. In the creation of recorded music, cowriters, producers, fellow musicians, recording engineers, background singers, and various support people come together with the single purpose to create one work.

I am a fan of new technology and I am excited about the potential I see in the new ways of distributing music that are being offered to music lovers. My enthusiasm is tempered, however, by the realization that these new services are all cast against the backdrop of crushing digital piracy and licensed under outdated and byzantine laws which stand in the way of creators being paid fairly for their work.

Among the problems facing us are; one, the lack of a public performance right for terrestrial radio play for recording artists. The United States is one of a few countries, including China, North Korea, and Iran that lack a radio performance right for artists. The failure to recognize this right means that performers cannot collect royalties for their work even when it is broadcast in countries where the right exists because the treaties the U.S. has signed are reciprocal.

Two, issues concerning how rates are set for licenses that songwriters offer for their work. Currently, the law prevents courts from considering all the evidence that might be useful in setting the fairest rates for licenses that performing rights organizations offer. And royalty rates are not set on a fair market basis. This makes no sense. The Songwriter Equity Act, introduced by Congressmen Collins and Jeffries, would address these issues and I thank them for that.

Three, the lack of Federal copyright protection for pre-72 sound recordings. There is a gap in copyright protection for sound recordings created before 1972, which digital services use as an excuse to refuse to pay legacy artists.

I thank Ranking Member Conyers and Congressman Holding for introducing the RESPECT Act to treat the work of legacy musicians fairly. For example, if my father were alive today, he would receive no payment for digital performances of his song "I Walk the

Line," written and recorded in 1956. But anyone who re-recorded that song today would receive a royalty.

The injustice defies description.

These are a few of the many challenges we face as performers and songwriters. And I understand Ranking Member Nadler is considering legislation to comprehensively address these and additional concerns.

Thank you, Congressmen Nadler.

Bottom line, copyright law should not discriminate among individual music creators. Each should be fairly compensated for their role in the creation and delivery of music to audiences.

I see young musicians give up their dreams every single day because they cannot make a living doing the thing they most love, the thing they just might be on the planet to do. They deserve our encouragement and respect. Musicians and artists of all kinds should be valued members of American society; compensated fairly for honest hard work.

I believe we can find solutions so that artists and musicians can succeed together with both new and existing music services. And I thank you for this time.

[The prepared statement of Ms. Cash follows:]

Testimony of Rosanne Cash, on behalf of the Americana Music Association Before the House Judiciary Committee, Subcommittee on Courts, Intellectual Property and the Internet

Music Licensing Under Title 17 – Part 2
June 25, 2014

Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, Members of the Subcommittee, thank you for the opportunity to testify today.

I am a singer/songwriter, author and performer. I wanted to be a songwriter from the time I was a teenager. I thought songwriting was an honorable, even noble profession. I believe that songwriting is far beyond just self-expression, but a powerful means of service: we, songwriters and musicians, help people to understand themselves better by helping them to feel— through music. We shine light on the dark corners of the soul. We help reveal the nooks and crannies of our shared humanity. We provide a community for the language of the heart. As Hans Christian Andersen said, where words fail, music speaks.

From the age of 18, I put myself to work. I 'showed up for the Muse', as my friend, writer Steven Pressfield says. I sat quietly around great songwriters to listen to their conversations about process, refinement, editing, rhyme schemes, chord progressions, lyric structure, narrative arcs, and on and on. I was full of passion and ambition, and I made myself an apprentice to some of the greats.
I have been a singer/songwriter and a sound recording artist now for over 30 years and I feel the same passion I felt as a teenager.

I have enjoyed acknowledgment, and much encouragement. I've won a Grammy, and been nominated for that award twelve times. I have charted 21 Top 40 singles, including 11 number one singles. I attribute most of this to very hard work and wonderful opportunity, as well as some native talent and tremendous collaboration with other creative individuals over the course of my career. I have had the great fortune of wonderful mentors and incredible fans, who have stayed with me for 35 years. I now share what I have learned by teaching songwriting and creative process. I have been a guest teacher in both English and Music programs at many colleges and universities, including New York University and Harvard. I am also a writer of prose, and have published four books, including my memoir, 'Composed', in 2010. I have kept my head down and shown up for work.

But the right beginnings, hard work and talent have NEVER been enough in my business. Creating music is, for the most part, a collaborative effort. Musicians are a tight-knit group. In the creation of recorded music, co-writers, producers, fellow musicians, recording engineers, background singers and various support people all come together with a single purpose: to create ONE work. For example, my new album The River and The Thread, from conception to a finished product took almost two years of writing and recording by myself and my husband and writing partner

John Leventhal. It was arranged and produced by John, and co produced by Rick DePofi over that period. Then a team of creative and business professionals committed to 18 solid months of promotion and touring with me to support it. I am in the sixth month of that promotion.

With good fortune, a musician may also enjoy, as I do, the confidence and financial investment of a record label. I have been signed to major labels since 1978 and I'm honored to be on the esteemed label of Blue Note Records now. I am also a member of BMI, my performing rights organization, a member of two unions— SAG-AFTRA and the Musicians Union, of an artists advocacy group called Content Creators Coalition, and I'm a member of the Americana Music Association on whose behalf I am privileged to testify today.

I tell you these things to underscore that to me as a singer/songwriter, a recording artist, and a participant in many other parts of the music business it seems painfully obvious that all creative people deserve fair compensation when their work is used by others. For various reasons, that does not seem to be happening in the marketplace today, and we need a realignment.

I am a fan of new technology, both as a consumer and an artist. I am active in social media and do it myself, and I love it— I love the connection and the conversation. I'm also excited about the potential I see in the multiple new means of distributing music digitally that are being offered to music lovers, but my enthusiasm is tempered by the realization that these new business models are all cast against the backdrop of at least two decades of crushing digital piracy. This is important, because the royalties we are often offered as a result seem non-negotiable. We can license services on the terms they offer. The alterative is piracy.

My father, Johnny Cash, testified before this committee in 1997 in support of the Digital Millennium Copyright Act. He told the committee then how challenging and dispiriting it was to find one of his biggest hits, 'Ring of Fire', being sold by someone in Slovenia on an illegal website and that he hoped the DMCA would aid in solving that. What an innocent time that was. Isolated illegal websites have morphed into a multi-national juggernaut that threatens to decimate the livelihoods of *all* musicians, songwriters and performers. There is a team at my record label devoted to issuing takedown notices to pirate sites. It is an absolutely futile gesture. The most popular search engines list pirate sites on the opening page of a search.

I have been publicly critical about the payment structures streaming services currently offer artists. For example, for an 18 month period, there were nearly 600,000 streams of my songs on a popular subscription site. I was paid $114.00 for those streams. I am not a lawyer or a politician or a policy wonk, and I couldn't begin to parse the incredibly complex, outdated, pre-Internet laws regarding licensing and copyrights but I CAN tell you that I see young musicians give up their dreams Every Single Day because they cannot make a living, they cannot survive doing the thing they most love, the thing they just might be on the planet to do.

There are various legal obstacles that currently hinder creative people in the music business from making a fair living from their work.

Among those are:

- The lack of a public performance right for terrestrial radio play for sound recording artists. The United States is among a small number of countries that lack a broad sound recording performance right for artists. The others are China, North Korea and Iran. That list speaks for itself. The failure to recognize a broad public performance right for sound recording artists means that performers cannot collect royalties for their work even when it is broadcast abroad in countries where the right exists, because the treaties the U.S. has signed work on a reciprocal basis. Besides being fundamentally at odds with the principles this country was founded on – that we value the creations of the mind as much as we value what we create with our hands - since we export more music than we import, the continued failure to recognize a performance right for terrestrial radio play makes no economic sense.

- Issues concerning how rates are set for compulsory and collective licenses songwriters offer for their work. Songwriters and composers typically collectively license their work for public performance through performing rights organizations (PROs). This makes it easier for services like digital music services, satellite radio, television and other users of music to get the rights they need in one place, rather than having to license them directly from songwriters on an individual basis. Rates for these licenses generally end up being set by a federal court in New York. A provision of the copyright act prohibits the court from considering sound recording royalty rates as relevant evidence when setting rates for performances of compositions. Courts should be free to consider all evidence they find relevant to set the fairest rates.

  As songwriters, we are also required to allow anyone who wishes to make a reproduction of our songs to do so in exchange for paying a statutory royalty rate. That rate was 2 cents per song in 1909 and today is only 9.1 cents per song.

  The Songwriter Equity Act, introduced by two members of this Committee - Congressmen Collins and Jeffries – would address these issues by allowing the courts to consider all relevant evidence when setting rates, and by directing the government body that sets the rate for the compulsory license for making reproductions of songs to reflect market value for the songs.

- The lack of federal copyright protection for pre-'72 sound recordings. There

> is a gap in copyright protection for sound recordings created before 1972 which allows digital streaming services to refuse to pay older artists even for digital performances of those sound recordings. Works recorded prior to 1972 are protected by state laws so they don't enjoy the digital sound recording performance royalty provisions of the federal copyright act. I thank Ranking Member Conyers and Congressman Holding for introducing the RESPECT Act to treat the work of older musicians fairly by addressing this payment disparity. To put a personal perspective on this, if my father were alive today he would receive no payment for digital performances of his song 'I Walk The Line', written and recorded in 1956, but anyone who re-recorded that song WOULD receive a royalty. This makes absolutely no sense, and is patently unfair.

Bottom line: Copyright law should not discriminate among different types of creative workers in affording them basic rights to compensation for their work. The creation and delivery of music to audiences requires the collaboration of many individuals and businesses including songwriters, performers, producers, music publishers and record labels. All of these individuals and entities should be appropriately compensated for their role in crafting and bringing work to audiences. At the moment in various important circumstances, some artists have no rights to royalties at all when their work is used by others to generate income. Other creators, like songwriters, have the compensation for the use of their work regulated by outdated laws and regulations.

These are just a few of the issues facing the music community. I understand that other legislation may be proposed by Ranking Member Nadler, from my home state of New York, thank you Mr. Nadler, to address music issues more comprehensively, and I will look forward to that bill with interest.

The complex system of music licensing that exists today should not be used to pit colleagues one against the other. I value all the contributions other creative people have made to my work and my career, and I have felt fortunate to be able to contribute and collaborate with others in return. The current dissonance we hear over music licensing issues does not stem from any ill will amongst colleagues or business partners, but solutions need to be found that realign incentives so that artists and songwriters can succeed together with existing and new music platforms.

Violinist Pablo Casals, one of the greatest musicians ever to live, said 'Music will save the world.' I believe that with all my heart. Where there are great differences among people, where misunderstanding and conflict are entrenched and seem impenetrable, there is a commonality, a language we all understand that resonates outside the arena of dispute and bitterness, outside linear time, a language that creates community and joy, and that is beyond words: Music.

Thank you .

Mr. COBLE. I thank you, Ms. Cash.

Mr. Sherman, let's start with you. You are recognized for your statement.

TESTIMONY OF CARY SHERMAN, CHAIRMAN AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA)

Mr. SHERMAN. Chairman Goodlatte and Coble, and Ranking Members Conyers and Nadler, and Members of the Subcommittee, my name is Cary Sherman. I serve as Chairman and CEO of the Recording Industry Association of America, representing such iconic labels as Columbia, Motown, Capitol, Atlantic; to name a few.

Our members have worked hard over the past two decades to build a viable, diverse and consumer friendly digital music marketplace. Millions of music lovers can find whatever they want whenever and where ever they want it.

Digital models already account for more than two-thirds of our revenue and that number is growing. But before the music marketplace can realize its full potential, there remains serious systemic issues to address. Records are the economic engine that drives the entire music industry. It's the recording invested and marketed and promoted by record labels that produces real revenue for the songwriter, for the artist, for broadcasters, for digital music services.

Record labels invest not just the financial capital but their human capital, years of experience and expertise from the likes of Clive Davis, Jimmy Iovine, Mo Ostin, who work with artists to bring out their very best, resulting in music that not only captivates fans but also drives revenues for the benefit of everyone in the music value chain.

Yesterday, we released a report on the investments in music made by major record companies. In embracing digital distribution, record labels have revolutionized the business and streamlined their operations all while revenues have plummeted. Even in tough times, however, has a percentage of U.S. net sales revenue over the last decade major label payments for artist royalties have increased by 36 percent and mechanical royalties for songwriting have increased by 44 percent.

Impediments to licensing impact the ability of record labels to sustain the investment that benefits the entire music ecosystem. Today's antiquated, complex and time consuming licensing regime undermines that system. And that's why we believe music licensing must be fixed, because behind the seamless experience provided to consumers lurks an inefficient and frankly broken system.

We've got to rethink it. Here is what we suggest. First, grant a broadcast performance right for sound recording. It is frankly inexcusable that the U.S. still provides a special interest exemption for the benefit of AM/FM radio broadcasters; a subsidy which is taken out of the pockets of artists and their record labels. It's time for that to end.

Second, make sure artists who are recorded before 1972 are paid. Because sound recordings are covered by Federal law after February '72 and State law before that date, some of our most cherished artists are not being paid by businesses who take advantage

of the compulsory licenses. We are extremely grateful to Representatives Holding and Conyers and their other cosponsors who are proposed to RESPECT Act to fix this anomaly.

Third, allow rights to be bundled and administered together. Owners of every other type of copyrighted work are able to license all the copyrights necessary for all uses. A movie streaming service doesn't have to go to one entity to license the performance and a different entity to license the making of a server copy so it should be a musical works.

Fourth, create an across-the-board market-based rate standard. It goes without saying that every right sold, it deserves fair market value for their work. We should have one fair market value rate standard for uses of all music that remain under a compulsory license.

Finally, consider a one-stop-shop for musical work licenses. We have filed with the copyright office an idea laying out one possible way to license musical works in this manner. It is a potential path toward simplifying the complicated way musical works must be licensed today. But we also understand, as we stated repeatedly in our submission, that no revision to the music licensing regime can move forward unless publishers, songwriters and all the relevant stakeholders in the music community, come to a solution on which they agree.

The goals of any solution should be to align the economic interests and incentives of music creators; ensure that songwriters and publishers receive a fair portion of revenue from the licensing of the sound recording; avoid competition between record labels and music publishers for the same dollars from licensees; speed the licensing process, making it quicker and easier for consumers to enjoy new music services; and make royalty payments to songwriters and publishers more efficient and more transparent. We welcome the opportunity to engage with our music industry partners on our idea, as well as on any other ideas they may have to improve the status quo.

The music business has reinvented itself but our work is not done. We hope by working together with music industry colleagues that we can find the consensus necessary to simplify music licensing and ensure that all creators are paid fairly.

Thank you.

[The prepared statement of Mr. Sherman follows:]

Statement of
Cary Sherman
Chairman and CEO, Recording Industry Association of America
on "Music Licensing under Title 17, Part Two""
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary, U.S. House of Representatives
June 25, 2014

Introduction

Chairman Coble, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers, and members of the Subcommittee, my name is Cary Sherman and I serve as the Chairman and CEO of the Recording Industry Association of America. RIAA is the trade organization that supports and promotes the creative and financial vitality of the major record companies (often called the "majors"). Its members include iconic incubators of musical talent such as the Columbia, Motown, Capitol and Atlantic labels, to name a few, that together comprise the most vibrant record industry in the world. I greatly appreciate the opportunity to participate in this continued hearing on music licensing.

RIAA's members have worked hard over the past two decades to build a viable, diverse and consumer-friendly digital music marketplace. Millions of music lovers now listen to billions of recordings every single day. They can find whatever music they want, whenever and wherever they want it, in whatever format they choose. Undoubtedly, we have come a long way. Digital models now account for more than two thirds of our U.S. revenue. There are numerous new business models that could not even exist just a decade ago. We are light years ahead of other content-based industries in fully adapting to digital models.

But despite our efforts to meet consumers' demands in the modern music space, there remain serious systemic issues to address before the music marketplace can realize its full potential in the 21st Century. I would like to discuss what we see as our role in this evolution and highlight the challenges that remain.

The Role of the Sound Recording in the Music Licensing System

Record labels are the venture capitalists of the music industry. They invest tremendous resources in developing, marketing and promoting artists, and serve as the industry's economic engine. Yesterday, we released a report that details the major record companies' investment in music. As the report states, major record companies have embraced the digital age in every facet of the music business, giving recording artists, and the songwriters whose works they record, broader reach, finding new ways for them to earn a living from their craft, and helping fans take full advantage of innovative ways to find, access and enjoy their favorite music. Consumers have told record labels how they want to access music, and they have listened, with

offerings on numerous platforms from downloads, to on-demand streaming services with low subscription fees to ad-supported video streaming models that are free-to-the-consumer.

In the process of embracing digital distribution, record labels have revolutionized the business, streamlining their operations and allocating a higher proportion of their revenues to investing in artist career development. Record labels provide the investment on which everyone in the music value chain depends, "seeding" the entire music ecosystem with $22.6 billion in U.S. talent investment – including artists, songwriters and music publishers - in just the last decade (and that's just from the major labels). The majors also invested an additional $6 billion over the same period to market recordings in the U.S.

There can be no doubt that songwriters and music publishers are our partners in this business. As Lee Miller, one of today's most prolific songwriters and the President of the Nashville Songwriters Association International stated at the first session of this music licensing hearing on June 10th, "I do not succeed if my songs are not recorded, sold and played." The job of record labels is to help creators succeed, by investing in them and their talent, marketing and promoting the recording and the artist, while at the same time partnering with today's and tomorrow's music service providers to expand the existing marketplace for music. Record labels make heavy investments in the artist's brilliant way of bringing a song to life, and ensure that this creativity reaches and captivates generations of fans, allowing everyone to reap the rewards of their contributions.

And even in tough times, our investments in creators have been significant. As a percentage of U.S. net sales revenue, over the last decade major label payments for artist advances and royalties have increased by 36% and mechanical royalties for songwriters and music publishers have increased by 44%.

Records are the economic engine that drives the entire music industry, from songwriter/publisher royalties to earnings from broadcasters and music services. If the song isn't recorded, and invested in by record companies through marketing and promotion, there is no real revenue for a songwriter, for an artist, for a broadcaster, for a digital music service. And many other types of income, from concert ticket sales to merchandising and endorsement opportunities, rely on the risks taken by record labels through investments that benefit not just well-known recording artists and songwriters but engineers, background musicians and many others.

Needless to say, investing in the careers of artists is an inherently unpredictable business, given the elusive nature of consumer taste. According to data from Nielsen SoundScan, 80% of new albums sell less than 100 copies and 94% sell less than 1,000 copies. Out of 8 million digital tracks sold in 2011, 7.5 million sold less than 100 copies. In 2011, only one-half of one percent of all albums that sold even a single copy sold more than 10,000. Professor Anita Elberse has concluded that most record companies "recovered their investments in only one out of every five or six new albums." And it goes without saying that record labels must be able to receive a fair return on their investment, or they cannot take the necessary risks. If record labels cannot

license their products widely and efficiently, they cannot sustain the investment needed to keep the economic engine running smoothly. Impediments to licensing – be they rights that are more limited than other copyrighted works, rate-setting processes that result in less than fair market value, or inefficient systems for licensing musical works – all impact the ability for record labels to drive the future of the music business for the benefit of all stakeholders.

Overall Goals

So why are we here today? Why is this Subcommittee holding a hearing on the system for music licensing and not movie licensing, or book licensing, or software licensing? Well, because behind the seamless experience provided to consumers lurks an antiquated, inefficient and, frankly, broken system. Modern media must pair with today's and tomorrow's technologies to meet consumers' demands and expand consumer choice; foster rapid and frictionless innovation; and provide fair market value to creators, entrepreneurs and investors across the ecosystem. Unfortunately, the current music licensing system is not achieving these goals.

Issues

Music licensing is uniquely a product of its history – a series of legislative, regulatory and industry measures designed to address particular needs at particular points in time. Each of these measures may have made sense when enacted but, taken together, they now make little sense. The resultant fraying patchwork has produced a number of anomalous consequences. For example:

- Recordings, inexplicably, and unlike any other copyrighted work, are excluded from a full performance right, which means AM/FM radio does not pay for their use;

- Recordings are protected by Federal copyright law only if made after February 15, 1972, and some large digital radio services that benefit from a compulsory license are refusing to pay for recordings created before that date;

- Three digital radio services which are each now more than 20 years old still pay for recordings based on a below-market rate standard that was first established on the theory they were start-ups in need of a break;

- Unlike any other kind of copyrighted work delivered to consumers, the considerable investments in recordings are encumbered by a complicated regulatory regime for licensing musical compositions incorporated in the recording;

- Separate licensing entities exist for each of the underlying rights in musical compositions (i.e. performance, reproduction/distribution), so that digital music services that want to use our music are encumbered by the need to obtain multiple licenses from multiple sources for the same commercial use; and

- Musical compositions can be simultaneously subject to (1) free market negotiations, (2) compulsory licensing, and (3) judicial consent decrees, all at the same time, for inclusion in the same product or for the same commercial use.

It's no wonder everyone finds music licensing arcane and complex and dysfunctional. The system is simply not fit for the needs of the current marketplace. If we were to devise a licensing system from scratch, the one we've got today would not even be on the table. So we've got to rethink the system to more closely resemble other modern licensing frameworks, and we need to do it together – to achieve consensus from recording artists, record labels, songwriters and music publishers, along with the rest of the music community.

What specifically do we need to achieve? Our music licensing system should:

- Ensure that everyone in the value chain receives fair market value for their works, and for all of uses of their works, regardless of platform;

- Simplify musical work licensing by aggregating works under a blanket license, such as those already offered by ASCAP and BMI and the Section 114 compulsory license for recordings.

- Cover all the rights needed to bring to market all modern music releases, not just the audio-only products of yesterday.

Solutions

Fortunately, we do not need to reinvent the wheel to come up with a system that could actually achieve these specific priorities, and the overall goals listed above. We can simply look to the rights and licensing regimes already in place for most other copyrighted works.

First, grant a broadcast performance right for sound recordings. Every other copyrighted work has the same full set of rights. Only recordings have been denied the comprehensive rights enjoyed by every other copyrighted work – namely the right of public performance. That's why AM/FM radio is able to profit from the public performance of recordings without paying artists or record labels a dime. This has to be fixed.

This loophole in the law, which is unique among developed nations, costs artists and rights holders – and the U.S. economy – millions of dollars as foreign countries refuse to pay for radio performance of U.S. music since the U.S. doesn't pay. This anachronistic exemption didn't make sense in the past, and it certainly doesn't make sense in the current broader music industry landscape. If we're talking about modernizing music licensing, it only makes sense to finally put an end to the nearly century-old economic government subsidy provided to terrestrial broadcasters.

Second, make sure artists who recorded before 1972 are paid. Compulsory licenses in the law apply to copyrighted works regardless of when they were created. Only sound recordings are paid, or not paid, under a compulsory license depending on the date of their creation. This too has to be fixed.

While recordings made on or after February 15, 1972 are covered under Federal copyright law, those made before that date are protected by state law. Unfortunately, some digital radio services operating under a compulsory license have abused this bifurcation by refusing to pay for use of "pre-72" sound recordings under either state or federal law. The result is that many legacy artists are not compensated for the classic music that not only stands on its own (and inspires entire dedicated stations like Sirius XM's "60s on 6"), but helped pave the way for the hits of today.

Reps. Holding and Conyers have proposed legislation, H.R. 4772, the RESPECT Act, that would create a condition for use of the compulsory license. Services that benefit by using the compulsory license to stream sound recordings without permission and by paying one check for all music to one entity, would have to also pay for pre-72 music under the same system. Modernizing the modern music landscape cannot overlook and leave behind these cherished artists and their invaluable contributions to our country's musical heritage.

Third, allow rights to be bundled and administered together. Those who develop and own every other type of copyrighted work are able to license all the copyright rights necessary for the uses to be made by the licensee. A movie streaming service doesn't have to go to one entity to license the performance and a different entity to license the making of a server copy. So it should be with musical compositions.

Right now, the antiquated consent decree under which ASCAP operates prohibits that organization from offering licenses to any rights other than the public performance right, and another consent decree prohibits BMI from offering other rights such as synchronization licenses. That may have made sense in the 1940's, but in an age where multiple rights are implicated when music is downloaded and streamed online or consumed on video services like YouTube and Vevo, these restrictions have become an impediment. This must be changed. All licensing entities must have the ability to license all the rights needed for the use of the musical composition.

Fourth, create an across-the-board market-based rate standard. It goes without saying that every rights holder deserves fair market value for their work. Their livelihoods depend on it. We should have one rate standard for uses of music that remain under a compulsory license.

For example, three mature digital radio services – Sirius XM, Music Choice and Muzak – have enjoyed below-market royalty rates for their use of sound recordings. Rather than using the "willing buyer/willing seller" rate standard that applies to every other service, these three services still operate under the "801(b)(1)" standard that they were "grandfathered" into before 1998. For these services, that standard has been interpreted to set royalty rates that

are less than fair market value, effectively forcing artists and record labels to subsidize these services' business models on a continuing basis.[1] They were "grandfathered" into the lower rate standard because of concern for the business expectations of start-up companies, but Congress never intended this to produce permanent below-market subsidies on the backs of artists and record labels. These services are no longer nascent businesses. All services that take advantage of the statutory licenses should be subject to the same willing buyer/willing seller rate standard.

Similarly, musical work owners must be guaranteed fair market value for their works by basing royalty rates on the same "willing buyer/willing seller" rate standard when mechanical royalty rates are set under Section 115 of the copyright law. We support the revision of that provision to reflect the fair market value standard as part of comprehensive revision of music licensing law (which would include updating the standard for the "grandfathered" services under Section 114).

The consent decrees under which ASCAP and BMI operate must also be revisited to ensure that musical work rights holders are paid fair market value for their compositions.

Finally, consider a one-stop shop for musical work licenses. We have filed with the Copyright Office (in response to their request for comments) an idea laying out one possible way to license music in this manner. It would have the music publishing and recorded music sides of the industry negotiate, in the free market, an overarching allocation of royalties between them for the exploitation of sound recordings. It is a potential path toward simplifying the complicated way musical works must be licensed today.

The goals of any solution should be to align the economic interests and incentives of music creators; ensure that songwriters and publishers receive a fair portion of revenue from the licensing of the sound recording; avoid competition between record labels and music publishers for the same dollars from licensees; vastly simplify and speed the licensing process, making it quicker and easier for consumers to enjoy new music services; and make royalty payments to songwriters and publishers more efficient and more transparent.

There are undoubtedly many approaches to address today's broken system, and we are ready to discuss them with our industry colleagues.

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[1] *See, e.g., SDARS II*, 78 Fed. Reg. at 23,058 (rejecting marketplace benchmark for preexisting subscription services as "so far from the current rate" and basing new rates on below-market rates previously established; selecting a lower SDARS rate because of cost structure); *SDARS I*, 73 Fed. Reg. at 4087 (selecting a lower SDARS rate because of concerns about profitability and cash flow); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25,394, 25,399-25,400, 25,405-09 (May 8, 1998) (rates to be based on policy considerations, not the marketplace; sustaining low rate based on service risk exposure and perceived precarious financial position).

Ultimately, what remains at the center of this exercise is music and its intrinsic value in our lives. Music – and fans' engagement with music – is more important than ever in this digital age. Music is at the core of our culture and it is often the connective tissue of the Internet. The most talked about topic on social media is music, the most watched videos on YouTube are music videos, the most followed people on Twitter are recording artists, and iTunes is still called **iTunes**. Just last week, Mashable published a story documenting how music is the essential draw for advertisers, for charitable organizations, for technology companies, for social media, you name it. Technology firms recognize they need to be part of the music space because they know that's where their customers are. Our members are proud to invest in the development of a diverse array of products that are so universally enjoyed, and they want to continue to be the engine behind this cherished art form. The music business has reinvented itself, but our work is not done. It can only be made easier if our complex licensing system is simplified and music creators are paid fairly.

Again, we thank the Subcommittee for holding this hearing and for its interest in modernizing music licensing. It's not easy to reform a system as deeply rooted as our music licensing system, and undoubtedly there will have to be give and take by every interested party if we are to succeed. But we believe, given the increasing dysfunction under our current system, that the time is ripe to make the changes that can truly transform music licensing for the better. And we hope, by working together with our music community colleagues, that we can find the consensus we think is necessary to establish a system that works for everyone.

Thank you.

Mr. COBLE. Thank you, Mr. Sherman.

Mr. Warfield?

TESTIMONY OF CHARLES M. WARFIELD, JR., JOINT BOARD CHAIR, NATIONAL ASSOCIATION OF BROADCASTERS (NAB), AND SENIOR ADVISOR, YMF MEDIA

Mr. WARFIELD. Thank you. Good morning, Chairman Coble, Ranking Member Nadler——

Mr. COBLE. Mr. Warfield, pull your mic closer to you, if you will.

Mr. WARFIELD. Good morning, Chairman Coble, Ranking Member Nadler, and Members of the Subcommittee.

My name is Charles Warfield and I am the Joint Board Chair of the National Association of Broadcasters. Over my 37-year career in and around broadcasting I have served as President in one of the country's first wholly minority-owned radio station groups. I ran the day-to-day operation of some of America's top radio stations and I've even worked as an executive at a record label.

Over that time, I learned that broadcasters serve our listeners in many beneficial and significant ways. Radio broadcasters inform, educate and alert listeners to important events, topics and emergencies. We introduce them to new and old music. We entertain them with sports, talk and interviews. We are local, involved in our communities and serve the public interests. For those reasons, I am proud to testify today on behalf of the thousands of free, local, over-the-air radio stations across the United States.

Supreme Court has repeatedly held that the core objective of copyright law is a public good. Not the creator's interest, not the user's interest, but the interest of the public at large. Unfortunately, in testimony before this Committee, some are arguing for fixes to copyright law that serve a very different goal; ensuring that their individual constituencies receive greater compensation at the expense of both music licensees and listeners. Nowhere in their arguments do they emphasize the need for balance, the interest of consumers, or enhancements to competition; any one of which would promote the public good.

In contrast, stepping back from any one piecemeal legislative proposal before this Subcommittee, it is clear that, taken as a whole, the time-tested laws that govern the relationship between the music and broadcast industries promote the public good in three important ways.

First, the existing law has enabled a locally focused radio industry that is completely free to listeners. Anyone with an AM/FM antenna can access our programming completely free of charge, especially in times of emergency when other forms of communication fail. Radio is unique among entertainment mediums in that there is no subscription, no broadcast package or expensive wireless data connection needed for access.

Second, the resulting popularity of radio has significantly contributed to a U.S. recording industry that is the envy of the world, both in terms of size and scope. While U.S. copyright law may contain some critical differences from its international counterparts, those differences have fostered the largest recording industry in the world. One that dwarfs that of the U.K., Germany, France, and Italy combined. Our unique system of free airplay for free pro-

motion has served both the broadcasting and recording industry as well for decades to the benefit of listeners.

The fact is, in all 37 years of my career, I have never had a record executive come to my station and say, "Why are you playing all of my music?" I have never had a promotion department refuse to provide us with their newest record the day it comes out. They show up at radio where they see the value and realize that we have the greatest promotional tool for their artist. And we're happy to provide them with that.

Third, and most importantly, the community-based nature of local broadcasting has driven our industry to extraordinary levels of public service. For example, in the wake of Hurricane Sandy, New York City's WQHT, HOT 97, put its music on hold and broadcast steadily throughout multiple power outages, providing them much needed connection to lifesaving news and information. Then, in the days following, HOT 97 ran continuous informational announcements providing critical information about disaster relief locations and assistance. Further, its Hip-Hop Has Heart Foundation provided blankets, clothing, HD radios and essentials to residents of the inflicted areas throughout the crisis.

This is just one example of our industry's commitment to service and it is the norm, not the exception. Each of you knows this as you see the value of the local broadcasters back in your districts every day. But make no mistake, the unique community focus of broadcast radio is only enabled by the current legal framework.

I would urge this Committee to tread carefully and resist piecemeal changes to law that might disrupt this delicate balance that has enabled our industry to serve the public good for decades.

Turning briefly to streaming, I agree with others on this panel that the current legal framework governing webcasting imposes obstacles on every corner of the music ecosystem that currently prevents our businesses from collectively serving the public good. Today, whether you are a large broadcaster or small broadcaster, the revenue that can be generated from streaming simply does not and cannot offset the costs, so many of our members simply do not do it. I urge this Subcommittee to focus this music licensing review on changes to law that will promote a sustainable webcasting industry to the benefit of artists, songwriters and consumers.

In conclusion, NAB stands ready to work with you to ensure a vibrant and competitive broadcast industry, now and in the future, that serves the public good.

I am pleased to answer any questions and welcome your invitation for me this morning. Thank you.

[The prepared statement of Mr. Warfield follows:]

Hearing on
"Music Licensing Under Title 17: Part Two"

United States House of Representatives
Committee on the Judiciary

Subcommittee on Courts, Intellectual Property, and the Internet

June 25, 2014

Statement of Charles M. Warfield, Jr.
YMF Media, LLC

On behalf of the National Association of Broadcasters

I. Introduction

Good afternoon, Chairman Coble, Ranking Member Nadler and members of the Subcommittee on Courts, Intellectual Property, and the Internet. Thank you for inviting me to testify today. My name is Charles Warfield, and I am currently the Joint Board Chair of the National Association of Broadcasters, and a Senior Advisor to YMF Media. I am testifying today on behalf of the more than 6,000 free, local, over-the-air radio members of the NAB.

My career in broadcast radio has spanned more than 36 years. Over that time, I served as President and COO of one of the first wholly minority-owned radio station groups, ran the day-to-day operations of some of America's top radio stations, and even spent several years as an executive on the record industry side of the business. Many of my radio stations directly served your constituents, and continue to do so today. These included WJLB-FM/WMXD-FM in Detroit, WEDR-FM in Miami, and WBLS-FM/WLIB and WRKS-FM in New York, which became "the most listened to radio station in America" under my watch.

I am uniquely situated to testify on the issues before this Committee today for two reasons. First, NAB is an Association comprising both creators and users of copyrighted works, so it has a distinct interest in advancing the cause of both sides in this debate. Second, I was personally involved on the recording industry side of the business, so I recognize the opportunity and challenges that industry faces as well.

II. The Overriding Objective of Copyright Is the Public Good

As you undertake your review of the music licensing laws, it is worth highlighting at the outset that the Supreme Court has repeatedly held that the core objective of copyright law is the public good.[1] Not the creator's interest. Not the user's interest. But the interest of the public at large.

[1] *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) ("The primary objective of the Copyright Act is to encourage the production of original, literary, artistic, and musical expression for the good of the public"); *Twentieth Century Music Corp. v.*

While stakeholders on each side have manipulated the text of the Constitution and subsequent case law in attempts to justify their own arguments and agendas; Congress and the Court have always strived for a copyright regime that balances the rights of creators and users to maximize this public good. The aim of this Subcommittee's Copyright Review should be no different.

Unfortunately, two weeks ago, when this Subcommittee held its first of two hearings on music licensing, groups representing artists, music publishers and songwriters seemingly ignored this incontrovertible objective. Instead, each industry made its case for fixes to copyright law that served a very different goal – ensuring that their individual constituencies receive greater compensation for their work at the expense of music licensees and listeners. Nowhere in their arguments did they emphasize the need for "balance", the interest of "consumers", or the impact on "competition" – any of which would promote the public good.

Today, I am going to take a different approach, and will briefly explain why I believe that broadcast radio, and the current legal framework that enables it, unquestionably promotes the public good. While unfortunately, the laws governing webcasters fail this test.

III. The Legal Framework Governing Broadcast Radio Promotes the Public Good

For over ninety years, broadcast radio has impacted the lives of Americans in many beneficial and significant ways. Radio broadcasters inform, educate, and alert our listeners to important events, topics, and emergencies. We introduce them to new music. We entertain them with sports, talk, and interviews. We are local, involved in our communities and proud to serve the public interest.

There is much to criticize regarding the complexity of the laws governing the music industry. But viewed through the lens of the public good, there should be little question that the

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Aiken, 422 U.S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts").

specific laws governing the relationship between the music and broadcast industries have been a resounding success in three ways.

First, the current law has enabled a locally-focused, community-based broadcast industry that is completely free to listeners. This free service is unique among entertainment media, and doesn't require a subscription, a broadband connection, or an expensive wireless data connection for access. Instead, it is completely free to anyone with an AM/FM antenna. Combined with an architecture that ensures that broadcast radio is always on in times of emergency, even when other forms of communication fail, broadcast radio has played a critical role in communities across America for decades.

But make no mistake, maintaining this completely free model in an increasingly competitive and costly industry is a delicate balance. Like all other businesses, local radio stations represent brands created and maintained at great expense – from on-air talent and content-production costs to staffing and equipment. Radio broadcasters' ability to continue offering their product under a completely free model is directly premised on the existing legal framework and resulting cost-structure.

Second, the resulting popularity of broadcast radio – due to its cost (it's free!), community-focus, and of course the product, which often includes music – has contributed to a U.S. recording industry that dwarfs the rest of the world both in terms of size and scope. This output of diverse and high quality musical works and sound recordings unquestionably benefits the public and flows from the current legal regime.

The existing U.S. system of "free airplay for free promotion" has served both the broadcasting and recording industries well for decades. The U.S. is the most significant exporter of music and the largest creator for recorded music sales world-wide. Further, the mutually beneficial relationship between broadcasters and the music industry, enabled by the existing law, has incentivized a U.S. recording industry is larger than that of the U.K, Germany, France and Italy combined, all of which impose performance royalties on over-the-air sound recordings.

Both empirical[2] and anecdotal[3] evidence suggest that the U.S. radio industry – the equivalent of which exists nowhere else in the world and which is directly attributable to the existing legal framework – contributes to this commercial success by providing significant benefits both to performing artists and recording companies. Indeed, listeners identify FM radio as the place they first heard the music they purchased. With an audience of 242 million listeners a week, the radio audience dwarfs the listenership of satellite radio and Internet music services.[4] The fact is, the recording industry invests money promoting songs in order to get radio airplay, and earns revenues when radio airplay leads to the purchase of the music listeners hear. Contrasted with the varying legal regimes governing sound recordings in other countries, the U.S. system has unquestionably been a win for the U.S. recording industry, artists and the public.

Third, radio broadcasting has a profoundly positive impact on the economies and spirits of local communities. A recent study found that local radio generated a total of more than half a trillion dollars in GDP and over one million jobs in 2012 across the United States.[5] In North Carolina and New York, local radio is responsible for generating close to 32,000 and 67,000 jobs in these states, respectively.[6] But perhaps more importantly, the fundamental community-based nature of local broadcasting has driven extraordinary levels of public service that make our medium unique. The following are recent representative examples of local broadcasters serving their communities:

- When deadly tornadoes ripped through parts of Nebraska, Oklahoma, Arkansas, Alabama, and Mississippi in late April 2014, broadcasters stepped into their important lifeline roles as first informers, stopping the music and interrupting regularly scheduled programming to provide live, wall-to-wall storm coverage;[7]

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[2] Empirical analysis demonstrates that artists and record labels derive significant value from local radio airplay, ranging from $1.5 to $2.4 billion annually. Dertouzos, Radio Airplay and the Record Industry: An Economic Analysis 5 (https://www.nab.org/documents/resources/061008_Dertouzos_Ptax.pdf).
[3] *See* Attachment A.
[4] 2013 NAB Annual Report at 13.
[5] Woods & Poole Economics, Local Broadcasting: An Engine for Economic Growth 2 (http://www.nab.org/documents/newsRoom/pdfs/Local_Broadcasting_Engine_for_Growth_Publication.pdf).
[6] *Id.* at 41, 40.
[7] http://www.nab.org/documents/newsRoom/PSI/052014LTS.html

- Hundreds of radio stations across the country have helped raise more than $385 million for the life-saving work of St. Jude, and the St. Jude family of partner stations continues to expand. *Radio Cares for St. Jude Kids* is one of the most successful radio fundraising events in America;[8]
- The North Carolina Association of Broadcasters, in a partnership with the USO North Carolina, hosted the Welcome Home Vietnam Veterans Celebration for more than 70,000 attendees including veterans, their families and community members;[9]
- In the wake of Hurricane Sandy, one of the hardest-hitting natural disasters to strike the northeast, WQHT/Hot 97's Hip Hop Has Heart Foundation was a life-line, responding to the overwhelming needs of the community. During the storm, Hot 97 broadcast steadily throughout the multiple power outages, providing for some the only connection to news and information. In the days following, Hot 97 ran continuous informational announcements providing critical information about disaster-relief locations and assistance;[10]
- Fifteen radio stations across Chicago are currently helping to spread a message of anti-violence with "Put the Guns Down," an initiative to promote safety through the local communities and help to lessen the senseless gun violence that has plagued Chicago. Mayor Emanuel explained why he is now using local radio stations in his fight, saying: "We do policing. We do prevention. We do penalties. We also need parenting. We're going to add a fifth "P" today... pop culture;"[11]
- WACO-FM Waco, Texas, morning program, The Zack and Jim Morning Show, broadcast live from Afghanistan for a week in February to show support for members of the military who are stationed overseas;[12]
- Every August, WSLQ-FM Roanoke, VA, hosts its annual *Pack the Bus* campaign distributing school supplies to children in more than 21 school systems;[13]
- WSNW-FM, Greensboro, NC and its listeners raised over $200,000 to send more than 80 children intimately affected by illness to Victory Junction Gang Camp," a medically equipped place where children with chronic conditions get to just be kids;"[14]
- KLAC-FM Denver hosted the 13th annual Children's Miracle Network radiothon in 2014 to benefit the organization's local hospital, raising $1.87 million over three days and $14 million over 13 years;[15]
- When wildfires hit San Diego in May, prompting at least 23,000 evacuations, local radio stations including KBZT, KIFM, KSON, and KFMB, jumped into action with around the clock evacuation updates, wildfire reports, school closings, and traffic information;[16]
- And next week, the Virginia Association of Broadcasters – with the support of more than 150 local radio and television stations – will begin a year-long campaign *Feeding Virginia*

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[8] http://www.radiocaresforstjude.org/programsites/v/index.jsp?vgnextoid=8431d8edea413210VgnVCM1000001e0215acRCRD
[9] http://www.nab.org/documents/newsRoom/pdfs/032812_NCBA_Vietnam_release.pdf
[10] http://www.nabef.org/documents/newsroom/pressRelease.asp?id=2918
[11] http://chicagoradioandmedia.com/news/6539-chicago-radio-stations-asking-listeners-to-put-the-guns-down
[12] http://www.nab.org/xert/2014emails/publicservice/032014LTS.html
[13] http://www.broadcastpublicservice.org/story.asp
[14] id.
[15] http://www.nab.org/xert/2014emails/publicservice/032014LTS.html
[16] http://www.allaccess.com/net-news/archive/story/129665/radio-responds-to-san-diego-fires

to support all seven regional food banks in Virginia through fundraising and donation drives.[17]

These are not isolated incidents of public service. Rather, these are only a handful of examples of what radio stations do across the country, every day, every week, every year, for their local communities.

IV. The Legal Framework Governing Webcasting Stifles It and Undermines the Public Good

I would like to echo the previous testimony of DiMA Executive Director Lee Knife which underscored the significant problems created by the current legal framework governing the webcasting space. The current webcasting compulsory license contained in section 114 of the Copyright Act has failed to achieve the balance between music licensor and licensee that is necessary to benefit the public interest. To the contrary, the current compulsory license and resulting webcasting rates work to prohibit effective competition in the webcasting space and limit consumer choice.

Under the current law, it has proven impossible to run a profitable, stand-alone, non-interactive webcasting business. The largest player in the space, a company with 70% of the non-interactive streaming audience is losing money with every listener – and that service is paying license fees at a rate that has a 45% discount compared to the fees that the Copyright Royalty Board (CRB) set as the so-called market rate that others must pay. If Pandora had to pay the rate set by the CRB, it would have closed its doors long ago. That is not truly a competitive market rate.

As a result, this space lacks effective competition to maximize consumer choice. Make no mistake – today, the only companies that can attempt to challenge this service are companies that are successful in other industries – whether it be broadcasting, Internet search,

[17] http://www.vabonline.com/news/vab-announces-campaign-against-hunger/

or consumer electronics – and as a result can leverage that success to subsidize a long-term investment in streaming. But that leaves a limited pool of competitors in this space, and little opportunity for new entrants. Moreover, history shows that even those competitors eventually will tire of losing money and leave the field. It is not a recipe for long-term health.

For broadcasters in particular, the digital space offers an opportunity to expand the footprint of the public benefits highlighted above. But the current rate-setting standard and procedures used at the CRB have resulted in license fees that make webcasting cost prohibitive. Today, whether you are a large broadcaster or small broadcaster, or your station is based in Washington, DC or Charlotte or Casper, the revenue that can be generated from streaming simply does not, and cannot, offset the costs.[18] This imbalance is impeding the growth of Internet radio among local radio broadcasters, which ultimately is not to the benefit of artists, songwriters, or most of all consumers.

Broadcasters favor abandoning the "willing buyer/willing seller" standard and transitioning to the fair value "801(b)(1)" standard for setting sound recording performance royalty rates. The 801(b)(1) standard (so named because it is found in that section of the Copyright Act) has effectively, efficiently, and equitably balanced the interests of copyright owners, copyright users, and the public for decades, in various contexts and proceedings.[19] Further, changes in law that would promote increased transparency in copyright ownership, enhanced record-keeping requirements on the part of Performance Rights Organizations and other collectives, and reforms to the CRB process, would benefit webcasters and consumers,

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[18] This economic reality has engendered several innovative direct licensing deals between radio broadcasters and record labels that include revenue sharing agreements for both streaming and terrestrial airplay. *See, e.g.*, Press Release: Big Machine and Cox Media Group Seal Direct Licensing Deal, June 12, 2014 (http://www.coxmediagroup.com/news/cmg-press-releases/big-machine-and-cox-media-group-seal-direct-licens/ngJ9z/). These agreements signify that efforts to impose a performance royalty on terrestrial broadcasters are better resolved through individualized marketplace agreements rather than a one-size-fits all legislative government mandate.

[19] Instead of determining rates for the a statutory license through a hypothetical marketplace, 17 U.S.C.§ 801(b)(1) sets forth four objectives to be considered: (A) To maximize the availability of creative works to the public; (B) To afford the copyright owner a fair return on 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 owners 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 communications; (D) To minimize any disruptive effect on the structure of the industries involved and on generally prevailing industry practices."

and serve the public good.

V. Conclusion

Thank you for inviting me to testify before this Subcommittee today. I am confident that as this Subcommittee undertakes its review of music licensing, it will find that laws which promote a vibrant and competitive broadcast industry – now and in the future – benefit the public good.

I am pleased to answer any questions you may have.

Attachment A

Members of the recording industry at the artist and label levels confirm the promotional impact of radio airplay:

- "Thank you to radio...This record ['Stay'] never would have been this big if it wasn't for radio" says @rihanna at @iheartmusic Awards.[20]
- "You can see a direct correlation. If you looked at a terrestrial radio audience chart and at the iTunes top 10 singles chart, I would say 75 percent of it matches up." - RCA Records Executive Vice President & General Manager Joe Riccitelli,[21]
- Radio "still has massive reach in the local community" and "the top of the food chain" for making hits. - Island Def Jam's Steve Bartels[22]
- "Radio connects the world together. It's my friend and it's everyone's goal to have a big hit song on the radio." - Lady Gaga producer and songwriter/producer and label executive RedOne[23]

[20] https://twitter.com/InsideRadio/status/462048988997648385?refsrc=email
[21] September 26, 2013, http://www.radioink.com/Article.asp?id=2704233&spid=24698
[22] NAB Radio Show, September 18, 2013, http://www.allaccess.com/net-news/archive/story/122418/the-2013-radio-show-kicks-off-in-orlando
[23] SXSW "Navigating The Waters Of Radio To Your Benefit" panel, http://www.allaccess.com/net-news/archive/story/116420/radio-s-clout-hailed-at-sxsw

Mr. COBLE. Thank you, Mr. Warfield.

Mr. Van Arman?

TESTIMONY OF DARIUS VAN ARMAN, CO-FOUNDER, SECRETLY GROUP, AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

Mr. VAN ARMAN. Chairman Coble and Ranking Member Nadler and Members of the Subcommittee, thank you for inviting me to testify today on behalf of the small and medium-sized businesses that make up the American Association of Independent Music, A2IM.

I am Darius Van Arman and I am an entrepreneur. I am the Co-Founder and Co-Owner of Secretly Group, a group of independent labels headquartered in the mid-West of the United States. We currently employ 70 U.S. employees. We have multiple gold albums and singles, and one of our recording artists, Bon Iver from the State of Wisconsin, has won multiple GRAMMYs. I'm also on the board of A2IM, a not-for-profit trade organization representing over 330 independent record labels of all shapes and sizes from all over the U.S. from Hawaii to Florida.

Our sector now comprises 34.6 percent of the U.S. recorded music sales market. First and foremost, the American independent sector wants nothing more than a free market with a level playing field. However, there is one thing standing in our way: Big companies using their power and resources to take what is not fairly due to them.

Large technology companies use our music but, because of the safe harbors our current copyright law provides to them, artists, creators, and independent labels are not being fairly or adequately compensated. Broadcasters are not paying anything at all to broadcast their sound recordings on AM/FM radio. This is not only unfair to us on the creator's side, but it is also unfair to those digital services who do pay creators. And, within our music industry, there is one imbalance that is the primary threat to musical creative enterprise: Market concentration.

Today, just three major label groups exist comprising about 65 percent of the U.S. recorded music sales market based upon copyright ownership, the largest two of which are subsidiaries of foreign corporations. Congress intended the copyright would stimulate new creative works for the public interest for consumers. It did not intend to enable just a handful of private interests the ability to make huge profits unfairly on the backs of creators.

While we like the idea of a comprehensive approach to music copyright legislation, this music bus must be driven by all members of the music creator community; not steered by just a few major private interests toward only their goals.

So what do we need? We need stronger copyright protections. The shape of copyright law now is currently subsidizing large technology companies.

We need a broadcast performance right. Broadcasters must fairly compensate all creators so the creation process can continue. A broadcast performance right will also give us international reciprocity and the receipt of overseas radio royalties which will improve America's balance of trade.

We need more transparency and more efficiency in our music licensing system. Our industry can't afford to unfairly take value away from artists, creators and those who invest in these creators.

Finally, we need a stronger compulsory statutory license for non-interactive performances as it is the best friend of a level playing field.

Creator pay must be based on actual music usage. The current music licensing system is broken. It provides incentives for the wrong behavior. Large companies take advantage of whatever inefficiencies exist in the marketplace to make an extra buck.

So we need copyright law revisions that do the following: Increase the value of music; make copyright more equitable; reduce inefficiencies; and enable creators to create what consumer's desire. Our sincere hope is that we can come to these revisions in partnership with all industry participants.

The vast majority of small and medium enterprises that comprise the independent sector are American companies employing American citizens in American offices and directly supporting American creators. Almost every dollar that is earned by an independently owned copyright has a much greater impact on the U.S. economy than every dollar earned by a foreign-controlled major label copyright. Congress and the copyright office should keep this in mind when it contemplates copyright law revisions. As American copyright law should inure primarily to the benefit of American consumers, American creators and American enterprises.

In the end, all the independent sector wants is a free market with a level playing field. We want to compete to provide the economic growth and job creation that our American economy needs. Thank you.

[The prepared statement of Mr. Van Arman follows:]

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

Testimony of Darius Van Arman
Co-Founder of Secretly Group
Bloomington, Indiana

Board of Director member of the American Association of Independent Music ("A2IM")

before the

United States of America House of Representatives

House Judiciary Committee
Subcommittee on Courts, Intellectual Property and the Internet
2138 Rayburn House Office Building
Washington, D.C. 20515

Hearing on:
Music Licensing Under Title 17, Part Two
2141 Rayburn House Office Building
10:00 AM
June 25, 2014

Chairman Coble and Ranking Member Nadler, and members of the sub-committee, thank you for inviting me to testify today on behalf of the small and medium sized businesses that make up the American Association of Independent Music ("A2IM").

My name is Darius Van Arman and I am an elected member of the A2IM board of directors. A2IM is a 501(c)(6) not-for-profit trade organization representing a broad coalition of over 330 independently owned U.S. music labels. We are primarily American-owned small and medium-sized enterprises (SMEs) who directly support the American creative community. We are not only investors in creative enterprise, but our members either directly facilitate the creative process or are recording artists and songwriters themselves. Our community is a diverse community. We release music in all genres, we are based in all parts of the United States—from Florida to Indiana to Hawaii—, and we come in all shapes and sizes. Some of our members have dozens of employees in multiple locations, some are very small shops with just a handful of employees, and some are just artists themselves who self-release their own music.

Being independent doesn't mean being small. Independent labels release commercially successful hit records by artists such as Taylor Swift, Adele, Paul McCartney, Mumford & Sons, the Lumineers and Vampire Weekend, to name a few. According to Billboard Magazine—using Nielsen SoundScan data for 2013 and computing on the basis of copyright control or ownership—, the independent music label sector now comprises 34.6% of the U.S. recorded music sales market. Looking at just digital sales or streaming figures using the same methodology, the independent market share figure is significantly higher, closer to 40%. Independents also currently release over 90 percent of all music released by music labels in the United States. We are not on the margins of the music industry; we are, together with the artist creators who we support, at the very vibrant core of it.

In addition to testifying as an A2IM board member, I also come here today as an entrepreneur. I founded the record label Jagjaguwar in 1996 out of my bedroom in Charlottesville, Virginia. Since then, I have become a co-owner in the labels Dead Oceans, Secretly Canadian and Numero Group. These four labels are now known as Secretly Group, we are headquartered in the Midwest of the United States (primarily in Bloomington, Indiana), and, together with affiliated companies SC Distribution, Fort William Artist Management and Secretly Canadian Publishing, we currently employ seventy U.S. employees. For the most part, our companies fund, release and champion new music by new artists, but we also re-release older works, investing to richly re-contextualize them when we do and always with an eye on spotlighting artists who have been overlooked or underappreciated. Although our companies have not invested in the insider games prevalent within the U.S. commercial radio world, we've achieved multiple gold albums and singles on the strength of our repertoire. Our recording artists have also achieved some of the highest accolades within the industry. For example, in 2012, Jagjaguwar recording artist Bon Iver won two Grammy Awards (for Best New Artist and Best Alternative Album), and, in

2014, Secretly Canadian recording artist Tig Notaro was nominated for a Grammy Award for Best Comedy Album. We are for-profit companies, with an eye on the bottom line and with the intent to grow our businesses and create job growth without any reliance on government subsidies or handouts. At the same time, the primary purpose of all of our companies from day one has been to make a deep and lasting cultural contribution. We exist to profitably invest our time and resources in the creative enterprises of artists in order to accomplish this purpose.

It should also be mentioned, as it will come up later in my testimony, that I am a non-voting observer on the board of Merlin, which is an international rights agency used by independent music companies to collectively license their repertoire to digital services.

This is my testimony on the state of music licensing today in the United States, and it reflects my views, the views of A2IM and the perspective of the independent community.

COPYRIGHT AND THE MUSIC INDUSTRY

Copyright was established to stimulate the creation of new artistic and scientific expression. With this public interest in mind, the United States Congress passed copyright legislation providing creators with exclusive rights to their works for a set period of time. This, in effect, created markets for intellectual expression. It was Congress's intent that these markets sustain the efforts of creators and the institutions that directly support and finance them. Otherwise, the purpose of copyright would never come to fruition, either for lack of sufficiently motivated creators or for lack of sufficient investment in creative enterprises.

While these exclusive rights are essential to sustaining creators and those who invest in creative enterprises, if copyright laws inadvertently established effective markets that compensated creators either too poorly or too generously, then the dissemination of intellectual expression would suffer. Either it would not be worth the time for creators to create new works, or the cost of new works would be too great for the public to either have access to them or to afford them. Thus, Congress must be primarily concerned with achieving and maintaining the right balance when it contemplates changing copyright law and protection—the balance not only between the public interest and the interests of creators, but also the balance between the various constituents on the creator side. In the music industry context, the interests of the creator side that Congress must balance are those of the small and medium recording companies (i.e. "the independents"), the major recording companies, the recording artists, the songwriters, the producers, the publishers, the musical performers and the performance societies.

What does the music industry agree on? We agree that copyright is essential, and that without strong copyright our music industry would not be viable. We also agree that copyright protections have become too thin, and, as a result, too much of the compensation stemming from musical copyrights on both the sound recording side and the songwriting side is falling into the coffers of large technology companies and large broadcasters. When these large companies defend themselves against criticism that they are not adequately or fairly compensating rights holders for the musical expressions they are exploiting, they claim they are serving the public interest and that any increase in compensation to rights holders would dampen the public's access to content. At the same time, they fail to mention or gloss over the record profits they are enjoying on the backs of content rights holders. The reality is this: in sharp contrast to the fortunes of the technology companies and the broadcasters, the music industry revenues are now just a fraction of what they were 15 years ago. Since then, U.S. Track Equivalent Units per Nielsen SoundScan (which factors 10 single sales as equal to one album) have declined 45% from 755 million in 1999 to 415 million in 2013. According to RIAA statistics, there has been an even greater 52% dollar decline from $14.6 billion to $7 billion in overall recorded music revenues, a decline of 65% after factoring in the Consumer Price Index. This greater decline is the result of both lower music sale prices and new revenue streams, such as streaming, not making up the difference.

While much of this erosion in the value of copyright is due to the disruption caused by the digital revolution, digital transmission is an innovation that the independent sector embraces, as it has substantially improved our community's direct access to consumers, both commercially and promotionally. At the same time, it is the very ease now with which consumers can digitally access music that has caused the copyright balance to shift away from creator interests and towards public access and the so-called-intermediaries of access. In light of this, it is wholly appropriate for Congress to act now to reset the overall copyright balance. Or, at the very least, Congress should set policy to prevent any further erosion of copyright value.

MARKET CONCENTRATION

Within the music industry, one imbalance in particular is the primary threat to musical creative enterprise: market concentration. Twenty-five years ago, there were six major labels in the recorded music market in the United States. Today, just three companies exist—whose interests are represented by the Recording Industry Association of America, Inc. ("RIAA")—comprising 65.4% of the recorded music sales market in the United States based on copyright ownership, the largest two of which are subsidiaries of foreign corporations. These three major recording companies control an even higher percentage of the total market share of U.S. music distribution, and each of their parent companies also have music publishing arms that, altogether, own or control composition copyrights that represent almost 50%

of publishing revenues in the United States. Even the RIAA, who represents just the three major recording companies, claims on its website and in its regulatory filings that the "RIAA is the trade organization that represents the music companies that create, manufacture and/or distribute approximately 85% of all legitimate recorded music produced and sold in the United States".

What does this market concentration lead to? Well, using their market clout and misrepresenting their market share figures[1], the three major recording companies have become proficient at extracting a disproportionate share of copyright-related revenue from the marketplace. For example, it is a common practice for the largest of the three, Universal, to require new digital services—who cannot rely on compulsory statutory licenses—to provide advances or guarantees so large that there is no recourse left to the digital service other than to heavily discount what they can offer as compensation to independent rights holders. This is an unfair trade practice and deserves Congress's and the Copyright Office's special attention. But the underlying mechanics of this practice are even more problematic, causing a deeper inequity, which I will expand on below.

For example, consider the scenario where a digital service offers a streaming deal to a major recording company, where it proposes a royalty rate (which could be a certain amount that is paid per each stream of the major's repertoire) as well as a guarantee on what income the major will receive over the first year of the deal regardless of how many streams actually occur. In the negotiation that ensues, the major could try to increase the royalty rate, the guarantee or both.

In this scenario, what would be the most advantageous negotiation strategy for the major? Well, if the major uses all of its bargaining power to maximize just the guarantee—with the intention that the guarantee is so high that it can't possibly be recouped in the period of time allotted for it—then the unrecouped portion of the guarantee is a significant boon to the major. It is revenue that cannot be attributed to specific recordings or performances, and thus the major does not have to share it with its artists, the independent labels distributed by the major, or publishing interests, unless there are special contractual stipulations covering this kind of income (which is an accommodation that is attainable by only the largest and most established artists and labels). Also, a very similar dynamic to the one described above is the practice where majors receive equity stakes in digital services, presumably in exchange for providing such services more favorable terms for their copyrights. For example, all three major recording companies have received equity

[1] For example, the Billboard Magazine article on 2013 market share dated January 15, 2014 shows Universal Music with a 38.9% market share based upon distribution (which is in of itself an over-stated percentage of distribution share as some labels Universal distributes do not use Universal for 100% of their distribution) but only a 28.5% market share based upon copyright ownership. Universal uses the higher market share figure to increase the guarantees and advances it gets in negotiations. A2IM believes that copyright ownership is the only appropriate market share definition.

stakes in the interactive streaming service Spotify. If Spotify has an IPO and these equity stakes are liquidated, how will the proceeds be shared?

This additional revenue that is earned from unrecouped advances, annual guarantees or equity stakes can be referred to as "breakage". These breakage revenues are not just earned by the major recording companies, they are also earned by independent labels, which is one of the reasons why the independent sector is well aware of breakage and how much value it can potentially divert from both the independent community and the overall creative community. The international rights agency Merlin—of which many of A2IM's members are also members—, not only maintains equity stakes in some of the digital services that it has concluded deals with, just like the majors, but it recently reported that it would be paying its members over a million USD from unrecouped guarantees from just two global streaming deals. In one deal, this breakage is over half of what was earned in royalties, and, in the second deal, the breakage is almost five times what was earned. It is worth considering what this latter case actually represents value-wise to get a full sense of how much breakage can distort compensation, i.e. when a label receives $600 through this second streaming deal, it could theoretically keep $500 (the unrecouped portion, i.e. the breakage portion) as its pure profit and only share with the artist a portion of $100 (the recouped portion, i.e. earned from streams that occurred). This is a significant inequity.

While it is Merlin's practice to apportion such breakage revenues it has received pro-rata to what was actually performed on each service, which encourages that such extra value is passed on to artist creators, the independent labels and distributors that Merlin represents are not obligated to share this breakage income in this way. Counterbalancing this to an extent, many leading independent labels have decided to sign on to the "Labels' Fair Digital Deal Declaration" that the Worldwide Independent Network has authored (see Exhibit 1), volunteering[2] to equitably share such income with creators in the same manner they share royalties. But the voluntary measures will not be enough. What must be enacted in copyright law are provisions (some of which are recommended further below) that will protect against the inequities caused by breakage. Quite simply, playing breakage games is not the way the independents want to do business; it's unfair and highly inefficient. Although we've gotten a small taste of how lucrative breakage can be, the vast majority of the value of the copyright marketplace being misallocated by this practice is done so at the hands of the major recording companies. It is also our preference for primarily non-interactive services that, whenever possible, the compensation is aggregated and allocated via a system of

[2] One of the major recording companies, Warner Music Group, currently has a more progressive stance than the other two majors with regards to breakage, volunteering to share unrecouped advances and guarantees (but not equity) as a matter of policy with artists and with the independent labels that it fully digitally distributes.

compulsory statutory rates set via a copyright court that ensures that all creators are paid fairly based on the actual consumption of music.

The intent of copyright is to create markets to stimulate new expressions, not to provide a handful of private interests the ability to make profits by using their market clout to siphon off an unfair share of the compensation that was intended to reward creators and the institutions that most directly support them. If the music industry is to be compared to an ecosystem like the ocean, it can't be a viable or vibrant one if a few really big fish are sucking up most or all of the oxygen that copyright is providing. Also, this music industry ecosystem would not be a fair and equitable one if the appropriate copyright balances between the constituents within the music industry were determined by just the big fish and outside the full purview of Congress and the Copyright Office. While we like the idea of a comprehensive enactment of omnibus music copyright legislation that the whole music industry supports, this bus must be driven by all members of the music creator community, not steered by just a few major private interests towards only their goals.

The current music licensing system is broken, and while Congress and the Copyright Office consider the full range of possible remedies, it should take great care not to replace our current system with one that is even more privately controlled, that leads to more market concentration and that further incentivizes breakage-like practices.

"FAIR MARKET VALUE" AND THE COMPULSORY STATUTORY LICENSE

Within the scope of recorded music sales, the fair market value of recorded music copyrights can be easily determined, whether these copyrights are embodied in the form of compact discs, vinyl records or permanent MP3 downloads. Fair market value in this context is simply a function of what the market will bear. A music label or a distributor sets a wholesale price for its recordings, using its best business judgment as to what price will maximize revenue. A physical or digital music retailer then marks up this wholesale price by whatever percentage it chooses (or the retailer could decide to rely on an agency model, where it always marks up a certain set percentage). It is then left to the market what revenue actually comes back to rights holders. If one label sets too high of a price for a recording, there is no negative impact on the sales revenue performance of a different recording from another label.

Now, however, a new music economy is emerging where recorded music sales in the form of compact discs and permanent MP3 downloads, as described above, have been dramatically diminished. Replacing recorded music sales are access models in the form of interactive digital services such as Spotify, Rdio, Beats and Rhapsody and semi-interactive custom radio services such as Pandora and iTunes Radio. Since 1999 per Soundscan, CD sales have fallen from over 750 million

units per year to 165 million units in 2013, while sales of digital downloads are now in steep decline, falling 5 percent in 2013 and dropping 13 percent in the first quarter of this year.[3] Counterbalancing this, the number of Spotify paid subscribers has climbed to 10 million worldwide, and Pandora has grown 28 percent over the previous year.[4]

One can now very easily imagine where all this is heading. David Carr, music writer for the New York Times, may have stated it best when he wrote, "With scarcity now gone, songs are in the air, a mist we move through like so much department store perfume. We are no longer collecting music; it is collecting us on various platforms."

So, in this new emerging paradigm, what is the most appropriate method of determining the fair market value of a music copyright?

The answer is obvious. When a digital service such as Pandora earns revenue by either charging a subscription fee or by selling advertising, it ends up with a fixed revenue pie from which it shares revenue with all rights holders. This revenue pie is the same value, regardless of which specific recordings on the service are played, whether Led Zeppelin is played 100 times or 100,000 times. So the most equitable way for a service like Pandora to divvy up its revenue with rights holders is to do so in direct proportion to the number of streams that actually occur for each rights holder. This is what Congress clearly intended when they enacted the Digital Performance Right in Sound Recordings Act in 1995 (the "DPRA") and the Digital Millennium Copyright Act in 1998 (the "DMCA"). "A song by a pop artist such as Justin Bieber shouldn't be valued more than a blues song by an artist by the name of Koko Taylor," A2IM president Rich Bengloff said just recently in an interview with NPR. "They should have the exact same value. Justin Bieber may get paid 10 times more because his music is listened to 10 times more, and that's fair."[5]

In the new music economy, each music copyright should possess the same intrinsic value, where the revenue that each copyright earns for its rights holder should only be a function of how many times the copyright is performed by the public, not a more abstract notion controlled by gate keepers, the major publishers or the major recording companies. Music copyrights should be competing in the market place for "user attention" on a level playing field. Pedigree or the so-called imprimatur of a copyright being owned by a larger company doesn't increase a copyright's value. Only the actual performance of copyrights by users matters. Valuing music copyright in this way is not only fair and market-based, but there is

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[3] Cited from Jon Maples, http://jonmaples.com/2014/05/08/the-magic-numbers-how-apple-beats-the-demise-of-music-downloads/
[4] Cited from David Carr's column "The Media Equation" in the New York Times, http://www.nytimes.com/2014/06/09/business/media/free-music-at-least-while-it-lasts.html
[5] Rich Bengloff interviewed by NPR, http://www.npr.org/2014/06/09/320324953/reach-for-the-sky-youtube-music-service-in-standoff

no other methodology that comports more efficiently to the very intent of copyright law than this.

The level playing field for compensation as described above is a central aspect of the compulsory statutory licensing provisions established in sections 114 and 115 of the Copyright Act, and it is why the compulsory statutory license on both the recorded side and the publishing side is so important to the independent sector. But the compulsory statutory license also protects against the practice previously discussed of major recording companies abusing their market clout to get a disproportionate share of fixed revenues. Remember, with music sales through CDs or MP3s, if a price is raised on one recording, it has no deleterious effect on the income prospects of another recording. In contrast, in the new world of access model digital services where revenue to rights holders comes from fixed revenue pools, if a major recording company finds a way to make an extra dollar for its copyrights, it's one less dollar that the digital service can afford for everyone else's copyrights. The compulsory statutory license protects against this inequity by creating a value floor for all copyright owners and removing the incentive for digital services to trade guarantees and advances for lower royalty rates (which only lowers the value of music and artist compensation). The compulsory statutory license assures that all compensation stemming from the exploitation of copyrights is attributable to specific performances, such that compensation is shared fully with all rights holders including creators and songwriters.

Another really good rationale for maintaining or significantly expanding the scope of compulsory statutory licensing is the reduction of transactions costs for the entire industry that comes with it, which Bob Kohn, author of Kohn On Music Licensing, makes a strong argument for in his recent Library of Congress U.S. Copyright Office music licensing filing.[6] This transaction cost savings is not lost on the technological sector in particular, which is one of the reasons why they are in favor of compulsory statutory licensing as well. In an interview with CNET at SXSW in 2013, Spotify founder Daniel Ek said, "That is one of our biggest limiters to growth, the restriction that you can't share any piece of content anywhere. You need collecting societies in every market and publishing deals in every market."[7]

STATUTORY REFORMS WE SUPPORT

Currently, on the recorded music side, the compulsory statutory license outlined in Section 114 is applicable only to services that are "non-interactive" and

[6] As Bob Kohn stated in his recent Library of Congress U.S. Copyright Office music licensing filing, "But what justifies restricting the copyright owner's freedom of contract? It could only be that, by reducing transaction costs, the public will benefit from the availability of a greater variety of recordings (within legitimate limits that protect artistic integrity) of existing musical works—which is the ultimate purpose of incentivizing creators in the first place."

[7] Spotify founder Daniel EK interviewed by CNET, http://www.cnet.com/news/the-future-of-music-according-to-spotifys-daniel-ek/

that comply with certain programming restrictions. It clearly applies to non-interactive internet radio simulcasts (such as streaming by radio stations KEXP or KCRW) and non-interactive transmissions from Sirius XM satellite radio, and it clearly does not apply to fully interactive services like Spotify and Rdio. But it is unclear whether it applies to services that are semi-interactive, such as iTunes Radio, which could potentially rely upon a compulsory statutory license but instead relies on a direct license (which by itself, does not make it a non-statutory service, as direct licenses for statutory services are permitted by our copyright law). There is no common agreement, including between the major recording companies, whether iTunes Radio is eligible for the Section 114 license.

With this in mind, A2IM supports the following ways of clarifying or expanding the scope of the compulsory statutory license:

1) Congress, when adapting copyright law, should more precisely delineate the distinctions between interactive, semi-interactive and non-interactive services, and it should also provide some ruling mechanism to determine the eligibility of services for the Section 114 license (or for the applicable mechanical rate according to the Section 115 license) when there is ambiguity regarding interactivity and functionality. Compulsory statutory licenses should be made available to semi-interactive services such as iTunes Radio.

2) Congress should prohibit the pervasive practice where some portion of compensation stemming from interactive licenses is not apportioned to performances of copyright. This would not only prevent an end run around the intent of copyright, it will also provide some compulsory-like protection against the ill effects of market concentration in the interactive streaming space.

3) The U.S. Copyright Office and the CRB must ensure that all services using sound recordings within their services be required to use an International Standard Recording Code (i.e. "ISRC" codes) and an International Standard Name Identifier (i.e. "ISNI" codes) to identify all recordings, and such services should also be required to incorporate these codes into the metadata of the recordings they use in order to achieve more accurate accounting and distribution of sound recording royalties. Additionally, all services relying on the statutory license should be required to report all musical performances that occur through their service to royalty collecting collectives such as SoundExchange, clearly delineating which performances are relying on the statutory license and which are relying on direct licenses instead, to better ensure fair and accurate accounting to all parties. A major concern for independent music labels is not just contractually getting their correct proportionate share of revenues based upon actual copyright ownership. A second challenge is ensuring that the accounting received is correct and that independents are actually getting

paid for all of their copyright repertoire. A group must be created to set standards and help create and maintain copyright ownership databases under the auspices of the U.S. Copyright Office, and not under the auspices or control of the RIAA or the major recording companies, to ensure high standards are maintained on a fair and equitable basis.[8]

4) A terrestrial radio performance right on the recording side must be established (see below), and Section 114 must be expanded to provide a compulsory statutory license for it. As SoundExchange commented in its recent filing with the Copyright Office, "Businesses using music for commercial advantage should pay for the privilege, and such payments are what makes possible the creation of new music. Accordingly, the lack of a terrestrial radio performance right is a glaring iniquity in U.S. law that should be addressed. Where rights exist, music licensing provides a framework for channeling payments to creators to enable more creativity."

5) Pre-1972 sound recordings must be included within the Section 112 and 114 statutory licenses. It is unfair when services using pre-1972 recordings do so without compensating creators for those usages. Our heritage artists deserve equitable compensation for their significant cultural contributions.

THE TERRESTRIAL RIGHT

The U.S. is the only one of the 34 Organisation for Economic Co-operation Development Countries ("OECD") that does not have a performance right for public broadcast radio performances. For the over-the-air traditional AM/FM broadcast radio dial, the independents have made significant inroads in airplay. But we still don't have a performance right that would ensure that music creators get paid when their sound recordings are broadcast on over-the-air radio. This must change. AM/FM broadcasters make billions selling ads to folks who tune in for our music while our sound recording creators get nothing. That's unfair. A2IM are members of the musicFIRST coalition, along with featured artists, backing musicians and vocalists, artist managers and others working toward making this legislation happen in the U.S.

In addition, this lack of a broadcast performance right impacts our international business, as our royalties overseas remain captive to the fact that, unlike other industrialized nations, we don't compensate performers for terrestrial

[8] A2IM will he filing with the U.S. Copyright Royalty Board (the "CRB") in response to their request for comments on "Record Keeping For Use of Sound Recordings Under Statutory Licenses", outlining in further detail some of the items discussed above, as strict detailed data reporting requirements are essential to ensure the proper copyright owners are compensated for their investment in the musical creation process.

airplay. So without this legal reciprocity right, our royalties are, in effect, not available to U.S. independent music labels and their artists. If we allow radio or internet services to force zero rates or below market rates on us, to subsidize their business models, we will have allowed the gift wrapping to take on much greater value than the treasure that is in the box, the music! Our artist's music that fuels AM/FM radio and every other platform that features music must be compensated.

A2IM's members also believe in parity for all members of the music community. The lack of a sound recording performance right is unfair to the digital transmission music services (both interactive and non-interactive) who already support sound recording owners with compensation. We believe that allowing terrestrial broadcast stations to continue to pay nothing may undermine the critical structures that are now emerging which may lead us towards a fair and equitable music industry. So we believe that some form of rate parity between terrestrial and digital broadcasters must be a goal of any music licensing revisions contemplated by the U.S. Congress, however we stress that this parity should not be established by discounting what is already being paid on the digital side, as we contemplate a music marketplace which will become increasingly more digital and less terrestrial over time.

MUSICAL WORKS

A2IM represents music labels who are the investors in the creation of sound recordings. That said we believe that over one-third of our music label members also have ownership interests in and are involved in the exploitation of musical works. As a result, a large number of A2IM members are involved in both the creation of and the use of written compositions.

The National Music Publishers Association ("NMPA") and the Performance Rights Organizations ("PRO's") ASCAP, BMI and SESAC have been advocating for an overhaul of the musical works licensing process, stating that the songwriters and publishers that they represent are not receiving fair compensation for their work. A2IM as an organization has the utmost respect for these creator colleagues and the individuals and companies they represent. That said we believe the current system of mechanical licensing under section 115 using compulsory statutory licensing rates is a fair system to use for compensating songwriters and publishers.

Music labels are the major investors in the music creation process. Music labels sign artists and incur at-risk capital to support artists with advances and funding of the recording of sound performances. Music labels then incur the costs to market and promote the artist's music and employ both internal staff, with high fixed costs, and pay external staff to cover the areas of publicity, advertising, marketing, radio and video promotion, etc. Most label's artist signings are not

ultimately profitable and overall music label profit margins in the aggregate are very low.

Contrast this with publishers. Many publishers sign songwriters and give advances only after either a songwriter is established or after a music label has agreed to sign the songwriter/ recording artist for recordings because they know at that point that the above music label investment process will commence. Publisher's investments in songwriters are modest to non-existent, except for established proven writers who have already achieved success, and their marketing budgets are low. As a result, the bottom line for Publishers is high. Based upon public releases for ASCAP and BMI, Publishers had revenues from music performances of almost $1.9 billion for their most recently reported fiscal years. If you add an estimate for SESAC, which does not disclose revenues, we believe the number should exceed $2 billion. Both ASCAP and BMI have disclosed overhead rates before distributions of under 14%, in the aggregate about 13%. The balance of 87% is distributed, which means that there are profits of over $1.7 billion from PRO performance sources. The publishers then additionally have their revenue streams from sales, synchronization licensing and other sources.

The above data, we believe, confirms that the publishers make considerably more profits than the sound recording owners, and we believe the net profits earned by the creator community should be the criteria considered, not the gross amounts received which the NMPA erroneously keeps emphasizing. Let us assure you that there is no expense waste or high salary creep in our community. The Section 115 compulsory statutory mechanical licensing process, using CRB rates, is working for all parties. There is no need for a blanket licensing process for mechanical licenses for songs used in the sale of recorded music. Any elimination of statutory rates for these recurring standard usages will tip the profit scales further in favor of the publishers and market concentration. We also believe that the use of musical works for audio/visual synchronizations and other non-standard usages of written compositions for television, games, advertisements, toys, etc. should continue to be negotiated on a direct license basis.

THE DMCA SAFE HARBOR AND GOOGLE YOUTUBE

Google, currently the largest corporation in the world by market capitalization, is cognizant of the rising perception that the copyright imbalance has moved too far away from adequately compensating rights holders. So much so that the vice president of YouTube content at Google, Tom Pickett, recently told music industry attendees at the Midem conference in Cannes, France that Google YouTube "[has] paid out to the music industry over the last several years over a billion dollars."[9] However, this sum is far less than what more music-oriented digital

[9] Cited on Creative Intelligentsia's Content & Technology Report, February 7, 2014, http://www.creativeintelligentsia.com/content-technology-policy-report-february-7-2014/

services such as Spotify and Pandora are paying creators and labels, especially when taking into account that these other services are paying significantly more based on less streaming and to satisfy fewer consumers. It should be pointed out that the manner in which Google YouTube has decided to pay the music industry—often with large advances or guarantees to only the largest labels, where a significant portion of such advances are not attributable to specific performances or streams, i.e. the practice of breakage we discussed previously—means that the compensation offered for content does not flow efficiently to the creators. Also, Google YouTube currently relies on a safe harbor granted by the DMCA which allows for user-generated content (i.e.,"UGC") to be uploaded to the YouTube service without Google YouTube itself having copyright infringement liability (provided it reacts in a timely fashion to take down requests), a safe harbor provision that Google YouTube claims it needs for the YouTube service to remain viable.

Currently, a significant portion of the independent sector is involved in a public dispute with Google YouTube over its new subscription music service that it plans to unveil in the next few months. A2IM President Rich Bengloff said in a recent letter to the Federal Trade Commission (see Exhibit 2) about Google You Tube's unfair trade practices connected to this launch, "Google has shown little willingness to play fair on issues such as tax responsibility, and it now shows a similar lack of regard for cultural diversity and creativity and marketplace access. We would argue that a dominant player such as YouTube forcing SMEs to accept lower rates than non-SMEs constitutes abuse of a dominant position, with regard to the digital music and video streaming market."

Also, one account of this dispute claimed that YouTube will start blocking the videos of independent repertoire in some countries very soon. According to Associated Press sources, "YouTube will block the music videos so users of the test version won't be confused about which content they can access for free and which features require payment. Allowing free streams of music by certain artists while not offering them on the paid service would erode the value of the paid plan."[10] This relates to the premium videos that labels and artists create. YouTube has announced their intention to continue to stream consumer's UGC videos, so as to continue to supply Google with consumer traffic and the resulting advertising revenues. But related to the UGC videos of the independent music community, it seems that Google YouTube no longer plans to monetize those videos with advertisements or to make available to creators the YouTube content management system that enables efficient management of the availability of creator assets within the YouTube service. This will result in creators having to fall back into the costly whack-a-mole process of copyright protection, which we believe was not the intent when Congress enacted the DMCA legislation in 1998.

If the above is true and if takedowns occur in the United States, not only will

[10] Cited by Associated Press, June 17, 2014, http://abcnews.go.com/Technology/wireStory/youtube-launch-music-service-amid-indie-dispute-24183506

consumer access to the rich musical heritage and diverse American musical culture that the independent music community brings to the world be jeopardized, but also the hypocrisy in Google YouTube's position on the DMCA safe harbor will come in sharp focus. How can Google YouTube argue that it needs the DMCA Safe Harbor to remain viable and to protect access to the public on the one hand while, on the other hand, it has found the resources and the wherewithal to take down music videos simply because these videos have the potential to create confusion or erode value to the detriment of its new commercial enterprise?

Perhaps the existing safe harbor that the DMCA has created for UGC has inadvertently given Google YouTube too great an advantage in the marketplace, an advantage that the largest corporation in the world doesn't need, and one that is contrary to the interests of copyright, especially when Google YouTube is now contemplating a new commercial product using the advantages of the DMCA safe harbor to compete against the more music-oriented digital services who don't have this safe harbor and who more adequately and more fairly compensate creators. Google YouTube must immediately cease waving the flag that "the public deserves access to all content" without also including the fine print caveat that reflects their true purpose: "unless it gets in the way of our commercial interests".

THE AMERICAN INDEPENDENT POSITION

In the music licensing discussion, the greatest concern of American independents is the ill effects of market concentration: big companies using their power and accumulated resources to take what is not fairly due to them. Not only has market concentration made artist creators and members of the independent sector commercially poorer, it is also to blame for our country's copyright system moving dangerously away from its early and principled moorings towards a newer mindset that benefits private interests and that disadvantages creators at large.

Lord Thomas Babington Macaulay, one of the forefathers of copyright law in the English-speaking world, said in the 1800's,"It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil but the evil ought not to last a day longer than is necessary for the purpose of securing the good." Contrast that with how Lucien Grange, current Chairman of Universal Music Group, talks about power (that he has accumulated because of copyright), in his February 16th 2013 Billboard Magazine Power interview: "Power is about who calls who and whose call you take. That's power. Power is a combination of the ability to write checks, the ability to make things happen, the ability to block things—political power, the ability to testify and the requirement to testify at a Senate hearing and have five commissioners against zero in favor of what you said. Power is the ability to buy and sell businesses. Power is the ability to stop new services. Power is the ability to create new services. That's power."

To a large extent, the market concentration issues we are facing (and the evolving mindsets such as Grange's above that are rewarded and promoted by such concentration) are a product of a basic systemic problem. The current copyright system provides incentives for the wrong behavior (such as maximizing breakage). Large publicly traded companies, whose only fealty is to making profits for its shareholders in the short-term, are acting rationally when they take advantage of whatever inefficiencies exist in the marketplace. The same can be said about independent companies or their digital agencies, such as Merlin, when they take advantage of the same systemic issues to protect their own interests. But the key question to the whole music industry is this: while we do what we all have to do to protect our own interests and maximize our own profits, do we have the conviction and the wherewithal to push for real reform to improve the whole copyright system, to make it more equitable and to reduce inefficiencies? The independent community's answer to this question is a resounding yes, and our sincere hope is that we can come to these reforms in partnership with the whole music industry, including the majors.

The financial sector had a very similar moment, recently, when the Investors Exchange ("IEX") was created in response to systemic issues with the high-frequency financial trading market. Some Wall Street traders were taking advantage of an issue that only a few really understood and had the resources to exploit: slightly uneven trading transmission delays, where those geographically closer to electronic market hubs had better information and better opportunities than others. Exploiting this issue generated huge profits, where every dollar of profit generated was one less dollar left for everyone else. This is very analogous to the systemic issues that the majors are taking advantage of with their innovations in digital music licensing. American non-fiction author Michael Lewis's book on high-frequency trading entitled "Flash Boys: A Wall Street Revolt" provides an inspiring outcome, where the major financial traders all moved to IEX to trade on a level playing field. This should give great hope to the whole music industry when it seeks to address systemic issues within music licensing markets.

> IEX had made its point: That to function properly, a financial market didn't need to be rigged in someone's favor. It didn't need payment for order flow and co-location and all sorts of unfair advantages possessed by a small handful of traders. All it needed was for investors to take responsibility for understanding it, and then to seize its controls. "The backbone of the market," [IEX CEO and co-founder Brad] Katsuyama says, "is investors coming together to trade."[11]

[11] As excerpted in the New York Times, "The Wolf Hunters of Wall Street, An Adaptation From 'Flash Boys: A Wall Street Revolt'" by Michael Lewis, http://www.nytimes.com/2014/04/06/magazine/flash-boys-michael-lewis.html

Because copyright is not a private property right, it would not be possible to make the same kind of adjustment to address systemic issues just within the music industry (like IEX achieved within the financial sector) without the help of Congress and the Copyright Office. But the whole music industry can work together to support the revisions to copyright laws and protections that Congress and the Copyright Office find necessary in its review. The independent sector trusts that Congress and the Copyright Office will find that the compulsory statutory license must be strengthened, not weakened, that breakage-like practices must not be incentivized, and that the independent sector must be provided more tools, such as antitrust relief, in order to more effectively use what power the independents already have to stave off big business market concentration. In the end, all the independent sector wants is a free market with a level playing field. We want to compete, to provide the economic growth and job creation that our American economy needs.

Congress and the Copyright Office must also consider carefully the practical implications of the music copyright reforms in the world market. Currently, the United States is being particularly hard hit and needs support as we're losing our place in the world music market economy. The overall world market has declined at a slower pace than the U.S. market per the International Federation of the Phonographic Industry ("IFPI", www.ifpi.org) wholesale statistics. In 2005 the U.S.'s share of the international music market was 34%. By 2010, the U.S. was down to 26% world market share. In addition to the overall drop in U.S. share of worldwide music sales, the IFPI has also confirmed that the percentage of U.S. repertoire sales within overseas markets is also declining. As America's manufacturing and service sectors continue to shift abroad, Intellectual Property is one of the few potential growth areas for our economy via exports and we, as music creators and small businessmen and investors in music creation from across the country, need our government's support for a cooperative effort to restore American global competitiveness in the music business.

The vast majority of small and medium enterprises that comprise the independent sector are American companies, employing American citizens in American offices, directly supporting American creators, and who pay their taxes almost entirely (and fully) within the United States. By contrast, the top two of the three major recording companies are owned by foreign subsidiaries, and the Recording Industry of America gets the majority of its funding from these foreign-owned companies. So almost every dollar that is earned by an independently owned copyright has a much greater positive impact on the U.S. economy than every dollar earned by a major label copyright. Congress and the Copyright Office should keep this primarily in mind when it contemplates copyright law revisions, as American copyright law should inure primarily to the benefit of American consumers, American creators and American enterprises.

Thank you for your time and for inviting me to testify at this important hearing.

EXHIBIT 1

"The big print giveth and the small print taketh away."
- Tom Waits

LABELS' FAIR DIGITAL DEALS DECLARATION

We make the following declaration in connection with the distribution of recordings in digital services.

We will:

1. Ensure that artists' share of download and streaming revenues is clearly explained in recording agreements and royalty statements in reasonable summary form.
2. Account to artists a good-faith pro-rata share of any revenues and other compensation from digital services that stem from the monetization of recordings but are not attributed to specific recordings or performances.
3. Encourage better standards of information from digital services on the usage and monetisation of music.
4. Support artists who choose to oppose, including publicly, unauthorized uses of their music.
5. Support the collective position of the global independent record company sector as outlined in the Global Independent Manifesto below.

We wholly disapprove of certain practices which leave artists under-recompensed and under-informed in the digital marketplace and will work together with the artist community to counter these practices.

Signed on behalf of [Label]

[Print name]
[Date]

Global Independent Manifesto

The points below represent the collective position of the global independent record company sector, put forward by the sector's collective voice, WIN (Worldwide Independent Network: www.winformusic.org).

All points are equal in stature, and are not numbered according to any form of ranking or significance.

1. We, the independents, will work to grow the value of music and the music business. We deserve equal market access and parity of terms with Universal, Sony and Warner, and an independent copyright should be valued and remunerated at the same level as a major company copyright. We will work with the majors in areas where we have a common goal. We will work to ensure that all companies in our sector are best equipped to maximize the value of their rights.

2. We support creators' freedom to decide how their music may be used commercially, and we will encourage individual artists and labels to speak out directly against unauthorized uses of music as well as commercial uses of music that stifle that freedom. We support creators' right to earn a living from their work, which should be respected as a basic human right. We expect any use of music by commercial third party operators to be subject to fairly negotiated licensing terms, in a market where any use of music is an end in itself, not so-called promotion driving a subsequent sale.

3. We support independent music labels that treat their artists as partners and who work with them on reasonable commercial terms, noting that labels are investors who deserve a fair return alongside their artists.

4. We promote transparency in the digital music market; artists and companies are entitled to clarity on commercial terms.

5. We oppose further consolidation in the recorded music, publishing and radio sectors since this is bad for independent music companies, their artists and fans, as it reduces market access and consumer choice.

6. We support initiatives which confront market abuse, and which aim to adapt competition laws to promote independent market access and foster collective responses by independents to potentially anti-competitive conduct by large operators.

7. We recognize that all independent music businesses contribute to local culture, diversity, jobs and export opportunities, and multiply the economic success of related industries. We will ask governments to promote and support the independent music sector in securing access to finance and tax credits, and to local and international markets.

8. We hold that collecting society revenues must be allocated and distributed accurately and transparently. This includes distribution of unclaimed money that logically belongs to the independents. We will push for the independent sector to be formally represented in the governance of collecting societies, with trade associations being eligible for board seats.

9. We support the creation of a worldwide track-level sound recording rights database, subject to neutral governance and ownership, to ensure accurate distribution of rights revenues to their rightful owners.

10. The independents will, as always, actively encourage and support new commercial opportunities for music, and will continue to support and develop new, legitimate business structures and partnerships.

EXHIBIT 2

Chairwoman Edith Ramirez
Director Bureau of Competition Deborah L. Feinstein
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

June 4, 2014

Re: Google/YouTube Notice-Independent music labels and their artists' content to be blocked on the YouTube music website

Dear Chairwoman Ramirez and Director Feinstein,

I am writing as a follow-up to previous letters I have sent to the FTC regarding the investigation of the Universal Music acquisition of EMI's recorded music assets that concluded with the FTC's transaction approval approximately two years ago. My last letter dated September 6, 2013 is attached. **Today I am writing to draw your urgent attention to recent actions taken by YouTube with regard to music recordings from Independent music rights holders where, due to anti-trust restriction on the allowed behavior of A2IM and our members, we respectively request urgent government intervention.**

During the course of the FTC's review of the Universal transaction the American Association of Independent Music ("A2IM"), the not-for-profit 501(c)(6) organization representing the U.S. Independent music label community and of which I am the president, shared our thoughts and those of our members with Robert Tovsky of the FTC. During the lengthy process we expressed our concerns to Bob and made a public statement to the press (read statement HERE) expressing the Independent music community's concerns about the ramifications that acquisition would bring to consumers, emerging technology companies, and the Independent music label sector.

As we'd previously shared with the FTC prior to the EMI acquisition, UMGD had made a practice of using their existing market share as a means of figuratively holding hostage new and exciting music consumer platforms from launching unless said music consumer platforms were willing to give unreasonably favorable terms to UMGD. Since the acquisition, it is becoming evident that this near monopoly (or duopoly with Sony Music) is turning into a vicious cycle that gives further market clout to a single player, or two players, which in turn gives those players a gigantic advantage in exposing and monetizing their music at the expense of competition, thus leading to fewer music choices and fewer music access points, for consumers.

These trends underline our previously stated fear that UMG will abuse their market dominance by extracting unsustainable terms from digital services. We urged you to investigate UMGD's practices because, ultimately, we see a music landscape where the primary outlet for artists, music businesses, and consumers to create and enjoy music will be via one or two entities. We were confident time was not our ally; that things were certain to get worse as UMGD's advantages in access and financial terms provided greater advantage over any possible competitor which, in turn, will only allow them even greater clout.

Today I am writing to draw your urgent attention to recent action taken by YouTube with regard to music recordings from Independent music rights holders.

The Independent music sector is made up of small and medium size enterprises ("SME's") which the past two Presidential Administrations have seen as the growth engine of the U.S. economy via increased exports improving the U.S. balance of trade and creating commerce abroad and creating jobs at home. The U.S. Independent music sector employs 80% of the industry's workforce and accounts for well over 80% of all new commercial music releases. Independent record companies act as investors in creativity and culture, searching out individual talent and giving them the starting point to build a sustainable career in the creative industries. They perform a vital role both economically and culturally in meeting consumer needs and providing musical diversity. Every new genre and trend in music has been kick-started by the Independent sector.

Even though Independent labels are individually smaller entities than the three individual "so called" major record labels, based upon copyright ownership collectively the Independent music labels are the largest music label industry segment. According to Billboard Magazine, Independent labels altogether were 34.6% of the overall U.S. recorded music market in 2013.

You Tube is a dominant Internet source of music with approximately 80% of Internet users engaging with You Tube for video streaming. As you know, YouTube has been a wholly owned subsidiary of Google since 2006. YouTube is expected to launch a new audio music streaming service to compete with established services such as Pandora and Spotify, and is attempting to force contract terms upon the Independent sector which we understand from our members are significantly inferior to those offered to the international non-U.S. owned 'major' record companies (Sony, Warner and Universal).

Our members have been informed that if they do not sign up to these revised terms, YouTube has given notice to them that YouTube will remove/block our members' and their artists' musical repertoire from the entire YouTube service, not just the new audio music streaming service. As YouTube is one of the leading music outlets the effect on our members on the promotion and monetization of their artists will be severe as the premium videos our members create will be blocked and the User Generated Content videos created by consumers using our members artists' music will cease to be monetized via advertising. Our members will then be forced to engage in the "whack-a-mole" process of getting these non-monetized videos off of YouTube, so as not to detract attention from services that are paying our Independent members, as was not anticipated when Congress enacted the DMCA in 1998.

According to our members, the terms currently on offer to Independent companies from YouTube are non-negotiable and highly unfavorable, and in many cases, unworkable (for example insisting on global rights which the Independent may not be able to grant). They also undermine existing rates in the marketplace from music streaming partners such as Spotify, Rdio, Rhapsody and others but are reportedly planning to launch their service charging consumers a subscription fee similar to or at the same rate as what these competitor services charge. All of these competitor companies chose to pre-license Independent content at terms which are comparable to the majors, something which YouTube has never attempted to do.

If this threatening and intimidating behavior does not stop, the implications are very serious, not only for the music industry, but for all creative and rights based industries. We face the very real prospect of all internet based trade in creative output being controlled by three non-U.S. owned companies who seem intent on taking as much value for themselves, and passing as little value as possible back to those companies and artists creating the very content on which their businesses are built, and are dependent upon, to the detriment of our primarily U.S. owned and based Independent membership. There are parallels in the book retailing world: it is now a matter of public record that Amazon is punishing publishers who refuse to sign new terms which amount to a transfer of value, not a benefit to the consumer.

Google has shown little willingness to play fair on issues such as tax responsibility, and it now shows a similar lack of regard for cultural diversity and creativity and marketplace access. We would argue that a dominant player such as YouTube forcing SMEs to accept lower rates than non-SMEs constitutes abuse of a dominant position, with regard to the digital music and video streaming market.

We ask the U.S. Government to urgently intervene, in order that other creative sectors are not forced into expensive and wasteful litigation against dominant players such as Google. We call on the U.S. Government to provide injunctive relief to prevent You Tube from blocking these Independent companies from their music platforms while our members seek a commercial solution.

The significance of this issue is such that our European Independent music sector colleagues, through their Brussels based lobbying body IMPALA and worldwide Independent music label umbrella organization WIN, are also requesting that action be taken at the European Commission level on this matter as a matter of urgency. Our international colleagues across the rest of the work are also contacting their governments requesting action.

We would be very happy to provide you with further information on this matter. Sadly, all our fears about the effects of the Universal/EMI purchase are coming to pass. More scale has been created and the effects of the Universal and Sony duopoly leveraging that scale are visible everywhere. When rights owners license to fixed-pie digital services - those where there's an income pie to share, rather than a wholesale price – French owned Universal and Japanese owned Sony demand more than their copyright ownership market share, and those excesses ends up coming out of the indies' share. Independents which are primarily U.S. owned music labels who traditionally have introduced new musical trends and who are the custodians of our U.S. music culture in genres such as Reggae, Jazz, Blues, Americana, etc ., genres that have largely been abandoned by the three non-U.S. owned major labels. Our

Indie music community is often an early adopter of new consumer friendly digital services, as opposed to those larger creators who inhibit market innovation and often block marketplace entry. As Lucien Grange, Chairman of Universal Music Group, noted in his February 16th Billhoard Magazine Power interview:

"Power is about who calls who and whose call you take. That's power. Power is a combination of the ability to write checks, the ability to make things happen, the ability to block things—political power, the ability to testify and the requirement to testify at a Senate hearing and have five commissioners against zero in favor of what you said. Power is the ability to buy and sell businesses. Power is the ability to stop new services. Power is the ability to create new services. That's power."

Collective licensing has enormous benefits for the music market and consumers. It provides broadcasters and services with a one stop license for the world's repertoire under compulsory statutory licenses with rate setting by the Copyright Royalty Board. Collective statutory licensing as set by Congress under the DSPA in 1995 and DMCA in 1998 which recognized that each song is created equal and each copyright holder should be compensated equally for each song, and that size of the creator of the song performance or the economic power of the investor in the sound recording should be irrelevant. The only differentiation in pay should be hased upon consumer demand for the music, e.g. the number of streams each receives, not the ownership company. That's the basis of the compulsory statutory license; each individual jazz song, blues song, pop song or classical song should all have the same basic single usage value. The non-interactive compulsory statutory licensing regime ensures equity and fairness for all copyright owners and allows greater music service marketplace access resulting in greater consumer choice

Unfortunately for non-statutory services requiring direct licenses under U.S. anti-trust laws, collective negotiation of interactive-on-demand licenses by Independent music labels is limited, which, instead of promoting competition, and thus allowing consumers greater choice and broader music service choices as barriers to music usage are lowered, reduces competitiveness of Independent lahels and their artists. This lack of ahility to collectively negotiate a group license also bars certain services from access to "so called" major label music should they decide not to license and to a wide swath of Independent music which they need to successfully launch in the market place due to more difficult licensing logistics. **We come to you today to request government intervention related to YouTube's proposed blocking of our member's content** since we are forbidden under anti-trust laws to negotiate collectively or collectively advocate a boycott of a service.

While the Universal/EMI merger has been completed the repercussions continue to be felt. We hope you'd agree that the importance of a robust and competitive music market place is still a worthwhile goal for the U.S. economy, consumers, and emerging technological services. I would most appreciate being able to have a conversation with someone from your offices regarding our concerns about both YouTube and the Universal/Sony duopoly. My thanks for your time and I look forward to hearing from you.

Sincerely,
/s/Richard Bengloff
Rich Bengloff
President, American Association of Independent Music ("A2IM")

C. C .Robert Tovsky
C.C. Janet Kim
FTC- Bureau of Competition

C.C. Monsura Sirajee
Office of Chairwoman Edith Ramirez
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

C.C. Assistant Attorney General William J. Baer

Mr. COBLE. Thank you, Mr. Van Arman.
Mr. Christian?

TESTIMONY OF ED CHAIRMAN, RADIO MUSIC LICENSE COMMITTEE, INC. (RMLC)

Mr. CHRISTIAN. Mr. Chairman, Ranking Member Nadler, and Members of the Subcommittee, my name is Ed Christian and I'm Chairman of the Radio Music License Committee, the RMLC.

The RMLC has been in existence for well over 50 years and is a non-profit that represents some 10,000 local radio stations in the United States with respect to music licensing matters. Over the years, the RMLC has been involved in extensive music license negotiations with the two largest performing rights organizations, ASCAP and BMI.

The mission of the Radio Music License Committee has always been to provide a competitive market for music licensing in which radio station operators pay a fair price for performance rights and copyright owners receive equitable compensation. The RMLC has historically achieved fair and reasonable licenses for the radio industry with ASCAP and BMI through our combination of industry-wide negotiation and, as necessary, Federal rate court litigation. While recently, the RMLC has found itself involved in antitrust litigation involving the smallest of the performing rights organizations in the U.S., SESAC, in order to curb this company's anti-competitive licensing practices.

I will start by saying, unequivocally, that licensing redistribution concepts that rely upon the radio industry for funding are misguided. With particular reference to the recurring demand by the recording industry for a sound recording performance right to be imposed upon terrestrial radio, please understand that the radio industry is not some vast pot of riches that can be tapped as a bail-out for a recording industry that has failed to execute a digital strategy that addresses a decline in its own brick and mortar income.

Congress unambiguously intended that, in exchange for unique promotional support afforded record labels and artists, terrestrial radio should be treated differently from other transmission platforms. That premise has not changed.

Local radio station operators are responsible for obtaining licenses for the public performance of copyrighted musical works. For the vast majority of operators, this equates to a blanket license that permits a station to air music from a particular PRO's repertory without having to account for actual usage. Traditionally, the administrative benefits of a blanket license has outweighed antitrust aspects associated with a structure that permits PROs to aggregate music works in a way that has the hallmarks of a monopoly.

Given the large scale of the radio industry, the RMLC believes that a retention of collective licensing in some form is efficient and advisable. In this regard, the independent and experienced Federal judges, associated with the ASCAP and BMI rate courts have been able to deliver appropriate rate-setting oversight. A purely free market approach to music licensing, coupled with the absence of consent decrees monitored by the Department of Justice, would in-

vite market abuse and represent a step backward from a system that has served parties well for decades. Indeed, the fact that there are currently two antitrust cases against SESAC in Federal court is a testament to what has happened in the absence of government supervision of entities that wield the leverage of aggregated musical works combined with a club of statutory penalties for copyright infringement.

Now, if Congress is dedicated to bold reform, it could lead to process efficiencies and enhanced royalty payment to creators. It might want to explore the prospect of a super licensing collective along the lines of what has already been proposed by other stakeholders. Outside of Brazil, it is hard to identify another country in the world that supports multiple licensing entities that administer a single right such as the public performance right in the musical composition.

The fact that the U.S. continues to maintain three organizations for this purpose, ASCAP, BMI and SESAC, sets up an enormously complicated and redundant licensing system and likely guarantees precious royalty payments due creators are being diminished in their journey from the licensee to the copyright owner. Indeed, this example doesn't even account for the role of other licensing agencies such as the SoundExchange and The Harry Fox Agency that further contribute to the music licensing morass.

Before we simply attribute the perceived economic injustices ascribed to creators of musical works to the level of fees paid by music users, the radio industry, we really need to carefully scrutinize the royalty distribution process that dictates how and what creators are paid relative to incoming license fees.

The RMLC brings longstanding and professional expertise to the table, and we stand ready to work with other stakeholders in fashioning a pragmatic music licensing regime that is fair to all and preferential to none.

Thank you.

[The prepared statement of Mr. Christian follows:]

Ed Christian, Chairman
Radio Music License Committee, Inc. (RMLC)

Wednesday, June 25, 2014

Music Licensing Under Title 17: Part Two

Hearing on "Music Licensing Under Title 17: Part Two"
Before the House Subcommittee on Courts, Intellectual Property and the Internet
Chairman, Bob Goodlatte
Statement of Ed Christian scheduled for June 25, 2014

Mr. Chairman, Ranking Member Nadler, and members of the Subcommittee, my name is Ed Christian and I am the Chairman of the Radio Music License Committee, Inc. ("RMLC"). I have been a broadcaster for over 50 years now. The RMLC, which has also been in existence for well over 50 years, is a non-profit that represents the collective interests of some 10,000 local commercial radio stations in the United States in connection with music licensing matters. During the decades of its existence, the RMLC has been involved in extensive music license negotiations with primarily the two largest U.S. Performing Rights Organizations ("PROs") – the American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI").

The longstanding mission of the RMLC has been and continues to be to provide a competitive market for music licensing in which local radio stations pay a fair price for performance rights and copyright owners receive equitable compensation associated with these rights payments. The RMLC has historically achieved fair and reasonable licenses for the radio industry with ASCAP and BMI through a combination of industry-wide negotiations and, as necessary, federal "rate court" litigation. More recently, the RMLC has found itself involved in antitrust litigation involving the smallest of the PROs in the U.S. – SESAC – in order to curb this company's anti-competitive licensing practices.

No question about it. The digital era has resulted in a sea change for the music industry generally, and the music licensing process in particular. When taking stock of where we are, today does not look like yesterday and tomorrow will not look like today. Regarding reforms, stakeholders in this process

should seize the opportunity to develop a music licensing process that allows creators a fair chance to reap their just reward by, *first*, insuring that existing license fees paid by music users are not disproportionately diminished in their journey from licensee to the copyright owner. **Before we simply attribute the perceived economic injustices ascribed to creators of musical works to the level of fees paid by music users, we need to carefully scrutinize the royalty distribution process that dictates how and what creators are paid relative to incoming license fees.** Until we are satisfied that the current royalty distribution process works efficiently and fairly for creators, the conversation should not turn at all to level of payments made by music users generally, and the radio industry in particular.

Any licensing redistribution concepts that rely upon the radio industry for funding are misguided. With particular reference to the recurring demand by the recording industry for a sound recording performance right to be imposed upon terrestrial radio, please understand that the radio industry is not some vast pot of riches that can be tapped as a bailout for a recording industry that has failed to execute a digital strategy that addresses a decline in its own brick and mortar income. Congress *unambiguously* intended that, in exchange for unique promotional support afforded record labels and artists, terrestrial radio should be treated differently from other transmission platforms. That premise has not changed and the RMLC strongly supports our industry trade organization, the National Association of Broadcasters, in its efforts to oppose imposition of this licensing obligation that would cripple a radio industry that has been financially treading water for years now. We also thank those representatives in Congress who have expressed support for our industry position on this issue by signing on as co-sponsors of The Local Radio Freedom Act resolution.

The hypocrisy does not end with the recording industry seeking a new fee tied to the sound recording right that, if imposed on radio, would effectively bite the promotional hand that feeds the recording industry. We have recently witnessed the PROs pushing for passage of a bill dubbed the Songwriter Equity Act. If passed, this legislation would eliminate the existing firewall provision in the Copyright Act that prohibits, for instance, ASCAP and BMI rate court judges from taking note of rate precedents tied to the sound recording performance right. The dirty little secret here is that it was these same PROs that insisted on this firewall in the first instance. Why? Because they feared that, over time, their slice of the license fee pie tied to the musical composition performance right might be diluted if license fees tied to the newly-established sound recording performance right continued to grow. Now that the PROs see that the grass is literally "greener" on the other side of the fence, where a pure webcaster like Pandora pays a reported 50% or more of revenue to the SoundExchange, the PROs salivate at the prospect of gaining parity with respect to the musical composition rights that they administer. One has to believe that the representatives in Congress who support this legislation are unaware of the history that frames the issue and the hypocrisy that dominates it.

It's important to distinguish here between pure webcasters (or internet radio), satellite radio, and terrestrial radio. Internet radio does <u>not</u> represent a "free" platform to consumers who need to pay an internet service provider (or "ISP") for access, and who often pay a subscription fee. Satellite radio generally requires the consumer to pay an excess fee as well. Terrestrial radio, on the other hand, is free to the consumer and prides itself on local service to the community. It's critical that Congress judge the local radio industry upon its particular merits alone and <u>not</u> as a comparable to other transmission platforms. It's ironic that within the context of the digital "perfect storm", local radio, which utilizes primarily *analog* transmissions as the basis for its platform, has been broadly tagged as

the problem by stakeholders in the music industry. To be clear -- the only crime that terrestrial radio has committed is to continue to represent the most important promotional tool for artists and the recording industry. Otherwise, why would labels and artists continue to place a premium on securing terrestrial radio airplay?

Local radio station operators are responsible for obtaining licenses for the public performance of copyrighted musical works used in the programming and commercials they broadcast. For the vast majority of radio broadcasters, this equates to a blanket license fee that permits a station to air any and all music from a particular PRO's repertory without having to account for actual music usage; this, despite the fact that a typical radio station may, at any given time, rely upon a library of only 400-500 songs for its playlist. Traditionally, the administrative ease associated with the blanket license has outweighed antitrust aspects associated with a one-size fits all structure that permits PROs to aggregate musical works in a way that has the hallmarks of a monopoly.

In considering the scale of the radio industry, with some 10,000 stations, the RMLC believes that collective licensing in some form is efficient and advisable. In this regard, the ASCAP and BMI rate courts, coupled with their independent and experienced federal judges, have historically been able to deliver appropriate rate-setting oversight. A purely free market approach to music licensing, coupled with the absence of consent decrees monitored by the Department of Justice, Antitrust Division, would wreak havoc upon a system that has served us well for decades. Any reforms that weaken the existing consent decree/rate court system will represent a step backward and invite market abuse. The fact that there are currently two antitrust cases against SESAC in federal court is a testament to what happens in the absence of government supervision of entities that wield the leverage of aggregated

musical works combined with the "club" of serious statutory penalties for copyright infringement. In this regard, Congress [as well as the DOJ] must remain cognizant of the fact that there are new PRO players on the scene that also need to be placed under a consent decree regimen in order to preempt marketplace abuse.

Now, if Congress is dedicated to bold reform of the music licensing process, it may want to explore the prospect of a supra licensing collective along the lines of what has already been proposed by other stakeholders in this process. Outside of Brazil, it is hard to identify another country in the world that supports multiple licensing entities that administer a single right such as the public performance right in the musical composition. The fact that the U.S. continues to maintain three organizations for this purpose – ASCAP, BMI, and SESAC – sets up an enormously complicated and burdensome music licensing structure and likely guarantees that precious royalty payments due creators are being diluted due to PRO administrative redundancies, not to mention the difficulty encountered by foreign licensing agencies in attempting to identify entitled parties of U.S.-controlled works. Indeed, this example doesn't even address the role of other licensing agencies such as The SoundExchange and The Harry Fox Agency that further contribute to the music licensing morass. A supra licensing entity could represent a paradigm shift that results in both process and monetary efficiencies that might well result in enhanced royalty payments to creators. In this regard, the RMLC brings longstanding professional expertise to the table and we stand ready to work with other stakeholders in fashioning a pragmatic music licensing regime that is fair to all and preferential to none.

Of course, in order to facilitate music licensing transactions and competition, particularly as to digital transactions, transparency of rights control is vital. Unfortunately, to date, the PROs have chosen to

obfuscate control of particular musical works and this makes it very difficult for music users to attempt new licensing alternatives geared to direct licensing with copyright owners. Congress must appreciate that there is no reason whatsoever for the PROs to evade transparency by continuing to deprive music users of access to a real-time, comprehensive works database of their respective repertory offerings.

In conclusion, the RMLC has and always will recognize the contributions of musical creators who wish to be fairly compensated for their efforts. The RMLC's goal is to participate in the fashioning of "win-win" music licensing reforms that ensure sustainable and workable economic conditions for creators and broadcasters alike.

Thank you.

Mr. COBLE. Thank you, Mr. Christian.

Mr. Williams?

TESTIMONY OF PAUL WILLIAMS, PRESIDENT AND CHAIRMAN OF THE BOARD, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP)

Mr. WILLIAMS. Good morning, Chairman Coble.——

Mr. COBLE. Mr. Williams, pull that mic closer to you, if you will.

Mr. WILLIAMS. There we go.

Good morning, Chairman Coble and Goodlatte, Ranking Member Nadler and Conyers, and Members of the Subcommittee and visiting members of the larger organization. My name is Paul Williams and I am a songwriter, I am an American songwriter. I also have the great pleasure and honor of being President and Chairman of the Board of the American Society of Composers, Authors, and Publishers. We are ASCAP.

In 1914, the small but visionary group of American songwriters had an idea. They believed they could protect their rights as music creators more effectively if they joined together rather than going it alone. So thank God they formed ASCAP.

Today, more than 500,000 songwriters, composers and music publishers trust and depend on ASCAP to negotiate licenses, monitor public performances, and distribute royalties all on a not-for-profit basis. I will repeat that: On a not-for-profit basis.

I'm honored to appear before you today to speak on their behalf. We're here today because technology is changing to the world in wonderful ways. We're moving into a world where people no longer own the music they love, they stream it whenever and wherever they want. At the same time, the Federal regulations that govern how music is licensed and thus how songwriters, like myself, are compensated for our work, do not reflect the way people listen to music today. In fact, they are stuck in the distant past and it's threatening the very future of American music.

ASCAP is governed by a consent decree created in 1941 and last updated in 2001. That's, incidentally, before the iPod ever hit a store. We all know the music marketplace has changed dramatically since then and sadly new music services are finding ways to take advantage of this outdated regulatory system. Consider the fact that it takes one million streams on Pandora for a songwriter to earn $90; nine, zero dollars.

For some perspective, one of the most popular songs in 2011 was Lady Antebellum's wonderful hit, "Need You Now." For 72 million streams on Pandora, the four songwriters earned less than $1,500 apiece. Meanwhile, record labels and artists often earn 12 to 14 times more than songwriters for the exact same stream.

Such an imbalance would not happen in a free market where real competition exists and songwriters have more of a say over how our music is licensed, how our music is licensed. But under the current consent decree, songwriter compensation reflects the true value of our work less and less even as our music is performed more and more.

There is now a very real risk that major publishers will withdraw from ASCAP and BMI entirely. As a result of that, voluntary collective licensing could soon collapse. It would make the system

more complex, more inefficient, and more expensive for everyone including music fans, the people that love our music, unless we do something to fix it.

Now I sit here surrounded by representatives of multi-billion dollar corporations that profit from our songs and I find it beyond perplexing that American songwriters, like Rosanne and myself, are the ones subject to the heaviest government regulation. Be that as it may, I believe that all of us working together to modernize the music licensing system will allow songwriters and composers to thrive alongside businesses that revolve around our music. We want you to be a giant success. You are delivering our songs to the world.

To that end, we're proposing several updates to our consent decree with the Department of Justice. We believe these updates can save voluntary collective licensing from the serious risks facing it to the benefit of music users, consumers, and creators alike. First, we need a faster, less expensive process for settling rate disputes with businesses that use music; one that considers independent agreements reached in the free market as benchmarks.

Second, songwriters need flexibility to manage our own rights. We should be allowed to grant ASCAP the right to license our music for some uses while maintaining the right to license other uses directly ourselves. It's our music. Doing so will foster greater competition in the marketplace.

Finally, we can streamline the licensing process for thousands of music creators and users by giving ASCAP the ability to license all of the composition rights that business needs to operate their music in one transaction. Passage of the Songwriter's Equity Act, introduced by Representatives Collins and Jeffries for which we are most grateful, is another crucial piece of this puzzle. It is a simple and reasonable fix which will enable the court to consider sound recording royalty rates as evidence when establishing songwriter royalty rates.

Working together to make these changes, I'm confident we can preserve the immense benefits of voluntary collective licensing. This will benefit businesses that license music and listeners who enjoy it while ensuring that songwriters, composers, and music publishers are compensated for the true value, for the true value, of our music the true value our music brings to the marketplace.

Thank you for the opportunity to share this with you today. Thank you so much.

[The prepared statement of Mr. Williams follows:]

Written Statement of Paul Williams
President and Chairman of the Board
American Society of Composers, Authors and Publishers
on
"Music Licensing Under Title 17 – Part Two"
Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
June 25, 2014

Mr. Chairman, thank you for this opportunity to present testimony before the Subcommittee on Courts, Intellectual Property, and the Internet of the U.S. House of Representatives Committee on the Judiciary on the important subject of the future of music licensing.

I am the President and Chairman of the Board of the American Society of Composers, Authors and Publishers ("ASCAP"), the oldest and largest performing rights organization ("PRO") in the United States. But first and foremost, I am a songwriter. For 100 years, ASCAP has defended and protected the rights of songwriters and composers, like myself, and kept American music flowing to millions of listeners worldwide. Today, our 500,000 songwriter, composer and music publisher members depend on ASCAP for their livelihoods, by negotiating licenses, tracking public performances, distributing royalties and advocating on their behalf. Through a century of innovation, ASCAP's collective licensing model has served as the primary gateway to music for businesses seeking to perform copyrighted music, ensuring that they may efficiently obtain licenses to perform the millions of works in ASCAP's repertory. As we consider our next 100 years, I firmly believe that ASCAP's collective licensing model is the most effective, efficient and compelling model to serve the needs of music creators, businesses that perform music, and music listeners everywhere.

New technologies, however, have dramatically transformed the way people listen to music, a transformation that, in turn, is greatly changing the economics of the music business, particularly for songwriters and composers, who do not share the same revenue streams as recording artists, such as concert and merchandise revenue. Streaming music through services such as Pandora, Spotify, and iTunes Radio is growing at a fast pace as physical music sales and digital downloads decrease in popularity. Digital audiovisual services such as Netflix and Amazon are revolutionizing the ways in which the world watches television and movies, changing the traditional media landscape. Music is now enjoyed by more people, in more places and over more devices, and ASCAP and our members embrace these new services as means to bring our music to the public. But the regulatory system that governs how ASCAP can license such new services has failed to keep pace, making it increasingly difficult for music creators to realize a competitive return for their creative efforts and for PROs such as ASCAP to appropriately serve the needs of their members (music creators), customers (music licensees) and the music listening public. A time for change has come.

In my testimony, I will describe how collective licensing by PROs such as ASCAP and Broadcast Music, Inc. ("BMI") plays an essential function in the music marketplace and continues to do so in the face of a digitally transformative economy. I will then describe how regulatory oversight through negotiated consent decrees and the U.S. Copyright Act has failed to meet those changes in the marketplace. Finally, I will suggest modifications to the consent decrees that will address such shortcomings and emphasize how Congress may assist in ensuring that ASCAP's songwriter, composers

and music publisher members realize competitive prices that reflect the true value of their music.

I. Collective Licensing Is Crucial to the Music Licensing Marketplace

On February 13, 1914, a group of visionary songwriters convened at the Hotel Claridge in New York City to address the problem facing songwriters and composers of that day – how to efficiently obtain compensation for the widespread use of their copyrighted music by thousands of businesses performing their music countrywide. The solution was the creation of ASCAP, the first PRO. ASCAP would negotiate and administer bulk licenses for the non-dramatic public performance rights in works of its members on a collective basis, monitor music usage by and collect fees from licensees, distribute royalty payments to its members and protect from infringement of its members' exclusive public performance rights. A bulk license offered by ASCAP would provide efficiencies for both rights holders, who would otherwise struggle to individually license or enforce the millions of performances of their works by thousands of individual users on an individual basis, and licensees, who would otherwise find it impossible to efficiently clear the rights for their performances if forced to negotiate separately with each individual copyright owner. Most crucial to its success, ASCAP's collective licensing would permit its members to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level and ensuring that more of the money collected is paid to songwriters and publishers as royalties. As a testament to ASCAP's collective efficiencies, ASCAP – *which operates on a non-profit-making basis*, distributing all license fees collected, less operating expenses, as royalties to its members – today distributes to our members as royalties

approximately 88% of all fees we collect, on account of performances made by over 700,000 different entities, making it the most efficient PRO in the world.

Moreover, PROs like ASCAP offer their members another crucial benefit – transparency. Unlike other relationships, such as that found with many record labels and recording artists where royalties are distributed on a pass-through basis, hinging on complex contracts, ASCAP's relationship with its members is direct and transparent. Every dollar that ASCAP receives is divided into two – fifty cents is allocated to songwriters and composers and fifty cents to music publishers. ASCAP distributes separately each allocation directly to our songwriter and composer members, and to our music publisher members, regardless of their separate contractual agreements. This direct relationship provides much needed transparency and is crucial to the continued ability for songwriters and composers to earn a competitive return for the use of their music.

A century ago, ASCAP's efforts were directed towards the music users of that day – performance venues and other public establishments that play music, such as bars, restaurants, hotels and retail stores. With the progression of technology over the years, ASCAP innovatively met the demands of the marketplace, ably negotiating licenses on a non-exclusive basis for the public performance rights in the musical works in our repertory of millions of works, as well as the repertories of nearly 100 foreign PROs with which ASCAP has reciprocal agreements, to a wide range of licensee industries. In the 1920s through the 1940s, ASCAP met the needs of the radio marketplace devising licenses that today serve thousands of radio stations. In the 1950s through the 1970s, ASCAP engineered licensing for the developing local and network television industry. In

the 1980s and 1990s, ASCAP provided solutions to the emerging cable and satellite industries. In each decade, despite challenges posed by new technologies and business models, ASCAP was able to work with user industries to provide efficient licensing solutions that would provide a much needed stream of income to ASCAP's members for the use of their works – royalties such songwriters and publishers might otherwise be unable to collect. The consent decree did not impede ASCAP's ability to serve our members, who for decades were able to earn a living writing and composing music, largely due to the royalties collected by ASCAP on their behalf.

Today, ASCAP's role remains unchanged, despite the seismic changes confronting the music industry by virtue of the advent of the Internet and other digital technologies. If not for PRO collective licensing, the billions of performances made by digital music services such as Pandora, Spotify and Apple's iTunes Radio would require clearance on a copyright-owner-by-copyright-owner basis – exactly the problem faced by ASCAP's founders years ago, but on a magnitude far greater. Indeed, such services herald PRO collective licensing as a model of licensing efficiency to be emulated throughout the market, without which licensing – and their businesses – would suffer.[1] In fact, the U.S. Copyright Office and its current and past Registers of Copyright have attested to the success of and need for the PRO collective licensing model, and its potential as a model for other rights.[2]

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[1] *See, e.g.*, Comments of Sirius XM Radio Inc., U.S. Copyright Office, In the Matter of Music Licensing Study: Notice and Request for Public Comment, Docket No. 2014-3 ("Music Study") at 5 ("[T]he efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence"); Comments of the Digital Media Association, Music Study at 27 ("[T]he blanket licenses (among other forms of licenses) offered by ASCAP, BMI and SESAC provide a framework that promotes licensing efficiencies and reduced transaction costs for both licensors and licensees alike.")

[2] *See* U.S. Copyright Office, LEGAL ISSUES IN MASS DIGITIZATION: A PRELIMINARY ANALYSIS AND DISCUSSION DOCUMENT 32 (2011); Maria Pallante, Remarks at the Copyright Matters program of February 25, 2014 ("Pallante Remarks") ("[I]t is clear there will always be an important role for the collective

Today's robust marketplace for performing rights is built on the foundation provided by collective licensing. Indeed, competition in the collective licensing marketplace has expanded widely. ASCAP now competes with two other PROs in the U.S. – BMI and SESAC, Inc. (a private unregulated PRO) – as well as new profit-making market entrants.

The role of the PRO therefore remains vital to the future of the music marketplace – both for ASCAP songwriter, composer and publisher members, who depend on the performing right royalties collected by ASCAP as a major source of income, particularly as digital music streaming services account for an increasingly larger portion of music revenues in the U.S. and other sources of royalties (such as those from the sale of compact discs and digital downloads) decline, as well as for digital content services, who depend on the efficiencies of PRO collective licensing to compete in the market. However, it has become clear – as I explain below – that the consent decree regulating ASCAP has failed to properly adjust to meet those changes, leaving ASCAP's members in much the same place as they were a century ago at the Hotel Claridge – searching for a solution to the problem of how to achieve a competitive return for the widespread use of their copyrighted music. And, much like its forebears concluded then, the solution is a vibrant ASCAP that provides collective licensing in an efficient manner. However, to

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licensing paradigm, which was innovative when ASCAP was founded 100 years ago and remains innovative today."); Statement of Marybeth Peters, The Register of Copyrights, Before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States Senate 109th Congress, 1st Session, July 12, 2005, Music Licensing Reform ("The United States also has collective licensing organizations, such as ASCAP, BMI and SESAC, which appear to function quite successfully. These performing rights organizations license the public performance of musical works – for which there is no statutory license – providing users with a means to obtain and pay for the necessary rights without difficulty. It seems reasonable to ask whether a similar model would work for licensing of the rights of reproduction and distribution.")

maintain the feasibility of that solution, the consent decree must, too, adapt. A time for change has indeed come.

II. The ASCAP Consent Decree and U.S. Copyright Law Require Adjustment

In 1941, ASCAP settled a lawsuit brought by the Department of Justice and entered into a consent decree (the "Consent Decree" or "Decree") that prohibited ASCAP from receiving an exclusive grant of rights from its members and required ASCAP to charge similar license fees to music users that are "similarly situated." The ASCAP Consent Decree has only been amended twice – first in 1950 and, subsequently in 2001, prior to the biggest developments of the digital music era, including the introduction of Apple's iPod. In its current form, the Decree requires ASCAP, after receiving a request for a license from a music user, to negotiate a reasonable license fee or seek such a determination from a "rate court." Pending the completion of any such negotiations or rate court proceeding, the Decree grants the music user the right to perform any or all of the musical works in the ASCAP repertory.

Additionally, among other things, the Decree prohibits ASCAP from acquiring or licensing rights other than for the public performance of musical works, such as mechanical or synchronization rights. As I discuss below, it is now apparent that the Decree has failed in these and other respects to accommodate the rapid and dramatic changes in the music licensing marketplace brought about by the extraordinary evolution in the ways in which music is now distributed and consumed. As a result, the collective licensing model that has, for the past century, benefited music creators, licensees and consumers alike, and which is necessary for a viable music licensing system in the future, is at risk.

A. The Automatic License Requirement

Under the Decree, a music user is entitled to begin performing any or all ASCAP music as soon as a written license application is submitted, without the threat of infringement, before fees are negotiated by the parties or set by the rate court. However, the Decree does not currently compel either ASCAP or an applicant to commence a rate court proceeding in the absence of agreement on final license terms, nor does it establish a definite timeline for the negotiation of a final fee – elements of the licensing process that certain users have begun to exploit as a dilatory tactic to avoid paying competitive prices to perform the ASCAP repertory.

For many years, the license application process was merely a procedural step leading to eventual final licenses for established industries. ASCAP traditionally negotiated licenses with industry committees or associations representing entire classes of licensees. For example, ASCAP negotiates with the Television Music Licensing Committee, which testified before you on June 10th, to reach license agreements for the entire local broadcast television industry. Established relationships and courses of conduct, as well the development of traditional media business economies – such as the radio and television broadcast economies – led generally to continued payment of fees, even without a negotiated final license in place.

In today's marketplace, however, digital services without a history of negotiating licenses and paying fees, and often without any proven business model, utilize the Decree license process to their benefit. As ASCAP licenses are compulsory and fees can be set retroactively, certain music users have strategically delayed or extended the negotiating process, choosing to remain applicants or interim licensees indefinitely—in some cases a

decade or longer—without paying fees to ASCAP or providing ASCAP with the information necessary to determine a reasonable final fee. In some cases, music users have decided that interim license rates are more favorable than anticipated rate increases, and have made strategic choices to stay on interim terms for as long as ASCAP permits. In other cases, new applicants have applied for a license – claiming the shelter of the Consent Decree's guarantee of a right to perform ASCAP members' music while an application is pending – while simultaneously disclaiming the need for such a license and refusing to provide the information ASCAP needs to formulate a fee proposal.

In the scenarios above, ASCAP has limited choices. It can do nothing and permit users to remain as applicants or interim licensees longer than would be preferred without paying any fees. Or, it can accept what it believes is a sub-optimal outcome and, open the door for other users to argue that ASCAP must offer to them the same sub-optimal license due to the Decree's mandate to offer the same license rates and terms to similarly situated licensees. Or, ASCAP can decide whether to use its limited resources to pursue a lengthy, expensive and arduous rate court proceeding, which, as I describe below, can result in below-market rates. ASCAP's members consequently often find themselves placed between a rock and a hard place.

This problem is particularly pronounced with regard to new digital services or other new media services that are particularly susceptible to changing market conditions. As compared to traditional music users like terrestrial radio stations or television broadcasting networks, the potential scale and type of music use can now vary widely among new media licensees, complicating the process through which ASCAP values the requested license. Moreover, the speed with which new media licensees enter and exit

the market has increased. As a result, ASCAP's need for information from an applicant regarding its plans for a particular service has increased, both to calculate a reasonable fee, but also – in the event that the applicant refuses to provide information – to assess the potential costs and benefits of petitioning the rate court to set a reasonable fee. When applicants ignore ASCAP's requests for information, ASCAP can lack even the basic information necessary to determine whether rate court litigation is justified. These problems might be mitigated somewhat if the new media services were amenable, and able, to negotiate on an industry-wide basis like other industries do. However, as these new media services elect not to (or simply cannot) negotiate collectively, ASCAP is forced to go down the same path with each service separately at a huge cost to ASCAP's members.

B. The Rate Court Process

Until the advent of the digital era, the rate court process was rarely invoked. Established industry groups and ASCAP were generally able to reach license agreements outside of the rate court. However, as I described earlier, the compulsory license application process under the Decree has led to licensing deadlock with many digital services, forcing greater resort to the rate court. Indeed, of the 30 or so rate court proceedings to date over the past half century, more than half were initiated since 1995.

While the ASCAP rate court was meant to provide a forum for the efficient and timely determination of rate disputes, in practice, rate court litigation has resulted in great expense and prolonged uncertainty for both ASCAP and license applicants. The Decree mandate to commence the trial within one year of the filing of the initial petition is rarely met, largely because the parties are permitted the full range of costly pretrial motion

practice and discovery afforded by Federal rules; post-trial appellate proceedings or possible proceedings on remand further delay the determination of a final fee even beyond the original expiration date of the license at issue.

Rate court proceedings have proven to be extremely expensive for the parties involved. In addition to enormous internal administrative and labor costs, ASCAP and applicants have collectively expended many tens of millions of dollars on litigation expenses related to rate court proceedings, much of that incurred since only 2009. Of course, each licensee bears only the expense of its own ASCAP rate court proceeding; ASCAP must bear the expense of them all.

C. Rate-Setting Standards

In addition to making the rate-setting process administratively faster and less expensive, there is a dire need to establish a clear rate-setting standard that looks to competitive free-market benchmarks. Under the Decree, the rate court must set a "reasonable fee." However, the Consent Decree does not define "reasonable;" thus, ASCAP and our members are burdened by the lack of clarity regarding what factors the rate court should consider when setting a reasonable fee and the weight given to those factors. The rate court has often looked to the concept of fair market value, looking at the price that a willing buyer and a willing seller would agree to in an arm's length transaction, and finding that this value can best be determined by the consideration of analogous licenses or benchmark agreements from a competitive market. However, many of the licenses presented as benchmarks – those between ASCAP or BMI and various licensees – are inherently different from the licenses that would be obtained in a competitive market. This is because a seller's ability to refuse to sell is a key

requirement for a true market transaction, and neither ASCAP nor BMI are free to refuse to license their repertories under their respective consent decrees.

But the last few years have seen an increase in the number of direct licenses negotiated between music publishers and music users outside of the compulsory licensing regime imposed by the ASCAP and BMI consent decrees – licenses that can be used as a measure of competitive pricing in the market for public performance rights. As certain publishers withdrew their digital rights from ASCAP and BMI and negotiated licenses in the free marketplace outside of the constraints of consent decrees (a phenomenon I will describe below), the rate court was, for the first time, supplied with actual competitive market benchmarks. However, the rate court signaled in its most recent decision that it would not rely on the most recent licenses negotiated by copyright owners in the free market – rates that were widely known to be higher than what applicants were willing to pay the PROs – a result that means that ASCAP's members will be paid lower rates than what other copyright owners are receiving from the same licensee.

In addition, the rate court is not permitted to look to other relevant marketplace indicia when it sets rates. Section 114(i) of the Copyright Act prohibits the rate court in setting fees for the performance of musical works from looking at fees paid *by those same services* to the recording industry for the performance of sound recordings, leading to rate disparities in favor of sound recordings in the order of 12 to 1. This problem has been addressed by the introduction of the Songwriter Equity Act, which I discuss below.

It is clear that the legal and regulatory restrictions imposed on ASCAP by the Consent Decree and the Copyright Act severely limit ASCAP's members from achieving competitive market rates for their works.

D. Flexibility in Licensing Is Imperative

The option for copyright owners to directly license works has long been a key feature of ASCAP membership. Because ASCAP can accept grants of rights only on a non-exclusive basis, ASCAP's members are free to issue licenses directly to users, and many have done so over the years. Of course, due to the efficiencies afforded through ASCAP's collective licensing system, most ASCAP members, however, have licensed all of their works through ASCAP all of the time. However, certain ASCAP publisher members recently developed concerns that, due to the constraints imposed by the Decree and the inability to achieve competitive market rates through the rate court process, licensing their songs through ASCAP in the new media marketplace did not allow them to realize the full value of their copyrights. Moreover, some ASCAP members wanted increased flexibility to manage their own rights and negotiate contractual scope and terms directly with particular music users (terms which the Decree might prohibit). These members questioned whether their only option to achieve these licensing goals was to withdraw their membership from the PROs altogether.

To ensure that our members would be able to exercise the rights granted to them under the copyright law as copyright owners, but not be forced to surrender all of the benefits of PRO collective licensing by withdrawing from ASCAP completely (after all, licensing tens of thousands of music users individually is practically impossible for any copyright owner), ASCAP struck a balance: we decided to permit our publisher members to withdraw rights on a limited basis, giving such members the flexibility to license digital services on their own in the free marketplace while retaining the blanket efficiencies afforded by collective licensing for all other uses for the benefit of owners

and users alike. BMI took a similar approach. However, the ASCAP and BMI rate courts both denied copyright owners this flexibility, ruling that the ASCAP and BMI respective consent decrees did not allow for a partial grant of rights, but instead require copyright owners to be either "all in" as PRO members or "all out."

As a result, copyright owners are currently forced to choose to either remain PRO members and reap the benefits of PRO collective licensing, but through a regulated system that does not compensate them for the true value of the performances of their works or leave the PRO system altogether, achieving competitive rates in the marketplace, but losing the efficiencies of collective licensing and leaving unlicensed performances by thousands of music users they cannot affordably individually license. The crucial problem with this second choice is that the efficiencies of collective licensing depend on the PRO's ability to spread the costs of licensing and monitoring music usage among the entire membership, thereby reducing costs to a manageable level; the loss of major members from the PROs would severely limit such efficiencies for the remaining members, perhaps so much so that the PROs could not efficiently operate anymore. If that happens, and the collective system consequently collapses, we all lose – songwriters, music services and consumers alike.

Furthermore, the Decree denies ASCAP the flexibility to construct the licenses its digital music users seek. The public performance right licensed by ASCAP on behalf of its members is only one of several exclusive rights provided to copyright holders of musical compositions. Others include the right to reproduce and distribute musical works as phonorecords (the "mechanical right"); the right to use a recording of a musical work in timed relation with visual images, such as part of a movie or television program (the

"synchronization" or "synch right"); and the right to print or display a composition's lyrics (the "print right"). Each of these rights are licensed separately; at the moment, services typically license performance rights through a PRO and mechanical rights and synch rights directly from the copyright owner, administrator or a designated agent, often on a song-by-song basis.

This division of licensing was sufficiently convenient in the traditional analog world in which licensees rarely needed licenses for multiple rights. The introduction of digital technology, however, has changed the traditional licensing environment, requiring digital users to often clear multiple rights for the same use. Digital music services that stream music on an on-demand basis need a public performance license as well as a mechanical license. A wide variety of digital music services display lyrics as songs are streaming, necessitating both public performance and print licenses. Services utilizing audiovisual content are now required to clear synchronization rights on a large scale basis, which must be obtained from the publishers directly, again on a song-by-song basis. Separate licensing of these rights is inefficient and may discourage new media users from properly licensing their services.

These complexities inherent in a multiple rights clearance system have triggered music users to vocalize their desires for collective licensing solutions. ASCAP, of course, offers that collective blanket licensing solution, but is prohibited under the Consent Decree from licensing rights in musical compositions other than public performance rights. Other PROs in and outside of the U.S. are able to do so. Indeed, many foreign PROs are already engaged in the process of licensing multiple rights. ASCAP's inability to offer licenses for multiple rights not only creates licensing

inefficiencies for music users to the detriment of consumers who ultimately bear the transactional costs, but it also places ASCAP's members at a competitive disadvantage in the licensing marketplace if other organizations can license those rights.

E. U.S. Copyright Law Must Be Technology Agnostic

While music businesses have been built upon a rights model largely unchanged in 100 years, the drastic changes in the means by which copyrighted content is used and transmitted on a global scale means copyright law must be modernized to ensure that copyright owners are protected in the future. Consumers no longer rely upon a passive, pre-scheduled means of experiencing content. Rather, digital content is made available in a myriad of ways that permit consumers flexibility in the means by which they experience such content. The old strict divide between user-uncontrolled, non-interactive webcast streaming and full download transmissions that took minutes (or hours) to complete has evolved into hybrid technologies that do not lend themselves to traditional content delivery labels. Users care little how they obtain content – the simply wish to access it, whenever and wherever they choose. Technologies have evolved to meet those consumer expectations.

While the differences in technologies and user experience may be reflected in the ultimate compensation paid for those experiences, it is clear that artificial legal differentiation between what is and what is not compensable under U.S. law is no longer justified. ASCAP has always believed that our Copyright Act grants to copyright owners the broadest protection for the offering of their works to the public, and does so in a

manner that brings our law in compliance with various international treaty obligations.[3] However, a number of recent cases have interpreted the public performance right in such a manner so as to limit the reach of a copyright owner's rights. First, courts have held that transmissions that result in content downloads do not meet the statutory definition of a performance, even though it is clear that such technologies have evolved to make any such distinction irrelevant.[4] More recently, decisions have further limited the extent of the performance right by holding that the transmissions of certain individually-accessible content on a one-to-one basis at the request of consumers are not "public" performances, thus denying copyright owners the right to authorize and be compensated for those transmissions.[5]

If these decisions and their rationale are permitted to stand, the narrowing of the public performance right based on loophole-exploiting technological engineering will lead to the increased use of music without due compensation to its creators. And, considering that countries around the world do not make these technological distinctions in their laws, and we now exist in a borderless digital economy, U.S. rights holders are further disadvantaged. Continued access to creative output depends on competitive compensation to creators for the use of their works, without which, again, ultimately the consumers lose.

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[3] *See* Joint Comments of the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., The Songwriters Guild of America, SESAC, Inc. and The National Music Publishers' Association, U.S. Copyright Office, Study on the Right of Making Available, Docket No. 2014-2.
[4] *U.S.* v. *ASCAP, In the Matter of the Application of America Online, Inc.*, 627 F.3d 64 (2d Cir. 2010).
[5] *WNET, Thirteen* v. *Aereo. Inc.*, 712 F.3d 676 (2d. Cir. 2013); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008)

III. Proposals For Change

Maintaining ASCAP as the effective licensing solution it has been for the past century requires change – changes to update the Consent Decree, as well as change to the copyright law. Specifically, I propose the following modifications.

A. Modifying the Consent Decree

Maria Pallante, current Register of Copyrights and Director of the U.S. Copyright Office, stated recently that "the time has come to review the role of the consent decrees governing ASCAP and BMI".[6] That time is now. In order to alleviate the significant limitations placed on ASCAP and our members by the Consent Decree, I propose four ways in which the Decree should be modified.

1. Permitting Limited Grants of Rights. The Decree should permit PROs to accept partial grants of rights from copyright holders. Allowing ASCAP to maintain the compromise already struck with our members would preserve the benefits of collective licensing for users and owners in many situations, while allowing copyright holders to pursue direct non-compulsory licenses when they felt it was economically efficient and beneficial to do so. This approach would also afford greater latitude in structuring license arrangements, ultimately benefiting copyright owners and music users alike. Further, by encouraging the negotiation of direct licenses by truly willing buyers and willing sellers who are not under any compulsion to grant licenses, this approach would result in competitive market transactions that would then provide informative benchmarks for the rate-setting tribunal. Finally, members would be encouraged to remain within the PRO system, thereby effectuating collective efficiency for, and benefiting, all other members, music users and consumers alike.

[6] *See* Pallante Remarks.

2. Expedited Rate-Setting Process. The Consent Decree's rate-setting process should be replaced with an expedited arbitration process with focused discovery that would be significantly faster and substantially less costly. Expedited arbitration proceedings would serve two purposes. First, both music creators and music users would benefit from a more definite timeline and cheaper resolution of license fee disputes. Second, it would discourage applicants for automatic Decree licenses from indefinitely resting on mere license applications or remaining on interim licenses, and impose on applicants an obligation to pay for their use of ASCAP members' music.

3. Competitive Market Rate Standards. The establishment of an evidentiary presumption that direct non-compulsory licenses voluntarily negotiated by copyright holders provide the best evidence of reasonable rates would ensure that rates are based on competitive market transactions. Such a presumption would provide more certainty for all parties involved and also encourage more out-of-court negotiations, by providing the parties a reliable preview of the rate court's ultimate benchmark analysis and discouraging the strategic use of rate court proceedings to avoid the influence of market rates.

4. Licensing Multiple Rights. ASCAP should be permitted to extend the benefits of collective licensing through aggregated licensing to music users that could negotiate with ASCAP for multiple rights – namely, mechanical, synchronization and print rights in addition to public performance rights – in a single transaction. This would finally create a "one-stop shop" for musical work rights. Modifying the Consent Decree in this way would respond to licensee demand for simplification of the licensing process and administration of multiple rights. In addition, the flexibility to structure licenses that

aggregate rights would greatly reduce transactional costs and administrative expenses for owners and music users, which would benefit their customers, and, ultimately provide music creators with a greater monetary return for the use of their works. This would also allow ASCAP to compete more effectively in both the domestic and international licensing marketplace with owners or PROs that can, and do, aggregate rights.

B. Modifications to the Copyright Law

1. Songwriter Equity Act . ASCAP, along with other PROs and music publisher and songwriter groups, have joined to support the Songwriter Equity Act ("SEA"), a bill that would further the goals of providing competitive market rates to songwriters and composers. The SEA would provide for the setting of competitive market rates under the outdated pre-World War One era Section 115 mechanical license, and would remove the unfair barriers placed by Section 114(i) upon rate courts from considering license rates and fees paid by services for the public performances of sound recordings in setting fees for the same public performances of the underlying musical works. Significantly, the SEA does not mandate the rate-setting bodies to increase rates. Rather, it will permit them to finally be able to examine and take into account all relevant market evidence in setting rates. It is our hope that the passage of the SEA will further the ability for songwriters and music publishers to achieve competitive prices for the use of their works and lessen the inequitable disparity currently in place between payment for sound recordings and musical works. ASCAP and our members thank Representative Doug Collins and Hakeem Jeffries for their leadership in introducing this bill, and thank the many subcommittee members who have joined them through their co-sponsorship.

2. Making Available Right. The Supreme Court, understanding the significance of the issues raised in the *Aereo* case regarding Internet retransmission of broadcast signals to individual users, is reviewing the lower court's decision and will thereby shed further light on the reach of the performance right. ASCAP hopes and expects the Court to rule in favor of a broad reading of the performance right. However, regardless of the ultimate decision, U.S. law should remain agnostic regarding how copyrighted content is made accessible to users, and should extend protection to cover all means by which copyrighted content is made accessible to the public. This principle of neutral treatment is the basis for the broad "making available" right required upon signatories to the two WIPO Internet Treaties, the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, which were intended to provide a broad technology-agnostic exclusive right to encompass all manner and form of providing and disseminating copyrighted works to the public regardless of the manner of such transmission. Congress must ensure that the U.S., as a signatory to those treaties, provides a copyright law that respects this principle, and to the extent necessary, amend the Copyright Act to confirm that copyright owners should receive due compensation for the use of their works regardless of the means of delivery.

IV. Conclusion

For 100 years, PRO collective licensing has served as the solution to an efficient licensing marketplace, and it remains the solution today. However, new innovations in the marketplace demand that the outdated regulations governing the ability of the PROs to license on behalf of their songwriter, composers and publisher members evolve to meet those changes in order to provide competitive remuneration for the use of those

members' musical works. Without those changes, copyright owners may abandon the collective PRO system in hope of achieving competitive rates on their own, potentially tearing apart our collective licensing system. If that were to occur, everyone loses. Withdrawing copyright owners lose the efficiencies offered by the PROs, leaving unlicensed many performances of their work. Other copyright owners lose the ability to license their work on a blanket basis. Songwriters and composers lose the transparencies and services provided by the PROs. Services lose the ability to license on an efficient and transactional cost saving basis. And the ultimate losers would be those for whom the music is intended – the consumers. A time for change has indeed come.

Mr. Chairman, ASCAP and I look forward to working with your committee and staff to achieve these changes, and ensure that the music licensing marketplace works for all.

Mr. COBLE. Thank you, Mr. Williams.
Mr. Harrison?

TESTIMONY OF CHRIS HARRISON, VICE PRESIDENT, BUSINESS AFFAIRS, PANDORA MEDIA INC.

Mr. HARRISON. Thank you, Mr. Chairman, Ranking Member Nadler, Chairman Goodlatte, Ranking Member Conyers and the other Members of the Committee. Pandora appreciates this opportunity to testify at this important hearing.

Without question, Pandora is delivering tremendous value to listeners, artists, songwriters, and the music industry. 77 million listeners tuned into Pandora last month and listened for an average of 22 hours. Every month Pandora performs more than 1.5 million songs by more than 100,000 recording artists, 80 percent of whom were not played on terrestrial radio.

Pandora contributes hundreds of millions of dollars to a new royalty stream for artists that did not exist 20 years ago. Just 9 years after launching, Pandora will celebrate a major milestone later this summer; $1 billion in total royalties paid.

As this Committee considers opportunities to improve music licensing, Pandora hopes the Committee will appreciate the essential aspects of our current system of statutory blanket licenses, including the consent decrees which encourage innovation through simplified licensing procedures, protect music users from the anticompetitive behavior of big copyright owners, and ensure that artists receive their fair share of the hundreds of millions of dollars in royalties that services like Pandora pay each year.

In today's highly concentrated music industry, with fragmented and opaque copyright ownership, statutory blanket licensing is the most efficient means for digital music services to license the millions of copyrights owned by tens of thousands of copyright owners and are necessary to offer a compelling service to consumers. As the Future of Music Coalition recently stated, "The incredible growth of Internet radio would have been inconceivable had fledgling webcasters been compelled to negotiate with all the music publishers individually. Without an easier way to obtain permission to play songs, Internet radio might never have happened."

That being said, Pandora's recent experience reflects the very real and continued anticompetitive behavior of major music publishers in the performing rights societies reflecting a continued need for government protection.

As concluded by the Federal judge who oversaw Pandora's rate proceeding with ASCAP, "The evidence at trial revealed troubling coordination between Sony, Universal Music Publishing, and ASCAP, which implicates a core antitrust concern underlying the ASCAP consent decree."

Statutory blanket licenses provide important transparency into how royalty payments are calculated and enable direct payment to recording artists and songwriters. Without them, the royalty payment process would be controlled by record labels or music publishers where un-recouped advances are deducted and a smaller percentage of the royalty, if any, is passed through to the artist.

While Pandora believes that statutory blanket licensing should remain a central feature of copyright law, Congress can improve

the efficiency of determining the reasonable fees for such licenses. For example, several respondents to the Copyright Office's recent notice of inquiry noted the expense and burden of the current Copyright Royalty Board rate-setting process, highlighting: number one, the need for the application of the Federal Rules of Civil Procedure in evidence; two, the establishment of the unitary proceeding with ample time for discovery and presentation of evidence; and three, the application of the so-called 801(b) standard.

We would also recommend, in order to foster greater transparency, the creation of a single database of record, hosted by the Copyright Office in housing all relevant copyright ownership information. Participation need not be mandatory, but Congress could incent robust participation. For example, just as Chapter 4 of the Copyright Act prevents a copyright owner from seeking statutory damages unless the work at issue is registered, Congress could include a requirement that entitlement to statutory damages would be contingent on registering and keeping accurate ownership information in this database. This would help prevent copyright owners from holding services, such as Pandora, hostage during negotiations; something we experienced directly in 2013 when a handful of major publishers threatened our business with massive copyright infringement penalties while refusing to disclose their repertoire.

In addition to enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify the owners of the songs it performs, which would encourage real competition among copyright owners for distribution across all platforms.

It is important to note that while transparency would help mitigate anticompetitive behavior, it would not alleviate such abusive practices entirely. That's why the protection of statutory blanket licensing and the consent decrees must be preserved.

Thank you and I look forward to answering your questions.

[The prepared statement of Mr. Harrison follows:]

PANDORA

Executive Summary of Testimony of Chris Harrison
Vice President, Business Affairs, Pandora Media Inc.
Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet
June 25, 2014

Changes to the Copyright Act must be advanced with the interests of the primary beneficiary of copyright firmly in mind: the hundreds of millions of Americans who listen to, delight in, and benefit from their legal consumption of music through services like Pandora Radio.

Pandora believes that the Judiciary Committee's music licensing review should be guided by three important principles:

1. **Balance Must Be Restored to the Music Ecosystem to Include All Stakeholders:** Music licensing laws have historically favored the interests of big copyright owners and made only small allowances for other stakeholders, including music users, in the music community. However, technology companies have made tremendous investments of intellectual property and capital to positively transform the music landscape to provide new options for consumers. Non-interactive Internet radio has quickly become a significant platform of legal music consumption. Seventy-seven million Americans (nearly 1 in 3 Americans over the age of 13) tuned into Pandora last month and listened for an average of more than 22 hours. Every month, Pandora performs more than 1.5 million songs by more than 100,000 recording artists, 80% of whom would not be discovered otherwise. The value of this intellectual property contributed by innovators must be considered as Congress shapes music policy.

2. **Statutory Blanket Licenses Enable Broad Participation in the Music Marketplace and Must be Preserved:** While Pandora believes that there are important improvements that can be made to the music licensing process, the existing statutory blanket licensing structures for non-interactive Internet radio services such as Pandora are largely achieving copyright's primary goal. In this world of fragmented and opaque copyright ownership, statutory blanket licensing is an efficient means for digital music services to license the millions of copyrights owned by tens of thousands of copyright owners that are necessary to offer a compelling service to consumers. In addition to ease of licensing, statutory blanket licenses, as practiced by ASCAP and BMI and required of SoundExchange, provide extremely valuable transparency into the royalty payments of songwriters and recording artists. They also allow songwriters and recording artists to participate directly in the receipt of royalties. This current system must be preserved to ensure that new legal services can enter the marketplace, musicians and songwriters are paid, and consumers are given many options in music and music services.

3. **The Music Ecosystem Must Be Protected from Anticompetitive Music Licensing Behavior:** The collective licensing of copyrights owned by different copyright owners creates the very real market power problems from which anticompetitive behaviors can emerge. In addition, the highly concentrated music industry enables one or two companies to determine which innovating services survive and which die, often in situations where these companies have a direct financial interest in a service. The recent experiences of Pandora and other music licensees reflect anticompetitive behavior of various music publishers and the performing rights societies for which continued government intervention is required. It is the consent decrees in the case of ASCAP and BMI and the statutory provisions of Sections 112 and 114 in the case of record labels that protect music users from the potential abuse of market power created by collective licensing. These protections must remain.

Finally, just as statutory blanket licenses provide much needed transparency for songwriters and recording artists, in order to foster more transparency for music users such as Pandora, we recommend the creation of a single database of record, hosted by the Copyright Office, that would house all relevant music copyright ownership information. Participation in such a database need not be mandatory, but Congress could create the proper incentives for robust participation. By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs they perform, which would encourage true competition among copyright owners for distribution on digital platforms. While the transparency provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, it would not alleviate such behavior entirely, reaffirming the need for the protection of statutory blanket licensing structures.

PANDORA

Testimony of Chris Harrison
Vice President, Business Affairs, Pandora Media Inc.
Before the House Judiciary Subcommittee on Courts, Intellectual Property and the Internet
June 25, 2014

Introduction

Thank you, Mr. Chairman and ranking Member Nadler. Pandora appreciates this opportunity to testify at this important hearing. Pandora applauds Chairman Goodlatte and this Committee for your leadership in initiating a comprehensive review of the current Copyright Act. The subcommittee's hearings of June 10th and today are particularly important as they bring focus to the many thorny issues related to how copyright law impacts the licensing of music. Music is a vital part of our vibrant culture that enriches our lives and connects us to places, times and people; Pandora is proud of the constructive role we play in the music ecosystem.

Pandora is confident that members of this Committee, as well as the full House and Senate, will bear in mind that any changes to the Copyright Act that impact the licensing of music must be advanced with the interests of the primary intended beneficiaries of copyright firmly in mind: the hundreds of millions of Americans who listen to, delight in, and benefit from their ***legal*** consumption of music.[1] Pandora supports any efforts to make the current system work better and smarter, so long as such efforts adhere to the following foundational principles:

1. The interests of all stakeholders in the music ecosystem must be balanced, not just the interests of big copyright owners;

[1] Both the intent of Congress behind the Copyright Act and decades of jurisprudence from U.S. Courts of Appeals and our Supreme Court instruct that copyright is intended to "stimulate activity and progress in the arts ***for the intellectual enrichment of the public***." *Cariou v. Prince*, 714 F.3d 694, 705 (2d Cir. 2013) (quoting Pierre Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1107 (1990)) (emphasis added); see also H.R. Rep. No. 2222, 60th Cong., 2d Sess. (Report on the Copyright Act of 1909) (noting that copyright exists "primarily for the benefit of the public.")

2. Statutory blanket licenses enable broad participation in the music marketplace and must be preserved; and
3. The music ecosystem must be protected from anticompetitive licensing behavior.

While Pandora believes that there are important improvements that can be made to the music licensing process, the existing statutory blanket licensing structures[2] for non-interactive Internet radio services such as Pandora are largely achieving copyright's primary goal.

Pandora Is Radio

Although delivered over the Internet and not the airwaves, Pandora is radio. Advertising supported, free-to-the-listener radio like Pandora has been a critical part of the cultural fabric of America for nearly 100 years. In establishing nonsubscription services in the DMCA, Congress recognized that advertising supported radio is a democratizing force, enabling shared cultural expression across the entire socioeconomic spectrum. Radio is also the preferred mode of music consumption; research shows that 80% of time spent listening to music is a "lean back" radio experience, in which the listener selects the style or genre of music and the radio service selects which songs to play.

Although it is the newest form of radio, non-interactive Internet radio has quickly become a significant platform of legal music consumption. Seventy-seven million Americans (nearly 1 in 3 Americans over the age of 13) tuned into Pandora last month and listened for an average of more than 22 hours. Every month, Pandora performs more than 1.5 million songs by more than 100,000 recording artists, 80% of whom were not played on terrestrial radio.

[2] For ease of reference, we refer to both statutory licensing of sound recordings under Sec. 114 and blanket licensing under the ASCAP and BMI consent decrees as "statutory blanket licensing."

In addition to exposing this wide variety of artists to tens of millions of listeners, Pandora also contributes hundreds of millions of dollars to a new royalty stream that did not exist twenty years ago. Today, Pandora pays more than $1,500 in total royalties per 1 million performances on our service. In the language of terrestrial radio, 1 million performances on Pandora is equivalent to 21 performances on 102.7 KIIS FM in Los Angeles or just 16 performances on 100.3 WHTZ FM in New York. Just nine years after launching, Pandora is on track later this summer to pass the milestone of $1 billion in total royalties paid.

Pandora's Technology

The public's embrace of Pandora is the result of a massive investment in its unique intellectual property. Tim Westergren, Pandora's founder, had the idea that all music could be categorized against a single taxonomy, and created the most powerful tool for discovering music: the Music Genome Project. Fourteen years later, Pandora's music analysts, most of whom have degrees in music composition or music theory, have devoted as much as 333,000 hours - the equivalent of 38 years - listening to and cataloging the musicological traits of each song in the Genome across as many as 450 different characteristics. The result of this process is that each song in Pandora's Music Genome Project exists as a single point in a multi-dimensional space at the intersection of all of that song's characteristics or "genes." Pandora then uses as many as 50 proprietary mathematical algorithms to determine how geometrically "close" one song is to another. It is Pandora's creation of, and investment in, its intellectual property that enables a listening experience that empowers tens of millions of listeners to discover new music that they love.

Non-interactive Internet radio, however, is not just about discovering new music; it's also about being able to experience music that is culturally relevant regardless of whether a local broadcaster operates a station in a particular format. Pandora routinely receives emails from listeners like Chris who

tuned into Pandora after his local jazz station changed formats or Jen who listens to Christian Rock on Pandora because no local station carries that genre.

Pandora's Investments in Monetization

To help generate our 120-plus percent average annual revenue growth over the last three years, Pandora has invested more than $440 million in resources and initiatives to monetize our tens of millions of monthly listeners. Pandora now employs more than 800 people (and growing) in sales and sales support operations across the country, including salespeople selling in 37 local advertising markets, going head-to-head with terrestrial radio for local advertising dollars. Pandora's investment in monetization has produced remarkable results, both in magnitude and in the pace of growth. For example, Pandora is behind only Facebook and Google in revenue generation from mobile advertising sales, with $366 million in mobile advertising revenue last year, representing a growth rate of approximately 1,200% in just three years.

Is Licensing Reform Needed?

As this Committee considers changes in music licensing regimes, Pandora hopes that the Committee will appreciate the salutary aspects of our current system that encourages innovation through simplified licensing procedures, protects music users from the anticompetitive behavior of big copyright owners, and assures that artists actually receive their fair share of the hundreds of millions of dollars in royalties that services like Pandora pay each year. In order to understand the need to maintain but improve upon the status quo, we must consider the current music licensing environment.

The Music Industry Is Too Concentrated

Our music industry is a highly concentrated one, in which major record labels do not really compete against one another for distribution on digital platforms[3] but attempt to use their market

[3] "Because each Major currently controls recorded music necessary for these streaming services, the music is more complementary than substitutable in this context, leading to limited direct competition between Universal and EMI."

power to decide which services win and lose,[4] in many instances because that major record label has a direct financial interest in a digital music service.[5] Unfortunately, the loudest voices in the debate about music licensing are these big copyright owners who assert that what is good for them is good for all.[6]

Copyright Ownership Is Too Fragmented

While the music industry is highly concentrated, copyright ownership is extremely fragmented. For example, the 2013 Grammy winner for best song, "We Are Young" recorded by fun.[7] has four different songwriters and seven different music publishers.[8] Although the Copyright Act provides that a co-author may grant a non-exclusive license to a joint work such as "We Are Young," the custom and practice in the music industry has developed such that each co-owner will only license its proportionate share in the underlying work.[9] Therefore, absent the availability of a statutory blanket license, the more than 1.5 million tracks that Pandora plays in a given month may implicate separate licensing negotiations with tens of thousands of individual copyright owners.

Statement of FTC Bureau of Competition Director Richard A. Feinstein, *In the Matter of Vivendi, S.A. and EMI Recorded Music*, September 21, 2012.

[4] "Power is the ability to stop new services. Power is the ability to create new services. That's power." Billboard Power 100: Lucian Grainge Q&A, by Bill Werde, February 07, 2013 8:55 PM EST http://www.billboard.com/biz/articles/1538532/billboard-power-100-lucian-grainge-qa; *See* Paul Resnikoff, "Sony/ATV 'Now Has the Power to Shut Pandora Down...,'" Digital Music News, Jan. 17, 2013, *available at* http://www.digitalmusicnews.com/permalink/2013/20130117pandora (quoting publishing sources as saying, "The 25 percent bump is going to get higher after the first year deal," "They aren't squeezing Pandora now, but they will," and "Sony now has the power to shut Pandora down, that's your negotiating power"); Paul Resnikoff, "Universal Music Publishing 'Now Has the Power to Shut Pandora Down...',," Digital Music News, Feb. 5, 2013, *available at* http://www.digitalmusicnews.com/permalink/2013/20130205umpg (quoting source saying, "I said it to you on Sony/ATV and it's the same with Universal. They can shut Pandora down if they want to. So that's your negotiating power.").

[5] Universal Has A Big Stake In Beats That's Worth Nearly $500 Million, by Peter Lauria posted on May 8, 2014, at 6:11 p.m (Universal Music's investment in Beats, recently sold to Apple, may yield $500 million) http://www.buzzfeed.com/peterlauria/universal-music-will-make-nearly-500-million-on-apples-beats; The Major Labels Are Trying to Sell Spotify for $10 Billion, Sources Say, by Paul Resnikoff Wednesday, June 11, 2014 (Major labels own a 20% stake in Spotify) http://www.digitalmusicnews.com/permalink/2014/06/11/major-labels-trying-sell-spotify-10-billion-sources-say.

[6] Two foreign-owned multinationals now dominate music publishing and recorded music; e.g., the so-called "Majors." Sony Corporation, headquartered in Japan, controls the largest music publishing catalog along with the second largest record label. Vivendi, headquartered in France, through its Universal Music Group subsidiary, controls the second largest music publishing catalog and the largest record label. While music publishers complain about the disparity of royalties they receive compared to record labels for performances on Pandora, in many cases Pandora is paying same company for both performance rights.

[7] The band's name is stylized as *fun.*

[8] The songwriters are Jack Antonoff, Jeff Bhasker, Andrew Dost, and Nathaniel Ruess and the music publishers are Bearvon Music, FBR Music, Rough Art, W B Music Corp., Shira Lee Lawrence Music, Sony/ATV Songs, and Way Above Music.

[9] 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 6.10[A][2] (2013).

Copyright Ownership Information Is Too Opaque

There is no authoritative database of copyright ownership information to which a service such as Pandora could turn if it had to license directly these millions of copyrights owned by tens of thousands of copyright owners. Those databases that are available (e.g., ASCAP, BMI and some music publishers maintain online databases that can be searched on a title-by-title basis) often contain conflicting information. For example, the ASCAP database indicates that Universal Music Publishing owns the composition for the song "Somebody that I Used to Know" co-written and recorded by Gotye; however a search of the Universal Music Publishing website results in no matches for the title "Somebody that I Used to Know" or songs recorded by Gotye.[10]

Statutory Blanket Licenses Are Necessary to Alleviate Concentration, Fragmentation and Opacity

In a concentrated industry with fragmented and opaque copyright ownership, statutory blanket licensing can be an efficient means for digital music services to license the millions of copyrights owned by tens of thousands of copyright owners that are necessary to offer a compelling service to consumers.[11] As the Future of Music Coalition recently stated, "The incredible growth of Internet radio, for example, would have been inconceivable had fledgling webcasters been compelled to negotiate with all of the music publishers individually. Without an easier way to obtain permission to play songs, Internet radio might never have happened."[12]

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[10] The Universal Music Publishing website contains the following disclaimer: "UMPG makes no warranties or representations whatsoever with respect to its accuracy."

[11] "Collective licensing has enormous benefits for the music market and consumers. It provides broadcasters and services with a one stop license for the world's repertoire under compulsory statutory licenses with rate setting by the Copyright Royalty Board. ... The non-interactive compulsory statutory licensing regime ensures equity and fairness for all copyright owners and allows greater music service marketplace access resulting in greater consumer choice." American Association of Independent Music ("A2IM") President Rich Bengloff's letter to the Federal Trade Commission Chairwoman Edith Ramirez and Director Bureau of Competition Deborah L. Feinstein regarding Google/YouTube Notice-Independent music labels and their artists' content to be blocked on the YouTube music website (June 4, 2014) available at (http://www.a2im.org/downloads/FTC_Letter_June_4_2014.pdf)

[12] The Blanket 'Problem': Balancing the Needs of Songwriters with New Forms of Radio (Guest Post), By Casey Rae, April 21, 2014 12:59 PM EDT available at (http://www.billboard.com/biz/articles/news/radio/6062737/the-blanket-problem-balancing-the-needs-of-songwriters-with-new)

1. Statutory Blanket Licenses Provide Transparency for Songwriters and Recording Artists

In addition to ease of licensing, statutory blanket licenses, as practiced by ASCAP and BMI and required of SoundExchange, provide extremely valuable transparency into the royalty payments of songwriters and recording artists.[13] For example, in her opinion in Pandora's rate proceeding with ASCAP, Southern District of New York Judge Denise Cote described how "Songwriters, and at least some independent music publishers, were concerned about the damage that might be wrought from ... the partial withdrawal of rights from ASCAP" because "Songwriters were concerned about the loss of transparency."[14] In almost every case under a statutory blanket license, a songwriter or recording artist can determine the royalty rate applicable to a particular performance to ensure that payments received accurately reflect royalties earned.[15]

2. Statutory Blanket Licenses Provide Direct Payment of Royalties to Songwriters and Recording Artists

Not only do statutory blanket licenses provide transparency of how royalty payments are calculated, they allow songwriters and recording artists to participate directly in the receipt of royalties. Under the Section 114 license, recording artists are directly paid by SoundExchange for performances of

[13] "Direct deals on the publishing side also raise concerns about transparency. Outside of the framework made possible by oversight, what guarantees do songwriters and composers have that their share will be fairly apportioned?" Comments of Future of Music Coalition in Response to the Copyright Office's Music Licensing Study, Docket No. 2014-3, May 16, 2014 at 16; "The trend toward direct licensing to copyright users by music publishers of performing rights in musical compositions is one that is causing grave concern to the music creator community because of the utter lack of transparency in the direct licensing process." Comments of Songwriters Guild of America, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 ("Comments of Songwriters Guild") at 7; "The statutory licenses are also transparent." Comments of SoundExchange, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 4.

[14] Songwriters "were concerned as well that the publishers would not manage with as much care the difficult task of properly accounting for the distribution of fees to multiple rights holders, and might even retain for themselves certain monies, such as advances, in which writers believed they were entitled to share." *In re Petition of Pandora Media Inc.*, 12 civ 8035-DJC (SDNY March 18, 2014) (hereinafter "*In re Pandora*") at p. 97).

[15] For example, the rate that Pandora pays for the public performance of sound recordings is part of the Federal Register and is prominently displays on SoundExchange's website.

their music on services such as Pandora.[16] Likewise, ASCAP and BMI directly pay songwriters their share of the royalties collected.[17] These direct payments are important because they bypass the traditional royalty accounting whereby royalties flow through a record label or music publisher, where unrecouped advances are deducted and a much smaller percentage of the royalty collected—if any—is passed through.

3. *Anticompetitive Behavior Must Be Constrained*

Collectively licensing an aggregation of copyrights owned by different copyright owners, however, creates the very real market power problems from which anticompetitive behaviors can emerge.[18] It is the consent decrees in the case of ASCAP and BMI and the statutory provisions of Sections 112 and 114 in the case of record labels that protect music users from the potential abuse of market power created by collective licensing. Notwithstanding recent calls to do away with consent decrees because, for example, they were last modified before the advent of the iPod, the same joint selling agency among horizontal competitors that gave rise to the anticompetitive behavior that the government felt needed to be constrained in the 1940s still exists today. In fact, it is ironic that it was the reactions of ASCAP and big music publishers to the advent of terrestrial radio, when ASCAP attempted to increase royalty rates by 375%, that caused the government to sue ASCAP for engaging in an "unlawful combination and conspiracy in restraint of ... commerce in radio broadcasting."[19] Today, ASCAP, BMI and the major publishers appear to be saying that the consent decrees that resulted from this prior anticompetitive behavior against terrestrial radio broadcasters needs to be amended so that they can repeat this same anticompetitive behavior against Internet radio services.

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[16] "An important feature of the Section 114 statutory license is that artists directly and immediately participate in the royalty stream." Comments of SoundExchange, Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 3.

[17] "This system has ... provided music creators with the crucial assurance that an important source of revenue will be paid directly to them by the PRO." Comments of Songwriters Guild, p 7.

[18] As the U.S. Copyright Office recently concluded, "there is a significant risk that the collective may exploit its market power by charging supra-competitive rates or discriminating against potential licensees" U.S. Copyright Office *STELA § 302 Report* 95-96 (August 29, 2011).

[19] Original Complaint filed by the Department of Justice in U.S. v. ASCAP, 41 civ. 1395 (SDNY February 26, 1941).

The recent experiences of Pandora and other music licensees reflect the very real and continued anticompetitive behavior of various music publishers and the performing rights societies for which continued government intervention is required. SESAC, the one performance rights society in the U.S. that does not operate under a consent decree or statutory license, is currently being sued in two separate antitrust lawsuits. In one case, federal District Court Judge Engelmayer found that the "evidence would ... comfortably sustain a finding that SESAC ... engaged in an overall anticompetitive course of conduct designed to eliminate meaningful competition to its blanket license."[20] In the other case, federal District Court Judge Jones found that the Radio Music License Committee was likely to prevail on the merits of its antitrust case because, in part, SESAC was deliberately concealing the contents of its repertoire to effectively stifle competition to its direct license.[21]

Pandora's Recent Experience with Anticompetitive Behavior by Major Music Publishers

As this Committee is no doubt aware, over the last two years major music publishers, allegedly motivated by a perceived inequity between the amount of royalties Pandora pays to record labels and the amount publishers collect, sought to withdraw from ASCAP and BMI the right to license digital music services such as Pandora. When the major music publishers purportedly withdrew their digital rights from ASCAP and BMI in 2012 and 2013, they were supposedly operating in the "free market," the expected benefits about which you have heard so much from the publishers themselves. When given the chance to compete, however, the major publishers and ASCAP choose not to. Instead, they quickly reverted back to exactly the type of anticompetitive behavior the consent decrees are meant to mitigate. As Judge Cote concluded, "the evidence at trial revealed troubling coordination between Sony, UMPG, and ASCAP, which implicates a core antitrust concern underlying [the ASCAP consent decree]."[22]

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[20] Meredith Corp. v. SESAC LLC, 9 civ 9177-PAE (SDNY March 3, 2014).
[21] Radio Music License Comm., Inc. v. SESAC, Inc., 12 civ 5807-CDJ (ED Pa. February 20, 2014).
[22] *In re Pandora* at p. 97.

Judge Cote's 136 page opinion is replete with the details of this coordinated and anticompetitive behavior. For example, the major publishers and ASCAP refused to provide Pandora with the list of repertoire purportedly being withdrawn,[23] thereby depriving Pandora of the ability to exercise self-help and take down content it could not or did not want to license.[24] The major publishers "each exercised their considerable market power to extract supra-competitive prices" from Pandora.[25] The major publishers "interfered" with Pandora's negotiations with ASCAP at the end of 2012, preventing ASCAP from signing a deal Pandora believed it had reached with ASCAP management.[26] A major publisher even used the press to leak the confidential terms of their agreements with Pandora.[27] In sum, "ASCAP, Sony, and UMPG did not act as if they were competitors with each other in their negotiations with Pandora. Because their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified."[28]

Statutory Blanket License Rate-Setting Process Can Be Improved

While Pandora believes that because of its procompetitive benefits statutory blanket licensing should remain a central feature of licensing non-interactive Internet radio, there are steps that Congress can take to improve the efficiency of determining the reasonable fees for statutory blanket licenses and mitigate against the kind of continued anticompetitive behavior Pandora recently experienced.

During Pandora's rate setting proceeding with ASCAP, Judge Cote welcomed thoughts from all interested parties "about ways that the litigation could be conducted in a more cost-effective way" and

[23] "Pandora also asked ASCAP for the list of Sony works in ASCAP's repertoire. It would have taken ASCAP about a day to respond to Pandora's request with an accurate list of the Sony works. But, ASCAP, like Sony, stonewalled Pandora and refused to provide the list." *In re Pandora*, p. 67.
[24] "Without that list, Pandora's options were stark. It could shut down its service, infringe Sony's rights, or execute an agreement with Sony on Sony's terms." *In re Pandora*, p. 98.
[25] *In re Pandora* p. 97.
[26] "They also interfered with the ASCAP-Pandora license negotiations at the end of 2012. UMPG pressured ASCAP to reject the Pandora license ASCAP's executives had negotiated, and Sony threatened to sue ASCAP if it entered into a license with Pandora." *Id.*
[27] "[D]espite executing a confidentiality agreement with Pandora, Sony made sure that UMPG learned of all of the critical terms of the Sony-Pandora license. And LoFrumento admitted at trial that ASCAP expected to learn the terms of any direct license that any music publisher negotiated with Pandora in much the same way." *In re Pandora*, p. 98.
[28] *In re Pandora* pp. 98-9.

asked "to talk ... with ASCAP and the right set of music users" about ways to "set up some streamlined procedures for appropriate discovery." Judge Cote indicated that a revision to the consent decree would not be required to implement these types of cost-saving efficiencies. Instead of rushing into a decree modification process, ASCAP and BMI should engage with music users around process changes to which all parties could agree.

Several respondents to the Copyright Office's recent notice of inquiry regarding music licensing commented on the expense and burden of the current Copyright Royalty Board ("CRB") rate-setting proceedings.[29] The current process involves a bifurcated proceeding during the first phase of which the parties submit their written direct cases, including their rate proposals and all testimony and evidence they intend to introduce at the hearing, without the benefit of any discovery from other participants. Because the record labels, which share information with their representative SoundExchange, have access to all of the direct licenses that typically serve as benchmarks in these proceedings, but individual licensee-participants only have access to direct deals into which they have entered, if any, the current procedure significantly favors the copyright owner participants. Recently, Pandora and the National Association of Broadcasters attempted to ameliorate this problem by filing motions for the issuance of subpoenas with the CRB in connection with the current rate-setting for non-interactive webcasting, commonly referred to as Web IV.[30] The CRB, however, denied these motions.

The common themes among these respondents are (1) the need for the application of the federal rules of civil procedure and federal rules of evidence to apply to CRB proceedings, (2) the establishment of a unitary proceeding with ample time for discovery and presentation of evidence, and

[29] See, e.g., Comments of Sirius XM Radio Inc., pp. 1S-17; Comments of the National Association of Broadcasters, pp. 19-22 (noting that the "current CRB procedural rules applicable to rate cases have resulted in proceedings that are at least as, if not more, expensive than analogous litigation in the federal ASCAP and BMI rate courts, but also provide less complete evidentiary records and therefore less satisfactory results"); Comments of Music Choice, pp. 29 – 32, and Comments of Digital Media Association, pp. 37 – 39 (noting that "CRB rate proceedings are actually more expensive (or certainly no less expensive) than federal court proceedings before the ASCAP and BMI rate courts, but they are far less efficient.").

[30] In re Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings, Docket No.14-CRB-0001-WR (2016-2020).

3) the application of the so-called 801(b) standard. Even the Recording Industry Association of America recognizes that the application of the 801(b) standard can result in rates that reflect fair market value.[31]

A Database of Record Would Mitigate Anticompetitive Behavior

Just as statutory blanket licenses provide much needed transparency for songwriters and recording artists, in order to foster more transparency for music users such as Pandora, we recommend the creation of a single database of record, hosted by the Copyright Office, that would house all relevant music copyright ownership information.[32] Participation in such a database need not be mandatory, but Congress could create the proper incentives for robust participation. For example, just as Chapter 4 of the Copyright Act prevents a copyright owner from seeking statutory damages unless the work at issue is registered, Congress could include a further requirement that entitlement to statutory damages was contingent on registering and keeping accurate copyright ownership on this database. Because this database would be the database of record, copyright owners would only have to enter their ownership information a single time, reducing the current situation where information is often entered and reentered across multiple databases. A single reliable and fully searchable database of record, coupled with ineligibility of statutory damages for works not in the database, would prevent copyright owners from holding services such as Pandora 'hostage' during negotiations, threatening massive copyright infringement penalties while refusing to disclose their repertoire.[33] By enabling services to quickly ascertain who owns which rights to a work, a single database of record would also enable services to identify, on a catalog-by-catalog basis, the owners of the songs it performs, which would encourage real competition among copyright owners for distribution on digital platforms. While the transparency

[31] See Comments of the Recording Industry Association of America, U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014, p. 25. In the context of Section 115 licenses, in over 35 years that the 801(b) standard has applied, there have been only two litigated proceedings. Compare this record of compromise to the history of the application of the so-called "willing-buyer, willing-seller" standard. Each of the webcasting rate-setting proceedings have been fully litigated, including appeals, and, on at least two occasions, Congress felt compelled to intervene.

[32] "Identifying and locating the co-authors of each of millions of copyrighted musical works is a daunting task that is hampered significantly by, among other things, the lack of a modern and publicly searchable database identifying the current owners of musical works and the contact information for such copyright owners." Comments of Spotify USA Inc., U.S. Copyright Office Study on Music Licensing, Docket No. 2014-3, May 16, 2014 at 4.

[3333] One cannot search the ASCAP or BMI databases by publisher and receive a list of all works owned by that single publisher.

provided by such a database would mitigate the anticompetitive behavior Pandora recently experienced, it would not alleviate such behavior entirely, reaffirming the need for the protection of statutory blanket licensing structures.

Thank you again for your leadership on this issue and the opportunity to testify. I look forward to answering your questions.

Mr. COBLE. Thank you, Mr. Harrison.
Mr. Huppe?

TESTIMONY OF MICHAEL HUPPE, PRESIDENT AND CEO, SOUNDEXCHANGE INC.

Mr. HUPPE. Mr. Chairman and Members of the Subcommittee, I'd like to start by telling the Committee something you probably don't hear very often: Congratulations to Congress on getting it right.

For over 10 years now, SoundExchange has administered the statutory license for sound recordings on digital radio that this Committee created in 1995. And that decision shines as a true legislative success story. It provides transparency and efficiency that makes possible the digital radio services enjoyed today by over 100 million Americans. It has led to a critical and growing revenue stream for SoundExchange's 100,000 accounts which represent featured artists, background musicians, labels and rights owners large and small.

And the statutory license has provided a huge commercial benefit to the 2,500 services who have used it to build their businesses, some of America's best known and fastest growing companies with household names, like Pandora and SiriusXM, providing them easy access to the product they needed to get off the ground.

Congress greased the tracks, removed the barriers to entry, and a bourgeoning multibillion industry grew. And while you've heard many parties discuss problems elsewhere in the industry, Mr. Chairman, everyone, everyone connected with the SoundExchange world, which includes the entire recorded music side of the business, artists, labels, unions, even the digital services themselves, everyone, uniformly supports the fundamentals of this system.

But as we move forward, there was one core principle that should guide everything we discuss and that is this: All creators should receive fair pay on all platforms whenever their music is used; period. Everyone who has a hand in the creation of music deserves fair market value for their work. And I mean everyone, Mr. Chairman; songwriters, publishers, studio producers, and engineers. The artists who give compositions life and record companies who help artists fill their creative vision. Fair pay would ensure justice for creators, whose contributions form the soul of these services; fair pay would level the playing field for radio services; and fair pay would ensure a healthy vibrant ecosystem for listeners and fans.

With that guiding principle, I would like to propose a few modifications to make the good system work even better. First, Congress must address the current royalty crisis facing legacy artists with recordings made before 1972. The refusal of some radio services to pay royalties for this era of music makes no sense as a matter of policy and is surely not what this Committee intended when it created the digital radio license. It is just wrong to pay nothing to artists who created the most iconic era of music in American history.

And on behalf of SoundExchange and all of the artists we represent, I extend our thanks to Congressmen Holding and Ranking Member Conyers and all of the Members on this Committee who

have joined them in supporting the RESPECT Act. I urge the Committee to act now on this critical piece, pre-1972 artists, simply cannot afford to wait.

Second, Congress must ensure that all radio platforms pay all creators. This means eliminating the ancient and unfair loophole that allows the $17 billion AM/FM radio industry to pay nothing for the source of its lifeblood. FM radio uses music to draw the crowd and make its profits. Yet, it ignores the performers at the center of its stage. FM's tired and stale justification for taking advantage of artists rings hollow and are unfair to other services seated with me here today.

And third, Mr. Chairman, once all platforms start paying creators, they should pay according to the same fair market standard. It makes no sense, that similar radio platforms played by different rules, especially in today's world, where those platforms may compete against one another in the same places over the same speakers to the same listeners. To quote Ranking Member Nadler's opening statement, "The government must get out of the business of picking winners and losers in this industry." If we want innovation, the law shouldn't give favorable rates to some companies or breaks to older formats. Stated another way, Mr. Chairman: these businesses should compete based on their legal appeal and economic value not on the strength of their legal loopholes.

So Mr. Chairman, what would success look like for music licensing going forward? It would be a system where many of the challenges we're talking about today would fade into the background; where the back office would work seamlessly and invisibly; where we are focused on business models and consumer offerings rather than rate standards and inequity. Success would mean a system where the entire music community worked cooperatively to address these issues for the collective good; and, most importantly, success would mean a system based on the guiding principle that I set forth earlier, all creators receive fair pay on all platforms whenever their music is used.

In closing, Mr. Chairman, the American music industry represents some of our best talent and our most cherished assets. All we're asking for is something pretty simple, that those responsible for bringing these treasures to life be treated fairly when someone else profits off of their work.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Huppe follows:]

Statement of

Michael Huppe
President & CEO
SoundExchange, Inc.

before the

United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing on

"Music Licensing Under Title 17, Part Two"

June 25, 2014

Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, Ranking Member Nadler, and Members of the Subcommittee, I appreciate the opportunity to appear before you for Part Two of your discussion of Music Licensing Under Title 17.

My name is Michael Huppe, and I am the President and CEO of SoundExchange, Inc. SoundExchange administers the statutory license Congress created in the late 1990s for digital radio, a true legislative success story that has produced an explosion in dynamic new radio services that are fundamentally reshaping how we experience music. Today, SoundExchange administers the royalties paid by more than 2,500 digital music services – services that reach well over 100 million people.[1] We collect and distribute royalties to over 100,000 featured artists, background singers and vocalists, and record companies – big and small. SoundExchange – and the statutory license that underpins our work – have helped make all of this possible.

My testimony today will cover a number of topics all of which relate to a single core principle that I believe must guide any discussion of the music licensing landscape: all creators should receive fair pay, on all platforms and technologies, whenever their music is used. First, I will describe SoundExchange and our work. Second, I will briefly describe some of the key changes unfolding in the music business and suggest first principles to guide the Committee's review of music licensing laws. Third, I will describe several critical areas where reform is especially important, including (i) the refusal of digital services to pay royalties for pre-1972 sound recordings, (ii) the fundamental injustice of the continued lack of an AM/FM/HD radio performance right for sound recordings, and (iii) the need to harmonize royalty standards across platforms. Fourth, I will offer brief comments on the continued value and importance of the statutory license structure this Committee created nearly two decades ago. And finally, I will share my thoughts on some forward-looking investments needed to ensure a healthy future for the music ecosystem.

[1] Edison Research/Triton Digital, "The Infinite Dial 2014," available at http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf.

I. SoundExchange – Making Digital Radio Work

SoundExchange is a non-profit organization designated by the Copyright Royalty Board to administer the federal statutory licenses for digital radio.[2] These licenses allow anybody – from the largest Internet company to a single entrepreneur – to stream every federally protected sound recording ever commercially released, merely by filing a short document and meeting a few procedural requirements. Digital radio services then file reports on the recordings they stream and pay the required royalties in one lump sum to us, which we distribute to the artists and copyright owners whose music was used. This "one stop shop" for access to virtually all recorded music is the foundation of the modern digital radio business – ensuring that services can access whatever music they need without engaging in extensive negotiations or hunting for rights owners around the world.

SoundExchange
(AS OF DEC. 31, 2013)

2,500+
digital radio providers using statutory license

$590M
paid to recording artists and rights holders in 2013

4.5%
admin rate

We are efficient and relentless in our work. Nearly 90% of the money we collect from the 2,500+ services we work with goes out the door within 75 days of receipt. We are more efficient at this than anyone else in the world, with an administrative rate in 2013 of 4.5%. Since our founding in 2003, we have paid out more than $2 billion in royalties.

SoundExchange is overseen by a board of directors made up of artists, their representatives, and major and independent record companies and organizations that represent them and is thus one of the unique organizations representing both artists and labels together. In the same way, we are both a technology company and a music company, with a unique ability to appreciate the business and platform challenges faced by music services, as well as the economic and artistic perspective of music creators. In fundamental ways, we sit at the center of the music ecosystem today – interfacing with and supporting virtually all the other stakeholders sitting at the witness table today.

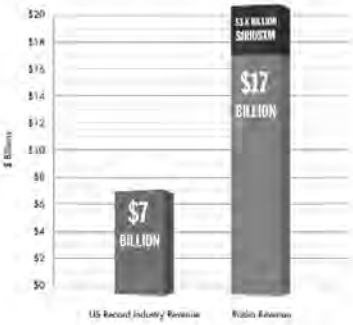
[2] 17 U.S.C. §§ 112(e), 114; 37 C.F.R. Parts 370, 380.

II. "Listening" is What Matters -- First Principles for Music Licensing Review

The members of this Committee know better than anyone how completely the music ecosystem has changed in recent years. While the foundation of the recording industry was once album sales and personal ownership of music, the rise of streaming and digital access is fundamentally challenging that idea, and the legal and economic structure that has been built upon it.[3] As more and more of the public enjoys music through fleeting delivery – via digital streams or other broadcasts – the key economic moment in the life of a recording is shifting from "buying a copy" to "listening." This is appropriate: Music has value when it is played and heard. The power of music to draw an audience and shape our moods and feelings has economic value that goes far beyond its ability to sell albums, downloads, or subscription access to services that provide music on-demand. Music captures the attention of people in their cars and offices, and is the reason we listen to radio – and sit through advertisements. Music "draws a crowd" better than anything else, and technology is bringing it to more places and spaces virtually every day.

This is why I believe our industry's standard measure for assessing revenue grossly undervalues the role of music in the economy. The RIAA this year reported record industry revenues of $7 billion for 2013.[4] Most of the revenues in that number are *retail* figures – in other words, those figures include the revenue generated by Apple for selling downloads, by Spotify for selling subscriptions, and by other distributors for selling music.

A Lost Opportunity from Radio



[3] IFPI, "Music Subscription Revenues Help Drive Growth In Most Major Markets," March 18, 2014, available at http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets

[4] RIAA, "News and Notes Regarding 2013 RIAA Music Industry Shipment and Revenue Statistics," available at http://76.74.24.142/24b356cA-6f96-E0CA-2766-72779A364D01.pdf

What's not included in those figures? The $17 billion that radio made from selling advertising in 2013, mostly by playing ads in between songs,[5] and the $3.8 billion earned by SiriusXM,[6] mostly because people like having access to music in the car.[7] Our friends at the NAB claim radio stations are not in the business of distributing music,[8] but that is simply wrong. Of course they distribute music, in exactly the same way that television stations distribute network television programs. Indeed, the business of radio is, for the most part, playing music to tens of millions of people for free and collecting billions of dollars in advertising in return. If they aren't in the business of distributing music, I don't know who is.

We need rules for music licensing that reflect the value that music generates for radio and other platforms. But the obsolete and inconsistent rules that have piled up in the Copyright Act over time simply do not do that.

Again, if there is a principle that should guide Congress as it considers the music licensing landscape, it is this: all creators should receive fair pay, on all platforms and technologies, whenever their music is used. Period. Everyone who has a hand in the creation of music deserves fair market value for their work – songwriters and publishers, producers and engineers, the artists who give compositions life, and the record companies who help artists fulfill their creative vision and connect the music to an audience. This is a matter of justice and fairness fundamental to the core purpose of the Copyright Act. That approach would also be good for digital radio services – who would then compete on a level playing field based on the public appeal and economic value of their services, rather than on the strength of the legal loopholes that apply to them.

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[5] Radio Advertising Bureau, "Network, Digital, Off-Air Shine as Radio Ends 2013 in the Black," available at http://www.rab.com/public/pr/revenue_detail.cfm?id=132.

[6] SiriusXM, "SiriusXM SiriusXM Reports Fourth Quarter and Full-Year 2013 Results," available at http://investor.siriusxm.com/releasedetail.cfm?ReleaseID=823023.

[7] The numbers reported by the RIAA include the amounts distributed by SoundExchange, and some portion of those revenues do come from SiriusXM and from radio broadcasters for their webcasting. However, the royalties paid to SoundExchange are but a small portion of the total value that those services – as well as other users of music – generate.

[8] The Comments of the National Association of Broadcasters, *In the Matter of Music Licensing Study: Notice and Request for Public Comment*, Docket No. 2014-03 (hereinafter "Music Licensing Study"), p. 26, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf.

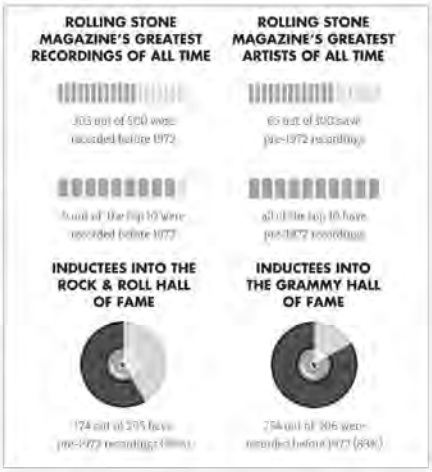
III. Reforming Music Licensing – Making the Copyright Act Work for All Music Creators and All Forms of Radio

I applaud Chairman Goodlatte for launching the current review of our copyright laws. As Copyright Register Pallante testified last year, music licensing issues are in particular need of reform – and thanks to the diligent work of this Committee, are uniquely ripe for resolution and legislative action now.[9] Today I would like to focus on three key reforms that should be part of any revision to our copyright laws, and which I urge the Committee to take up as soon as possible. Some of these ideas are already reflected in pending legislation, such as the RESPECT Act (H.R. 4772) recently introduced by Congressman Holding and Ranking Member Conyers. And they are entirely consistent with the comprehensive legislation Ranking Member Nadler described at part one of this hearing. I am grateful to all the many members of this subcommittee who have supported legislation to improve the music ecosystem and protect the rights of performing artists, songwriters and all creators.

A. RESPECTING All Performers – Fair Pay for Pre-1972 Recordings

There is one fundamental change that demands immediate attention: the Committee should act as soon as possible on closing the loophole that some digital radio services rely on when they refuse to pay royalties to older artists for recordings fixed prior to February 15, 1972. I thank Congressman Holding and Ranking Member Conyers for introducing the RESPECT Act (H.R. 4772) to cure this problem, as well as Chairman Coble, and Subcommittee Members Chu, Deutch, Gohmert and Jeffries for supporting this effort.

[9] Testimony of Maria Pallante, Register of Copyrights, in a Hearing Before the Committee on the Judiciary of the House of Representatives' Subcommittee on Courts, Intellectual Property, and the Internet (March 20, 2013), p. 42, available at http://judiciary.house.gov/_files/hearings/printers/113th/113-20_80667.PDF (stating that the public performance for sound recordings is "ripe" for review).



Pre-1972 sound recordings are the foundation of the music industry and remain both vital and commercially significant. According to *Rolling Stone* Magazine, 305 out of the top 500 tracks of all time were recorded before 1972;[10] 65 out of the greatest 100 artists of all time have pre-1972 recordings in their catalog – including all of the top 10 on the list.[11] 175 members of the Rock and Roll Hall of Fame (out of 304) have pre-1972 releases[12] and 754 recordings in the GRAMMYs Hall of Fame (out of 906) were recorded prior to1972.[13]

Yet, some digital radio services, two of whom are represented on the panel at this hearing, are operating under an interpretation of state and federal copyright laws that they believe allows them to use pre-1972 sound recordings without a license and without compensating either the artists or the rights owners at all. Some of the services who won't pay pre-1972 artists have entire channels dedicated to their work. They market these stations in selling subscriptions, and their playlists are awash in these great recordings. Pre-1972 sound recordings represent between 5 and 15% of all the music played by their services. The result is that legacy artists, many of whom are now in their 70s and 80s, are being excluded from this modern revenue stream for no sound policy reason. SoundExchange estimates that in 2013 alone this cost artists and rights owners $60 million in royalties. In 2014, we expect that number to be closer to $80 million, and the total will keep climbing.

Withholding royalties from pre-1972 artists is a slight to the musical legacy of our nation – and declaring these recordings worthless is surely not the outcome that Congress intended when it created the statutory licenses for digital radio. All recording artists and copyright owners deserve to be paid for

[10] http://www.rollingstone.com/music/lists/the-500-greatest-songs-of-all-time-20110407
[11] http://www.rollingstone.com/music/lists/100-greatest-artists-of-all-time-19691231
[12] http://rockhall.com/inductees/.
[13] http://www.grammy.org/recording-academy/awards/hall-of-fame/.

the use of their works, whether they were recorded in the 1960s or just last month. And legacy artists, just like current ones, should participate in the success of the services building businesses on their recordings. Indeed, the artists who created pre-1972 recordings are especially dependent on digital revenue streams, because they are often less likely than more current artists to be able to generate significant income from touring, product sales, and other sources.

This is not *just* a matter of fairness; it is also a matter of rationalizing the current regime governing the licensing of pre-1972 sound recordings. Digital radio clearly implicates state law rights, and copyright owners have begun to take legal action to enforce their rights against services operating under the statutory licenses that are refusing to license and pay for pre-1972 recordings.[14] Although the litigation addresses the fundamental unfairness of the present situation, it will not lead to a sensible regime for licensing of services operating within the scope of the statutory licenses. Having 50 separate sets of rules for pre-1972 recordings across the U.S. does not provide the simplicity and efficiency that Congress contemplated when enacting the statutory licenses. The point of the statutory licenses is to provide a one-stop-shop for services that want to operate within its four corners. Nobody wants a statutory license that covers 90% of usage but requires individualized negotiations for the last 10% – and, we respectfully submit, that is not the regime that Congress had in mind when it created the Section 114 license in 1995.

Congress can easily bring pre-1972 recordings within the scope of the statutory licenses in a way that does not disturb any other aspect of the Copyright Act, and that in effect codifies the practices of many services that operate under the statutory license today. That is what the RESPECT Act (H.R. 4772) would do – it requires digital services that enjoy the benefits of the statutory license to pay for all of the music they play, regardless of the date the recording was made. This approach would not involve any of the complications raised by broader "federalization" of pre-1972 recordings, but it also would not preclude future consideration of so-called "full federalization." The solution is both simple and essential, and there is no reason Congress shouldn't act.

[14] Flo & Eddie, of the classic rock band The Turtles, have filed class action lawsuits in three states on behalf of copyright owners of pre-1972 sound recordings whose works are played by SiriusXM. Capitol Records, Warner Music Group, Sony Music Entertainment, UMG Recordings, and ABKCO Music & Records have likewise filed a lawsuit against SiriusXM in a California state court. Most recently, a group of record companies filed a case against Pandora in a New York state court. *See* Billboardbiz, "SiriusXM Hit With Fourth $100 Million Lawsuit In Past Month," available at http://www.billboard.com/biz/articles/news/5680147/siriusxm-hit-with-fourth-100-million-lawsuit-in-past-month; Billboardbiz,"Record Labels Sue Pandora Over Pre-1972 Recordings," available at http://www.billboard.com/biz/articles/news/legal-and-management/6062401/record-labels-sue-pandora-over-pre-1972-recordings.

B. Closing the AM/FM Loophole Once and For All

The loophole that allows terrestrial radio (*i.e.*, over-the-air broadcast channels on AM/FM/HD) to use copyrighted sound recordings without paying continues to be the most glaring inequity in music today. Terrestrial radio remains a very significant way that consumers listen to music; according to Nielson, radio reaches 242 million people each week.[15] The NPD Group has reported that, even for young Americans who are moving most rapidly to digital platforms, 24% of all music listening is through AM/FM radio.[16] Radio makes $17 billion a year selling advertisements[17] – primarily for its music radio stations.[18] And yet radio pays nothing to the performers that brought the music to life and the copyright owners who helped shape those recordings and bring them to the world. Terrestrial radio should pay royalties to artists and copyright owners for the same reason that other radio platforms pay: all creators should receive fair pay, on all platforms and technologies, whenever their music is used.

Ending the terrestrial exemption is critical to leveling the playing field for digital services as well. Right now, digital radio sits alongside terrestrial radio in cars, boats, and homes – yet those modern innovators pay for the music recordings they use while AM/FM broadcasters pay nothing even when their broadcasts are played through the same speakers to the same audience. The government should not be picking winners and losers in this way or propping up particular technologies or business models.

It is sometimes argued that the broadcaster exemption is justified because radio airplay promotes record sales. However, that does not describe most radio use of music today – if it ever did. Indeed, classic artists like The Beach Boys, The Temptations, Led Zeppelin and Billy Joel do not need radio to promote them, yet radio stations play their music all the time. And, over the last fifteen years,

[15] Nielson, State of the Media: Audio Today 2014, available at http://www.nielsen.com/us/en/reports/2014/state-of-the-media-audio-today-2014.html.

[16] NPD Group, Streaming Music is Gaining on Traditional Radio Among Younger Music Listeners, available at https://www.npd.com/wps/portal/npd/us/news/press-releases/streaming-music-is-gaining-on-traditional-radio-among-younger-music-listeners/.

[17] Radio Advertising Bureau, "Network, Digital, Off-Air Shine as Radio Ends 2013 in the Black," available at http://www.rab.com/public/pr/revenue_detail.cfm?id=132.

[18] Inside Radio, "Changes Among Radio's Top-Billing Formats," available at http://www.insideradio.com/articles.asp?id=2710554&spid=32060#.UG0AvJldVHV.

even as the radio industry has grown, retail music sales in the U.S. have dropped by about 53%.[19] If radio play was as promotional as claimed, sales should be rising, not falling.

And even to the extent FM radio may be promotional, that does not justify an uncompensated "taking" of musicians' property. A movie may promote an underlying book upon which the movie is based, and television may promote a local football team by broadcasting games on their station. Yet nobody would dare suggest that the book author or the NFL should surrender those rights for free under the mantra of "promotion." Why should music be any different?

Some of our critics suggest that we don't appreciate the value of radio as an outlet, and as a mass medium. Nothing could be further from the truth. I fully recognize that FM radio is a place for hit recordings, and radio can help determine how the shrinking recording industry pie gets divided. Indeed, when an artist has a hit on FM radio, that can be a sign the artist has made it to the major leagues. But that is what is so upside down about the law as it exists today. When a baseball player makes it to the major leagues, he is not suddenly expected to play for free. Instead, he is rewarded for his success and the value he brings to the franchise. When it comes to music, however, a recording artist that has major success meets the exact opposite fate: radio plays her recording for free, to tens of millions of people, while making billions of dollars off of the fans who have tuned in to hear her music. The system makes no sense at all.

The free ride given to terrestrial radio also makes the U.S. an outlier internationally, because we are the only western industrialized nation that does not have a sound recording performance right.[20] This places the U.S. in the company of countries like North Korea, China, and Iran that likewise fail to provide fair compensation for performers. The international landscape is especially significant because the lack of a performance right in the U.S. has prevented U.S. artists and copyright owners from collecting performance royalties earned overseas. American music is heard all over the world, yet our artists earn nothing for that airplay because we refuse to pay for airplay here at home.

When she testified before this Committee last year, Register of Copyrights Maria Pallante

[19] RIAA, "Scope of the Problem [of Piracy]," available at http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem.

[20] Milom Horsnell Crow Rose Kelley PLC, "Terrestrial Radio Performance Royalties for Labels and Artists: Wait for It or Go for It?" available at http://milomlaw.com/articles/terrestrial-radio-performance-royalties-for-labels-and-artists-wait-for-it-or-go-for-it.

called the lack of an AM/FM performance right "indefensible."[21] She noted that the time to recognize a more expansive performance right in sound recordings was "long overdue" and that a failure to act "prolongs a longstanding inequity." [22] The list of supporters for a terrestrial performance right is a virtual who's who of the Arts, technology, and politics, including the last six Administrations of both parties, digital services like Pandora and SiriusXM, and artists from Frank Sinatra to Flea. Mr. Chairman, the time to rectify this "long overdue" injustice has come.

C. Leveling the Playing Field for All Forms of Radio

When Pandora came to this Committee last Congress seeking to reduce the royalties it pays, the Committee was understandably resistant to a "solution" that would drastically slash pay for music creators. But Pandora did have one point – it faces an unfair and unlevel playing field where it must compete against AM/FM radio, which pays nothing for the sound recordings it uses, and against SiriusXM, which pays a below market rate for its music. While these exceptions and grandfathered rules may theoretically have some historical roots – none of them make sense today. All creators should receive fair pay, on all platforms and technologies, whenever their music is used.

Fair pay means "fair market value" and all statutory licenses should be governed by the principle that creators should receive fair market value for their work. But this is not the case in existing law. While the statutory licenses that we administer achieve this by applying the "willing buyer/willing seller" rate standard to most users of the Section 112/114 licenses, only three of the 2500+ services that we administer – SiriusXM, Music Choice and Muzak (the services offering "grandfathered" satellite and cable radio) – benefit from below-market rates set under the Section 801(b)(1) standard. Almost 20 years after the creation of the statutory licenses, and more than 15 years after the willing buyer/willing seller standard was introduced for other licensees, these services neither need nor deserve to have their rates subsidized by artists and record companies, and they should no longer enjoy an unfair competitive advantage over other services. Whatever rationale may have once existed for the grandfathering of these services, it no longer exists; and it is time that SiriusXM, Music Choice and Muzak pay a fair market rate for the music that they use.

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[21] Testimony of Maria Pallante, Register of Copyrights, in a Hearing Before the Committee on the Judiciary of the House of Representatives' Subcommittee on Courts, Intellectual Property, and the Internet (March 20, 2013), p. 40, March 20, 2013, available at http://judiciary.house.gov/_files/hearings/printers/113th/113-20_80067.PDF.

[22] Id. at 3.

IV. The Statutory License Administered by SoundExchange Works

As the Subcommittee considers specific proposals, it is important to remember that the statutory licenses set forth in Sections 112(e) and 114 largely work just as Congress intended, but for the few improvements I described above. While all of the stakeholders appear to be unsatisfied with the system for licensing musical compositions under Section 115 and the consent decrees that govern ASCAP and BMI, the statutory license that we administer under Section 114 presents a completely different picture. Those who rely on the statutory license in Section 114 obviously believe it needs to be preserved (even as they seek tweaks). These services like having a one-stop shop that they can go to.[23] But creators, too, believe that the basic structure works, as is apparent from the comments filed by SAG-AFTRA and AFM,[24] A2IM,[25] RIAA,[26] and the Recording Academy,[27]all of which make it clear that artists and labels alike support the work of SoundExchange and the basic outlines of the statutory license.

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[23] Comments of the National Association of Broadcasters, Music Licensing Study, p. 2, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Association_of_Broadcasters_MLS_2014.pdf ("[t]he statutory sound recording licenses and exemptions are critical to music licensing");
Comments of the Digital Media Association ("DiMA"), Music Licensing Study, p. 33, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Digital_Media_Association_MLS_2014.pdf ("[the statutory] licenses promote efficiency and reduce transaction costs by making a vast body of sound recordings subject to license coverage immediately upon the service of a single notice");
Comments of SiriusXM Radio Inc., Music Licensing Study, p. 11, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Sirius_XM_%20Radio_Inc_MLS_2014.pdf ("the statutory licenses are a necessity for national services using thousands…of sound recordings").

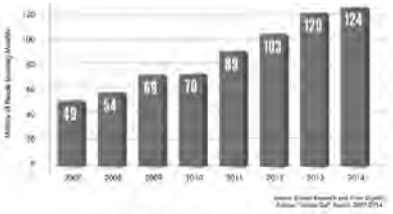
[24] Comments of Screen Actors Guild – American Federation of Television and Radio Artists and American Federation of Musicians of the United States and Canada, Music Licensing Study, p. 2, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/SAG_AFTRA_AFM_MLS_2014.pdf ("the Section 114 statutory license has delivered extraordinary benefits to music creators, music investors, digital music services and music listening").

[25] Comments by the American Association of Independent Music ("A2IM"), Music Licensing Study, p. 3, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/American_Association_of_Independent_Music_MLS_2014.pdf ("[t]he non-interactive compulsory statutory licensing regime ensures equity and fairness for all copyright owners and allows greater music service marketplace access resulting in greater consumer choice").

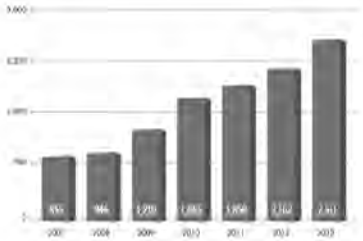
[26] Comments of the Recording Industry Association of America, Music Licensing Study, p. 35, May 23, 2014, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Recording_Industry_Association_of_America_MLS_2014.pdf ("the statutory licenses have proven to provide an efficient mechanism for administering licensing and payment for the large number of services providing radio-like programming").

[27] Comments of the National Academy of Recording Arts & Sciences, Music Licensing Study, p. 4, available at http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/National_Academy_of_Recording_Arts_and_Sciences_MLS_2014.pdf ("The Recording Academy supports the statutory license under Section 114, which is beneficial for performers and efficient for licensees….the 50-50 split of revenue and direct payment to artists have provided a financial lifeline to many performers.").

The reason why everyone is in basic agreement is apparent: services have flourished under the statutory system, and revenues have grown. The audience for digital radio has grown from 49 million to 124 million over the past 7 years, the average time spent listening to digital radio has doubled in the past 5 years to more than 13 hours a week today,[28] and advertising and subscription revenue continues to flood into the space of non-interactive services.[29] Since 2012, when I last testified before Congress, the number of statutory licensees has grown from 2,000+ to more than 2,500 today, and major players continue to be interested in digital radio.[30]



Digital Radio Audience Growth
(Millions of people listening monthly)



Digital Radio Services Using Statutory License

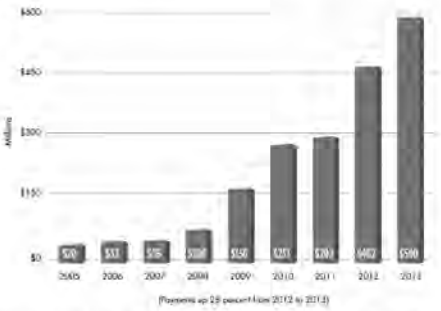
[28] Edison Research/Triton Digital, "The Infinite Dial 2014," available at http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf.

[29] For example, SiriusXM's subscriber and advertising revenue has grown 34% for the first quarter of 2014. *See* http://files.shareholder.com/downloads/SIRI/3111449874x0xS908937-14-8/908937/filing.pdf. Pandora's revenue has increased even more dramatically, growing 69% year over year during the first quarter of 2014. *See* http://investor.pandora.com/phoenix.zhtml?c=227956&p=quarterlyearnings.

[30] For example, Apple launched its iTunes Radio service. See http://www.billboard.com/biz/articles/news/digital-and-mobile/5763260/business-matters-itunes-radio-starting-strong-but-not. Google's Play Music All Access also has a digital radio option. *See http://www.theverge.com/2013/2/13/4218750/google-play-music-all-access-adds-pandora-radio-shuffle*

As digital radio has exploded, payments from SoundExchange to the industry have also continued to grow. Last year, we distributed $590 million to artists and labels, an increase of 28% over the 2012 distributions. Our distributions are now 8.4% of recording industry revenue.[31] And most critically, the featured artist royalties we distribute are paid *directly* to those artists – meaning that artists are participating directly and immediately in this new revenue stream. The license also makes available valuable new royalties for background and non-featured artists.

Digital Performance Royalties Paid to Artists & Labels



In other words, the system works, and needs only a few important and fundamental changes to be a foundation for further growth. While the reforms I have described earlier in my testimony are critical, Congress got the fundamentals right when it laid down the rules of the road for digital radio nearly two decades ago – a particularly impressive feat given how new and different the Internet and satellite broadcast technologies were and how entrenched the old models had become. Every American who loves the digital music world that has grown up in the past twenty years owes this Committee our thanks.

V. The Next Generation of Reforms – Industry Infrastructure and a Strengthened Copyright Office

As the music industry changes and grows, our back office systems and infrastructure must keep up. SoundExchange is leading the way. We are constantly improving our distribution infrastructure, with a goal toward getting the right royalties into the right hands as quickly as possible. Beginning this year, we distribute royalties monthly, where many of our peers distribute annually. We are also building a comprehensive repertoire database and repository of International Standard Recording Code numbers, designed to rationalize and collect the metadata that we need for our business, and that can

[31] RIAA, "News and Notes Regarding 2013 RIAA Music Industry Shipment and Revenue Statistics," available at http://76.74.24.142/2403566A-D36-E0CA-2766-72779A364D01.pdf.

also be a foundation for other uses as well.

We are also developing our systems to be a resource for the industry, and to work toward a world in which "who owns what" is clear and easily known. We don't believe that informational advantage and disparities should determine the winners and losers in the music business. Music creators should be rewarded based on their contributions to the fabric of our culture and the value they bring to the moment. Music should rise or fall based on its artistic power and creativity – not the happenstance of its metadata or the lack of transparency in the process through which the royalties flow.

I would also urge the Committee to support Register of Copyrights Maria Pallante in her efforts to invest in the next generation Copyright Office, including interoperable services and platforms and public-private partnerships. Her call for amendments that will make copyright work better, administrative flexibility to help the office make the best use of its resources, and administrative and budgetary support for this critical piece of our nation's copyright infrastructure is an important one.

VI. What Does Success Look Like?

The music ecosystem today is pushed and pulled in too many conflicting directions based on grandfathered loopholes, unjustified exemptions, and a confusing network of laws. Musicians feel like they can never get ahead, and even if they do break through and find artistic success, they still struggle to pay the bills. Songwriters struggle beneath the weight of decades-old consent decrees. Competitors on all sides spend far too much on litigators and negotiators that could be going to creators.

As I mentioned above, SoundExchange is governed by the principle that <u>all creators should receive fair pay, on all platforms and technologies, whenever their music is used.</u> In our daily business, and in our planning for the future, that means designing, operating, and always improving an infrastructure that will maximize the transparent and efficient payment of royalties to creators. Success for SoundExchange is a world in which the systems that facilitate fair payment to creators operate silently and transparently in the background, so that artists, songwriters, producers, and those larger organizations that help all of them succeed can focus on making and promoting great music.

For Congress, I believe success is a world in which the government does not pick winners and

losers, and in which all creators are entitled by the law to receive a fair market value for their contributions. Most urgently and immediately, that means (i) ensuring that legacy artists are protected when their music is played on digital radio, (ii) eliminating the unfair and distorting loophole that requires artists to subsidize AM/FM/HD radio, and (iii) ensuring that all radio platforms are subject to a fair market value for all creators' contributions.

I look forward to working with the Committee as well as all stakeholders in the creative, technology, and broadcast communities to bring about real reforms that achieve our one central goal: ensuring that all creators receive fair pay, on all platforms and technologies, for all of their music.

Mr. COBLE. Thank you, Mr. Huppe.
Mr. Frear?

TESTIMONY OF DAVID J. FREAR, CHIEF FINANCIAL OFFICER, SIRIUS XM HOLDINGS INC.

Mr. FREAR. Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler and Members of the Subcommittee, thank you for the opportunity to testify today. My name is David Frear. I am the Executive Vice President and Chief Financial Officers of SiriusXM.

SiriusXM is one of the largest radio providers in the United States. We have over 25 million subscribers, subscribers residing in every congressional district in the continental U.S. and we employ 2,100 people around the nation.

SiriusXM is well positioned to offer testimony on these copyright issues. In 2013, we paid approximately $325 million in royalties to record companies, publishers, songwriters, and artists. We have paid over $1.8 billion in music royalties since we launched service 11 years ago.

I'd like you to take away four key themes from my testimony. First, parity. Radio is radio whether it is AM, FM, satellite or Internet radio. All radio companies should pay for the music they use on the same basis; no exceptions. Continuing to exempt the terrestrial radio companies that dominate radio listening with over 90 percent of the market and generate over 15 billion in revenue is bad policy. Copyright law does not distinguish between AM and FM radio based on technology and it should not distinguish between AM/FM, satellite or Internet radio either, based on technology.

Second, today's Copyright Act creates an unfair digital disadvantage. Drawing any distinction based on the claim that some radio services are digital while others are not, is based upon the false premise and produces a distorted result. Terrestrial radio began broadcasting digital signals over a decade ago and they have routinely made digital copies in the ordinary course in their broadcast operations since the 1980's. Similar services, regardless of the mechanism or medium through which they are delivered, should be treated similarly. With each rate-setting proceeding, the digital disadvantage between terrestrial radio and other radio services just gets wider. The two pending bills, the Songwriter Equity Act and the RESPECT Act, will only further widen this digital disadvantage.

Third, protection from market power. The music business has never been more concentrated than it is today. Three companies control nearly 90 percent of the market for distribution of music. The same three companies control nearly 70 percent of the music publishing market. Two PROs control over 90 percent of musical performance rights and one collective controls the sound recording performance rights.

The consent decrees are crucial to protecting against noncompetitive rate demands. The consent decrees do not interfere with competition, they prevent activities that would otherwise constitute clear violations of the antitrust laws. Recent attempts by copyright owners to partially withdraw from ASCAP or BMI, in an attempt

to cherry-pick entities who are relying on their PRO licenses for access to those publisher's works, are troubling; especially in light of the publisher's refusal to provide the catalogue data that would allow the services to remove the catalogue from the air in the event they couldn't reach agreement on the fees.

Fourth, and finally, fair rates. The willing buyer, willing seller standard can have meaning only where marketplace transactions reflect the workings of an actual free market. There is no functioning free market in music licensing because of the unprecedented concentration in the music industry and the aggregation of power in the PROs. Congress should, instead, adopt the 801(b) rate-setting standard for a broad array of music licensing purposes. That standard provides the Copyright Royalty Board with wide latitude to ensure that both copyright owners and users are treated fairly, including potential new users, like terrestrial radio.

The 801(b) standard is also a matter of simple fairness. Congress adopted that standard in recognition that services subject to those standards founded their services at a time when there was no sound recording performance right at all. To change the standard now would fundamentally undercut the reliance interest of those services.

So in summary, while the $15 billion AM and FM radio industry pays the PROs approximately $300 million per year, they do not pay a penny for sound recording performances. By comparison, radio companies, like Pandora and SiriusXM, are less than one-third the size of AM and FM in terms of revenue. Yet, we'll pay more than two and a half times, nearly $800 million, in music royalties this year. It is simply bad public policy to reward the biggest entities in the radio field with a competitive cost advantage while penalizing innovation and emerging services that increase economic activity and create jobs.

As you consider new legislation, it is my hope that you will recognize the unbalanced playing field for the music licensing today and craft an equitable and durable solution.

I thank you for the opportunity to testify.

[The prepared statement of Mr. Frear follows:]

Written Statement of David J. Frear
Chief Financial Officer, Sirius XM Holdings Inc.

Before the

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on Music Licensing Under Title 17

June 25, 2014

Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee:

My name is David J. Frear. I am the Executive Vice President and Chief Financial Officer for Sirius XM Holdings Inc. ("Sirius XM"), a position I have held since 2002. On behalf of Sirius XM, I thank you for the opportunity to offer testimony to the Subcommittee.

Sirius XM, with an estimated 40 million listeners, is one of the largest radio providers in the United States. We employ over 2,100 people at our facilities in New York, Washington, DC, Florida, New Jersey, Texas and California. Since our inception, we have operated pursuant to licenses from ASCAP, BMI, and SESAC for the public performance of musical compositions, and we operate under the Section 112 and 114 statutory licenses with respect to the public performance of sound recordings. We have also fully litigated two rate-setting proceedings before the Copyright Royalty Board.

In 2013 alone, we paid approximately $325 million to record companies, publishers, song writers, and recording artists. We have paid well over $1 billion in sound recording performance royalties since we launched in late 2001.

This experience has provided us with great insight into the issues before the Subcommittee, including what works and what does not work within the music licensing market as currently structured. My testimony, builds on that experience – as well as similar comments Sirius XM recently submitted to the Copyright Office as part of its music licensing inquiry – and centers on four key points:

1. **The Need for Platform Parity**: There is no reason that satellite radio and Internet radio should pay sound recording performance royalties while terrestrial radio continues to enjoy an exemption from that obligation.

2. **The Importance of the 801(b) Rate-Setting Standard**: The 801(b) standard provides the Copyright Royalty Judges with both the ability to examine potentially relevant marketplace transactions and the flexibility to balance the interests of both the copyright owners and licensees. The 801(b) standard has proven far superior to the "willing buyer willing seller" standard championed by the rights-owner community. It should be maintained.

3. **The Continued Necessity of the Consent Decrees Governing ASCAP and BMI**: The antitrust consent decrees are not outdated "relics" that prevent competition or copyright owners achieving fair market value for their works, but a necessary antidote to the extreme concentration that persists in the market and would, absent the decrees, violate the antitrust laws. In short, they help *ensure* that rates are set fairly.

3. **The Significant Problems with the Proposed RESPECT Act for Pre-1972 Sound Recordings**: The proposed act would further exacerbate the irrational disparity between digital services and terrestrial radio (which would remain exempt from paying performance royalties for *any* recordings), create a new payment obligation on a narrow set of licensees, and bestow a one-sided windfall on owners of recordings created 70 or 80 years ago, without advancing in the least the foundational purpose of copyright law: providing an incentive for the creation of new recordings.

As may be evident, a common-theme pervades my comments. In statement after statement, copyright owners suggest that the current regulatory framework – including the statutory licenses, the 801(b) rate-setting standard and the antitrust consent decrees – artificially interferes with the normal working of a free and competitive market. The unmistakable tenor of the conversation is that copyright owners are being unfairly forced to subsidize licensees with below-market rates. But these sorts of comments conveniently overlook the reality on the ground in the music licensing marketplace.

On the publishing side, for example, we confront two collectives (ASCAP and BMI) that each control distinct repertories approaching 50% of the market, and a third (SESAC) that, while smaller, makes outrageous fee demands under threat of statutory infringement claims while refusing to identify the works it is licensing. On the record-label side, we see three major labels that likewise control distinct repertories ranging from 20% to nearly 40% of the market each – and over 85% collectively. These entities control separate catalogs of works that are not substitutes for one another. They do not compete with one another as that term is typically understood. A "free" market in licensing – if by that term one means giving copyright owners free rein to exploit the market power they enjoy by having amassed massive repertories of works – would be neither fair nor competitive, but be plagued by rates approaching monopoly levels.

By contrast, the regulatory framework that has developed over the years, rather than forestalling competition or preventing copyright owners from achieving fair market value, helps to achieve the opposite result: ensuring that rates paid by entities like Sirius XM are at least somewhat insulated from the incredible market concentration that would otherwise push them to monopoly levels.

My comments below provide additional detail on these points.

I. Platform Parity Is Vital

As the Subcommittee no doubt is aware, music services in the U.S. operate under a patchwork of statutes, rules, and regulations that distinguish audio entertainment services based upon the mechanism or medium of delivery. This framework is the product of historical compromises and trade-offs between interested parties that no longer make sense and, as many

participants noted in the June 10th hearing before the Subcommittee, it is a framework that no one would readily choose again today.

The current framework exempts traditional "terrestrial" radio from the obligation to pay performance royalties to sound recording owners, while requiring other radio services that offer essentially the same service to make such payments. Further, drawing any distinction based on the claim that some services transmit digitally while others do not is nonsensical: terrestrial radio began broadcasting digital signals over a decade ago and has made use of digital copies of sound recordings to further their broadcasts for 30 years. It is antiquated, inequitable, and simply bad public policy to reward the biggest entities in the radio field with a competitive cost advantage while penalizing innovators whose services increase economic activity and create jobs.

To start, similar services – regardless of the mechanism or medium through which they are delivered – should be treated similarly. Copyright law does not distinguish between AM and FM radio based on technology, and should not distinguish between terrestrial and satellite radio, or terrestrial and Internet radio, either. The playing field – that is to say, the requirement that performance royalties be paid, and the standard under which royalty rates are set – should be leveled for all participants in the radio market. In short, "radio is radio," regardless of whether it is AM/FM radio, HD radio, satellite radio, cable radio or Internet radio. *See, e.g.*, *In re Petition of Pandora Media, Inc.*, No. 12 Civ. 8035 (DLC), at 14 (S.D.N.Y. Mar. 18, 2014) (Opinion & Order) (explaining that the "radio experience has remained constant through the years, regardless of whether radio programming is transmitted by broadcasting, through a cable, from a satellite, or over the internet").[1]

Continuing the distinctions between various forms of radio established in 17 U.S.C. § 114 – whereby AM/FM radio is exempted from any sound recording performance right obligation, while satellite, Internet, and other audio services (including simulcasts of those very same AM/FM broadcasts) are not – is bad and unjustified policy. Chiefly, it has the effect of subsidizing the largest entities in the industry – the $15 billion/year AM/FM radio station market – and is exactly the opposite of what the public would expect: accommodations to *new* entrants to encourage growth and entrepreneurship. Such a policy punishes digital pioneers with massive royalty obligations not borne by their established and entrenched competitor. For example, Sirius XM, despite enjoying a subscriber base of nearly 25 million, went 18 years until it achieved profitability in 2010 – and then only after running up cumulative net operating losses of $8 billion, merging the two predecessor companies, and narrowly surviving two brushes with bankruptcy. At the same time, it paid well over $1 billion in royalty payments to the recording industry, while AM/FM radio stations paid precisely *zero*.

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[1] We do not mean to suggest by this that all services should pay the exact same fees, but rather that similar services should have their fees set pursuant to the same rate-setting standard and process. As we discuss below, the 801(b) rate-setting standard provides the Copyright Royalty Judges with the necessary and appropriate latitude to account for variations between particular services or service categories in the rate-setting process.

That sort of inequity hampers innovation and job creation. While Sirius XM survived, and while most AM/FM stations continue to offer some form of simulcast, one need only survey the graveyard of services that have tried and failed to establish viable standalone digital radio businesses (including major companies like Yahoo! and AOL) to see the depth of the problem. Winners and losers in the audio entertainment field should be selected by the market on the basis of innovation and the entertainment and other value they provide to consumers, not historical anomalies or cost-side inequities created by statute.

II. The Importance of the 801(b) Rate-Setting Standard

Copyright owners have stated that 17 U.S.C. § 801(b) provides an artificial subsidy to services and suggested that the "willing buyer-willing seller" (WBWS) standard be applied to all Section 114 licenses, or that the 801(b) standard be altered, for example by removing the "disruption" factor found at 801(b)(1)(D). They are wrong.

To start, it is important to highlight the continuing importance of the statutory licenses for national services using thousands (or tens of thousands) of sound recordings. Negotiating with each and every copyright owner would be extremely difficult and costly for at least two reasons. First, any service would need to be able to identify and then negotiate with the copyright owners of hundreds of thousands (or even millions) of songs. Second, the service would be forced to confront a record industry that has become incredibly concentrated, with three majors (and the smaller independent labels distributed by the majors) accounting for over 85% of the market. This concentration provides those record companies with tremendous negotiating leverage, as each major is a "must have" that many services cannot do without.

For similar reasons, the 801(b) standard should be retained as written. Copyright owners blithely characterize the 801(b) standard as devoid of marketplace considerations. But the 801(b) standard requires the Judges set rates that are "reasonable," and in prior proceedings the Judges have started their rate-setting analyses under that standard by first identifying a "zone of reasonableness" defined by *market* benchmarks, and only then using the 801(b) policy factors to identify a rate *within* the *marketplace* range.[2] Moreover, as the economists who have testified on behalf of the industry have argued repeatedly to the Judges, the 801(b) factors – such as the goals of ensuring a fair return and fair income for the parties, and recognizing their "relative contributions" – are those that parties to a *marketplace* transaction would themselves consider. The 801(b) standard thus allows the Judges to consider *marketplace* benchmarks and considerations as part of their determinations, but also provides the Judges with the latitude and flexibility to consider the enumerated policy factors (for example, in the *Satellite I* proceeding, the disruption that Sirius XM would suffer at the rates proposed by SoundExchange, as well as Sirius XM's need to spend hundreds of millions of dollars in satellite-related expenditures).

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[2] That approach has been blessed by the D.C. Circuit. *See Recording Indus. Ass'n of America, Inc. v. Librarian of Cong.*, 608 F.3d 861, 865 (D.C. Cir. 2010). *See also* 17 U.S.C. § 114(f)(1)(B) (specifying that "the Copyright Royalty Judges may consider the rates and terms for comparable types of subscription digital audio transmission services and comparable circumstances under voluntary license agreements").

The WBWS standard, by comparison, has proven to be a failure. In the absence of marketplace benchmarks involving non-interactive services, the Judges have been forced to rely on agreements between record companies and completely different categories of music users (*e.g.*, interactive services) and adjust them for application to non-interactive services – an inexact science at best, and one that causes the Judges to apply all manner of imprecise "interactivity" and other adjustments. In the wake of the *Webcasting II* decision, Congress was compelled to enact two Webcaster Settlement Acts to allow the record industry and various services to negotiate "voluntary" agreements (the so-called "WSA" deals) at rates other than those set by the Judges, which would have bankrupted most services. By the time of the *Webcasting III* proceeding, some 95% of the market was operating under such agreements (*i.e.*, not operating under rates set according to the WBWS standard), and only one commercial service of any size participated in the proceeding. Meanwhile, the three largest providers (Yahoo!, AOL, and Microsoft) all exited the market.[3] In contrast, the decisions pursuant to the 801(b) standard have not resulted in the participants rushing to Congress for legislative relief.

Retention of the 801(b) standard is justified not only because it is fundamentally superior to the WBWS standard, but also as a matter of simple fairness. Congress implemented (and later retained) that standard in recognition that services subject to those standards founded their services at a time when there was no sound recording performance right at all. To change the standard now would fundamentally undercut the reliance interests of those services.

To those who would argue that anything other than a free-market standard amounts to a perversion of their property rights and an unfair subsidy from the recording industry to the digital services, it must be remembered that the statutory license was an integral part of the bargain reflected in the Digital Performance Right Act in 1995. Namely, sound recording record companies were provided with a digital audio transmission right against non-interactive services only on the condition that such services (who were being hit with a new royalty not borne by terrestrial radio) have access to a statutory license[4] -- and, in the case of satellite radio, the 801(b)(1) rate-setting standard. Sound recording owners present their right to public performance royalties as a given, and the statutory license as a burden on that right; but that position fails to recognize that the statutory license was the *price* for receiving the performance

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[3] Similar problems plagued the satellite television market. After Congress shifted the Section 119 compulsory license to a "fair market value" standard in the Satellite Home Viewer Act of 1994, the rate increase implemented by the CARP was so drastic that Congress was compelled, in the Satellite Home Viewer Improvement Act of 1999, to slash rates by 45%. *See* Register of Copyrights, Satellite Home Viewer Extension and Reauthorization Act § 110 Report, at 8-11 (Feb. 2006).

[4] This is compared to the interactive services – the providers of the so-called "celestial jukebox" – which Congress feared would substitute for CD sales and which drove the legislation. Sound recording owners, who had never enjoyed a public performance right in the U.S., received a full digital performance right as against on-demand streamers, but not as against non-interactive services that were not viewed as creating the same threat of substitution. Several CARP and CRB proceedings have lent further support to this distinction, as the record industry has failed to present any credible evidence that non-interactive services substitute for record sales.

right in the first place. *See* H.R. Rep. 104-274, at 14 (describing need for "balance" among interests and resulting "limitations" on the performance right, including the statutory license).

III. The ASCAP and BMI Antitrust Consent Decrees

Sirius XM operates pursuant to blanket licenses from ASCAP, BMI, and SESAC covering the public performance of musical works. In our experience, the ASCAP and BMI consent decrees and the licensing process that they mandate work relatively well. As a result of the mandatory license requirement, Sirius XM is assured that it has license coverage for the full repertories without needing to contact and negotiate with every single songwriter and publisher featured on its service. Each side has the opportunity to pursue rate-court litigation if it feels the other side is being unreasonable. Despite that possibility (or likely because of it), Sirius XM has enjoyed relatively amicable negotiations with each of ASCAP and BMI over the past decade, and has not needed to litigate. The publishing community, for its part, has received hundreds of millions of dollars in royalty payments from Sirius XM.

The recent trends in this area, however, are disturbing. The first such trend is the publishers' increasingly strident suggestions, in the press and on Capitol Hill, that the consent decrees are a relic of the past that should simply be dispensed with. Changing times, however, do not change the facts. As noted in the introduction, ASCAP and BMI collectively represent close to 50% of the market each – and a *distinct* 50%. A music service like Sirius XM must take a license from each of those entities to operate effectively – they are not substitutes for one another. ASCAP and BMI do not compete against one another on price, as one would expect to find in a typical "competitive" market – *i.e.*, Sirius XM can't tell ASCAP that if it doesn't lower its price, we will purchase the rights we need from BMI instead. As is obvious, this gives each organization a tremendous amount of market power over licensees who need a license from each to operate a successful service.

As a result, what was true in the 1940s when the consent decrees were adopted, and reiterated throughout the decades, remains just as true now: the PROs' blanket licensing practices are "inherently anti-competitive," reflecting their exercise of "disproportionate power over the market for music rights." *United States v. Broad. Music, Inc. (In re Application of Music Choice)*, 426 F.3d 91, 93, 96 (2d Cir. 2005); *see also United States v. ASCAP (In re Application of RealNetworks, Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) (explaining that "ASCAP, as a monopolist, exercise[s] disproportionate power over the market for music rights") (alteration in original) (citation and internal quotation omitted).

While the efficiencies of the blanket licenses and one-stop shopping may justify the PROs' existence, the consent decrees are crucial to protecting against the inevitably non-competitive rate demands (and the ability to shut a service down that does not accede to those demands) that result when publishers are allowed to negotiate collectively. Put simply: a "free" market in this context – i.e., one where publishers are given free rein to negotiate collectively and wield their market power without constraint – would be neither "fair" nor competitive" as the copyright owners like to suggest. The consent decrees do not interfere with competition; they prevent activities that would otherwise constitute clear violations of the antitrust laws.

The existence of national music services playing tens of thousands of songs in reliance on blanket licenses makes the consent decrees all the *more* necessary. Given the practical impossibility of a service identifying and negotiating privately with every copyright owner featured in its programming – ASCAP alone purports to represent over 500,000 songwriters and publishers, while services such as Spotify (to give just one example) advertise libraries of millions of tracks – a music service could face dramatic exposure to infringement liability (and statutory damages) absent the compulsory licensing mechanism of the consent decrees.

Sirius XM's own experience with SESAC (which, unlike ASCAP and BMI, is not bound by a consent decree) drives home the importance of the consent decrees. In prior negotiations with Sirius XM, SESAC has demanded oversized fees that are totally unsupported by the information available regarding its catalogue, and always with the implicit threat of infringement liability. At the same time, it has refused to identify its catalogue of musical works, meaning that Sirius XM cannot (as it could with a single copyright holder) simply remove the tracks at issue from its service. This combination of concentrated ownership and either an unwillingness or inability to be transparent as to what works are actually in the repertory creates a completely untenable situation.[5]

Such anti-competitive concerns have been exacerbated by recent attempts by publishers to withdraw from ASCAP and BMI. As detailed by Judge Cote from the record of the ASCAP-Pandora litigation, publishers that control hundreds or thousands of smaller catalogues (and millions of songs) under one licensing umbrella – making them effectively private PROs five or ten times the size of SESAC – have (a) insisted on the ability to partially withdraw from ASCAP; (b) made exorbitant fee demands, under the threat of litigation, to force direct licenses on services who no longer have access to those publishers' works via the PROs; and (c) refused to provide catalog data that would allow the targeted service to diminish or stop performing the works of those publishers absent a more reasonable fee demand.

To the extent PRO withdrawals become a regular feature of the music licensing landscape, complete transparency with respect to copyright ownership – *i.e.*, what exactly is in the catalogues of each publisher – is an absolute must. Congress should insist on a comprehensive, up-to-date public database of musical work and sound recording ownership information that is available freely to all potential licensees. Second, licensees should enjoy a safe harbor from statutory infringement exposure for copyright owners in such situations who fail properly to identify their works and allow reasonable and sufficient time to remove them from the service's servers and playlists. It is a travesty that a company can assemble millions of copyrights under a single licensing umbrella, insist on an exorbitant fee, but then not tell the licensee which copyrights it is forcing the service to license or stop playing.

IV. Pre-72 Recordings

Sirius XM has been the target of a spate of recent lawsuits regarding its use of sound recordings fixed before February 5, 1972 ("Pre-72 Recordings"). Three suits involve a putative

[5] Judge Engelmayer recognized this exact problem in his recent summary judgment ruling in the television broadcasters' case against SESAC. *Meredith Corp., et al. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2014 WL 812795 (S.D.N.Y. Mar. 3, 2014).

class of record companies suing Sirius XM in California, Florida, and New York seeking damages and license fees under the law of those three states. A fourth suit involves the major record companies and ABKCO (coordinated by the Recording Industry Association of America) suing Sirius XM in California for damages and license fees pursuant to California law. Those same Plaintiffs have also sued Pandora in state court in New York.

Simultaneous with these state-law cases, SoundExchange – the entity that collects and distributes royalties for copyrighted (*i.e.*, "Post-72") recordings pursuant to the statutory licenses found at Sections 112 and 114 of the Copyright Act -- has sued Sirius XM in the District of Columbia for failure to pay for the same performances of Pre-72 Recordings under the *federal* statutory license. SoundExchange has also lobbied for introduction of the RESPECT Act, which would force statutory licensees like Sirius XM and Pandora to pay for performances of Pre-72 Recordings under the (federal) statutory license.

Respectfully, the RESPECT Act is riddled with problems.

First, and worst, by adding a new royalty obligation solely to digital services that currently pay for performances of Post-72 recordings under the federal statutory license, it only further exacerbates the above-described disparity between other audio services and terrestrial radio stations, which would continue to be exempted from performance royalties, not only for Post-72 recordings, but for Pre-72 Recordings as well.

Second, the bill as drafted does not actually grant federal copyright protection to Pre-72 Recordings: it simply forces statutory licensees paying for Post-72 recordings to pay royalties for Pre-72 Recordings as well, without creating any underlying entitlement to such payments.[6] The bill thus effectively exempts Pre-72 Recordings from the limits that typically apply to works covered by the Copyright Act: for example, the need to register works prior to litigation; a limited term of protection; the "Homestyle" exemption at Section 110 (which shelters small business establishments and religious facilities from public performance liability); and, significantly, the DMCA safe harbors at Section 512 (which protect Internet services from infringement liability if they respond promptly to takedown notices from copyright owners). These limitations are crucial to the purposes of the Copyright Act, which seeks to strike a balance between copyright owners and the interest of the public in gaining access to copyrighted works. Owners of Pre-72 Recording should not gain the benefits of copyright protection (royalty payments under Section 114) without being subject to these important limits.[7]

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[6] To the extent the Act is predicated on a purported state-law performance right in sound recordings, no such right exists. After months of litigation in three different states, the record companies have failed to demonstrate that such a right exists in those states, much less in the 47 states in which no such litigation is taking place.

[7] The music industry has fought tooth and nail to deny the Section 512 safe harbor to services that offer Pre-72 Recordings – and succeeded – on the ground that a federal statute cannot shelter infringements of non-federally-copyrighted works. (See, for example, the *UMG Recordings v. Escape Media* case in New York). And the RIAA came out strongly *against* the federalization of Pre-72 Recordings in response to a recent Copyright Office inquiry on the subject, no doubt hoping to avoid the limitations in the Act. They cannot have it both ways.

More generally, the RESPECT Act does not serve the fundamental purpose of the Copyright Act: to serve the public interest by providing only the protection necessary to incentivize the creation of works in the first instance before allowing them pass into the public domain.[8] Demanding a new and retroactive royalty obligation for recordings created 45 or more years ago will not, and by definition cannot, serve that purpose. Clearly, the protections that existed prior to 1972, which did not include the prospect of performance-related income, were more than sufficient to prompt the creation of such recordings. And no doubt the same was true of the period between 1972 and 1995, where there continued to be no public performance right – and millions of sound recordings created nonetheless.[9] Absent any public performance right, recording artists continued to make recordings, expected that radio stations would play them, and in fact encouraged radio to do so because they knew it would help them sell even more records.

In short, demanding payment now for what radio has never, in 100 years, had to pay for will merely create a windfall that the artists did not expect when they created the works. Sirius XM, by contrast, will be confronted with tens of millions of dollars in a new, unforeseen, and significant payment obligation that was *not* part of the rights framework in place when it started its business – money that will no longer be available for improving our products and services, innovating, or hiring new employees.

* * *

In conclusion, I would like to thank the members of the Subcommittee once again for the opportunity to submit this testimony. Sirius XM stands ready to provide any additional information or testimony that the Subcommittee would find helpful as it continues its consideration of these important issues. It is crucial that all participants in the music industry

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[8] The Court of Appeals for the Second Circuit reiterated these basic principles just this week: "As the Supreme Court has explained, the overriding purpose of copyright is to promote the Progress of Science and useful Arts. . . . In short, our law recognizes that copyright is not an inevitable, divine, or natural right that confers on authors the absolute ownership of the creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public." *Authors Guild, Inc., et al. v. HathiTrust, et al.*, No. 12-4547-cv, at 10-11 (2d Cir. June 10, 2014) (internal quotations and citations removed).

[9] The Sound Recording Act of 1971 was passed by Congress specifically to remedy the specific problem of record piracy, which was forbidden by laws in certain state laws but not in others. Congress thus intentionally withheld a public performance right, which it recognized had never existed at the state level (clearly radio stations were not paying performance royalties, and never had). Notably, the 1971 Act also bestowed federal reproduction and distribution rights solely to those recordings created *after* enactment on February 15, 1972. The effect of this was that once the Act was passed, recordings created *even a few months earlier* were left completely unprotected as to public performance rights, and unprotected with respect to unauthorized reproduction and distribution in states that had no record piracy laws. In light of this long history, the current complaints that Sirius XM and Pandora are acting unfairly or even "shamefully" by not paying performance royalties for pre-72 recordings ring hollow. ecosystem – digital services as well as content creators – have a seat at the table as reforms are considered and debated.

Mr. COBLE. Thank you, Mr. Frear. I appreciate that.

I want to thank the panelists for no one abused the 5 minute rule. And for that I am appreciative to you. We try to comply with the 5 minute rule too. So if you all could keep your responses as tersely as possible, we would be appreciative to you.

Ms. Cash, let me start with you with a simple question but I think it may be pertinent. Do you believe that the music licensing system should be set up in such a way that makes it easier, or at least more simple, for artists to understand they are being paid and who is paying them?

Ms. CASH. I do.

I think that transparency is essential and that the lack of transparency is a huge part of the problem. For instance, there was a petition going around not long ago from Pandora asking musicians to sign. And it was very enthusiastic about how that would benefit us. We found that to be somewhat manipulative not transparent. And, in fact, they lobbied for lower rates for us. So fans are confused, which they are, they come to me all the time and say, "How do I buy your record? What is the decent thing to do? How can I support you so you keep making records?"

Then, if they are confused and we are a bit confused, I think transparency would go a long way toward clearing some of this up.

Mr. COBLE. Ms. Cash, you opened the transparency door, so let me walk through that door. And I'm going to put this question, if you will, if I may go to Mr. Harrison and Mr. Williams.

Transparency is a word this Subcommittee has heard repeatedly quite a bit including transparency in copyright ownership, transparency in who pays what and transparency in how royalties are divided. How should the Congress, in your opinion, consider the issue of transparency as we consider potential changes to our music licenses laws? Is transparency just as important and vital as other issues?

Start with you, Mr. Williams, then follow, Mr. Harrison.

Mr. WILLIAMS. Mr. Chairman, I apologize my hearing is a little bit up but if I get the gist of what you said, and my hearing is not the best, but——

Mr. COBLE. Nor is mine so I can relate to that. [Laughter.]

Mr. WILLIAMS. To answer your question, I think, as much as I could hear, was related to transparency. And ASCAP is very proud of our transparency. We have a database for our members. If the Love Boat theme that I wrote is being played in Lithuania right now, I can jump online and find out that it is being played.

I have to disagree with Mr. Harrison. I think he was perhaps misinformed in something of what evolved in the Pandora case with Sony. I want to straighten that out, first of all. We are very proud of the fact that we are open and transparent on all cases.

When Pandora requested information on licenses, for example, the 2 days before the end of their trial, we immediately gathered that information. And, after 2 days, when we had it all together, we reached out to Pandora and said, "Would you like this information?" We never heard back from them. I understand the communication in a multimillion dollar organization sometimes is not the best. Perhaps that didn't reach the head office but we had the information that they wanted and we have it today. And have to tell

you, Mr. Chairman, that I believe that any licensee that we do business with has the right to know what they are getting for their money. So we have that information; it is open and available.

We are proud of our transparency on all levels and incidentally there was never any finding of any improper coordination between ASCAP and any of the publishers. If there had been, I'm sure that the very capable judge would have brought it to our attention and would have filed on it. There was never any such filing.

Mr. COBLE. Thank you, sir.

Mr. Harrison?

Mr. HARRISON. Yes.

Transparency is a key part, as Mr. Frear indicated to any free and competitive market; the ability for users to understand who owns the content that is supposedly being licensed; and our ability to access that information.

With due respect to Mr. Williams, I don't want to get into a debate about what happened in a trial. There is a 136-page opinion that is very detailed by Judge Cote. And if the Chairman would like it, I'm happy to provide it for you.

Mr. COBLE. Let me try one more question before the red light appears.

Mr. Sherman, with the world going digital and the need to update our laws for the digital age, is the time to finally resolve music licensing issues, once and for all, before us?

Mr. SHERMAN. Definitely.

The opportunity has never been greater. It is when the system is in crisis that there is an actual opportunity to bring people together to actually try and make a difference. That time seems to be now.

Mr. COBLE. Anybody else want to add very briefly to that?

I will open the door, if you will, because my red light is about to illuminate.

I recognize the distinguished gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you very much.

Let me just say, first, before I begin, some questions that we have heard a lot of testimony today. We have heard testimony about the advantage of the, what do you call it, the free air play for free promotion system has served the industry, has served everybody well and it is, you know, it is a good thing.

Let me say I find that argument incredible. In a capitalist system, it may be somebody's judgment that not paying people for their performances because they get compensated through promotions, et cetera. That may be a judgment, it may be correct, it may be equitable. But, it should be the decision of the person whose services are being broadcast.

You will not go into a store and say, "I decide that the price of that is fairly such and such and, therefore, I am going to take it for that price." Someone who performs cannot be told that—I don't see how, in any rational or fairness system can be told that we have decided that for all these reason, you should be happy with just promotion. I don't see how equitably or morally anybody has the right to make such a decision, and certainly not Congress.

And so, all the arguments based on that, are just simply nonstarters; as far as I am concerned. Lots of debate on everything else, and balancing considerations, but there is no balance for saying we are going to take your work and not pay for it. That is not a balance. It is not a consideration.

Mr. Huppe, many have said that it is time for unified comprehensive approach to address the licensing problems of the music industry. Do you agree and, if so, what steps should Congress take to help bring that about?

Mr. HUPPE. Yes, Mr. Nadler.

First off, thank you for your comments on promotion. I could not agree more with your thoughts on that. The concept that the broadcasters believe they can take that right and not pay for it is as ludicrous as suggesting that a book can be made of a movie and yet the author of the book does not have to be compensated, or that the NFL can broadcast games on national TV but, yet, the NFL doesn't have to be compensated.

In terms of unification, I agree with you. We do need to streamline the system of licensing. One of the benefits of the statutory license that SoundExchange operates under is that it is a system that is transparent and efficient. We are the most efficient at what we do. Ninety percent of the royalties that come into our shop are out the door within 75 days, and we have the lowest admin rate. So having a coordinated streamline licensing system is absolutely urgent.

Mr. NADLER. Thank you.

And briefly, how has the lack of a public performance right for terrestrial radio impacted artists and the overall music marketplace?

Mr. HUPPE. Artists are losing the tune hundreds of millions of dollars over the course of the past several years not only in the United States where radio makes $17 billion but compensates artists zero, but they also lose royalties overseas where——

Mr. NADLER. There is a lack of reciprocity.

Mr. HUPPE. Lack of reciprocity.

Mr. NADLER. And if they got that money, what impact would that have in the broadcast industry?

Mr. HUPPE. The overseas money or the——

Mr. NADLER. Here.

Mr. HUPPE. It depends on what the rate is, Mr. Nadler, but if they got that money, it would go a long way toward compensating the artists who deserve to be paid for the central feature they play in the services.

Mr. NADLER. Thank you.

Ms. Cash, will you comment on that question?

Ms. CASH. I agree.

The idea that I am patted on the head and said, "Well, it's promotional, you know, it's good for you," I would rather have control of my copyrights and rather be paid for that. I am a songwriter, as well. So I live in both worlds. But, the fact that they can use my songs on the radio, my sound recordings, to make billions of dollars for themselves and basically use my work to sell ads, is not only ludicrous it is insulting. And artists should have control of their copyrights.

Mr. NADLER. Thank you.

Mr. Frear, you said that there is no reason that satellite radio and Internet radio should pay sound recording performance royalties while terrestrial radio continues to enjoy and exemption from that obligation. Should I take it from that, that you would agree that everyone should get paid or that no one should get paid?

Mr. FREAR. I actually do feel everyone should get paid.

Mr. NADLER. Thank you.

There are different rate-setting standards applicable to different uses of music. Some are established under the 801(b) standard, which many argue produce below market rates, while other rates are set under the market-based willing buyer, willing seller approach. For example, satellite radio is subject to 801(b) while webcasting's rates are set according to the willing buyer, willing selling standards. How are these differing standards justified? I am not sure who I should ask that of.

Mr. SHERMAN. They really shouldn't be justified. Everybody should be paying on the same rate standard regardless of the platform on which the music is appearing. It doesn't make sense to have different standards for different platforms. It is having Congress pick winners and losers, which is not what Congress ought to be doing.

Mr. NADLER. Would anyone on the panel disagree with that?

Mr. WILLIAMS. If I may, you know, the fact is there are so many different, it is Paul Williams down here. [Laughter.]

You know, ASCAP licenses many, many different platforms for our music; radio, television, cable, satellite and, happily now, Pandora. You know, we operate one of the most efficient performing rights organizations in the world. We don't operate at the percentage that you just heard SoundExchange because we have a much wider group of people that we are servicing with our music. The fact is that trying to operate under the consent decree as it exists right now is crippling to us. We operate at 12 percent. At 12 percent, which would come down considerably if we could be relieved of some of the millions and millions and millions of dollars we spend in——

Mr. NADLER. I am sorry. What do you mean you operate at 12 percent? 12 percent of what?

Mr. WILLIAMS. Let me ask if Pandora will be kind and help me on this.

At 12 percent is our operate—88 cents of every dollar we collect goes to our writers.

I am a songwriter so that 12 percent takes care of a large group of people trying to keep track of everything that is going on. We do it more efficiently than anybody probably in the world. We are one of the most efficient. This rigorous honesty is part of my recovery and a part of my oath today.

But I am proud of the way we operate. But when you look at a system where, you know, where the recording labels and the artists receive 12 to 14 times more for the exact same thing we get, something is broken.

You can do two things for us in Congress. First of all, you can support our efforts with the Department of Justice and you can pass the Songwriter's Equity Act which will allow us to go into

court and present both sides of both copyrights and the information around what they are both being paid. Be huge, huge.

You know, what Congressmen Collins and Jeffries have offered is not a comprehensive, it is not going to fix everything, but it is a beautiful in-road to putting some balance in the way we operate. We are so grateful for that. And I think that what we all want is to see, I mean, I want Pandora to, not survive, I want Pandora to thrive; you know? I mean, I made albums that even my family didn't buy. I love the idea that he is going to out there and make it available for anybody if they might want it.

Mr. NADLER. Thank you.

My time has expired. I yield back.

Mr. MARINO [presiding]. Thank you.

Mr. Chabot?

Mr. CHABOT. Thank you, Mr. Chairman.

I would first like to ask unanimous consent to insert into the hearing record, House Concurrent Resolution 16, which is the Local Radio Freedom Act, which states in part that "Congress should not impose any new performance fee, tax royalty, or other charge relating to public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air."

Local radio stations provide promotion of the music they play at no cost to the listener. This concurrent resolution has 225 bipartisan cosponsors including myself, which is more than a majority in the house. And I think it is important to at least mention, I know we have had some kind of disparaging remarks about the recording industry from some of our panel members. I certainly understand that, but I thought that should be, at least, part of the record. I would also, just a couple of comments before I get to the question.

Mr. Huppe, I——

Mr. MARINO. Without objection, those documents will be entered into the record.

[The information referred to follows:]

113TH CONGRESS
1ST SESSION

H. CON. RES. 16

Supporting the Local Radio Freedom Act.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 15, 2013

Mr. CONAWAY (for himself, Mr. ALEXANDER, Mr. BONNER, Mr. BOUSTANY, Mr. BUTTERFIELD, Mr. CALVERT, Mrs. CAPITO, Mr. CAPUANO, Mr. CASSIDY, Mr. COFFMAN, Mr. COURTNEY, Mr. COLE, Mr. CRENSHAW, Mr. DENT, Mr. DIAZ-BALART, Mr. DINGELL, Mrs. ELLMERS, Mr. FITZPATRICK, Mr. FLEMING, Mr. FLORES, Mr. GENE GREEN of Texas, Mr. GINGREY of Georgia, Ms. GRANGER, Mr. HARPER, Mr. HASTINGS of Florida, Mr. HASTINGS of Washington, Mr. HINOJOSA, Mr. HUELSKAMP, Mr. HULTGREN, Mr. KINZINGER of Illinois, Mr. JOYCE, Mr. KLINE, Mr. LAMBORN, Mr. LANCE, Mr. LOEBSACK, Mr. LONG, Mr. LUETKEMEYER, Mr. MCHENRY, Mr. MEEKS, Mr. MICHAUD, Mr. MILLER of Florida, Mr. NEUGEBAUER, Mr. NUNNELEE, Mr. OLSON, Mr. PEARCE, Mr. PETRI, Mr. POE of Texas, Mr. POMPEO, Mr. RANGEL, Mr. ROGERS of Kentucky, Mr. ROGERS of Alabama, Mr. ROGERS of Michigan, Mr. ROYCE, Mr. RUNYAN, Mr. RYAN of Ohio, Mr. SARBANES, Mr. SCHWEIKERT, Mr. SESSIONS, Mr. SHIMKUS, Mr. SIMPSON, Mr. STIVERS, Mr. TERRY, Mr. THOMPSON of Pennsylvania, Mr. TIBERI, Mr. TURNER, Mr. VISCLOSKY, Mr. WALBERG, Mr. WALDEN, Mr. WESTMORELAND, Mr. WITTMAN, Mr. WILSON of South Carolina, Mr. WOMACK, and Mrs. MCCARTHY of New York) submitted the following concurrent resolution; which was referred to the Committee on the Judiciary

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CONCURRENT RESOLUTION

Supporting the Local Radio Freedom Act.

the symbiotic relationship that has existed among these industries for many decades;

Whereas for more than 80 years, Congress has rejected repeated calls by the recording industry to impose a performance fee on local radio stations for simply playing music on the radio and upsetting the mutually beneficial relationship between local radio and the recording industry;

Whereas local radio stations provide free publicity and promotion to the recording industry and performers of music in the form of radio air play, interviews with performers, introduction of new performers, concert promotions, and publicity that promotes the sale of music, concert tickets, ring tones, music videos and associated merchandise;

Whereas Congress found that "the sale of many sound recordings and the careers of many performers benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting";

Whereas local radio broadcasters provide tens of thousands of hours of essential local news and weather information during times of national emergencies and natural disasters, as well as public affairs programming, sports, and hundreds of millions of dollars of time for public service announcements and local fund raising efforts for worthy charitable causes, all of which are jeopardized if local radio stations are forced to divert revenues to pay for a new performance fee;

nesses that play music including bars, restaurants, retail establishments, sports and other entertainment venues, shopping centers and transportation facilities; and

Whereas the hardship that would result from a new performance fee would hurt American businesses, and ultimately the American consumers who rely on local radio for news, weather, and entertainment; and such a performance fee is not justified when the current system has produced the most prolific and innovative broadcasting, music, and sound recording industries in the world: Now, therefore, be it

1 *Resolved by the House of Representatives (the Senate*
2 *concurring),* That Congress should not impose any new
3 performance fee, tax, royalty, or other charge relating to
4 the public performance of sound recordings on a local
5 radio station for broadcasting sound recordings over-the-
6 air, or on any business for such public performance of
7 sound recordings.

○

Mr. CHABOT. Thank you.

Is it Huppe?

Mr. HUPPE. Yes. Huppe. Yes, sir.

Mr. CHABOT. Okay. I just wanted to thank you. I think we are at something like 7 percent approval now. And, to say Congress actually did something right, we don't hear that much around here.

Mr. HUPPE. Happy to oblige.

Mr. CHABOT. Oh, thank you very much.

And, Mr. Williams, we have had an opportunity to meet a number of times over the years you have been here. And you are a national treasure. You know, thank you for——

Mr. WILLIAMS. Thank you very much. Thank you.

Mr. CHABOT [continuing]. Everything that you have done to make life better. You got some amazing songs. Thank you.

Mr. WILLIAMS. Thank you.

Mr. CHABOT. Let us see.

Mr. Frear, being kind of an old codger, I enjoy some—I guess Sirius was in our car when we got it. We kept the service and we enjoy it, especially when you are kind of traveling around the country.

Mr. FREAR. I thank you, Congressman. My daughters thank you, as well.

Mr. CHABOT. Thank you. [Laughter.]

Cousin Brucie, in particular, and Herman's Hermits Peter Noone, is sort of, you know, we can kind of relate to that. It is interesting.

And now, I guess one question I always have—this is a very large panel, we usually have four or something like that. We have got nine and a lot of interest or recognize—is there any particular interest that probably should have been added or that we could have added that didn't? Either it got overlooked? Anybody have comment on that on the panel? Is there anybody else that perhaps we could have thought of that didn't get in or was either overlooked or whatever?

Mr. Huppe?

Mr. HUPPE. Yes.

I will say one thing, Mr. Congressmen. We have, obviously, a large panel here and we have great performing artist representatives. Obviously, with two artists to our right, one very important constituency of SoundExchange are actually the two leading unions in our industry: AFM, the American Federation of Musicians and also SAG-AFTRA. And the unions represent, in addition to featured artists another important group of non-featured artists, background musicians, background vocalists who also have a very important voice in this debate; I think.

Mr. CHABOT. Okay, thank you.

And during the copyright hearings that we have had, we have heard the term free market obviously used a lot from every different side of the debate. I would kind of like to hear how recording artists view a free market system working. Do artists believe a free market model to be a better alternative than the licensing system that we have today? With so much consolidation in the industry, do you believe it is even possible for music to truly become a free market?

Mr. Williams?

Mr. WILLIAMS. It is exactly what we are seeking. We are seeking a free market because a free market will dictate, you know, what something is worth. And the last thing that we need is less control of our music.

You know, the one area where you can really get a sense of what the free market is is in sync licenses. Everything else is basically controlled under our agreement with the consent decree with the Department of Justice. But if you look at sync licenses, which are straight ahead free market, it is about a 50/50 split.

In a sense, you know, this is the United States of America, we can trust business to work things out. And incidentally, I want to thank Pandora right now. You are getting a classic example of the two of us working together when I can't hear what you are asking me and he tells me. And I am actually trusting that he is telling me the actual question. [Laughter.]

So, you know, the fact is the collectively——

Mr. HUPPE. The question is: What is the performance right?

Mr. WILLIAMS. You know, I am kind of in a little David and Goliath moment here. You know, sitting between the giants of the industry. I left my sling at home. What I brought is the truth and the truth is I represent 500,000 songwriters, composers and publishers. I mean, what an honor to share this time with Rosanne. What we do is reach in to the center of our chest and, you know, try to write something that will, you know, that will affect people's lives, it will comfort them in sad times. You know, all I wanted was to right something that would make a young lady say yes when I ask her to marry her. And three times, thankfully, that happened. [Laughter.]

So we can all work together. I can turn to Pandora for help on all. I think so much for examining this system.

The system is broken. You know, most of our money has always come from traditional, you know, from bars and grills, radio, wonderful radio, amazing relationship we have had with radio through the years. They give us their advertising money in a fair and a system that we have always been able to work out. You know, you sit down, roll up your sleeves and you strike a deal. It is a great way to work in all.

But, the fact is, that the world is changing. People don't want to own their music anymore, they want to stream it. And thanks to people like Pandora and Spotify, I can hear my music anywhere in the world. I can put in my car whenever I like. It is a wonderful time, it should be the golden age of music. For the music listener, who is the person we care most about, this is a time they should celebrate. The stream is a dream, it should not be the nightmare for the men and women who create music.

Mr. MARINO. Thank you.

Paul, you should have brought the infamous stack of phonebooks that we talked about a couple of times.

Mr. WILLIAMS. Yes, exactly.

Last Friday, I did. I conducted an orchestra for Dick Clark standing on a bunch of phonebooks, you know. In this room I would stand on the bible. [Laughter.]

Mr. MARINO. Dr. Chu?

Ms. CHU. Thank you.

As Co-Chair of the Creative Rights Caucus, I firmly believe that artists should be fairly compensated across all platforms but we know this is not the case in the U.S. In fact, let me tell you about the story of Janita who provides a contrast between Finland and the U.S. She is a recording artist originally from Finland who lived there for her first 18 years, became a profession singer at a young age in her home country. She was paid for her performances on the radio in Finland, which was about a third of her income.

Then, she moved to New York when she was 17 to take the next steps in her career. She achieved success with having two Billboard magazine top 40 U.S. radio hits but was shocked to find out that the U.S. didn't pay artists for radio airplay. She thought, perhaps, Finland was an exception in paying artists and that the rest of the world didn't pay artists their radio royalties. But it turns out that it was the other way around. The U.S. was the exception in not paying radio royalties. Well there are two other countries: Iran and North Korea.

Well, last summer, Janita proudly became a U.S. citizen but, in doing so, she is now a citizen of a democratic country that doesn't honor AM/FM radio pay for its artists. And she suffers a loss of significant income. This is not the American dream that she envisioned.

Her story shows that we need to fix the disparities in the current music licensing system to make sure that artists are fairly compensated. If we don't, we risk losing the innovation from creators like Janita because they will no longer have the incentive to create for the public.

And so, I would like to ask a question to Paul Williams. One area of agreement between you and the music licensees on the panel appears to be the importance of preserving the voluntary collective licensing model that ASCAP pioneered. You have made a compelling case that this is at risk of crumbling. Clearly, that would be a bad result for music licensees. So what would that mean for ASCAP songwriters and composers, particularly, your smaller, independent and up-and-coming members?

Mr. WILLIAMS. Oh, it would be devastating.

First of all, thank you, Congresswoman Chu, for your advocacy. You have been a great friend to music creators and we appreciate that.

You know, if things don't change, if the consent decree isn't modified, our major publishers are looking to withdraw their rights. And if they do that, it fragments the system; it becomes more expensive; it becomes less sufficient. I think what we have to do is we have to look at a very, very quick adjustment to the system. But, essentially, it needs—the entire consent decree is, at this point, is—it is not like going into battle with one hand tied behind your back that you are going to fight with. It is one hand tied behind your back that you are going to feed your family with.

Incidentally, as far as the performance and the sound recording, I absolutely believe that everybody—it is a sad, sad story to hear of somebody losing their loss of income when they become an American citizen. We absolutely believe that everybody that contributes, you know, to the performance of music, the creation of music,

should be honored. But, it is not an excuse to pay less to the people that create the music, though. We need to find a balance and I think the trick is to let the fair market decide that for us.

Ms. CHU. Thank you for that.

My next question is for both Chris Harrison of Pandora and Rosanne Cash. Last year, Pandora embarked on a campaign to rally artists to sign a petition to Congress in support of Internet radio, but it was during the time when the Internet Radio Freedom Act was being debated in Congress; which would have actually resulted in a cut to artist royalties. Pandora's letter to artists stated that they simply wanted to have the artist's voice heard. And yet, from what some artists discovered, this was not the actual intent. The implication for the artist signing the petition, at that particularly time, was that they were supporting cuts to themselves.

So, Mr. Harrison, can you tell why Pandora enlisted the help of artists?

And, Ms. Cash, can you tell us what you, in the creative community felt when this was happening?

Mr. HARRISON. Part of my opening remarks I noted that Pandora plays 100,000 recording artists every month, and 80 percent of those recording artists don't get played on terrestrial radio. There is, actually, a large group of independent, primarily recording artists and singer/songwriters, who do value Pandora because it is the only outlet, the only distribution platform available for them to find an audience that loves their music.

Ms. CHU. Ms. Cash?

Ms. CASH. That is what a lot of us are calling the exposure argument; that we are seduced into thinking if we allow these performances, without pay that we will get exposure, therefore, drive consumers to buy our records. That may or may not be true, but the point still remains that we don't have control over those copyrights and we are not paid fair compensation. We are not paid fair market rates.

As I said before, there is no transparency about this. It is somewhat manipulative. And I feel that we end up subsidizing these multibillion dollar companies. They use our music as something like a loss leader to draw people in and they make the money.

And, to confirm what Mr. Williams said, the place that artists have the most control are sync licenses. I have given my songs for free, my choice, to college students making their first film who want to use my song. That is great. I want to support them. And then, I have negotiated a fair rate with a popular television show that wanted to use my song. I have control over those things and that is the bottom-line. That, and fair compensation.

Ms. CHU. Thank you.

I yield back.

Mr. MARINO. Thank you.

I am going to ask some questions now or, more so, make some statements and then, hopefully, you can respond.

First of all, I would like to give each member of the distinguished panel an opportunity to respond to this question, following question, in writing; if you care to do it? Because there are too many and we are not going to get through my couple of minutes. If you would be so kind as to tell me, in your opinion, what a free market

is and what a fair market is, comparing the two. Because I hear those terms thrown around. Free market. Fair market.

I asked the last panel to do this and I am asking you to do the same and get that to me in writing; if you care to do so.

I have been having meetings. My staff and I have been meeting with people that have a dog in this fight, continually. We have been doing it for months. If someone has not been invited to a meeting, please contact my office. I am Congressman Tom Marino and I'm Vice-Chair of this Subcommittee. And let us know, because I think we have covered all the bases but there are many, many people involved in this. I am trying to get a consensus. I don't want Congress to sit down and have to sort this out. And I will show you why in a minute.

This is very complex. I have been studying this for months and talking to many people. And here is the reason why I do not want Congress to sit down if we can get a consensus among everyone who has skin in the game. I am going to read to you a list of those individuals and I probably missed one or two. These are the parties that we have come to the conclusion that are involved in this, excluding the public: songwriters; movie score composers; performance rights organizations, PROs, such as BMI and ASCAP; royalty collectors for digital music; SoundExchange; artists/performers; terrestrial radio; broadcasters; satellite radio; cable TV radio; digital radio; streaming; digital download; providers like iTunes; record labels, copyright owners; music promoters; consumers; listeners; music publishers; collective music organizations; Music Academy; GRAMMYs; recording engineers; copyright offices; groups that may hold exemptions such as libraries, universities, churches; and I am sure I missed someone.

So you see the litany of names and individuals and groups and entities that we have involved here. Now, what I am going to show you, for the record and without objection, I would like this schematic that I have in front of me, it is a schematic of the music licensing marketplace and the publishers/songwriters and anyone else involved in the litany of names that I just read off. I have a beautiful colored display here on my iPad. You are not going to see it but I am just going to hold this up. You may be able to understand some of it.

This is an example of the breakdown, and these are on both sides. So I have three documents here of the breakdown of the schematic just like a corporation would be set up; President, CEO, Vice Presidents, et cetera. This is the complication of the legislation that we have and those involved. Look at the subcategories underneath the subcategories underneath the subcategories on both sides of these documents. And the third one that I hold up here, as well.

Then, we get into issues such as payment. Who is going to be paid? How are they going to be paid? What are the courts going to do about this? And I do not even have the court schematic here showing the process that one would go through if there are appeals.

So I think I got my point across here about how complicated this is, how complex this is, but we are also talking about, you know, fairness and on just to songwriters and writers and individuals

who are not being compensated, particularly those because of the legislation from 1972, prior to 1972. And that has something to do with State law, which is an issue that I think can be dealt with today.

So as trying to be an individual, that is learning as much as possible about this, hearing from everyone. Some of you are a little disappointed because I haven't said, you know, which way I am leaning on this. As a prosecutor, I want all the information at my fingertips before I make a decision. But, also, I am asking everyone that I mentioned here today to please, please think about sitting down with us in a group face-to-face. It is real difficult. It is more difficult to sit face-to-face and look at each other eyeball-to-eyeball and say no as it is instead of over the phone or an e-mail. So maybe we can get together and you folks can get a consensus on this and that will resolve the issue. It is a monumental task but we will attempt it. My time has run out so thank you very much.

Mr. Conyers?

Mr. CONYERS. Thank you, Chairman Marino.

Let me ask Paul Williams this question: Do you believe that the consent decree system severely limits ASCAP's members from achieving competitive market rates for their works?

Mr. WILLIAMS. Congressman Conyers, you absolutely go to the heart of the reason that I am here. And to address something you just spoke about, one of the things we're denied because the consent decree is the right to bundle rights. You go to all these different places for all these wonderful uses of our music.

One of the things might change in the consent decree you are going to give us is, which we are hoping will be given at some point, is the right to bundle these rights. You know, it is exhausting for people to go from one place to another to another for these rights.

There are two copyrights. There is a copyright for the original material, there is a copyright for the recorded material. I think that it is incredibly complicated. What would be a great solution is to bring it back to us and let us, you know, let us control our future. Let us control our copyright. The last thing we need is to throw more of this into the government's lap to deal with it for us.

Mr. CONYERS. So the decree hasn't accommodated the rapid and dramatic changes, technologically, that we are all talking about. And we have to end up in a rate court on top of it all and I think that this is the new situation that we have been in since the decree. And I am hoping that all of our Members on the Committee will take this into account.

Now I want to say that broadcast radio has played an important role in the lives of people all across the country. Broadcasts have educated listeners to important events, emergencies, and a lot of new music including jazz, I might add. And we want to work with the broadcasters to continue to do this work not just down to the communities but all the communities. Now, if there is anybody of the nine witnesses here that oppose creating an AM/FM performance right; would you just raise your hand so I will know who you are?

[Nonverbal response.]

Mr. CONYERS. Okay.

We got a couple of hands raised. And now that you have been identified and branded appropriately, we will know how to proceed. But I thank you for your candor and frankness about this.

I am going to ask one of the hand raisers, Warfield, has the lack of a public performance right for terrestrial radio impacted the overall music marketplace?

Mr. WARFIELD. Mr. Conyers, I would say I have been in this industry for over 37 years and what has always been true during that period of time is the relationship that radio stations and record companies have had. We have supported one another consistently through that period of time to the point that we are looking at an industry here, a recording industry even with the challenges that it has, just like the radio industry has its challenges, it is still the strongest recording industry in the world.

I mean, I have heard remarks about who we could be with that we are not proud of but we have an industry, a recording industry here that is larger than any industry, any recording industry in——

Mr. CONYERS. Thank you.

Let me get one question into Ms. Cash before my time expires. And it is about the RESPECT Act that I introduced with our colleague, Congressman Holding. Do you think it would address the payment disparity and do you think it important that we fix the loophole in the copyright protection for sound recordings before 1972, which refuses to pay, the older artists?

Ms. CASH. I thank you for introducing that bill. Of course I think we have to fix that loophole. The example I gave you about my father, his royalties going to someone else who did a cover version of his song. It is hard to understand how that could be possible. But these legacy artists, some of them: they are growing older; they are ill, the ones who are still around; they have to go on the road when they would rather not to make up for the money they would have received from these royalties. It is heartbreaking. I see this all the time. I know these people in that generation before me who are still around.

Mr. CONYERS. Thank you so much.

Mr. Chairman, I yield back.

Mr. COBLE [presiding]. Mr. Conyers, even though you have exposed certain panelists, I think you will be able to walk the halls safely. [Laughter.]

Mr. CONYERS. I am more worried about them than me. [Laughter.]

Mr. COBLE. I won't go there.

The distinguished gentleman from California, Mr. Issa.

Mr. ISSA. Thank you, Mr. Chairman.

Chairman Goodlatte has said he wants to do comprehensive copyright reform and I am going to take this opportunity today to challenge all of you, since you sort of represent, no kidding, the spectrum, the width and breath, of the problem in music both written and obviously the broadcast of the performance.

And we will just go back, as we often do here, especially for the non-lawyers who were here on behalf of the constitution, to the clause. And I am leaving words out because I only want to have the part related to copyright not the part related to patent. The

constitution clearly says that we have "To promote the progress of useful art for a limited time on behalf of the author's exclusive right to the respective writings."

Now it doesn't actually talk about the performance, but we have all come to appreciate that a performance is, in fact, part of that structure of writing. The constitution is an interesting document to go back to because sometimes it is illustrative of all the mistakes we, on this side of the dais, and presidents have made during their time doing our job.

We have totally screwed up your industry relative to the constitution. If I read the constitution very clearly, although the "promote" does say that, in fact, what we do in the way of granting you exclusive rights for a limited time is for the purpose of in fact enhancing commerce. I don't believe that the founders ever thought that the "promote" would be to exclude a performance from being paid if in fact the owner of that who had the exclusive right, which to me is the right to exclude, didn't want it to be played for free. And yet, we don't have that right. And I have joined Mr. Conyers for years in trying to rectify that.

But I think there is a bigger problem here today and I would like you all to comment on it from your respective positions, starting with Ms. Cash. If, in fact, the intent has always been exclusive right, and I will read that backwards, right to exclude, belongs to the author or to the performer or, to be honest, to the many people that are part of that collective process that we will just call a right, if that right were to be restored, wouldn't we essentially eliminate all of these court decisions, all of these consent judgments, and most of the laws that we have helped perpetuate including the exclusions?

Then we would be down to Congress determining that there had to be a fair use under free speech and so on. We would want to have that. Sampling but not sampling as a ringtone, necessarily. Those kinds of things. And wouldn't we, then, empower all of you to come together, Mr. Williams, come together and decide that collectively you are going to offer your rights through pooling or individually you are going to retain your rights if you are just, say, The Beatles?

Isn't one of the fundamental things we should consider here, scrapping generations of legislation that now cause us to infinitely try to figure out whether in fact Pandora can effectively compete against broadcasters, effectively compete against satellite, effectively compete because I am seeing all of you wanting to get a level playing field but not give up the playing advantage you have, if you have one. And I don't think Congress can do that.

I will start down the end and just say: How do you see the possibility of us scrapping almost everything we have done and then giving the industry an opportunity to rebuild against the original intent of the constitution?

Ms. CASH. Can I just say that the question, itself, gave me hope? So thank you. That was so well stated.

I would hope that exactly what you just said, that restoring, although I don't even know if restoring is the right word because it was never there. Performance royalty would solve so many of these

problems that you could then build from the ground up to create a new paradigm. I don't know, but I hope so.

I know that for every Mick Jagger in the world there are 10,000 musicians who are in the trenches.

Mr. ISSA. And they were all younger.

Ms. CASH. They are younger, too. And they depend on those royalties that they are not getting. And, you know, the lack of performance royalty, I will just say this quickly, it is kind of a way of saying music should be free. If music should be free, I am willing to have that discussion when musicians aren't the only ones who aren't being paid.

Mr. ISSA. And I really do want to hear from the broadcasters too because you have inherited your business model, you didn't create it. Your company's owners bought based on a value that we put in. That, when Mr. Conyers and I try to change the law, to a certain extent, we are taking away value you have already bought and paid for. And I want to be sensitive to everyone at the table has inherited an unfair deal in some ways. Please.

Mr. COBLE. The red light has illuminated so we will hear from two witnesses, Darrell.

Mr. ISSA. Who is most motivated to answer?

Please.

And, Mr. Huppe.

Mr. VAN ARMAN. Well, let me touch on what Mr. Marino was talking about. A fair market is a free market with a level playing field that adequately compensates all creators but also serves the public interest. So if we scrap everything and start from scratch, that should be the guiding principle. How do we make sure that small creators, big creators and the public, all of their interest are well balanced?

Mr. FREAR. Yes, thank you.

You know, I think it is something that the Congress should consider. And, you know, as part of that consideration, please take into account the concentration of ownership in the music industry, and as you think about who is sitting across the table to negotiate the right; who actually is that? And in many cases, it isn't Ms. Cash. It is Universal Music, it is Sony, it is Warner, and on both the label side as well as the publishing side. I go out every day and try and negotiate direct licenses, and over the last 6 years I have negotiated 100 direct licenses with the music industry, none of them with major labels.

Mr. COBLES. Gentlemen, sorry to cut you off, Darrell, but the time has run out.

Mr. ISSA. My questioning time ran out, but answering time I thought was unlimited, Mr. Chairman.

I am only kidding. Thank you. [Laughter.]

Mr. COBLE. Thank you.

The distinguished gentleman from Florida.

Mr. DEUTCH. Thank you, Mr. Chairman. Thanks for holding today's hearing.

It is really easy to decide for some that the way things work today is the only way that they can work in the future, or that the, what is by all accounts an absurdly complex system that has developed over the past 100 years deserves all the credit for the thriving

cultural treasure that is the American music legacy. Certainly, some aspects of the system have helped but too many have been obstacles that the music industry is growing stronger by simply working around. Too frequently, revisions over the previous decades have ended up being both reactive and, all too often, parochial; preserving one element without making enough effort to look at music licensing as a whole.

And while it is tempting to point fingers, and there has been plenty of that today, I think it is helpful to recognize that everyone has the opportunity, everyone, everyone at this panel or previous panel, has the opportunity to benefit from new growth and markets if, as Mr. Marino had said earlier, we can agree on a basic framework that incentivizes and rewards creators while giving companies who profit from the music a fair transparent way to do so.

Our goal has got to be to fix the system so that everyone has an opportunity to succeed together. And that new entrants have the chance to continue transforming the way we listen to music in the future. So that is, I think, how we ought to approach this.

There are some issues that jump out at us. And, before I get into my question, I wanted to throw out one example of what I think represent the failures of a patchwork system, specifically the pre-72 distinction.

This, for the youngsters in the crowd, is an album.

[Laugher.]

Mr. DEUTCH. This album is Neil Young's Harvest, which includes legendary songs like Old Man and Heart of Gold. It was released on February 14, 1972. The precise cutoff for pre-72 recordings is February 15, 1972. That means that any track from this album, this bestselling album in 1972, can be played without paying for it. But, if it had been recorded on February 16, released on February 16, just a day after its release, Neil Young's songs from this album would be covered with full Federal copyright protection.

Now, Mr. Frear, you said earlier in exchange with Mr. Nadler that you believe that everyone should be paid. Why shouldn't that include legacy artists?

Mr. FREAR. Well, I believe it should. I think Congress has had two shots at this and has rendered its opinion both times. First, back in 1972 when it decided to distinguish, for reasons I am not familiar with, between recordings before that date and after it. And then, the second time, 20 years ago, when it granted the sound recording performance right and did not extend that right to pre-72.

Mr. DEUTCH. So if Congress acted today, you would acknowledge that that is consistent with what you said earlier, that everyone should get paid.

Mr. FREAR. Well, I think that——

Mr. DEUTCH. Are you supportive of those efforts?

Mr. FREAR. I would be supportive of closing the loophole that Mr. Conyers referred to. That loophole includes terrestrial radio, as well as pre-72.

Mr. DEUTCH. I appreciate that.

So let me get to Mr. Christian who said something earlier—I appreciate it, Mr. Frear.

Mr. Christian, you said something earlier that I think helps us focus a lot on what we are dealing with. You said in your testimony

that with particular reference to the recurring demand by the recording industry for sound recording performance right to be imposed on terrestrial radio "Understand, you said, that the radio industry is not some vast pot of riches that can be tapped as a bailout for a recording industry that has failed to execute a digital strategy that addresses a decline in its brick and mortar income. Congress unambiguously intended that, in exchange for your unique promotional support, terrestrial radio should be treated differently from other transmission platforms."

And you say that premise hasn't changed. And then, you go on to explain that any change in our approach will be met with opposition because it would cripple a radio industry that has been financially treading water for years now. I would respectively suggest that this is what we are trying to get at today.

Going from the claim that there shouldn't be a performance right because the music guys haven't been able to figure out their industry and we shouldn't impose it on the radio industry, which you acknowledge is, as you put it, has been treading water financially for years now. That doesn't help us solve the problem, help us address this position that we are in.

As was included in this document that was referenced, I think, Mr. Warfield, in your testimony it says that "conventional wisdom is that radio airplay stimulates record sales." And it quotes a study from a law review article in 1974. And it talks about a survey of rock music buyers that found that 80 percent of albums were purchased because a particular track was first heard over the radio. But that survey was conducted in 1972.

I acknowledge the role the broadcast radio plays, the important role that it plays in our communities, but for us to go at this issue as if where we stand today, in 2014, is somehow unchanged from the industry as it existed decades ago, I don't think is appropriate and I don't think it is fair of all of the rest of us, new market entrants, musicians and the rest.

I hope that, as we go forward in this debate, we can acknowledge the important role that everyone on this panel plays in furthering the music industry and providing unbelievable music and outlets for Ms. Cash's work and for Mr. Williams' work and for all of the members. But let us do it in a way that recognizes that, if we only take the parochial view of our industry, than we are never going to come up with something that works for everyone, we are probably going to fail. And that might satisfy some of you for short time but we are going to be right back at this again in a couple of years if we haven't had a chance to take that full approach.

And I yield back. I thank the Chairman.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Utah is recognized.

Mr. CHAFFETZ. I thank the Chairman. And glad to see so many of you having this discussion.

I particularly have a keen interest in Internet radio. I happen to believe that that is a big part of our future. It is where I see my kids enjoying music that they probably would have never seen or heard otherwise. They wouldn't have gotten it. Quite frankly, on terrestrial radio, they probably wouldn't have been able to afford to buy the albums that we did in generations past to even have a

chance to understand or see that. I personally have been exposed to a whole host of artists that I now enjoy on a regular basis, but I would have never heard of before.

I am also deeply concerned that the marketplace for Internet radio really isn't working. We can point to one who has been highly successful in Pandora. I enjoy them, but it does concern me that it is not much more prevalent than that and that, even under their model, they are not making the kind of money, even though some people want to attack some of the ownership, and also the others for, you know, making money on the way.

The reality is the Copyright Royalty Board has twice tried to set the royalties and twice the United States Congress needed to come in at the last hour and help save the deal and change it and make it so that it would work. And so, we don't want to keep doing that. Any time we have to go to Congress to get a fix, it is probably not going to turn out the way anybody wants it to turn out.

So, with that, I have deep concerns about how do we make this a viable business model going forward so that everybody can win along the way, and everybody can get paid along the way.

We have two standards: the 801(b) and the willing buyer, willing seller, which I think is grossly misnamed. To suggest it is willing buyer, willing seller and not have all the information at your fingertips to enter in those discussions is grossly misleading.

Let us go to Mr. Sherman, if I could. From what I have seen, in my limited viewpoint, you have been a little inconsistent. On the one hand you sort of like the 801(b) and sometimes you don't like the 801(b) depending on which side of the negotiation you are on. Can you help clarify that for me?

Mr. SHERMAN. We have actually said that we are fine with changing 801(b) to a willing buyer, willing seller standard across all platforms. We just want it to be part of comprehensive reform. We don't want to pay on one standard and not get paid on the same standard. But we think that the right standard is willing buyer, willing seller for all creators across all platforms.

Mr. CHAFFETZ. And would that include in the negotiation having all the information available for all parties? Is there anything you would withhold from those negotiations?

Mr. SHERMAN. Well, certainly the CRB process has all the information available to all parties. How information can be disseminated when there are a lot of private deals with nondisclosure agreements and so on, becomes more complicated, obviously.

Mr. CHAFFETZ. That is why I am asking you. What would you do?

It seems to me that if you are going to have willing buyer, willing seller, you got to come to the table with all the information and not just hide parts of it, which is what has happened in the past. Would agree or disagree with that?

Mr. SHERMAN. No. I don't think that anything has been hidden because all the information becomes available to all of the parties and all of the lawyers who are litigating the cases have all the information. A lot of those settlements take place after that information has completely circulated.

You know, one other thing I would like to comment on is you talk about whether Internet radio is profitable and so and so forth. But, if you look at a company like Amazon, which has a $75 billion prof-

it, excuse me, capitalization rate, everybody would consider them a huge success. But their profit, last year, was 1 percent $274 million on $70 billion revenue.

Mr. CHAFFETZ. But this is part of the concern. Some of the biggest players into this music world. On the one hand, it is a good thing to see Amazon and Apple get into this part of it, but when you saw Rolling Stone and MTV and you saw these other organizations try to get in the space whose forte is into the music industry, they have never been able to make it a go. And they started into this and then they had to let go of it. Yahoo did this. Others cannot make a go of this.

My time is so short. I need to go to Mr. Harrison. I want to understand what would happen to Pandora if Congress had not stepped in and fixed what happened at the Copyright Royalty Board.

Mr. HARRISON. Well, the CRB rates are obviously part of the public record. They are multiples of what the negotiated settlement was, the pure play rates. I guess you just have to do the math. Obviously, if we're paying 60 to 70 percent of our revenue under the pure play rates. If the CRB rates are two or three times that, I am not very good at math, but I don't think at 120 percent of revenue we can make it up in volume.

Mr. CHAFFETZ. What do we need to do to ensure more transparency? And why don't you have more competitors?

Mr. HARRISON. It is an interesting question. I think you have touched on it a little bit. The rates certainly are an issue. The entrants we have seen recently are all engaged in other lines of business; Apple, Google, Amazon. And music is really an ancillary product that is designed to sell the primary service. We have had East Village Radio, which is a longstanding Internet radio service in Mr. Conyers, I am sorry, Mr. Nadler's district. And that recently went out of business because they couldn't afford the royalty rates.

So certainly, if you look at the comments that came in from the Copyright Office's Notice of Inquiry, from a large number of constituents including Mr. Frear, there is some process improvements that needs to be made in the Copyright Royalty Board that would improve the process and potentially improve the outcome.

Mr. CHAFFETZ. I wish I had an opportunity hear all of your answers but, Mr. Chairman, thank you for your indulgence in the extra time.

Mr. COBLE. I thank the gentleman.

The distinguished lady from California.

Ms. BASS. Thank you, Mr. Chair.

My colleague, Mr. Issa, had asked a question and I am not sure everybody got a chance to respond. I just want ask it slightly different. I believe he said: if we were to scrap copyright and start over, what would you like to see changed?

My question is is that could you briefly explain one provision that you would amend in the current law? And I know that several of you didn't have a change to respond. So those of you that didn't maybe you would like to take the opportunity now.

Mr. Warfield?

Mr. WARFIELD. I am sorry. I know Mr. Christian and I represented radio. We haven't had much to say here today. A lot has been said about us. We have not had an opportunity to say much.

Ms. BASS. Well, take the opportunity now.

Mr. WARFIELD. You know, I am hearing a lot of comments about the, you know, the industry that provides free play for free promotion and has done it for 80 years. And we are talking about what is driving it. Radio, itself, is driving it. I even heard comments here that radio does not drive record sales.

Congressman Deutch left, but there is a 2013 study recently issued that does indicate very clearly that more than any other platform radio airplay does drive sales. Even in digital platform it drives sales. You know, we have got an industry here that has really helped put these other businesses, give them the opportunity to go out and create a new business model.

Unfortunately, even on the radio side, we are not able to participate on the digital side. We pay into the system as it is now. We pay hundreds of million dollars to ASCAP and BMI and SESAC. We pay tens of millions of dollars to SoundExchange, and we do participate on digital side. But many broadcasters unfortunately cannot make a go of that as other entrants in the digital arena have found. With the way that the laws are written today, we cannot make money. We can spend money, we cannot make money. And that is not a model that is going to be a healthy one for any of the participants here.

So from a NAB perspective, we would very much like to see changes made in the streaming rate standards so that all of the participants here who all have concerns there can participate more fully and grow a platform that will benefit artists, writers, performers, labels, all participants here.

Ms. BASS. Other examples? Anybody else would like——

Mr. CHRISTIAN. I think one of the things that we would also like to see from Congress is if at some point in time, if you all could define what a performance is. Nobody has yet been able to tell us what a performance is. If you listen to SoundExchange, they will tell you that it is 3 seconds long. They won't tell you whether it is beginning, middle, or the end of what it is. So we are subjected to royalties that we can't even get a consensus as to what our royalty payment is for, and especially on the digital streaming part of it.

On the other part, we really must ask for oversight, especially in the advent of new performing rights organizations that are forming right now. There are no barriers to entry for performing rights organization; you need a catalogue, you need composers, you need whatever. And unless those rights are protected for the aggregators or some oversight, we run the risk of finding, as we have with SESAC, where there are antitrust things; which is why the 801(b) is more homogenous than the willing buyer, willing seller.

We really do need this oversight for an industry. We have got 10,000 different licenses to be administered, which is why the blanket license is important that we keep it in place, which is why the consent decree is important. Because, otherwise, you can imagine the madness of trying to find a way to deal with individual radio stations in your home district and every district up here to give

them a license, the record keeping and everything else. One final thing is——

Ms. BASS. Thank you. And then I want to move on before my time runs out.

Mr. CHRISTIAN. Okay. We do need a transparency in terms of identification of catalogues. We need to be able to find out, on a daily basis or whatever, who owns what; who the performers are and what it is.

Ms. BASS. Thank you.

Mr. Huppe, I believe——

Mr. HUPPE. Thank you, Congresswoman.

Ms. BASS [continuing]. You want to respond. And then, Mr. Williams, you look like you want to respond.

Mr. HUPPE. I would like to respond to our friends at radio. First of all, the concept that the sound recording Internet radio business is not working. I am not so sure that the proper image has been presented to the Committee.

The fact of the matter is, it isn't just Pandora who, last year alone, knows to non-GAAP profit. But the head of Clear Channel, Mr. Bob Pitman, announced just a few days ago that the iHeartRadio, that is terrestrial radio simulcast online, has 50 million users and has made several hundreds of millions of dollars, I believe, or hundreds of millions of dollars, which I assure you is vastly in excess of the content cost from where we sit.

Ms. BASS. Thank you.

Mr. HUPPE. Secondarily, we have 500 more services now using the statutory licenses that SoundExchange administers, 500 more than were there 2 years ago when I last testified before this Committee.

Ms. BASS. Okay.

Mr. HUPPE. You know who the majority of those are? The majority of those 500 are broadcasters like those that Mr. Warfield is speaking about going online.

Ms. BASS. Mr. Williams?

Mr. WILLIAMS. If you ask what we would change right now, it is thanks to Representative Collins and Jeffries, it has been offered to you right now, which is the Songwriters Equity Act. It fixes a small part of a really large problem for us; it fixes it immediately.

I agree with what Mr. Christian says about the value of the blanket license. It is a wonderful way to come together and simplify the system. And for somebody like Pandora, that 70 percent of their income that is rolling out for royalty payments, I have to remind everybody that ASCAP is getting about 1 or 2 percent of that. I am under oath, I won't say it is 1 percent but it is very close to that. It is a tiny, tiny part of that. So I wouldn't pretend to tell you how to adjust your business model but there is some way to do this so that music creators who create the one product you have can be properly compensated.

Ms. BASS. Thank you.

Mr. COBLE. The gentle lady's time has expired.

Ms. BASS. Okay.

Mr. COBLE. The distinguished gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

I think that, one, is sitting, you know, here today is one thing I have tried in this whole process and many of you on this panel, but many of you in the second, third, and forth rows back have been in our offices and we have talked many of times. And yes, the Songwriter Equity Act is an issue that we have brought forward. There has been other issues that have come before, from performance right to others also. I have tried to be very consistent that the one thing that I feel is that the creator in this process and the performer, there is a valuable inherent property right there.

I think I applaud the Supreme Court this morning for inherently seeing that there is a creative property right. Now that does not mean that the broadcasters and I will always get along. Probably not. But that is okay. There are things in this debate that we can all look at.

I was thinking about it just a few minutes ago as I listened to all of you. And the one thing I have tried to do in this whole process is I have interesting comments not to me, I have heard about it when you go to other places, so yes, it comes back, is that I want to take an arm from one and a leg from another and fix this all together.

But what I have found in the last little bit is that what has to happen in this process is one bad business model 5 years ago could now be the bad business model today. And you don't need Congress to come in and prop up either one of you. You need a process in which we can look at this and we fix it from a holistic approach that says that everybody is included; that everybody has a stake at the table. The pie is enlarging. Now the reason that some, and was interested in hearing, just a second ago from, you know, my friend from Pandora which I listen to, that a lot of these went out because they couldn't afford the rates.

Well, there is a lot of businesses in this country who go out of business because they can't afford their cost. That is an issue we have to deal with on both the broadcaster side and the digital side. The performers and the copyright holders are in the middle. That is the one thing that I am looking at.

One of the things that concerns me here, though, is that we are wanting many times to fix today's problem. And I have shared this with you when you come in. That is not my goal. My goal is to fix this problem when Pandora was—wow, I used to remember when I used to—you still listen to that? Unless they have changed greatly and it is no offense to them? But I think the radio, and when my first listening to an 8-track tape, as I told Ms. Cash this morning, was to her dad listening to A Boy Named Sue live from San Quentin. It all develops.

So the thing that you got to understand here is, is that when we come together, that you have got to remember that the bottom line there is a property right interest that many of you at this table make good money off of. And that has to be rewarded at all levels.

And I appreciate Mr. Huppe bringing in those background musicians and others. The problem is, though, if you continue and if we continue in this round of saying, well, I've got to protect my model and you got to protect your model and we don't get to that point, then my question is where are we at 20 years from now? When this panel maybe looks completely different, where are we at? So I will

open up a question to you. I don't want your answer for today where broadcasters say protect our terrestrial radio, where Pandora says look at our rates. Where are we going to be so that we are not coming back, as my friend from Utah said, every time there is a problem at the rate board we run to Congress to fix it?

I am an attorney beforehand and the last thing you wanted to do, and I did counseling and divorce work, the last thing you wanted was the judge to make a decision. Because, in the end when the judge makes the decision, both parties are unhappy. When you make the decision, then we go.

So Mr. Warfield, we got a minute and ten, you got 30 seconds.

Mr. Williams, you got 30 seconds.

Tell me what you envision how we can work this out so we are not propping up bad models either way.

Mr. WARFIELD. Well I think that there certainly needs to be a close look at the digital rates that are being charged. We would like to participate and grow there. We think that helps all of the stakeholders that are here.

The one thing that I would ask this Committee to keep in mind is the consumer, the user. We talk about terrestrial radio, it is free. It remains free. There is no additional cost that they have to incur. Let us keep them in mind as we talk about with these other business, how this is going to be more efficient for them and more cost worthy. But the consumer needs to be considered here also.

Mr. COLLINS. Time.

Mr. Williams?

Mr. WILLIAMS. We have an expression in recovery: Progress not perfection. Great progress is a Songwriter's Equity Act. That is a great beginning. The fact is, the people we need to think about today are the young songwriters who are starting out trying to have the kind of life that I have had.

I have a daughter who is a social worker. She got that because I was properly paid for the hard work that I was doing.

What we can do is give more control back to the songwriters. Yes, we don't want the judge to make all these decisions but we can move back to an arbitration panel which makes it a speedier more efficient way to deal with our problems. I think that it is a process that is going to take longer than any of us want it to take. But the fact is, if we don't step into it and make that first little adjustment, people are going to wind up getting day jobs instead of writing songs for a living.

Mr. COLLINS. The industry is moving forward. We are not moving backwards. It is not going to be automatic, as the song says.

Mr. WILLIAMS. Exactly.

Mr. COLLINS. So you got to move forward. You all got to come to the table and talk about this. And that is what we are going to be——

Mr. WILLIAMS. Thank you, Sir.

Mr. COLLINS [continuing]. Beginning to do in the next few weeks and months.

Mr. COBLE. I thank the gentleman from Georgia.

The distinguished gentleman from Louisiana and I will say to Mr. Richmond, if you promise not to show up at the ballgame tonight, I will give you 10 minutes. [Laughter.]

Mr. RICHMOND. I think with 10 minutes all I can do is get in trouble anyway. So I will take the five, but thank you.

Let me just pick up where my colleague, Mr. Collins, left off. And that is, you know, and I think Mr. Frear mentioned that Congress had two chances to get it right with the 1972 and the legacy royalties, and we didn't. All I can promise you is if we solve this problem, nobody is going to like it and it is probably going to be wrong. Because we are not the subject matter experts on it, the technology moves so fast and we will probably screw it up. But I say that to say, you all are at the table. You all should be in the room trying to figure out who can give and come to some sort of solution. And the other thing I would tell you all, just to be honest, is that nobody has a better ballgame position. Because if we do it, we'll probably start from scratch and nobody will like the results.

So that would just be my recommendation. And, you know, the comment was made earlier that for every Mick Jagger, there is 10,000 artists in the trenches. Well, I think they all live in New Orleans, by the way. And I want to make sure that they have an opportunity to continue to do and follow their passion and their dreams, but at the same time be compensated for it. And I tell people all the time when I go speak at schools, follow your dreams, do what you love, and if you do it well, you will make a living doing it. And I want to be able to look those kids in the face in our performing arts schools and all those things in New Orleans and actually mean it. And it has benefitted so many people in New Orleans and I would just like it to continue and to be there for the long-term.

Mr. Warfield, let me just ask you a very direct question because we beat around the bush and nobody says, what impact would it have to your industry if you all had to pay the performance, I mean to pay all the rights and royalties for what you play on the radio?

Mr. WARFIELD. I have testified to the potential financial impact of that to radio broadcasting. I have been in this business for 37 years, I have been in radio stations that have been sold. I worked for a wholly owned minority radio company that at one point was the twenty-second largest broadcasting company in the country that no longer exists today. And we made it clear at that point that we could not afford to pay a performance royalty if it was imposed upon the industry.

There are severe financial difficulties that many broadcasters would experience if that were the case. And, you know, I have been in this for 37 years, I have been doing it for 37 years to serve the communities that our stations serviced. The communities that I came out of, quite honestly here in Washington D.C. and Anacostia, continue to do that; not necessarily to serve the stakeholders that are here but they all benefit from what we do as terrestrial over-the-air broadcasters free.

Mr. RICHMOND. Well let me ask you a question. The station you talked about that closed, closed anyway. Do you think that this would put, for example, Clear Channel out of business?

Mr. WARFIELD. There are many different size broadcasters. You know, there are over 15,000——

Mr. RICHMOND. I am using Clear Channel as an example. Do you think it would put Clear Channel out of business?

Mr. WARFIELD. I don't know their financial standing. They are contributing and participating in the digital arena. My company cannot afford to do that on any major way. We could not afford the cost of participating. I think everyone up here would like to see the pie grow, we would like to see the digital platform grow, but not at the expense of our companies.

Mr. RICHMOND. And Mr. Frear, you mentioned that if everybody is contributing, that 1972 was a number that Congress picked. And are you saying that we decided to pick another number that went back further, as long as everybody had to pay it, you all are okay with that?

Mr. FREAR. Quite honestly, on this issue, we have been open to any number of solutions for years now. I have had many discussions with major labels over the years about whether or not they don't want to find a way to compromise on this issue. And I am happy to work with the Congress, I am happy to work with SoundExchange and the major labels to, you know, find some appropriate ground in the middle.

As I said before, I don't know why the choices were made and maybe there are other business reasons, good policy reasons, why the choices that were made were made. And we are wide open to the discussion.

Mr. RICHMOND. Well I see that my time is about to expire. And I would just say again that I would love to have balance on this and make sure that everybody at the table continues to thrive. We don't want to put anybody out of business and we certainly don't want to send anyone to bankruptcy or influence anyone to stop following their dreams. So help us help you. And that means get in the room and figure out ways to come to some sort of conclusion. And with that, Mr. Chairman, I yield back.

Mr. COBLE. I thank the gentleman from Louisiana.

The distinguished gentleman from Missouri.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman.

It has been interesting participating in these review hearings for the last year, serving on this Committee. And one common ground I think that I have heard from all of you and the folks that I have been meeting with the music industry throughout is that we all love music. We just got to find more common ground. And I look forward to working with all the stakeholders to try to get that common ground. But I do have a few questions.

Mr. Huppe, I think it would be helpful, at least to myself, for you to lay out for us the standards that are used for determining royalties with respect to each copyright for a performance of a song. For instance, who is a willing buyer, who is 801(b), who is set by the rate court? Could you tell me briefly who is subject to which standard for each of the two copyrights?

Mr. HUPPE. Sure. Thank you, Congressman.

Obviously, it is a great question and a complicated question. I think the best way probably to answer that is to give you an example. And the example is this: Let us say you are driving your car down the road and you are listening to an excellent Rosanne Cash recording. And if you happen to be listening to that over your cellphone through an Internet radio station, chances are most of those are set according to the fair market standard value; willing

buyer, willing seller. And the rate that the service would pay for that would be set by the CRB, go to SoundExchange. It would be anywhere between an eighth or a quarter of a penny for that stream.

Let us say you decided to stop doing that on your cellphone and you decide to switch, instead, to get that exact same awesome Rosanne Cash sound recording through satellite radio. Well that is set by a completely different standard, the 801(b) standard, which we believe is below market value. So the compensation flowing from that would be set according to different rules and they would pay about 9.5 percent of their revenue pro rata across all the streams.

And then, let us say for whatever reason you got out of view of the satellite and you had to go with good old AM/FM. Well that would be easy because in that case there is no right, there is no rate, there is no CRB and the answer there is zero. And keep in mind that is the same recording coming out of the same speakers in your car and hitting the same ears. Each one of those three is set differently according to different rules. And that is just not right.

Mr. SMITH OF MISSOURI. Mr. Harrison, you mentioned in your testimony that Pandora has paid $1 billion in royalties. Is that correct?

Mr. HARRISON. Yes. This summer we will have paid, in total, $1 billion in royalties.

Mr. SMITH OF MISSOURI. Okay.

Then my next question is, how is it that songwriters and artists claim that they are not getting paid?

Mr. HARRISON. Well, that is an excellent question. I mean, today, Pandora is the highest paying form of radio. We pay a higher percentage of revenue than either terrestrial or satellite radio. We will pay north of $400 million in royalties this year, alone. To the extent, the copyright owners believe there is a different or better allocation of that revenue. Certainly, we would say that the copyright owners, themselves, are better situated to make that relative evaluation.

Mr. SMITH OF MISSOURI. Mr. Williams, would you like to respond to that?

Mr. WILLIAMS. I totally agree that the copyright owners, themselves, are the people to make these decisions and all. You know, I have said it again and again and I said it in my opening statement. The fact is we are a tiny percentage of that cost. So we need to find balance in this.

You know, when the song of the year, the GRAMMY winning song of the year from 2011, is performed 72 million times on Pandora and the four writers each get less than $1,500 a piece, there is something terribly broken in the system. And, you know, you could take from my comment that, you know, that we have a major, major problem with Pandora. We have a major problem with Pandora's balance of payment. We are not going to suggest how they adjust that, but fair market will tell. Give us a chance. You know, we don't have the right to say no. With this case, we don't want to. We want our writers and copyright owners to be properly compensated.

Mr. SMITH OF MISSOURI. The song of the year in 2011; was that Need You Now that you referred to earlier?

Mr. WILLIAMS. I am going to turn to my contributor, excuse me. It was Need You Now by Lady Antebellum.

Mr. SMITH OF MISSOURI. 72 million performance.

Mr. WILLIAMS. 72 million performances.

Mr. SMITH OF MISSOURI. And what was——

Mr. WILLIAMS. In other words, to give you the exact rate of exchange for it, we get nine cents for a thousand streams at Pandora. Roughly, I think it is a little less than nine cents. You know, you just don't build a kingdom on those kind of dollars.

Mr. SMITH OF MISSOURI. Ms. Cash, would you respond any differently.

Ms. CASH. I am sorry.

If all that money was paid out of Pandora, if it was paid in an aggregate, I don't know how it was distributed. It certainly didn't come to artists.

And, notwithstanding my hard words toward them, I want them to succeed. I see the future. I want all of us to succeed but I just have to point out that all of these gentlemen on the panel would not be here had songs not been written. And it is in their best interest to get us paid so we are inclined to give them more songs.

Mr. SMITH OF MISSOURI. Thank you.

Mr. COBLE. I thank the gentlemen.

The distinguished lady from Washington State——

Ms. DELBENE. Thank you, Mr. Chairman.

Mr. COBLE [continuing]. Is recognized.

Mr. DELBENE. And thanks to all of you for being here, for all of your time.

It seems to be clear recognition across the board here that we are seeing a change in business model, definitely, toward digital transmission of music. And that is where the industry is headed. And even broadcasters are talking about the need to move, you know, to streaming, et cetera.

And I wanted to ask you, Mr. Warfield, you have folks who are also streaming content and digitally providing content, how are you seeing the business model move even for terrestrial stations into the digital world?

Mr. WARFIELD. Well we would certainly like to participate more. The rates that we pay for digital streaming is probably double what some other participants do pay. And as I have indicated to the panel here, it is not economically feasible for most broadcasters, particularly to mom and pop, locally or in broadcasters, not the big guys that everyone tends to focus on but which makes up most of the broadcast industry in this country have not been able to find a way in paying those kinds of rates to be profitable. So many broadcasters have just made a decision not to stream.

Ms. DELBENE. So you are not seeing folks move that direction and seeing somewhat more of their, you know, their audience moving or accessing——

Mr. WARFIELD. Congresswoman, we still reach over 240 million people a week with radio. We still have the largest audience out there which is why radio is the number one driver of music sales, whether it be sales in a retail outlet or digital downloads. I mean,

so our audience is still loyal to what we do. We are free. There is no additional cost that is there for them. And we provide a lot more than just playing music. So our audience is still supportive of the business model that we have and we have been able to develop with the record industry.

Ms. DELBENE. But given that we are talking about music today, do you see a change? Would you say there is a change? I mean we are talking a lot about how folks are listening to music today. Would you acknowledge that there is a change in where things are heading?

Mr. WARFIELD. There is a change. I think all of us listen to different platforms. I have been in radio for 37 years. I have always listened to radio. I still buy music. So there is a change. We want to participate as that change occurs but there is still a basic broadcast industry here that our listeners, our audiences, our communities, still rely on and they still support.

Ms. DELBENE. I have a question, maybe, for anyone who has an answer on this one which is we talked a little bit about internationally how our laws are different here versus around the world. Are there particular models that you have seen in other parts of the world that you think are good examples of where we should be headed?

Mr. SHERMAN. International models pay almost in every country of the world with very few exceptions. We should simply follow that model. It is really very simple.

Ms. DELBENE. And beyond paying specifically, are there other unique aspects of models in other countries that you think——

Mr. SHERMAN. There are some other models in which music publishing rights are paid on a percentage base instead of on a cents-based system. We could learn from that. I mean, there are definitely models that we could be looking at to try and redefine something for the United States.

A lot of the questions have been what specific changes would you make? But the real answer is, we have to change everything. You can't pick one piece. That is what we have done for the last decades, was pick one problem and fix one problem at a time. We do really need a holistic solution.

Ms. DELBENE. Yes, Mr. Williams.

Mr. WILLIAMS. If I may, one of the things that the Europeans have that we don't have is a limited grant of rights. For us to, you know, as rights holders to be able to license some of our rights directly would be a great improvement.

Ms. DELBENE. Yes, sir.

Mr. VAN ARMAN. And then, just to echo what Cary Sherman was saying, it is that we don't have a broadcast right here that is the big difference. We do need a broadcast right and it will also unlock lots of money from those international markets with reciprocity. Our creators here will be able to get paid for their performances overseas.

Ms. DELBENE. Okay.

Thank you very much for your time and yield back my time, Mr. Chair. Thank you.

Mr. MARINO [presiding]. Thank you.

Mr. Sensenbrenner?

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

This brings me back to what I attempted to do and succeeded in about 15 years ago with the Fairness in Music Licensing Act which was put in the copyright term extension law. And that was easy compared to this because the people who were for my bill were those that didn't have any content over music like retailers and restaurateurs but ended up getting nailed with a licensing fee and everybody else was against it.

And, you know, I do remember very vividly that my good friend, Mr. Coble, had a hearing in Nashville on that subject. And I had to be driven back to the national airport in the car of the United States Marshal who was a little bit worried about my safety. And he stayed with me until the wheels were up.

Now I did have a long series of debates with our late colleague, Sonny Bono. And that ended when he was kind of shedding tears about changing the music licensing law before an audience of the National Restaurant Association which was very sympathetic to my standpoint. After he was very elegant, I got up and turned around and I said, "What Mr. Bono is telling you is 'I got you babe.'"

Now, with this background, you know, here, everybody at the table has a different viewpoint on this issue. And I think that getting you all together and getting on one page will happen 2 days after the sun rises in the West.

Now, you know, that being said, let me ask Mr. Warfield a couple of questions. And it basically goes as: Under the current system of licensing and royalty payments, have record sales gone up? And do you believe that the free over-the-air music that you and your members broadcast, have a lot of people going and actually buying music and paying the royalty on music that they buy?

Mr. WARFIELD. From what has been recorded by the recording industry, music sales have gone down, I believe, in terms of hard copies. Not through the fault of anything that radio has done. We continue to freely promote and play this music. And our audience does continue to go out and buy the music.

Within that system between radio and records, we are still driving our consumers, our listeners, to go out and buy music. There is no other way that they can get it. They're not recording, what we do on the air, or stealing that content by recording our program over the air and then listening to it. There are alternatives that they can go to. They can certainly go to digital platforms but if they go there they have to pay just for the right to listen to what is there. There is no charge to do what we do.

Mr. SENSENBRENNER. Okay.

Mr. WARFIELD. So there is a digital model out there that none of us has really found a way to make it work. And I think we can all sit here and agree that there is a challenge there that we have as a business model which can help hopefully grow the various platforms, benefit all of the stakeholders, the recording industry also, so they are not taking anything away from radio.

Mr. SENSENBRENNER. You know, I am kind of a simple country lawyer. And what you say is that the existing system is that you give them free advertising by putting their music on the air but you don't have to pay for giving them free advertising?

Mr. WARFIELD. Free airplay, free promotion.

Mr. SENSENBRENNER. Well promotion and advertising are kind of synonymous, aren't they?

Okay, so what I am hearing from some of the other folks is that they want you to pay for giving them free advertising. Is that kind of a simplistic way to get to the bottom of this?

Mr. WARFIELD. I have heard that from some participants. But the one thing that I will say, relative to what radio has done, radio has helped the record industry develop to being as vibrant as it is today even with the financial difficulties they have. We have always supported the writers of the music. But we also help to develop the careers of the artist we are here talking about in some cases today. To develop careers that, in many cases today, when they might not be supported by record labels because of airplay that we are doing over the air free, continue to promote what they do. They can still tour. Whether they choose to tour or not, that is a personal decision but they have the opportunity to do that. And we continue to support those artists in many ways.

Mr. SENSENBRENNER. My time has almost expired so I yield back.

Mr. COBLE [presiding]. I thank the gentleman.

The distinguished gentleman from New York, Mr. Jeffries.

Mr. JEFFRIES. I thank the Chair and let me also thank each and every one of the witnesses for your presence here today and, in particular, Mr. Williams and Ms. Cash for your advocacy for the creative community and on behalf of your fellow artists and your fellow songwriters.

Let me turn, now, to the subject of Internet and/or satellite radio. And let me, first, say that I believe the the success of Internet radio is critical for the overall music ecosystem in terms of providing a viable, meaningful alternative to the piracy that was previously taking place and was extremely rampant. And that is a point I believe cannot be overstated.

But I do think that there are a few issues relative to the compensation structure and the business practices that I wanted to explore. So let me start with Pandora and Mr. Harrison.

Now I believe that you testified earlier today that one of your business practices is to ensure that artists receive a fair share; is that correct?

Mr. HARRISON. First of all, Congressman Jeffries, thank you for the kind words about our service.

What I was speaking about is the value that statutory blanket licenses have, not only for services like Pandora that allow us to license content efficiently but that songwriters and recording artists actually participate directly in those royalty streams.

Mr. JEFFRIES. Okay.

Now am I correct that Pandora, however, notwithstanding what you just indicated, currently refuses to pay for the use of pre-1972 recordings under either State or Federal law?

Mr. HARRISON. We do not pay under Section 114 for the performance of pre-72 sound recording which is Federal law.

Mr. JEFFRIES. But you are also contesting the rights of recording artists to receive any compensation in State court as well; correct?

Mr. HARRISON. We do have a pending litigation in the State of New York. And, yes, we disagree with the claims that the record labels make in that case.

Mr. JEFFRIES. Okay.

Now, pre-1972 recordings are an important part of business model; true?

Mr. HARRISON. Yes, they are.

Mr. JEFFRIES. So you have, for instance, a 60's oldies channel; is that right?

Mr. HARRISON. Yes.

Mr. JEFFRIES. And you have got a motown channel; correct?

Mr. HARRISON. I believe so, yes.

Mr. JEFFRIES. 50's rock and roll channel; true?

Mr. HARRISON. I believe so.

Mr. JEFFRIES. Golden oldies channel?

Mr. HARRISON. You are aging out of my demographic, but I believe that is true.

Mr. JEFFRIES. Okay.

A doo-wop channel I believe; is that right?

Mr. HARRISON. I believe so.

Mr. JEFFRIES. A classic soul channel as well; correct?

Mr. HARRISON. Yes.

Mr. JEFFRIES. Now Pandora doesn't pay anything for any of the sound recordings played on any of these six channels; true?

Mr. HARRISON. If the recordings were made after 1972, that would be correct.

Mr. JEFFRIES. Okay.

Before 1972; correct?

Mr. HARRISON. Correct.

Mr. JEFFRIES. Okay.

So, for instance, Respect was recorded by Aretha Franklin in 1965. Every time Respect is played on Pandora, Aretha Franklin doesn't receive a dime; correct?

Mr. HARRISON. Well Pandora would not pay a performance royalty to the record label. She would be paid if she were a songwriter.

Mr. JEFFRIES. Okay.

So My Girl was recorded by the Temptations, I believe, in 1964. The Temptations don't receive a dime of compensation from Pandora every time this extremely popular song is played; correct?

Mr. HARRISON. Again, if you are talking about a payment to the record label, that is correct. If they are songwriters, they would get paid.

Mr. JEFFRIES. Okay.

And the same would be true for Soul Man, recorded by Sam Moore in 1967; A Change Is Gonna Come, recorded in 1964 by Sam Cooke; Stop In The Name Of Love, recorded in 1965 by the Supremes. I would suggest that the failure to pay recording artists for pre-1972 recordings is not a fair business practice. And in the context of this overall discussion, it is a problem that should be voluntarily resolved. But if it is not voluntarily resolved, Congress should act.

Let me turn, quickly, to SiriusXM, which I believe you also refuse to pay recording artists for pre-1972 recordings; is that correct?

Mr. FREAR. There is no public performance right and, under the law, there is no amount due to them.

Mr. JEFFRIES. Right, on the Federal law. But on the State law, you are also in litigation, I believe, in California trying to prevent compensation under California State law; correct?

Mr. FREAR. It is clear from the litigation there is no public performance right under State law either.

Mr. JEFFRIES. And in that California State court proceeding, I believe your company stated that "Granting a pre-1972 public performance right would produce a pure windfall to recording artists without any commensurate benefit to the public."

That was in your filing in that California case; correct?

Mr. FREAR. Under the way that the policy is written under copyright law, that statement is true.

Mr. JEFFRIES. I would just suggest a windfall is defined as an unexpected, unearned or a sudden gain or advantage in compensating artists for their creativity, even if it was recorded prior to 1972, is not a windfall, it is the American way.

I yield back.

Mr. COBLE. I thank the gentleman.

The distinguished gentleman from Rhode Island is recognized.

Mr. CICILLINE. Thank you, Mr. Chairman. And thank you to the witnesses.

I am proud to come from the State of Rhode Island, which was the birthplace of the creator of the National Endowment for the Arts and the National Endowment for the Humanities Center, Claiborne Pell, who I think reminded us that the strength of our nation was not simply the power of our military or our economic resources but our ability to honor the creative artists and the culture of this country and protecting the work of our artists is an important part of protecting our democracy. So I thank all the witnesses for this really important testimony.

I want to really begin with you, Mr. Frear. You said, in fact, "I believe everyone should be paid." And I assume you believe everyone should be paid because they have created a product and they are entitled to be compensated for it and that argument applies to creators before 1972 and after 1972, based on this notion that people are entitled to value for what they have created.

Mr. FREAR. So I am not a copyright lawyer, I am just a history major. And it doesn't make a whole lot of sense to me that the distinctions that were made in the past between pre- and post-72 artists were ever made. It doesn't make a whole lot of sense to me——

Mr. CICILLINE. So you agree that we should——

Mr. FREAR. Let me just finish up, Congressman.

When they granted the sound recording performance right that they did not give it to pre-72 artists and it makes no sense to me that terrestrial radio gets a free walk.

Mr. CICILLINE. And you agree that not only should all of that production be compensated but that it should be done in a fair amount driven by the market.

Mr. FREAR. Yes.

I agree it has to be a working competitive market.

Mr. CICILLINE. Okay.

And, Mr. Harrison, you spoke about the value that Pandora provides to hundreds of millions of Americans as a result of your service. But would you agree that there is some danger that, if that product is provided without compensation, that the very product you sell could be in peril?

Mr. HARRISON. I don't think I understand your question.

Mr. CICILLINE. Well, you rely on a product that you, at least for part of your inventory, you don't compensate the artist for.

Mr. HARRISON. If you are referring to sound recording fixed before 1972——

Mr. CICILLINE. Well the example Ms. Cash used, where someone re-recording her father's song would be compensated, but someone who is playing the original recording would not be required to compensate her. That strikes you as inconsistent, nonsensical, not good public policy; I take it.

Mr. HARRISON. Well, unlike David Frear, I actually am a copyright lawyer. And copyright makes distinctions like this all the time. A musical work written by W.C. Handy in 1920 is part of the public domain and isn't compensated. And yet, if a modern day recording artist were to record that song, that recording artist would receive a royalty.

Having said all that, Pandora would be in favor of following the Copyright Office's recommendation, which is fully federalizing pre-72 recordings to allow both consumers to benefit from the protections, like fair use under the Copyright Act, allow recording artists to exercise their rights to terminate their transfers.

So I understand the argument, sir, but if Congress makes the decision to fully federalize pre-72, we would be happy to pay.

Mr. CICILLINE. So does anyone think that that is a bad idea? Does anyone think this distinction of 1972 makes any sense? Any of the witnesses?

Mr. SHERMAN. We agree that the distinction ought to be erased. There are complications in terms of how to do it. And we have expressed a perfect willingness to figure out, with the Copyright Office and all the stakeholders, how to federalize pre-72.

Meanwhile, this legislation, which deals with legacy artists who need money now, there is really no reason why action couldn't be taken on that immediately while we figure out the federalization.

Mr. CICILLINE. Mr. Christian, let me just ask you, you argue that this existing model ought to continue with free use of music and AM/FM. And it strikes me, I am new to this Committee, new to this issue, but it is a curious argument that I can't think in another context where the kind of creative results of musician or artist should whole scale be appropriated, used to build up a business and generate revenues without any compensation. I am wondering why you don't think the marketplace—you know, assuming there is some value to promotion which I will concede that the artist would have an ability to understand what the value of that is and negotiate a price that made sense for you as the consumer of that music and for the creator and artist who created it.

Why would the marketplace not provide the kind of context for a fair exchange of that and why would we ever permit this practice continue where that asset created, that creative product created, is

just used for the revenue generation of a private enterprise at the expense of the people who created the products?

Mr. CHRISTIAN. Are you speaking about the pre-1972?

Mr. CICILLINE. Yes.

Mr. CHRISTIAN. That really isn't applicable to the radio industry as we don't play performers that have performance rights right now. We do pay for composers, authors, and publishers work in that era.

Mr. CICILLINE. I am talking about performers, post-72.

Mr. CHRISTIAN. Oh, after 72. We believe that what we have right now and that is that the promotional value is supplied to them. Our product is free. For instance, we can't charge for our product. Please understand that. We provide a free product to listeners across United States; hundreds of millions of people. And we do this in marketing and what's also, was brought up on the advertising, but there is also promotion. And that is if you want——

Mr. CICILLINE. Oh, no. I understand that. But my question is: I recognize your argument that it has promotional value, but why is it not in the context of a free market, an exchange between the artist and you, as the broadcaster, to say this has some value for promotion so this is what I want to charge as an artist, this is the value it has to you because it helps to generate revenue for your company. Why will not the result of that be some fair price where the artist is compensated and you make money?

Mr. FREAR. Well I think that——

Mr. COBLE. The gentleman's time has expired. You'll be very brief in your response, Mr. Christian.

Mr. CHRISTIAN. All right. So one response will be glad to deal with you directly on that, if I could, at some point.

Mr. CICILLINE. Of course.

Thank you, Mr. Chairman. I yield back.

Mr. COBLE. I thank the gentleman.

The gentle lady from Texas, Ms. Sheila Jackson Lee.

Ms. JACKSON LEE. Chairman, thank you so very much for this hearing and I am excited to see so many of you that I have worked with. I almost feel like calling the roll.

Ms. Cash, thank you for the music I enjoy of your dad and I am sure of your entire family. Thank you so very much.

It is good to see Mr. Sherman.

It is good to see Mr. Warfield; we worked together before. Mr. Van Arman, Mr. Christian.

And Mr. Paul Williams and I could be considered brother and sister, we have seen each other so much and appreciated your work. Thank you so very much for what you do for children in teaching children about music.

Chris Harrison, Mr. Huppe, I believe the name is, or did I add a "P" on it that I should not have?

Mr. HUPPE. That is perfect.

Ms. JACKSON LEE. Thank you, sir.

And Mr. Frear, thank you so very much.

Let me also just put on the record that I hope that this Committee, if it is appropriate, will have a hearing on the DIRECTV/AT&T merger just for the fact that content is included in that as well.

To the witnesses here, my delay was provoked by the fact that this is a year anniversary of the Shelby case, United States Supreme Court case that, in my opinion, dismantled the voting rights of this country. And there is a hearing going on in the United States Senate that is very important. And I would almost say that many of the artists that you represent, performers, benefitted on their opportunities to vote because of the Voting Rights Act. So I apologize for my delay in coming to the meeting. But this is no less an important hearing. One of the reasons why I dashed in here to be here.

We have gone through this before and I think I have made clear that I think that we have an issue that should draw the interest of all in the recognition of the talent of the artists but also to understand, I have tried to take some time to understand the workings of radio and the expense that they incur. And so, I am prepared to be in this fight for a way forward. And I will pose my questions in that context.

So I would ask both Mr. Warfield and the representative from Pandora, first of all, does the XM deal sound attractive in its construct for the pre-1972 artist, the pay structure? And I will just say this: In the early morning hours of coming here and listening to radio, I heard that Diana Ross think she has got some music pre-1972, was going to be at one of our venues here in this area and apparently they said something about a national tour. And apparently they felt very confident that there would be standing room only. These artists are attractive, they are still bringing in crowds, we still love their music as we will do in years to come for those who are now. So Mr. Warfield, if you would, I would appreciate it.

Mr. WARFIELD. As representative of the NAB, we have not taken a position on the pre-1972. What I would say is that our members, if they are participating, and I would probably argue that most of them are paying those fees in the digital arena, they are not looking for ways to avoid that. You know, we have some concerns of whether or not there may be some unintended consequences as a result of it. So we are sort of studying that issue, but we are not taking a position to oppose the bill.

Ms. JACKSON LEE. Great. And would you continue to study it for me, because I think your insight is going to be very important to a lot of Members?

Mr. WARFIELD. Yes, ma'am.

Ms. JACKSON LEE. So I would encourage you to do that.

Mr. Harrison?

Mr. HARRISON. If Congress decides that protection for pre-72 is an issue that needs to be resolved, we would support the position of the U.S. Copyright Office which suggested a full federalization so that not only do consumers get the benefits of the copyright law, for example, the right of fair use, but artists will also potentially get their right to terminate their transfers under Section 3.

Ms. JACKSON LEE. You just opened a door with respect to how we construct what may be most effective. So in the time that I have, if we approach this from a comprehensive perspective, I would like to have anyone who will press their button and tell us what do want in the comprehensive approach that will pass the House, pass the Senate and get signed by the President, which is

what I want to see happen and not go another decade without a response that I think is so very important.

I don't know who wants to start. I am looking at Mr. Williams. What would be good if we just looked at the whole picture, said we want to answer everyone's concern, what would be good to have in that comprehensive bill?

Mr. WILLIAMS. Well I think, first of all, we have to work together. I mean, we create a product which you all deliver and we are eternally grateful for that.

Incidentally, thank you for your service. What you did this morning was incredibly important, as well.

You know, I am 73 years old. We operate under a consent decree that is about a year younger than me. And while almost everything on this 73 year-old body works pretty good, there are parts of that consent decree that need to be dealt with. They just simply don't work anymore. We have no right of refusal. We have no right of refusal so somebody can begin using our music immediately before they have even told us how they are going to use the music. You know, to prepare, you know, an appropriate bill for, you know, this is what your rate is going to be. We need information.

People begin using our music before we even have that information. So the consent decree has certain elements that can be changed. For your support in our efforts at the DOJ are going to be incredibly important. We need a faster and a cheaper rate-setting process. To go to rate court costs millions and millions of our members money. And arbitration would be so much similar. It would be a huge part of that.

You know, to allow our members, you know, right now we are existing under an all-in or all-out rule that has been imposed upon us so that the major publishers who want to be able to go directly and license certain rights separate and it is a right I believe they should have, are not allowed to have that.

Mr. COBLE. The gentle lady's time has expired.

Mr. JACKSON LEE. Well let me just say, Mr. Chairman, thank you for your indulgence. And I am ready for all of us to come together and craft a portion of what Mr. Williams said. And I know others did not get a chance to answer my question. I would appreciate it if I could hear some of the comments in writing back to the Committee so that we could work on in the way that Mr. Williams has already laid out.

I thank the gentlemen, the Chairman and the Ranking Member, and I yield back.

Mr. COBLE. You are indeed welcome.

I want to thank the panelists and those in the audience who have been here now for almost 3 hours. By the way, the room must be cleared by 2 o'clock because of a scheduled hearing but today's hearing has been concluded. Thanks to all for attending.

Without objection all Members will have 5 legislative days to submit additional written questions for the witnesses and all additional materials for the record.

The hearing stands adjourned.

[Whereupon, at 12:51 p.m., the Subcommittee was adjourned.]

SUBMISSIONS FOR THE RECORD

United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Statement of Adam B. Jaffe
Fred C. Hecht Professor Emeritus in Economics,
Brandeis University

On Behalf of the Television Music License Committee, LLC

Hearing on:
Music Licensing Under Title 17

July 8, 2014

I. Introduction and Overview

As an economist who has studied and prepared expert reports on musical works performance rights for more than a decade, I have been asked by Mr. Hoyt of the Television Music License Committee to comment on Congressman Marino's question on the difference between fair market value and the free market. I have done so in the context of the ASCAP and BMI Consent Decrees and the recent actions of SESAC, all of which I have studied in order to prepare expert reports as part of litigation involving these organizations.

II. The ASCAP and BMI Consent Decrees foster desirable markets outcomes and are not an artificial constraint on "free markets"

Going back to Adam Smith, economists have understood that under certain circumstances *competitive* markets yield desirable outcomes in terms of maximizing the satisfaction of society's wants and needs at lowest cost, as if guided by an "invisible hand." The idea of "free markets"— markets where prices and market choices are determined by market participants without direct government oversight—is closely related to the invisible hand and the desirability of *competitive* market outcomes.

But there are market conditions—generally described as "market failures"—under which the invisible hand fails. Such market failures include, for example, monopoly and imperfect information. In these circumstances, unregulated free markets will not produce desirable outcomes.

What this means in practice is that we need a more subtle concept of "free markets." To be useful, "free markets" should be taken to mean markets with appropriate legal rules so that they perform efficiently rather than some notion of markets with no government involvement of any kind.

As an example, we generally think of the stock market as a "free market," but in fact this does not mean that government plays no role. We prohibit insider trading, because such trading would actually distort the market outcomes away from the desirable competitive norm. You could in some sense argue that it would be more of a "free market" if we eliminated restrictions on insider trading, but doing so would degrade rather than improve its performance.

Similarly, we might think of the wheat market as a "free market," but we have regulations designed to prevent traders from "cornering the market" in a given commodity, because accumulating a monopoly position would interfere with the desired competitive outcome. You could in some sense argue that it would be more of a "free market" if we eliminated restrictions on cornering the market, but doing so would degrade rather than improve its performance.

In the market for public performances of musical works, as described below, the widespread dependence on "blanket licenses" creates a market failure. In effect, ASCAP, BMI and SESAC are able to corner the market on the licensing of the performances of their affiliates' musical works. In the absence of some kind of government constraint, local television broadcasters have no choice but to accept whatever price they demand for the needed performance rights. The Consent Decrees limit this monopoly power, and hence make the markets behave more like the desired competitive norm.

III. The Consent Decrees represent appropriate application of antitrust principles to the music licensing market

The ASCAP and BMI Consent Decrees are not the result of copyright law; they exist because performance rights are licensed in a way that would otherwise be illegal under the antitrust laws.

Copyright gives creators a monopoly over their own works; rightsholders licensing their works individually have the right to charge whatever they choose, and would not be subject to any restriction on their licensing practices or prices. There is no legal or regulatory restriction on the right of any individual composer to operate in this manner today.

Composers and music publishers have chosen, however, to organize themselves into Performing Rights Organizations or "PROs." The PROs (ASCAP, BMI and SESAC) offer local television broadcasters (and other licensees) "blanket" licenses that convey to local television broadcasters the right of public performance to the works of thousands of individual composers at a single price. We would not allow wheat farmers or law firms to band together and offer access to their products only on a package basis at a fixed price, because we expect that if they did so they would insist on higher prices than each could get on their own.

It might seem that this logic does not apply to music performance rights, because music creators "already have" a monopoly granted by copyright. But the copyright monopoly covers only a creator's own works; it does not convey the right to monopolize the combined works of many creators. In some contexts, program producers might feel that they have to have a specific work or a specific composer, in which case competition from other composers would be irrelevant. But in many cases, such as the choice of background or theme music for a television series, there might be many different works and many different composers that would do. We would expect in those circumstances that composers would compete with each other to have their music used and performed. This competition would determine the royalty rates for use of the music. Bundling thousands of composers and thousands of works together in a blanket license eliminates that potential competition.

The ASCAP and BMI Consent Decrees came about because the Antitrust Division of the Department of Justice ("DOJ") challenged this collusive behavior. The logic of the decrees is that appropriate restrictions on the behavior of the PROs can allow them to engage in collusive pricing while mitigating the anticompetitive consequences that would otherwise flow from such behavior.

The nature of the restrictions imposed by the Consent Decrees is directly tied to this function, that is, the restrictions control or mitigate the ability that the PROs would otherwise have, by virtue of collusive pricing, to elevate licensing royalties above the level that would result from competition among different music rightsholders. Specifically:

1. ASCAP and BMI must grant a license to anyone who requests one—because restricting access to the collective product is the mechanism by which a cartel elevates the price.

2. If ASCAP or BMI cannot reach agreement with a licensee on the royalty rate, that royalty is determined by a neutral party (the "Rate Court")—because otherwise the PROs' control of the repertory of thousands of composers would allow them to insist on royalty rates far in excess of what those composers could individually negotiate.

3. ASCAP and BMI are prohibited from restricting their affiliated rightsholders' ability to negotiate individually to license their works—in order to mitigate their collusive market power by allowing for the possibility of competition along side the collective licensing.

4. ASCAP and BMI are required to offer licensees "genuine alternatives" to the blanket license, and to allow licensees to adjust to some limited extent their blanket license fees to reflect works for which they have secured performance rights directly from the rightsholders—again in order to mitigate the collusive market power of blanket licensing by allowing competing mechanisms to operate in parallel with the collective blanket license.

Not surprisingly, ASCAP and BMI would prefer to operate without these restrictions. But from a public policy perspective, the predicate for a performance-royalty-licensing regime without these restrictions should be independent licensing by distinct copyright owners, subject to action under the antitrust laws if they attempt jointly to set the price for portfolios of works from multiple distinct rightsholders. If, on the other hand, the rightsholders wish to continue to price performance rights jointly through blanket licenses, then the above restrictions are entirely appropriate to mitigate the market distortions of unrestricted collusion.

IV. Reasonable royalties for licensing of music performance rights

As noted above, part of the compromise inherent in the Consent Decrees is that ASCAP and BMI are permitted to engage in collusion, but given the likely effect of such collusion on royalty levels, royalties are set by the Rate Courts if the parties cannot agree. To fulfil this role, the Rate Court is charged with setting "reasonable" royalties, and has tied "reasonable" in this context to the rate that would prevail in a competitive market. *United States v. ASCAP (In Re Applications of RealNetworks, Inc. and Yahoo! Inc.)*, 627 F.3d 64, 76 (2d Cir. 2010) ("fundamental to the concept of 'reasonableness' is a determination of what an applicant would pay in a competitive market."); *United States v. ASCAP (In Re Application of Buffalo Broad. Co.)*, No. 13-95 (WCC), 1993 WL 60687, *16 (S.D.N.Y. Mar. 1, 1993) ("[T]he rate court must concern itself principally with defining a rate ... that approximates the rates that would be set in a competitive market.").

Written and oral testimony before the subcommittee has introduced other conceptions of the level at which royalties should be set, including "free market," "fair market," and the "willing buyer/willing seller" test. It is useful to consider what these words might mean and how they relate to each other.

Obviously, sellers like high prices and buyers like low prices. From a public policy perspective, there is no reason to seek either higher or lower prices, *per se*. What we can say is that prices approximating those that would occur under competition

are economically efficient, meaning that they allow society's overall wants and needs to be satisfied at the lowest possible cost. Thus, in the absence of some other market-specific argument in favor of high or low prices, public policy should seek to approximate competitive prices.

"Free market" prices: As discussed above, the "free market" price level can be interpreted as the level that would obtain in a competitive market free of market failures. In this sense, it means essentially the same thing as the competitive market price level, which is the level that the Rate Court seeks. If, on the contrary, "free market" price level is taken to mean the level that would prevail if PROs were not subject to the antitrust laws, then this means prices elevated over the competitive level by monopoly power. There is no reason why public policy should seek this outcome.

The "willing buyer/willing seller" test: The problem with this test is that, without further elaboration, it does not actually provide much guidance for price setting. In particular, it does not preclude undesirable monopoly pricing, because monopolists are willing sellers, and buyers who have no choice but to pay the monopoly price if they want the monopolized good are, in a sense, willing buyers.

Consider, for example, when OPEC started to operate as an effective cartel in 1972 and raised the price of oil from $2-$3/barrel to $12/barrel. Lots of people continued to buy the oil. They didn't like the new price, but they were still "willing" buyers, given their lack of alternatives, and OPEC was certainly quite willing to sell. Thus the $12 price seems clearly to meet the willing buyer/willing seller test. But it seems equally clear that it was not the competitive price. Should a Court or other fact finder wishing to determine a reasonable price for oil at that time have accepted $12 as "reasonable" because it met the "willing buyer/willing seller" test? If so, then "reasonable" ends up placing no restriction on the exercise of monopoly power.

Thus, if the purpose of the Rate Court is to try to ensure approximation of competitive prices for collective licenses, the willing buyer/willing seller test is not adequate. What we want are prices that approximate the competitive level. The willing buyer/willing seller test does not ensure this outcome because it also allows for monopoly prices.

"Fair market" value: In some contexts, prices subject to negotiation or arbitration are set according to a standard of "fair market" value. It is not clear that this concept is helpful in the current context. Typically, when someone argues that a given price is below (or above) "fair market" value, what they mean is that they can identify some situation that they believe is analogous in which the analogous price is below (or above) the given price. Now, if the allegedly analogous situation is indeed analogous, and if the observed situation is reasonably competitive, then this would be useful evidence regarding the competitive price. But if the analogous situation is not one in which the price is determined competitively, it should not be the basis for determination of the reasonable royalty level. Hence, like the willing buyer/willing

seller test, there may be situations in which "fair market" royalties and "competitive market" royalties are the same, but in those situations where they are not, the "fair market" standard is not a valid basis for determining the reasonable rate.

V. Actual experience with music royalties confirms that collective licensing elevates prices above the competitive level

We have two kinds of evidence that confirm the elevating effect of collective licensing on music royalties. The first is that in circumstances where licensees have been able to utilize direct (non-collective) licensing on a significant scale in a reasonably competitive marketplace in which individual rightsholders were competing against each other on the basis of price to have their works performed, the resulting prices have been well below the rates of collective licenses. The second is that the third PRO, SESAC, which is not subject to a Consent Decree, has demonstrated its ability and willingness to rapidly and significantly increase its royalty rates in the absence of any corresponding increase in value to licensees.

DMX provides packages of recorded music that retail stores and other businesses play in the "background" in their establishments. As such, DMX is in the somewhat unusual position of controlling which music is "performed" by its service and which is not. While historically the rights to these public performances were conveyed by a blanket license, in 2006 DMX embarked on a campaign to secure public performance rights directly from individual music publishers ("direct licenses"), with the explicit intention of using these directly acquired rights in place of blanket license rates. Over a period of 5 years, DMX was able to secure hundreds of direct licenses from music publishers – both small and large – whose catalogs collectively accounted for upwards of 30% of the musical works performed by DMX. These transactions occurred in a marketplace in which the rightsholders themselves, and not a licensing collective, decided whether or not the compensation offered by DMX for the right to publicly perform their music was reasonable. One consideration on the part of these rightsholders in evaluating DMX's request for a direct license was the likelihood that DMX would favor directly-licensed titles in constructing its playlists, meaning that rightsholders who agreed to a lower royalty rate would likely see a larger share of DMX plays and hence receive a larger share of royalty payments. This ability of individual rightsholders to compete with each other on the basis of price to have their works performed on the DMX service is the essence of competition.

With the injection of actual competition into the marketplace for performance rights, the license fees paid by DMX declined dramatically. The license fees that DMX secured in direct negotiations were well below those that ASCAP and BMI had historically secured from the background music industry, and were well below those that ASCAP and BMI were asking of DMX. This licensing experience of DMX provides an example of a competitive market for music performance royalties at

work, and demonstrates that in this context such competition produces royalty rates much lower than those produced by collective licensing. There is no way to know precisely how this experience would translate to other performance royalty licensing contexts, but it is at least suggestive that the economic prediction that collective licensing elevates royalties is correct and is quantitatively significant.

At the opposite end of the spectrum is the recent experience of local television stations (and others) in their dealings with SESAC, the one United States PRO that is not subject to a consent decree. Despite the fact that it is far smaller than both ASCAP and BMI, SESAC has been able to amass, through collective licensing, substantial monopoly power. With this monopoly power, SESAC, beginning in late 2007, demanded from local stations across-the-board fee increases that were entirely divorced from normal market forces. The data showed SESAC music use by local television stations declining, and the industry (and the economy generally) was in the throes of the "Great Recession." Nevertheless, the stations felt that they had no alternative but to take a SESAC blanket license; indeed some stations were informed by SESAC that it was withdrawing interim authorization for performance of its music and therefore the station would be subject to copyright infringement claims if it did not agree to the license terms demanded. Eventually, all stations gave in to SESAC's demands. This ability to dramatically raise one's price without suffering any loss in business is a hallmark of monopoly power.

VI. The ASCAP and BMI Rate Courts are reasonably flexible and appropriate mechanisms for the task of ensuring reasonable music performance royalties

The foregoing discussion shows that the problem the Consent Decrees are designed to solve is a real one. It is nonetheless fair to ask whether or not the decrees constitute a reasonable solution to this problem. Some testimony before the subcommittee has portrayed the Consent Decrees and the Rate Courts as obsolete and/or heavy-handed regulatory mechanisms. These are misleading characterizations.

While it is true that the Consent Decrees themselves have been around for a while, they have been continuously adapted to changing circumstances. There is no evidence that the Decrees or the Rate Courts have been resistant to implementing change as needed. In particular:

1. The Consent Decrees themselves have been amended on numerous occasions, most recently in 1994 for BMI and 2001 for ASCAP. *Broadcast Music, Inc. v. DMX Inc.*, 683 F.3d 32, 36 (2d Cir. 2012).

2. The Rate Courts have continuously adapted the rules and implementation for music licensing, including significant modifications to the per-program

license, and more recently the development of the Adjustable-Fee Blanket License

3. The Department of Justice has announced its own inquiry into the question of whether any modifications are necessary, and public comment on that inquiry is currently open. *See* Antitrust Division Opens Review of *ASCAP* and *BMI* Consent Decrees, at http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html.

While the advent of digital technologies and the growth of the Internet change the nature of music performances requiring licensing, they do not change the underlying reality that collective pricing for thousands of compositions creates monopoly power that is not present in the individual composers' copyrights. Hence while updating of the Consent Decrees may be appropriate, there is no analytically valid basis to suggest that these new technologies undermine the need for the oversight the Consent Decrees provide.

Another issue raised by some commenters is that the DOJ has a general presumption that antitrust consent decrees should "sunset" after some period of time. There are, however, good reasons why the general presumption that antitrust consent decrees should "sunset" after some time does not apply here.

First, most antitrust enforcement actions emerge out of a particular set of market conditions at a point in time. In most markets, companies that manage to establish some kind of monopoly position can be expected to be unable to sustain any such dominance if prohibited from engaging in anticompetitive behavior for some period of time. But the market power associated with the collective pricing by the PROs is fundamentally different. It is not the result of a narrow or temporary set of circumstances—it is inherent in the licensing structure they have chosen to establish.

Second, the general presumption that consent decrees should be of finite duration in no way implies that when a consent decree ends the firms involved are subsequently somehow exempt from the antitrust laws. But BMI and ASCAP do not seem to be proposing ending their practice of collective licensing. What they apparently seek is weakening or removal of the Consent Decree restrictions, while they would continue to be permitted to license collectively. The analogy to such a proposal is not "sunsetting" of a narrow consent decree, it is broad exemption from the antitrust laws that apply to everyone else.

Finally, some commenters have emphasized that the Rate Courts are expensive and time-consuming, and implied that they are therefore an outmoded example of heavy-handed regulation. While it is true that Rate Court is time-consuming and expensive when it is invoked, it is only a very small number of cases in which it is needed. Year in and year out, ASCAP and BMI have thousands of licensees and license agreements. Only a handful of these agreements are handled by Rate Court

in any given year. For the rest, Rate Court provides a "backstop" that mitigates the monopoly pricing that collective licensing would otherwise generate, but it does so without actually being used. Thus, the time and expense of the small number of Rate Court cases that are actually needed is more than balanced by the benefit created in all licensing negotiations by its mere existence in the background. Rate Court therefore represents a reasonable solution to the problem of permitting collective licensing without generating monopoly royalty rates.

VII. A more competitive framework for music licensing royalties could be developed

At least in principle, one could imagine a different overall approach to the licensing of music performance rights for local television broadcasting. Instead of being paid after the fact for local television performances, music creators could negotiate with the producers of television programs to provide the subsequent right of public performance ("source licenses"). Within this framework, creators would receive additional compensation when programs are created to compensate them for the subsequent public performance of their works. The cost of this compensation would then be priced into the programs.

This approach has the advantage that the compensation for the right of public performance is determined at the time that the producer is deciding what music to use, so that the competitive market can operate freely to determine the compensation levels. This approach does have different risk-sharing and transactions cost properties than the more widespread after-the-fact licensing. How those risks and costs would be borne would be determined by market forces.

In a world in which all local television broadcasters have blanket licenses, and all composers share in royalties set collectively, there is tremendous inertia that operates against such source licensing developing. Nonetheless, the BMI and ASCAP Rate Courts have been working with the PROs and the licensees to develop the per-program license, and to develop the Adjustable-Fee Blanket License, so as to permit maximum development of alternative licensing pathways in conjunction with the blanket license. The evolution of these competitive market mechanisms offers the best hope for eventually reducing the need for Rate Court oversight to ensure that the PROs are not able to exercise monopoly power in the pricing of blanket licenses.

Written Statement of Patrick Collins
President & COO
SESAC
"Music Licensing Under Title 17" Hearing - Part Two
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet
June 25, 2014

Introduction

SESAC is deeply concerned that music licensing royalties have not kept pace with the increased consumption of music, particularly with respect to digital uses, and greatly appreciates the opportunity to provide input as Congress considers music licensing reform. It is of paramount importance that any reform ensures that songwriters and music publishers are properly compensated. SESAC also endorses the view, espoused by Congressman Marino in particular, that the best legislative solution will emerge from marketplace consensus, and it pledges to work closely with other stakeholders towards achieving this goal.

SESAC is a performing rights organization (a "PRO") that services both the creators and users of non-dramatic musical works by issuing public performance licenses, collecting fees for those licenses, and distributing resulting royalties to its affiliated songwriters, composers, and music publishers. It is the second oldest of the three domestic PROs recognized under the Copyright Act (together with ASCAP and BMI), the smallest of the PROs, and the only for-profit PRO.

SESAC is also the fasting growing PRO, growing exponentially while serving as a constant source of innovation in such areas as state-of-the-art performance monitoring for its affiliates. It licenses public performance rights in hundreds of thousands of songs on behalf of its affiliated songwriters, composers, and music publishers.

Value of Performing Rights Organizations and Blanket Licensing

The value of PROs and blanket licensing is a broad area of consensus among music user and copyright licensor stakeholders.

Together, the PROs represent the performing rights of millions of musical works created and owned by thousands of songwriters and publishers. The PROs also service many thousands of music users by providing licenses that authorize those users to perform the music to enhance their transmitted programming, business establishments, or websites. These benefits are most often realized through blanket licensing, which permits a music user to perform any of the works in a PRO's repertory as often as it wishes during a given period of time for a fixed fee.

Blanket licensing is an efficient, convenient and inexpensive licensing paradigm for the

increasing numbers of businesses who wish to exploit music for commercial gain. Blanket licensing also provides an efficient way for music users to easily license high-volume uses. The desirability and efficiency of blanket licensing will only increase as streaming models requiring the performance of millions of copyrighted works become more prominent.

"Free Market" v. "Fair Market"

SESAC believes strongly that allowing licensing of musical works in the free market will significantly improve the music licensing system. The term "free market" is an objective term that refers to a marketplace for the provision of goods or services - in this case, the authorization to use copyrighted works protected by exclusive rights under 17 U.S.C. 106 – between a willing buyer and a willing seller.

In contrast, the term "fair market" often has little objective value. A fair market is in the eye of the beholder. As evidenced by the hearings, the stakeholders' views on the current music licensing marketplace support this definition quite well: a music licensing transaction can often result in diametrically opposed views by the parties as to whether that transaction took place in a fair market, and music users and copyright owners have each expressed both views depending on the context and submarket.

Free Market Approach to Music Royalties

Licensing of musical compositions in the free market best serves copyright owners, music users, and the public. The free market has allowed SESAC to be flexible in licensing new business models while also pursuing innovative approaches to serve copyright owners and music users alike. As new distribution and performance delivery systems for music arise, the free market reacts to develop models to effectively and efficiently license those uses.

For example, in response to the large amount of user-generated content being uploaded to YouTube each day, much of which contains music not owned by the uploader, the micro-synchronization or "micro-sync" model was created by the private sector. Companies such as SESAC corporate affiliate Rumblefish, Inc. offer affordable licenses for the synchronization of music with video for small, non-commercial (i.e., micro) uses such as on YouTube. Rumblefish, which has amassed a song library of 2.5 million tracks, licenses music for 65 million videos online and is adding 80,000 a day.

SESAC feels that, as the landscape continues to shift, the free marketplace will be the key to technological and other innovations necessary to maintain efficiency and cost effectiveness in music licensing. SESAC has been and remains committed to the use of technology to drive innovation in the music distribution and licensing markets. For example, SESAC was the first performing rights organization to fully integrate fingerprinting technology into its music use tracking and distribution systems, building on the efficiencies of cutting-edge technology to further expedite payments to rights holders.

Rational Relation between Musical Composition and Sound Recording Royalties

The royalty paid for each use of a musical composition embodied in a sound recording should be rationally related to the royalty paid for the sound recording itself. Synchronization licensing - the incorporation of music into a movie, television show, commercial, or other audiovisual medium - is the only significant form of music licensing that takes place entirely in the free market. Generally, musical composition copyright owners and sound recording copyright owners are *equally compensated* in synchronization licensing transactions.

In contrast, there is a dramatic rate disparity between the compensation paid for the public performance of a musical work versus the public performance of a sound recording . For example, online radio service Pandora, as evidenced by its Fiscal Year 2013 Annual Report, paid 93% of its royalties to SoundExchange for the right to publicly perform sound recordings, while only paying the remaining 7% of its royalties for the right to publicly perform the underlying musical works. In other words, for every dollar that Pandora pays to record labels and artists through SoundExchange, it only pays *7.5 cents* to songwriters, composers and publishers.

SESAC strongly believes that this disparity should be addressed expeditiously, and supports the approach taken in the Songwriter Equity Act of 2014 ("SEA"), namely that Section 114(i) of the Copyright Act be amended to allow the ASCAP and BMI rate courts to consider the rates paid by music users for the digital performance of the corresponding sound recordings, both in the free market and pursuant to the Copyright Royalty Board's "willing buyer/willing seller" ratesetting standard, which is designed to mimic the free market.

By modifying Section 114(i) to permit the rate courts to include in their consideration these "willing buyer/willing seller" royalty rates paid for sound recording performances, Congress would afford the rate courts the ability to determine the rates for the public performance of musical works based on a more complete examination of marketplace factors.

Conclusion

In conclusion, SESAC would like to thank the Chairman and distinguished members of the Subcommittee for the opportunity to provide input in this legislative process of crucial importance to music creators, music users, and, most importantly, the public. We look forward to working with the Members of the Committee on legislation that ensures that all songwriters and publishers receive fair and equitable compensation.

Testimony of
Public Knowledge, the Consumer Federation of America,
and the Electronic Frontier Foundation

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing On: Music Licensing Under Title 17 Part Two

June 25, 2014

Dear Chairman Goodlatte, Ranking Member Conyers, and members of the committee:

It is a privilege to submit the following testimony for the record in this hearing on current music licensing issues.

Public Knowledge (PK) is a non-profit organization that advocates for the public's access to knowledge and open communications platforms. The Consumer Federation of America (CFA) is an association of non-profit consumer organizations that was established in 1968 to advance the consumer interest through research, advocacy, and education. Today, nearly 300 of these groups participate in the federation, set policy in the annual consumer assembly and govern it through their representatives on the organization's Board of Directors. The Electronic Frontier Foundation (EFF) is a nonprofit civil liberties organization working to protect consumer interests, innovation, and free expression in the digital world.

The legal provisions that shape our music licensing system should encourage a competitive, innovative market of music platforms and services that are accountable to music fans and musicians. This requires a set of well-developed structures that promote efficient licensing practices that minimize costs for everyone while promoting competition between intermediaries like record labels, publishers, collective licensing organizations, and distribution services. It has been said that companies operating in the music industry today must navigate a labyrinth of music licensing to be successful. PK, CFA, and EFF ask Congress to support policies that will simplify and strengthen music licensing mechanisms to promote the development of new competitive services while providing reasonable compensation for artists. The music licensing structures shaped or encouraged by copyright law should promote the creation of new music and increase the public's access to that music.

Online music services help musicians and their fans alike by giving listeners avenues to conveniently and legally access music. They can also give musicians new tools to create and distribute music, giving musicians the choice of forgoing traditional intermediaries to retain copyright ownership, collect a greater percentage of royalties, or simply maintain more control over their own careers. But if copyright law and licensing structures give traditional intermediaries the leverage to demand equity, enormous advances, or royalties disproportionate to their share of the marketplace, new online services will be beholden to the largest corporate rightsholders and will only become a tool for further entrenching the inequities in today's music

industry. This would only lead to fewer new tools to empower musicians and less competitive and innovative options for the public trying to legally access music.

The recent decision in the rate court dispute between Pandora and ASCAP is an important case study in how market concentration among rightsholders gives large incumbents the incentive and ability to harm consumers and independent musicians. The court's ruling rejected the notion that Internet radio should be treated differently from traditional radio under antitrust law. The ruling highlighted telling evidence of the publishers' willingness and ability to exert market power. The court found that Sony/ATV Music Publishing (Sony) and Universal Music Publishing Group (UMPG) "each exercised their considerable market power to extract supra-competitive prices" and further, that "[b]ecause their interests were aligned against Pandora, and they coordinated their activities with respect to Pandora, the very considerable market power that each of them holds individually was magnified." In addition, the court noted that Sony and UMPG attempted to withdraw selective rights from ASCAP despite the fact that "[s]ongwriters, and at least some independent music publishers, were concerned about the damage that might be wrought" with regard to transparency, payment disputes with publishers, and overall problems of consolidation in the industry.

This recent court decision is an important reminder that a legal framework that is sensitive to market power and protects principles like reasonable nondiscriminatory rates and transparency remains critical to a successful music marketplace. The consent decrees currently in force with the two largest performing rights organizations, ASCAP and BMI, remain necessary to achieve the efficiencies of collective licensing while preventing abuses of market power. Similarly, Congress should preserve statutory licensing options for a variety of online music services, to ensure a competitive and level playing field for music services and rightsholders of all sizes. At the end of the day, Congress must promote reasonable and efficient music licensing mechanisms to ensure the sustainability of innovative new services that benefit musicians and their fans alike.

We include the attached comments of Public Knowledge and the Consumer Federation of America for the record, which explain in further detail why the major publishers and major labels hold a concerning level of market power and why reasonable licensing mechanisms are necessary to ensure a competitive marketplace.

Jodie Griffin
Senior Staff Attorney
Public Knowledge

Mark Cooper
Research Director
Consumer Federation of the America

Mitch Stoltz
Staff Attorney
Electronic Frontier Foundation

Appendix A

Jodie Griffin, *Comments of Public Knowledge and the Consumer Federation of America*, Copyright Office Docket No. 2014-03 (May 23, 2014), https://www.publicknowledge.org/assets/uploads/blog/14.05.23_PKCFAComments.pdf.

Appendix B

Mark Cooper, *Comments of the Consumer Federation of America and Public Knowledge on Music Licensing Study*, Copyright Office Docket No. 2014-03 (May 23, 2014), http://www.copyright.gov/docs/musiclicensingstudy/comments/Docket2014_3/Consumer_Federation_of_Amercia_Public_Knowledge_MLS_2014.pdf.

Appendix C

Jodie Griffin, *Rewind, Reclaim: Copyright Termination in the Music Business*, PKTHINKS (Mar. 2014), https://www.publicknowledge.org/documents/rewind-reclaim.

Testimony of

Future of Music Coalition

On
"Music Licensing Under Title 17, Part Two"
Hearing

House Subcommittee on Courts, Intellectual Property and the Internet

June 25, 2014

Chairman Coble, Vice-Chairman Marino and members of the committee, it is a privilege to submit the following testimony for the record in this important hearing on music licensing.

Future of Music Coalition (FMC) is a national nonprofit education, research and advocacy organization for musicians. For thirteen years, we have observed changes to traditional industry business models, informing artists about what these developments could mean for artists' ability to reach audiences and be compensated for their work. FMC supports artists having a choice in how they exploit their copyrights, as well as their ability to take advantage of the innovations that help them reach potential audiences. We are cautiously optimistic that the ongoing review of current copyright law will result in recommendations for updating the Copyright Act that serve the interest of creators. To this end, we will outline criterion that we see as necessary for improving conditions for creators within the context of Title 17 of the Copyright Act.

As we have described in previous written testimony before this committee, ongoing technological shifts have reshaped how music artists and rightsholders create music and bring that music to fans. Though it is true that the larger industry players were not able (or willing) to respond to the digital disruption at its onset, nearly every participant in today's music marketplace are utilizing existing and emerging technologies to realize their goals. Even the major media conglomerates have pivoted to a place where the majority of their business is digital. Independent labels and publishers are servicing music users—such as digital services, and ultimately, fans—on an impressive array of platforms. Individual artists now have the ability to publish and perform music to a global audience with the click of a mouse or swipe of a screen. Yet despite the many exciting transformations within our sector, there remain numerous frustrations that limit the kind of growth that would encourage further investment in music and those who create it. In this testimony, we will describe existing tensions and remark on the basic values that must inform any attempt at reform.

Music Licensing, Broadly

FMC has weighed in on the state current music licensing with high degree of specificity, most recently in the form of comments to the Copyright Office in their Music Licensing Study.[1] We are also participants in roundtable conversations about potential ways forward, which will hopefully inform the work that this committee undertakes in the months to come. There are a number of areas that Congress could address in legislation, and there are currently several proposed bills that focus on specific adjustments to existing law for the benefit of various parties. FMC believes strongly that the goal in optimizing the Act for contemporary and future realities must be in line with Article I, Section 8 of the United States Constitution, which is silent on the matter of intermediaries, but clearly empowers Congress to make laws that incentivize authors to benefit the public.

FMC believes that music licensing and the copyright laws that give it shape should encourage the following:

1. Transparency and leverage in compensation structures
2. Artist inclusion in music data standards and management
3. Artist access to communications platforms
4. Uniformity in rights

1. Transparency and leverage in compensation structures

The current trend of direct deals between rightsholders and services raises many questions about transparency and leverage for the broader class of musicians and composers. There are recent deals between Clear Channel and the major labels (and a couple of independents, including Taylor Swift's label) to compensate for over-the-air plays at a percentage of overall revenue. In addition, there is the preference of major publishers to negotiate digital performance licenses directly. With each approach, there is a clear danger of the marketplace being tilted to favor just a handful of power players.

[1] *Future of Music Coalition Comments in Music Licensing Study*, United States Copyright Office Cong., 23 (2014) (filing of Casey Rae, VP for Policy and Education, Future of Music Coalition). Web.

Rightsholders often make the argument that direct deals establish a higher floor for compensation, but may end up being a race to the bottom. Take for example the deals made by the bigger labels with Clear Channel to pay a portion of revenue for AM/FM broadcast.[2] In no way are these deals a substitute for a full public performance right. First off, they leave out all performers who aren't signed to the label under such a deal. Second, there is little chance for anyone but the biggest labels and biggest artists to get to the negotiation table. Third, such deals aren't at all transparent. Inasmuch as we even know the terms, there are rumors that the provisions trade *some* compensation for over-the-air plays in exchange for lowered rates around digital streams. If (and some would say when) Internet radio overtakes terrestrial broadcasting in listenership, this means that "fair market" webcasting rates may end up being *lower* than those currently negotiated under the statutory license. Lastly, there are legitimate concerns that such arrangements are a backdoor to payola-like practices.

There are similar concerns about music publishers and digital music services. While the ability for publishers to remove partial catalog from Performance Rights Organizations (PROs) have been rebuffed by the courts, there is the ever-present possibility that the biggest music publishers will withdraw all catalog from the PROs, leaving just the smaller publishers and non-commercial broadcasters covered by the blanket licenses offered by the two PROs operating under consent decrees. Again, the case is made by the bigger publishers and their trade industry representatives, that direct deals will raise the floor for compensation overall, particularly if these deals are allowed to inform rate-setting in the courts (or arbitration, as is the preference of the publishers). Whether this would be the actual result of eliminating the consent decrees is doubtful. More likely is a further fracturing of the licensing marketplace to the competitive disadvantage of independent publishers, songwriters and smaller broadcasters. The impacts would be felt well outside of the Internet and satellite radio marketplace, which is why the Department of Justice must exercise caution and restraint when reviewing the consent decrees for a

[2] *See Warner Music Group and Clear Channel Announce Landmark Music Partnership*, CLEAR CHANNEL (Sept. 12, 2013) web; *see also Clear Channel and Fleetwood Mac Sign Landmark Revenue-Sharing Agreement*, CLEAR CHANNEL (June 12, 2013) web (marking the first directly negotiated performing rights partnership between a radio company and an artist).

possible amendment.

Eliminating the rate court in favor of an arbitration process also raises concerns. Arbitration proceedings are typically sealed and do not create a record or precedent, a move away from transparency—unless the rules around arbitration include mandatory public disclosure.

There is still a need for artist intermediaries. PROs and SoundExchange in many cases represent the only leverage individual songwriters and performers have in rate-setting proceedings. We wholeheartedly agree with both camps that artists deserve to be compensated for their work at a fair rate, but we would strongly urge this subcommittee to look beyond rate determination standards and consider the frameworks under which artists are paid and through which services can quickly and efficiently perform catalog for listeners. Transparency and leverage for artists within these structures must be at the forefront of any potential solutions, followed closely by what formulas are most likely to grow the legitimate digital marketplace.

We extend our concerns about transparency and leverage to interactive streaming, in which artist compensation is complicated and uncertain. Within the current licensing framework, recording artists signed to a label are compensated based on what is in their contract. It seems safe to say that individual artists—even highly successful ones—are unlikely to make much money from these platforms, as compensation is held against recoupable costs and may already be quite low based on the artists leverage at the time of signing a contract. For songwriters, there are issues of audit rights, an issue that has been brought forward by some parties in the Copyright Office Music Licensing inquiry.[3] From our vantage point, we see the stark difference in compensation and licensing between interactive and non-interactive services as troubling for the long-term sustainability of the digital music ecosystem.

[3] "U.S. Copyright Office - Music Licensing Study." *U.S. Copyright Office - Music Licensing Study*. U.S. Copyright Office, n.d. Web. 10 June 2014.

We are sensitive to the desire of some independent artists and labels for an "opt-out" option within statutory or compulsory licensing schemes. However, we also identify with the arguments put forward by the independent label trade group the American Association of Independent Music (A2IM), which has called for an expanded statutory license for interactive services to ensure that indies can compete on a level playing field within on-demand platforms like Spotify and Beats Music. By all available metrics—Billboard charts, Grammy nominations, global demand—independent music represents an essential and growing sector. However, the heavily consolidated major labels consistently inflate their market share in order to obtain large up-front payments and equity stakes in emerging digital music platforms. This places independents at a perpetual disadvantage in terms of licensing and investment. Artists, too, are affected, as they are typically last in line for compensation and have next to no leverage within the rate-setting process for interactive services. As FMC states in our own Copyright Office filing:

> "FMC considers supporting the expansion of a statutory license for sound recordings on interactive music services for the reasons of clear and transparent creator splits and direct payments. We do, however, recognize that in an environment where on-demand listening continues to supplant higher-margin transactions such as downloads, that there are many questions regarding the return on investment in the creation, distribution and promotion of recorded music. We believe that some of these questions can be addressed by integrating higher-margin commerce—scarce goods and other unique opportunities—within existing and future access platforms."

Congress should consider enacting an expanded statutory license for interactive streaming. This would present an opportunity to establish equitable and direct payment to musicians, as well as allowing services to more efficiently obtain licenses. Currently, negotiations for major label catalog takes an average of 18 months and a tremendous amount of up-front capital[4] with no guarantee of reaching terms. More efficient licensing would allow services more room to innovate new and enticing ways to deliver music to fans, and get artists paid more quickly (and hopefully directly). It may be possible to

[4] Touve, David. "Innovation at the Edge: An Investigation of Music Licensing Efforts and the Process of Opportunity Development." Davidtouve.com. Washington and Lee University, 22 July 2012. Web. 09 May 2014.

construct this system to include opt-out provisions under an extended collective license; at any rate, Congress should closely consider how to narrow arbitrary technological distinctions between streaming platforms in order to establish a more competitive marketplace built on transparency and efficiency.

2. Artist inclusion in music data standards and management

Future of Music Coalition is on record in support of voluntary global copyright registries and/or authentication databases as a means to reduce frictions in the digital music marketplace and more efficiently compensate creators for various uses of their work. We also support metadata standardization to streamline these processes.

We wholly endorse the approach described by Jim Griffin in his testimony at this hearing,[5] particularly his call for inclusion for the recordation of copyrights and a broader availability of information about ownership and other data:

> "Performers, featured artists, background artists, writers, editors, translators, owners and all associated with a copyright should be included in efforts to record and enumerate copyright information because they often have remuneration and attribution rights, and they can help elucidate ambiguous information. Much as we do with land ownership records, we should welcome any claim related to any work."

While there are a number of such databases extant or in development, they are either lacking in accuracy or depth of information or are to one or another extent proprietary. The Copyright Office offers one example of a publicly searchable rights database, but some of its records are incomplete and not always available online.

Any comprehensive registry system or systems would benefit tremendously from metadata standardization, as would commercial platforms that sell or provide access to music. There is still much work to be done in fixing metadata—the information that accompanies a sound recording file and is delivered to download stores like iTunes and

[5] *Testimony of Jim Griffin before the House Subcommittee on Courts, Intellectual Property and the Internet*, 113th Cong. (2014) (testimony of Jim Griffin). Print.

streaming platforms like Spotify or Pandora. Metadata includes things like performer, composer, record label, and release date, but it could also include useful information like production and songwriting credits, which music professionals depend on to encourage future work.

Better data on the input side and enhanced functionality and interoperability on the output side would alleviate many of the existing frictions in the music licensing space while pointing the way towards potential solutions for other copyright sectors. The government, including the United States Congress, should encourage all parties to work towards a comprehensive, globally workable database (or databases) for music, with unique numerical signifiers and improved metadata standards.

3. Artist access to communications platforms

It may seem that we've solved the problem of access for creators, but high-quality and affordable broadband Internet service—a critical resource for music entrepreneurs—remains frustratingly out of reach for many. At the time the National Broadband Plan was published in 2010, around 100 million Americans lacked access to broadband Internet in their homes. Where broadband Internet is available, users often have only one or two choices in providers. Prices remain high for wireline Internet service, and just a few companies control the rapidly growing mobile space.[6] High consumer prices for broadband can also impact how much money consumers have to spend on legitimate entertainment offerings. An absence of competition is also a factor in the lack of incentive to build out to more communities. This encourages telecommunications carriers to enter preferred partnerships with well-capitalized companies who can afford to pay for premium access to subscribers—it's easier money and requires no new investments in or improvements to the existing network.

[6] *See* Laura Houston Santhanam, et al., *Audio: By the Numbers*, PEW RESEARCH CENTER FOR EXCELLENCE IN JOURNALISM, *available at* http://stateofthemedia.org/2012/audio-how-far-will-digital-go/audio-by-the-numbers/. Mobile and other transportable digital devices are experiencing strong listenership growth, with as many as 40% of Americans currently consuming music through a digital device and projections for 2015 double that figure. Importantly, the amount of people using a mobile device to consume online music in an automobile doubled from 2010 to 2011.

Musicians and songwriters know payola when we see it. Currently, the FCC is considering rules that would establish a "tiered" Internet service, which would allow Internet Service Providers (ISPs) to create a fast lane for content providers that agree to pay a fee. While this may make good business sense for the telecom and cable companies, it would be devastating to entrepreneurs and innovators in music and elsewhere. ISPs should not be allowed to pick winners and losers in a free market. Products, services, innovations, songs and ideas must be allowed to find their audiences without undue interference based on business or political preferences. Who on this committee has not used Twitter to reach your constituencies? Where will the next Twitter come from if the flow of information is controlled by just a handful of gatekeepers? Congress must support an Internet where creativity and commerce can flourish in a free market. Clear rules of the road for ISPs that allow any and all *lawful* online content to reach end users is the bare minimum to promote American competitiveness for future generations. This is not a partisan issue, though some would seek to make it so. It's a small enterprise issue, an innovation issue, a global competition issue and a free speech issue. It's also a music issue, and that's why we are raising it today.

Concerns go beyond the currently debated Open Internet proposals. Last year, AT&T announced a "sponsored data" scheme in which the company would charge its subscribers for data overages engendered through the use of the services and applications of its preferred partners. While such activity may be permissible under even recently overturned net neutrality rules, it illustrates how competition and clear rules of the road are necessary to innovation online. If ISPs are allowed to pick winners and losers among applications and services, artists may find themselves locked into structures that don't play to their economic advantage, thereby frustrating a key incentive of our copyright regime.

We urge Congress to consider issues of broadband competition and openness as it examines issues around copyright to ensure that the incentive to create, innovate and seek remuneration remains viable for all artists and entrepreneurs who use the Internet.

4. Uniformity in rights

There is currently much talk of "parity" in the music licensing space. While generally FMC has been opposed to "one-size fits all" solutions to licensing issues, we do recognize that the current system offers unfair advantages for some, while limiting opportunities for others. Above, we referenced the recent decision by the Department of Justice to reexamine the consent decrees that govern two of the three songwriter/publisher PROs.

In recent comments filed before the Copyright Office, ASCAP claimed the consent decrees are no longer necessary at all. Echoing separate comments filed by BMI, the organization also recommended that if the consent decrees remain, they should be entirely reshaped to allow the "bundling" of licenses beyond just public performance uses. This would allow the PROs to offer mechanical and synchronization licenses alongside those for public performance. The PROs cite efficiency and the need to be globally competitive as reasons for these tweaks, but it's clear that they also want to expand their own businesses.

Meanwhile, recent court decisions have favored Internet radio company Pandora in arguments about royalty rates and whether major publishers should be allowed to withdraw partial catalog to license directly to services. (Publishers' reason for wanting to go direct is to achieve higher rates than those set by the courts when parties fail to reach common ground.) On the rate-setting issue, the court largely sided with Pandora, scolding ASCAP for heavy-handed negotiation tactics. Ultimately, the rates stayed where they have been (1.85 percent of revenue, as opposed to a scheduled increase to 3 percent sought by ASCAP).

As to the standard for determining rates, the publishers and PROs prefer a "willing seller, willing buyer" approach, which is what labels and performing artists have for sound recordings used on Internet and satellite radio.

Songwriters are likely caught in the middle. On one hand, the consent decrees shaped the member agreements at ASCAP and BMI, which most songwriters find fair. (These agreements establish 50-50 splits between publisher and songwriter/composer for performances of musical works). If the consent decrees were eliminated, songwriters may find all the leverage for the licensing of musical works falling to just a few major publishers that can dictate what innovations can come to the marketplace and how writers get paid. Which is to say, eliminating the consent decrees (or amending them too far) is something of a Faustian bargain. Creators should not be forced to trade transparency, leverage, and direct/equitable payment for the mere possibility of rate increases.

Music services should also be nervous. The consent decrees were originally put in place to curb the anticompetitive tendencies of ASCAP and the publishers, which in the 1930s and 1940s had a monopoly on the licensing of music. Without these limits and the blanket licensing allowed by the consent decrees, it is unlikely that AM/FM radio would have ever gotten off the ground. And, considering that over-the-air broadcasters only pay songwriters and publishers (but not performers and labels), this would have meant that countless music creators would miss out on a key revenue stream. Internet and satellite radio services obviously want to pay the lowest rates possible, but apprehension about a post-consent decree world raises concerns for other reasons—namely, the ability to bring catalog to music listeners quickly and efficiently, grow the legitimate digital market and pay creators.

A bill currently before Congress, the Songwriter Equity Act, would accomplish many of the publishers' goals with regard to performance and mechanical royalties. It doesn't go as far as to eliminate the consent decrees, however, which is probably why the National Music Publishers Association has been putting pressure on the Department of Justice (DOJ).

For its part, the DOJ should proceed with caution and not simply cave to the demands of just a handful of powerful publishing companies. It's crucial that government regulators consider closely the impact of any decisions on songwriters for whom rates are important,

but who also depend on transparency and leverage in these systems. It would be a poor outcome for creators and fans if DOJ intervention resulted in a fracturing of the legitimate marketplace at a time when we should be doing everything we can to make digital music work for all parties, especially artists.

There are also efforts to resolve the issue around the digital public performance of pre-1972 copyrights. Make no mistake about it, FMC wants older artists to be paid for the use of their work, which is one of the many reasons we've supported a terrestrial public performance right—countless legendary performers who are not songwriters have been for decades unable to collect money for AM/FM airplay. Worse still, the lack of a reciprocal right means they don't get paid for overseas plays in the many nations and territories that value American expression. We believe full federalization—not litigation or stopgap legislation—is best way to ensure that all recording artists can exercise their full rights under law, from performance to rights recapture. The next move should be a complete terrestrial performance right as a first step towards parity across platforms. One thing is for certain: the major label tactic of litigation for high damages is insufficient to establishing a long-term mechanism for compensating so-called "legacy" performers. There is certainly no indication that a big win for the labels would result in a single cent going to the performers or their heirs. There is certainly no such provision to share equity with artists when a company like Beats Music gets sold for 4 billion dollars, just as no portions of the money awarded from successful filesharing lawsuits has been distributed to artists.

One reason the labels are likely keen to press their case is that if they can get a favorable ruling establishing liability around pre-'72s, this precedent might be extended to the "safe harbors" governing other internet service providers, such as search engines and user-upload sites.

Again, we think there is a better solution, and one that would result in services knowing what to pay and to whom, and where performers are directly compensated. And that solution is the full federalization of pre-1972 copyrights.

There are, of course, many other issues that Congress might consider when approaching an update of the Copyright Act, some of which we have itemized in previous submitted testimony. We expect that as proposals are formulated and introduced, that there will be further opportunities to comment on specifics.

Conclusion

FMC is committed to helping artists navigate these issues. We look forward to engaging with the subcommittee further to ensure that creator viewpoints—particularly those in the independent sector—are considered as you go about your important work. Although it isn't easy to find solutions that satisfy the many stakeholders in today's music space, we are convinced that working artists must be part of the process.

Casey Rae
VP for Policy and Education
Future of Music Coalition
1615 L ST NW Suite 520
Washington, DC 20036

Recording Industry Association of America (RIAA) Response to the Honorable Tom Marino

Question: What is the difference between "free market" and "fair market?"

Answer:

"Free market" reflects what a buyer and a seller determine themselves to be the fair price for their transaction. The parties may take dozens of factors into consideration, but they themselves determine those factors and what their "best and final offer" is. This is a true open market negotiation with no artificial guidelines, measurements, or adjustments.

When used in the context of music licensing, "fair market" refers to a price or rate standard governing a compulsory license or a consent decree (set by the government or a court). This "fair market" price or rate standard acknowledges that it is not literally set by the open market, but strives to best reflect what that open market price or rate would be; in technical terms, what a willing buyer would pay a willing seller for the product or service. Notably, this "willing buyer-willing seller" standard naturally factors in <u>all</u> considerations of both sides, obviating the need to artificially tip the scale with duplicative and biased concerns such as "disruptive impact."

United States of America House of Representatives- COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
Testimony of Darius Van Arman Co-Founder of Secretly Group-Bloomington, Indiana
Board of Director member of the American Association of Independent Music ("A2IM")

Music Licensing Under Title 17, Part Two- June 25, 2014- Responses to Follow-up Questions:

Congressman Marino-"Define what Free Market is versus Fair Market" as he "wants all the information he can get before making a decision"

In the music industry context, it is critical that we focus on achieving a fair market. A fair market is a free market that is conducted on a level playing field. Almost all participants in the American music industry talk about how they want a free market, however many desire it for the wrong reasons. The biggest companies want to take advantage of the market clout they have achieved to extract more than their actual market share of value from the marketplace and to further increase their control of the market. While the American economic system flourishes like none other when there is a free market that is well balanced — historically making us the worldwide leaders in job creation, innovations and efficient business practices — it is generally accepted that a free market that veers too far away from full competition towards concentration and monopolization means less jobs, less innovations, less efficiency and higher prices to consumers. A monopolistic free market is really bad for our economy. So, in the music industry context, it is critical that we focus on achieving a fair market. Rely on free market principles, but don't construct a system that reinforces market concentration or creates incentives for the wrong behavior that ultimately limits consumers' access to important cultural works.

More specifically, in the new music economy, each music copyright should possess the same intrinsic value, where the revenue that each copyright earns for its rights holder should only be a function of how many times the copyright is performed by the public, not a more abstract notion controlled by technology gate keepers, the major publishers or the major recording companies. Music copyrights should be competing in the market place for "user attention" on a level playing field. Pedigree or the so-called imprimatur of a copyright being owned by a larger company doesn't increase a copyright's value. Only the actual performance of copyrights by users matters. Valuing music copyright in this way is not only fair and market-based, but there is no other methodology that comports more efficiently to the very intent of copyright law than this. The statutory compulsory license in its current form is not perfect, but it achieves this very important outcome towards establishing a fair market.

Congressman Collins (Sponsor of the Songwriter Equity Act)-"Where are you going so that you do not need to run to Congress for a decision if things do not work out"

The independent community would love nothing more than to get together with other industry participants to establish a fair market, which is a free market that is conducted on a level playing field, that adequately compensates creators while at the same time serving the public interest. But if the music industry experiences more market concentration, our belief is that it then becomes the responsibility of Congress or the other branches of government to get involved, to protect not only consumer interests but also the very intent of copyright, which is to stimulate new creative works that makes our culture richer.

Right now many industry participants, not just the independents, are very concerned that an equitable arrangement amongst all music industry participants might not be possible as long as the biggest companies are focused on doing everything they can to maintain the now dwindling advantages they have achieved. Big broadcasting companies are working hard to maintain their free ride on AM/FM radio, and major recording companies, major publishers and their trade organizations would like a system where their share of the market, not the quality of their copyrights, is what dictates how much money they can earn. In the new music economy, where all participants are carving up fixed revenue pies, every additional dollar that a large company can unfairly achieve for itself for their copyright is one less dollar for the other participants, including the independent smaller creators, publishers, music labels and songwriters.

If Congress can address just these two things— establishing a terrestrial (AM/FM) performance right, and shoring up the statutory compulsory licensing system to address the ill effects of market concentration — we believe that the whole industry would then have a fighting chance to present a fuller and more comprehensive framework to Congress that makes sense for all of the industry participants.

Congresswoman Sheila Jackson Lee-"What do you want Congress to do?"

American independent labels want nothing more than a free market with a level playing field. But one thing is standing in our way: market concentration. Big companies are using their power and accumulated resources to take in excess of their true market share what is not fairly due to them, to the detriment of independent labels, artist creators and songwriting interests. So when Congress reviews the state of music licensing and considers any remedies or revisions to copyright law, it should take great care not to replace our current compulsory statutory licensing system with one that is more privately controlled, that leads to more market concentration, or that diminishes the fair and equitable compensation of creators. The independents want to compete, to provide the economic growth and job creation that our American economy needs.

Sirius XM Radio Inc.
1221 Avenue of the Americas
New York, NY 10020

July 25, 2014

Representative Tom Marino
Vice Chairman, Subcommittee on Intellectual Property
410 Cannon House Office Building
Washington, DC 20515

Dear Representative Marino:

I write to respond to your invitation to the witnesses attending the June 25, 2014 Hearing on Music Licensing Under Title 17 to submit for the record any comments they might offer concerning the difference between the concepts of "free" and "fair" market value.

I understand that Willard Hoyt of the Television Music License Committee has submitted an analysis of the issue from Dr. Adam Jaffe, a highly respected economist with years of experience in the music licensing arena. Sirius XM fully endorses Dr. Jaffe's conclusions, which we attach again here, and which square with my comments on this topic in my initial written submission to the Subcommittee. My conclusion there was simple: that due to incredible concentration among copyright owners on both the music publishing and sound recording side, "free" market negotiations (in the sense of negotiations where neither side is compelled to enter into a deal) are not necessarily "fair" – and indeed may lead to rates closer to monopoly levels rather than to the competitive rates one would expect in a truly fair-market transaction.

Dr. Jaffe's analysis focuses on the market concentration evidenced among the performing rights organizations (the "PROs") ASCAP, BMI, and SESAC – and rightly concludes that the consent decrees remain vital and necessary to curb the market power that comes with such entities collectively representing and licensing thousands of music publishers, and millions of songs, in a single blanket license transaction. But the Subcommittee should not be under the illusion that marketplace agreements involving individual rightsholders, as opposed to PROs, are necessarily more indicative of fair-market value just because they do not involve a PRO and may be freely negotiated outside the constraints of a consent decree.

The publishing market is dominated by three major companies, two of whom (Universal and Sony/EMI) represent between 20 and 30% of the market each, and a third (Warner Chappell) which represents approximately 15%. Those companies have assembled together thousands of smaller publishing catalogues which they license on a repertory-wide basis for a single price. Given the size of their amassed repertories, a company like Sirius XM could not realistically operate its service without a license from each of these majors. And because each of these major publishing companies' repertories are unique (and thus not substitutes for one another), we cannot get them to compete

against one another on price to win our business; we need a license from each of them.[1] Given these market realities, it simply is not the case that agreements negotiated outside the constraints of the ASCAP and BMI consent decrees and rate courts are (or would be) somehow more representative of fair market value, even if they might be characterized as "freely" negotiated in a narrow sense.

The sound recording market is likewise dominated by three companies each representing between 20% and 40% of the market. And the implications are essentially identical: any large scale music service (especially on-demand services that must make available whatever music a consumer wishes to hear at that moment) must obtain a license with each of the majors, lest it lose access to major swaths of recorded music. For such services, saying "no" to Universal or Sony is simply not a realistic option – hardly the basis for a fair negotiation.

Moreover, it must be remembered that saying "no" would require a music service to remove the repertory of the given publisher or record company from its offerings. Even if it were inclined to take that step, the contents of the majors' repertories are so convoluted, and so shrouded in secrecy, that the service would not know which songs to remove. That would expose the service not only to the commercial damage of a diminished repertory, but to potential copyright infringement penalties of $150,000 per work for songs it failed to remove. This only furthers the bargaining leverage enjoyed by the majors and their ability to drive rights far above competitive levels.[2]

In sum, given the highly concentrated nature of the music licensing marketplace, free-market deals may be "free" in name only; more often than not, they will reflect the tremendous market power that results from concentrating copyright ownership in a handful of companies. Even if one can construe agreements reached under such circumstances as being freely entered, they may be far from fair.

Before concluding, I note as well that these conclusions necessarily impact the choice of rate-setting standard utilized by the Copyright Royalty Board. To the extent the "willing buyer willing seller" standard is utilized, and to the extent it requires the Judges to look to marketplace agreements as benchmarks for statutory license rates, the unfair, non-

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[1] Indeed, the situation is even more complicated. Publishing shares are commonly split across different co-writers affiliated with different publishing companies. Thus, a license from, say, Universal might convey rights to only portions of given songs, and condition those rights on our obtaining licenses from co-publishers affiliated with Sony or Warner Chappell – meaning we could not perform the songs without taking licenses from those majors as well.

[2] To be clear, this power is different from the monopoly creators are granted in a single work. It is a power that comes from combining hundreds of thousands of copyrights together in a single repertory licensed on a blanket basis.

competitive rates the major publishers and record labels are able to extract in unregulated markets will tend to drive up rates under the statutory licenses as well (in the case of the statutory webcasting license, to rates so high that the intervention of Congress was required). The 801(b) standard, by comparison, allows the Judges to consider marketplace benchmarks – and experience shows that the Judges do in fact set rates within the range suggested by marketplace benchmarks – while also allowing the Judges the latitude and flexibility to consider the enumerated policy factors as well.

Thank you again for the opportunity to provide testimony to the Subcommittee. I would be pleased to respond to any additional questions that you might have for Sirius XM.

David J. Frear
Executive Vice President and Chief Financial Officer, Sirius XM Holdings Inc.

CC: Members of Subcommittee on Courts, Intellectual Property, and the Internet

Enclosure (1)

Recording Industry Association of America (RIAA) Response to the Honorable Sheila Jackson Lee

Question: What do you want from the comprehensive approach that will pass the House, pass the Senate, and get signed by the president? If we just looked at the whole picture, and said, "We want to answer everyone's concern," what will be good to have in that comprehensive bill?

Answer:

We thank you for your question and greatly appreciate your involvement on this important and complicated issue. As I noted in my testimony, it will be impossible to "answer everyone's concern" when addressing the issue of music licensing. There are far too many interested parties with far too many vested interests. But we have started from a shared perspective: that the system is broken and something needs to be done.

I believe that the key to addressing this problem is to focus on the current impediments to an efficient and fair system. This includes acknowledging the myriad licensing processes operating under different rate structures, all within a marketplace (and technological revolution) that has evolved beyond anyone's vision. These elements are fundamentally intertwined, with a minor change to each producing a ripple effect across all others. The solution, therefore, should not, and cannot, be piecemeal.

For example, one area we believe would benefit from a comprehensive review is licensing for musical works. What both services and content owners seek is a streamlined and predictable system, based on fair and efficient payment. Of course, what sounds easy to create is anything but. These are extremely difficult problems to solve and there is no one right answer. The RIAA respectfully offered its own proposal in our comments to the Copyright Office's NOI – which I referenced in my testimony – and we hope that it will at least prompt an honest and meaningful conversation among all participants in this venture.

There were a few other points noted in our comments and my testimony, which I'd like to briefly mention here:

First, three mature digital radio services – Sirius XM, Music Choice and Muzak – have enjoyed below-market royalty rates for their use of sound recordings. Rather than using the "willing buyer/willing seller" rate standard that applies to every other service, these three services still operate under the "801(b)(1)" standard that they were "grandfathered" into before 1998. For these services, that standard has been interpreted to set royalty rates that are less than fair market value, effectively forcing artists and record labels to subsidize these services' business models on a continuing basis. They were "grandfathered" into the lower rate standard because of concern for the business expectations of start-up companies, but Congress never intended this to produce permanent below-market subsidies on the backs of artists and record labels. These services are no longer nascent businesses. All services that take advantage of the statutory licenses should be subject to the same willing buyer/willing seller rate standard.

Second, while recordings made on or after February 15, 1972 are covered under Federal copyright law, those made before that date are protected by state law. Unfortunately, some digital radio services operating under a compulsory license have abused this bifurcation by refusing to pay for use of "pre-72" sound recordings under either state or federal law. The result is that many legacy artists are not compensated for the classic music that not only stands on its own (and inspires entire dedicated stations like Sirius XM's "60s on 6"), but helped pave the way for the hits of today. Modernizing the modern music landscape cannot overlook and leave behind these cherished artists and their invaluable contributions to our country's musical heritage. That is why we support H.R. 4772, the RESPECT Act, which would create a condition for use of the compulsory license. Services that benefit by using the compulsory license to stream sound recordings without permission and by paying one check for all music to one entity, would have to also pay for pre-72 music under the same system.

Third, we must grant a broadcast performance right for sound recordings. Every other copyrighted work has the same full set of rights. Only recordings have been denied the comprehensive rights enjoyed by every other copyrighted work – namely the right of public performance. That's why AM/FM radio is able to profit from the public performance of recordings without paying artists or record labels a dime. This loophole in the law, which is unique among developed nations, costs artists and rights holders – and the U.S. economy – millions of dollars as foreign countries refuse to pay for radio performance of U.S. music since the U.S. doesn't pay. This anachronistic exemption didn't make sense in the past, and it certainly doesn't make sense in the current broader music industry landscape. If we're talking about modernizing music licensing, it only makes sense to finally put an end to the nearly century-old economic government subsidy provided to terrestrial broadcasters.

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