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ENSURING ARTISTS FAIR COMPENSATION: UPDATING THE PERFORMANCE RIGHT AND PLATFORM PARITY FOR THE 21ST CENTURY

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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ENSURING ARTISTS FAIR COMPENSATION: UPDATING THE PERFORMANCE RIGHT AND PLATFORM PARITY FOR THE 21ST CENTURY

TUESDAY, JULY 31, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:08 a.m., in Room 2141, Rayburn House Office Building, the Honorable Howard Berman (Chairman of the Subcommittee) presiding.

Present: Representatives Berman, Conyers, Watt, Jackson Lee, Cohen, Johnson, Schiff, Lofgren, Coble, Feeney, Smith, Goodlatte, Cannon, Chabot, Keller, Issa, and Pence.

Mr. BERMAN. The hearing of the Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

And I would like to begin by welcoming everyone to this hearing, which is entitled, "Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century."

I would like to welcome our distinguished panel of witnesses who each have a personal story and a unique perspective about the performance rights issue. In addition, I would like to welcome back Marybeth Peters, who remains a tremendously valuable resource to this Subcommittee.

I have wanted to hold this hearing for a very long time, not only because of my constituents, but because as a policy matter it is time for Congress to re-evaluate the limitations of the current performance right for sound recordings.

I have supported the expansion of the performance right for over 20 years, with two caveats. One is that, by extending this right, it does not diminish the rights and revenues of the creators of musical works. And secondly, that terrestrial broadcasters large and small remain a viable source of music.

Over time, the Copyright Act has provided protection for various types of works in a piecemeal fashion. As early as 1909, Congress recognized the right in the musical composition. Over 70 years later, Congress provided limited protection for sound recordings.

The copyright system is complex for it applies to multiple types of works, each entitled to multiple but separate rights. Moreover, each work can be utilized on multiple platforms, each of which has a different set of rules.

Some rights are exclusive and provide the copyright owner the ability to negotiate freely in the marketplace. Some are constrained by a compulsory license, which entitles users to access the work without permission, providing that they pay the set rates and adhere to specific conditions. Some rights are even further limited by providing users an exemption from getting permission or providing payment for use of the work. This is the last category which is most troublesome from the perspective of a copyright holder.

If Congress were writing the statute from scratch, it would probably not look the way it does. As time passes, it is incumbent on Congress to re-evaluate the various provisions of the licensing structure to see how markets or businesses have changed, and whether it is time to reform the law.

Currently, section 114 provides a compulsory license to publicly perform a sound recording where there is a digital audio transmission. Terrestrial broadcasters, however, aren't required to pay a royalty for their transmissions. They enjoy an exemption from the digital performance right.

Historically, the broadcasters have argued that the exemption is appropriate because of the symbiotic relationship that exists between the over-the-air airplay on radio and the promotion of the music leading to future sales. To a certain extent, the existence of payola was evidence of this idea.

Furthermore, the broadcasters suggest that to incur a further requirement of compensation for sound recordings to artists and musicians, that is tantamount to a performance tax.

Finally, there is concern as to how smaller broadcasters will survive if required to pay it.

I am sure we will hear cogent arguments from our witnesses today about the history of the exemption for broadcasters and the effect of providing a performance right. However, I would like to initially engage on a number of these arguments and the primary question: Is there justification today for this exemption given the number of outlets for music and how consumers acquire it?

First, Rights parity: Regardless of whether there remains a symbiotic relationship and whether, in fact, airplay constitutes promotion or substitution, there is an equity argument that has been consistently ignored. Performers and musicians as creators should be entitled to control use and at least receive revenue for their works. That Patsy Cline's estate is not compensated for the over-the-air performance of her rendition of "Crazy" seems crazy.

In addition, my notion is that removal of a Government compulsion for labels, artists, and musicians to provide something for free—that repeal to the exemption removal—removal of that compulsion is not a tax. In fact, if anything, the Government's provision of free spectrum to radio stations is a tax to benefit broadcasters imposed on U.S. taxpayers, who pay for it.

Platform parity: Nowhere in the past has there been more engaging technological platforms which offer music to consumers at almost any time in any format. Especially with the rollout of high-definition radio, which will provide more choice, as it becomes harder to justify an exemption for any one platform. Satellite, Internet and cable all provide and promote music to their listeners, yet all pay fair compensation to artists and musicians.

Then there is international parity. Because America does not have an adequate performance right, we disadvantage our own creators because they can't receive foreign royalties. In many countries, between 20 and 50 percent of the music played abroad is American made. And because of lack of reciprocity, we are denying our creators millions of dollars in revenue.

As we work toward crafting a bill, I take note of at least two considerations.

One is that we need to ensure that songwriters are not adversely affected by the elimination of the broadcast exemption. I would note, however, in countries where there is a performance right for sound recordings, as well as a performance right for musical compositions, there has been no decrease in the royalties to owners of musical composition. In fact, the royalties have grown over time, as have royalties for performers and sound recording owners.

Furthermore, I am open to a special consideration for small broadcasters.

Just one last note. Because I have heard from business establishments and others, let me start out today's hearing by saying that this Subcommittee's examination of the performance right is limited to re-evaluating the current exemption and the compulsory license for terrestrial broadcast radio. We are not considering the extension of a full performance right for sound recordings like the one afforded musical works.

Thus, restaurants, bars, establishments, venues and others who pay performance royalties to songwriters and music publishers would not be affected. Rather, because there is a special exemption in the current compulsory license for radio services that benefits only terrestrial radio over other types of radio, the question is whether circumstances have changed so that it is now time to reconsider that particular exemption.

I now have the great pleasure of introducing my friend and Ranking Member. But before I do that, I am going to introduce, if he doesn't mind, because the Chairman of the Committee has to go to the floor, our distinguished Chair. All right, what we are doing is we are going to recognize the Chair, and then the Ranking Member of the full Committee and then the Ranking Member of the Subcommittee.

If I had known this before I started talking, I might have done it before I went ahead.

But, Mr. Conyers, you are recognized. [Laughter.]

Chairman CONYERS. Thank you, my good friend.

I am delighted to have heard you because now that we have heard everything on the subject, we can just welcome our witnesses. And that is all I want to do today.

And I have to stay here from the floor, we have a lobbying bill up. We have been working on this package. And my good friend Howard Coble and I are both due on the floor. Lamar Smith is due on the floor, as well.

All I wanted to do is say hello to Sam Moore. And let him know that I will be seeing Aretha Franklin in Detroit when the session ends, and I will be giving her your good regards.

And, Judy Collins, one of our favorite artists, we are so happy to see you today, my dear.

It is great for you all to be here.

Let me just say that it is very important that we realize how unfair the system is to artists and other music platforms as artists, under the current law. They are not compensated when their songs are played on broadcast radio. And, you know, that is my big thing to examine here today.

Satellite pays. The Internet pays. Broadcast still hasn't come around.

Now, there was a time when just being played on the radio would do it. That would make you. But those days, as everybody here knows, are not the same anymore.

We have so many different venues. And it is in this sense that songwriters who receive compensation regardless of which platform performs their songs, artists are only paid when their songs are played over the Internet, on satellite radio, or cable.

I just want to conclude—and I will put in the record my remarks—is that I think we can work out some kind of compensation package, Chairman Berman, without harming the songwriters. And they have had to come through a long period of time for them to be compensated.

So, over the years, it has been debated whether Congress should amend current law to eliminate the specific exemption for broadcasters from the duty of paying the performance royalty. And we should all be mindful of the potential impact this right would have on songwriters who currently are paid every time their songs are played on radio.

And so, I am going to review this testimony carefully.

I am so glad that all of you are here today. It is great to see all those who have worked so hard.

And as I look all over the audience, I see a lot of people connected to this entertainment industry here today, not excluding people who have worked on the Hill for so many years. [Laughter.]

And so, maybe there is a connection between what I am going to do on the floor and what is going on here. Who knows? [Laughter.]

Thank you for this opportunity, Mr. Chairman.

Mr. BERMAN. If, when you come back, half the audience is gone, we will know you—— [Laughter.]

I am now pleased to recognize the Ranking Member of the full Committee, who also has to go to the floor on the same piece of legislation. The gentleman from Texas, our Ranking Member, Lamar Smith?

Mr. SMITH. Thank you, Mr. Chairman.

I also want to thank Mr. Coble for deferring to me and yielding me the time to go ahead of him in making an opening statement.

And, has already been mentioned, let me apologize to our witnesses today that, unfortunately, I do need to go to the floor, along with the Chairman, to manage a certain lobbying reform bill. So I will not be able to stay as I would like to.

Clearly, though, it is obvious that there is a lot of interest in the subject today and deservedly so.

Mr. Chairman, thank you for convening today's oversight hearing on music licensing and the proposal to expand the performance royalty to cover over-the-air radio broadcast of sound recordings.

With the Subcommittee's high-profile emphasis on advancing patent reform in this Congress, a casual observer could easily presume that copyright issues in general, and music issues in particular, have not received much attention so far. That conclusion would be wrong.

This oversight hearing marks the third copyright-focused hearing in the IP Subcommittee this year to focus on the protection and promotion of the music industry and the rights of recording artists and composers.

Mr. Chairman, you and I have spent a great deal of time, both personal time and public time, over the past several Congresses working together in a bipartisan effort to streamline, modernize and improve the music licensing process, with the shared goal of adapting the compulsory license process to the digital age. Over this time, we have made tremendous progress in identifying and narrowing many of the process-related issues.

But the goal of enacting a public law and actually implementing some of our agreed reforms remains. I continue to believe this task can be achieved in this Congress.

Unlike our effort to reform the process for clearing the legal rights to use copyrighted musical works and sound recordings and adjudicating the royalties to be paid to recording artists and copyright owners, the subject of today's hearing is one that affects the substantive rights of these parties, as well as the settled expectations of those in the traditional radio broadcasting industry.

The goal of enacting a full statutory performance right for sound recordings is one that has been sought by performing artists and the recording industry for many years. It has only been 12 years since Congress first provided a limited public performance right in sound recordings with the enactment of the Digital Performance Right in Sound Recordings Act, a law that made available a compulsory license for sound recordings to non-interactive cable and satellite services.

But in that span of a dozen years, recording artists, along with the music and broadcasting industries, have confronted many unanticipated challenges and experienced seismic changes.

Competition and technological advances have generated both positive and negative aspects for all. The transition to high-definition radio holds great promise for broadcasters. In contrast, the trend among young consumers to download the music they want—sometimes legally, but all too often illegally—rather than purchase CDs or other physical media, holds great peril for recording artists and record labels.

I consider this subject to be one whose significance should not be underestimated, and I hope we will address it this year.

Mr. Chairman, I will yield back the balance of my time.

Mr. BERMAN. Thank you very much, Mr. Smith.

And now, the Ranking Member of the Subcommittee, who, when he was Chairman, we were delving into this issue as well, Mr. Howard Coble of North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

And I want to repeat what the others have said. It is good to have this distinguished panel before us.

And I would be remiss if I did not recognize, especially, our distinguished Register. Good to have you back, Marybeth.

Mr. Chairman, the stated purpose of today's hearing is to begin an examination of concerns that relate to proposals to remove the exemption for terrestrial radio broadcast in the copyright compulsory license for public performances. What that means in layman's terms is the Subcommittee intends to consider whether the copyright law should be amended to require over-the-air broadcasters to pay compensation directly to recording artists when their songs are played over the radio.

If the testimony of the two recording artists who are with us today represents the views of other musicians and performers, then it seems there is a fairly strong consensus in that community that the law should be so amended.

Indeed, the Copyright Office and the record labels also share that perspective, asserting that a principled and consistent application of the copyright law requires that audio transmissions of sound recordings ought to benefit from the same performance right that has been extended to music publishers and composers for nearly a century.

It is not surprising that the broadcasters who would be statutorily obliged to pay such a royalty, and who are represented by the National Association of Broadcasters, considers such an amendment to be an anathema. Their view is that Congress should leave well enough alone; that is, unless the Congress wishes to amend the compulsory copyright license to enable broadcasters to stream their signals over the Internet without paying a performance royalty to performers, or to lighten the regulatory and reporting requirements required when a broadcaster chooses to simulcast its signals over the Web.

Proponents, Mr. Chairman, appear to rely upon three main arguments in asserting that the over-the-air broadcast exemption should be jettisoned.

One, the exemption was never justified as a matter of copyright law, but today serves as an anachronism and a glaring inequity.

Two, the copyright law requires cable, satellite and Internet radio services to pay performance royalties to both composers and recording artists. Therefore, nondiscrimination and platform parity demand that traditional radio broadcasters should also pay a proportionate share.

And finally, the United States is alone among free market economic powers in denying a performance right in terrestrial radio broadcasts to artists and performers.

Among other things, the broadcasters conversely respond they already pay $450 million a year in performance royalties to composers and music publishers.

They contend over-the-air radio has a symbiotic relationship with recording artists who benefit from free promotional airplay, which in turn, spurs demand for product sales, touring promotions and souvenir revenue.

Traditional radio formats, which do not include multi-channel offerings of various music formats, do not pose a serious threat to the distribution of sound recordings, they contend.

Broadcasters are subject to numerous Commerce Committee and FCC-imposed statutory and regulatory obligations that justify exemption from the ordinary application of the copyright law.

And finally, the United States recording and broadcasting industries are unique, and policies implemented elsewhere are not appropriate for United States conditions.

Believe it or not, this summary barely touches the surface of the strongly held views that will soon be articulated by the parties involved in this debate.

As the Subcommittee embarks on this examination, Mr. Chairman, I am mindful of other interests not directly represented here today. For instance, the public benefits enormously when Congress exercises, in an appropriate manner, the authority granted in article I, section 8 of the Constitution, which calls upon us to promote creativity and expression by securing for limited times to authors the exclusive right to their writings.

In addition, I think it is important to bear in mind the interests of other copyright owners, which should not be diminished by any prospective changes in the law.

Mr. Chairman, in closing, I will simply note that I look forward to learning more about the intricacies of this debate, and by observing that I have friends on both sides of this issue. All of you I embrace very warmly.

I recall, Mr. Chairman, I think one of the first hearings I attended as a freshman Member of Congress, I heard a Member in this very hearing room conclude his remarks with these words. He said: I have friends on both issues of this subject, and I want to make it perfectly clear I am with my friends. [Laughter.]

If it were only that easy, Mr. Chairman. I hope, at the day's end, that no one will feel rejected, that all will feel embraced, and that we can get something with which everyone can live.

And, finally, Mr. Chairman, I have a Coast Guard hearing that I may have to attend, with your permission, later on. And I don't want my abrupt departure to be indicating that I am not interested in this very, very important issue.

And I yield back, Mr. Chairman.

Mr. BERMAN. Well, thank you very much.

Hopefully, you will get to the panel as soon as possible, but given that I don't really have clean hands, having spent at least 7 or so minutes with an opening statement, are there any other Members who want to make comments at this time?

Mr. Issa?

Mr. ISSA. Mr. Chairman, there wouldn't be any possibility, any possibility that it wouldn't be appropriate to make just a few comments here today, because I think what you are doing here is so monumental.

In my 7 years in Congress, this is the first time that, in a no-ifs-ands-or-buts way, it has been made clear that the status quo will no longer be acceptable. Although this is a hearing and not a markup, I think we all understand here today that the broadcasters are on notice that we intend to look at a reorganization of this.

I certainly hope that we have additional follow-up hearings. I certainly would like to see a panel that was all made up of broad-

casters and broadcaster-related people, giving us sort of their view, in addition to what we are going to hear today, of how they are going to deal in a more balanced way.

Certainly, as Mr. Coble said, it is very clear that finding a common platform where broadcast and simulcast can be dealt with fairly should be on the table.

I believe that, in fact, the broadcasters should embrace this as an opportunity to create transparency between what they presently do on a terrestrial basis and the other ventures that these companies are now expanding into.

I think the fact that high-definition and digital is about to go to high-power, high-definition digital, it is very clear that we are going to need to make this move in a timely fashion, because what has been coming out in the satellite industry for a number of years is clearly going to be coming out of our radios in our cars as we drive.

Additionally, digital recording devices are going to be undoubtedly made by the consumer electronics industry to record on-air broadcasts as it has never been recorded before: in digital format, in a sound quality that very much will be, for most people's ears, the equivalent of CDs.

I certainly also think that we in Congress have long ago lost our clean hands on the concept that broadcasters are promoting.

It is very clear that perhaps Judy Collins or Sam Moore, a few years ago, in the earlier part of your careers, might well have signed away for 3, 5 or 10 years the rights to receive any royalties from their performance, in return for a guarantee that they would be promoted when their songs were not so—or their music—was not so well-regarded.

It is also clear that artists who are deceased—their estates today cannot say we are going to perform. We are not going to go on the road.

Actually, Mr. Moore was here previously talking about when you are no longer on the road but somebody else is saying they are you. And we have already dealt with some of those.

It is very, very clear, though, that we need to create a recognition that the performing artist has a right. The broadcaster must show any offset to that right.

That is why, not only am I thrilled that you are holding this hearing today, but I am encouraging that we thoughtfully go through listening to all parties, because I think the change we make is a change that we make for the rest of the world who today provide a revenue stream for performing artists, while we don't. If we are going to make a change, let us make a change we are all proud of.

And with that, I yield back.

Mr. BERMAN. I thank the gentleman.

And the gentleman from Tennessee.

Mr. COHEN. Thank you. Thank you very much, Mr. Chairman.

"The gentleman from Tennessee." I feel like Johnny Cash or something like that. [Laughter.]

But I just wanted to——

Mr. BERMAN. Another guy with a predisposition, huh? [Laughter.]

Mr. COHEN. Well, I just wanted to testify what your voices have meant to me.

What, I guess, the system is now, if you are the songwriter, which is a great talent—composer—you get paid, but if you sing and perform, you don't.

And our performers we have out here—Ms. Collins, I have listened to a lot of your music over the years, and it has meant a lot to me. The writers were brilliant, but without your voice, I wouldn't have been listening to it.

And the idea that you are getting promoted, and that they are doing you some favor as a by-product, I mean, it should be B-U-Y product.

With that logic, they would never pay Muhammad Ali—or wouldn't have paid him—to show his fights, because they were promoting him so more people would want to go out to the stadium to see him fight or whatever. And they could just show it for free on free TV. "Oh, we are promoting you."

And the same thing for baseball and football and basketball: We shouldn't have to pay for showing the Lakers and Kobe. We are giving everybody the chance to see Kobe, and then they will go to the arena and see Kobe.

That is absurd. And they have just kind of gotten a free ride over the years.

As great as all the songwriters were, if it weren't for Frank Sinatra, people would not have listened to those songs. And Frank Sinatra should have been compensated as the performers are, just like the songwriters.

So, as the gentleman from Tennessee—and from Memphis, in particular—I am here with the performers and the songwriters and artistic artists being paid for what they do to make our lives better. And I thank each of you.

Mr. BERMAN. I thank the gentleman.

And now the gentlelady from California is recognized.

Ms. LOFGREN. Thank you, Mr. Chairman. I will be very brief.

I think this is a very useful hearing, and I thank the Chairman for scheduling it. I think the concept of how we level the playing field in the marketplace is important, as well as the need to make sure that artists get compensated.

And so I am thrilled that we have two artists who I greatly admire that we can listen to. I know that we will not touch on it today, but as we look at this issue of equity among the platforms, I think we need to look at not just who gets paid, but how much.

We know that in the Internet radio environment right now—and the Chairman, I know, is well-aware of this—there are small Internet radios that are going to be charged 300 percent of their revenue. That is not going to work for them. I mean, they are niche stations—Beethoven all the time, and the like—so at some point, as we look at making sure artists get paid as they should, we need to figure out how we have equity across all platforms in all ways. And I look forward to being a part of that debate.

And I thank the Chairman for his leadership on this issue and for this hearing today. And I yield back.

Mr. BERMAN. I thank the gentlelady.

And Mr. Schiff from California?

Mr. SCHIFF. Thank you, Mr. Chairman. I am going to be very brief, as well.

It is an honor to have you with us here today. And, as you can tell, we are all fans, and we are just delighted to be in your presence.

I appreciate the Chairman calling this Committee hearing and, not only on this fairly specific issue, but on the broader issue of reform in this area.

This is one of those areas of law, I think, of which there are many in national security and a whole variety of other issues where if we were starting today drafting the rules of the road, we would never draft a system that looked anything like this. But we are where we are, and we have to try to either improve it or junk it.

And I just appreciate our Chairman's tenacity in this wildly complex area.

And it is nice, actually, today to have a very discrete, very manageable, very understandable issue. And I am very much looking forward to hearing your testimony.

Thank you, Mr. Chairman.

Mr. BERMAN. Thank you.

And now we will go to the panel unless—we will do that.

Our first witness, our only colleague who sought to testify and someone who based on his unique background belongs at the panel table, is Congressman Paul Hodes, who represents New Hampshire's 2nd Congressional District. He is president of the freshman congressional class of 2006.

Prior to entering Congress, Congressman Hodes was a partner at Shaheen & Gordon. He is well-known for his musical talents on the guitar. He and his wife, Peggo Hodes, have recorded several albums together that have received critical acclaim from the Parents' Choice Awards. The duo were invited to perform at the White House in 1996, and they continue to perform at many charity fundraising events, not to mention our caucus.

Good to have you here, Paul.

Marybeth Peters—she has been referenced before. She is the United States register of copyrights, and with almost 40 years of experience at the U.S. Copyright Office, she is one of the nation's leading experts on copyright law. A graduate of George Washington University's School of Law, Ms. Peters has lectured on copyright law at Catholic University's Columbus School of Law, as well as Georgetown University Law Center. She has received numerous awards recognizing her distinguished career, and also served as a consultant on copyright law to the World Intellectual Property Organization in Geneva, Switzerland.

Like many of my colleagues, I am a great fan of our next witness. Judy Collins has inspired millions across the globe with her music. Her rendition of "Send in the Clowns" won the Grammy Award for song of the year, and her version of "Both Sides Now" is part of the Grammy's Hall of Fame. Judy Collins continues to enthrall audiences with her voice, her passion, and her grace.

Charles Warfield Jr.: president and chief operating officer of ICBC Broadcast. He oversees nearly 20 radio stations. Mr. Warfield's career in the broadcasting industry spans over 30 years, in-

cluding serving as vice president and general manager of WRKS-FM New York, which was named the most listened to radio station in America. In addition to his work in broadcasting, Mr. Warfield is active with the American Red Cross, the United Negro College Fund, and a Partnership for a Drug-Free Greater New York, among other organizations.

Mr. Warfield, it is good to have you here today.

And, finally, Sam Moore, who has been called the greatest living soul singer and is perhaps best known for his performance of "Soul Man" and "Hold On I'm Comin'" as part of the soul and R&B duo Sam and Dave. Most recently, in 2006, Sam Moore released the critically acclaimed solo album entitled "Overnight Sensational," which received a Grammy nomination for the song, "You Are So Beautiful." His music continues to thrill audiences worldwide, and he has been an inspiration to a generation of artists.

All of your written statements will be made part of the record. I would ask you to summarize your testimony in 5 minutes or less.

There will be a timing light at your table, and when 1 minute remains, that light will switch from green to yellow and then red when the 5 minutes are up. And we would appreciate you summing up at that point. And then we will have time to talk to you further through questions and dialogue.

We welcome you all.

And, Congressman Hodes, why don't you begin?

TESTIMONY OF THE HONORABLE PAUL HODES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Mr. HODES. Thank you, Mr. Chairman and Ranking Member Coble, Members of the Subcommittee. I really appreciate the opportunity to testify at this hearing on updating the performance right and platform parity in the 21st century. I am honored beyond description to be on a panel with the distinguished artists who are sitting with me, as well as the members of the industry and the register of copyrights for the United States.

You know, I was taught as a musician that it all begins with the song. And I have written numbers of songs, which I have published at a small publishing company. I am a member of ASCAP. And I have also performed other people's songs and recorded other people's songs.

And what we are really dealing here today with is something very fundamental. While it all begins with the song, the song does not come alive without the performance. Without the performance on a recording of a song, that song might as well be dust. It might as well sit on a piece of paper in terms of listening to that song.

Mr. Coble talked about the argument that the exemption is an anachronism. And I think about the way the music business has changed just in my lifetime.

I first recorded in the mid-1980's in a studio—I was lucky enough to go into a great studio—and when I was done with that recording, it came out on a big, round record. It was vinyl.

There was no Internet radio. There was no satellite. There was no cable. And I was desperate to try to get some radio play for that vinyl record.

And over the years, there has been a revolution in the way we record and distribute music.

Today, by contrast, I have a studio in my home with digital equipment. It goes out over the Internet. It is transmitted digitally by cable, by satellite.

I am pleased to say that I got a check the other day from SoundExchange for $19.58. [Laughter.]

I am a member of the American Federation of Musicians. I am proud to be part of that union.

I belong to the National Music Publishers Association.

I am a former member of the New Hampshire State Council on the Arts. As a councilor, I have been chairman of an art center, former minority shareholder in a small radio station.

And I have really pursued music out of love, more than out of money.

So in some sense, given that my wife and I have recorded six records, I have produced numbers of others, I think I speak for many of the thousands of small, independent businesses. Because that is what musicians are: they are small businesses who are looking for fairness and justice, and looking for ways to make a living through many, many different streams of income. Many, because, like all small businesses, they are struggling with all the issues that affect us today. They are on tight budgets. They have to manage their income carefully.

I have now come to Congress, and I serve on the Oversight and Government Reform Committee. And I have been pleased to have the opportunity to investigate numerous areas of Federal policy that need changing.

This area of Federal policy is one that has needed change for a very, very long time. I believe that what we are talking about today is rectifying a situation which has needed correction for more years than I have been alive.

It is time for terrestrial radio to pay a performance right to performing musicians whose indispensable contribution to bringing the music alive needs to be recognized.

I have worked as an entertainment lawyer, and I will just end with one story.

I represented a great artist, an African-American who was born in Louisiana, who at a young age was taken by a manager to Florida to record a record. And when I asked him what his deal was—because it was somebody else's song that rose very high in the charts at a time when there was only radio, no Internet, no satellite, no cable—there was only radio—I asked him what his deal was. And he said, "I don't remember." I said, "Well, was there a contract?" He said, "Not that I know about." And I said, "Have you ever seen any money from that fabulous song which charted really well?" He said, "Well, they paid me $50 and gave me a bottle of scotch." [Laughter.]

And I went and I tried to track down the deal and the contract. And we reached lots of dead ends.

He had a tough life and now lives in New Hampshire and is making a good life for himself. On his behalf, I am here to say it is time to correct the injustice that was done to him for many years, when his life should have been easier, for a fair and bal-

anced performance royalty, because his song was played a lot on the radio.

So, on his behalf, I say it is time for fairness and justice. And I thank you for the opportunity to testify here today.

[The prepared statement of Mr. Hodes follows:]

PREPARED STATEMENT OF THE HONORABLE PAUL HODES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW HAMPSHIRE

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today at this hearing on Updating the Performance Right and Platform Parity in the 21st Century. I look forward to sharing my experience as an entertainment lawyer, proprietor of a small independent record label, a performer, producer, songwriter, publisher, member of the American Federation of Musicians, National Music Publishers Association, and American Society of Composer, Authors and Publishers, and former member of the New Hampshire State Council on the Arts.

Most recording artists are much like the other small business owners that drive our nation's economy. They have tight budgets and have to manage their income carefully to stay afloat. Unlike almost any other profession, artists must take advantage of every source of income available in order to stay in business. In addition to selling albums and performing at live concerts, this means collecting royalty payments when their songs are played on internet, cable, and satellite radio, and directed by current law. Because they don't receive any royalty payment when their songs are played on air radio, these small businessmen and women are missing out on a large source of capital that they deserve.

In my first term in Congress and as a Member of the House Committee of Oversight and Government Reform, I have had the opportunity to investigate a wide variety of sectors of federal policy that are outdated and in need of reform. I believe this sector is an area that needs new policy to meet the changing way people listen to music. In the last 15 years new platforms have emerged that helped small scale and independent artists reach new audiences in ways that were never before imagined. As these new formats grew, royalty rates were set that compensated the artists for the hard work and creativity they put into their work. However, terrestrial radio, a format which nearly half of all listeners still choose for their music, still pays no royalty to musicians.

Not only does this market structure give an unfair advantage to AM and FM radio over their competitors, it also discourages aspiring musicians from contributing to the creative economy that is a vital part of our society. Royalty payments are an issue of fairness for thousands of American performers. I look forward to discussing these issues with the members of the Subcommittee today.

Mr. BERMAN. Thank you very much, Paul.

Ms. Peters?

TESTIMONY OF MARYBETH PETERS, REGISTER OF COPYRIGHTS, U.S. COPYRIGHT OFFICE, WASHINGTON, DC

Ms. PETERS. Okay. Thank you.

Mr. Chairman, Mr. Coble, Members of the Subcommittee, thank you for the opportunity to testify on removing the existing exemption for the public performance of sound recordings by terrestrial radio broadcasts.

Sound recordings became subject to Federal copyright protection on February 15, 1972. In the 1960's and 1970's, the main issue was unauthorized duplication of recordings, tape piracy. And the protection given was the right to control the reproduction and distribution of recorded performances. Thus, protection was limited to that which was required to address the then-existing problem.

Although there was a major push to include a performance right in the 1976 Copyright Act, it was not included. Instead, the register of copyrights was charged with studying the problem and delivering a report to Congress by January 3, 1978.

In her 1978 report, the register recommended a performing right for sound recordings, saying: A performance right would bring sound recordings into parity with other categories of copyrightable subject matter. No legislation was enacted in response to the register's plea.

Congressional action was spurred by technologies of the early 1990's which made it possible to transmit sound recordings digitally throughout the world and allowed individuals to make copies of these transmissions, thereby diminishing the sale of copies—physical copies and mp3 files.

In 1995, when Congress first established a public performance right, it created a very narrow right. In section 106(6) and section 114, it was limited only to digital transmissions by interactive and subscription services. All other digital transmissions, including over-the-air broadcasts, were exempted.

In 1998, the statutory license was broadened to specifically include non-subscription webcasts, but not over-the-air broadcasts.

Today's reality, as you said, is that satellite and cable radio pay, as well as webcasters. Broadcasters do not.

The question before you is one of parity: parity among the users of sound recordings, parity among copyright owners, parity with respect to technology. The goal is leveling the playing field, but it is a matter of basic equity and fairness. It is also a matter of the position of the United States in the area of protection of intellectual property.

To achieve equity and parity, the public performance right for sound recordings needs to be broadened to include all commercial transmissions, but especially broadcasts.

Today, the careful balance that Congress struck in 1995 and 1998 has been undermined by technology, new business models, as well as the changed relationship that we have heard about between radio broadcasters and performers of sound recordings.

Broadcasters, however, continue to assert that there is a mutually-beneficial economic relationship with record companies, citing the promotional value of the performance of sound recordings. Whether there is such a relationship or not—and I tend to think there is not—as a matter of principle and equity, broadcasters should pay royalties for sound recordings they broadcast, just as others do.

Historically, the record industry has been a very profitable industry, making its money in the United States from distribution of copies. That, coupled with the political clout of broadcasters—basically a clout that they have always enjoyed—has led to today's situation.

Today, however, the recording industry is hemorrhaging because of the reproduction and distribution rights which can no longer generate the revenues to support the industry. In part that is due to the epidemic of online piracy that we have yet to come to grips with and that we will never be able to control completely. In part it is due to technological advances that allow people to get copies for free.

So broadcasting is clearly a threat, as well as a benefit.

In this new environment, we can no longer afford the anomalous treatment that has been accorded to sound recordings. As works

that are primarily enjoyed by means of performance, they should be subject to public performance rights that provide, at a minimum, compensation from those who financially benefit from their public performances.

One other point: I am extremely disappointed and troubled by the persistent characterization of compensation for performers as a tax. This is especially true when broadcasters for the last 8 years have been seeking international protection in the form of exclusive right for their signals, which, according to their logic, should really be a broadcast tax. Of course, they have never used the word tax with respect to the protection they are seeking.

I won't go into it, because it has been covered, but there is also the international issue.

In conclusion, equity and fairness require the law to be changed to create parity and compensation. Commercial entities who use sound recordings as part of their businesses should pay performers, producers of those recordings. Performers and producers need to be paid for their performances to ensure that the creativity and variety of recordings that we all enjoy continue. It is time to end this anomaly.

I agree with you, Mr. Berman, that in doing this, we must ensure that songwriters and music publishers are not negatively affected. And we must ensure that small broadcasters survive. But we can do that through carefully structured legislation that does achieve the appropriate balance.

I appreciate the opportunity to express the Copyright Office's views on this subject. And I look forward to working with you and Mr. Coble and your staffs on correcting this long-standing imbalance in our law.

Thank you.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Statement of

Marybeth Peters
The Register of Copyrights

before the

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

110th Congress, 1st Session
July 31, 2007

Hearing on "Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century"

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, thank you for the opportunity to appear before you to testify about the need to update the public performance right for sound recordings. The marked decline in record sales and its ripple effects throughout the industry bring us together once again to discuss legislative options that would allow performers and record companies to receive reasonable compensation for their creative endeavors, while at the same time ensuring that the use of new technologies for bringing music to the consumer are not hampered.

As you know, in 1995 Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[1] that, for the first time, granted to copyright owners of sound recordings[2] a limited public performance right. Congress took this step after carefully

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

[2] When discussing sound recordings, it is important to consider their relationship to other related copyrighted works. A CD, the embodiment of a sound recording, actually includes two copyrighted works. The first is the sound recording itself - the aggregate sounds of music, lyrics and musical instrumentation and production. The second is the underlying musical composition - consisting of the

considering the effect that new digital technologies would have on the sale of records - a primary source of revenue for performers and the record industry. It determined at that time that copyright owners of sound recordings required more protection under the law to guard against unlawful copying and believed that a limited performance right for public performances by means of digital transmission subject to a statutory license was an adequate solution.

I believe the creation of this limited performance right for sound recordings was a step in the right direction. This initial step helped foster the growth of new services that make legitimate use of music transmitted over digital networks such as the Internet and satellite radio services. However, continued technological developments as well as new business models – both legitimate and illegitimate – have given consumers more choices and greater flexibility in how they listen to and obtain their music, but often they do not allow the creators to share in the profits gained from the use of their works. This is particularly true of the technological developments in the area of broadcasting and the services that compete with broadcasting. Terrestrial broadcasters have long enjoyed the freedom to use the newest record releases without any payment to the artists or the record companies. While in the past, broadcasters' argument that airplay promotes the sale of records may have had validity, such a position is hard to justify today in light of recent technological developments and the alternative sources of music from other music services, and declining record sales. So what is to be done?

In answering that question, it is important to gauge the extent of the problem and craft an appropriate response just as Congress did when it first created the limited performance right. Then as now, the goal of any legislative change would be to preserve and "protect the livelihoods

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written notes and lyrics - that is contained in the sound recording. Although both works are protected under copyright law, they do not share equal protection. Currently, musical works enjoy a full right of public performance, while the performance right in sound recordings is limited to performances by digital transmission.

of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues from traditional sales, . . . without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters."[3] Of course, in 1995, Congress accepted the notion that terrestrial over-the-air broadcasts offered no threat to the record industry and actually promoted the sales of records. The actual turn of events since that time, however, casts doubt on this premise and the sufficiency of the limited performance right to achieve this goal.

Record sales continue to drop precipitously and revenues from other sources are not making up the short fall. Last year, consumers purchased 588.2 million albums. This figure is a marked decrease over the number sold just six years earlier when the number of album sales topped out at 785.1 million.[4] But the decline in record sales tells only part of the story.

A recent article in Rolling Stone recounts how the decline in music sales has had ominous consequences for everyone associated with the record industry, noting that "more than 5,000 record-company employees have been laid off since 2000" and that "about 2, 700 record stores have closed across the country since 2003."[5] Such numbers might suggest that the interest in music has waned, but that is not the case. The article goes on to observe that "[d]espite the industry's woes, people are listening to at least as much music as ever. Consumers have bought more than 100 million iPods since their November 2001 introduction, and the touring business is thriving, earning a record $437 million last year. And according to research organization NPD Group, listenership to recorded music -- whether from CDs, downloads, video games, satellite

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[3] S. Rep. No. 104-128, at 14-15 (1995).

[4] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

[5] *Id.*

radio, terrestrial radio, online streams or other sources -- has increased since 2002. The problem the business faces is how to turn that interest into money."[6]

While I have long supported a full performance right for sound recordings, I recognize that the time may still not be right to seek this change.[7] Nevertheless, I strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales. Such an approach has multiple benefits. It would provide performers and record producers with an ongoing and growing source of revenue, and it would also level the playing field between, on the one hand, digital music services and webcasters who today pay a performance royalty on each digital transmission and, on the other hand, broadcasters who pay nothing for their use of sound recordings when transmitted over-the-air.

Is an exemption for terrestrial broadcasters justified?

Although Congress recognized the existence of a "mutually beneficial economic relationship between the recording and traditional broadcasting industries"[8] when it passed the DPRA in 1995, a claim broadcasters' continue to assert,[9] significant doubts exist with regard to the amount of promotional value gained from the performance of sound recordings by terrestrial radio as compared to exposure to new music from other sources. Today listeners are not limited

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[6] *Id.*

[7] An overview of the history of the struggle to obtain a full performance right for sound recordings and the Office's longstanding position in support thereof is recounted in David Carson's statement to this subcommittee during hearings on "Internet Streaming of Radio Broadcasts." See Statement of David Carson, General Counsel, United States Copyright Office before the House Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property, July 15, 2004. http://www.copyright.gov/docs/carson071504.pdf

[8] S. Rep. No 104-128, at 15 (1995); and H. Rep. No. 104-274 at 13 (1995).

[9] NAB, *NAB Responds To musicFirst Coalition,* NAB Press Release (June 14, 2007).

to what they hear on traditional radio to inform their choices. Consequently, whatever promotional value that may have existed in 1995 has been diluted by the increase in alternative media, such as satellite radio and digital music services, through which listeners can listen to the current top 10 or find and experience music by new groups. In fact, a finding was made in the 2002 webcasting ratesetting proceeding that whatever promotional value that existed for webcasting was similar to that of traditional over-the-air broadcasting.[10] Moreover, broadcasters' claims ignore the fact that songwriters and music publishers receive payments for the same public performances for which performers and record companies do not. The broadcasters' rhetoric never accounts for this inconsistency and it fails to explain why airplay provides promotional value to performers and record companies but not to the songwriters and music publishers.

It is also worth noting that the exemption for broadcasters was based upon an understanding that promotional airplay led to record sales. Sales, however, have plummeted and continue to spiral downward. One reason for declining sales is the continued widespread use, even in the wake of the Supreme Court's ruling in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*,[11] of peer-to-peer file sharing services which permit millions of users to obtain infringing copies of sound recordings, with devastating effect on the legitimate market for phonorecords. Alongside this practice is the availability of new technology that allows a listener to rip a stream of music and copy the song for future use.

Of course, terrestrial broadcasters are not responsible for the actions of its listeners. Nevertheless, this $20 billion broadcast radio industry continues to advocate for the right to use sound recordings, without payment. Why? So it can use the music as a hook to get listeners

[10] 67 FR 45252, 45255 (July 8, 2002).

[11] 545 U.S. 913 (2005).

and, by extension, profit-generating advertising dollars.[12] This arrangement stands in stark contrast to most of the other businesses, such as satellite radio and digital music services, that derive their existence from the public performance of sound recordings and are direct competitors of broadcasters. These services compensate the performers and record companies for the works they use even though such businesses presumably provide at least as much promotional value to sound recordings as broadcasters. Understandably, digital music services have been pushing back and seeking parity with terrestrial broadcasters on this point as a way to strike a competitive balance in the marketplace.[13] They maintain that terrestrial broadcasters should also pay the performance royalty for sound recordings especially now that terrestrial radio is positioned to transition to a digital format on a wide scale basis.

Certainly, when the transition is complete, and that time is near,[14] broadcasters stand to gain an even greater marketplace advantage over the other music services. Electronic companies are manufacturing and marketing digital radio receivers for those who wish to receive clear, digital radio signals over the airwaves. Today, consumers can choose from a variety of receiver models which are available in thousands of retail outlets at prices that continue to drop. The automotive industry is also feeding the market for HD radio. BMW already offers HD radio as a factory-installed option across its entire product line, with Jaguar and Hyundai offering it in their premium sedans scheduled for introduction in 2008. In addition, eleven automotive manufacturers will begin offering HD radio as an option on 55 models in the next 18-24

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[12] Olga Khafir, Traditional Radio to Pay for Play, Business Week, (July 4, 2007), http://www.businessweek.com/technology/content/jul2007/tc2007073_639316.htm

[13] Kenra Marr, *Shaken Internet Radio Stations Face Specter of New Fees Sunday*, Washington Post, (July 13, 2007), D03, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071202169.html

[14] HD Digital Radio Alliance, *HD Radio Celebrates Major Milestone: Rollout in Top 100 Markets* (May 14, 2007), http://www.hdradio.com/the_buzz.php?thebuzz=93 (Noting that earlier this summer, HD Radio completed rollout of services in the nation's top 100 markets).

months.[15]

As HD radio technology enjoys wider implementation, innovative features continue to arise. Companies are busy designing and manufacturing new products to capture and record HD radio signals. In fact in the UK, one of the more popular HD radio devices, sold under the brand name "The Bug," features functions that allow the listener to record over 30 hours of audio; program the device to record specific programs at specified times; and upload recorded programs onto a personal computer in a transferable file.[16] The combination of these capture and transfer capabilities provides recipients the means to edit and store specific sound recordings from a prerecorded program, and allows for further distribution of these sound recordings to others via electronic transfers over the Internet or by other means. Capabilities such as these in combination with the digital quality of HD radio transmissions further threaten traditional sales of sound recordings.[17]

The answer to the problem is to find a way to minimize the threat of unauthorized copying and to ensure that performers and record companies receive compensation from the use of their contributions.

Reevaluating the Sound Recording Performance Right

This hearing provides the opportunity once again to consider how to address the latest

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[15] *Id.*

[16] PURE Digital, *Radio With Attitude - Bug Too: Fact Sheet* (June 2006), http://www.videologic.com/Factsheets/VL-60802.pdf

[17] While a court recently and, in my view, correctly rejected a motion to dismiss a claim of copyright infringement based on the marketing of a similar device by a satellite radio service as part of its subscription service operating under the section 114 statutory license, *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, 2007 WL 136186, 2007 Copr.L.Dec. ¶29,312, 81 U.S.P.Q.2d 1407, 35 Media L. Rep. 1161 (S.D.N.Y., January 19, 2007), a similar suit against a consumer electronics manufacturer offering a similar device for use with free over-the-air digital broadcasts might well reach a different result.

threats to the market viability of creators of sound recordings. The answer is clearly not to inhibit the roll out of HD radio; nor is anyone suggesting a slowdown on this or future technological fronts. A piecemeal solution is also not the answer. Instead the answer is removing the current limitations placed on this increasingly crucial right, so that performers and producers of sound recordings can enjoy the ability to adapt to market changes armed with the same set of rights as other copyright owners. Thus, I believe the best approach would be to grant copyright owners of a sound recording a performance right for all audio transmissions, both digital and analog, subject to a statutory license.

Such an approach has a number of advantages. First, it would establish legal equity among similarly situated parties with respect to users and creators. Second, it would provide a much needed and dependable source of income to performers and record companies from performances both in the United States and abroad, thereby ensuring that the creators have an incentive to invest their time and talents in producing new works. And finally, it would ensure that minimal safeguards are utilized to protect the copyright owners from unauthorized copying in accordance with the conditions already set forth in the statutory license.

a. Legal equity

Earlier, I discussed why broadcasters are no longer justified in receiving an exemption from the performance right from sound recordings. Primary among those reasons is the need to establish parity among those commercial competitors who depend upon the use of sound recordings. Currently, digital music services pay two different groups of rightholders for each digital transmission of a sound recording. They pay the performers and record companies for the performance of the actual sound recording and they also pay the appropriate performing rights organizations, e.g., BMI, ASCAP and SESAC, for the performance of the musical work embodied therein. Terrestrial broadcasters, on the other hand, pay only the latter royalty due to

an exemption in Section 114, based on the purported promotional value they provide to the record companies. However, in light of declining sales over the past seven years, the expansion of new avenues for distribution of music, and the continuing threat from unauthorized copying, this argument is unsustainable.

Congress has the power to remedy this situation and strike the proper balance in favor of producers as well as performing artists who create sound recordings. The question should no longer be whether Congress should provide performance rights for sound recordings, at least with respect to audio transmissions, but whether the right should be subject to statutory licensing and, if so, how to evaluate and tailor such a license in order to ensure innovation and monetary incentives for the creation of works for the enjoyment of the public. Stated another way, the challenge of copyright in this context, as it is in general, is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[18]

In striking this balance, I would propose expanding the section 114 license to cover all non-interactive audio transmissions and to remove the current exemptions for broadcasters and for business to business establishments. Like the broadcasters and the digital music services, the core of their businesses rely heavily upon the use of sound recordings to generate its revenues and there is no apparent reason why either of these businesses should not pay a performance royalty to the performers and record companies.

Although some have asserted that granting performance rights to copyright owners of sound recordings amounts to a tax, this is clearly not the case. A tax is a charge levied by, and

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[18] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

paid to, the state. A payment for use of a property right, on the other hand, is made to the owner of the right and the amount and terms of the payment are set by negotiations between a willing buyer and a willing seller. In fact, aside from not being a tax, a grant of performance rights to copyright owners of sound recordings would be exactly the type of private property right the Constitution indicates should be available to authors in order "To promote the Progress of Science and useful Arts."[19] In addition to providing strong incentives for the continued creation of new works, granting performance rights to copyright owners of sound recordings offers the advantage of providing legal equity. It also offers increased harmony with international law, which I will discuss shortly.

However, in expanding the license to cover terrestrial broadcast programming, it would be appropriate to reexamine the conditions set forth in the license to protect against unauthorized copying. I recognize that it has been asserted that certain provisions within the existing 114 statutory license, such as programming restrictions designed to limit unauthorized copying by the recipient of the performance, may pose problems to the current broadcast business model. At this time, I am not persuaded that those problems would be significant or that it would be undesirable to require broadcasters to comply with those restrictions. However, to the extent that there would be such problems, any amendments to the 114 license to cover broadcast transmissions could surely address them, while at the same time including broadcast-friendly measures to reduce unauthorized copying by the recipient of performances.

It is also worth noting that expansion of the section 114 license to include all audio transmissions will result in a direct payment of these additional royalties to featured artists and non-featured musicians and vocalists by guaranteeing that they collectively receive 50% of the

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

distributions of receipts from the statutory licensing of transmissions,[20] an outcome of great importance to the performers. Moreover, expansion of the statutory license would include a provision protecting copyright owners of musical works from having their royalty fees affected by the royalties granted to owners of sound recordings.[21] Certainly, the purpose underlying any expansion of the public performance right for sound recordings is not to disrupt or diminish the generation of revenues for the public performance of musical works. These are separate streams of income that flow to different rightsholders for the use of different works. In fact, ASCAP reported a five percent increase in performance royalties in 2006[22] underscoring just how important these revenue streams are to the songwriters and publishers and why they need to be preserved.

This increase in ASCAP's stream of revenue is likely due to the fact that songwriters and publishers receive a performance royalty from all performances of their works, including royalties for terrestrial airplay. Because songwriters and publishers receive these royalties for performances of their works, they appear to have been able to offset the noted decline of revenues due to decreased sales of phonorecords. Performers and record companies, on the other hand, having only a limited performance right for some, but not all, digital transmissions have not received sufficient revenues to weather the shift in market preferences from sales to performances. Thus, amending the statutory license to include all audio transmission would level

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[20] 17 U.S.C. 114(g)(2)

[21] 17 U.S.C. 114 (i) "No Effect on Royalties for Underlying Works. — License 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. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)."

[22] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

the playing field for those businesses providing music in today's market, and it would have the beneficial effect of compensating performers and record producers for their efforts in creating the sound recording in the same way that songwriters and publishers receive compensation for their efforts in writing and publishing the music embodied therein.

b. The International Situation

Our failure thus far to recognize a meaningful performance right for sound recordings (the term phonograms is used in many countries) places the United States, which considers itself a world leader in copyright protection, well outside the mainstream of international law.[23] Many countries of the world, and virtually all industrialized countries, recognize performance rights for sound recordings, including performances made by means of broadcast transmissions. Most of these countries belong to international treaties that provide protection for performers and producers of sound recordings.

The first international treaty including a performance right for sound recordings was the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations, known as the Rome Convention.[24] It was concluded in 1961 and entered into force in 1964. Abraham Kamenstein, U.S. Register of Copyrights, served as rapporteur-general of the Diplomatic Conference. Article 12 provided protection for secondary uses of phonograms; secondary uses were defined as use of phonograms in broadcasting and communication to the public. The U.S. never adhered to the Rome Convention.

In 2002 the WIPO Performances and Phonograms Treaty (the WPPT), concluded in 1996

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[23] The US, UK and other common law countries frequently provide copyright protection; other countries protect the contributions of performers and producers of sound recordings under "neighboring (related) rights" regimes. No international treaty offering protection for the performers or producers of sound recordings is considered a copyright treaty per se.

[24] This treaty is administered by the International Labor Organization, UNESCO and WIPO.

and ratified by the U.S. in 1998, came into force. Today, that treaty has 62 members with many additional European Union countries soon to join.[25] Article 15 of the WPPT provides for the right to equitable remuneration to performers and producers for the broadcasting and communication to the public of their phonograms., i.e., secondary uses of phonograms. This Article, however, allows a country to declare that it will apply this right only to certain uses or declare that it will not provide this right at all. Because of the inadequacy in our law in the area of performance rights for sound recordings, the U.S., in its instrument of ratification, included a reservation concerning its commitments under Article 15; specifically the U.S. stated that it would limit itself to protection of only certain acts of public performances by digital means. It made clear that public performances of sound recordings in over-the-air broadcasts were not subject to equitable remuneration.

Thus, the U.S., a leader in the creation, distribution and world-wide licensing of recorded music, is not a party to the Rome Convention; and, while a party to the WPPT, the U.S. has limited its obligation for protection to only certain digital transmissions, and specifically has exempted over-the-air broadcasts. With respect to the lack of protection for over-the-air broadcasts of sound recordings, the United States stands out as the most prominent industrialized country without this protection.[26]

In most countries of the world broadcasters pay royalties to recordings artists and record producers. These countries recognize the incredible value of a recording artist's interpretation of a musical composition or other artistic work. More often than not, a performer is the reason for

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[25] Item Note, Council of European Union, Brussels, 12 July 2007 on Agreed principles with regard to the ratification of the 1996 WIPO Treaties.

[26] Ironically, two countries that the United States has long urged to upgrade their copyright laws – China and Singapore – have used the United States' example as an excuse to adopt weaker performance rights for sound recordings.

the popularity and endurance of a particular musical recording.

Equally important is the fact that when our sound recordings are exploited in countries that are signatories of only the Rome Convention, there is usually no payment for the performance of those sound recordings despite the fact that royalties have been collected in these countries for their use. And, the breadth of our reservation in the WPPT also results in WPPT member countries denying payment for broadcasting and other public performances of sound recordings. U.S. performers and producers would have much to gain if Congress broadened the public performance right to include analog and digital broadcasts of sound recordings. One industry estimate, in 1990, suggested that U.S. performers were losing $27 million a year in potential foreign performance royalties.[27] A more recent industry estimate places the loss due to performers and labels for performances in foreign broadcasts at about $70 million.

c. Incentives for continued creation

Congress has repeatedly recognized the emergence of technological threats to the creators of sound recordings. In 1971[28], 1976[29], 1995[30] and 1998[31] it re-calibrated the rights of copyright owners of sound recordings to address these threats. Now, as traditional record sales continue to decline[32] (and the rate of decline far outpaces the emergence of download sales) and HD radio has begun to experience wide implementation and acceptance, Congress again finds itself

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[27] Mathew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, Vanderbilt Journal of Entertainment and Technology Law, Vol. 6, No. 2, Spring 2003, at 191.

[28] Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

[29] Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976).

[30] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

[31] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2286 (1998)

[32] Lars Brandle, *Piracy, Shrinking Sales Send Global Music Market Down 5%*, Billboard, (July 3, 2007).

considering how to address the latest threat to the market viability of creators of sound recordings. And something must be done.

What is needed is a change to ensure that performers and record companies can continue to make a viable living from their craft. As I have suggested, an expansion of the performance right for sound recordings would I believe provide fair compensation to the creators and serve as a significant stimulus to ensure that creators continue to develop new works throughout the 21st Century. But whatever course Congress chooses, it should be aware of the need for strong incentives for creators to continue their artistic endeavors and the equal need for incentives to encourage the continued development of new technological advances that enable legitimate exploitation of and access to musical and other works. In the absence of corrective action, new technologies will pose an unacceptable risk to the survival of what has been a thriving music industry. In order for the industry to continue to enrich society, performers and record labels must be able to make a living by creating the works that broadcasters, webcasters and consumer electronic companies are so eager to exploit for profit.

Mr. Chairman, as always, we at the Copyright Office stand ready to assist you as the Committee considers how to address the new challenges that are the subject of this hearing

Mr. BERMAN. Well, thank you very much, Ms. Peters.

And now, Judy Collins?

TESTIMONY OF JUDY COLLINS, RECORDING ARTIST

Ms. COLLINS. Thank you so much Mr. Chairman, Ranking Member Coble, Members of the Subcommittee, thank you for the opportunity to testify today.

I am pleased to be here on behalf of musicFIRST Coalition and my more than 150 fellow founding artists and the thousands of working musicians and singers around the country who care deeply about this issue, which I do consider a glaring inequity.

Songs have always told my story and, I hope, given me a voice to tell others.

I learned the love of song from my own father, who was a fine singer and a sometime writer of songs. He knew the secret of hunting for the right song for his voice and taught me that the search for those jewels was the discipline of a singer's life. He was in radio for 30 years, sang his heart out, was never paid a cent for his voice.

I believe that musicians and artists, as well as songwriters, should be rewarded and awarded and paid properly for their talent and artistry in making the music, and deserving the right to be paid for their creations, whether they are performed or written and, much the way creators of literary and dramatic works are paid, to have the disparity in the equity of payment changed for the better.

You know, I have had dozens of platinum-and gold-selling albums. It is nearly 50 years. I know I don't look it, but I took Social Security—— [Laughter.]

I wanted to tell you, I took Social Security this year before it runs out. [Laughter.]

Mr. BERMAN. Well, don't open up that one. [Laughter.]

Ms. COLLINS. Well, as I said, for the most part artists are treated equally. There is one glaring exception in today's music marketplace where musicians, artists and sound recording copyright owners are left behind: Terrestrial radio stations do not compensate artists for our performances when they play our music over the air, which you have heard this morning.

For example, you remember a little song that Stephen Sondheim wrote. I recorded "Send in the Clowns" in 1975, and shortly after the record's release, it became a top hit. Unfortunately, I did not earn a cent from radio when that song was played time and time again.

In fact, I just came across a letter the other day when we were meeting about this conference, and I would like to read it to you, if I might. It says Stephen Sondheim on the top. It says March 2, 1976. "Dear Judy: And thank you for giving me my first hit song. Gratefully, Stephen Sondheim."

Songwriters enjoy a performance right and deservedly so. Stephen Sondheim deserves every penny he makes on every song. Their creativity and talent should be, and is, rewarded when their musical composition is played on the radio.

I have recorded songs of many, many artists—Joni Mitchell, Ian & Sylvia, Stephen Sondheim—and never been paid a cent. It is a

privilege to have helped them make a living. I would like to do the same for myself with your help.

It is only fair that the artists, background singers, and musicians who breathe that life in the song should also be compensated.

I want to tell you, just sitting here with Sam, you know, I am thinking, "God, this is a disgrace that he has not been paid for playing, for his singing on the radio."

You know, the other countries who do this? China, Rwanda, Sudan, Iran.

Don't get me wrong. I love the radio. My father had his own radio program, as I said, and that is how I grew up, listening to radio, singing on the radio. I just don't believe it is fair, nor has it ever been, that musicians and recording artists don't get paid when our music is played on the radio. Patsy Cline's heirs deserve to have that.

Paid for play. Every other music platform, like satellite, cable and Internet radio, reward artists and musicians for our performances, and it is time radio did, too.

As I said at the outset, I and Sam both have been very fortunate in our careers. We work like mad, harder than ever, as far as I know.

There are lots of great artists and musicians who are still struggling to just earn a living doing what they do and get over that first hump of public recognition. When their music is played on the radio, they deserve to get paid.

Many of my musical compatriots, like me, are on the road touring.

I tour more than I ever did. I do 50 to 80 shows a year. And I have never taken a year off.

I mean, as I said, I am 68 years old, which I was not going to read into this record—— [Laughter.]

I was advised, don't say that. I am proud of it.

I have been able to make my living in a career of my choice. I should be paid. And not being paid is like a lawyer going to a party every day and having people say, "You want to practice a little law," 365 days a year. [Laughter.]

There are artists just starting out their careers. My record label, Wildflower Records, has many wonderful young artists on it. I want to see them paid for their performances on radio.

Kenny White, for example, one of my artists on the label, is now on KFOG in San Francisco. He is not earning radio royalties. I was on KFOG years ago. I didn't earn radio royalties either.

Yet, when his music is played on XM satellite station the Loft, he earns performance royalties.

Mr. Chairman, royalties that were held by broadcasters should have been my annuity, my pension. I should have been able to retire from top hits like "Amazing Grace," "Both Sides Now," "Someday Soon, "Chelsea Morning," "Who Knows Where the Time Goes," and "Send in the Clowns."

It is music that people love. It is not commercials. Our music sells those commercials, if you have noticed, on the radio.

We simply believe that broadcasters should share the profit they earn at the expense of artists.

Mr. Chairman, thank you for holding this hearing today.

Songs have value. Singers have value. Musicians have value. We are asking for recognition of that value and urging you to change the law to right this long overdue injustice.

And thank you so much.

[The prepared statement of Ms. Collins follows:]

PREPARED STATEMENT OF JUDY COLLINS

Mr. Chairman, Ranking Member Coble, Members of the Subcommittee, thank you for the opportunity to testify today. I am a pleased to be here on behalf of the musicFIRST Coalition and my more than 150 fellow founding artists, and the thousands of working musicians and singers around the country who care deeply about this issue.

I was born in Seattle, Washington, into a home always filled with music. I grew up in Los Angeles and Denver, and began playing piano at an early age, honing my skills on my father's radio show and in every school play or church program I could find. I studied classical piano, but at age 14, fell in love with the guitar and never looked back. At 19, I started performing in clubs and eventually worked my way across the country to New York. It was there that my career took another turn when I was signed to Elektra Records and released my first recording in 1961.

Songs have always told my story and, I hope, given me a voice to tell others. I learned the love of song from my father, who was a fine singer and sometimes writer of songs. He knew the secret of hunting for the right song for his voice and taught me that the search for those jewels was the discipline of a singer's life. A great song is always worth the pursuit and always worth writing. I've done a little of both in my 40-plus years in the music business.

I believe the songwriters, musicians and artists who give their time, talent and artistry to making music deserve the right to be paid for their creations whenever they are performed, much the way creators of literary or dramatic works are paid.

And, for the most part, artists are treated equally. There is one glaring exception in today's music marketplace where musicians, artists and sound recording copyright owners are left behind. Terrestrial radio stations do not compensate artists for our performances when they play our music over the air. For example, you may remember a little song that Stephen Sondheim wrote for the musical A Little Night Music entitled "Send in the Clowns." I recorded the song in 1975 and shortly after the record's release, it became a top radio hit.

Unfortunately, I did not earn a cent from radio when that song was played time and time again. On the other hand, Stephen Sondheim rightly earned a great deal. In fact, I just came across a letter Stephen wrote, and if you don't mind, Mr. Chairman, I'd like to read it here. It's quite brief and to the point: "Judy, thank you for giving me my first hit song."

Songwriters enjoy a performance right, and deservedly so. Their creativity and talent should be, and is, rewarded when their musical composition is played on the radio. It is only fair that the artist, background singers and musicians who bring that song to life also be compensated.

Don't get me wrong, I love radio. My father had his own radio program and that is how he provided for his family. I just do not believe it is fair, nor has it ever been, that musicians and recording artists don't get paid when our music is played on the radio. Every other music platform like satellite, cable and Internet radio rewards artists and musicians for our performances, and it's time radio did too.

Moreover, every other developed country in the world has a public performance right for artists and copyright owners. The United States, with the richest and most diverse music history and culture in the world, stands alone in failing to reward recording artists for our music when it is played on the radio. This is simply wrong.

To make matters worse, other countries collect royalties for artists' performances in their countries but cannot legally pay U.S. performers because we do not have a performance right here. This "rule of reciprocity" is especially harmful for U.S. performers because 30-50 percent of the world's airplay is of American music.

As I said at the outset, I've been fortunate in my career. But there are lots of great artists and musicians who are still struggling to earn a living doing what they love, and when their music is played on the radio, deserve to get paid. Many of my musical compatriots are, like me, still on the road touring, because while their music is played on the radio, they are not selling records and have to rely on touring to make ends meet.

There are artists just starting out in their careers. My record label, Wildflower Records, has many young and talented artists hoping to make a career doing what they love. Kenny White, for example, is getting airplay on KFOG in San Francisco, but not earning royalties. Yet, when his music is played on XM's satellite station, "the Loft," he earns performance royalties.

This additional revenue stream would be tremendously helpful to artists – at every stage of their careers. Broadcasters should not be able to continue to profit off recording artists' creative talent.

Mr. Chairman, royalties that were held by broadcasters should have been my annuity, my pension. I should have been able to retire from my top hits like "Amazing Grace," "Both Sides Now," "Some Day Soon," "Chelsea Morning," "Who Knows Where the Time Goes" and "Send in the Clowns," among others. I am pleased that the writers of these great songs were rewarded, but only the broadcasters themselves benefited financially from my hits and they earned countless thousands of dollars in advertising revenue in the process. For, let's remember, no one turns on the radio to listen to commercials. It's music they love, music that draws them in and keeps them tuned in. We simply believe broadcasters should share the profit they earn at the expense of artists.

Mr. Chairman, thank you for holding this hearing today. I have been so fortunate to be a minstrel, a troubadour, an artist, a singer. The music and songs have carried me through the rough spots and the joyous times. They have helped me carve out a life that has

meaning and pleasure and creativity. Music has value. Songs have value. Singers have value. Musicians have value. We are asking for recognition of that value and urging you to change the law to right this long overdue injustice.

Mr. BERMAN. Well, thank you very much.

And now we will turn to Charles Warfield.

TESTIMONY OF CHARLES M. WARFIELD, JR., PRESIDENT AND CHIEF OPERATING OFFICER, ICBC BROADCAST HOLDING, INC., NEW YORK, NY

Mr. WARFIELD. Good morning, Chairman Berman, Ranking Member Coble and Members of the Subcommittee. And thank you for inviting me here today to offer the broadcaster perspective on the issue of performance rights for sound recordings.

My name is Charles Warfield, and I am president and COO of ICBC Broadcast Holdings, serving primarily African-American communities in New York City; San Francisco; Columbia, South Carolina; and Jackson, Mississippi. And I am also testifying on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

With regard to the issue of creating a new performance royalty for sound recordings, which we do consider a performance tax on local broadcasters, NAB strongly opposes any such proposal. We oppose a performance tax because compensation to the record labels and artists is provided under the current system. And the effort to upset the careful balance envisioned by Congress and beneficial to all parties for the last 80 years is misguided.

The existing model works for one very significant reason: The promotional value that the record labels and artists receive from free airplay on local radio stations drives consumers to purchase music.

A survey done by Critical Mass Media shows far and away FM radio is the dominant medium for listening to music. In fact, 85 percent of listeners identify FM radio as the place they first heard music they purchased.

With an audience of 232 million listeners a week, there is no better way to expose and promote talent, or as Tom Biery, senior vice president for promotions for Warner Brothers Records said: It is clearly the number one way that we are getting our music exposed. Nothing else affects retail sales the way terrestrial radio does.

Beyond just playing music, consider that stations give away free concert tickets, conduct on-air interviews with bands releasing a new CD, or hype a newly-discovered artist. Local radio is without question the engine that drives music sales. Any suggestion that radio play does not boost sales or actually diminishes sales runs counter to simple common sense.

While it is true that the recording industry has seen its profits dip in this new digital world, in no way can that decline be attributed to radio; just the opposite. Local radio is free advertising for record labels and artists and provides the best and most direct way to reach consumers.

In 1995, when Congress last examined this issue, lawmakers rightly considered what new digital mediums were a threat to the sale of music. Satellite and Internet radio, which were covered by the 1995 law, are services often available by subscription and both offer consumers true interactivity to download songs.

Local radio, however, is free. There is no subscription. It is not interactive. And between disc jockey lead-ins and commercials, people are not stealing music from over-the-air radio.

Congress came to this same conclusion. That local radio airplay does not threaten music sales, as satellite and Internet radio does, but rather, directly and positively promotes the sale of music.

I came to this debate from experience on both sides of this issue, from my many years in broadcasting and some years as a record label executive. What I have failed to understand after 30 years in the industry is why the recording industry is willing to essentially bite the hand that feeds it.

The free airplay for free promotion concept has established a natural symbiotic relationship between local radio and the recording industry. Both grow and flourish together. A performance tax, however, will financially hamstring broadcasters.

The effect of such a dramatic increase in radio station costs will not go unnoticed.

Broadcasting is an industry that is funded entirely through advertising revenue. We do not have the option of raising our subscription rates. The funding to pay for this new fee has to come from somewhere.

So do we cut the $10.3 billion that broadcasters donated in 2005 to public service announcements and community service for charities and other worthy causes?

Do we run more advertisements, which will have the effect of playing less music, which will ultimately harm the recording industry?

Or what about small urban and rural radio stations that serve niche communities, such as minority groups? There is a reason that the National Association of Black Owned Broadcasters, or NABOB, also opposes the imposition of this tax.

Finally, how will such a tax degrade the ability for stations to offer programming for their local community, such as community affairs, traffic, and essential news and weather in times of emergency?

The answers are not simple and the consequences of this debate will hit both industries in unanticipated ways. The bottom line is that there is no justification for changing a system that has worked for the music industry as a whole for so many years.

The United States has the most prolific and successful music industry that is the envy of the world. Upsetting the careful balance that Congress struck by imposing a performance tax on local radio broadcasters would be a shift of seismic proportions. For over 80 years, Congress has not seen fit to alter this mutually-beneficial policy, and there is no reason to do so now.

I thank you for inviting me here this morning.

[The prepared statement of Mr. Warfield follows:]

PREPARED STATEMENT OF CHARLES M. WARFIELD, JR.

Testimony of

Charles M. Warfield, Jr.

President and COO

ICBC Broadcast Holdings, Inc.

Hearing on Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century

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

July 31st, 2007

Introduction

The United States enjoys broadcasting, music, and sound recording industries that are the envy of the rest of the world. This is due, in no small part, to the symbiotic relationship and proper balance that has existed among these three industries for many decades. For more than 80 years, Congress wisely has rejected repeated calls by the recording industry to impose a tax on the public performance of sound recordings that would upset this balance. It has done so for a number of very good reasons and this mutually beneficial policy should not be disturbed.

Radio broadcasters pay more than $450 million annually in royalties to ASCAP, BMI and SESAC, the performing rights organizations that collect royalties on behalf of the composers and publishers of the music they play. Radio stations also provide tens of millions of dollars in free publicity and promotions to the producers and performers of sound recordings in the form of air play, interviews with performers, concert promotions and publicity that promotes the sale of sound recordings and concert tickets. Through the years, Congress had found these promotional benefits appropriate and valuable compensation. And, there is no doubt that those promotional benefits are important. The saying "I heard it first on the radio" is a refrain that purchasers of sound recordings recited in the 1920s and are still repeating today. The acknowledgments for performing artists that "I owe my success to radio" and from recording executives that "without radio my records would never have made it on the charts" have also, over the years, been repeated over and over, and over again.

So, what is the purported justification, at this point in time, for changing a system that has produced the strongest music and recording industries in the world and provides more than sufficient economic rewards for performers as well as record companies to continue to produce new sound recordings? The impetus for change comes from record companies, many under

foreign ownership, that want to increase their profits. Not satisfied with current amounts of revenue from the sale of sound recordings, frustrated by their inability to deal with pirates, the labels suggest turning to the radio industry that already pays license fees for music and streamed sound recordings and provides hours and hours of free news, sports, information and public affairs programming, essential local news and weather information in times of emergency, and hundreds of millions of dollars of time for public service announcements and local fund raising efforts.

There are many radio stations, especially in small and medium sized markets, that are facing challenges. These stations would be particularly hard-hit by any new performance tax. So too would the many other small businesses caught by this new tax. Every bar, restaurant, retail establishment, shopping center, sports and other entertainment venue, transportation facility, juke box owner and everyone else who publicly performs sound recordings could be caught in this web. I submit that such a drain on the American economy to support private interests is not warranted, and is not wise.

Under the Constitution, Copyright is designed: "To promote the progress of science and useful arts."[1] There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound recordings in this country or that the imposition of such a tax would stimulate additional revenues of sound recordings.[2] To the contrary, while many countries have such a tax and the United States does not, we are the most prolific producers of sound recordings in the world.

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

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

In short, I urge the Committee to see this proposal for what it is, a wealth transfer that will hurt American businesses, small and large, and ultimately, American consumers. The current system has produced the best broadcasting, music and sound recording industries in the world. It is not broken and is not in need of fixing.

Evolution of the Sound Recording Performance Right

U.S. copyright law confers a series of enumerated rights upon the owners of various works of creative expression. These are enumerated in Section 106 of the Copyright Act and are, in turn, subject to a series of limitations and exemptions, which are set forth in Sections 107 through 121 of the Act. Among the enumerated rights is a right of public performance which empowers the copyright owners – subject to any applicable limitations, exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium. 17 U.S.C. § 106(4), (6).

While composers have long enjoyed a right of public performance in their musical compositions – for which radio broadcasters in 2007 will pay annual royalties exceeding $450 million to the performing rights organizations (*e.g.*, ASCAP, BMI and SESAC) – prior to 1995, U.S. copyright law did not recognize any right of public performance in *sound recordings* embodying such musical compositions.

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

Congress first afforded limited copyright protection to sound recordings in 1971, in the form of protection against unauthorized reproductions of such works. The purpose of such

protection was to address the potential threat such reproductions posed to the industry's core business: The sale of sound recordings. And, while the record industry argued at that time for a public performance right in sound recordings, Congress declined to impose one.

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

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.[3]

Congress continued to decline to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records. Indeed, copyright protection of any sort for sound recordings is of relatively recent vintage. It has been marked throughout by careful efforts by Congress to ensure that any extensions of copyright protection in favor of the record industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." S. Rep. No. 104-128, at 13 (1995) (hereinafter, "1995 Senate Report"). As to performance rights in sound recordings in particular, Congress has explicitly recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[4]

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

[4] The symbiotic relationship among the various industries is a complex one. Music composers and publishers receive enormous compensation through public performance licensing fees paid

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. In granting this limited right, Congress stated it: "should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries."[5] As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmission."[6]

Consistent with Congress's intent, the DPRA expressly exempted non-subscription, non-interactive transmission, including "non-subscription broadcast transmission[s]" – transmissions made by FCC licensed radio broadcasters, from any sound recording performance right liability.[7] Congress again made clear that its purpose was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from

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by broadcast radio stations to performing rights societies such as ASCAP, BMI and SESAC. The record producers and recording artists, on the other hand, receive the vast majority of their revenues from the sale of sound recordings, as well as from the concerts, both of which are promoted by radio. While receiving no copyright fees from broadcasters for their over-the-air performances of sound recordings (radio stations do pay the recording industry when their signals are streamed), they enjoy tremendous promotional value from free over-the-air broadcasting. Cf. Subcomm. On Courts, Civil Liberties, and the Admin. Of Justice, House comm., on the Judiciary, Performance Rights in Sound Recordings, at 37, 48, 49-50, 54 (Comm. Print 1978).

[5] "1995 Senate Report at 15;" *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not "upset[] the long-standing business relationship among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.").

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

[7] 17 U.S.C. §114 (d)(a)(A). All statutory citations are to the Copyright Act, Title 17 of the United States Code, unless otherwise noted.

> airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[8]

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[9]

In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, over-the-air radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities;[10] (4)

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[8] 1995 Senate Report, at 15.

[9] *Id.*

[10] Radio broadcast stations provide local programming and other public interest programming to their local communities. In addition, there are specific requirements that do not apply to Internet-only webcasters. *Se* 47 U.S.C. §§ 307, 309-10 (1998). *See, e.g.*, 4 C.F.R. § 73.352(e)(12) (requiring a quarterly report listing the station's programs providing significant treatment of community issues); 47 U.S.C. § 315(a) (requiring a station to offer equal opportunity to all candidates for a public office to present views, if station affords an opportunity to one such candidates); 47 C.F.R. § 73.1212 (requiring identification of program sponsors; *id.* § 73.1216 (providing disclosure requirements for contests conducted by a station); *id.* § 73.3526 (requiring maintenance of a file available for public inspection); *id.* § 1211 (regulating stations' broadcast lottery information and advertisements).

promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[11]

It should also be noted that even though the Copyright Office has argued for a performance tax, Congress has strongly and consistently refused to adopt these recommendations.[12]

The Free Benefits Radio Provides for the Recording Industry

As Congress has repeatedly recognized, the radio industry provides tremendous practical and other benefits both to performing artists and to the recording companies. Examples of acknowledgements and confirmations of these benefits of all segments of the industry are abundant.

From Recording Artists:

- "Radio is that big amplifier in the sky."

  -- Chely Wright (2004)

- "That's the most important thing for a label, getting your records played."

  -- Eddie Daye (2003)

- "Radio helped me a lot. That's the audience. I can't see them, but I know they're there. I can't reach out and touch them with my hand, but I know they're there."

  -- B.B. King (2002)

[11] 1995 Senate Report, at 15.

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

- "I want to thank the radio stations for promoting my music throughout my 30-year music career."

  -- Juan Gabriel (2002)

- "I am so grateful to radio. Their support has truly changed my life, and I hope they know how appreciative I am for that."

  -- Jo Dee Messina (1999)

- "This happened to me because of country radio."

  -- Trisha Yearwood, Grammy Award Winner (1998)

- "They [radio tours] are unbelievably important . . . I only regret I couldn't do it more and do it longer . . . You guys are so important to us.

  -- Pam Tillis (1993)

- "I'm really glad I had the opportunity to do that [go on radio tours], because I feel that it has really, really helped me."

  -- Lisa Steward (1993)

- "This one's going out to radio."

  -- Garth Brooks, Country Music Entertainer of the Year Acceptance Speech (1991)

- "In answer to the question, How important is radio to you: 'Well, that is it. What you're doing is you're advertising.'"

  -- Bobby Colomby, Blood, Sweat & Tears (1975)

From Recording Industry Executives:

- "I have yet to see the big reaction you want to see to a hit until it goes on the radio. I'm a big, big fan of radio."

  -- *Richard Palmese, Executive Vice President of Promotion RCA (2007)*

- "It's still the biggest way to break a band or sell records: airplay.. It's very difficult to get it, but when it happens, it's amazing."

  -- *Erv Karwelis, Idol Records (2007)*

- "Radio has proven itself time and time again to be the biggest vehicle to expose new music."

  -- *Ken Lane, Senior Vice President for Promotion, Island Def Jam Music Group (2005)*

- "It is clearly the number one way that we're getting our music exposed. Nothing else affects retail sales the way terrestrial radio does."

  -- *Tom Biery, Senior Vice President for Promotion, Warner Bros. Records (2005)*

- "If a song's not on the radio, it'll never sell."

  -- *Mark Wright, Senior Vice President, MCA Records (2001)*

- "Square one is a lot farther from the finish line without a radio hit. With a hit record, those opportunities walk through the door."

  -- *Ted Wagner, Vice President for National Promotion, Columbia Records (2001)*

- "Air play is king. They play the record, it sells. If they don't, it's dead in the water."

  -- *Jim Mazza, President, Dreamcatcher Entertainment (1999)*

- "We are in this business to sell product. You sell product by airing it, liking it and going out and buying it. Without the airplay nobody knows what it sounds like. If they don't know what it sounds like why would they want to buy it?

  It is the repetition that's the reason for the chart numbers, the heavier the rotation, the more exposure the more likely someone is to buy the product."

  -- Jack Lameier, Vice President/Promotion, Epic Records (1993)

- "I, like every other head of a record company, need and want radio to play our records. Without airplay, we'd all be in the door-to-door aluminum siding sales business."

  -- Bob Sherwood, President Phonogram/Mercury Records (1979)

- "What would happen to our business if radio dies? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases. We at Warner won't even put an album out unless it will get airplay."

  -- Stan Cornyn, Vice President, Warner Records (1975)

- "Our whole method of promotion in this business is normally through radio stations and television stations. Until the public actually hears your product, you can't tell whether you have a hit or not."

  -- Cecil Steen, President Records, Inc. (1960)

From Other Segments of the Recording Industry:

- The 2003 Billboard R&B and Hip-Hop Conference included a session titled "Let's Get It On" about the importance of securing radio airplay.
- "Ticket sales are driven by airplay. It's every concert promoter's dream to increase airplay on an act that's coming into a local market.

  -- Gary Bongiovanni, Editor, Pollstar Magazine (2000)
- "I guarantee you that radio will continue to play a vital role in the future of the music business."

  -- Jeff McClusky, Music Promoter (1998)
- "What influenced music consumers the most when it came to purchasing a particular piece of music? Radio."

  -- National Association of Recording Merchandisers survey (1996)
- The 1991 Country Music Awards included six awards to disc jockeys and radio stations for their contribution to the success of country music.
- "Sales of new records to the public are generated largely by air play on various radio stations through the United States.

  Pop radio air play is a critical factor in the success of a record label."

  -- Motown Record Company v. MCA (1991)
- A 1984 survey showed that over 80 percent of rock albums were purchased because people heard cuts off the album over the radio.

  -- Office of Technology Assessment
- 80% of singles buyers learned about the records they purchased from radio.

-- CBS Records survey (1979)

- The 43% of the total population who listen to music on the radio at least 10 hours per week comprise 54% of all buyers and account for 62% of the total dollar market.

-- Warner Communications survey (1977)

These acknowledgements are consistent with a 2006 Omnitel survey in which 63% of respondents rated local radio as their primary source to learn about new music,[13] and are consistent with a Critical Mass Media Study that 85% of listeners from all audio services identify FM radio as the place they first heard music that they purchased.[14]

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

The recording industry represents a classical oligopoly, where a small number of firms dominate the revenues of a particular industry. There are four major companies in the recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only US-based company; the other three major players are foreign-owned.[15]

While the U.S. recording industry was estimated at $11.5 billion in 2006, the recording industry suffered declining revenues in 2006 for the seventh consecutive year. All countries

[13] www.americanmediaservices.com/news/radio index/survey/3.5html (Question 21).
[14] Clear Channel Critical Mass Media Study attached as Exhibit 1.
[15] Universal Music Group, a subsidiary of the French corporation Vivendi, is the dominant player in the recording industry, with a 31.6% market share in 2006. Sony/BMG, which is owned 50/50 by Sony of Japan and German's Bertelsmann, is second at 27.4%; Warner Music Group of the U.S. is third at 18.1% and the U.K.'s EMI is fourth at 12.2%. Together, these four companies control 87.4% of all of the revenue in the recording industry; a number of smaller, independent firms together account for just 12.6% of revenues in 2006. An Examination of Performance Rights, Albarron & Way, July 6, 2001] (hereinafter "Performance Rights Study"), attached hereto as Exhibit 2.

have experienced a decline in physical music sales due to, among other factors, the growth of the Internet, peer-to-peer file sharing and piracy.[16] While all of these factors have hurt the recording industry, there are no facts that even suggest that radio broadcasters are to blame for the economic problems in the recording industry, nor that a performance tax will in any way address the factors that have contributed to declining record sales.[17]

International Federation of the Phonographic Industry ("IFPI") Chairman and CEO John Kennedy claims the current economic data "reflect an industry in transition."[18] Despite the decline in physical sales of recordings, many sectors of the music industry aside from the major record labels have experienced strong growth. According to the IFPI, digital shipments (the legal sale of online music, such as through iTunes and other legal download services) grew by 85% in 2006 to $2.1 billion. Live performances were up 16% from 2005 to 2006 to an estimated $17 billion. Merchandising and sponsorship grew by 30% in 2006. Yet another growing segment is portable digital players, estimated at another $10 billion in revenue for 2006. There is little hard data as to how much revenue is acquired on music globally through mobile phone and Internet Service Providers, but IFPI and other sources estimate these revenues to be several billion dollars.[19]

What this data suggests is that, in addition to piracy, a major reason for the recording industry's revenue decline is its failure to adjust to the public's changing patterns and habits in how they choose to acquire sound recordings. Any such shortcoming also was not of

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[16] Performance Rights Study at 3.
[17] Radio stations provide the recording industry with substantial additional revenues through fees they pay for simultaneously streaming their signals.
[18] Brandle, Lars, "Music Biz Sales Off for a Seventh Year: Study." *Reuters*, July 5, 2007. Retrieved July 26, 2007 from: http://www.reuters.com/article/entertainmentNews/idUSN0527941020070705?feedType=RSS&rpc=22&sp=true.
[19] Performance Rights Study at 3.

broadcasters' making; nor should our industry be looked to as a panacea, through a tax or fee, to provide a new funding source to make up for lost revenues of the record companies.

Indeed, the imposition of such a tax could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the tax, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, providing less exposure to music. This could not only adversely impact the recording industry, but the music composers and publishers as well.

Sixty-eight percent of commercial radio stations in this country are located in Arbitron markets ranked 101 or smaller.[20] Many radio stations, especially in these small and medium sized markets, are also struggling financially. It is these stations on which a new performance tax would have a particularly adverse impact. Were such additional royalties imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

[20] *Media Access Pro, BIA Financial Network Inc.*, Data Retrieved July 25, 2007.

A New Performance Tax Could Apply to Thousands of Business and Facilities Large and Small

The Committee should be aware of the fact that in those countries that have adopted a performance tax, it applies in every instance where a non-exempt public performance in sound recordings is made. Indeed, there is no basis or precedent for singling out radio broadcasters for such a tax. Hence, to be clear, any change in the law to provide for this new tax may impose a new hardship on every bar, restaurant, retail establishment, shopping center, sports and other entertainment venue, juke box owner and dance and concert where recorded music is played, not merely radio stations. The Committee needs seriously to consider the economic and other consequences on these entities, and on consumers who would ultimately foot the bill.

Justification for Performance Rights in Sound Recordings Cannot Be Gleaned By Comparison With the Intellectual Property Laws of Other Countries.

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

music composers and publishers is significantly higher than that paid for sound recordings, yet the Copyright Royalty Board decisions in the U.S. have provided rates for performing digital audio transmissions several times higher than rates paid to the composers.[21] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

The U.S. has the best radio system in the world. Among other things, it has helped spawn the most lucrative recording industry in the world. The U.S. commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not and do not receive one cent from the government or its listeners. Many, in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government or by taxes. The fact that under those systems the governments also chose to subsidize their own recording industries by granting performance rights and paying royalties from government owned or subsidized stations does not mean this is an appropriate system for this country. In this regard, it is significant to note that the U.S. recording industry that operates under a regime with no performance tax, is larger than that of the UK, France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance tax regimes.[22]

In many countries, broadcasters might pay lower fees to the composer and/or the record companies might have to pay more to the composers than is true in the U.S. So, the whole music, sound recording, broadcaster pie is split differently.[23]

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[21] Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).
[22] Performance Rights Study at 2.
[23] AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement, June 2007 at pp. 23-24 ("AEPO-ARTIS Study").

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

Advocates for a performance tax often raise the specter of overworked and underpaid performers who would be beneficiaries of such a tax. The history of the treatment of performers by recording companies makes any assumptions that performers meaningfully would share in any largess created by a performance tax highly dubious. That history is replete with examples of record company exploitation of performers. Following are just some examples:

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

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

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

Often the distribution system for performance rights in sound recordings is very skewed to the record companies as opposed to performers, and often the performers allocation is heavily skewed to the top 20% of the performers.[24] A performance tax will take money out of the pockets of radio stations and other business, and put it in the hands of record companies and a few performers.

Need to Fix Performance Rights For Sound Recordings As Applied to Streaming

While the focus of this hearing is whether the current narrowly defined performance right in sound recordings should be expanded, it is imperative that this Committee keep in mind the critical need of radio broadcasters to obtain reforms in the laws governing the simulcast streaming of radio broadcasts over the Internet. This is a subject about which NAB testified at length in July 2004 before this Committee.

Coupling the powers of the Internet with the longstanding strengths and benefits of local free over-the-air radio provides exiting possibilities for broadcasters and our listeners. Unfortunately, the current legislative scheme imposes conditions and limitations that are totally incompatible with traditional and emerging broadcast practices and the recent decision of the Copyright Royalty Board has resulted in oppressive and unjustified sound recording royalty fees that have made a viable business model for simulcast steaming almost impossible. We urge the Committee to address these gaping inequities as soon as possible, and certainly not to permit the record companies to expand the existing unfair and unworkable system any further.

[24] AEPO-ARTIS Study at II.1.5.a.

Conclusion

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

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

The recording industry's pursuit of a performance tax at this time appears directly linked to the loss of revenues from the sale of music. This should not be a basis for the imposition of such a tax and radio should not be responsible for the loss of revenue from physical sales in the recording industry. A performance tax would harm the beneficial relationship that exists between the recording industry and the radio industry. Together, these two industries have grown and prospered. Congress would better serve all parties, including the public, by encouraging our industries to work together to solve challenges rather than to legislate a system that would merely siphon revenues from one to the other.

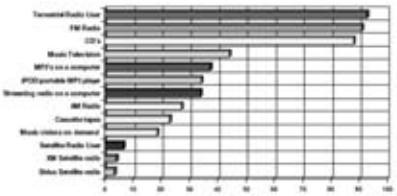
ATTACHMENT 1

CLEARCHANNEL
CRITICAL MASS MEDIA

Media Influence on New Music Sales – Conducted July 2006

FM Radio is the dominant medium for listening to music

Question posed: *Which of the following sources do you use to listen to music on a regular basis?*

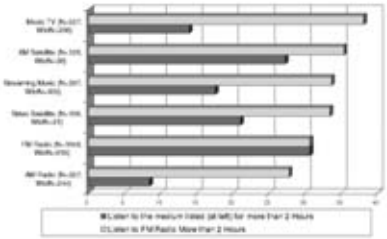


Of those using ANY audio medium, more spend over two hours per day listening to music on FM RADIO than on any other source.

More satellite radio listeners spend over two hours per day listening to music on FM radio more than they do on satellite.

Similarly, more streaming Internet listeners spend over two hours per day listening to music on FM radio more than they do on streaming Internet

Question Posed: Please stop me when I reach the range that describes the amount of time you spend listening to music on (a) FM radio and (b) [your identified medium] during a typical day.



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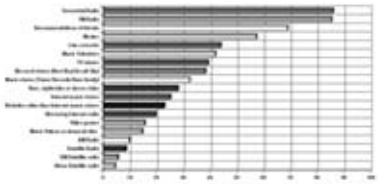
CLEARCHANNEL
CRITICAL MASS MEDIA

FM Radio is the dominant medium driving CD sales

Eighty-five percent of listeners of all audio services identify FM RADIO as the place they first heard music that they purchased (compared to less than 10 percent for satellite and less than 20 percent for streaming Internet)

Question Posed: I'm going to name places where you might hear new music. For each one, please tell me if it's where you first heard music that you've purchased.



FM Radio's strong influence on CD sales is across the board

Question Posed: Where did you first hear music you purchased?

With so many more listening to music on FM RADIO, heavy music buyers (those who bought more than 10 CD's or 20 MP3's in the past year) are 9 times more likely to listen to music on terrestrial than satellite

Question Posed: Which of the following sources do you use to listen to music on a regular basis?

	Bought More than 10 CD's	Bought More than 20 MP3's
No (Unweighted Base)	377	143
Weighted Base	277	107
User's of:		
Terrestrial Radio	92.3	92.2
FM Radio	90.4	92.0
CD's	97.8	89.2
Music Television	57.0	38.2
MP3's on a Computer	45.0	70.7
iPOD/portable MP3 player	44.7	67.0
Streaming radio on a computer	40.1	45.0
AM Radio	28.9	25.9
Cassette tapes	23.7	8.4
Music videos on demand	25.3	21.9
Satellite radio	10.0	10.7
XM satellite radio	6.1	7.1
Sirius satellite radio	5.4	5.4

SATELLITE RADIO USAGE

Over 77,000 Critical Mass Media nationwide interviews conducted March 2006 through June 2006, establish satellite radio listenership at 6.6% among persons 14-54

Correlating well with July 2006 satellite radio subscription reports of 11.6 million, and census estimates of 172.7 million persons 14-54.*

METHODOLOGY

Between June 22, 2006 and June 27, 2006, 17,486 telephone dialings resulted in 1,158 interviews lasting an average of 7 minutes. Calls were placed in 80 US markets representing all market sizes, geographic regions, and time zones.

** Designed to include 900 nationwide respondents, this sample would include only 59 satellite radio listeners by natural proportion. Satellite radio listeners were over-recruited by a factor of more than 3. The 206 satellite radio listeners in the sample are weighted down to their 6.6% proportionality, allowing us to more reliably dissect their behavior independently. This weighting affects only the total sample number.*

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ATTACHMENT 2

An Examination of Performance Rights in Sound Recordings

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July 6, 2007

The authors are independent researchers hired as consultants by the NAB, and the opinions expressed here are solely the responsibility of the authors.

An Examination of Performance Rights Organizations

Executive Summary

Introduction

At the request of the National Association of Broadcasters, the researchers were retained to examine performance rights in sound recordings in developed nations around the globe.

The Recording Industry of America (RIAA) recently asked Congress to consider establishing a performance right that would require local radio broadcasters to pay for the use of sound recordings when they are aired on the radio. Radio stations already pay PROs in the United States royalties which go to composers and publishers.

If this levy were to be enacted, it would create a new fee for radio stations to pay for the use of recorded music. A new expense could cost stations millions of dollars annually, at a time when revenue streams for local stations are already stressed by competition from MP3 players, satellite radio, Internet radio and other forms of streaming media.

The researchers worked independently of the NAB, and the opinions expressed here are solely the responsibility of the authors.

Historical Context

In the United States, radio stations pay significant fees each year to ASCAP, BMI and SESCA to play music. These fees go to music composers and publishers, but not to artists or record companies.

Radio stations and the recording industry have existed in a mutually beneficial relationship for over 70 years. Radio stations utilizing a music-based format play recorded music, which gives exposure to artists and creates interests in acquiring recordings among the audience. This system has resulted in the United States being the largest market for sound recordings in the world (see Table 1)

Table 1: 2006 Music Market Data

Country	Change from previous year	Total US Dollars/Retail Value*
US	-7%	$11,501
Japan	1%	5,273
UK	-7%	3,252
Germany	-3%	2,091
France	-10%	1,700
Canada	-9%	719
Australia	-4%	621
Italy	-11%	598
Spain	-11%	497
Mexico	-10%	374

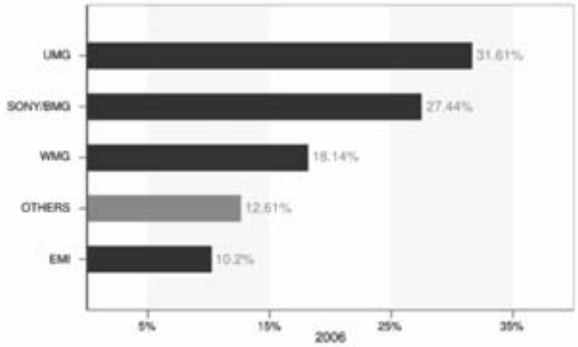
*in millions of US dollars
Source: Adapted from IFPI Market Research, available at www.ifpi.org

Economic Context

Globally, sales revenue in the recording industry was estimated at $31 billion in 2006. The recording industry is part of the larger global music industry, estimated at $131 billion in 2006. The recording industry represents a classical oligopoly, where a small number of firms dominate the revenues of a particular industry. There are four major companies in the recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only US-based company; the other three major players are foreign-owned (see Figure 1).

As illustrated in Figure 1, Universal Music Group, a subsidiary of the French corporation Vivendi, is the dominant player in the recording industry, with a 31.6% market share in 2006. Sony/BMG, which is owned 50/50 by Sony of Japan and Germany's Bertelsmann, is second at 27.4%; Warner Music Group of the U.S. is third at 18.1% and the U. K.'s EMI is fourth at 12.2%. Together these four companies control 87.4% of all of the revenue in the recording industry; a number of smaller, independent firms together account for just 12.6% of revenues in 2006.

Figure 1: Market Share of Companies in the Record Industry (2006)



Source: http://www.swivel.com/graphs/show/13985951

The U. S. recording industry was estimated at $11.5 billion in 2006, more than double the size of Japan, the second largest nation in terms of recorded music. The top 10 countries in 2006 accounted for 85.8% or a total of $26.6 billion in recording industry revenues.

The recording industry lost money in 2006 for the seventh consecutive year. All countries have experienced a decline in physical music sales due to, among other factors, the growth of the Internet, peer-to-peer file sharing and piracy. All of these factors have hurt the recording industry, but there is no data that suggest that radio broadcasters are to blame for the economic problems in the recording industry. IFPI Chairman and CEO John Kennedy claims the current economic data "reflect an industry in transition." (*Washington Post, Hollywood Reporter*).

Despite the decline in physical sales of recordings, many sectors of the music industry aside from the major record labels are showing strong growth prospects. According to the IFPI, digital shipments (the legal sale of online music, such as through iTunes and other legal download services) grew by 85% in 2006 to $2.1 billion. Live performances were up 16% from 2005 to 2006 earning a total of $17 billion. Merchandising and sponsorship grew by 30% in 2006. And yet another growing segment is through portable digital players, estimated at another $10 billion in revenue for 2006. Further, there is not a clear source as to how much revenue is acquired on music globally through mobile phone and Internet Service Providers, but IFPI and other sources estimates these revenues to be several billion dollars.

International Context

Other countries collect and pay royalties for the use of music and sound recordings in different ways in comparison to the United States.

Like the United States, other nations provide royalties to composers, and publishers of music. Some countries also provide a performance royalty for sound recordings.

But many differences exist, and it is challenging to draw any concrete comparisons. For example, in some countries (Australia, Canada and Italy) royalties are actually tied to statutory price or "royalty caps" based on fair market revenues. Other countries provide no performance royalty (e.g, China) or value different sectors of performance very differently.

In all of the major countries examined (in terms of national revenues) the royalty rate for compositions is significantly higher than that for sound recordings. Composition rates range from 1.5% to 6.0% for these nations, recognizing that the composer/publisher of the work should be compensated. In the United States, an estimated $450 million+ in fees are paid by radio stations to ASCAP, BMI and SESAC every year.

Sound recording royalties in the countries examined range from a low of 1% to as much as 5%. It should be noted that the higher rate is found in the countries of France and Germany, which are among the highest tax rates in the world (see Table 2). Further, many of these countries pale in comparison to the U. S. in terms of how their broadcasting services are licensed.

For example, most European nations allow more public service broadcasting stations than they do privately owned stations, and there are stations licensed at the national, regional and local levels. This of course is a huge difference in the U. S., where the majority of stations are privately owned and serve only local geographic markets. There is greater scale in the United States than in other countries in terms of radio stations.

For example, the Media UK directory for the United Kingdom lists 810 radio stations in total, which includes public service channels like the multitude of BBC services, private radio stations (like Capital FM, one of the first in the UK) and Internet radio stations. Compare that to the United States, which has over 10,000 privately owned on-air stations alone.

In the nations that report a separate sound recording royalty, the reported rate does not all go to the artist; in many nations only a fraction of a percentage will be allocated to the artist, and depending on the accounting for services and management fees rendered by the recording company, the artists may not even receive a royalty every year.

In looking at the international context, there is nothing to suggest that there is a standard practice regarding performance royalties, nor any particular "best practices" that stand out. To the contrary, the United States market remains the clear global leader in terms of sales in the recording industry.

One final area of comparison worth noting is that of sales tax on recordings. A summary of sales tax on recordings for the various countries is reported in Table 3:

Table 3: 2006 Sales Tax Rates

Country	Tax Rate	Import Tax Rate
USA	2-9%*	-
Japan	5%	-
UK	17.5%	-
Germany	16%	-
France	19.6%	-
Canada	6%	Up to 12%
Australia	10%	-
Italy	20%	16% (non-EU imports)
Spain	16%	16% (non-EU imports)
Mexico	15%	-

*US tax rate is based on state rate which varies.

The sales tax on recordings in most countries is very high; the United States, Japan and Canada have the lowest tax rates on sound recordings. We do not suggest that sales tax will keep consumers from buying sound recordings, but it is no surprise that the two largest global markets for music have the lowest sales tax rate structure.

Summary

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

The efforts by the RIAA to encourage Congress to establish a performance royalty comes at a volatile time for both the radio and recording industries in the U. S. Both industries are fighting intense competition for consumers through the Internet and other new technologies, and both industries are experiencing changes to their traditional business models.

The desire of the RIAA to pursue this performance royalty at this time in the 21st century is directly linked to the loss of revenues from the sale of music in the largest developed markets in the world. The industry's own IFPI has targeted the U. S., Japan and China as three countries where they are devoting efforts to secure performance royalties.

However, the enactment of a performance royalty would not begin to make up the loss of revenue from physical sales in the recording industry, nor improve a business model in disarray.

What it would do is harm the beneficial relationship that exists between the recording industry and the radio industry. Together, these two industries have grown and prospered. In this new age of intense competition for audiences and consumer choice, these industries should be working together to solve challenges rather than trying to siphon revenues from one another.

We conclude that Congress was correct in rebuffing previous attempts to enact a performance royalty targeted at broadcast stations. When one considers the total historical, legal, economic and international context, there is little justification for such a significant change in media policy and regulation in the United States.

Curriculum Vitae—Revised 5/27/2007

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EDUCATION

The Ohio State University	Ph.D.	(Communication)	1990
Marshall University	M. A.	(Speech/Broadcasting)	1978
Marshall University	B. A.	(Speech/Broadcasting)	1976

ACADEMIC EMPLOYMENT

Department of Radio, Television and Film, The University of North Texas, Denton, TX.
Professor and Chair, August 2000-present
Director, Center for Spanish Language Media, May 2006-present

Southern Methodist University, Dallas, Texas, 1990-2000
Associate Dean, Research and Technology, 1998-2000, Meadows School of the Arts
Assistant Professor, 1990-1994; Associate Professor, 1994-1999; Full Professor, 1999-2000

Department of Communication, The Ohio State University, Columbus, Ohio
Lecturer, September, 1989 to June, 1990.
Graduate Teaching Associate/Research Assistant, August 1987 to August 1989

Division of Public Communication, Sam Houston State University, Huntsville, Texas
Instructor, Radio-TV-Film and Faculty Manager, KSHU-FM, August 1979 to July 1987.

Raleigh County Schools, Beckley, WV
Coordinator, Broadcast Technology Program, June 1978 to August 1979.

Department of Speech, Beckley College, Beckley, WV
Adjunct Faculty, July 1978 to August 1979.

Department of Speech, Marshall University, Huntington, WV
Graduate Teaching Assistant and Station Manger, WMUL-FM, January 1977 to May, 1978

OTHER ACADEMIC AFFILIATIONS

Visiting Professor, University of Navarra, Department of Media Management, Pamplona, Spain
Professor, Konrad Adenauer Center for Journalism, Ateneo de Manila University, Manila, Philippines
Professor, Department of Communication Sciences, Universidade Autónoma de Lisbon, Portugal
Visiting Professor, School of Communication, Universidad Panamericana, Guadalajara, Mexico
Honorary Professor, School of Film & Television Arts, Shanghai University, China
Visiting Professor, Shanghai Jai Tong University, Shanghai, China (2005)
Inaugural Faculty, Institute for Media and Entertainment, New York, NY (2004)
Visiting Professor, Munich Business School, Munich, Germany (2004)
Visiting Professor, University of St. Gallen, St. Gallen, Switzerland (2003)

ADMINISTRATIVE APPOINTMENTS

The University of North Texas:
Director, Center for Spanish-Language Media, September 2006 to present
Chair, Department of Radio, Television and Film, August 2000 to August 2007

Southern Methodist University, Dallas, TX:
Director, SMU-in-London Study Abroad Program, 1999 to 2000.
Associate Dean, Meadows School of the Arts, June 1998 to July 2000. Interim Director, Center for Communication Arts, January 1999 to May 1999.
Assistant Dean, Research and Information Technology, Meadows School of the Arts, June 1997 to May, 1998.
Director, Center for Communication Arts, January 1996 to July 1997.
Director of Graduate Studies, Center for Communication Arts, August 1991 to December 1995.

PUBLICATIONS (Refereed)

Albarran, A. B., Anderson, T., Garcia Bejar, L., Bussart, A. L.,Daggett, E., Gibson, S., Gorman, M., Greer, D., Guo, M., Horst, J. L., Khalaf, T., Lay, J. P., McCracken, M., Mott, B. & Way, H. (in press). "'What happened to our audience?' Radio and new technology uses and gratifications among young adult users." *Journal of Radio Studies* 9 (2) xxx-xxx.

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Managing Sales Conference Highlights. *Feedback*, 25 (2) 28-9, 1983.

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A Passion to Win by Sumner Redstone. (2002). *Journal of Media Economics* 15 (4) 297-298.

Multimedia: A Critical Introduction by Richard Wise. *Convergence* 7 (4) 119-121.

The Business of Books by Andre Schiffrin. *Journal of Media Economics* 14 (3) 193-194.

Internet Economics by Lee McKnight and Joseph Bailey, Editors. *Webonomics: Nine Essential Principles for Growing Your Business on the World Wide Web* by Evan Schwartz. *Journal of Media Economics* 11, (4) 53-55.

Convergence-Integrating Media , Information & Communication by T. F. Baldwin, D. McVoy & C. Steinfield. Convergence 3, (2) 134-136.

Toward Competition in Cable Television by L. L. Johnson. *Journal of Media Economics 10*, (1) 53-55.

Video Economics by B. M. Owen & S. W. Wildman. (1993). *Journal of Media Economics 6*, (2) 53-54.

Video Economics by B. M. Owen & S. W. Wildman. (1993). *Journalism Quarterly, 70*, (1) 204-205.

The Selling of Broadcast Advertising by White, B. & Satterwaithe, D. *Journal of Broadcasting and Electronic Media*, 34 (3) 367-368, 1990.

Media Economics by R. G. Picard. *Feedback*, 31 (4) 26, 1990.

DISSERTATION

Albarran, A. B. (1990). *An Ecological Study of Gratification Niche Dimensions and Competition in the Video Entertainment Industries*. Unpublished doctoral dissertation, The Ohio State University.

CONVENTION PAPERS (Referred/Competitive)

Albarran, A. B. (2007). "Media Employment in the United States: An Examination of Selected Industries." Paper presented at the Broadcast Education Association Convention. Las Vegas, NV, April 18-20.

Albarran, A. B., Anderson, T., Garcia Bejar, L., Bussart, A. L.,Daggett, E., Gibson, S., Gorman, M., Greer, D., Guo, M., Horst, J. L., Khalaf, T., Lay, J. P., McCracken, M., Mott, B. & Way, H. (2006). "'What happened to our audience?' Radio and new technology uses and gratifications among young adult users." Paper presented at the Consuming Audiences Conference, Copenhagen, Denmark, September 29-30.

Dimmick, J. & Albarran, A. B. (2005). "A Proposed Measure of the Potential for Scope Economics in Communication Firms." AEJMC National Convention, San Antonio, TX, August.

Albarran, A. B. & Mierzejewska, I. B. (2004). "Media Concentration in the U. S. and European Union: A Comparative Analysis." 6th World Media Economics Conference, May 12-15, Montreal, Canada.

Albarran, A. B. & Patrick, W. L. (2004). "Models of Broadcast Station Valuation: Review and Analysis." Broadcast Education Association Convention, Las Vegas, NV, April.

Loomis, K. D. & Albarran, A. B. (2003). "Teaching Media Management in the 21st Century: What Curricula are needed?" AEJMC National Convention, Kansas City, MO, August 1.

Loomis, K. D. & Albarran, A. B. (2003). "Managing Television Duopolies: A First Look." Broadcast Education Association, April 5 *(Top Three Paper-Management & Sales Division).*

Albarran, A. B. & Moellinger, T. (2002). "The Top Six Communication Industry Firms: Structure, Performance and Strategy." 5th World Media Economics Conference, May 9-10, 2002, Turku, Finland.

Albarran, A. B. (2001). "Megamedia: A Research Note Examining Communication Industry Concentration." AEJMC National Convention, Washington, DC, August 7.

Albarran, A. B. & Sarma, S. (2000). "Children and the New Media: Economic Aspects." 2000 Southern States Communication Association, New Orleans, LA.

Albarran, A. B. & Dimmick, J. (1999). "Strategic Management and Multinational Companies: The Role of Diversification." 1999 Broadcast Education Association, Las Vegas, NV, April 15-17.

Albarran, A. B. (1999). "Electronic Commerce: A Taxonomy and Research Agenda." Southern States Communication Association/Central States Communication Association joint annual conference, April 8-11.

Albarran, A. B. & Carlin, E. J. (1998). "Teaching the Media Management Course: Issues and Opportunities." AEJMC National Convention, Washington, D. C., August 5-8.

Albarran, A. B. (1998). "The Coalescence of Power: The Transformation of the Communication Industries." Media 2000 and Beyond, London, England, April 16-17.

Albarran, A. B. (1998). "Media Economics Research: Paradigms, Issues, and Contributions." Southern States Communication Association, San Antonio, TX, April 1-5.

Albarran, A. B. (1998). "Convergence in the Mass Media Industries: Implications for the Marketplace and the University Curriculum." AEJMC Mid-Winter meeting, Dallas, TX, February 21. (*Top Paper, Media Management and Economics Division*).

Albarran, A. B. & DeMars, T. (1997). "Television Mergers and Acquisitions: Strategic and Economic Perspectives." Broadcast Education Association, Las Vegas, NV, April 3-6.

Albarran, A. B. (1997). "Redefining the Marketplace: Implications for the Communication Industries." Southern States Communication Association, Savannah, GA, April 3-6.

Albarran, A. B. (1996). "Concentration in the Communication Industries." Southern States Communication Association, Memphis, TN, March 27-31.

Albarran, A. B., Lewis, K. A., & Morrel, L. (1995). "Network Prime-Time Programming, 1983-1993: An Examination of Oligopoly Practices." Speech Communication Association National Convention, San Antonio, November 18-20.

Albarran, A. B. & Tidwell, D. (1995). "Electronic Media Managers and Ethics." Speech Communication Association National Convention, San Antonio,

Albarran, A. B. & Ludwig, L. S. (1995). "Radio Duopolies Impact on Management: Reflections from a Major Market." Broadcast Education Association Conference, Las Vegas, April 7-10.

Standley, T. C. & Albarran, A. B. (1995). "The Audience's Perception of the Audience: An Analysis of Third Person Effects." Southern States Communication Association, New Orleans, April 6-9.

Albarran, A. B. (1994). "The Synergistic Relationship Between Telcos and Cable: An Economic Analysis." Speech Communication Association, New Orleans, November 19-21.

Umphrey, D. & Albarran, A. B. (1994). "An Ethnic Study of Polarization in a Multi-Channel Environment." AEJMC National Convention, Atlanta, August 6-8.

Albarran, A. B. (1994). "Structural Changes in the Broadcast Networks: A Case Study." Southern States Communication Association Convention, Norfolk, VA, April 6-10. (*Top Three Paper*).

Albarran, A. B. & Umphrey, D. (1993). "Television Viewing Among Ethnic Adults: Results of a Longitudinal Study." Speech Communication Association Convention, Miami, FL, November 18-21.

Albarran, A. B. & Umphrey, D. (1993). "Ritualistic and Instrumental Television Viewing Revisited: A Survey of Whites, African-Americans, and Hispanics." Southern States Communication Association/Central States Communication Association, Lexington, KY, April 16-18.

Umphrey, D. & Albarran, A. B. (1993). "Assessing Ethnic Differences in Motivations for Using Remote Control Devices." Broadcast Education Association, Las Vegas, NV, April 16-18.

Albarran, A. B. & Umphrey, D. (1992). "The Impact of Viewing Motivations, Program Types, and Demographics on Determining Subcribership to Cable and Pay Cable Services." Speech Communication Association, Chicago, IL October 29-November 1.

Umphrey, D. & Albarran, A. B. (1992). "Segmenting Hispanics, Blacks and Whites in the New Media Environment." Association for Education in Journalism and Mass Communication Southwestern conference, Jonesboro, Arkansas, October 23-24.

Albarran, A. B. & Umphrey, D. (1992). "Ethnic Diversity: The Uses of Television and Cable Television by Hispanics, Blacks, and Whites." International Communication Association, Miami, Florida, May 21-25.

Albarran, A. B. & Thomas, S. M. (1992). "A Comparison of CD Owners and Non-Owners and Attitudes Towards Radio Listening." Southern States Communication Association, San Antonio, TX, April 9-12.

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Thomas, S. M. & Albarran, A. B. (1992). "Compact Disc Owners and Non-Owners: Demographic Characteristics and Attitudes Toward Radio." Spring Conference, Texas Association of Broadcast Educators, Dallas, TX, February 28-29.

Albarran, A. B. (1991). "Cable Networks in the '90's: Feast or Famine?" Speech Communication Association, Atlanta, Georgia, October 31-November 3.

Albarran, A. B. & Stavitsky, A. G. (1991). "Analyzing Broadcast-Cable Relations: Adversaries or Partners?" Texas Association of Broadcast Educators Fall Conference, Houston, TX, October 5.

Albarran, A. B., Pilcher, A., Steele, D. & Weis, J. (1991). "An Analysis of Prime-Time Programming, 1985-1990: The Introduction and Impact of the Fox Network." Broadcast Education Association, Las Vegas, NV, April 13-15. (*Second Place Paper Award--Research Division*).

Klopfenstein, B. C. & Albarran, A. B. (1991). "The Trivialization of the VCR Audience." Broadcast Education Association, Las Vegas, NV, April 13-15.

Albarran, A. B. (1991). "An Assessment of Competitive Superiority in the Video Entertainment Industries Using Gratification Measures." Southern States Communication Association, Tampa, Florida, April 5-9. (*Top Paper Award-Mass Communication Division*)

Albarran, A. B. (1990). "An Examination of Gratification Niche Dimensions and Competition in the Video Entertainment Industries." Speech Communication Association National Convention, Chicago, IL, Nov. 1-4.

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Albarran, A. B. (1990). "Public Corporations and Cable Television Systems: A Comparison of Cable and Non-Cable Business Segments." Southern States Communication Association Convention, Birmingham, Alabama, April 5-9. (*Top Three Student Paper*).

Albarran, A. B. (1989). "Bridging the Gap: What Mass Communication Research Offers to Organizational and Interpersonal Communication Research." West Virginia Communication Association Convention, Huntington, West Virginia, October 13-14.

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Foley, J. M., Albarran, A. B., Musgrave, R. & Nchia, D. (1989). "Competition, Monopoly and the Public Interest: Mass Communication Policy Issues in the Debate Over Telephone Company Entry into Cable Television." Speech Communication Association Convention, San Francisco, California, November 18-21.

Albarran, A. B. & Porco, J. (1989). "Measuring Corporate Diversity in the Pay Cable Industry." Communication Research Conference, Ohio University, Athens, Ohio, April 21-22.

Albarran, A. B. (1989). "Competition in the Pay Cable Industry." Southern States Communication Association, Louisville, Kentucky, April 6-9.

Acker, S. R. & Albarran, A. B. (1988). "Implementing ISDN: A Sociotechnical Analysis." International Communication Association, New Orleans, Louisiana, May 29-June 3.

Albarran, A. B. (1988). "A Comparative Content Analysis of Music Videos." Communication Research Conference, Ohio University, Athens, Ohio, April 28-29.

WORKS UNDER REVIEW/IN PROGRESS

Albarran, A. B. *The Media Economy.* New book in progress.

Albarran, A. B. *Handbook of Spanish Language Media.* New edited volume in development.

INVITED WORKSHOPS/SEMINARS/PRESENTATIONS

"Economics and Ownership of Spanish Language Radio." Part of panel presentation at the 2007 Radio Ink Hispanic Radio Conference, San Antonio, Texas, May 23, 2007.

"Global Media Trends and Patterns: A Look at the Audiovisual Market." Presentation at Universidad La Sabana, Chia, Colombia, March 2, 2007.

"Global Media Trends and Patterns for the Audiovisual Market." Presentation at the 2007 Andina Link Conference and Exhibition, Cartegena, Colombia, February 27, 2007.

"Ethics and Social Responsibility of the Media." Keynote speaker for conference at the Universidade Autonoma de Lisboa in Lisbon, Portugal, October 27, 2005.

"International Trends in the Media Sector." Presentation to the Department of Communication at the Instituto de Linguas e Administracao (ISLA) in Porto, Portugal, October 25, 2005.

"Media Economics." Four day course for MBA students at Aetna School of Management, Shanghai Jiao Tong University, Shanghai, China, April 15-18, 2005.

"The Media Business Environment." Presentations to the School of Communication at Universidad Panamericana, Guadalajara, Mexico, February 19, 2005.

"Digital TV in the United States: Management Challenges and Opportunities." Invited keynote presentation, Taiwan International DTV Forum & Conference, Taipei, November 28-30, 2004.

"Advanced Topics in Media Economics." Two-day seminar presented at the Institute for Information Systems and New Media, Munich Business School, University of Munich, Germany, July 8-9, 2004.

Albarran, A. B. & Gormley, R. K. "Strategic Response or Strategic Blunder: Examining the Mergers of AOL Time Warner and Vivendi Universal." Presentation at the Strategic Responses to Media Market Changes, Jönköping International Business School, Jönköping University, Sweden, October 17, 2003.

"Global Implications for Media Management." Presentation to the Media MBA program at the MCM Institute, University of St. Gallen, St. Gallen, Switzerland, May 14, 2003.

"Time and Media Markets" and "Media Globalization." Presentations to the School of Communication at Universidad Panamericana, Guadalajara, Mexico, August 6-7, 2002.

"Globalization and the Mass Media." Two-day seminar conducted at the Pontificio Anteneo Della Santa Croce, Rome, Italy, May 8-9, 2000.

"The Concept of Time and the field of Media Economics." Invited presentation, "Time and Media Markets" International Conference, University of Navarra, Pamplona, Spain, May 4-5, 2000.

"Media Economics: Future Directions of the Field." Co-presentation with Robert G. Picard at the University of Tampere, Tampere, Finland, March 21, 2000.

"Global Media Business Strategies." Seminar presented to the Media MBA Group, Turku School of Business and Economics, Turku University, Turku, Finland. March 17, 2000.

"The American Television Market." A six-part seminar, and "Publishing in Academic Journals," a workshop, all conducted at the School of Public Communication, University of Navarra, Fall, 1997, Pamplona Spain.

"Religious Broadcasting in the United States." Two-day seminar conducted at the Pontificio Anteneo Della Santa Croce, Rome, Italy, November 19-20, 1997.

"Strategies of American Mass Media Companies." Invited presentation at the Institute Francais De Presse, University of Paris II, Paris, France, November 27, 1997.

"Murder One: Relaunch in the U. S., Premiere in Germany." Invited presentation to the 1996 Medienforum International Television Conference, June 2-5, 1996, Cologne, Germany.

"What We Know About the Cable TV Audience and Implications for Cable Access Programmers." Luncheon speaker, Metroplex Access Group, Dallas, Texas, November 11, 1992.

"Segmenting Hispanics, Blacks, and Whites in the New Media Environment." Luncheon speaker, National Association of Minorities in Cable, Dallas-Fort Worth Chapter, June 30, 1992, Dallas, Texas.

"The Radio Audience in the 21st Century." 1991 Regional Convention of the Broadcast Education Association/Texas Association of Broadcast Educators, March 1-2, Dallas, Texas.

GRADUATE THESIS ADVISEES (Chair/Major Professor Only)

University of North Texas:

Heather C. Way, (2007). *The Reshaping of the Traditional Television Advertising Model: An analysis of Media Agency Perceptions and Decisions Marking Processes Regarding the Effects of Digital Video Recorders on Television Commercial Effectiveness.*

William E. Mott IV, (2007). *Political Agenda-Setting in Cable News as a Possible Technique for Securing an Audience Niche.*

Miao Guo, (2007). *The Impact of Ownership, Regulation Issues and Technology Adoption on the Introduction of Digital Terrestrial Television: A Comparison of the United States and Mainland China.*

Jeremy Upchurch, (2006). *Religious Television and New Technologies: Managing Change in the Broadcast Environment.*

Catherine Bowers Burdette, (2006). *Big Hair and Big Egos: Texan Stereotypes in American Entertainment Media as Found through Television Viewing.*

Phyllis Slocum, (2005). *The Future of Local Television News: Is There a Possible Strategic Planning Approach?*

Adam Dean, (2005). *The Paradox of Creativity and Business in Feature Hollywood Filmmaking: The Relationship Between Motion Picture Production and Budgeting.*

Southern Methodist University:

Daniel Arasa (2001). "The Church And The Internet: A Content Analysis Of Two Catholic Websites."

Lance S. Ludwig, (1996). *Duopoly and its effects on radio management.*

Tracy Collins Standley, (1994). *Linking third person effect and attribution theory.*

Andrea L. Pilcher, (1992). *A gender survey of selected individuals to determine the extent of uses and gratifications of audience activity of viewing televised professional football.*

Marjorie R. Stamper, (1992). *The influence of interpersonal and media sources on the decision to register to vote: Implications for the two-step flow hypothesis.*

Dina A. Steele, (1992). *A media system dependency perspective of the impact of new technologies on public television.*

Melanie A. Bailey, (1991). *The uses of video for organizational communications in American corporations today.*

CONSULTING/RESEARCH ACTIVITIES

Consultant, Univision Radio. November 2005 to present.

Consultant, Dallas Community TV, August 2006.

Workshop on Economic Reporting. Conducted with Bosnian Radio Journalists, May 17-28, 2004 at the University of North Texas. Sponsored by Media Training Division of the International Broadcasting Bureau, part of Voice of America (U. S. Government).

Council of Advisors, Gearson Lehman Group, New York, NY. (Media industry consultant on contract basis). 2000—present.

Cable Access of Dallas. Consultant on audience research. 1996.

Brodeur & Reina, Attorneys at law. Economic consultant on lawsuit, 1995.

Prime Cities Broadcasters of Mississippi. Expert legal consulting project on station economic analysis, December, 1993.

CompuServe Incorporated, Columbus, Ohio. Market Research Department. June 1989 to June 1990. Assisted in analyzing and evaluating various types of marketing data, preparation of reports for management.

WOSU TV-AM-FM, Columbus, Ohio. Research assistant. January 1989 to August 1989. Supervised audience research projects, conducted data analysis.

Ameritech Grant ($19,500). "Opening the Telecommunications Marketplace: An Analysis of the Dynamics of the Policy Debate." June 1988 to May 1989. Grant Supervisor: Dr. Joe Foley.

State of Ohio Department of Health Grant ($20,000). "Citizen Communication Needs and Perceptions of Risk Relating to Toxic Waste Sites." Conducted data entry/analysis for study. Summer, 1988. Grant Supervisor: Dr. Brenda Dervin.

Sales consultant, KAI31-TV, Huntsville, Texas, summer 1986. Conducted workshop with sales staff.

Technical Advisor and talent for two video productions for Utility Fuels, Incorporated, Houston, Texas. "Positive Discipline" and "The Dragline," 1985-86.

Technical Advisor. Region VI Educational Service Center, Huntsville, Texas, audio-visual presentations, 1984. (Volunteer position)

EMPLOYMENT RECORD (BROADCAST INDUSTRY)

Air Personality, production, programming. KIVY AM/FM, Crockett, Texas, June to August 1980.

Sports Director, Account Executive (part-time). WCIR AM/FM, Beckley, WV, July 1978 to August 1979.

Air Personality, WKEE AM/FM, Huntington, WV, April to June 1978.

Production Assistant, WPBY-TV, Huntington, WV, 1976-77 (part-time)

News Stringer, WSAZ-TV, Huntington, WV, 1976 (part-time)

Air Personality, WAMX-FM, Ashland, KY, August 1975 to March 1978.

Air Personality, WCAK-FM, Cattlettsburg, KY, November 1974 to July 1975.

GRANTS AWARDED

National Association of Broadcasters Educational Foundation, March 2007. Grant to conduct Media Sales Training Institute at the University of North Texas. $45,000.

Charn Uswachoke International Development Grant, University of North Texas, September 2001. Funds used to support visit of an international scholar from Spain to campus. $2700.

National Association of Broadcasters, Washington, D. C. Competitive research grant awarded to study changes in radio station management. Awarded May 2001, $5000.

Faculty Research Grant, University of North Texas, Denton, TX. Research grant awarded to study changes in television station management. $4000.

Summer Chair Research Grant, College of Arts & Sciences, University of North Texas. Awarded salary grant to conduct full-time research.

National Association of Television Program Executives (NATPE). Awarded NATPE faculty fellowship for 2000 to attend NATPE national convention, New Orleans, LA, $2000.

University Research Council, Southern Methodist University, Dallas, Texas, 1998. $1000. To support international conference travel in Europe during spring 1998.

University Research Council, Southern Methodist University, Dallas, Texas, 1997. $3000. To support research and travel in Europe during fall 1997 sabbatical leave.

International Engineering Consortium, Chicago, Illinois, 1997. Received grant awards of approximately $3000 to cover registration to attend National Communications Forum and Western Communications Forum.

Meadows School of the Arts, Southern Methodist University, Dallas, Texas, May, 1995. $450. To support research on study of ethics and broadcast management.

Sam Taylor Fellowship Award, Board of Higher Education, The United Methodist Church, November 1994. $1000. To conduct research on ethics and broadcast management.

C-SPAN, Washington, D. C. January, 1994. $500. Faculty development grant to conduct research on the National Information Infrastructure.

University Research Council, Southern Methodist University, Dallas, Texas, 1994. $1500. To support travel to international conference on media economics research in Europe.

Meadows School of the Arts, Southern Methodist University, Dallas, Texas, 1992. $3000. To continue research on uses of television and cable services in ethnic households. Co-recipient with Don Umphrey.

University Research Council, Southern Methodist University, Dallas, Texas, 1991. $3000. To support research on uses of television and cable services in ethnic households. Co-recipient with Don Umphrey.

LiTel Telecommunications Corporation, Columbus, Ohio, 1990. $4000. To support survey research on telecommunication needs for small businesses.

Center for Advanced Study in Telecommunications, Ohio State University, Columbus, Ohio, 1990. $4000. Project Title: "The nature and needs of small business and their use of telecommunications networks."

Dowden Center for Telecommunications Dissertation Grant Award. $1000, The Dowden Center, University of Georgia.

Sam Houston State University, Huntsville, Texas. $250, Development of Teaching Grant, 1986.

Exxon Incorporated, Houston, Texas. $1000, "Computer Funding for KSHU-FM Student Broadcasting," 1985.

EXTERNAL REVIEWS (for Tenure/Promotion Candidates at other institutions)

Ball State University
George Washington University
Nanyang Technological University (Singapore)
Northern Illinois University*
Queens College (New York)
Rutgers University*
Texas Tech University
University of Cincinnati
University of Denver
University of Florida
University of Georgia+
University of Hartford
University of Louisville
University of Miami (Florida)+
University of Nebraska
University of North Florida
University of Tennessee*
University of Wyoming
Western Michigan University*

*Institutions requesting reviews of candidates to both associate and full professor
+Indicates institutions requesting multiple reviews.

PROGRAM REVIEWS (of academic departments/programs)

Lynchburg College (Department of Communications)
Rowan University (Department of Radio-TV-Film)
Jonkoping University, Sweden (Media Management and Transformation Centre)

EDITORIAL BOARDS/EDITORIAL SERVICE

Editor, *The International Journal on Media Management*, 2006-to present; Co-Editor, 2005.

Series Editor: *Media Management and Economics* Book Series, Lawrence Erlbaum Associates. New book series, 2004 to present.

Series Editor, *Media and Technology* Book Series, Blackwell Press, 1999-2005.

Editor, *Journal of Media Economics*, 1997 to 2005. Guest Editor for 1995 (volume 8, number 2) on "Theory and Media Economics."

Member of the following Editorial Boards: *Journal of Media Economics*, 1992 to 1997 and 2006-present, *Mass Communication & Society*, 1997-present; *Journal of Broadcasting and Electronic Media* 2000 to present, *Journal of Radio Studies*,1999-present, *International Journal on Media Management*, 1999-2005, *Communicacion y Sociedad*, 1999-present.

Manuscript reviewer for *Journal of Broadcasting and Electronic Media, Southwest Mass Communication Journal, Mass Comm Review, Convergence, Journal of Advertising Research, Journalism and Mass Communication Educator, Journalism and Mass Communication Monographs, Critical Studies in Media and Communications.*

Book manuscript and proposal reviews for many publishing companies including McGraw-Hill, Inc., Wadsworth, Blackwell Press, Allyn & Bacon, Routledge, Inc., Columbia University Press, Lawrence Erlbaum Associates, Iowa State University Press.

PROFESSIONAL ACTIVITIES

Broadcast Education Association, Immediate Past President, 2004-2005. National President, 2003-2004, Vice President for Academic Relations and Executive Committee Member, 2002-2003, Secretary Treasurer, 2001-2002; Board Member, 1998-2001.

Member, Board of Governors and Scholarship Chair, Lone Star Emmy Chapter of the National Academy of Television Arts and Sciences, 2002-2005.

Talent/Host for "Eagle View," a public affairs presentation of North Texas Television, fall 2001.

Founding Board Member, Center for Global Media Studies, Inc. 1999-2005.

Western Communications Forum, International Engineering Consortium, 1999 Planning Committee Faculty Member and Co-Chair, Tec Forum on Electronic Commerce.

Texas Association of Broadcast Educators, President, 1993-94, Vice President, 1992-93.

Southern States Communication Association. Time and Place Committee, 1994-1998. Executive Council Member, 1993-94; 1996-1998. Chair, Mass Communication Division, 1993-94.Vice Chairman/Program Planner, 1992-93, Secretary/Newsletter Editor, 1991-92.

Broadcast Education Association, Member, Research Committee and Management/Sales Committee.

Served as a paper reviewer, program chair, and respondent for several programs in annual meetings of BEA, SCA, ICA and SSCA.

Alpha Epsilon Rho, National Broadcasting Society. National President, 1985-87; National Advisory Committee Member, 1987-89; National Vice President for Professional Development, 1982-84.

Producer/Host of "Understanding Your Finances," a twelve-week radio series syndicated nationally through the Intercollegiate Broadcast System, 1983; and "Forces Which Move the World," a twelve-week radio series syndicated nationally through the Intercollegiate Broadcast System, 1981.

Invited panelist, Program Syndication, IBS National Conventions, 1981, 1983, Washington, D. C.

UNIVERSITY COMMITTEES/STUDENT ADVISING

University of North Texas
- Chair, Student Publications Board, 2004-2007
- Co-Faculty Advisor and General Manager, North Texas Television (NTTV), 2004-2006.
- Provost and Academic Affairs VP Search Committee, 2002-2003
- Presidential Inauguration Committee, 2000-2001
- Various RTVF Departmental Committees

Southern Methodist University:
- Commission on Teaching and Learning, 1999-2000
- Academic Computing Steering Committee, 1996-2000
- Desktop Computing Standards Committee, 1996-2000
- Chair, Distance Learning Committee, 1996-1999
- SMU Web Strategy Committee, 1997-1999
- Cable Television Committee, 1996-1997
- Board member, Student Media Inc., 1996-1998
- University Research Council, 1994-1996
- Human Subjects Review Board, 1994-1996
- Graduate Studies Council, 1991-1995
- Director of Graduate Studies, TV-Radio, 1991-1995
- Provost committee on Cultural Diversity, 1994
- Meadows committee on multiculturalism, 1994-95
- Meadows Academic Policy Council, 1991-93
- Intellectual Property Rights, 1991-1993
- Southwest Film & Video Archives Advisory Board, 1992-1993
- Advisor, College Republicans, 1992-93

Sam Houston State University:
- Chairman, Student Organizations Board, 1985-86
- Chairman, Wesley Foundation, 1985-87; Board member, 1981-1985
- Member, Recruitment and Retention Committee, 1986-87
- Advisor to Alpha Epsilon Rho, 1980-82, 1984-85

PROFESSIONAL AFFILIATIONS

Association for Education in Journalism and Mass Communications
Broadcast Education Association
Lone Star Chapter, National Academy of Television Arts and Sciences
Southern States Communication Association
Texas Association of Broadcast Educators
Honorary Societies:
- Omicron Delta Kappa
- Kappa Tau Alpha (honorary life member—SMU Chapter)

HONORS AND AWARDS

Winner, *Broadcast Education Association Case Study Competition*, April 2007.

Robert G. Picard Book Award, Media Management and Economics Division, Association for Education in Journalism and Mass Communication. *Handbook of Media Management and Economics* selected as the best book for the year, 2006

Fulbright Senior Specialist Award, Moscow State University, Russia, June 2006.

Toulouse Scholar Award. Toulouse Graduate School, The University of North Texas, 2006.

Mortar Board, Top Professor Teaching Award, University of North Texas, May 2003.

Top Three Paper-Management & Sales Division. Broadcast Education Association, April 2003.

Selected as *2000 Spotlight Scholar*, Mass Communication Division by the Southern States Communication Association. Panel honoring research and contributions to the field at the SSCA Convention, April, New Orleans.

Top Paper Award, 1998 Media Management & Economics Division, AEJMC Mid-winter meeting, Dallas, TX, Feb. 21.

Named *1997 Frank N. Stanton Fellow* by the International Radio Television Society, New York.

1997 Stephen H. Coltrin Award for Excellence in Electronic Media Education presented during the IRTS Faculty Industry Seminar, New York.

Named to Who's Who in Media and Communications, 1996-97.

Top three paper, Mass Communication Division, and Production Award, Southern States Communication Association, 1994.

Second Place paper award, Management & Sales Division, Broadcast Education Association, 1992.

Debut Paper Award, Research Division. Broadcast Education Association, 1991.

Top Paper Award, Mass Communication Division. Southern States Communication Association, 1991.

Named to Who's Who in the Southwest, 1991.

Named CAST Associate, Center for Advanced Study in Telecommunications, The Ohio State University, Columbus, OH, 1991.

1990 *Dowden Center for Telecommunications Dissertation Grant Award* ($1000).

Top Three Student Paper, Mass Communication Division, Southern States Communication Association, 1990.

Top Three Student Paper, Student Mass Communication Division, Speech Communication Association, 1989.

Professional Participation Award, Department of Communication, The Ohio State University, 1989-90 and 1988-89.

Named to Outstanding Young Men of America, 1984, 1986.

Named to Who's Who in Texas, 1986.

Nominee, Faculty Distinguished Teaching Award, Sam Houston State University, 1985 and 1986.

Outstanding Service Award, WMUL Radio, Marshall University, 1978.

HOBBIES AND ACTIVITIES

Guitar, oil painting, gardening, reading, travel, sports, golf, swimming

HEATHER C. WAY

901 Wood Duck Way, Flower Mound, TX 75028
Home: 972.355.3614 **Cell: 972.333.2512** **Email: h_way@mac.com**

SUMMARY OF EXPERIENCE

Adjunct Professor, Media Buyer, Account Executive, Training Coordinator

- Six years' experience in media planning and media placement for local, regional, and national advertisers.
- Five years' experience in national media sales for small and medium U.S. media markets.
- Extensive research in new media technologies, such as satellite radio and digital video recorders.
- One year experience as an instructor at the University of North Texas.
- Exceptional organization skills in all aspects of professional and academic careers.

EDUCATION

Masters Degree

Master of Science/Radio, Television, and Film *August 2007*
University of North Texas, Denton, Texas

Bachelors Degree

Bachelor of Science/Mass Communications – *May 1995*
East Central University, Ada, Oklahoma

ACADEMIC PUBLICATIONS AND AWARDS

- Co-author "Analyzing the U.S. Satellite Radio Market: A Strategic Examination of XM and SIRIUS." Published in December 2007 in the Annual Review of Communications, Volume 60.
- Co-author "What Happened to Our Audience?" Radio and New Technology Uses and Gratifications Among Young Adult Users – Paper presented at the 2006 Consuming Audiences Conference, Copenhagen, Denmark.
- Outstanding Graduate Student 2006/2007, University of North Texas, Department of Radio, Television, and Film

PROFESSIONAL EXPERIENCE

University of North Texas, Denton, TX **08/06 to present**
Department of Radio, Television, and Film

Adjunct Professor- Fall 2007

- Adjunct Professor for Perspectives on Radio and Television class of 140 students.

Teaching Fellow/Research Assistant- Fall 2006-Spring 2007

- Instructor for Perspectives on Radio and Television class of 140 students.
  Instructor for Introduction to Visual Writing class of 22 students.

- Research assistant for the Center for Spanish-Language Media, a new academic initiative in the Department of Radio, Television, and Film.

SpotPlus/Omnicom, Dallas, TX **08/05 to 08/06 - 6/07 to present**

Freelance Media Buyer

- Responsible for all aspects of media placement for television and radio media schedules as well as media buy performance maintenance.
- Responsible for placing media buys on behalf of Pepsi, Subaru, Pizza Hut, Taco Bell, Kentucky Fried Chicken, and Harrah's.

Millennium Sales and Marketing, Dallas, TX **05/00 to 06/05**

Senior Account Executive/Training Coordinator

- Responsible for selling and packaging 108 television stations.
- Strengthened negotiating skills working with media buyers for highest possible shares of advertising budget. Increased share on all key business.
- Developed strong relationships with media buyers and television stations personnel.
- Promoted in June 2004 to head 13-week training program for the Millennium Dallas offices.
- Successfully trained employees placed in Millennium's regional office.

Eyemart Express, Carrollton, TX **01/99 to 05/00**

Director of Advertising

- Responsible for all aspects of media for in-house agency, including: print, television, and radio creative, media planning, media placement, trafficking, and billing resolution.
- Created, produced, and directed television and radio commercials for 35 markets. Increased sales during period in which commercials aired.
- Developed company's first website www.eyemartexpress.com.
- Analyzed and adjusted media plan based on weekly and monthly sales figures.
- Worked closely with owner/client to achieve advertising sales goals.

RP Media, Irving, TX **09/96 to 01/99**

Media Buyer

- Responsible for placing media schedules in 10 regional markets for Honda, Unicare, and VH1.
- Acquired extensive knowledge of all aspects of media buying; preparing budgets, cost per points, TRP levels, historical information, market profiles, post performances, and estimating Nielsen ratings data.
- Developed strong negotiating skills with television and radio stations as well as national representation firms.

Katz Media Group, Dallas, TX **06/95 to 09/96**

Media Sales Assistant

- Assisted account executive selling 172 television markets.
- Initiated opportunity to sell television stations and complete spot TV buys.
- Maintained media buys, working directly with advertising agencies and television stations.

COMPUTER SOFTWARE
Windows, Microsoft Word, Works, Office, using Macintosh and IBM platforms. Donovan and SmartPlus Data Systems.

PROFESSIONAL ACTIVITIES

- President, Southwest Broadcast Representatives, 2001-2003
  Planned and executed annual SBR Christmas Gala and Texas Showdown.

Mr. BERMAN. Well, thank you very much, Mr. Warfield.

And now, finally, is our concluding witness, Sam Moore.

TESTIMONY OF SAM MOORE, RECORDING ARTIST

Mr. MOORE. Thank you. Good morning, Mr. Chairman and Ranking Member Coble. My performance here this morning may be the most important gig of my career.

I am grateful to the Subcommittee for holding a hearing on this vital issue that faces us American recording artists.

I am proud to be here as a founding member of the musicFIRST Coalition, and a member of AFTRA, SAG, RAC and the Recording Academy.

I will tell you a little bit about my career, and I promise to be brief, no matter how long it takes. [Laughter.]

40 years ago, I formed a duo that made it big in the mid-1960's. Our famous Sam and Dave recording became a series of top hits as in "Hold On I'm Comin'," "I Thank You," and, of course, a little, small hit called, "Soul Man." You can hear those songs today on radio across the country and all over the world. That is pretty amazing.

My most recent album, "Overnight Sensational," was nominated for a Grammy last year, 40 years after my first nomination. But at 71, I am still forced to go out on the road to support my family and myself.

To shed light on this issue of broadcast performance royalties for artists, let me share something I hear all the time, even from some of you members of this great body, just learning of this issue who mistakenly believe I get paid when my recordings are played on the radio.

You would be amazed at how shocked people are when they learn, whenever I say, I am not getting nothing. No royalties whatsoever from the broadcasters for my performance that has been enjoyed by the audience and used by them to draw that audience support and to support their families.

I just heard that the radio industry thinks they are going to do me some kind of favor by playing my recordings. They think they are promoting me through my music so I can sell records and concert tickets——

I say, in no uncertain terms, radio does absolutely nothing to promote me or sales of my recording unless I have a current product and a huge promotional budget. People hear the bulk of my recordings so frequently on oldies stations that they don't have to buy my records at all.

As for radio allowing me to, and helping me to, sell tickets, well, thank you very much. But at almost 72, I would rather be at home spending time with my grandchildren and running a golf ball thinking I am Tiger Woods.

If broadcast shared any of the money they earned from playing my records, I would not have to continue to spend so much of my life running up and down the road. I don't have the private jets and the extravagant tour buses with staff to make my life comfortable. And my posse? My wife, Joyce, the bag schlep.

So while my record continues to bring joy to music lovers worldwide and continues to help the radio business become a $20 billion industry, I struggle to even make a living, even if I look successful.

Broadcasters also claim they are serving the community. Well, what about the artists? Aren't we part of the community? And haven't we been struggling independently, small businessmen, before some of us got the right to vote?

Those recordings are my legacy. They, and I, the artist, deserve to be protected with a full performance right. In every other developed country in the world, artists have such a right.

Adding insult to injury, when my recordings are played on stations overseas, I cannot claim any of the funds paid for my songs there, simply because the U.S. does not require payments here.

I learned the other day coming here that a friend of mine, Mr. Howard Veegal, told me about Little Jimmy Scott who is in the hospital that hurt his good hip. He was out working. Now, he is almost going to be tossed out of the hospital because his nursing home, at 85, said he can't pay. He is frail, and he can't work.

We are also talking about the Mary Wells, the Ruth Browns, the Junior Walkers—all worked until they died because they had to because of charity cases. Why?

Mr. Chairman, this is the only thing about—this whole thing is about fairness and equity. American broadcasters literally earn billions by playing our records. All we are asking is to receive what artists in every country around the world, when their recordings are broadcast, is fair compensation for the performance of our work.

Our legacy is our music. Please help us fix this historic injustice. We have sought the rights to help for more than 50 years. Let us just play fair. That is what it is all about.

Personally, I pray I live to see this important legislation pass in my lifetime, and I remind you, I am looking hard at 72.

I am grateful for your invitation to share my views with you today. Thank you.

[The prepared statement of Mr. Moore follows:]

PREPARED STATEMENT OF SAM MOORE

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

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

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

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

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

To shed light on the issue of broadcast performance royalties for artists, let me tell you about something I frequently hear from fans around the country. They'll say, "Sam, I love this song or that song of yours and I always request your music on the radio." They tell me this because the public believes I'm getting paid when my songs are played on the radio. You would be amazed at how shocked people are when they learn that whenever one of my recordings is played on the radio, I receive absolutely nothing, no royalty whatsoever from the broadcaster. Even though hundreds of oldies stations and some other formats play my records so they can sell advertising on their station, I do not share in any of that income.

The radio industry thinks they're doing me some kind of a favor by playing my recordings. They claim they are promoting me through my music so I can sell records and concert tickets. Well, may I please enlighten you and tell you in no uncertain terms that without a huge promotional budget and massive marketing support, radio does absolutely

nothing to promote sales of my records. People can hear my songs so frequently on oldies stations that they don't have to buy my records at all.

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

And as for radio "allowing me" to tour: well, thank you, but at almost 72 years old I'd rather be spending time with my grandchildren. If broadcasters shared any of the money they earn from playing my recordings, I would not have to continue to spend so much of my life running up and down the road. I don't have the private jets and the extravagant tour buses with aides and staff to make my life comfortable. I don't have a posse unless you count my wife Joyce who often does bag schlep for the both of us.

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

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

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

And there are so many others.

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

Mr. Chairman, this is about basic fairness and equity. American broadcasters earn billions by playing our records. All we ask is to receive what artists in every other developed country around the world receive when their recordings are broadcast: fair compensation for the performance of our work. As recording artists, our legacy is our music. Now this subcommittee can leave an equally important legacy by fixing this historic injustice.

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

Thank you.

Mr. BERMAN. Well, thank you all very, very much.

And the Chair is now going to recognize the Ranking Member, Mr. Coble, for 5 minutes for questions.

Mr. COBLE. Thank you, Mr. Chair, for this courtesy. Mr. Chairman, an outstanding panel and a superb, productive hearing I believe.

Madam Register, if the performance royalty exemption for broadcasters is eliminated, would it create a sizable impact, either negative or positive, for songwriters, performers, and the music industry as a whole?

Ms. PETERS. Hopefully not.

One of the things that already is in section 114, when the very first performance right—limited as it was—performance right was created was that that was in no way to affect rights that are basically guaranteed—the public performance rights for composers and for music publishers. That is also an international treaty obligation: that you cannot derogate from those rights.

So that has to be a commitment, both a national and international commitment, so I would say——

Mr. COBLE. Thank you for that.

Mr. Warfield, I am going to give you a simplistic question. I think most people—strike that—maybe not most. Many people respond to this issue in this way: More people are listening to music more and more each day, I am told, because of Internet and satellite broadcasting. Why should not terrestrial broadcasters, many people ask, pay the same performance royalties that Internet and satellite broadcasters pay?

And let me put a second question to you, Mr. Warfield, if I may. Toward the conclusion of your statement, you noted that the United States commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs—and I am in agreement with that—but who did not and do not receive one cent from the Government or its listeners.

Now, Mr. Warfield, I am thinking now about the spectrum. What would be your estimate of costs to the industry to replace the spectrum, if you were forced to pay a commercial rate for it?

If you would respond to those two questions?

Mr. WARFIELD. Well, Mr. Coble, I can't answer the last question there in terms of what would the costs be for the spectrum.

I do know, though, as a licensed broadcaster by the FCC, there are responsibilities that we all have to our communities. There is a public affairs program in that we provide public interest obligations that we meet, public service announcements that we provide to the community. There is local news and weather information that we provide, that we are obligated to provide, and we are happy to do that. We also provide essential information in the event of emergencies.

So there are certainly obligations that we, as broadcasters, have with the spectrum that we have the right to broadcast on.

So, you know, I could not put a dollar value on that. I do know that we did provide over $10 billion worth of these types of public services in 2005, the last year that those numbers are available. So we are being responsible in that regard.

In terms of the new platforms and the listening of music, I still go back to indicate that, you know, radio still reaches over 232 million listeners a week. Many of those listeners are listening to music radio. And it is still evidence that radio is still the primary means in which most of these individuals learn about new artists and new music, which they may then go to other platforms. They may decide to purchase some of that music.

But there is still the awareness factor and the exposure factor that still is there as a result of the free broadcasting that we do in radio.

Mr. COBLE. I thank you, sir.

And I thank you all again for being with us today.

Mr. Chairman, I am going to the Coast Guard hearing, and I am going to try to come back. But, in conclusion, Mr. Chairman, I want to repeat what I said earlier.

I am high on broadcasters. Do you hear me, Mr. Warfield? I am high on broadcasters. I am also high on performers.

And I am hoping we can strike some sort of balance, Mr. Chairman, that will result in a not-too-burdensome conclusion.

And I yield back.

Mr. BERMAN. I think there is a song there. [Laughter.]

Thank you very much, Mr. Coble.

Mr. COBLE. Do I get paid for it, Mr. Chairman? [Laughter.]

Ms. COLLINS. Would you perform it?

Mr. BERMAN. The gentleman from North Carolina, Mr. Watt?

Mr. WATT. I think if I wasn't going to get paid for it, I am not planning to sing it. [Laughter.]

Let me first thank the witnesses for being here and thank the Chairman for convening the hearing.

I feel kind of like the new guy on the block, as I have since I got on this Subcommittee. And I was reluctant to give any kind of opening statement because I am in a learning mode and listening mode more than a talking mode. And I suspected that there had to be multiple sides to this issue. And Mr. Warfield certainly helped us paint that picture.

I feel like I am blessed, obviously, to be in the presence of all these artists. And I am embarrassed that I have really kind of assumed that music would be available in my life.

I get mad at the radio for running commercials. I get disappointed when I can't hear exactly what I want to hear.

And so I come to this with—kind of as a blank slate without any background in it. And I suspect the same thing will happen that has happened on the patent reform bill: that blank slate, and the recognition that I am a blank slate, will leave open the door for various people to come in and paint what that slate should consist of.

So I suspect, Mr. Chairman, you are opening yet another one of those doors for the various interests to come and visit and try to educate me. And I look forward to that.

Ms. Peters, I am just wondering how one might approach structuring a compensation system that would both be fair to the performing artists, the writers, and not burdensome or detrimental, at least, to terrestrial radio. How would you go about—has anybody done any studies on that issue? How would you——

Ms. PETERS. Well, remember that almost all countries in the world already have a structure in place.

Mr. WATT. Okay. Maybe I am asking the question——

Ms. PETERS. And Canada actually has——

Mr. WATT [continuing]. How are other countries doing it?

Ms. PETERS. You can look at Canada. They make a difference between the size of the broadcast station, how many hours in which music is being played.

We are not talking about an exclusive right, where you go and negotiate with everybody. We are talking about a statutory license which guarantees equitable remuneration for the performer and the record producer. So that is what we already have in our law with regard to webcasts.

The criteria could take into consideration the size of the station. The basic principle that you try to put in place, but make it as painless as possible, is what a willing buyer and a willing seller would do under the circumstances. So a small broadcaster would pay a lot less than a large broadcaster. You know, a huge broadcaster who has music 24 hours a day, 7 days a week, would pay a lot more than someone who only had music several hours a day.

So I think it really isn't that difficult to achieve the correct balance.

Mr. WATT. Let me get one more question in to——

Ms. PETERS. Yes.

Mr. WATT [continuing]. Mr. Warfield.

Are you associated with radio stations in other countries? And how do you differentiate the way terrestrial radio is treated in the U.S. vis-a-vis those other countries?

Mr. WARFIELD. As a broadcaster, our company does not own any radio stations outside of the continental United States.

But as I look at our industry here—I have not really been involved with international radio as a broadcaster in my career. However, as I look at the U.S. radio system, as I indicated in my testimony, we, as broadcasters, support the most lucrative and successful recording industry in the world. And under a system that we have with no performance tax, the U.S. record industry is larger than the industry for the U.K., France, Germany, Canada, Australia, Italy, Spain, Mexico combined.

So I think when we talk about the relationship that has existed and the success of the recording industry and, through that success, the success of artists, through this 80-year history, makes me as a broadcaster say, "Why would the system really need to be changed?"

Mr. WATT. Thank you, Mr. Chairman. I appreciate you getting me in this bind again.

Mr. BERMAN. Well, it may be a blank slate, but it has a great deal of adhesiveness.

Mr. Goodlatte?

Mr. GOODLATTE. Thank you, Mr. Chairman. And thank you for holding this hearing.

I want to thank all the witnesses. This has been a very, very interesting hearing. And I would be willing to hum along with Mr. Coble if he does the song that finds the cure to this. [Laughter.]

Let me start with Mr. Warfield.

One of the rationales for exempting terrestrial broadcasters from the requirement to pay royalties for the public performance of sound recordings was that terrestrial radio gave performers and owners of sound recordings substantial promotional value in that more consumers were likely to purchase these songs when they heard them on the radio.

I wonder if you might comment on how the rollout of satellite radio, iPods, Internet radio, and other new technologies have weakened that argument that terrestrial radio alone provides a substantial enough promotional value over these other technologies to justify keeping the exemption.

Mr. WARFIELD. You know, we all—the record industry, the radio industry—we are all competing against these new platforms that are emerging today. Still, terrestrial radio still reaches, as I indicated, over 230 million people per week across this country. The symbiotic partnership that still exists between radio and the recording industry has helped these companies become the envy of the world, as I had indicated.

But now what we are looking at and the challenges that the record industry, unfortunately, has not necessarily kept up with these changing times, and then coming here as part of a coalition seeking taxes from local broadcasters to subsidize their challenged business model.

There is no question that the industry is challenged today in selling music with these new alternatives that are out here, but in no way would we indicate is there any evidence that the work that local broadcasters do and the free promotion that we provide is responsible for any of that. As I indicated, we are not——

Mr. GOODLATTE. I don't think they are responsible for it, but they are suggesting that if some of these other platforms are paying performance royalties, that they are also providing a means by which songs are promoted and there is a disparity there that somehow we need to find a way to bridge the gap.

Ms. Peters, would you care to comment on that?

Ms. PETERS. That is exactly the point. That all of these people are paying, and that the principle is that this is a copyright and this is a right that is being exercised and it forms the basic business model of radio stations. And that, in fairness, they should pay also. You can talk about under what terms and what conditions, but they should pay.

Mr. GOODLATTE. Ms. Peters, let me follow up with that.

What are foreign nations doing? Are they currently withholding royalty payments to U.S. performers and sound recording owners—their nations are not compensated when their songs are performed over U.S. terrestrial broadcast signals?

Ms. PETERS. It depends on the country.

Mr. BERMAN. I think we need a sound engineer.

Ms. PETERS. Yes, right.

It depends on the country, but in many countries they collect for all sound recordings, including U.S., and don't pay. In others, they don't collect. But under either scenario, their performers are getting paid and our performers are not, even though the performances of both are taking place in that particular country.

Mr. GOODLATTE. Thank you.

Ms. Collins, would you care to comment on this relationship?

Ms. COLLINS. Yes. I think you, you know, it is interesting. I am sitting here wondering about class actions suits.

You know, all of the artists, excluding the issue of whether or not we should be paid as artists in this country—and I think I have settled that in my own mind, we certainly should—and it should be a sliding scale for those who can afford more, for those who can afford less.

But the fact that my records across the world have not been paid for means that many, many thousands, millions, perhaps, of artists over a period of what is it, 80 years? Is that the—it is 80 years. Eighty years and all of these musicians who are not being paid in countries which have laws which protect the artist, where is that money? It is not in my pocket.

And in the case of "Amazing Grace," which played around the world and which most of you know, amazing grace, you know, how sweet the sound—— [Laughter.]

How sweet the free sound, it turns out. [Laughter.]

I am curious about that idea, because with this coalition of artists, that might be a subject that we might want to bring up.

We are certainly not talking about a retroactive situation, although legally we might, but the idea of the money that is sitting internationally and why we don't respect other artists in this country who are not receiving payments for their performances either. It is a complicated question, but once we solve this one, then we will look at that.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. BERMAN. Thank you.

The bells have gone off. The situation is we have about 15 more minutes and then 3 votes, and then we will come back. But I do believe we have time for one more witness before we recess.

So the gentlelady from Texas, Ms. Sheila Jackson Lee?

Ms. JACKSON LEE. Chairman, thank you.

Let me add my affirmation that you managed to find the armadillo in the middle of the road when it comes to questions that I think are enormously important.

Let me quickly go to the esteemed Sam and Dave, but Mr. Moore, thank you, all of you, for your testimony.

Would you just give me the list of names—I happen to represent, I believe, the last remaining member of The Ink Spots. He is close to 100-plus years old, and he is living in a nursing home. I would imagine what he would be able to find a way to live if we had some altering of this process.

Would you just give me the names of those who have suffered? Jackie Wilson, I know, had a terrible time. But you mentioned Billy Preston. Are there any others? Would you just mention some of those names for us that really have suffered in the later years of their lives?

Mr. MOORE. Well, let us see. You said Jackie Wilson, yes.

How about Bo Diddley? That was in Iowa not long ago, about 2 or 3 weeks ago, working on stage and had a stroke.

Now, you must understand that, before the stroke, he was an amputee on his left foot. Now, you know, if he was getting performance pay, he could have that $3,000, $4,000, $5,000 a month to pay

and not worry about taking care of his bills or his family or anything else. He could not worry about anything other than taking care of his health. So that is——

Ms. JACKSON LEE. Those are glaring examples. Thank you very much.

Ms. Peters, can you give me any legal—legally speaking, is there any way to justify the sole exemption of sound recordings from a performance right? And do you know how such exemption came about? And because bells are ringing, I am asking for quick songs at this point.

Ms. PETERS. The answer is no. I don't know of a justification. I have been advocating this for almost 25-plus years, and before that, my predecessors have.

I will argue—and I think I sort of suggested it—that it is the effectiveness of the broadcast lobby.

Ms. JACKSON LEE. In the 1998—the register, which—was that you in 1998?

Ms. PETERS. No. It was Barbara Ringer.

Ms. JACKSON LEE. Went on record affirmatively for that——

Ms. PETERS. And I have gone on record——

Ms. JACKSON LEE [continuing]. For that position of those payments.

Ms. PETERS [continuing]. Absolutely, yes.

Ms. JACKSON LEE. Would you understand the value of—as we try to forge—which I think my good friend Howard Coble suggested, a reasoned place in the middle—the exemption of certain small radio stations which would probably suffer greatly and close if they were to come under such a requirement?

Ms. PETERS. I believe that when you craft a solution you craft it so that it is equitable. Yes, the basic principle is paying, but, yes, you can have special provisions and even exemptions for small broadcasters.

Ms. JACKSON LEE. Thank you.

Mr. Warfield, broadcasters have labeled the payment to artists a performance tax. Is that how you are viewing payments to songwriters for radio play or do you view them as royalty payments? Why wouldn't payments to performers be royalty payments?

Mr. WARFIELD. The performance tax that we are discussing today would go to what is referred to as artists and record companies who, in the existing system, benefit greatly from the free on-air airplay of their product. Record sales result from that, which benefits the artists, as well as the record label at this point. Whereas the composers of the music—the writers of the music—do not receive that type of a benefit, which is why there are payments being made to them and have been statutorily required throughout our broadcast industry.

Ms. JACKSON LEE. I think the industry has changed so much, Mr. Warfield. And I want to thank you for your leadership, but that probably is not accurate. I can't really agree that there is such an enormous benefit to performers that we would classify one as a tax and one as a royalty. But I hope we can find common ground.

I don't want to leave my good friend, Congressman Hodes, out of—for the fact that people should know that he sings very well,

even as a congressperson, and we have enjoyed very much his singing.

But, Congressman, is there a way to balance this?

And I might conclude quickly by asking Ms. Collins, should we not have a balance on the royalty payments on these Internet radio royalties where Clear Channel, Yahoo, and Microsoft pay so much, should we not have royalty rates for that lower level that will create music diversity?

So I am going to go to the congressman and then, since I got in before the light, if you would be able to answer that.

Congressman?

Mr. HODES. Thank you for your question.

Very quickly, there are models that are already in place that point the way to the kind of balanced and fair system that this Committee, with its expertise, is well-capable of crafting.

Ms. Peters has talked about sliding scales. There are potential exemptions. There are lots of ways to make this work, and we already have some models in what has happened in the digital realm.

Ms. JACKSON LEE. Ms. Collins, I——

Ms. COLLINS. Thank you.

Ms. JACKSON LEE [continuing]. Would hear "Amazing Grace" forever, but the Chairman is going to gavel me down.

Just to balance out the Internet rates, should they be?

Ms. COLLINS. I believe that the equitable distribution of royalties, not taxes, should be worked on and a fair and equitable decision made about this.

But I want to just remind us of why we are really here. We, in this country, do not recognize the value of our artists as we do in other countries. That is really what this is about. We have devalued the contribution of great, great, great artists, and that needs to be remedied.

Ms. JACKSON LEE. Thank you.

Thank you, Mr. Chairman.

Mr. BERMAN. We will now recess. We hope very much that all of you can stay because, if you do, we will come back. [Laughter.]

[Recess.]

Mr. BERMAN. The Subcommittee hearing will resume.

And I am pleased to recognize the gentleman from Florida, Mr. Keller, for 5 minutes.

Mr. KELLER. Well, thank you, Mr. Chairman. I very much appreciate that.

I want to thank all the witnesses for your testimony.

This is an issue that I certainly approach with an open mind. And so I am going to ask some easy and tough questions, hopefully of both sides, because I genuinely want to learn a few things.

Let me begin with Mr. Warfield to make sure that I have got this scenario correct.

For free radio, also called terrestrial radio, the songwriter would get paid a royalty but not the performer? Is that correct?

Mr. WARFIELD. That is correct.

Mr. KELLER. And on satellite radio, the performer would get paid a royalty. Is that right?

Mr. WARFIELD. That is correct.

Mr. KELLER. Now, if a law, such as the topic that we are talking about today, is implemented requiring terrestrial radio to pay a royalty for performers, how would radio adjust to this new law? Would you have to raise advertising revenue by increasing advertising prices, or what would you do?

Mr. WARFIELD. I am sure some broadcasters would attempt to do that, but in the current environment, that would be very difficult to do.

Unfortunately, I believe some broadcasters would, if not change format and get away from a music format—some broadcasters, unfortunately, would probably be forced to sell their radio stations and get out of the business. And our concern is that many of the smaller market medium-size broadcasters that would be a very real option that they would have to consider.

Mr. KELLER. So your three options: You are going to have to change your format to go to talk radio, where you don't have to pay these royalties, or you are going to have to layoff some people for overhead, or you are going to have to increase the advertising revenue rate.

Mr. WARFIELD. Make an effort to do that.

Mr. KELLER. So when I buy my ads on radio for my next political campaign, I may have to pay more money to make sure the Dixie Chicks have higher profits? There is your trouble with that particular scenario.

Now, you have said that this is a tax. Let me ask you, do you consider the current system of paying the songwriters to be a tax?

Mr. WARFIELD. No, we consider that to be a royalty. It is part of our operation that we understand, since they do not benefit in the same manner that the record labels and the artists do under the existing system that has been in place for 80 years.

Mr. KELLER. Well, if this were implemented, the Treasury would get no money from this new royalty to performers. Is that correct?

Mr. WARFIELD. I don't know what form it would ultimately take.

Mr. KELLER. Does the Treasury get any money today by paying the songwriters a royalty fee?

Mr. WARFIELD. Not to my knowledge, no.

Mr. KELLER. Okay. So I would just point out some folks wouldn't consider that to be a tax.

Let me just say this. Listening to you all, it seems to me—and again, I am open-minded—that the radio stations are a bit underappreciated here.

You have made the argument, Mr. Warfield, that there is a symbiotic beneficial relationship and that by putting an artist's songs into the regular rotation and getting them substantial airplay that that helps the record sales and helps promote concerts. Is that correct?

Mr. WARFIELD. That is correct, as further evidenced by this morning's USA Today that has music charts in it based upon radio airplay.

Mr. KELLER. Okay.

Mr. WARFIELD. That is correct.

Mr. KELLER. And I have heard Ms. Marybeth Peters and Mr. Sam Moore take a different view that—I believe she said that she is not inclined to think there is a mutually beneficial relationship.

I just have to say, on this issue I think the radio stations are a bit underappreciated on it. Because, during the break, while I am voting, I just picked up the phone and called the head of music programming for my local radio station, the main one in Orlando. And he tells me that the record companies and their publicists call him nearly every day begging for their songs to be put into the regular play list rotation.

And if there is no benefit to the record companies or the artists from getting regular airplay, I wonder why in the world they keep begging the radio stations to put their music on the air.

Mr. WARFIELD. I agree with that. It is a situation that in the industry—and I have been in the industry for 30 years and a couple of those years in the record industry—quite a bit of their time, quite a bit of our staff's time is spent in conversation and dialogue with the record industry every week.

Mr. KELLER. Now, Mr. Sam Moore, let me just thank you so much for being here today. And if you never did nothing in your life, you have already changed our culture with your great performances with "Soul Man."

Is the gist of your argument that it is very unfair to you that you are paid a royalty when your music appears on satellite radio and other venues but not on regular radio? Is that the gist of it?

Mr. MOORE. I think my only argument is this: If I don't know anything else, I only know this. We just want to even the field, be fair, you know.

The writers are getting what they are getting. I don't know nothing about the figures. I am not a CPA and all that stuff.

But I do have a question, if I may.

Mr. KELLER. Sure.

Mr. MOORE. Wouldn't it take a full credit to reduce your tax burden of what you pay? I would ask Charles that.

Mr. WARFIELD. Was the question—I am sorry to misunderstand the question, but would it be a cost of operation and therefore be a taxable operating expense? Depending upon how that is structured, most likely, sure.

Mr. KELLER. Well, I have more questions. I want to get some hard questions to the other side, too, in fairness. But I have to tell you, I ran out of time.

So, Mr. Chairman, I will yield back the balance of my time.

Mr. BERMAN. Thank you, Mr. Keller.

Ms. COLLINS. May I address that question with a little comment here?

Mr. BERMAN. Does the gentleman from Tennessee wish to allow the——

Mr. COHEN. I would gladly yield my time to the lady from California. Had a feeling—— [Laughter.]

Ms. COLLINS. Thank you.

As a business owner myself—and I am a small business, and I am the product—I pay taxes. They are always very high.

And I understand—I have had to come to this, because it has taken me a long time to learn about how any business operates. I am a slow learner. However, I know when I have a business expense, my taxes go down. And I think that is one question we could address.

Also, I don't want to underestimate the value of radio either. I love radio. Radio has been fantastic to me. There is no reason why I shouldn't be paid for my presence on radio, but I value, I value the institution tremendously.

So I don't want anybody to get the idea that we don't appreciate what it does. We just want to get paid for our work.

Mr. BERMAN. On the tax issue, have you thought about starting a hedge fund? [Laughter.]

Never mind.

Ms. COLLINS. I run my own mutual fund. [Laughter.]

Mr. COHEN. Thank you, Mr. Chairman.

First, this is just on my mind. Mr. Moore said he didn't know anything about math. And I will ask Congressman Hodes because he can probably answer this question. I was trying to—what are the words to that. It is I don't know algebra, don't know anything about, just know that I——

Ms. COLLINS. Oh, yes.

Mr. COHEN. What is the song called?

Ms. COLLINS. Don't know much about history——

Mr. HODES. Don't know much about——

Mr. MOORE. "What a Wonderful World," Sam Cooke.

Mr. COHEN. Thank you, sir. Name that tune. [Laughter.]

Mr. MOORE. Right.

Mr. COHEN. Mr. Moore, last time I saw you I think was Governor Sundquist's inauguration or Tennessee 2000 or something like that. But you were doing a nice event in Nashville, and I appreciate your coming back and doing that whenever you are in Memphis.

"Soul Man," you don't get paid when it gets on the radio but the songwriters get paid for that, right?

Mr. MOORE. Yes.

Mr. COHEN. Is that David Porter?

Mr. MOORE. David Porter and Isaac Hayes.

Mr. COHEN. And they are both friends of mine. Would you like me to negotiate for you? [Laughter.]

Mr. MOORE. Would you mind? [Laughter.]

Mr. COHEN. I think Mr. Bainwall's friend, Mr. Moore, could do that better than I, but.

You know, they wrote it, but I don't know that—of course, they are a different situation. I was kind of thinking about Elvis. Elvis never wrote anything.

Mr. MOORE. Right.

Mr. COHEN. Except maybe a check.

Mr. MOORE. Right.

Mr. COHEN. But Elvis doing the song, that was the song.

Mr. MOORE. Right.

Mr. COHEN. And the writers got paid and Elvis didn't.

Mr. MOORE. Right.

Mr. COHEN. And without Elvis, there wasn't a song.

Mr. MOORE. That is right.

Mr. COHEN. Without a song——

Mr. MOORE. Without a song.

Mr. COHEN [continuing]. Et cetera, et cetera.

Mr. MOORE. The world would never end.

Mr. COHEN. Keep going. Don't let me——

Mr. MOORE. No, no, no. [Laughter.]

I will have to charge you then. [Laughter.]

Mr. COHEN. Let me ask Mr. Warfield.

I understand your position, obviously. And I have, like Mr. Coble, friends in broadcasting, as well. But how can you distinguish the system in America from the system in Europe, as far as its appreciation of or paying of songwriters? Do the—I mean, singers. Do the singers in Europe not get the benefit and get to perform and get more people to come to their concerts and buy their records?

Mr. WARFIELD. I think just the sheer magnitude of the industry here, both the recording industry, the size of the recording industry, the profitability of the recording industry and the revenues that are generated through the support of over 6,800 local radio stations, significantly dwarfs what is available to many of these artists in foreign countries versus the United States.

And I think that size issue and the fact that the broadcasting industry for 80 years has been providing this type of free exposure to artists and labels is what has helped this industry grow to the size that it has been and spawned so many very successful artists over the last 70-plus years.

Mr. COHEN. Even if, you know, size is important, but nevertheless, in Europe, where they have got a different market, they still have to get paid, the singers. And they do get paid in Europe. You don't see that there is some equity there?

Mr. WARFIELD. I think that the reality of a lot of these artists that are international are looking for that type of support here in the United States, support that is provided by radio airplay, would indicate that they are sort of willing to work with the system that is in place here in the United States. They see the rewards and the benefits that have accrued to many labels and many artists over a long period of time.

And I think that many of them—they don't—they are not sitting here today. Would they trade that? I am not sure. But it is certainly a benefit that they would consider.

Mr. COHEN. Do you have a proposal that would make some kind of equitable solution? Do you have something you want to put on the table?

Mr. WARFIELD. I would like to leave the system the exact way it is today——

Mr. COHEN. I know. But if you couldn't leave it the way it is, what would be your suggestion, other than a de minimis amount of money?

Mr. WARFIELD. I could not agree to do anything more than the system as it exists today, Mr. Cohen?

Mr. COHEN. Okay. Well—and I guess it is. I—— [Laughter.]

You know, if you had Mr. Hodes singing "Suspicious Minds," instead of Mr. Presley, you wouldn't have as many people listening to your station, I suspect. [Laughter.]

And so Mr. Presley's estate should be paid for that. [Laughter.]

Mr. BERMAN. Is that a compliment? I don't think so. [Laughter.]

Mr. WARFIELD. And I was going to leave that one alone. I wasn't going there. [Laughter.]

Mr. COHEN. Thank you, Mr. Chairman.

Mr. BERMAN. The gentleman from Georgia.

Mr. JOHNSON. Yes, thank you, Mr. Chairman. I certainly want to commend you for holding this hearing. It is a matter of equity and fairness.

And I might first begin by saying that, you know, when you rub a cat the wrong way, the cat gets kind of agitated. And I feel like a cat that has—my hairs have been rubbed the wrong way when I hear the term performance tax.

And what I wanted you to answer for me, sir, is, I mean, a tax is generally paid to the State. A tax is always paid to a governmental entity. But you would not be paying—broadcasters would not be paying revenues to a governmental entity. It would just be simply paying to a performer on a sound recording.

Why is it that you persist in using the term performance tax?

Mr. WARFIELD. Well, this is a payment that broadcasters both large and small would have to pay. You know, some people look at this as a wealth transfer that is going to very successful record companies who would benefit from this in addition to the artists. Radio stations——

Mr. JOHNSON. How would record companies benefit from paying royalties to performers, especially when the record companies are already receiving income from their publishing rights?

Mr. WARFIELD. As I understand the coalition that is——

Mr. JOHNSON. Sometimes they have even taken the writer's share.

Ms. COLLINS. Absolutely.

Mr. WARFIELD. The record labels?

I would only indicate there, and it is, you know, it is sort of along the lines of earlier comments about the artists who have not been treated fairly. I would put that back as a responsibility of the record labels.

Why have the record labels allowed that to happen with artists that have helped make them as successful as they are today? And it is not the responsibility of the broadcasters to cover, I would say in some cases, the misdeeds of the record labels.

Mr. JOHNSON. Well, the fact is, though, that terrestrial broadcasters make a lot of money on those sound recordings themselves.

Mr. WARFIELD. I wouldn't say we make money on the recordings.

Mr. JOHNSON. Well, if——

Mr. WARFIELD. The free broadcasting of those records that are provided to us by the record labels is what allows them to expose that music to the consumer, which will then turn around and purchase those records, which benefits both the label and the artist at that point.

Mr. JOHNSON. And having those sound recordings broadcast causes you to be able to reap——

Ms. COLLINS. Exactly.

Mr. JOHNSON [continuing]. The benefits of advertising revenues that are derived from that exploitation.

Mr. WARFIELD. I wouldn't use exploitation, but there are certainly some broadcasters that do well with that. There are some that do not.

And the imposition of this additional tax on many of these broadcasters in small and medium markets could be the difference be-

tween whether they remain in business or not, whether they continue to service the communities that they are licensed to serve. And, unfortunately, as a minority broadcaster, a lot of small and medium broadcasters that target these audiences are people that I am very much aware of that don't have the means, unfortunately, to pay additional costs.

Mr. JOHNSON. Well, I tell you now, I am looking at Clear Channel—I am looking at a report here where Clear Channel Communications reported revenues of $1.8 billion in the second quarter of 2007, an increase of 5 percent from the $1.7 billion reported for the second quarter of 2006. And then the net income increased 19 percent to $236 million in the second quarter of 2007.

There is a lot of money in terrestrial broadcasting. Part of that money comes from Web broadcasters who pay royalties to the terrestrial broadcasters for running their transmissions over the Web, isn't that correct?

Mr. WARFIELD. Mr. Johnson, I would respectfully indicate that our industry—and I believe I saw a press release yesterday that the broadcast industry has grown from $15 billion to a $20 billion industry from 1998 through 2006.

Mr. JOHNSON. My question——

Mr. WARFIELD. But what I would indicate with that is that all of that growth occurred between 1998 and 2000. There has been absolutely no growth in our industry——

Mr. JOHNSON. Okay.

Mr. WARFIELD. Respectfully, what Clear Channel has done, that is wonderful for Clear Channel. But that certainly does not translate to many broadcasters in this country today.

Mr. JOHNSON. Well, my question is this: Webcasters pay a fee to broadcast terrestrial radio over the Web, correct?

Mr. WARFIELD. In some cases, that may be true.

Mr. JOHNSON. Well, I mean, no respectable broadcast radio transmitter would allow their signal to be broadcast over the Web without getting paid for it.

Mr. WARFIELD. We broadcast ourselves. We stream two of our radio stations. Of the group that we have, we stream two radio stations on the Web only.

Mr. JOHNSON. And if anybody wanted to broadcast your programming over the Web, you would want them to pay you for that.

Mr. WARFIELD. If you know anyone that would like to do that, I would love to speak with them. I have not had that opportunity in our company.

Mr. JOHNSON. Well, there are a lot of folks out there who are broadcasting over the Web and paying money for it. And if you look at that in terms of that Web broadcast being like a sound recording, it is paying the performer, in other words, to broadcast. And so I don't see why terrestrial broadcasters should be exempt from having to pay for the——

Mr. BERMAN. The time of the gentleman has expired.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. BERMAN. I will recognize myself for 5 minutes.

If it is any consolation, Mr. Keller, my guess is that the radio stations you will be advertising on are probably boycotting the Dixie Chicks. [Laughter.]

Mr. KELLER. I hope so. [Laughter.]

Mr. BERMAN. Mr. Warfield, continuing to beat on you. [Laughter.]

I grew up and live in Los Angeles. There is a wonderful baseball announcer there named Vin Scully who broadcasts a pretty magical game in a very magical way. And no one can tell me that Vin Scully's broadcasts of Los Angeles Dodgers games doesn't attract fans to go to those baseball games.

In other words, I really don't have serious doubts that your promotion of records gets people interested in that music. But I think no one in the world would suggest that, because the station that broadcasts Los Angeles Dodgers games is helping the Dodgers increase its fan base and its purchase of uniforms and caps and other things for which they have ownership rights, that the Dodgers are somehow obligated to allow that station to broadcast the Dodger games for free.

Analytically, what is different about this situation than that?

Mr. WARFIELD. Mr. Chairman, I was, you know, born and raised here in Washington, D.C. It was——

Mr. BERMAN. Well, that is a different problem. [Laughter.]

Mr. WARFIELD. I was a Senators fan, by the way, you know, living in Anacostia.

And I grew up here in Washington, D.C., sitting on my porch listening to a—trying to pick up a small AM radio station in Baltimore, WEBB, to hear music that ultimately I would actually go out and buy. More years ago than I might want to say, it is almost 50 years ago that I did that. But that relationship with music radio stations and record companies and artists continues today.

I had such an extensive collection simply because of what I heard, and I went out and bought. And I would argue that today, that practice is still in effect. I spoke to my nephew yesterday afternoon——

Mr. BERMAN. Yes. I don't contest it. I am not challenging the mutually beneficial nature of the relationship.

I am just trying to understand why, in this area, the recognition of that relationship makes one conclude that therefore one party to that relationship shouldn't pay for what they are playing.

Mr. WARFIELD. I am sure that was a negotiation that existed between that broadcaster and that baseball team at that point. In terms of driving people to the seats, it is sort of whether they are winning or losing.

Mr. BERMAN. Fair—that is a—so maybe the thing isn't to pass a statutory license to compel record labels and recording artists and bands to provide their music at a certain price. Maybe it is to just let the free market play and let a radio station have to negotiate for every record it wants to use with the owner and the——

Ms. COLLINS. Right.

Mr. BERMAN [continuing]. Recording artists and all the people who have interest in that sound recording. But that is not a good system. Is it?

Mr. WARFIELD. I think the system that is in place now has worked very well for the recording industry and the radio industry——

Mr. BERMAN. Right. All right.

Mr. WARFIELD [continuing]. And for the artists, as a matter of fact.

Mr. BERMAN. Well, but part of it is because it is a mutually beneficial system, right?

Mr. WARFIELD. Mutually between the radio stations, the record labels, and the artists——

Mr. BERMAN. Yes.

Mr. WARFIELD [continuing]. Absolutely.

Mr. BERMAN. When one party to a relationship that the other party thinks is mutually beneficial thinks it aint that beneficial, in America we let the parties sort of decide——

Ms. COLLINS. Right.

Mr. BERMAN [continuing]. Whether that relationship is mutually beneficial, don't we?

Mr. WARFIELD. Well, when those individuals—I know, again, we have music day in our radio stations in all of our markets at least once a week. And we have no shortage of individuals from the record labels, nor artists, that want to come to the radio station and work to get airplay or work to have interviews.

I think that at that point I see a relationship that is certainly mutually beneficial for all parties. It is helpful to the radio station. It is helpful for the record labels, and certainly provides exceptional exposure for that artist, whether it be a new artist or an established artist that has new releases.

So I think it is absolutely beneficial to all parties.

Mr. BERMAN. All right. Well, my time has expired. But I am—oh, good. [Laughter.]

Mr. ISSA. I am there for you, Chairman. [Laughter.]

Mr. BERMAN. The gentleman from California, Mr. Issa?

Mr. ISSA. Thank you, Mr. Chairman.

And I rushed back because this is so important.

Ms. Collins, if you had the right to withhold from those who do not pay you a fee for your performance, today would you exercise it?

Ms. COLLINS. I am sorry. Could you repeat the question?

Mr. ISSA. It is a tough one.

The gentleman sitting next to you is happy to promote your music. He is doing you a favor. If you had the right to tell him that you did not want him to do the favor at his station anymore, if you had the right to do that, would you likely do that or consider it? Or, this is assuming he is paying you nothing.

Ms. COLLINS. Oh, I am getting an education here after being in the dark for so many years. And, of course, I would say, yes. Let us negotiate a price.

I mean, that is a free market enterprise. That is what free markets are about. We have other systems of Government which preclude this kind of negotiation. We at least say that we don't—that we are not those societies. We are an open, free market society.

Yes, I would negotiate.

By the way, even if there is promotional value—and of course there is on the radio—but that must be paid for. That is a service, and there is a profit being made.

As I said before, we are selling, with our music, plenty of advertising. And we are making, in most cases—now, there are excep-

tions and, you know, we were talking about the—distinguishing between those stations which can afford to pay X and those who can afford to pay Y—I think pay for play is the question here and respecting the artists in a society that says it respects artists.

Mr. ISSA. I am going to ask you a question I should know as a fan of yours, but I am unfortunately a fan of your music not currently being written.

Have you done anything in the last few years that you would like to get play on? Are you doing any kind of music anymore?

Ms. COLLINS. I am always touring. As I said, I do——

Mr. ISSA. No. But I am asking a question——

Ms. COLLINS [continuing]. I make records. They are on the market——

Mr. ISSA. But I am asking a question for a reason, and bear with me.

I told you I have spent a little bit more time with Carole King because she has been around here on other issues. And one time she did a concert, and she played songs I had never heard, some of which I liked and some of which I wasn't interested in. And I asked about them. And they basically don't get any play because the oldies, if you will, in fact, are what the stations play.

And I asked about it. She said: Well, this isn't what I am known for but this is a lot of what I am doing, and I am continuing to create.

If you had the ability to negotiate and were in Carole's position, for example, I am assuming that you would include in for playing my best known songs, the ones that are played habitually on the radio, that you would also want those promoted, something that is not happening today on any of these radio stations. Is that something that you feel you are being denied because, in fact, there is an absolute right to play your winners and no obligation to play those?

Ms. COLLINS. No. No, I don't feel that is true. I think that the market will dictate and the audience for the song will dictate—you know, I would love to have some of my lesser known songs played a lot on the radio.

When I do a concert, I design the concert. I include new things, old things, classic things, brand-new songs. My job as an artist is to bring all of those things together and to create a balance. And the radio has helped me do that.

Mr. ISSA. Right.

Ms. COLLINS. It still means that I have to be—must be paid for my performing.

Mr. ISSA. Mr. Moore, in your case, has a station ever been willing to promote your pieces, or do they prefer to play the best-known pieces——

Mr. MOORE. No, no.

Mr. ISSA [continuing]. As they like?

Mr. MOORE. No, no.

I just—well, last year, I have been promoting a new album. And you would be surprised, if you don't have the album, with some of the people I have had on there.

But, no, radio—and I am pretty sure that my dear colleague next to me—they didn't give—I don't think they gave—I have to believe, until I am straightened out, that they didn't give me the airplay.

Mr. ISSA. Okay. So the real bottom line is that they play what sells for them. They don't play what you would like to have promoted.

Mr. MOORE. Oh, no. No, no, no, no. No, that is true.

Mr. ISSA. As a general rule.

Mr. MOORE. That is true.

Mr. ISSA. Well, that has been my finding.

Now, of course, part of the problem is I want to listen to oldies stations. The music that I like is the music that they are not making anymore for the most part. And that would be one of my questions for Mr. Warfield.

How in the world do you justify the promotional value of an oldies station if, in fact, you say you are promoting, but these are songs that are well-established and that is exclusively what is being played on lots and lots of AM and FM stations?

Mr. WARFIELD. Within our company, we don't have any oldies stations.

But I will say to Mr. Moore—we had a brief conversation before this session started this morning—we do have a radio station in New York City, WBLS, that is a contemporary music station. But we have an air personality on on Sunday mornings, Mr. Hal Jackson, who has been a broadcaster for nearly 70 years who—I do have a copy of Mr. Moore's album because that is something that—his new material, as well as his better-known material, was played on that program. And we did give the audience an opportunity to hear that. So——

Mr. ISSA. Okay.

Mr. Chairman, could I ask one follow-up question if there is time? Thank you for your indulgence.

Because I think it is clear that we are going to deal with the disparity that exists between different forms of communication of people's performances, hypothetically, Mr. Warfield, if, in fact, you had the right that you presently have for your stations for the first 12 months of a new album, of a brand-new song, and you could play that for free, would that be a congressional way and an industry way of encouraging you to play the new—even if it is re-mastered—but, in fact, clearly promote what I think Mr. Moore and perhaps Ms. Collins would like to have promoted?

Mr. WARFIELD. The decision of what gets played on the various radio stations in our company is made on a market-by-market basis——

Mr. ISSA. No, no. I was only asking a very narrow question.

Mr. WARFIELD. I, I——

Mr. ISSA. Would you tend to play free versus pay because there would be a financial benefit to your promoting new?

Mr. WARFIELD. I think that becomes a matter, again, for each individual market. It can——

Mr. ISSA. No. I am only asking you.

Mr. WARFIELD. I would say I would leave that decision to the local programmers. I don't get involved in programming decisions in music.

Mr. ISSA. Thank you, Mr. Chairman.

I guess I am not going to be entitled to an answer of whether free sells better than cost. [Laughter.]

But I think we have established that in other hearings.

Ms. COLLINS. Free.

Mr. BERMAN. It is a willing buyer, willing seller situation.

Ms. COLLINS. Yes, yes, yes.

Mr. KELLER. Mr. Chairman?

Mr. BERMAN. I was going to let anyone else who, until the last one drops. [Laughter.]

Mr. Keller, the gentleman from Florida.

Mr. KELLER. Thank you.

Mr. Hodes, if you had made it big during your days as a performer and songwriter, would you be stuck with the low-end Government job that you are stuck with right now? [Laughter.]

Mr. HODES. Well, I did make it big. Here I am.

Mr. KELLER. All right. [Laughter.]

We are happy you are here, at least that side is, I am sure, but—— [Laughter.]

Mr. HODES. That is okay with me.

Mr. KELLER. Just teasing. I am just teasing.

Mr. BERMAN. Us and the country.

Mr. KELLER. And the country. Fair enough.

Ms. Peters, you have talked about making sure the performers are paid royalties. Do you think those royalties should be paid in cases where their music is played in restaurants, bars, retail shops, shopping centers, and sporting venues?

Ms. PETERS. Ultimately, yes. But the focus today is on radio over the terrestrial broadcasts. But I have always supported a broad performance right.

Mr. KELLER. And should they be paid when their music is played in small-and medium-sized radio stations?

Ms. PETERS. I think it is the marketplace. The issue is we are really talking about equitable remuneration. And equitable means under the circumstances; willing buyer, willing seller, and the circumstances that both find themselves.

Mr. KELLER. Right.

But what I am getting at is you have heard from Mr. Berman earlier today, who is an acknowledged leader and well-respected on this issue, that when it comes to making sure performers are paid royalties, he is not going to be going after restaurants, bars, retail stores, sports venues, shopping centers, and small radio stations. And I just want to know if there is any sound basis in the copyright law for making that distinction.

Ms. PETERS. I would suggest to you that every step forward in expanding the performance right is a positive step. And it is up to Congress to decide the scope of the step it is willing to take at any particular time.

Mr. KELLER. Well, thank you. You sound like the politician here. [Laughter.]

Let me go to Ms. Collins.

You have heard from Mr. Warfield that if they have to pay performers these royalty fees, then maybe they will just switch to other formats like talk radio——

Ms. COLLINS. Well, they would have to pay the talkers.

Mr. KELLER. Do you think that is realistic that a top-rated, top-40 station is going to switch and try to compete with Rush Limbaugh?

Ms. COLLINS. Well, I don't think that is the question.

I think people want to hear music. And I think if the stations are going to broadcast music, then they need to pay the performer.

So I don't—I think, again, it is a market-driven question. It is a question of what advertisers want. It is what happens between the buyer and the seller. And we don't want to be left out in the cold.

Mr. KELLER. And I don't want to cut you off, but I only have 5 minutes here.

And I agree. I think a marginal-rated station may do that, but you are not going to have the number one-rated top-40 station switch and try to do talk radio, especially when the market is flooded as it is.

Mr. Warfield, in your testimony, you talked about broadcasters paying songwriters $450 million a year in direct performance royalty, yet they are paying the performers zero. They get, instead, indirect promotional benefit by playing their records, you suggest.

Can you please explain why, in the broadcasters' rationale, it is okay to pay the songwriters for their copyrighted works but not okay to pay the performers?

Mr. WARFIELD. The songwriters are not benefiting actually from the sale of the records that is generated by the airplay. The same way that the artist is benefiting, the record label is benefiting through the sale of the product——

Mr. KELLER. I get it.

Mr. WARFIELD [continuing]. The composer——

Mr. KELLER. Well, the songwriter benefits from the record sales, too. He gets a certain amount for each record sold.

Let me go to my next question. Can you explain the distinction, Mr. Warfield, as why it is okay to pay the performer in terms of satellite radio, but not with respect to terrestrial radio? What is the distinction that makes it okay for you guys not to pay the performer?

Mr. WARFIELD. I think that there are three distinctions: one, digital; secondly, the interactivity of the new streams that are out there; and the fact that they are also subscription. I think there are three distinctions that separate these new platforms from terrestrial broadcasting.

Mr. KELLER. I thought you were going to say it is because we do things like public interest programming and public service announcements and that sort of thing. That is not your argument for why you shouldn't be treated differently from satellite radio?

Mr. WARFIELD. Well, we still do that. We are required to do that. And we are happy to do that. And we will continue to do that.

Mr. KELLER. Okay.

Ms. Collins, you are a songwriter, as well as a performer?

Ms. COLLINS. I am.

Mr. KELLER. Do you benefit from increased record sales?

Ms. COLLINS. By the play on the radio?

Mr. KELLER. Yes, ma'am.

Ms. COLLINS. I think it is a large subject. I think everything interacts. But if one of my income streams has been cut completely off for 50 years, you can see where my business and my personal life and my health care as I grow older is suffering.

Mr. KELLER. Thank you.

My time has expired, Mr. Chairman.

Mr. BERMAN. I thank the gentleman.

And, just at some point after Mr. Cohen questions, I do want to come back to the register of copyrights on the issue of when a record is sold, you know, retail, what the compensation stream and whom it goes to, just to clarify it for the record.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, sir.

Mr. Keller asked one of the questions I was going to ask and it was of Mr. Warfield. And I still don't think we got the answer. But the belief in why songwriters should get paid and a singer shouldn't when you play that song.

Mr. WARFIELD. The system has been in place for the last 80 years. Certainly, it is designed to support the creator of the music.

You know, the copyright is certainly designed to promote the progress of science and useful arts.

And, you know, absent a performance tax to date, there is certainly no lack of sound recordings being produced. Certainly, as I have indicated in this industry——

Mr. COHEN. I know that, but what is the difference? Why should Mr. Porter get money when you play "Soul Man" and Mr. Hayes get money, and not Mr. Moore?

Mr. WARFIELD. Well, the benefit to Mr. Moore and to the record label accrued to them upon the airplay, which then generated the record sales, which then benefited the label——

Mr. COHEN. But that is a by-product. Why should Mr. Porter and Mr. Hayes get paid also when they buy that record? The songwriters get paid every time.

Ms. COLLINS. Every time.

Mr. COHEN. They always get paid.

Ms. COLLINS. Always.

Mr. COHEN. It is only the singer. And there are more singers that, to be honest with you, sir, that are minorities who I represent than there are songwriters——

Mr. WARFIELD. It is——

Mr. COHEN. The songwriters oftentimes are Caucasian, more often than not, and a lot of the performers are African-American. They are minorities. And they are really, because of your system, they are getting shortchanged.

Mr. WARFIELD. I wouldn't say because of our system. I think what we need to also acknowledge here is that there is a long history of African-American and minority performers that have been mistreated by the record labels and not necessarily due to any fault——

Mr. COHEN. So that is wrong—because that is wrong——

Mr. WARFIELD. And that argument—you are absolutely right, but that is really an issue with the record labels and their artists that have helped them generate significant revenues over the years——

Mr. COHEN. No, sir.

Mr. WARFIELD [continuing]. Rather than——

Mr. COHEN. Excuse me, if I can?

It is the fact that when you play the song on the radio the minority guys don't get paid. It is the Stoller and Lieber, or whatever their names are. They get paid, the songwriters.

Ms. COLLINS. Always.

Mr. COHEN. But the guys in Rocky Joes don't get paid, or Smokey Joes, or whatever it is.

Ms. COLLINS. That is right.

Mr. COHEN. They don't get paid when they sing it. It is the guy that writes it, the Tin Pan Alley guy. And you and I should be on the same team.

Mr. WARFIELD. I am on the side of the team that has built a very successful business for the last 80 years and don't find—I think that, on your argument, there certainly needs to be something addressed with the record labels themselves. That is not a responsibility that should be laid at the feet of the radio broadcasters.

Mr. COHEN. Ms. Collins, let me ask you. You have listened to Mr. Warfield here today. Can you see both sides now? [Laughter.]

Ms. COLLINS. You mean, rows and flows of angel hair? We need a little music here.

Mr. COHEN. I have got more time. Keep going. [Laughter.]

Ms. COLLINS. You know, the issue of the performer as a misused and abused section of the entertainment population is a very important one. It is true. All writers get paid all the time.

Mr. COHEN. Right.

Ms. COLLINS. They get paid when the song goes on the radio. They get paid when I do a concert including my songs or other people's. They get paid when the record sells.

So they are getting the double dip—that is where the double dipping is happening in a way. That is equitable. I agree with that. I approve of that.

But the performer, the artist, is treated badly.

I was saying before, you know, it is sort of like, you know, we still, all of us performers, for the most part, go in the back door, through the kitchen. And I think of this as a kitchen route. You know, through the funny little entrances which you can't find to do the show. This is one of those situations.

I don't know why it has happened. I think the lobby is very strong.

Yes, it is very profitable not to pay the artists. Not for the artists, but it is very profitable. In 80 years, it has got to be extremely profitable.

Mr. COHEN. You know, Leonard Cohen is a great songwriter, and he was blessed with a great voice, too. But, nevertheless, when Jennifer Warnes sings his songs, they are better. And shouldn't Jennifer Warnes get paid for that?

Ms. COLLINS. She certainly should. And he should and does.

Mr. COHEN. Mr. Warfield, you said you like the system like it is today. What if we passed a bill that said the songwriters don't get paid when they get their songs played——

Ms. COLLINS. Yes, let us change places.

Mr. COHEN. Yes. Would you like that better?

Mr. WARFIELD. I sort of like it the way it is right now. [Laughter.]

I am not for advocating any changes, as I said here today. Thank you.

Mr. COHEN. Thank you, sir.

And thank all the panelists.

And I want to thank—I haven't thanked the Chairman. And this is like the Academy Awards when you are up here. You have to thank all the members of the Academy and my father—— [Laughter.]

Mr. BERMAN. And don't forget your family.

Mr. COHEN. Yes. My father thanks you, my mother thanks you, my brother thanks you, and I thank you.

Mr. BERMAN. Just to, I guess, to recognize myself, and then—first, Mr. Warfield, I am old enough to remember a time when the broadcasters did want to change the way the songwriters got paid for their music. They wanted to reduce it. They wanted to change the nature of the license. It was a major struggle here in the late 1980's.

So you may think it is just fine now, but there was a time when the industry didn't think it was so fine.

I would just like to ask the register to clarify one, this issue of who gets paid and when in, you know, short, simple terms. I think it has been said but it is—these things get complicated, and it is good to repeat it.

And also, Mr. Coble had a question prepared, but he had to go to his hearing. If there was a performance right, if we got rid of that exemption for terrestrial radio, why doesn't the money just go to the labels? What is the mechanism by which that money would be distributed?

So if you could just deal with those two issues.

Ms. PETERS. Okay. Let us start with the first one, who gets paid. And actually, your colleague knows the answer as well as I do.

Composers, lyricists, musical composition copyright holders have a full panoply of rights. And, certainly, the reproduction and distribution right is implicated in the making and sale of a phono record.

And they, actually, by statute, get paid subject to a compulsory license. It is called a mechanical compulsory license, section 115. It can be voluntarily negotiated, but because the mechanical license has a rate, it is bargained down.

But there is a payment to every composer and every music publisher for every recording that is sold in the marketplace. And just as there is for every, you know, for most performances.

The beauty of section 114 that deals with performance rights for sound recordings is that there is direct payment to performers. The income does not funnel through the record companies.

There are representatives here of SoundExchange. The money goes to SoundExchange, and it is distributed to the record producers and to the performers. So it is not, as is typical with record sales, funneled through the record companies.

Mr. BERMAN. Mr. Issa?

Mr. ISSA. Thank you.

You know, I spent a couple years in business. And I finished up my last few minutes debating the relative merits of free versus pay. And I was kind of confounded that the broadcasters wouldn't have a fairly simple, you know, decision on which they prefer, because the youth of America certainly do.

And I would like to touch on that for a moment.

It is very clear over the last decade, the 12 years, actually, since the 1995 act, that free trumps pay. It is clearly why we have had to deal with the copyright issues. It is clearly why those evil record labels that pay the artists nothing have seen their ability to pay them that nothing go down pretty precipitously. [Laughter.]

You know, there is no more lose lose than there is no money coming in, there is no money going out. Record sales have been dropping. And they have been dropping not because people listen to less music but because music is ripped and then ripped off.

When your industry improves from analog to digital, you are going to be able to deliver far better broadcasts, while you still have a little loop in the system and one that we are very aware of, which is that I can record your terrestrial broadcast. I can record that all I want.

There is no legal prohibition on my taking the analog. There is no legal prohibition on my taking the metadata, the digital information that is going to tell me that it is Mr. Moore's or Ms. Collins's music. It is going to tell me everything I need to know. It will probably give me the words so I can sing along because you will be broadcasting the information for karaoke machines.

All of that is going to be, under the current statutes—and correct me if I am wrong; that is why we have the Copyright Office here—it is going to be all free for me to download digitally because today terrestrial broadcast has essentially a free license for me to buy a piece of equipment to record that all I want.

Have I missed anything from the standpoint of current copyright?

I mean, that is correct. I see you are shaking your head so——

Mr. WARFIELD. Oh, for me?

Right now, with HD-radio, which is in its infancy in our industry, there are no pieces of hardware at this point that allows that type of recording, as a matter of fact——

Mr. ISSA. Well, I can tell you that the consumer electronics industry is well-represented here for a reason, because clearly that is a nanosecond away.

I have recused myself from the antitrust hearings on XM and Sirius because a company that I founded is now a hardware supplier in that industry, even though I don't own any stock. So I am acutely aware that what is happening in Sirius and XM is not a technological—as a matter of fact, it is easier to do on your music, which is not encrypted and encoded and requiring a separate chip.

In fact, there is no reason it couldn't be done today. And there is no reason that it actually—that the equipment doesn't exist other than, to be honest, you are not broadcasting enough stations in high enough, you know, supply, if you will. But it is only a matter of 6 months, 1 year, 2 years. It is an inevitability.

And I am the former chairman of the Consumer Electronics Association. I am definitely here to tell you we will see those at CES, if not this January, then next January.

And I am proud of the industry I came from. I think it is a very innovative industry. However, the songwriters and the musicians are a very innovative group.

And, in fact, you are sitting here today saying to me your industry cannot afford or doesn't owe anything for the huge amount of content that you play every day and that, under existing laws, if this body, this literal Committee, doesn't take action, will be broadcast in high-definition, very nice sound quality with digital data so you know what song it is to the listeners that will be recorded within a year or two and, as a result, CD sales that you claim to be promoting will plummet probably to zero.

And you are here today saying you can't afford to do anything about either problem, is that correct?

Mr. WARFIELD. That is not a problem that we are facing right now. It is just not available in our industry——

Mr. ISSA. It is not your problem today.

Mr. WARFIELD. It is not an issue within our industry at this point because they are not——

Mr. ISSA. When that recording device is on the market in a January Consumer Electronics Show this year, next year January, will it be your problem? And what will you do about it?

Mr. WARFIELD. I think that would be an industry concern at that point. I don't know what we would do.

Mr. ISSA. Okay. So, you know, look, I am a friend of the broadcaster, maybe a little more, little less than Mr. Coble. But I have to ask, if we don't act, will we destroy an industry that you claim you want to promote if we don't deal with both of those problems and do it in a timely fashion?

And I know my time is expired. And, Mr. Chairman, thank you for your indulgence.

I want us to continue working on this because I think you are here today. I hope that we have individual broadcasters back here so they can answer those two questions of what happens when all of their high-quality music is recordable with metadata and, in fact, the record industry goes from a shadow of what it once is to nothing, then who—won't the songwriters also be losing?

Thank you, Mr. Chairman. I yield back.

Mr. BERMAN. I think we are about to close. I am first going to yield half a minute to the gentleman from Florida, Mr. Keller.

Mr. KELLER. Thank you, Mr. Chairman.

I want to thank all of our witnesses for being here. I am still confused, but on a much higher plane, having been through this. [Laughter.]

Mr. Warfield, you have been there, the only one out of five espousing your position, the broadcasting position, so you have appropriately earned your last name today. [Laughter.]

And I want to thank you especially. [Laughter.]

I thank all of the witnesses. I tried to be fair with all of you, to get your all sides, and I think we brought those out. And it means a lot that you took time out of your busy schedule to be here, and especially my esteemed congressman, Mr. Hodes. And I wish I had

your creative background, as well as your political skills. I want to thank you for being here.

And I will yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

I might point out that we did try to get another witness who was opposed to this concept of compensating for the performance right, but Mr. Warfield you were a good warrior. [Laughter.]

And other than anything else the panel wishes to say to us or each other, I am prepared to—is there any——

Mr. ISSA. Can they make a deal here today? [Laughter.]

Mr. HODES. Mr. Chairman?

Ms. COLLINS. I——

Mr. BERMAN. Ms. Collins?

Ms. COLLINS [continuing]. Respectfully just want to say that I am very grateful to be here. That you have all made yourselves available to this issue, put in so much time on thinking about it, and I know the future of music is going to benefit from this meeting today. Thank you.

Mr. BERMAN. Paul?

Mr. HODES. We have a tradition in this country of change. And sometimes change is a four-letter word. But the broadcast industry has enjoyed a tremendous benefit for 80 years, and I believe the change is coming.

If it is any consolation to Mr. Warfield, when the broadcast industry pays a fair and equitable performance royalty, the richness of our music in this country will be enhanced. Performers will do better. By doing better, they will make more and better music, and ultimately, that will inure to the benefit of the broadcasters.

So I am hoping that the broadcasters can look at the bright side because there is one, even though change is tough.

Mr. BERMAN. Did I get a sighting from my right here?

Mr. COHEN. Yes. Without conjuring up images that they shoot horses, don't they, I would like to ask one last thing.

Mr. Warfield, if we pass something to give songwriters money, that would cause the broadcasters——

Mr. HODES. Performers.

Mr. COHEN [continuing]. Performers—excuse me, I am sorry—performers money, that would cost you some of your additional costs, right?

Mr. WARFIELD. Correct.

Mr. COHEN. And then would you just reduce your costs—your profits, or would you charge the advertisers a little bit more money?

Mr. WARFIELD. In some cases, broadcasters will not have the opportunity to increase their revenue generation from advertising. And, unfortunately, there is this perception that all broadcasters are, you know, making a lot of money. And, unfortunately, some broadcasters, quite honestly, would possibly have to go out of business or to sell their radio stations.

Mr. COHEN. You don't think you could charge a little more advertising? It is not a lot of money. You could charge just a little more and then the public would pay for it when they buy goods, and the public, you know, that is where it ends up being?

Mr. WARFIELD. We have an industry that from 2001 through 2006, as evidenced in many trade articles, is absolutely flat with no revenue growth whatsoever. So to counter that, to believe that we would be able to generate additional revenue through higher rates, is not supported by the performance of the industry over the last 6 years.

Mr. COHEN. Okay. Thank you, sir.

Mr. BERMAN. The hearing of the Subcommittee is adjourned. Thank you all very much.

[Whereupon, at 1:16 p.m., the Subcommittee was adjourned.]