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PERFORMANCE RIGHTS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

ON

H.R. 4789

JUNE 11, 2008

Serial No. 110–141

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

42–829 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

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PERFORMANCE RIGHTS ACT

WEDNESDAY, JUNE 11, 2008

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

The Subcommittee met, pursuant to notice, at 3:22 p.m., in Room 2141, Rayburn House Office Building, the Honorable Howard L. Berman (Chairman of the Subcommittee) presiding.

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

Mr. BERMAN. This 1 hour and 20-minute-late hearing of the Subcommittee on Courts, Internet, and Intellectual Property will come to order. I apologize to everyone, but it truly was events beyond my control.

I would like to begin by welcoming everyone to this hearing on H.R. 4789, the "Performance Rights Act." As I said last July, I have supported the expansion of the performance rights and sound recording for over 20 years with two caveats. First is that by extending this right, it should not diminish the rights and revenues of the creators of musical works. Secondly, terrestrial broadcasters large and small must remain a viable source of music.

The bill we introduced in December does just that. The bill is designed to fix a glaring inequity. Currently Section 114 provides a compulsory license to publicly perform a sound recording where there is a digital audio transmission. However, terrestrial broadcasters or over-the-air radio broadcasters as they are sometimes referred to are not required to pay a royalty for their transmissions. They enjoy an exemption from the performance right.

I have long been convinced that fairness mandates that all those in the creative chain of the artists, musicians and others who bring the recording to life should get compensated for the way they enrich our lives. The U.S. is one of the only developed countries in the world that doesn't—one of the few developed countries in the world—the debate of whether or not China is now a developed country—that doesn't require over-the-air radio stations to compensate those artists and musicians producing the music that broadcasters use to attract the audience that generates ad revenues.

In large part because of music radio is able to profit. Not compensating those performers of the music is unfair and ultimately

harmful to music creation that benefits everyone, including the broadcasters.

Furthermore, the law currently requires all other platforms in the U.S. such as satellite and Internet radio to compensate the copyright owner. Let me begin by clarifying how we have narrowly tailored this legislation.

First, the bill repeals the current broadcaster exemption, but it does not apply to bars and restaurants and other venues. Secondly, the bill provides an accommodation for small and non-commercial broadcasting by setting a low, flat annual fee to allay any expenses relating to negotiation, litigation or arbitration. Nearly 77 percent of the existing broadcasting stations in this country, including college stations and public broadcast, will pay only a nominal flat fee rather than having to pay a percentage of their revenues as royalties.

Third, the bill extends certain performance rights to artists, musicians and their record labels. It does not harm or adversely affect the revenues rightfully paid to the songwriters and other existing copyright owners. Although I also understand there are additional protections the songwriters are seeking, which we will consider.

The broadcasters have argued that this bill is unnecessary and the exemption is appropriate because of a symbiotic relationship that exists between the airplay on radio and the promotion of the music leading to future sales. Furthermore, the broadcasters suggest that to pay compensation to artists and musicians for publicly performing their sound recordings is tantamount to a performance tax.

Finally, there is concern as to how smaller broadcasters can survive if required to pay. I would like to briefly address each argument in turn and ask any of the witnesses to respond. In terms of the promotion argument, let's assume radio broadcasts do promote music which leads to greater sales. Don't radio broadcasts of sports games also promote the sale of tickets and team merchandise, yet don't broadcasters pay to broadcast these games?

Why does the possibility of promotion in the case of music sales from over-the-air radio lead to the conclusion that there should be no payment made by the broadcasters? How is it that Internet and satellite also promote yet they are required to pay? Why should over-the-air broadcasts be treated differently?

Assuming there is a promotional value in the broadcast of music, there is nothing in the bill which would prevent a copyright royalty judge from factoring in the value of this promotion in determining the rates the radio station would have to pay. The argument about promotion should not be about whether to pay, but how much to pay.

As to the tax argument, my notion is while calling the performance right a tax might make for good rhetoric, it is even more accurate to call the exemption enjoyed by the broadcasters corporate welfare or even, God forbid, government confiscation of property. Since the U.S. code compels performers to give broadcasters their music for free, the bill merely eliminates an unjustified subsidy to broadcasters and requires them to compensate those whose work they use and profit from.

Furthermore, broadcasters do not argue that the money they pay to the songwriters constitutes a tax. What is the difference?

Finally, the impact on small broadcasters was clearly a concern for us and therefore in the bill, as mentioned earlier, we have provided an accommodation for those broadcasters. With this bill we have begun to move toward platform parity, rights parity, and international parity. The equity argument that performers should be entitled to receive revenue for their works can no longer be ignored. The Department of Commerce just yesterday offered their support for this legislation.

Circumstances have changed, but it is now time to reconsider the exemption for over-the-air broadcasters. In other words, put me down as leaning yes on this bill.

I look forward to working with Members of the Committee to address the inequity in the current law. I intend to proceed to markup shortly and welcome suggestions for adjustments to build broader consensus for this bill.

I now have the pleasure of recognizing our distinguished Ranking minority Member, Howard Coble, for his opening statement.

[The bill, H.R. 4789, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 4789

To provide parity in radio performance rights under title 17, United States Code, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 18, 2007

Mr. BERMAN (for himself, Mr. ISSA, Mr. CONYERS, Mr. SHADEGG, Ms. HARMAN, and Mrs. BLACKBURN) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide parity in radio performance rights under title 17, United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Performance Rights Act".

SEC. 2. EQUITABLE TREATMENT FOR TERRESTRIAL BROADCASTS.

(a) PERFORMANCE RIGHT APPLICABLE TO RADIO TRANSMISSIONS GENERALLY.—Section 106(6) of title 17, United States Code, is amended to read as follows:

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.".

(b) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING PERFORMANCE RIGHT.—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking "a digital" and inserting "an"; and

(2) by striking subparagraph (A).

(c) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING STATUTORY LICENSE SYSTEM.—Section 114(j)(6) of title 17, United States Code, is amended by striking "digital".

SEC. 3. SPECIAL TREATMENT FOR SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS STATIONS AND CERTAIN USES.

(a) SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS RADIO STATIONS.—

(1) IN GENERAL.—Section 114(f)(2) of title 17, United States Code, is amended by adding at the end the following:

"(D) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues in any calendar year of less than $1,250,000 may elect

to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $5,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

"(E) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $1,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.".

(2) PAYMENT DATE.—A payment under subparagraph (D) or (E) of section 114(f)(2) of title 17, United States Code, as added by paragraph (1), shall not be due until the due date of the first royalty payments for nonsubscription broadcast trans-

missions that are determined, after the date of the enactment of this Act, under such section 114(f)(2) by reason of the amendment made by section 2(b)(2) of this Act.

(b) TRANSMISSION OF RELIGIOUS SERVICES; INCIDENTAL USES OF MUSIC.—Section 114(d)(1) of title 17, United States Code, as amended by section 2(b), is further amended by inserting the following before subparagraph (B):

"(A) an eligible nonsubscription transmission of—

"(i) services at a place of worship or other religious assembly; and

"(ii) an incidental use of a musical sound recording;".

SEC. 4. AVAILABILITY OF PER PROGRAM LICENSE.

Section 114(f)(2)(B) of title 17, United States Code, is amended by inserting after the second sentence the following new sentence: "Such rates and terms shall include a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings."

SEC. 5. NO HARMFUL EFFECTS ON SONGWRITERS.

(a) PRESERVATION OF ROYALTIES ON UNDERLYING WORKS.—Section 114(i) of title 17, United States Code, is amended in the second sentence by striking "It is the

1 intent of Congress that royalties'' and inserting ''Royal-
2 ties''.

3 (b) PUBLIC PERFORMANCE RIGHTS AND ROYAL-
4 TIES.—Nothing in this Act shall adversely affect in any
5 respect the public performance rights of or royalties pay-
6 able to songwriters or copyright owners of musical works.

○

Mr. COBLE. Thank you, Mr. Chairman. Mr. Chairman, most of our colleagues here—strike that. Many of our colleagues here and perhaps most, but certainly many regard this bill as black and white. If you support the performers, you are adamantly opposed to the broadcasters. If you support the broadcasters, you are adamantly opposed to the performers. I don't see it, Mr. Chairman, as black and white. I see subtle shades of gray. And I hear and read compelling and convincing arguments and positions from each side.

Mr. Chairman, as you know, on this Hill when Members of Congress don't want to become involved with issues, their stock answer is I have no dog in that fight, and I am therefore removed. Folks, I have nothing but dogs in this fight.

The broadcasters on the one hand, friends, performers on the other hand, friends. For two and-a-half decades, Mr. Chairman, or almost two and-a-half decades on issues involving the broadcast industry I have come down on the side of broadcasters, not just because I like them, which I do like them, but because their positions were sound and meritorious.

But the issue before us, I believe—this may be subject to interpretation. But I believe the issue before us, Mr. Chairman, leans toward the performers. I think the performer right advocates probably have the better of the argument.

Last week I announced that I intend to support the bill at markup. I was not a co-sponsor because I wanted to retain my objectivity. I reached that decision, my friends and Mr. Chairman, after much deliberation and consideration of the respective arguments presented by all of my friends on either side of the issue.

While I still have questions going forward that I hope we can address about how precisely the law should be amended as well as concerns about the timing and implementation of any changes, the deciding factor for me is that the idea of continuing this exemption in perpetuity just does not strike me as the right thing to do.

I have difficulty in reconciling a system of copyright law, Mr. Chairman, that requires radio stations to pay the owners of musical works a royalty, but denies such treatment to the owners of sound recordings. Nor does it make sense, in my opinion, for the copyright law to, in effect, choose sides and grant preferences to one technology over another, as in this case, where satellite and Internet radio broadcasters pay copyright royalties to the owners of sound recordings and musical works, but traditional radio pays royalties to only the owners of the musical works.

And finally, Mr. Chairman, you will remember as television broadcasters maintained that they should be paid retransmission consent fees when cable companies carry their signal. It seems to me that the Federal law ought to provide the owners of copyrighted works, which after all are property, payment when their works are selected to be performed publicly and for profit by other broadcasters.

I recognize that changing the law in a manner that affects an entire industry, particularly one that is as valuable to our communities as our home town broadcasters, is not something that ought to be done hurriedly. If this change is to be made, Mr. Chairman, I hope we will be able to benefit from active discussions and involvement by those who will be most directly affected about how

best to transition from the old world of complete exemption to the new world of full participation in this aspect of our copyright law.

Mr. Chairman, I thank you for having convened this hearing today and for assuring all of us that we have excellent witnesses so we can benefit from their perspective. It is good to have all of you with us.

And, Mr. Chairman, with that I yield back the balance of my time.

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

And I now am pleased to recognize a co-sponsor of this legislation and the Chairman of the Judiciary Committee, Mr. Conyers, for an opening statement.

Chairman CONYERS. Thank you, Chairman Berman.

I welcome all of our witnesses here today. And I would just like to see a show of hands of all the performers and artists that are with us today. Raise your hands. I even see some instruments out there in the audience as well. Thank you.

And I am reminded of the passing last week of one of the founding fathers of rock and roll, Bo Diddley, who I know would be looking down upon us today thinking of how much progress we are making. Unfortunately, he didn't see much fairness in terms of compensation in his lifetime. And I have been working on this issue, I say without embarrassment, longer than anybody else here in the Congress.

But Howard Berman has done an excellent job, not just as Chairman of this Committee on Intellectual Property, but in terms of his new responsibilities as Chairman of the Foreign Affairs Committee as well. And his description of this issue doesn't require me to add any additional comments.

I am not leaning slightly in favor of this bill. I am 100 percent in support. And we are not going to rest until we get this taken care of. Why? Because creativity and intellectual property considerations are what the Judiciary Committee is all about.

We want to encourage and stimulate the great American sound that now is enjoyed and repeated around the world. I happened to be, in particular of all of our music, a jazz aficionado. And the lives of musicians and performers and singers has been unduly complicated by the fact that we are not fully compensating them for all of the great talent and the enjoyment that they have brought to us across the years.

And so, for Chairman Berman and Ranking Member Coble and all of us here on this Committee that support your great work, I am very proud to see you today. And I think this is an historic moment in bringing the equity that characterizes this Committee in terms of intellectual property, rights and creativity to a new high to include you in, and not continue to exclude you out of, the great benefits of this country.

Thank you.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

I commend Howard Berman for his leadership in introducing H.R. 4789, and for holding this second hearing on such an important issue.

As many of you know, earlier this week a resolution I and others introduced honoring the contributions of a founding father of rock and roll, the great Bo Diddley, passed the House.

While he was a music pioneer who created the very foundation of the majority of the music played on the radio today, I mention Bo Diddley today because of his tireless work in his later years for the cause of fair treatment of musical artists.

Unfortunately, Bo Diddley did not see such fairness in his lifetime. Despite all his hard work and his invaluable cultural contributions, he had to stay on the road performing into his 78th year.

He could not afford the "luxury" of retirement and only stopped performing last year when complications from a stroke forced him to.

Bo Diddley would be pleased that this Committee is doing more than just talking about performance rights—that we are taking *action* to promote fairness in the treatment of musical artists.

The current situation is quite simply not fair to the recording artists or to the recording labels.

I'm sensitive to the interests of broadcasters, and have taken pains to ensure that they are not harmed. But everyone but the broadcasters agrees that the current system is seriously flawed.

Every other platform—including satellite radio, cable radio and Internet webcasters—pays a performance royalty. Terrestrial radio is the *only* platform that does *not* pay a royalty for use of an artist's music.

That is a completely untenable situation in the 21st century.

The specific broadcaster exemption created in 1995 may have made sense for the music marketplace of the 20th century, but with rapid changes in technology come dramatic changes in usage. And the law should be updated to reflect those changes when the old rationales no longer apply.

Calcification of the law—stuck in an outdated reality—is not acceptable if we are to fulfill our constitutional directive of promoting creativity and innovation.

The bipartisan and bicameral legislation bill we are discussing today would create fairness by bringing broadcasters up to the same standards that we require of other music platforms.

Moreover, this bill will bring the United States in line with other developed nations, every one of which currently grants performers a right to be compensated for their work when it is broadcast on terrestrial radio.

If you were to go out on the street and speak to 100 people at random, most would be shocked to hear that recording artists receive no monetary compensation when their songs are played on broadcast radio.

Today we consider taking an important step closer to ensuring that artists who enrich our lives with their talent are treated fairly, are able to reap a benefit from their efforts at least somewhat proportional to their contribution.

This bill will establish a fair system in copyright law for compensating performers of sound recordings, with appropriate accommodations for smaller stations, public broadcast stations, religious services, and incidental users.

And it explicitly protects the public performance rights or royalties payable to songwriters or copyright owners of musical works.

I look forward to hearing from our witnesses today as we consider this important step.

Mr. BERMAN. Thank you very much, Mr. Chairman, for your comments to me as well as your substantive remarks.

I now am pleased to recognize the Ranking Member of the Judiciary Committee, my friend, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman. Mr. Chairman, I want to thank you and Ranking Member Coble for having this hearing on H.R. 4789, the "Performance Rights Act." Recording artists contribute their unique talents and ability to every song they perform. These artists enrich the lives of their fans and listeners.

Requiring a full statutory performance right for sound recordings has been sought for many years. In 1995 Congress enacted the Digital Performance Royalty and Sound Recordings Act, which established a compulsory license for sound recordings for non-interactive cable and satellite services. It has only been since then that sound recordings have been subject to even a limited public performance right.

At that time, Congress considered and determined to expressly exempt both non-subscription transmissions and retransmissions of sound recordings such as television, radio and business establishment broadcasts. It reasoned that public performance on these media benefits artists through increased record sales and thus should not be subject to a new direct royalty payment.

I understand the witnesses for the broadcasters today will present new evidence that they believe demonstrates a direct positive correlation between local radio airplay of songs and increased revenue to artists and record labels. The reality is copyright law does make distinctions among classes of owners and types of technologies with respect to both the entitlement to receive and the obligation to pay performance royalties.

Whether or not these distinctions are sensible and justified as sound copyright policy will be the focus of discussion today and I expect for some time to come. But neither this Subcommittee nor the Congress operates in a world of academic theory. The decisions we make impact the lives of real individuals and industries, and the effects can be immediate and lasting.

As we move forward in studying this issue, we must anticipate and consider the possible effects of any legislation in this area and take appropriate steps to eliminate or mitigate harmful or undesirable outcomes. For that reason I appreciate the steps the Chairman and other sponsors of this bill have taken to try and address the specific concerns of certain communities and classes of broadcasters.

In a moment we will have the opportunity to hear two broadcasters' own views of whether these proposed accommodations address the concerns their members have with this bill. But before we do, it appears that the primary justification for changing the law seems to be to achieve parity among platforms, copyright owners and our international trading partners. Without regard to the specifics of each one of the parity arguments, it is likely that this measure would actually create a number of new disparities that may or may not be entirely justified by present or future circumstances.

That said, this is a complex issue. Outside the Committee approximately 200 of our colleagues have sponsored a resolution that basically questions the content of this bill. It is clear that the advocates for this measure have more to do to persuade our colleagues in the House that this measure reflects sound public policy.

Mr. Chairman, again I appreciate your having this hearing today. And I know there are meritorious arguments on both sides, so we have much to learn. And I will yield back the balance of my time.

Mr. BERMAN. Are there any other Members who would wish not to follow my example and make brief opening statements?

The gentlelady from Texas?

Ms. JACKSON LEE. Mr. Chairman, you have such an example it is hard not to follow your example. And since I came in after your example, I will assume that you had a distinguished comment to make, one or two at least.

I do want to echo the comments of my distinguished Ranking Member of the full Committee. We have much to learn. And as my very distinguished Chairman indicated, that the rights of properties are cherished in this Nation. And I would imagine that we are also facing, for many who are not here to speak, many who have gone on, a great deal of hurt that we have to repair as well.

Property comes in many forms. It comes in the form of the intellectual rights of so many musical giants of yesterday, today and tomorrow. This past week I introduced commemoration of gospel heritage in the United States. I happen to believe that we should take credit for some distinctly Americana music which may range from rock and roll, jazz, gospel and many other, if you will, additions to that line.

For that reason I believe that this legislation is very important. And I would add that the ownership of all mom and pop locally based radio stations are also property rights and assets that we should be concerned with. So as I listen to the presentation of the very important and renown witnesses, who I know will speak from the heart and factually as well, I think that we have the makings of an important balance.

And that is the balance that respect, tenets that are invested in the Constitution, the due process and the respect of property and as well the idea that someone's hard earned intellect has to be respected. And when I say the two distinguishing factors, I talk about small businesses and small radio stations not versus, but also the recognition of individual talents of which the Chairman of the full Committee spoke.

So I hope that this hearing will find common ground to respect these two important elements. And since this is the International Intellectual Property Subcommittee, what better place for this debate and discussion to go forward and the understanding of this legislation and the resolution of this legislation and the fair treatment, the fair treatment, the importance of fair treatment to all of those who have given us joy, given us comfort and have given us a few steps of dance when we needed it. I do think it is time to resolve this in this manner as we go forward.

And with that, Mr. Chairman, I yield back.

[The prepared statement of Ms. Jackson Lee follows:]

HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

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STATEMENT BEFORE THE

JUDICIARY SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

HEARING ON H.R. 4789, THE "PERFORMANCE RIGHTS ACT"

JUNE 11, 2008

Thank you, Mr. Chairman, for your leadership in convening today's very important hearing on H.R. 4789, the "Performance Rights Act." I would also like to thank the ranking member, the Honorable Howard Coble, and welcome our panelists. I look forward to their testimony.

This hearing will provide interested parties an opportunity to comment on a bipartisan measure introduced December 18, 2007 by Representatives Berman, Issa, Conyers, Shadegg, Harman, and Blackburn. This hearing will explore the benefits and drawbacks of extending the scope of public performance rights to terrestrial broadcast performances. Under current law, owners of underlying "musical works" (i.e., the lyrics and musical notations), who, in most cases, include the songwriter or the music publisher, are entitled to receive royalties from statutory licenses for the public performance of their works in terrestrial radio broadcasts. However, the copyright owners of sound recordings and the artists featured in sound recordings do not have a comparable right to royalties for the public performance of their works in terrestrial radio broadcasts. This is in contrast to certain digital broadcasts of songs, including cable, satellite or webcasts, where the songwriters, performing artists and copyright holders of sound recordings are typically entitled to public performance royalties.

Since Congress first established copyright protection in sound recordings in 1971, holders of such copyrights have had the right to control the reproduction, distribution, and adaption of their works.

The Copyright Act defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds...regardless of the nature of the material objects...in which they are embodied." Congress did not grant copyright holders the right to control the public performance of their sound recordings, since it believed that possession of the three aforementioned rights would adequately compensate sound recording copyright holders.

Controversy has always existed over whether the "bundle of rights" to a sound recording should include the right to control its public performance. In a 1978 report mandated by the 1976 amendments to the Copyright Act, the Register of Copyrights recommended that Congress add a sound recording performance right. The Register predicted that new "technological developments could well cause substantial changes in existing systems for public delivery of sound recordings...[and] [i]n that event, it [would be]...possible that a performance right would become the major source of income from, and incentive to, the creation of such works."

As the Register predicted, the growing popularity of Internet broadcasting ("webcasting") created an environment where the public performance of copyrighted sound recordings became an important

new source of both revenue and potential priacy. In 1995, Congress responded to the introduction of "satellite and digital technologies [that made] possible the celestial jukebox, music on demand, and pay-per-listen services on the Internet by amending the Copyright Act to create a performance right for digital transmissions in the Digital Performance Right in Sound Recordings Act.

Congress feared that "in the absence of appropriate copyright protection in the digital environment...the creation of new sound recordings and musical works would be discouraged." Accordingly, to address this concern, in the 1995 Act, Congress amended Section 106 to provide an exclusive right to perform copyrighted sound recordings publicly by means of a digital audio transmission. Significantly, the Act exempted "nonsubscription" transmissions and retransmissions of sound recordings such as television, radio, and business establishment broadcasts under the rationale that the public performance of sound recordings on television and radio benefits the owners of the sound recording in terms of record sales and thus should not be compensable. For "subscription transmissions," the Act created a statutory licensing scheme that mandated the transmitted to pay a royalty and comply with "other requirements."

These other requirements include: (1) not playing too many songs by one artist in close proximity, (2) not publishing a program schedule in advance, (3) not causing a listener's receiver equipment to switch from one channel to another in order to listen to more than one artist's songs in a row, and (4) including copyright management information for the songs broadcast. For interactive tansmissions, the Act did not include a statutory license mechanism and instead required interactive transmission services to directly contract with sound recording copyright owners, thus making licensing more difficult.

In the intervening years, commentators have discussed the benefits and drawbacks of extending the public performance right to all sound recordings. The primary beneficiaries of the absence of a full public performance right in sound recordings are terrestrial radio stations. These broadcasters strongly oppose the creation of a public performance right for sound recordings on a number of grounds, which include the expense involved in directly compensating copyright owners of such works as well as their perception that recording artists are adequately compensated directly through the "free" promotional value that airplay provides. Others maintain the

view that a general public performance right will encourage those who make sound recordings to increase their production and justly benefit the artists and musicians featured on sound recordings.

Through Article I, Section 8 of the Constitution, Congress has a mandate to "promote the progress of science and the useful arts...by securing for limited times to authors...the exclusive right to their...witings...". In exercising this Congressional mandate, today's hearing will examine whether extending the public performance right to terrestrial radio broadcasts, as proposed by HR 4789, would further this constitutional imperative.

I look forward to hearing from our distinguished panel of witnesses. Again, thank you Mr. Chairman for holding this hearing. I yield the remainder of my time.

Mr. BERMAN. I thank the gentlelady.

The gentleman from Florida, Mr. Feeney?

Mr. FEENEY. Thank you, Mr. Chairman, for bringing this important issue to us. And I think the gentlelady from Texas used the word balance. And I think that is what the hearing today hopefully is all about, how we consider the Performance Rights Act in this Subcommittee how we balance the rights of copyright owners to be compensated for the use of their work and the interest of terrestrial broadcasters who currently enjoy an exemption, but also provide some great utility to America and our communities.

Since the beginning of the radio music era, terrestrial broadcasters have been exempt from paying performance royalties. For decades radio was virtually the only medium that efficiently took artists' works and put them into the ears of Americans. If you became a major artist in America, radio played a pivotal role.

They promoted CD sales, before that, record sales, concerts, endorsements, et cetera. But the technology explosion over the last quarter century has not only changed the music and broadcast industries, but it has changed markets, and it has changed America itself.

Satellite-based radio, Internet sales and music, other subscription-based services have entered the marketplace and altered the dynamic by which artists are exposed to the general public. In some instances, artists have gained substantial amounts of exposure in the marketplace by uploading their songs to social networking sites like MySpace, for example. Users listen to the music and recommend it to their friends on the site.

Nevertheless, the promotional value of local radio airplay does seem to translate into some significant revenues for some artists and record labels for some period of time after a song is initially released. While the promotional value is real, we can also see a clear property right that belongs to the performing artist or their supporting record label or a combination of both. Generally speaking, the purpose of the copyright law is to give creative minds and talented individuals exclusive control over the use and exposure of their work.

I formed on a bipartisan basis with several colleagues the intellectual property caucus in this House. The two questions are directed at the heart of the issue before us today. Number one, does the current promotional value in light of changes in technology of radio airplay fairly compensate artists and radio labels for their copyrights? Secondly, should Congress continue to intercede in the marketplace to categorically determine that promotional value of music and that it is always sufficient payment for artists in the changing marketplace?

In this rapidly changing environment of mass media we can expect intellectual property issues not just in this arena, but in many other technological areas to force this Committee to deal with updates in the way we protect intellectual property and reward and protect artists or others that are involved in grading intellectual property.

But I think the gentlelady from Texas put it right. Balance is the key for me here. I look forward to hearing the witnesses' testimony.

I have met extensively with all sides in this argument and grateful that the Chairman has held this hearing today.

Mr. BERMAN. I thank the gentleman. His time has expired.

The gentleman from Tennessee, Mr. Cohen?

Mr. COHEN. Thank you, Mr. Chairman. This issue is one that affects quite a few of my constituents in Memphis and also some folks in Nashville who are also my constituents. I lived there for many years. And they are songwriters and they are singers, performers. And while the songwriter has been compensated—and I have a strong alliance and appreciation of songwriters—I think that the singers and performers have been shortchanged.

I met Sammy Conn one time, and it was great to meet him. And I have read about Timmy Van Heusen and listened to Harold Arlen's music over the years and all these great songwriters. And they have produced beautiful music, and they were geniuses. But if it weren't for Frank Sinatra singing their songs, people wouldn't be listening.

There is a way that a performer delivers a song that makes it special. And, yes, the songwriter creates it, and the songwriter is compensated. But without the singer emoting and making it special, you are not going to have people listening.

I agree that back in the 1950's people like Allen Freid who played rock and roll and Dewey Phillips in my home town of Memphis who kind of got Elvis out there—without them spinning records that people otherwise wouldn't have had access to, you wouldn't have had rock and roll. You might not have had Elvis.

But that is not the situation anymore with the Internet and other forms out there. It is not the disc jockeys who are mostly playing program music which doesn't give people who were originally creative people, originators, an opportunity to really get heard. Those people are getting heard on low-frequency stations, the ones that I am pleased this bill takes into consideration. And I appreciate the RIAA and everybody else that worked with NPR and the small wattage stations to see that they are not adversely effected by what wasn't intended in this bill.

They are the ones that give the new creative folks an opportunity. It used to be that the major broadcast stations did. That doesn't happen anymore.

So I think it has been an injustice that the performers had—Elvis, I don't think, ever wrote a song. I doubt Frank Sinatra did. But nobody could perform a song like Frank Sinatra and Elvis. When you think of singers and you think of music, you think of them. You don't think of Stoller and his partner. You don't think necessarily of Sammy Conn or Jimmy Van Heusen. You think of Elvis. You think of Frank Sinatra.

When I think of "These Boots are Made for Walkin'," I think of Nancy Sinatra. I am not sure if another singer could have made them dance, could have made them walk. Lee Hazlewood wrote it, but it was Nancy that made those boots walk. And it is the performer that makes things special.

So they need to be compensated. I think we have come a long way. And I am pleased to be part of this Committee that is going to end this injustice that has gone on for years and the free use of these great people's talents.

And if I can take 1 minute to reflect, I want to thank Ms. Sinatra for being here. I am a big fan of her father's, have seen him perform four or five times in my life, have his picture up, a big picture in my home and all kind of Sinatra books everywhere. But he came to Memphis and performed at the St. Jude shower of stars on several occasions, which was a big thing in Memphis and a big thing for me to attend.

And I know that when Elvis came back from serving in our military in Germany you facilitated his going to be on that show. And I don't think there is a greater moment in show business, even though they made those songs, than your father singing Love Me Tender and Elvis singing Witchcraft, a great moment. Thank you very much.

[The prepared statement of Mr. Cohen follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

STATEMENT OF REP. STEVE COHEN
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
HEARING ON H.R. 4789 – THE "PERFORMANCE RIGHTS ACT"
JUNE 11, 2008

I am a strong supporter of H.R. 4789, the "Performance Rights Act." Notwithstanding the efforts of broadcasters and other opponents of this legislation, the issue that the Act addresses is straightforward. Internet, cable, and satellite radio are required to pay performance right royalties to holders of sound recording copyrights, and such royalties are an essential source of income to recording artists. There is no good reason why the far larger and more profitable terrestrial radio broadcasters should remain exempt from this same obligation.

Opponents raise numerous arguments that have nothing to do with whether Congress should establish a performance right for over-the-air public performances of sound recordings. Rather, they seek to change the subject by demonizing and ridiculing the recording industry. Such arguments are unpersuasive and unhelpful. Moreover, this tactic only serves to illustrate the fact that there are no meritorious arguments that actually detract from the need to equalize the rights of sound recording copyright holders, regardless of the medium through which their works are publicly performed.

I recognize the valuable contribution that broadcasters make to the national economy and the good works that they contribute to local communities around the country. I do not wish for them to see my position on this issue as a slap at them. Nonetheless, my judgment is that the merits of the arguments in this case weigh strongly in favor of artists and record labels. Therefore, I urge my colleagues to support H.R. 4789.

Mr. BERMAN. I am pleased to recognize the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I would like to thank you and Ranking Member Coble for holding this hearing on the Performance Rights Act. Because the United States has been the pioneer for strong intellectual property protections, it is no surprise that the copyright industries are so successful and are so crucial to our national economy.

The U.S. copyright industries have created millions of high-skilled, high-paying U.S. jobs and have contributed billions to our economy. Today we are examining whether an exemption that has existed for years which allowed terrestrial broadcasters to play copyrighted works without paying performance rights royalties is still justified in the digital age. This is a tough issue.

Broadcasters argue that recording artists receive great benefits from the airplay their songs get, which result in higher sales for the artists. While this is likely true, I believe that digital music technologies have come to fruition over the past 5 to 10 years that consumers do not rely solely on terrestrial broadcast stations for their music any more. Other media like satellite radio and online broadcasters also deliver promotional value to the recording artists that they pay performance right royalties.

On the other hand, I am very concerned about maintaining local radio programming. Local radio programming is one of the best and least expensive ways that citizens gain access to news and emergency information in their communities. At a time when consolidation seems to be the norm, I believe it is important to do what we can to encourage radio stations to continue to provide local news and information, which often is done at cost or at a loss to the radio stations.

As such, I am pleased that H.R. 4789 contains provisions to grant relief to small radio operators who fall underneath the revenue threshold in the bill. However, I am still concerned that the exemption does not strike the right balance, that some radio stations that provide excellent local programming that may make enough money to just clear the revenue threshold of the bill will be on the fringe.

It would be a shame if this legislation were to be the last straw that caused stations like these to make the decision to go ahead and sell to a national conglomerate. I am working to ensure that local programming is not adversely affected by the good intentions of this bill. And it is my hope that the Chairman and Ranking Member of the Subcommittee will join me in this effort.

And again, I thank you for holding this hearing. And I look forward to hearing from all of our very interesting witnesses today.

Mr. BERMAN. I recognize the gentleman from California, Mr. Sherman.

Mr. SHERMAN. Thank you, Mr. Chairman. Thanks for introducing this bill and for your 20 years of work to try to bring fairness and justice to those who perform.

You know, you get a lot of wisdom before kindergarten from fairy tales. And we learned before kindergarten that terrible things happen to a society that refuses to pay the piper. As Americans we believe in the rule of law. We believe in the protection of private

property. We have one highly anomalous exception, and that is the rights of performers of recorded music.

The unfairness and anomalous situation is proven by so many examples. We see that satellite and cable broadcasters have to pay, giving them an unfair disadvantage perhaps when they compete with broadcasters. At the same time, no one has argued recently that the satellite and cable broadcasters should not have to pay the performance artists, yet they do as much for promotion as do the broadcasters.

We hear the use of the word tax, which is an ugly misuse of the English language. A tax produces revenue for government. This bill will not.

And where would we be if the Chinese decided that they could use any patent or copyright for anything they manufacture and if our private companies want a royalty, that is a tax that they are not obligated to pay? Of course, imagine a Chinese textile company making Mickey Mouse t-shirts and saying we don't have to pay the Disney company. After all, we are promoting Disneyland.

The idea that the satellite or cable broadcasters of paying a tax is absurd. The idea that the broadcasters are paying a tax when they pay for sports broadcasting is absurd. Calling this a tax is absurd.

One could imagine that I could take my TiVo, record any television broadcast, edit out the commercials, Webcast that. Would I then when stopped from that activity say I am being taxed, I am promoting the program? Because if people watch last week's episode they are be inspired to watch this week's episode.

Where are the broadcasters demanding that I start that activity, that I have the legal right to do so? Don't they need their programs promoted? Likewise, the idea that somehow this promotion justifies the free use of these works is absurd. Imagine Lindsey Lohan steals a car from the Hertz lot, drives it around, refuses to pay and then says I was promoting Hertz.

Now, it is true that under this bill some may decide—and this is the voluntary right of any property owner—to allow the use of their property without compensation. Hertz might very well decide to give Lindsey Lohan the key. But she can't steal them under our law.

Likewise, some garage band may decide that its best approach is to allow free broadcast, uncompensated broadcast of their efforts. I should point out also that this bill is important from a U.S. competitiveness standpoint. Our current law puts this at odds with the laws of the rest of the world.

We both sit on the Foreign Affairs Committee and know how important it is to the Chairman of the Foreign Affairs Committee that we reach out to the world and show that we are willing to harmonize our behavior with world expectations. And in addition we would pick up some $70 million for our artists from foreign sources perhaps providing some slight help with our enormous great deficit.

We ought to believe in the rule of law, the right to private property. And that means that you do not allow people to steal—that is to say to take the use of private property without permission and

without compensation. This bill is long past due. Put me down as undecided. I yield back.

Mr. BERMAN. The gentleman from Florida, Mr. Keller?

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

Thank you, to the witnesses, for being here. I certainly respect your opinions on both sides and look forward to hearing from you.

There is a bit of a distinction about how folks in this industry get their revenue. Songwriters get most of their royalties to do the public performances of their musical compositions. While record companies and performers get most of their money through record sales, concert tickets and merchandising. And there is no question that record labels and artists both are hurting right now for two principle reasons.

Number one, it is piracy. I am very sympathetic to that cause and have taken steps to help them. And number two, their business model at times was a bit off. People didn't want to pay $17.99 for a CD that had 12 songs on it and they only had one good song. So folks went to iTunes and bought that song for 99 cents instead. And now the music industry has adapted, and hopefully they can reap the benefits of that.

But these two things that are hurting the music industry were not caused by broadcasters. In fact, the benefit of having songs played on the free radio by the local radio stations are tremendous. When the songs are played, record sales go up. When concerts are promoted, concert attendance goes up. When more people attend concerts, merchandising profit goes up, all to the benefit of these artists and record companies.

In fact, the benefits that local radio stations provide to artists and record labels is so great that these record labels would pay the stations if they were able to get away with it. In fact, that is what used to happen in the 1950's. We had payola scandals. And payola is the practice by which a record label and some independent promoters offer money and other gifts in exchange for broadcast airtime for particular songs or artists.

It was such a benefit that the practice has continued as late as December of 2006. One company, a radio conglomerate called Intercom settled a suit brought by the New York attorney general for $4.25 million for engaging in payola. So clearly, there must be some benefit to the record companies and artists or else they wouldn't be paying the local radio station, sometimes illegally, to play their music.

And so, it was mentioned that, well, look at what happens with Disney. They get paid. Well, actually under this bill they don't get paid. This proposes to put a fee on the local radio stations only. If you are playing the same songs in a Wal-Mart or a theme park like Disney or at Olive Garden, the performer would not get paid. If you want to be intellectually pure, then you should be paid in those venues just as well as on the—if the song is played on the radio.

And so, I am looking forward to what the witnesses have to say about these issues. I was amused to see a letter. This was issued yesterday by the Department of Commerce in support of this bill where they say that there is an economic benefit to broadcasters from this bill. I would be curious if the broadcasters feel that there is an economic benefit, if they think this is in their best interest.

And I look forward to hearing from both sides on this issue. And thank you to our witnesses. I yield back the balance of my time.

Mr. BERMAN. I thank the gentleman.

And I yield to the gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, Mr. Chairman. I will be brief. I know we all want to listen to our witnesses.

But I just wanted to say I think there are good arguments that we will hear on both sides of these issues—of this issue. But one of the things that is of concern to me is that if we are going to have kind of a parity situation, we need to look at platform parity as well. To me, it doesn't make sense to have technology used to deliver music determine the amount of royalties that are going to be assessed.

And the recording industry feels that it is adversely impacted by the absence of performance royalties from the terrestrial broadcasters. The broadcast industry argues that royalty payments will devastate local radio. But the industry that is in real trouble today is Internet radio. Many Webcasters are facing royalty payments that are in excess of their entire revenues. And the Arbitron data now shows that Internet radio listenership is falling.

We have 150 Members of the House who co-sponsored a bill to take a look at that situation a year ago. And I would ask unanimous consent to put a letter in the record. We asked that we have a hearing on this subject. I do think it is pretty essential to do so.

I mean, if we take a look at the cable/satellite fees, it is about—well, the revenues, total revenues are about $2 billion in those sectors. Six to 15 percent of it is being paid out in royalties. The Internet radio companies generated about $150 million in revenue. And they paid at least 50 percent of that revenue in royalties. And some paid 100 percent of their revenue in royalties. Meanwhile, the broadcast industry generated $15.5 billion, and they paid nothing.

So it seems to me that if we are going to take a look at disparity across platforms and it is fair and appropriate to do so, it would be a real mistake not to use the opportunity to also take a look at Internet radio. And I think if we wait too much longer we are not going to have a discussion because it is not going to exist any more. And I think that would be a tragic outcome because if you want to look at how new artists newly break in without being too beholden to labels, it is on Internet radio. That is really the freedom and the opportunity.

And I have heard from some artists who are now telling me that one of their top priorities is not pirates any more. It is Net neutrality so that they are going to have an opportunity to control their future.

So I wanted to raise that issue. I look forward to hearing this debate. But it will not be complete for me until we include the Internet radio discussion.

And I thank the Chairman for recognizing me and yield back.

Mr. BERMAN. I thank the gentlelady.

And the gentleman from California, the chief Republican co-sponsor of this legislation, H.R. 4789, Mr. Issa?

Mr. ISSA. Thank you, Mr. Chairman. And it has been a privilege to work together on this bill and to see it come so far so quickly. When you and I were talking about this, I guess, a year-and-a-half

ago, I am not sure that we really knew that we would catch on so quickly to people realizing that this is a question that has to be answered now, not later.

Very clearly, I think the panel has heard that this is a divided dais, that there are some people who are undecided. There are some people who are, like Mr. Sherman, undecided in one direction. I am also one of those people that is undecided in the direction of the intellectual property holders.

But in setting the tone for this hearing and the markup to follow, I would hope that I would set a tone for the broadcasters that my co-authorship of this bill, my belief that this is clearly a law whose time has come to be reviewed and changed does so with an understanding that broadcasters bought their band width. The vast majority of them didn't get it for free yesterday. They, in fact, purchased their station based on a set of rules of the road that existed at that time.

In a strange and perverse way their stations were worth more money because they didn't pay the performer. That is a reality of the price they paid.

So as we transition—and I am confident that we will go from free being the balance between the two extremes to some amount of money—I think we have to do so recognizing that, in fact, we are in a transition. The broadcasters are transitioning from analogue to digital. The recording artists are dealing with the days of the eight-track and cassette being in the rearview mirror and the day of the perfect digital master being available on the Internet being here. And it has not been a pretty thing to deal with.

So I would hope that we start looking for the common ground that we have not yet found. Broadcasters have, not just in large, but in absolute unison, have told me that they cannot afford to pay anything. I don't believe that is true.

I do believe that this bill at least offers out an olive branch with concessions for the small broadcaster and certain other broadcasters, religious broadcasters and so on. I believe that there are additional olive branches that can be offered.

I believe that a transition period, a significant transition period could be put in this bill. But it won't be put in if zero versus an intellectual property right is the common ground that we are having to choose between. We have to choose a compromise, which means both sides have to come to the table.

To that end, I would hope that as we transition from this hearing to the markup and beyond that we understand that at least in some cases—for example, a performer whose records are no longer available commercially cannot get the benefit of promotion on the radio. So at least in that case there must be some alternative revenue that a person would be entitled to if promotion by definition gains them no benefit at all. And there are such artists.

I think additionally if we assume that in some cases the broadcasters are, in fact, extremely valuable—the word payola was used. And that is clearly illegal. But the fact is that I think that the companies representing the artists and the artists themselves need to come to terms with the fact that an arm's length relationship publicly, you know, done above the table that leads to real promotion should be put in the work.

Meaning your station should be able to say—because you have an absolute right to play who you want to or not play who you don't want to—that, in fact, if you are going to put airtime into promoting a new artist, if you are going to put airtime, quite frankly, into playing the ones that everyone has forgotten—somebody talked about 12 songs and only one was good. Well, I am a Harry Chapin fan. So I have got to tell you I like them all. They are all long, but I like them all.

And some of them don't get the play time. And I would hope that they would. So I would hope that we would come to the common ground.

I for one—and I know the Chairman for another—would absolutely welcome a constructive dialogue leading to innovative ideas on how the broadcasters could find a way to transition to paying some revenue, the intellectual property holders and their representatives understanding that broadcasters will need to find revenue in return for affirmative promotion, that we can bring those two together.

So I look forward to this panel. I know that it will be diverse in its views. But I also look forward to the negotiations that will be necessary to bring this bill to be law.

And with that, I thank the Chairman for his indulgence.

Mr. BERMAN. The time of the gentleman has expired.

The gentleman from Georgia, Mr. Johnson?

Mr. JOHNSON. Thank you, Mr. Chairman. Mr. Chairman, last week was the death of Bo Diddley, an artist who did not have control over his performances, over his works actually. And so, he did not receive royalties for the performance of his hits. And at the age of 79 he was still out touring trying to make ends meet. And I can think of no greater tragedy than an artist who has caused so much joy in the hearts of listeners to have to listen to their own rendition played on broadcast radio and everyone else in the chain is getting paid except for the artist.

And the artist has to go out and try to duplicate that performance every night, six nights a week, 250 nights a year, however many nights it is, and could never rest on the just royalties that should have been paid for that performance because we don't have that right here in the United States to pay performance royalties to artists. They are not fairly compensated for their creativity and for their investment.

They are paid royalties, these artists, when their music is played on cable television, satellite radio or the Internet. But I think most people don't realize that when they turn on an AM or FM dial and listen at a rendition that has played repeatedly over the past 30, 40, 45 years that the artists who made that rendition are not being paid for the performance of that work.

And so, the Performance Rights Act, which I am a co-sponsor of, I am proud to be a co-sponsor of, would correct that imbalance and that injustice so that artists from pop stars to backup singers would be fairly rewarded when broadcast radio stations played their music. And this bill will ensure that musicians who are threatened or artists who are threatened by today's pervasive online piracy would still have strong economic incentives and protections when they provide us with their works.

Indeed, the architects of our political system realized that creativity must be protected. And Congress has a constitutional obligation to protect these artists' work. Article 1, Section 8 mandates that Congress—Article 1, Section 8 of our Constitution mandates that Congress, "Promote the progress of science and the useful arts by securing for limited times to authors the exclusive right to their writing."

And understanding that writers and authors have this exclusive right, it stands to reason that we should compensate the performers of those rights for the work that they do as well. The courts have held that this mandate applies not only to authors of written works, but to all creators of intellectual property from inventors to musicians. Congress must protect American creation as the property of their creator.

I encourage my colleagues to support this legislation. It will reward musicians for their work and other artists. And it will fulfill our constitutional obligation to promote the arts by securing artists' performance rights to the musical performances that they create.

And I yield back.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE HANK JOHNSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Judiciary Subcommittee on Courts, the Internet and Intellectual Property
Wednesday, June 11, 2008 hearing on H.R. 4789, the "Performance Rights Act"
Remarks for Rep. Hank Johnson

- The Performance Rights Act – of which I am a cosponsor – will ensure that musicians and record labels are fairly compensated for their creativity and investment.

- Today, artists and labels are paid royalties when their music is played on cable television, satellite radio, or the internet.

- But most people probably don't realize that they are **not** compensated when traditional, land-based radio stations broadcast their work.

- The Performance Rights Act would correct this imbalance so that record labels and artists – from pop stars to backup singers – are fairly rewarded when radio stations play their music.

- This bill will ensure that musicians and labels, who are threatened by today's pervasive online piracy, still have strong economic incentives to provide us with their music. →→

- Indeed, the arcitects of our political system realized that creativity must be protected, and Congress has a Constitutional obligation to protect these artists' work. Article One, Section Eight mandates that Congress:

  "promote the progress of science and the useful arts by securing for limited times to authors the exclusive right to their writings."

- The Courts have held that this mandate applies not only to authors of written works but to all creators of intellectual property, from inventors to musicians. Congress must protect American creations as the property of their creators.

- I encourage my colleagues to support this legislation. It will reward musicians and record labels for their work, and it will fulfill our Constitutional obligation to promote the arts by securing artists' and labels' rights to the music they produce.

Mr. BERMAN. I thank the gentleman.

The gentleman from Indiana, Mr. Pence?

Mr. PENCE. Thank you, Chairman. Thanks for calling this hearing. I am very much looking forward to hearing from this panel, our distinguished witnesses and people on whom I had a crush at the age of 10.

Mr. BERMAN. It is not you, Tom.

Mr. PENCE. This is a very important issue. I want to identify myself with Mr. Keller's remarks. I understand both sides of this entertainment economy are hurting. And as Congressman Keller said, I am aware that on the performance side the principal villain is piracy.

And let me renew my appreciation for the Ranking Member's longstanding leadership on intellectual property issues and the Chairman's leadership in this area. This very Subcommittee exists for the purpose of addressing and protecting the intellectual property rights of the interests represented on this side of the argument.

The other is I am also aware that people are struggling among terrestrial broadcasters. I made a living for about 10 years in and around local radio back in Indiana. And in the ever more diverse entertainment economy that we have today the point, click, download choices that simply weren't there when people were out trying to hustle advertising sales even back in the early 1990's represents a very serious, if not existential threat to the economic vitality of local radio and terrestrial radio. And so, I understand those pressures very much.

And, Mr. Chairman, I am always interested in new business models for the new economy. I can't help but wonder aloud if radio stations ultimately will be required by Congress to pay artists directly performance fees as considered in H.R. 4789. Shouldn't radio stations perhaps enjoy some of the revenues from sales within that ADI? And doesn't the technology actually exist today to allow a portion of that revenue stream that comes out of that ADI to flow back to replenish the coffers of performance fees that might be paid? I just find myself thinking out loud about that.

Because I struggle with the Performance Rights Act as currently crafted. Although I know there has been a sincere effort to carve out exceptions and the like, religious broadcasters and local broadcasters. But my question is oftentimes as performers if, you know, you could pay radio stations to air your records, would you? And that is usually the one where the most respected representatives in this industry will look at me blankly and not answer me.

I mean, and if they, in fact, would be willing to pay, isn't that kind of prima facie evidence that there is value in the airtime? And I listened with great interest to my colleagues' thoughtful reflections on the life and career of Bo Diddley who recently passed. And as he used the words how tragic it was for him to hear his records played on a local radio station and not be compensated for that. And I respect the gentleman's opinion on that.

I would only add that I think the only thing more tragic for him or any other artist than hearing their record played on a local radio station and not being paid would be not hearing your record played on a local radio station. I mean, the very opportunity for artists to

be heard—I expect there have been generations of Americans who have come to appreciate the genius of Bo Diddley and the genius of other artists who have been able to sustain careers over many decades precisely because of the infrastructure of local radio in America that keeps the work of these people alive and before the public.

So I am listening. I have an open, if not fertile, mind on these issues. But I do bring these fundamental questions to this panel. And I look forward very much to the testimony and to the ability to have anyone on this panel respond to those core issues.

And I yield back.

Mr. BERMAN. I thank the gentleman.

The gentleman from Florida, Mr. Wexler?

Mr. WEXLER. Thank you, Mr. Chairman. I am not undecided. I have two points that seem to me compelling. One, if I understand it correctly, the radio stations took in $16 billion in advertising revenue last year, and not one cent was paid out to compensate performing artists for their music, which makes the radio station viable. So $16 billion in advertising revenue, zero in payments to performing artists. Something is wrong.

Some of our colleagues have talked about an issue of fair compensation. This isn't an issue of fair compensation. This is an issue of no compensation.

We are not talking about 3 percent versus 5 percent or whatever the number might be. This is zero versus $16 billion in revenue.

Also, this argument of well, we don't have to pay because we promote. And I am just curious when unilaterally declaring that we promote someone's product, when that replaced in the American economy the requirement that you pay for it.

It would be one thing if you negotiated it and both parties said, well, because you are promoting it, therefore we will reduce our price or you won't have to pay us under certain circumstances. But the idea that one party unilaterally says, well, I am promoting your product, therefore I don't owe you anything else—I just don't understand how that fits into any type of economic model.

And when you take that argument to its logical conclusion, as some people have talked about older music, well, does that mean because older music really is well beyond being promoted that older music should be paid for but newer music should not? Clearly, that wouldn't seem to be particularly sensible, either.

Thank you, Mr. Chairman, for pushing this very important issue.

[The prepared statement of Mr. Wexler follows:]

PREPARED STATEMENT OF THE HONORABLE ROBERT WEXLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Statement of Congressman Robert Wexler at Judiciary Committee Hearing on H.R. 4789, "Performance Rights Act"

Mr. Chairman:

The music that we hear and enjoy on the radio is the product of musicians' hard work, creativity, and inspiration. A radio station develops its identity through the type of music it plays, creating a dedicated listening audience and paving the way for financial viability. Because the music played by a station determines its financial success, it is difficult to understand how radio stations have been given a loophole in our Nation's copyright laws that excuse them from reimbursing the very artists and musicians who created the music responsible for keeping a station on the air.

Fundamentally, I hope we can all agree on the principle of basic equity, which underlies this discussion: It is wrong that musicians are paid when their music is broadcast on satellite radio, internet radio, cable radio, when streaming broadcast signal online,

internet streaming on mobile phones, but are not paid by AM and FM stations.

Musicians are compensated in almost every country, including Canada, Japan, France, Spain, Austria, Germany, and many others. In fact, the United States currently stands with China, North Korea, Sudan, and Iran as one of the few countries that do not provide artists and musicians with a broadcast performance royalty.

This gaping loophole would be closed by H.R. 4789, the "Performance Rights Bill." Under this bill, artists and musicians would be rightfully compensated for their work by radio broadcasters who, until now, have been reaping huge financial benefits by playing music for free. This bill will ensure that all traditional radio stations – AM and FM stations – pay a fair performance royalty to artists when their music is played on a station. These royalties will go to the performers, backup singers,

studio musicians, and copyright holders, all of whom create the music that is an indelible part of our daily lives. Collectively, they are also responsible for the financial viability of a radio station.

Through advertising revenue alone, stations make approximately $16 billion each year. However, not one penny of the advertising revenue is used to compensate performing artists for their music that makes a station viable. It is long past due that Congress addresses the responsibility of stations to share their revenue with the very musicians responsible for their financial success.

However, it is important to recognize that not all stations are broadcast to a large listening audience. There are many that broadcast to our Nation's rural communities. These stations that depend upon a smaller listening audience should not be subject to the same royalty assessment that those broadcasting to large city markets should. The "Performance Rights Bill" rightly

distinguishes between stations based upon the listening audience markets they target. Under this bill, small stations will only be required to pay a flat annual fee, rather than a fee for each song played.

Finally, in addition to expressing my continuing support for this bill and for the ultimate fairness that it will deliver to recording artists who have long deserved to be paid, I want to note my concern that this bill does not help Internet radio companies which seem to have suffered an injustice at the hands of the Copyright Royalty Board. I am not a cosponsor of the Internet Radio Equality Act because I do not think Congress should be legislating royalty rates, but I do believe that a decision which imposes royalties of 50, 60 and even 80 percent of revenue on services that are legal, properly-monetized and clearly meeting a very strong consumer need in this country, such as Pandora with 13 million registered users, must be flawed.

Moreover, I am sympathetic to concerns expressed by Internet radio supporters that today's bill resolves concerns with broadcast radio, but does not provide for parity among broadcast radio, satellite radio, cable radio and Internet radio. Certainly these services compete against one another and this Committee should consider whether the rules and regulations should ensure that the competition is fair rather than unfair. When a satellite radio's royalties are 6% of revenue and an Internet radio station's are 70% of revenue, something is unfair and this Committee should be concerned.

I want to thank Chairman Berman for all his work on this issue. He has been a tireless champion for all of the professionals responsible for creating the music that makes stations successful and who deserve to be compensated their work.

Mr. BERMAN. I thank the gentleman.

I should note for the record that the fact that a Member chose not to speak on this issue does not mean that that Member is not interested in this issue. Secondly, the warm-up performers are finished. We will now go to the main event.

Nancy Sinatra is a world famous recording artist with more than 24 chart hits in the U.S. and internationally, including the song "These Boots are Made for Walkin'." Nancy has written two books about her father, Frank Sinatra. She is very active in charitable causes, including Jerry Lewis' MDA telethon and songs of love. In 2006 Nancy received a star on the Hollywood walk of fame in recognition of her career achievements and her contributions to society, and for a long time, and I assume it still is, a constituent of Los Angeles and our area.

Steve Newberry is president and CEO of Commonwealth Broadcasting Corporation, a multi-station radio broadcast group with stations throughout Kentucky. Steve has served as vice-chair of the National Association of Broadcasters Radio board of directors and president of the Kentucky Association of Broadcasters Radio board of directors and president of the Kentucky Broadcasters Association. Steve has been active in public broadcasting having served for 6 years as a member of the national board of trustees of America's public television stations and 5 years as chairman of the Authority for Kentucky Educational.

Charles Warfield, good to have you here again. He is president and COO of ICBC Broadcast Holdings, which owns and operates 17 radio stations in New York City; San Francisco; Jackson, MS; and Columbia, SC. Throughout his career Charles has served as top manager for radio stations, including WRKS FM in New York, WDAS AM/FM in Philadelphia and KKBT FM in Los Angeles. Presently he serves on the Radio Advertising Bureau executive committee. His community commitments have included the American Red Cross, the United Negro College Fund, the Urban League, Harlem YMCA and various other groups.

Thomas Lee is the international president of the American Federation of Musicians of the United States and Canada. The AFM is an international labor organization representing over 90,000 professional musicians and over 230 local throughout the United States and Canada. Mr. Lee is also a professional pianist and served for 24 years on active military duty with the President's own Marine band performing 3 or more days a week at White House functions.

It is a pleasure to have all of you here. We appreciate your patience.

And, Ms. Sinatra, why don't you start?

TESTIMONY OF NANCY SINATRA, DAUGHTER OF THE LATE FRANK SINATRA, LEGENDARY RECORDING ARTIST

Ms. SINATRA. Can you hear me? It is a blonde thing. I didn't turn it on. Sorry.

Chairman Berman, Ranking Member Coble, and Members of this Committee. thank you all so much for inviting me here today. I am very nervous. The truth is I would rather be at the Hollywood Bowl

in front of 18,000 people singing a song. But I am very grateful to you for inviting me.

When most people are asked how much do you think artists are paid when their music is played on the radio they usually say a few cents. But as our chairman knows, over the years he has learned that we are paid zero. You all know that.

I actually feel like I should tear up my script and throw it out because you have all said practically everything that is in here. But then I wouldn't be doing my job. So I will read ahead.

I want to thank Chairman Berman for the leadership you have shown on this issue. On behalf of all recording artists—and this goes for the musicians, the rhythm sections, the horn sections, the reed sections, the string sections—whose names people don't know and, of course, the people whose names are on marquees, on a CD cover or on an iTunes download. We are all very grateful.

Many years have gone by since we began trying to right this wrong. Yet performers still are not compensated for the use of their work on broadcast radio. And we are still here still trying to get fair pay.

This is an injustice that compelled my father 40 years ago to lend his voice to the cause of fairness. For some of the singers and musicians that I know, especially back in the band era, their only compensation was their initial salary as a band singer, a stipend perhaps. But if they were to receive a royalty from their classic recordings that are still being played four and five decades later, it would mean the difference between having food and prescription drugs or not.

Imagine, if you will, struggling in your job, perhaps for years, to make the best product you can, a product made of your blood, sweat and tears. And now imagine people taking that product to use to build their own hugely successful businesses, just taking it, no permission, no payment, no conscience.

Imagine those people telling you they are doing you a favor by taking your product without your consent because some more people might come to know about you and your product. Imagine those people now telling you to shoo and go find compensation from those other people. And by the way, make some more of that product so we can take that, too.

Now, why is this scenario—does that mean something? Why is this scenario so outrageous in the abstract, yet perfectly acceptable in the reality of broadcasting? Why is the broadcasters' exemption allowed to rob us of our hard-earned income, including the millions from broadcasters overseas, very important point, who don't have to pay us because our country doesn't?

Why is the broadcasters' exemption allowed to disadvantage every other radio platform that does correctly pay us? In what other business is the promise of some promotion justification for taking someone's product?

Again, we are in no way seeking to harm broadcasters. Please believe me. We just want our fair share. And that is why I was pleased also to see that the legislation not only seeks fair royalties for recording artists, but it protects songwriters and gives an important break to religious, educational, non-commercial and small

radio stations, the ones, who, like the artists we are talking about today.

Mr. BERMAN. This means that in about 10 minutes we are going to have to recess for a while. But go ahead.

Ms. SINATRA. I will hurry. I will hurry.

Mr. BERMAN. No.

Ms. SINATRA. This search for justice is not about those of us whose careers have branched out and lasted for decades. It is not about me. It is not about my dad. Certainly, Dad wasn't fighting for this because he needed more money. His fight carried on by us all is a simple one of fairness. We are in search of fairness.

Our power lies in communicating our situation and feelings. We can sing about injustice, and our instruments can express our frustration and yearning, but your power lies in making the change. I hope you will consider supporting the Performance Rights Act. And thank you very much.

I would like to know what is ADI. I don't know what that means.

Mr. BERMAN. I know what ATD is.

Ms. SINATRA. Okay. I just got it. Thank you. I am sorry I took so long.

[The prepared statement of Ms. Sinatra follows:]

PREPARED STATEMENT OF NANCY SINATRA

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee. Thank you for inviting me to appear before you today to speak on the issue of a performance right. I am here on behalf of musicFIRST, a coalition of over 13 music industry groups, with more than 160 founding members and growing weekly. My bio is included in the written materials submitted so I will not be talking about my 24 chart hits or anything else about my 40 –plus year career.

When most people are asked, "How much do you think artists are paid when they're music is played on the radio?" they usually say a few cents. Mr. Chairman, over the years you've come to know that this is not true, that we are paid zero. I want to thank you for the leadership you've taken on this issue on behalf of all recording artists – from the bass players, horn players, string players, drummers and vocalists, whose names are rarely known by the public, to those who are fortunate enough to be the headliner on a marquee, on a CD cover or an iTunes download. In my written testimony you will find a long and winding road about why performers in this country don't receive a performance right, unlike those in virtually every other free market democratic country.

Mr. Chairman, this wasn't and isn't about the less than one half of one percent of recording artists who become stars. My father championed the cause of all recording artists, the vast middle class of singers and musicians some of whom are sitting behind me today. It was, for him, not only a matter of principle or decency, but of simple logic that all artists need to earn a living if they are to carry on. The fact that the United States remains the only developed country in the world that does not compensate performers when their music is played on the air, keeping company in this regard with North Korea, Iran and China probably says it all right there.

The truth is few who undertake a career in music achieve mega-star status. Some are like me, a couple of dozen hits, some touring opportunities and, if you get a big enough name, radio will play your songs but only if they believed it would help them sell advertising. Some have a megahit – the one hit wonders – but don't achieve the level of success people might think. Radio uses that hit every day to go to the bank. Imagine the recording artist who recorded but didn't write that hit, knowing that radio profits from that recording but he or she does not.

Most recording artists are of the middle class variety – they work hard, make a living and expect to be appropriately paid. Some are forced to tour until they die, if they can still sell tickets. And of course, widows and widowers can't tour at all. Lacking a pension, many live out their old age hearing their songs on the radio knowing that radio is making money while they are living in a home somewhere unable to make ends meet.

This struggle has been going on for a long time. Thirty years ago, in 1978, a report of the Register of Copyrights stated:

"Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap

in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances."

But the struggle began long before that, in the 1930s when recording artists were kicked out of radio stations and replaced with their own recordings. Radio operators reasoned, "Why pay performers to come into the studio and perform live, when we could play their records for free?" Because copyright law was written before sound recordings existed, the courts ruled that radio could get away with this. And when performers went to Congress to get sound recordings included in copyright law, they met and keep meeting the fierce, well-funded and powerful resistance of big radio. Three times this issue came before Congress – in 1975, 1979 and 1981 -- and three times recording artists were denied.

In 1995 recording artists were granted the performance right only for digital radio such as satellite and the Internet. Now we have a situation where one format – AM/FM radio – has a competitive advantage over another – digital radio. This isn't any more fair to digital radio than it is to artists.

The job of a recording artist is to take a composition and bring it to life – to infuse it with their own love, sadness, anger, hope and longing and have the listener share in the experience. It takes a lot of talent, hard work, and sheer persistence.

Imagine struggling in your job, perhaps for years, to make the best product you can – a product made of your blood, sweat and tears. Now imagine people taking that product to use to build their own hugely successful businesses. Just taking it – no permission, no payment, and no consequence. Imagine those people telling you they're doing you a favor by taking your product without your consent because some more people might come to know about you and your product. Imagine those people now telling you to shoo and go find compensation from those other people. Oh, and by the way, make some more of that product so we can take that, too.

Why is this scenario so outrageous in the abstract, yet perfectly acceptable in the reality of broadcasting? Why is the broadcasters' exemption allowed to rob us of our hard-earned income, including the millions from broadcasters overseas who don't have to pay us because our own country doesn't? Why is the broadcasters' exemption allowed to disadvantage every other radio platform that does correctly pay us? In what other business is the chance of some promotion justification for taking another's property?

Let me be clear: We love radio. All of us want to see it prosper and continue to grow – why shouldn't we? But it shouldn't be at our sole expense. Performers value whatever benefit broadcasters MAY provide. But we respectfully request that broadcasters similarly value the benefit we DO provide them. It is OUR music that attracts their listeners. It is OUR music that creates their hugely valuable ad space. It is OUR music that attracts listeners and drives the multi-billion dollar radio industry. Mr. Chairman, Members of the committee, the radio industry earns $16 billion dollars a year from

advertisers just for playing our music and pays the people who create the recordings absolutely nothing. I don't know of any business in America where people who do the work aren't paid for the products they produce.

Again, we are in no way seeking to harm broadcasters, just to be paid our fair share. That is why I am pleased to see that the introduced legislation not only seeks fair royalties for recording artists, but it protects songwriters and gives an important break to religious, educational, non-commercial and small radio stations; the ones, who, like the middle class artists we are talking about today, are working hard to make ends meet. In fact the musicFIRST coalition sent a letter to all radio stations across the country, reaching out and explaining the fair reasoning that went into this legislation. I would like to submit that letter for the record.

This search for justice is not about me. It is not about my father. But we both add our voices to a growing choir. Certainly, Dad wasn't fighting for this because he needed more money. His fight – carried on by us all – is one of simple fairness. It is about the thousands of performers, some of whom attended the hearing, who scratch out a living with their music. Why have these talented performers spanning generations and genres had the courage to speak out? Because we are in search of fairness, for us and for the thousands of performers and others who work so hard to make the music that you love.

Imagine, if you will, that the ability to record music had not been discovered until today. And imagine that radio stations are all talk all the time. And imagine that the ability to make sound recordings is finally discovered by a company like Microsoft or Apple. Now can you imagine how much the big radio conglomerates would then have to pay for sound recordings? Far, far more than they would have to pay under the proposed legislation. Why? Because the music is valuable, and big radio can't take advantage of Bill Gates or Steve Jobs the way they do recording artists. In a free market with an even playing field the radio stations would gladly pay for the recorded music because they know it's the heart and soul of their businesses. The fact is radio has got an incredibly good deal. They get the airwaves for free without having to pay the taxpayers a dime. And they get to use any music they want, any time they want, without having to seek permission of the copyright owners or the artists. For that, our hard working performers ask for a small royalty commensurate with the rest of the free world.

Our power lies in communicating our situation and feelings. We can sing about injustice and our instruments can express our frustration and yearning. But your power lies in actually making change. I hope you will finally correct this glaring inequity in our law that my father and so many others have fought against. We hope you will support the Performance Rights Act. Thank you.

Mr. BERMAN. I am sorry if that was one of the initials I used somewhere. Okay. Thank you very much. I did mention earlier that all of your statements will be included in the record. We would ask you to limit your testimony to 5 minutes. Probably after Mr. Newberry we will have to recess. We have two votes which make take 15 or 20 minutes and then come back and continue the hearing.

Mr. Newberry?

Mr. COBLE. Mr. Chairman, may I ask Mr. Newberry a quick question? What does ADI mean, Mr. Newberry?

Mr. NEWBERRY. Area of dominant influence. It is a ratings definition for a market area or geographical area.

Mr. COBLE. Thank you.

I didn't know, either, Ms. Sinatra.

TESTIMONY OF STEVEN W. NEWBERRY, PRESIDENT AND CEO, COMMONWEALTH BROADCASTING CORPORATION

Mr. NEWBERRY. Good afternoon, Chairman Berman, Ranking Member Coble and Members of this Subcommittee. My name is Steve Newberry, and I am president and CEO of Commonwealth Broadcasting, which operates 23 stations located in Kentucky. Thank you for inviting me to testify today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

I can tell you that all broadcasters, urban, rural, religious, public, community, ethnic, large and small broadcasters like me have concerns and oppose H.R. 4789. Local radio provides to the recording industry what no other music platform can, pure music promotion. Radio is free. It is pervasive, and no one is harming record label sales by stealing music from over the air radio.

Don't take my word for it. Just look at the recent studies that confirm local radio's promotional value. First, NAB compiled a report using data from the Nielsen Company and from Pollstar that showed the extraordinary promotional value that local radio provides to artists and record labels. These slides unequivocally show that there is a direct correlation between the number of spins or plays on the local radio and the sales of albums and singles.

This direct and positive impact on record sales is consistent across diverse genres and is seen regardless of the audience. As you can see on the screen and also on the sheet in front of me, Taylor Swift, who is the new country artist, has an increase in pre-radio airplay. You also see a corresponding spike in record sales. The sales mirror the spins. And it happens over and over with each song.

Now, that correlation can also be seen with an artist who may initially break on the Internet like Colbie Caillat. On her slide you can see the early but modest bump in sales that resulted from Internet play of her song Bubbly. But once she got exposure on local radio, her sales hit the roof.

So clearly, there is a strong and predictive relationship between radio airplay and sales. But can we quantify it in dollars and cents? Yes, we can.

In a paper just released, economist and Ph.D., Dr. James Dertouzos completed an economic analysis that measures the pro-

motional value of free radio airplay to record sales. And according to this analysis, Dertouzos found that the significant portion of record industry sales of albums and digital tracks can be attributed to local radio airplay at a minimum 14 percent and as high as 23 percent. That translates to between $1.5 billion and $2.4 billion of promotion annually.

Now, those numbers only include the promotional value to record sales. It would go even higher if it included the promotional value of concerts, tickets or merchandise sales. And this is the promotion that artists and labels are getting for free.

Under H.R. 4789 the value of this extraordinary promotional and all of the financial benefits that come from it would be harmed. Ultimately, less music will be played. Less exposure will be provided for artists, particularly for new artists and music sales will suffer.

On the international front it is simplistic to argue that because other countries pay a performance royalty the United States should as well. First, comparing the United States to totalitarian countries like Iran or North Korea is just plain silly when you consider the artistic freedom of expression that we have here in the United States of America. But it is also comparing apples to oranges.

Most of these other countries created performance royalties when the broadcast systems were either government owned and operated or at least substantially subsidized by tax dollars. Often it was the government who was paying the royalty.

The U.S. broadcasting system, however, is predominately privately owned and operated and does not receive any tax subsidies. Clearly, the lack of a performance right has not affected the quality or quantity of music in the United States. At the end of the day, the U.S. recording industry is the most prolific in the world and is more successful than the United Kingdom, France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have a performance fee.

Additionally, levying a new performance fee on local radio will not and cannot establish true parity. Yes, satellite and Internet radio do indeed pay performance fees. But satellite and Internet generally rely on subscription fees and offer interactivity so listeners aren't encouraged to buy the music.

Most importantly, I want this Committee to understand what this means to local radio should H.R. 4789 become law. Many local radio stations are struggling to be profitable since most of our operating costs are fixed and our advertising revenues are flat, and they are projected to remain flat in the foreseeable future.

I know the intent was to protect smaller market radio broadcasters. But as an owner of local radio stations in rural markets, I fear it does not.

I have been in local radio for many years, and for the life of me I do fail to understand why the record labels are looking to local radio to make up lost revenue. Because weakening radio will ultimately harm the performers.

Local radio is a purely promotional vehicle for artists. Radio airplay drives record sales. The system in place today has produced the best broadcasting, music and sound recording industries in the world. It is not broken. And it is not in need of fixing.

Thank you for inviting me today to give my perspective on H.R. 4789. And I will certainly entertain any questions.

[The prepared statement of Mr. Newberry follows:]

PREPARED STATEMENT OF STEVEN W. NEWBERRY

Hearing on H.R. 4789, the "Performance Rights Act"

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

June 11, 2008

Statement of Steven Newberry
Commonwealth Broadcasting Corporation

On behalf of the National Association of Broadcasters

Good afternoon, Chairman Berman, Ranking Member Coble and members of the subcommittee, and thank you for inviting me to testify today. My name is Steve Newberry, and I am President and CEO of Commonwealth Broadcasting Corporation, which operates 23 stations in Kentucky. I am testifying today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

Introduction

For decades, American radio broadcasters and the music and recording industries have worked and thrived together. Record labels and performing artists profit from the free exposure provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services. As a result of this mutually beneficial relationship, the United States proudly claims the strongest music, recording and broadcasting industries in the world.

I urge the Committee to see H.R. 4789, the Performance Rights Act, for what it is, an enormous fee 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.

H.R. 4789 Does Not Create "Equity" – It Takes a Fair System and Makes It Unfair

The recording industry attempts to characterize the issue as one of "parity." But today there is no actual "parity" in the world of music licensing, at

least not in terms of symmetry of compensation. Artists and songwriters are compensated differently, and different media are subject to different royalty rates, depending on the nature of the delivery system. In fact, that was the very reason Congress created a limited digital performance right in the first place – to compensate for perceived threats from certain types of digital transmissions but not others. While the question may be asked whether current royalty rates for various media reflect a rational basis to account for their differences, there is no reason to believe that levying a performance fee on local radio broadcasters will establish any sort of real "parity" in the complex arena of music licensing.

Although years ago it was an open question as to whether an artist's rendition of a song contained any copyrightable material, today no one seriously questions that performers bring artistic value to the songs that they interpret. Musical performers are respected as artists who create for fulfillment of their own creative passion, for the enjoyment of audiences and for the consuming public worldwide. And if they are both talented and lucky, performers might be able to fashion a viable career in the music industry. Today no one would seriously suggest that performers do not enrich and enhance musical compositions with their artistry, experience and interpretations of the songs. It is, however, indisputable that performers and composers are compensated for their contributions to sound recordings quite differently.

Royalty allocation to musical work and sound recording copyright owners has traditionally been unsymmetrical. Music producers and songwriters generally receive the bulk of their royalties via the public performance of their musical

compositions, while record labels and recording artists generally receive most of their royalties via the sale of physical copies (*e.g.,* CDs, digital downloads), concert tickets, and merchandise.

This structure has developed piecemeal over the years, with Congress granting a certain limited number of monopoly rights sufficient to motivate composers and performers to create and disseminate musical works for the good of the public. For example, Congress granted composers a limited monopoly over their compositions with regard to deciding the first person who may record them. Once that first person has recorded it, any other performer is free to record the song without obtaining the composer's permission. Composers would receive the statutory mechanical royalty of a few pennies per song if their song is, for example, recorded on a CD, but they were expressly denied unlimited control of their creative output.

Not only are artists and songwriters compensated differently, but different media are subject to different royalty rates, depending on the nature of the delivery system. Moreover, differing standards apply to different services. Thus, the Copyright Royalty Board set royalties for satellite radio – XM and Sirius – at 6 to 8 percent of revenue (originally set at 13 percent and then adjusted downward, due to consideration of so-called "fairness factors"), far lower than the rate assessed on Internet radio, which can run to several hundred percent of a small webcaster's revenues (based on the onerous "willing buyer/willing seller" standard).

The recording industry also contends that broadcasters should pay a performance fee as a matter of "fairness." But the symbiotic relationship that has evolved over the decades is actually the very essence of fairness. Both the radio and recording industries profit from the tremendous promotional value of the performance of music on local radio stations, a fact which Congress has repeatedly recognized over the decades. The recording industry invests money promoting songs in order to garner radio airplay and receives revenues when audiences like and purchase the music they hear. Reciprocally, playing music generates value for local radio and its advertisers. The result is that radio stations have been the driving force behind record sales in this country for generations.

Data from The Nielsen Company (Nielsen SoundScan and Nielsen BDS) and Pollstar track the relationship between "spins" of songs on the radio and the resulting sales and clearly demonstrate that artists and record labels derive significant value from local radio airplay.

Although there have been few efforts to quantify the value of this promotional benefit, a soon to be released study finds that a significant portion of industry sales of albums and digital tracks can be attributed to radio airplay – at minimum 14 percent and as high as 23 percent. Local radio is providing the recording industry with significant, incremental sales revenues or promotional sales benefit that range from $1.5 to $2.4 billion annually.

The recording industry claims to be trying to close a "loophole" in the law but neglects to point out that H.R. 4789 is specifically targeted at the over-the-air broadcasts of local radio, leaving untouched numerous other entities and venues

that play recorded music and are covered in foreign jurisdictions, such as hotels, restaurants, bars, nightclubs, sporting arenas, shopping malls, retail stores, health clubs, etc.

Further, by providing a $5,000 cap for what the recording industry estimates to be 75 percent of broadcasters (which would be devastating for each small broadcaster, although considered minimal by the recording industry), the purpose of the proposed legislation is clearly not to remove an existing "exemption" but, instead, to siphon funds from the coffers of the top 25 percent of radio broadcasters into a recording industry suffering from flagging revenues due to piracy and an antiquated business model.

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

The recording industry's legitimate difficulties with piracy and its failure to adjust to the public's changing patterns and habits in how it acquires sound recordings was not a problem created by local radio broadcasters, and local radio broadcasters should not be required, through a new 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 new fee could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the fee, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, ultimately providing less exposure to music. This could not only adversely impact the recording industry, but the music composers and publishers as well.

A new performance fee would have a particularly adverse impact on local radio stations in small and medium-sized markets that are already struggling financially. Were such additional fees imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, the coverage of local news and public affairs, and other valuable programming. In addition, as broadcasters try to adapt their traditional business models to include new technologies, they are required to pay sound recording performance fees on these new digital uses on the Internet and other new technologies, including streaming, podcasting, digital downloads, etc.

As local radio broadcasters have demonstrated on many occasions, stations serve the public interest by airing local and national news and public affairs programming and a variety of other locally produced programming that serves the needs and interests of their audiences, including sports, religious and other-community-oriented programming.[1] No other radio service, including satellite or Internet, provides this amazing level of service to communities across the county.

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

The commitment of local radio broadcaster to public service and their local communities can be further measured by their tangible community services. In calendar year 2005, the average local radio station ran 169 public service announcements (PSAs) per week. This is the equivalent of $486,187 in donated airtime per radio station per year, or a total for all radio stations of $5.05 billion.[2] Sixty-one percent of the PSAs aired by the average radio station during 2005 were about local issues, and 71 percent of radio stations aired local public affairs programs of at least 30 minutes in length every week during the year. *2006 Broadcast Community Service Report* at 5.

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

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

annual radiothon for funds for the homeless and hungry via the Salvation Army's Bed and Bread Program.[3]

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

It goes without saying, however, that maintaining this high level of local programming and other services requires radio stations to be economically sound. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the FCC concluded 15 years ago, the radio "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability."[4] Any one concerned about the service of radio stations to their local communities and listeners must necessarily be concerned about these station's abilities to maintain their economic vibrancy in light of new fees that could be levied though H.R. 4789. All of these local and community services could be jeopardized under this bill.

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

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

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

While proponents of a new U.S. performance fee for sound recordings often point to the laws of foreign countries to justify a performance fee, such an argument ignores key differences in the American legal and broadcast structures. To compare one feature of American law with one feature of analogous foreign law without taking into account how each feature figures into the entire legal scheme of the respective country produces exceedingly misleading results. For example, many foreign legal systems deny protection to sound recordings as works of "authorship," while affording producers and performers a measure of protection under so-called "neighboring rights" schemes. While that protection may be more generous in some respects than sound recording copyright in the United States, entailing the right to collect royalties in connection with public performances, it is distinctly less generous in others. For example, in many neighboring rights jurisdictions the number of years sound recordings are protected is much shorter than under U.S. law. Although U.K. copyright owners have a right of remuneration for the performance of their sound recordings, protection in the U.K. extends only 50 years after the date of the release of a recording, as compared to 95 years in the U.S. This was no oversight or anomaly on the part of the British Government, which recently considered and declined to extend the term past its current 50 years, despite fierce lobbying from the British music industry.

In many countries, the royalty rate paid to music composers and publishers is significantly higher than that paid for 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.[5] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

Governments in many foreign countries adopt policies to promote local artists, composers and national culture through a variety of means, including imposing performance fees on recordings and exercising control over broadcasting content. For example, the Canadian Broadcasting Act states that the purpose of the Canadian broadcast system is to provide "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,"[6] and that it should "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[7] Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.[8] French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.[9]

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

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

[7] Id. at § 3(1)(d)(i).

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

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

The U.S. has the most robust and diverse radio system in the world which, among other things, has helped spawn the most lucrative recording industry in the world. The American commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not, and do not, receive any subsidy from the government or their listeners. Many, and in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government and tax dollars. The fact that under those systems the governments also chose to subsidize their own recording industries and national artists by granting performance fees and paying royalties from government-owned or subsidized stations does not mean this is an appropriate system for the U.S. In this regard, it is significant to note that the U.S. recording industry that operates under a regime with no performance fees, is larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance fee regimes.[10]

Conclusion

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

[10] Performance Rights Study at 2.

music and where the desire on the part of the consumer to acquire the music begins.

Efforts to encourage Congress to establish a new performance fee 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 new performance fee 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 levy, and local radio should not be responsible for the loss of revenue from physical sales in the recording industry. A new performance fee would harm the beneficial relationship that exists between the recording industry and the radio industry. Together, these two industries have grown and prospered. 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.

Mr. BERMAN. Well, thank you very much, Mr. Newberry. And I think we will now recess the Committee for these two votes. Hopefully we will be back in about 20 minutes. You can make new flight arrangements while we are in recess.

[Recess.]

Mr. BERMAN. All right, the hearing will resume. And hopefully we can get a little time in before the next commercial break.

Mr. Warfield?

TESTIMONY OF CHARLES WARFIELD, PRESIDENT AND COO, ICBC BROADCAST HOLDINGS, INCORPORATED

Mr. WARFIELD. Thank you. And I was going to start out by saying good afternoon, but I guess it is good evening, Chairman Berman and Ranking Member Coble and Members of the Subcommittee. And thank you for inviting me back to the Subcommittee to give you my comments on H.R. 4789, the Performance Rights Act.

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. It should come as no surprise to anyone that local broadcasters are strongly opposed to H.R. 4789 and the imposition of any new performance royalties, what we broadcasters consider a performance tax, on local radio for the benefits for the recording industry. And we oppose H.R. 4789 for one very simple reason. This bill is not fair.

It is said all the time the music business is a product of a true symbiotic relationship. Unfortunately, today you have before you only two of the three groups that make up that relationship. The witnesses' table is missing the third arm of the music industry trio. Recording Industry Association of America, or RIAA, which represents the big four record labels.

Clearly, the crux of this issue is performer compensation. And frankly, I don't blame the artists. For over 2 years I worked for a record label. And I have seen from the inside how this industry works. But I can tell you the artists have focused their aim on the wrong target. We should be addressing the root cause of the artist compensation concern, the record labels.

First, is it fair that the record labels will take a full 50 percent of any new performer's royalty under H.R. 4789? Unfortunately, RIAA is not here to explain why it needs half of a new performer's fee that is designed for artist compensation.

Second, H.R. 4789 is unfair in that it targets local radio stations when the real culprits for the lack of artist compensation is the result of inequitable, one-sided contracts that artists find themselves entangled in for years after they have signed with a label. I have heard these awful stories about artists who were forced to tour in their later years. But the reason these older artists are slogging from city to city instead of spending time with their families is not local radio. It is their record label.

An example is rock pioneer Bo Diddley, as we have heard this afternoon who recently passed away at the age of 79. Despite ill health, Diddley remained a live performing artist almost until the end of his life. That is because, according to the Associated Press,

he and his contemporaries were often paid a flat fee to record an album with all rights going to the recording company. Records were sold, but Diddley received no royalties.

The A.P. quoted him saying "I am old. I have never got paid. A dude with a pencil is worse than a cat with a machine gun." Even today artists continue to complain that they lack true bargaining power when they sign with a record label.

Don Henley, front man for the Eagles, called the recording industry a dirty business. According to Henley, most artists don't see a penny of profit until their second or third album.

One of the most reported examples is the artist Prince, who scribbled the word "slave" on his cheek to describe his relationship with his label, Warner Brothers. Ultimately, Prince was so desperate to get out of his recording contract that he abandoned his name to the label.

And you have multi-platinum artists like TLC and Tony Braxton who were forced to declare bankruptcy because their recording contracts didn't pay them enough to survive. And these are only the most publicized stories. There are untold others by smaller, lesser known artists that never get reported. There is undoubtedly a problem with artists' compensation, but it is not the fault of local radio.

Third, H.R. 4789 equates artists being paid fairly as being paid the same as composers. Yes, composers and their publishers who were typically a division of the big four record labels receive a royalty from local radio airplay. And this makes sense because unlike performers the composers do not have the ability to capitalize on their celebrity as do performers.

Rather an artist is compensated with radio airplay and free exposure to 235 million listeners a week. It is this broad and far-reaching promotion that propels music sales, touring revenues, merchandise sales and a variety of other gains.

Finally, in addition to targeting the wrong industry to solve the artist compensation problem, H.R. 4789 is unfair in that it claims to achieve parity between music platforms when no true parity can exist. Being a local radio broadcaster carries with it large regulatory responsibilities which the other platforms do not have. True parity would mean Internet and satellite radio abide by decency regulations, public interest obligations, payola rules and emergency alert requirements.

But the fact of the matter is that local radio is different. We are local. We are free. We are purely promotional. And true parity cannot exist.

The current symbiotic relationship that has existed for years between radio and recorded industries is the very essence of fairness. But H.R. 4789 takes this balanced system and places the heavy thumb of government on one side of the scale—dramatically in favor of the performers and records. I believe that H.R. 4789 would also have a negative impact on everyone at this witness table and even those like RIAA who are not at this table.

Thank you for inviting me here today. And I am happy to answer your questions.

[The prepared statement of Mr. Warfield follows:]

PREPARED STATEMENT OF CHARLES WARFIELD

Hearing on H.R. 4789, the "Performance Rights Act"

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

June 11, 2008

Statement of Charles Warfield
ICBC Broadcast Holdings

On behalf of the National Association of Broadcasters

Good afternoon, Chairman Berman, Ranking Member Coble and members of the subcommittee, and thank you for inviting me to testify today on H.R. 4789, the Performance Rights Act. 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. I am testifying today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

Introduction

Recently, the financial dominance of the major record labels has been threatened by the emergence of digital technologies, alternative distribution channels, changes in consumer behavior and a reduction in market entry barriers. Consequently, the recording industry has gone in search of new revenue streams to make up for these losses. One of its most potentially lucrative strategies is trying to convince Congress to use the Copyright Act to impose a new obligation on local radio broadcasters, in the form of an additional fee for the benefit of the artists and record labels for playing recorded music on free, over-the-air radio.

But radio broadcasters already contribute substantially to the United States' complex and carefully balanced music licensing system, a system which has evolved over many decades and has enabled the U.S. to produce the strongest music, recording and broadcasting industries in the world.

The simple reality is that broadcasters are not responsible for the financial woes of the recording industry. Particularly in the current highly competitive environment, where local radio broadcasters are struggling to develop their own business models that address the realities implicit in new media, it makes little sense to siphon revenues from broadcasters in order to prop up the recording industry's failing business model.

The recording industry characterizes its attempts to develop a new revenue stream at the expense of broadcasters as the closing of a "loophole" and the ending of an "exemption." But prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings. At that time, Congress created only a narrow digital performance right, in order to address very specific concerns about copying and piracy issues. And for more than 80 years, Congress, for a number of very good reasons, has rejected repeated calls by the recording industry to impose a fee, which broadcasters would consider a "performance tax," on the public performance of sound recordings. There is no reason to change this carefully considered and mutually beneficial policy at this time.

Since Congress created a digital performance right in sound recordings, in response to perceived threats from certain digital technologies, the recording industry has ample means to exploit the promise of the Internet and mobile devices. Currently, download services (such as iTunes) are the dominant digital format, but, as the recording industry becomes increasingly digitally literate, new revenue streams spring up, and downloads now exist in a mixed economy with

subscription services, mobile mastertones, new advertising-supported models, and video licensing deals on sites like YouTube and MySpace.

Recent changes in production, distribution and consumer behavior patterns have caused recent losses for a recording industry that has been slow to adapt to them, but they also hold promise for the future. The explosion of digital sales, the proliferation of MP3 players, Internet activity and the comfort of younger generations with new technologies all suggest that new opportunities for profit abound. Although the two billion dollar decline in CD sales from 2004 to 2006 is not yet offset by the $878 million in digital download revenues in 2006, these figures are somewhat misleading since the profit margins generated by digital sales are larger than those associated with physical CD sales, and digital sales are increasing exponentially. Further, there are no longer physical constraints on inventory. Thus, independent artists are no longer restricted by a store's ability to carry expanded inventories that may or may not include their recordings. Combining these new opportunities for artists and record labels to succeed in the competitive marketplace with cost savings due to digital distribution, it is easy to conclude that potential revenue from paid downloading bodes well for the future of the recording industry.

Local Radio Broadcasters Provide Significant Promotional Value to Artists and the Recording Industry

As Congress has repeatedly recognized, local radio broadcasters provide tremendous practical and other benefits both to performing artists and to their record labels. The recording industry invests money promoting songs in order to

garner radio airplay and receives revenues when audiences like and purchase the music they hear. As the NAB has previously testified on this issue, artists consistently and effusively recognize the fact that local radio airplay is invaluable. On behalf of the Recording Artists' Coalition, Don Henley candidly admitted in his 2003 testimony before the Senate that getting a song played on the radio is "the holy grail" for performers and record labels.[1]

But the promotional value of local radio airplay is also tangible and quantifiable. Data from The Nielsen Company (Nielsen SoundScan and Nielsen BDS) and Pollstar track the relationship between "spins" of songs on the radio and the resulting sales and clearly demonstrate that artists and record labels derive significant value from local radio airplay. See Attachment A. The data shows that the when music is aired on the radio, record sales go up.[2] Moreover, the vast majority of listeners identify FM radio as the place they first heard music they purchased. With an audience of 235 million listeners a week, there is no better way to expose and promote sound recordings.

Importantly, a soon to be released study by economist James Dertouzos indicates that radio airplay increases music sales. A significant portion of industry sales of albums and digital tracks can be attributed to radio airplay – at minimum 14 percent and as high as 23 percent. Local radio is providing the

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

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

recording industry with significant, incremental sales revenues or promotional sales benefit that range from $1.5 to $2.4 billion annually.

In the Dertouzos Study, five econometric models were tested to determine the relationship between the sale of albums and digital tracks and exposure to music on local radio. Each of the five models indicated that music exposure had a positive and statistically significant impact on retail music sales. Across all models, results were especially noteworthy because of their magnitude, their high statistical significance and because they were remarkably insensitive to a variety of econometric methods, assumptions and measurement techniques.

The analysis of economic models indicates that new performance fees imposed on local radio stations may induce stations to change program format and/or the amount of music played. Some smaller stations could find a new fee too burdensome and go out of business. And, ultimately, much of the promotional benefit would be lost.

The Undercompensation of Artists Is the Result of Their Contractual Relationships with the Record Companies

Advocates for H.R. 4789 often raise the specter of overworked and underpaid performers as the supposed beneficiaries of such a fee. The history of the treatment of performers by record labels makes any assumptions that performers meaningfully would share in any largess created by a performance fee highly dubious at best. 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 percent of the performers.[3] A performance fee will take money out of the pockets of local radio stations and

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

other businesses, and put it in the hands of record companies and a few top-grossing performers. Even under H.R. 4789, a full 50 percent of the fee would go to the record label, although the performers are arguably the reason this bill is being considered.

Even those countries with sound recording performance rights, which proponents of a new performance fee often point to as models, have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists.[4] Imposing a new performance fee would not alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.[5]

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[4] "Indeed, in the past ten years, there has been a growing mount of evidence to confirm that the economic status of artists has diminished under the prevailing copyright regimes, not only in the new countries of the EU25, but also in the north and east of Europe. They show that, with the exception of a few big stars, the majority of contemporary artists in Europe can not live from the supposed economic returns on their professional activities provided to them through copyright instruments." European Institute for Comparative Cultural Research, The Status of Artists in Europe, November 2006, p. 51. Not only this cited study but many other studies and evaluations undertaken since the 1980s, including more recent ones of the European Parliament in 1991, 1999 and 2002, have all suggested that addressing the precarious socio-economic status of artists through other means, such as tax relief, labor laws, tailored social security frameworks, and unemployment benefits. *Id.* at 51-52. "[O]ne can wonder if performers' protection will really be increased where they are granted exclusive rights. Whereas the introduction of new rights provides for an improvement of the legal protection, it remains unsure whether it achieves the cultural policy objectives of improving the socio-economic status of performers." Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, p. 64.

[5] "[D]espite the beneficial aspects that specific collective agreements introduced in some performers' contractual clauses, for most performers common use consists of having no alternative but to waive all their exclusive rights at once, for a one-off fee, on signing their recording or employment contract… [I]n practice

Moreover, in this increasingly competitive environment record labels seek new revenue streams to make up for revenue lost from decreasing CD sales. This has resulted in a recent seismic industry shift towards so-called "360 deals" between record labels and performers, which are contracts that allows a record label to receive a percentage of the earnings from all of a band's activities (concert revenue, merchandise sales, endorsement deals, etc.) instead of just record sales, as well as a renewed interest in exacting monetary payment from local radio stations.[16]

The Recording Industry's Flagging Revenues Provide No Basis For Adopting a New Performance Fee that May Ultimately Decrease the Amount of Music Played on the Radio

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,

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most performers have to renounce the exercising of these rights to the benefit of those who will record and make further use of their performances." AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement - Summary, June 2007, p. 3. Germany has amended its law on copyright for the purpose of strengthening the contractual position of authors and performers, and France has considered the integration of labor law in copyright as a means to increase contractual bargaining power. Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, pp. 70-71.

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

Warner Music Group and EMI. The Warner group is the only U.S.-based company; the other three major players are foreign-owned.[7]

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 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.[8] Although all of these factors have hurt the recording industry, there are no facts that even suggest that local radio broadcasters are to blame for the economic problems in the recording industry, nor that a new performance fee will in any way address the factors that have contributed to declining record sales.[9]

International Federation of the Phonographic Industry ("IFPI") Chairman and CEO John Kennedy claims the current economic data "reflect an industry in transition."[10] Despite the decline in physical sales of recordings, many sectors of

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[7] 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").

[8] Performance Rights Study at 3.

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

[10] Brandle, Lars, "Music Biz Sales Off for a Seventh Year: Study." *Reuters*, July 5, 2007. Retrieved July 26, 2007 from:

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 percent in 2006 to $2.1 billion. Live performances were up 16 percent from 2005 to 2006 to an estimated $17 billion. Merchandising and sponsorship grew by 30 percent 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.[11]

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 oflocal 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 new fee could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the new fees, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, providing less

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http://www.reuters.com/article/entertainmentNews/idUSN0527941020070705?feedType=RSS&rpc=22&sp=true.

[11] Performance Rights Study at 3.

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

Evolution of the Sound Recording Performance Right Does Not Justify a New Performance Fee

When Congress created a narrowly tailored digital performance right for sound recording, it did so in order to address very specific concerns about copying and piracy issues.

As a threshold matter, U.S. copyright law confers a bundle of enumerated rights upon the owners of various works of creative expression. These are set forth 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,

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

exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium.[13]

While composers have long enjoyed a right of public performance in their musical compositions – for which over-the-air radio broadcasters in 2007 will pay annual royalties exceeding nearly half a billion dollars to the performing rights organizations (*e.g.,* ASCAP, BMI and SESAC) – prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings embodying such musical compositions. As explained below, even that right was very limited.

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

Congress first afforded limited copyright protection to sound recordings in 1971, in the form of protection against unauthorized reproductions of such works. The purpose of such protection was to address the potential threat such reproductions posed to the industry's core business: the sale of sound recordings. And, while the record industry argued at that time for a public performance right in sound recordings, Congress declined to impose one. Had Congress believed that record companies and performers were at risk of not being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings.

[13] 17 U.S.C. § 106(4), (6).

However, Congress wisely realized that the recording industry was already adequately motivated to serve the public interest and thus did not grant those additional rights.

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

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.[14]

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."[15] As to performance rights in sound recordings in particular, Congress has explicitly

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

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

recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[16]

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmission."[17]

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.[18] 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 airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes

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[16] 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).

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

[18] 17 U.S.C. §114 (d)(a)(A).

> 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.[19]

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."[20]

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;[21] (4)

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[19] 1995 Senate Report, at 15.

[20] *Id.*

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

promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[22]

It should also be noted that even though the Copyright Office has argued for a new performance fee, Congress has strongly and consistently refused to adopt these recommendations.[23]

Under the Constitution, Copyright is designed: "To promote the progress of science and useful arts."[24] There is absolutely no evidence that absent a performance fee there has been a dearth in the production of sound recordings in this country.[25] To the contrary, while many countries have such a fee and the United States does not, we are the most prolific producers of sound recordings in the world.

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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).

[22] 1995 Senate Report, at 15.

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

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

[25] 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).

Conclusion

With respect to the performance of sound recordings on local over-the-air broadcasting, NAB urges the subcommittee to recognize that H.R. 4789 and a new performance fee on broadcasters is neither warranted nor equitable. The frustrations of the recording industry in its inability to deal with piracy and an outdated business model are not sufficient justification for imposing a such a fee at the expense of the American broadcast industry, which has been instrumental in creating hit after hit for record labels and artists and whose significant contributions to the music and recording industries have been consistently recognized by Congress over the decades.

Mr. BERMAN. Thank you, Mr. Warfield.
And Mr. Lee?

TESTIMONY OF THOMAS F. LEE, PRESIDENT, AMERICAN FEDERATION OF MUSICIANS

Mr. LEE. Good afternoon, or close to early evening. Chairman Berman, Ranking Member Coble, Members of the Committee, my name is Tom Lee. I am the international president of the American Federation of Musicians on behalf of 90,000 AFM members and artist members in over 230 affiliated locals across the country, I thank you for your attention and your leadership on this important issue of performance rights.

And I am also honored to speak to you today on behalf of AFM's fellow performer organization, AFGRA, the Music Managers Forum, the Recording Academy, the Recording Artists Coalition, the Rhythm and Blues Foundation, the Society of Singers and the Vocal Group Hall of Fame. Together we represent tens of thousands of performers.

Dozens of our members have been here to Washington this week and today to tell you their stories. And I just want you to know how much they appreciate the opportunity to meet with you and be part of this hearing.

Many others are visiting their Congress Members probably as we speak, so they are not present here. I am privileged to appear here with Ms. Nancy Sinatra, who is a great performer. There is nobody in this room, I would bet you, who hasn't tried to attempt to sing "These Boots are Made for Walkin'" or "Something Stupid" or "Only Live Twice." In fact, some of my best friends sing "Something Stupid" when they are around me. I don't understand it.

But, of course, it is a great pleasure to honor Ms. Sinatra's father, the incomparable Frank Sinatra. He loved musicians. And I know they loved him. And he was a member of our union for over 50 years. And no matter how big Frank Sinatra got, he never forgot the musicians who helped him.

One of Sinatra's biographers quotes him as saying that he liked to be around bands and be part of their glamour. And, of course, in the end he was the most glamorous and had the most glamorous career of all. But he never forgot the artistic partnership between musicians who play an instrument and musicians whose instrument is their voice.

There is a tremendous amount of talent in our business, but not really that much glamour. So fame and fortune are very much the exception, not the rule. A successful performer is not necessarily one who is a household name. Successful performers are the ones who can quit their day jobs. Their music may be classical or grunge, jazz or country, rock or sahano, bondo or blues or folk. They may be established mid-tier artists, or they may be just starting out.

They create artistically successful recordings aimed at loyal fans. And those fans follow their careers avidly, even though they are not front page news. Or they may be successful session performers who contribute to the professionalism and creativity of recordings. And I am thinking, for example, of Vice President Harold Bradley of the International Federation of Musicians. You probably haven't

heard his name before today, but you absolutely have heard his guitar.

He was recording with Elvis. He has recorded with Patsy Kline when she did "Crazy," Brenda Lee's "I Am Sorry," Roy Orbison's "Only the Lonely," Roger Miller's "King of the Road," Tammy Wynette's "Stand By Your Man," Johnny Horton's "Battle of New Orleans" and, in fact, 30,000 recording sessions this individual has been on. He is a true session artist.

All these varied performers have a few things in common. First, they have tremendous talent. They take a song, whether their own or someone else's and transform it to words and notes on a piece of paper into a unique living and breathing work of art that has tremendous value as we know today.

Second, they are incredibly hard working. Performers labor long and hard to develop their musical skills and their business opportunities.

Third, they may do it for love, but they also have to eat. They have to provide for their families just like everybody in this room.

Fourth, in most instances, they don't get a weekly or monthly paycheck. They are entrepreneurs, small business people who patch together many different income streams to earn their living.

Royalties, concert fees, t-shirts and the whole range of payments for artists and background musicians, every kind of payment, large or small is important to string together for them to make a living. Like Frank Sinatra, the AFM started fighting for a performance right in sound recordings decades ago. And we are all still fighting today. And it is not because we are greedy, and it is not because we don't care about radio.

It is a question of justice, business and art. And it is a question of paying people for their creation of an intellectual property that has great value. The truth is that the art we make has a business value. Radio is not the only industry that uses recorded music to make money. But it is the only one with a free pass to pay performers nothing. That is unfair any way you cut it.

It is even more unfair given that radio's competitors, satellite radio, Internet radio and cable pay us. And it hurts the American economy because it causes us to lose millions of dollars in payments for our U.S. musicians. The United States is the only developed country without a performance right in sound recordings. What is wrong with this picture?

And the U.S. repertoire played by foreign radio is huge. But none of that money flows to the U.S. because we don't have a reciprocal right.

Artists around the world see this as unfair. And a few months ago, more than 6,000 of them expressed support for performance right in the United States. And I am pleased to announce that an additional 1,500 additional artists have stepped forward since then to add their voices to our cause, including such celebrated artists as Paul McCartney, Eric Clapton, P.J. Harvey and Ozzy Osbourne.

With your permission, Mr. Chairman, I would like to enter that document into the record.

Mr. BERMAN. Without objection, that will be included.

Mr. LEE. Thank you, sir. Today the sound recording is the second class citizen of copyright law. Every other performable work enjoys a performance right.

For example, radio pays songwriters for the use of their underlying song. And it is right, and it is fair, and it is part of H.R. 4789 to protect those songwriters' interests. And as performers we will work in any way we can to make sure that our songwriters' interests are protected.

We are just asking for the same fair treatment. H.R. 4789 contains special provisions to benefit small and non-profit radio stations. Their royalty obligations will be small and predictable. But performers are the classic small business. They are always taking risks. Their rewards are generally modest and never predictable. And they need help.

Radio may help to spread cultures. But let's be clear about one thing. It is the performers that create the culture. Every business that benefits from their worth should contribute to their livelihood. That is fair. That is American. That is what will keep the art and business of music strong in this country.

This hearing is not about the record labels and their relationship with their artists. That is a different topic on a different day. This is about fairness in radio. This is about paying those who create intellectual property that is deemed to have value. And indeed, $16 billion a year in value, as far as I am concerned, proves that it has value.

So let's take into consideration the individuals whose enormous talent create this intellectual property of great value. Thank you for your attention and for your help. And I stand ready to answer any questions.

[The prepared statement of Mr. Lee follows:]

PREPARED STATEMENT OF THOMAS F. LEE

Testimony of

THOMAS F. LEE

International President
American Federation of Musicians
of the United States and Canada, AFL-CIO

Before the

House Committee of the Judiciary

SUBCOMMITTEEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

"Hearing on H.R. 4789, the 'Performance Rights Act'"

June 11, 2008

Good afternoon, Chairman Berman, Ranking Member Coble, Chairman Conyers, Ranking Member Smith and Members of the Subcommittee. My name is Tom Lee. I am the International President of the American Federation of Musicians. On behalf of over 90,000 AFM members, in over 230 affiliated Locals across the country, I thank you for your attention and your leadership on the issue of performance rights.

I am also honored to speak to you today on behalf of the AFM's fellow performer organizations, the American Federation of Television and Radio Artists, the Music Managers Forum, the National Academy of Recording Arts and Sciences, the Recording Artists' Coalition, the Rhythm & Blues Foundation, the Society of Singers and the Vocal Group Hall of Fame. Together we represent tens of thousands of performers.

Dozens of our members have traveled to Washington to tell their stories to you and your colleagues today. I'd like to recognize and thank the performers in the hearing room. Many others are busy visiting their Members of Congress even as we speak.

I am privileged to appear with Nancy Sinatra. She is being modest about her own career, and speaking eloquently about her father. But she is a great performer in her own right. I would bet *any* money that *every* person in this room has been guilty of singing her hits in the shower – trying to imitate her sound in recordings like "These Boots Are Made For Walking," or "Somethin' Stupid," or "You Only Live Twice."

Of course, it is a great pleasure to honor Nancy's father, the incomparable Frank Sinatra. He loved musicians, and I know they loved him. He was a member of our union for over fifty years. Many of our members were his biggest fans. Many had the good fortune to be his colleagues. He played with all the great musicians in the legendary big bands like those under Harry James, Tommy Dorsey and Benny Goodman.

No matter how big Frank Sinatra got, he never forgot the musicians who helped him. He called Frank Mane one day in 1939, and asked, as a favor, to sing with the Frank Mane Band. Mane said, "Sure, why not" – and that's what led to Sinatra's first recording. Frank Mane played a mellow sax in New York and New Jersey for decades, while Sinatra went on to Hollywood and high celebrity. Decades later, Sinatra always treated Mane as a VIP. One of Sinatra's biographers quotes him as saying that he liked to be around bands and have a part in their glamour. Of course, in the end, his was the most glamorous career. But he never forgot the artistic partnership between musicians who play an instrument, and musicians whose instrument is their voice.

There is a tremendous amount of talent in our business, but not really that much glamour. Fame and fortune are very much the exception, not the rule. A successful performer is not necessarily one with a household name. Successful performers are the ones who can quit their "day" jobs. Their music may be classical or grunge, jazz or

country, rock or Tejano, banda or blues or folk. They may be established mid-tier artists or just starting out. They make artistically successful recordings aimed at loyal fans. Those fans follow their careers avidly even though they are not front-page news.

Or they may be session performers who contribute to the professionalism and creativity of recordings. I'm thinking, for example, of the AFM's International Vice President, Harold Bradley. You may never have heard his name before today, but you absolutely have heard his guitar. He's a critical part of great recordings like Patsy Cline's "Crazy," Brenda Lee's "I'm Sorry," Roy Orbison's "Only the Lonely," Roger Miller's "King of the Road" and Tammy Wynette's "Stand By Your Man," among countless others.

But all these varied performers have a few things in common.

First They have tremendous talent. They take a song – whether their own or someone else's – and transform it from notes on paper into a new, unique, living and breathing work of art.

Second – They are incredibly hardworking. It would be great if a little talent – or a lot – were enough, but it isn't. Performers labor long and hard to develop their musical skills and their business opportunities.

Third – They may do it for love, but they also have to eat. They must provide for their families just like other working people. And although some of the younger performers may not believe it yet, some day they will want to retire – or their health may force them to.

Fourth – They don't get a weekly or a monthly paycheck. They are entrepreneurs – businesspeople – who patch together many different income streams to earn their

living. Royalties, concert fees, t-shirt sales, and the panoply of union payments like session fees, pension and health – any and every kind of payment is important to them.

Like Frank Sinatra, the AFM started fighting for a performance right in sound recordings decades ago. We are all still fighting today. It is not because we are greedy. It is not because we don't care about radio. It is a question of justice, and business, and art.

The truth is that the art we make has a business value. Radio is not the only industry that uses recorded music to make money. But it is the only one with a free pass to pay performers nothing. That's unfair, any way you cut it.

It's even more unfair, given that radio's competitors pay us. And it hurts the American economy, because it causes us to lose foreign radio payments. The U.S. is the only developed country without a performance right in sound recordings, and the U.S. repertoire played by foreign radio is huge. But none of that money flows to the U.S., because we don't have a reciprocal right. Artists around the world see this as unfair, and a few months ago, more than 6,000 of them expressed support for a performance right in the United States. I am pleased to announce that an additional 1,500 additional artists have stepped forward since then to add their voices to our cause, including such celebrated artists as Paul McCartney, Eric Clapton, PJ Harvey and Ozzie Osbourne.

Today, the sound recording is the second class citizen of copyright law. Every other performable work enjoys a performance right. For example, radio pays songwriters for the use of their underlying songs. That is right and fair, and H.R. 4789 includes language to protect songwriters' interests. Performers are just asking for the same fair treatment.

H.R. 4789 contains special provisions to benefit small and nonprofit radio stations. Their royalty obligations will be small and predictable. But performers are the classic small business. They are always taking risks. Their rewards are generally modest and never predictable. They need help.

Radio may help to spread culture. But make no mistake, performers *create* culture. *Every* business that benefits from their work should contribute to their livelihood. That's fair. That's American. And that's what will keep the art and business of music strong in this country.

Thank you for your attention, and for your help.

Mr. BERMAN. Well, thank you, Mr. Lee and all the witnesses. I am going to defer my questions and comments until the end. And I will recognize my Ranking Member, Mr. Coble, for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you panelists with us today.

Mr. Warfield, you were with us about a year ago. You need to visit more often. It is good to see you again.

It is good to see all of you.

Mr. Newberry, let me start with you. The bill, as you all know, includes a carve out for small radio stations so they are able to pay a flat annual fee of $5,000 for the unlimited performance of recorded music. Mr. Newberry, does this provision address your concerns regarding the impact of small stations and small businesses?

Mr. NEWBERRY. Congressman, it is problematic from the standpoint that a lot of small market stations—and granted in Washington I am sure $5,000 is a small amount of money. But for a small market operator of an AM station or a small FM station that may very well be dealing less than $100,000 a year with a profit margin of 10 percent or less—and profit margin in most of these cases defines what the owners take home for their work. This is not after they have been paid. It is their take home pay.

So $5,000 is a significant amount. And if you take a small broadcast operation that has an AM/FM combination in a small community like Princeton, Kentucky or somewhere in rural North Carolina, now you have $10,000 of obligations to pay. So I understand the intent with that.

As a small market broadcaster I appreciate the intent. But I think the amount is something that would be an economic burden on those who find it most difficult to find profitability in our industry.

Mr. COBLE. I thank you, sir.

Mr. Warfield, you expressed concern about the economic circumstances of recording artists and criticized the bill because it would direct half the fee to the record label rather than to the artist. Now, are you suggesting, Mr. Warfield, that broadcasters could support a bill that provides a higher percentage of the royalty directly to the artist? Or do your concerns relate to other aspects of the bill?

Mr. WARFIELD. My concerns relate to the status and the condition of the artists themselves and experiences that I have had with artists and in the industry as to why they face some of the financial difficulties that they have. And it has nothing to do, quite honestly, with the bill or with radio with this issue. And I think that that is an issue that should be looked at and considered.

Mr. COBLE. I thank you for that.

Mr. Lee, broadcasters have testified that radio stations provide tens of millions of dollars in free publicity and promotion to the performers of sound recordings in the form of concert promotion and publicity, et cetera. Given the truth of this statement, and I don't doubt it, why is it that this valuable compensation is not considered by artists to be sufficient payment for the performance of their works?

Mr. LEE. Well, sir, first of all, the graphs that were shown to us today I have no understanding of the study. That wasn't shared

with us. And I don't think anyone disagrees that there is a promotional spike when radio stations play certain artists' recordings. But there is a lot more that goes into a touring artist than a radio station playing the recording.

You buy newspaper ads. You put up billboards. You have all kinds of promotional material that is taking place. To attribute every artist's spike in their record sales to simply the fact that they are being played on the radio is not taking into consideration all of the other things that go on around promoting that artist.

And I would say to you, as someone said earlier, when you broadcast a baseball game, a basketball game, NFL football, you are promoting the purchasing of tickets at actually a lot higher fees in some cases than what they are for concert artists. You are promoting a huge organization. And you are paying for it.

The radio stations have to pay for that signal. We are suggesting that there is nothing different if you are going to pay for a signal to promote a basketball game than intellectual property owners and the creators are entitled to these fees as compensation as well.

Mr. COBLE. Thank you, Mr. Lee.

One more question, if I may, Mr. Chairman.

Ms. Sinatra, we have heard about the recent passing of Bo Diddley. And I was an avid Bo Diddley fan. But my genre, as most of my colleagues know, flows more from country and bluegrass and Porter Wagoner, of course, pre-deceased Bo Diddley. Let me ask you this, Ms. Sinatra. How do you think your life and the lives of the late Porter Wagoner, of the late Bo Diddley—how might those lives may have been different if the Congress had enacted a performance right for recording artists when it was considered some almost three decades ago?

Ms. SINATRA. Addressing the older performers, the recording artists, I am only guessing that their lives, I am pretty sure, their lives would have been a lot better.

I know of many singers, including some in the 1940's and 1950's, who died penniless, and I think that they could have maybe lived longer—who knows? Their families could be enjoying, or they could be enjoying, something a little better now, if they had received royalties all those years.

As far as I am concerned, my own career, I have done extremely well, so I am not talking about me with this. I am talking about them, talking about the younger people starting out, who need royalties in order to continue their work in the arts. They don't receive them.

And I am also talking about the musicians, many of whom that I have worked with for 40-plus years, still travel with me to this day—that is the only time they get paid is when they are working for me, and I make sure they get paid. And the side of that is that I never make a dime on the road. So if we are talking about that, I don't know what to tell you.

Mr. COBLE. Well, that is a fair response. I thank the witness.

And, Mr. Chairman, I thank you as well and yield back.

Mr. BERMAN. The time of the gentleman has expired.

Next, the gentleman from North Carolina?

Okay. Then the gentlelady from Texas, based on order of coming in earlier?

Okay. You are going to yield your time to Mr. Wexler? Oh.

All right. Then I think it is Mr. Johnson. [Laughter.]

The gentleman is recognized for 5 minutes.

Mr. JOHNSON. Thank you. Me first, gentlemen. Yes. Okay.

Ms. Sinatra.

Ms. SINATRA. Yes, sir.

Mr. JOHNSON. I want to thank you vicariously. I want to thank you. I really want to thank your daddy for creating so many works on wax that people listen to and will continue to listen to in perpetuity. And he gave so much joy.

And he was also a man who looked kindly upon people of my race, by the way, and I deeply appreciate that.

By getting back to what we are talking about, Mr. Sinatra has so many renditions that are so special and unique that they could never be duplicated, and so we just play them over and over again. And whenever that is broadcast on broadcast radio, the artist, or his estate, does not partake in that moneymaking proposition.

And I assume that your life and the life of Mr. Sinatra's heirs would be enhanced, if you all were able to partake in such revenues. Am I correct about that?

Ms. SINATRA. I am sure you must be. We are very fortunate in that my dad owned most of his own masters, as I own most of my masters.

Mr. JOHNSON. Okay. So that shuts that down.

Ms. SINATRA. It takes the other stuff away——

Mr. JOHNSON. Your dad was very smart.

Ms. SINATRA. That is why I said we don't talk about us in this particular bill——

Mr. JOHNSON. Yes.

Ms. SINATRA [continuing]. Because we are already okay.

Mr. JOHNSON. Well, I tell you, that it is not the norm, though, among the performers. Most performers don't own their masters.

Ms. SINATRA. That is right.

Mr. JOHNSON. And so what I said applies to so many others, who you are representing today, and I appreciate that.

Let me ask Mr. Newberry. The broadcast radio industry has undergone substantial conglomeration since Congress first established copyright protection for sound recordings in 1971. Isn't that a fact?

Mr. NEWBERRY. The world has changed. Yes, sir. There has been a change in the organization of our industry, and there is a tremendous amount of additional competition.

Mr. JOHNSON. A lot of conglomeration or consolidation.

Mr. NEWBERRY. Certainly.

Mr. JOHNSON. And so therefore it is true to report that many of the stations that broadcast popular music are owned by major media corporations, correct?

Mr. NEWBERRY. Well——

Mr. JOHNSON. True or false?

Mr. NEWBERRY. Commonwealth Broadcasting is certainly not a major media corporation, but certainly there are publicly traded companies in broadcasting.

Mr. JOHNSON. But it is a multinational company.

Mr. NEWBERRY. Yes, sir.

Mr. JOHNSON. And this——

Mr. NEWBERRY. Just as further clarification, minimal amount of international activity. Most of these are American companies, American licenses.

Mr. JOHNSON. Certainly, but big companies.

Mr. NEWBERRY. And small ones.

Mr. JOHNSON. But mostly the major media companies have been consolidating their hold on the broadcast radio industry. Would you agree to that, Mr. Lee?

Mr. LEE. I absolutely would agree to that.

Mr. JOHNSON. And would you agree to it also, Mr. Warfield?

Mr. WARFIELD. There has been a certain amount of consolidation in our industry, but there are 13,000 stations in the United States. Many of those radio stations are owned by what we refer to as Mom and Pop, small organizations.

Mr. JOHNSON. Certainly. I know there are a lot of small, five-watt, 20-watt, 100-watt stations, but the 50,000-watt stations, 100,000-watt stations, the big boys—they are owned by the big media conglomerate.

Mr. NEWBERRY. That is not correct.

Mr. WARFIELD. That is not correct. Many stations are in individual hands and run small companies.

Mr. NEWBERRY. A 100,000-watt station in Bowling Green, Kentucky, owned by a competitor of mine.

Mr. JOHNSON. Okay.

Mr. NEWBERRY. Small market, small business.

Mr. JOHNSON. Small markets, but large markets, where the real money is made—they are controlled by the major media corporations. Now, you are going to try to hoodwink us on that, but I think everybody that there has been consolidation in the industry, and you all have admitted to it.

Now, given this shift into more larger media conglomerates controlling the broadcast industry, and while at the same time they have TV and newspaper outlets as well, this consolidation has been ubiquitous, and everybody knows it.

Don't you think, Mr. Lee, that the industry is much better equipped today than it was in 1971 to pay performance royalties?

Mr. LEE. I think they absolutely are equipped, much better equipped to pay performance royalties.

And I just want to make one thing clear. We are not out to make the small companies a lot of business. We want them to play our members' products. We are interested in that taking place. But we have 75 percent, I think is the number, that are small radio stations, and we have made provisions in the bill for small radio stations.

But when Beyonce Knowle comes out with a new recording, that radio station is going to say, "We have to play her recording and every other top artists' recordings, because that is how they sell their ads." It is a $16 billion a year ad industry.

They are not promoting our records as much as they are selling ads to make money for themselves. 2.3 million sound recordings are played a day. Now, those are not all the top recordings that are getting the promotional service that seems to be suggested here.

And I just have to say one other thing to Mr. Coble's question about the individual, the older musician. I can tell you right now

of a musician in Nashville, Tennessee. He was on 18,000 recording sessions.

That individual now is sitting in the nursing home, recovering from a broken hip. He is almost blind, and his hearing is almost gone, but he can hear well enough to hear a radio station that plays his songs—that is from Elvis to Dolly Parton to Ray Price to Emmylou Harris to Conway Twitty to Charlie Pride to Porter Wagoner to Loretta Lynn. He is hearing those songs play, and he is getting no revenue from it, and everybody else is making money off of it.

Mr. BERMAN. The time of the gentleman has expired.

The gentleman from Florida, Mr. Keller, is recognized for 5 minutes.

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

Mr. Lee, let me begin with you. Under this proposed performance fee legislation, the record labels would get 50 percent of the money, and musicians 2.5 percent. From the musician's perspective, is that a fair allocation, for the record companies to get 20 times as much as the musician?

Mr. LEE. Well, the artist will get 45 percent. The singers and background musicians will share 5 percent. That is correct.

Mr. KELLER. And musicians are 2.5 percent, and the background singers 2.5 percent. Is that correct?

Mr. LEE. That is correct.

Mr. KELLER. And you are here as part of the musicians' union, correct?

Mr. LEE. To represent that this legislation should be——

Mr. KELLER. Right. And my question is from a musician's perspective, who is slated to get 2.5 percent, is that a fair allocation, compared to the 50 percent given to the record label?

Mr. LEE. Well, we would always be interested in acquiring more percentage for the musicians. I think everybody would understand that. But there is one other aspect to this. When you have been on 18,000 recordings, and your recordings are for multiple artists, that adds up rather quickly.

Mr. KELLER. Right. Now, I will stick with you, Mr. Lee. The copyright registrar has testified that restaurants, bars and retail stores should also be paying a performance fee. Do you agree?

Mr. LEE. That is not the subject of this legislation.

Mr. KELLER. That is the subject of my question, and it may well be the subject of legislation, if I seek an amendment, so I would like you to answer it. Do you agree that these bars and restaurants and retail stores should also be paying a performance fee?

Mr. LEE. If you were to offer that as an amendment, we would absolutely not oppose that.

Mr. KELLER. Would you support it?

Mr. LEE. We would support it.

Mr. KELLER. Okay.

Mr. Warfield, turning to you, the Department of Commerce sent out a letter yesterday. Have you had a chance to look at that?

Mr. WARFIELD. No, sir. I have not.

Mr. KELLER. In this letter the Department of Commerce says this bill is good for you, that it is in the broadcasters' economic in-

terests to support this legislation. I will just read you the quote, since you haven't read it.

The Department of Commerce "testified before this Committee that establishing a public performance right to a sound recording was in the long-range economic interests of all parties, including U.S. recording companies and broadcasting stations."

You are a broadcaster. Do you think it is in your economic interests to pass this legislation?

Mr. WARFIELD. Absolutely not, sir.

Mr. KELLER. Did they ever contact you and ask you if it was in your economic interests while writing this letter?

Mr. WARFIELD. Absolutely not.

Mr. KELLER. Mr. Newberry, do you think it is in your economic interest as a broadcaster to pass this legislation?

Mr. NEWBERRY. No, sir, I do not.

Mr. KELLER. Has the Department of Commerce ever contacted you and asked you if it was in your economic interests to pass this legislation?

Mr. NEWBERRY. No, sir, it did not.

Mr. KELLER. Okay.

Ms. Sinatra, you have had the number one hit in America in 1966 with "These Boots are Made for Walkin'." In a very humble way, you didn't even mention it in your opening statement.

Let me ask you, as someone who has done what few people have ever done—that is, have a number one hit—do you believe your famous song could have become a number one hit without the local airplay it got from local radio stations?

Ms. SINATRA. That was just so long ago. It was way back in the last century. I don't know the answer to that, for my success was extremely visual. That is why—and it sounds terribly immodest—it was almost iconic, because it was the look, the boots, the miniskirt, the hair.

Mr. KELLER. Right.

Ms. SINATRA. Everybody copied. I did television mostly in those days, and I think radio may have helped me. I don't know. I know they jumped on the record at some point, but I honestly don't know at what point.

Mr. KELLER. Okay. Thank you.

Well, did you tour to promote that song with concerts?

Ms. SINATRA. I actually never toured——

Mr. KELLER. Okay.

Ms. SINATRA [continuing]. To promote the record. It was basically Ed Sullivan, Smothers Brothers, shows like that that made that record for me, I think.

Mr. KELLER. All right. Thank you.

Turning back to broadcasters, we have heard comments from the other side that essentially boil down to this. You all sometimes have a lot of revenue, so why don't you just take that revenue and pay it to the performers? And it is essentially trying to characterize you as greedy, to be honest.

I have to tell you what I have observed from my local radio station, as someone from Orlando, Florida. After 9/11 happened, our local Top 40 stations and country stations dropped everything they

were doing every single day to put me on the air, at no benefit to them, just to let people know what is going on.

I went through Hurricane Charlie in 2004. My mom lost her home. That was destroyed. They had me on the air, radio and top stations, every day to advise people what was going on.

We went through tornadoes that killed over 20 people in my congressional district. With no benefit to themselves, they dropped all their programming and their advertising to have me on the air every single day.

Let me start with Mr. Newberry.

Mr. BERMAN. Mr. Keller, time is—why don't you finish this?

Mr. KELLER. I will try to wrap this up.

Mr. Newberry and Warfield, are you concerned that by imposing this so-called performance fee, that radio stations would be less able, in the event of national emergencies and other critical things like 9/11 and Hurricane Katrina, to provide that type of service to their communities?

We will start with Mr. Warfield.

Mr. WARFIELD. I take it there are some operators that would have to cut significant services, would not necessarily have staff to that, or have the ability to do that and forego the revenue that would be required. I think there would certainly be a diminution of services provided to the community, unfortunately, as well as information and programming.

Mr. NEWBERRY. Yes, I do. And just to make a correlation to what you are talking about, and I appreciate the fact that your local stations did that, Mr. Lee earlier said there is a lot more that goes into the success of a concert than radio promotion, and I will tell you there is a lot more that goes into the success of a radio station than the music.

And it is the connection it has with the local community. And for us to look at assessing a fee on the top dollar of a radio station would cause dramatic effect to the services we could be provide.

Mr. BERMAN. Mr. Newberry?

Mr. KELLER. Thank you, Mr. Chairman.

Mr. BERMAN. Mr. Keller, your time has expired.

The gentleman from——

Ms. Jackson Lee is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Thank you very much, Mr. Chairman.

I am glad I followed by distinguished friend from Florida, because I don't perceive what we are trying to do as "I got you." This is not an "I got you" piece of legislation.

I hope that although applause came when song names were rendered, I hope that applause comes when members want to strike a balance to make this work, because frankly, it is a broken system, and we do need to fix it.

And we need to distinguish between heaps of profits that some broadcasters are making versus the smaller entities, and we need to find the kind of balance, if you will, that comports to the response to the songs, to songsters, the persons who give life to these songs, along with those who own the business entity of broadcasting.

So I first of all want to thank all of the witnesses for their presence here today. And I ask for you to beg my pardon, if I in some way accelerate the questioning, because it is pointed in order to get the right solutions here.

Let me first start with Ms. Sinatra and thank her so very much. I am so glad that she is admitting non-humbleness, because you are an icon, and I want it to be matched to your father, because you are here, but let us not in any way discount the wonderful entertainment and fun that you provided for us and continue to do so in the music that is being played.

Ms. SINATRA. Thank you.

Ms. JACKSON LEE. And certainly there is nothing to diminish the heroic status of your dad, both in theater and movies and certainly in song.

And my question would be to you, because one of the witnesses made mention of—and probably not in a purposeful, wrongful manner—but made mention of whose fault is it that people of yesteryear got these unfortunately deadbeat contracts.

And in the arena that I have traveled in, the music that maybe my mom and dad listened to, there were a lot of Negro and colored artists, who got a lot of deadbeat contracts. And they got them pennies on the song, if you will.

Do you think it is the fault of those that sang songs over the decades for the kind of—were they, if you will, delinquent and without diligence, that they would up sometimes paupers, as they sang songs that made us joyful?

Ms. Sinatra, was it the fault of those who sang songs that some of their contracts were poorly done?

Ms. SINATRA. Well, without diligence, perhaps it was true, because most musicians are just so grateful to have any opportunity to perform. They will do just about anything to be able to get a record made, and probably be a little careless regarding the contract.

But most of us, or I should say many of us, don't even have labels anymore. So many labels are gone, and I don't know how much we can blame this on the label release.

Ms. JACKSON LEE. So in essence, you are balancing your answer, which is that the love of the art caused a lot of singers to just go forward.

Ms. SINATRA. I think that is true.

Ms. JACKSON LEE. And the labels that were there may not even exist now, and so there is no real relief to go even back to the label.

Ms. SINATRA. In many cases, yes.

Ms. JACKSON LEE. And maybe the label was equally in the dark in those years past, because it has been pointed that the labels have been at fault.

And I want to go to Mr. Warfield, because you did seem to suggest, "I have got mine, and you get yours." And I don't think in this hearing room that can be the only solution. We have got to find a way to balance this question.

So tell me in the array of individuals or the way of your representation, what is the average, if you will, yearly revenue that your broadcast stations have? What is the range of them?

Mr. WARFIELD. I can speak on behalf of the industry overall. Our industry generated roughly $20 billion revenue in 2007, and our industry also in 1999 generated $20 billion in revenues. We have an industry that is a—you look at in place here when you look at it—is down, and has been experiencing difficulties as an industry for a number of years.

And that is just the facts about radio. I have heard questions about consolidation and the impact, and there is sort of behind that the greed factor about broadcasters. We are trying to provide the best service that we can in our communities, to continue to serve those communities and to be viable businesses in an industry that is not growing.

Ms. JACKSON LEE. Well, but you do have consolidation.

Mr. BERMAN. I am sorry, but the time of the gentlelady has expired.

Ms. JACKSON LEE. Did he finish his point?

Mr. BERMAN. I think he did.

Did you?

Yes.

Ms. JACKSON LEE. All right. Are we having a second round, Mr. Chairman?

Mr. BERMAN. If you want to.

Ms. JACKSON LEE. I would like one. Thank you.

Mr. BERMAN. I have got a hearing. We have got to get done before the votes.

Ms. JACKSON LEE. That would be great.

Mr. BERMAN. No rounds after the votes.

We will let you go. Until the votes, you are captive.

Ms. JACKSON LEE. Thank you. I yield back.

Mr. BERMAN. Okay.

The gentleman from California, Mr. Issa?

Mr. ISSA. Thank you. And I will probably sort of continue in the same genre as the gentlelady from Texas.

Mr. Warfield, I have a set of figures that we have compiled. We think it is accurate. You have 17 stations?

Mr. WARFIELD. Our company today has 17 stations. That is correct.

Mr. ISSA. Okay. Fourteen have revenues less than $1.25 million.

Mr. WARFIELD. That is correct. I don't know the numbers by heart, but I won't question that.

Mr. ISSA. I was a CEO once. I didn't know the numbers by heart, but I was always pretty close.

So those 14 stations would each pay $5,000 under this act, agreed?

Mr. WARFIELD. As the act is?

Mr. ISSA. Okay.

Mr. WARFIELD. Just calculate that based on what is there, that sounds about right.

Mr. ISSA. Okay. And let us just take sort of a middle of the road kind of a station. Well, let us take one. KVVN-AM revenues are about $1.2 million.

Mr. WARFIELD. That is correct.

Mr. ISSA. How much of that is labor?

Mr. WARFIELD. How much of that—excuse me?

Mr. ISSA. Is labor.

Mr. WARFIELD. Labor? I would say at least 50 percent of that.

Mr. ISSA. So you have got $600,000 in labor. I would assume that you have $60,000 in health care costs alone just for that labor, right?

Mr. WARFIELD. Roughly 10 percent.

Mr. ISSA. Okay. So could you afford $5,000 into $1.2 million in that case?

Mr. WARFIELD. That radio station is a talk radio station, so it would not apply.

Mr. ISSA. Oh, I am sorry. The format said ethnic. It didn't——

Mr. WARFIELD. It is targeted to the Vietnamese community in the San Francisco Bay Area.

Mr. ISSA. Okay. Well, let us actually move up. I am going to take a liberty. WARQ Rock revenues are about $1.4 million to $1.5 million, not covered by the current $5,000 cap. But let us just say for a moment that it was .5 percent, so you would be at $7,000. On $1.425 million, half of it being $700,000 worth of labor, would $7,000 make the difference of that company staying in business or not?

Mr. WARFIELD. Labor at that radio station is considerably higher, because this is a rock radio station. There are a lot of air personalities, and all of our day parts, and the costs of marketing, promotion. That radio station, the cost of operations is probably close to 85 percent.

Mr. ISSA. Okay. So if you went on that station and said we have paid $7,000 to the performing artists, because we think it is the right thing to do—.5 percent of our gross revenues—and we think that is the right thing to do, because we think these old rockers ought to get some revenue, when they can no longer roll through town and tour, do you think that would be worth—would that be a normal promotion that might pay you a dividend of at least $7,000 of listener royalties?

Mr. WARFIELD. Probably not.

Mr. ISSA. You don't think people would care enough that you——

Mr. WARFIELD. I think the fact that the radio station is supporting those artists and playing that music in that marketplace and doing other promotion for the——

Mr. ISSA. I appreciate that. My question, though, is could you afford it? Could you afford $7,000 into $1.4 million on that?

Mr. WARFIELD. It would probably cost us services in our operation in the Columbia, South Carolina, market. It is not a standalone radio station. It is part of a group of stations.

Mr. ISSA. But you wouldn't fold, if we mandated you pay $7,000.

Mr. WARFIELD. Would we fold? Probably not. But it would cost in services to the community.

Mr. ISSA. And don't you pay roughly $28,000 to the songwriters on that $1.4 million, roughly?

Mr. WARFIELD. There is a requirement to pay that. That is absolutely correct.

Mr. ISSA. Okay. So it doesn't kill you to pay $28,000, but $7,000 would cause cutbacks.

Mr. WARFIELD. Cost of that operation.

Mr. ISSA. Okay. If you are already paying the $7,000, it would be figured into your business model, but you are not paying it right now.

Mr. WARFIELD. Well, it might go into a decision that we would make as to what we would do with our radio stations in that market.

Mr. ISSA. Okay. I kind of see that. So I think we can probably live with the fact that you pay $28,000 to the songwriters—$7,000 or even $28,000 probably isn't what we are talking about. We are talking about whether or not your promotion value makes it legitimate to pay nothing.

Mr. WARFIELD. Yes.

Mr. ISSA. That is basically the status quo.

Mr. WARFIELD. Yes.

Mr. ISSA. Okay. Let me ask you another question. I am being rhetorical, but it is important, because we are trying to find some middle ground, and the NAB isn't going to give us middle ground, so I am hoping I can get it from businessmen.

If we allowed you straight over the table to charge for every song that you played, if you were promoting a song or a concert coming through town, and you could earn revenues from that, then would it be unfair to take 2 or 2.5 percent or some figure for what you play, remember that you can offset that with revenue?

Mr. WARFIELD. I don't know what kind of a business model that is. I would have to sit down as the CEO of the company and see if that makes sense in a marketplace that is going through tough times.

Mr. ISSA. One last follow up. The question I am asking—you said that it was worth paying nothing to the people whose music you are playing, because of the promotion value.

I am saying if you can monetize that, wouldn't it be fair to collect from those that you choose to pay that you haven't monetized, and collect from those that you believe you are promoting?

Mr. WARFIELD. I don't know how that model would work, sir.

Mr. ISSA. Okay. So I am going to summarize for you that you believe as of today that your worth of your promotion causes you to pay nothing, but you haven't looked into what the value of monetizing your promotion would be.

Thank you, Mr. Chairman. I got my point across.

Mr. BERMAN. Thanks. I think so.

The gentleman from Florida, Mr. Wexler?

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

Mr. Warfield, if I could just follow up Mr. Issa's conversation with you, I am having a hard time understanding the equity of your position.

I understand you make the argument that somehow the value of the promotion that you provide therefore obviates the need to provide even one cent of compensation to the performing artists.

It would seem to me the only logical position would be that yes, in fact, there is a promotional value that a radio station provides to a performing artist, and that promotional value should be a factor in the formulation of the royalty that is paid.

That is a value provided by the radio station, and the value of the music provided by the performing artist to the radio station

should be calculated together, and there should be an economic calculation that is made, based on the equities of the situation.

But to have the strident formula that the value of the promotion always exceeds in every situation from the beginning of time till the end of time the value of the product of the performing artist defies logic to me.

So we seem to have two extreme situations in the music industry. On the one hand, we have Internet radio, which pays what seem to be fairly significant percentages of revenue, and then we have your companies that pay zero percent of their revenue to royalties.

And as the questioning points out, which of course is in the bill, the idea that somehow this bill compromises the financial interests of smaller stations—that is really a misnomer.

That is really not an argument, because as we now know, smaller stations will pay out a flat fee. And that flat fee in most instances will be $5,000 or even less in terms, I understand, of educational institutions or some other institutions, which $5,000 in the context of most of these businesses is a fairly small, almost nonexistent percentage, of the business activity.

So help me understand the equity of your position in light of the value of the promotion. And tell me why is it that in other instances like Internet radio, where the royalty represents a very significant amount, in some instances I understand even half or more, why should we go on with this relationship that you benefit by, when there doesn't seem to be any economic justification or fairness to the performing artists?

Mr. WARFIELD. I have been in this industry for 30 years, running radio stations in large markets, small markets, have worked with artists, have been with radio stations that have, quite honestly, launched the careers of many artists, some of whom are household names today, some of whom would have never had careers without the benefit of airplay in our markets, and at no point was there any question about the value of what we did.

The same thing is true today, as we continue to promote those artists—those artists that I started with some 30 years ago, as well as the new artists today. There is a tremendous benefit to these artists and to the labels.

You want to equate that with fees that we pay by streaming the Internet. I think it was even said here at some point this afternoon that maybe those fees, maybe that is exorbitant.

We had a business model that is running people away and causing these businesses to fail. Is that what the intent of this might be?

Mr. WEXLER. Tell me, if you would, why isn't it not the best response that the value of the promotion, the factor in the royalty payment, why is it always 100 percent and zero? Why isn't it a factor?

Mr. WARFIELD. The ratio as it has existed through all of these years has been the fact that it has benefited these artists, as well as these labels, for the entire time I have been in this career.

There has been a tremendous benefit that has accrued to all of them through this. And we feel that that balance has been well for this industry for the last 60 years and should continue.

Mr. WEXLER. So you are saying that in every instance the value of the promotion exceeds the value of what the work product was of the recording artist to the radio station. Therefore, you owe them nothing, in every instance since the beginning of music.

Mr. WARFIELD. There is a strong recording industry in this country, stronger than any other country, in America, and I think the value has certainly been reflected in their success.

Mr. WEXLER. Thank you.

Mr. BERMAN. The gentleman from Tennessee. We should note that sometimes the victory goes to those who stay the latest. Notice who is left. [Laughter.]

Mr. COHEN. The last shall be first.

Let me ask the two gentlemen here from the broadcast companies. I don't know which would be the best one. Maybe this is for the purpose of Mr. Warfield, I guess.

What is the typical percentage that a good, healthy radio station pays out right now on copyrights for compositions or music?

Mr. WARFIELD. It is not a percentage. It is calculated now based on the market size that the operation is in.

Mr. COHEN. Yes, now a percentage of your gross you could probably guess what is an average. Is it 1 percent of the gross sales? Is it 2 percent, 20 percent?

Mr. WARFIELD. It is a fee that is set. It is not a percentage. It is a fee that is set with the——

Mr. COHEN. I know that that is not, but you get a radio station——

Mr. WARFIELD. As your revenues fluctuate, that number fluctuates also, but it is set based on the market size.

Mr. NEWBERRY. There was an historic basis that did not work on the percentage. And he is not trying to avoid the question. The honest answer is totally the percentage will move, based on the revenue of the station.

Mr. COHEN. Well, let us take the work I did.

Mr. NEWBERRY. It is 5 to 7 percent.

Mr. COHEN. Five to 7 percent. Good.

Mr. NEWBERRY. Historically.

Mr. COHEN. That is what I am trying to get to. And you make this up. You have advertises, right? What do you think it would cost, if we pass this bill? Do you expect it is going to cost you another 5 to 7 percent?

Mr. WARFIELD. It could cost this industry $5 billion to $7 billion.

Mr. COHEN. I don't mean that, but I mean a percentage of a typical radio station. Five to seven is what you pay out normally to the copyrights that you pay now.

Mr. NEWBERRY. I can tell you that $5,000 a year for a lot of stations, small market stations, would be well in excess of 5 to 7 percent.

Mr. COHEN. So if it is 5 to 7 percent, you could just increase your advertising costs by 5 to 7 percent, couldn't you?

Mr. NEWBERRY. On today's economy, no.

Mr. WARFIELD. Not in today's economy we are in.

Mr. COHEN. But you could do it. Are you suggesting that people wouldn't advertise?

Mr. WARFIELD. It would not be supported by the advertising community. That is correct.

Mr. COHEN. What would they do? Just kind of go to a color ad or something?

Mr. WARFIELD. What has been happening is they would buy less advertising from the industry.

Mr. COHEN. They would buy less advertising.

I didn't realize the industry was hurting that bad.

Mr. WARFIELD. Well, he referenced earlier that our industry has been flat for the past 5 years.

Mr. COHEN. Your executives—what do you think their income increased last year? Do you have any idea what the average broadcasters—say NBC—what percentage did his or her income increase last year?

Mr. NEWBERRY. He has no radio station, so I wouldn't have anything to——

Mr. WARFIELD. I can only say——

Mr. COHEN. Give me some fine radio station—Clear Channel.

Mr. NEWBERRY. The compensation was down last year.

Mr. COHEN. The compensation was down?

Mr. NEWBERRY. The CEO's compensation, to my recollection, was down last year.

Mr. COHEN. What do you think it has been over the last 5 years?

Mr. NEWBERRY. Don't know.

Mr. COHEN. I would submit to you that if you look at it—we can look at it afterwards—that the compensation of the executives, managers has increased on an annual basis over a certain number of years by a goodly percentage. And that is borne by the advertising costs.

And somehow or another, they all do good enough to charge more to the advertisers to compensate for your executive salaries, and we get along. But when it comes to paying the singers that give you the songs that give you the income to give the executives their salaries, you can't afford it.

Mr. NEWBERRY. Congressman, I can tell you as a matter of fact that my compensation has been flat for the past 5 years.

Mr. WARFIELD. And I can also sit here and say that over the last 5 years my compensation has been down.

Mr. BERMAN. I think Ms. Sinatra has something you wanted to say on this question?

Ms. SINATRA. I am sorry to interrupt. I just have a question. I think "Something Stupid," the duet with my dad, was number one in 1968—something like that. And I remember those days vividly, because my father was so excited to have a number one record. I think it might have been his first one. I don't know.

But in those days radio was announcing who was singing, what the label was, what the song was called, sometimes before they played it, and sometimes after.

Now, fast-forward 40 years. What I hear mostly is a computer-generated program. So my question is, where is the promotion now?

Mr. NEWBERRY. I can address——

Mr. COHEN. I yield the balance of my time to Ms. Sinatra. [Laughter.]

Mr. NEWBERRY. I can address that from my personal experience, and I am sure we could line up broadcasters all day that had similar experiences.

WPTQ in Bowling Green, Kentucky, is a rock station. It has a Saturday night show, it has a Sunday night show, that is promoting local artists. It back announces songs that are released within the past 6 months to a year. No, we don't. Every time we play Led Zeppelin, we don't tell you the song, because it is a standard. It is a classic. But that is part of the promotional value of that radio station.

I can bring bands that we play that are not able to get recording contracts, but we play them, because they are able to do their own recording. That value is there, and for it to summarily be said that our industry is being run by computers I think is an over exaggeration.

Ms. SINATRA. No, I didn't say that. I just need to move. [Laughter.]

Mr. BERMAN. Do you want to get a last gasp in here, Steve?

Mr. COHEN. Further Congressman saith not.

Mr. BERMAN. I am just going to yield myself 5 minutes to make a couple of comments and ask a few questions.

Mr. Warfield, both of you are really great witnesses. You have a tough argument, but you are great witnesses, and you do as well as can be done. You, Mr. Warfield, have not mellowed in 9 months. [Laughter.]

And there is something funny about the point raised by Mr. Keller. The Commerce Department thinks you will do better if our bill passes. You don't know why they think that, but they don't think you are the right judge of how your industry will do better. They are a better judge of it.

You are a better judge of how the recording industry will do than they are of what they think is in their interests, because they are wrong to be pursuing payment for performance, because all they are going to do is kill the goose and all that. So you are a better judge of their business model and what they think is in their interests than they are.

And on the issue of who is testifying and who isn't, I think we should one day have a hearing—I say this; it is not a promise, but it is in my mind clear—let us get Clear Channel and the biggest music label and have just a hearing of them.

In other words, we aren't seeing the big multinational conglomerate radio station owners coming to testify here. We are seeing a couple of very effective entrepreneurial owners of some stations, but many of them on the smaller side, make the case. So each group does what they want to do.

But the thing I most wanted to disabuse you of is—and I understand why you say it, and I think there is some historical truth to it—the notion that these days—I think the labels would love it, if it were still the case—that the labels have put a ring through the nose of the recording artists and are leading them to be their front people for their interests, and that the recording artists do not have a sophisticated and intelligent understanding of what their interests are, and that somehow these people, whatever the conditions were 25 years ago or 40 years ago or 50 years ago—and we

know some horrible stories from those periods of time and those contracts.

That is all true and accurate history—but the notion that—these days that they have formed a vibrant coalition, aggressively pursued their interests, and hand-in-hand with the union representing the musicians and the other organizations—they don't have the ability to know what is in their interests, and they are being led somehow by the labels, that ain't the world today.

And I am sure the labels, off the record, will let you know that they maybe wish that were the world today, but it isn't anymore. So I don't think we should discount the sophistication of the recording artists in understanding what they are facing now.

My question is two things—you haven't really responded to this—I raised in my opening statement. Others have touched on it. Explain to me why this is a tax, and what you pay for musical compositions isn't a tax.

Explain to me why what you promote for owners of sound recordings and for the performers and the musicians and the backup singers is so valuable to them that you shouldn't have to pay that, like your promotional value for the musical compositions that promote these early sales.

And I think there is a debate about whether spin on the radio causes sales or popularity of the recording causes the spin. I am not sure your study effectively addresses that. But explain what is the distinction between the two. Why is it okay to pay that for the musical compositions, and not here?

And then the second one, and then I will let you folks respond, is baseball, sports, promotion. Here we are mandating a compulsory license. You don't have to go out and negotiate with the NBA and the major league baseball and come to an agreement with them.

And I know those guys, and they are trying to suck as money out of you as they possibly can, to give you the right to broadcast their game.

And you promote their sports, and you promote their attendance, and you promote their merchandising by virtue of your coverage of their game. And you still pay them a lot of money for the promotional benefits you give them. What is the justification for that?

Mr. WARFIELD. Sir, I am going to defer to my associate, Mr. Newberry, on this last question about the baseball and sports franchises.

Mr. NEWBERRY. I am glad you brought that up, because I think that is a classic case and analogy for the situation we are talking about here.

There are many stations that will negotiate with a baseball team or a football team, but this same concept was attempted to be applied down to smaller teams that have less market value, have less name recognition.

So at high schools and small colleges, they attempted to charge radio stations a fee to carry the game. Radio stations stopped carrying the ball game, because it did not make sense.

Mr. BERMAN. Fair enough.

Mr. NEWBERRY. Can I continue?

Mr. BERMAN. Sure.

Mr. NEWBERRY. And I think what you are going to see is if we turn the relationship that has served this industry, performers and the radio stations, so well for these years, if we turn this into strictly monetary exchange, we are going to find ourselves in the exact same situation, that we will only play the songs that give us the highest return on that investment, and that smaller artists and unknown artists and people that are trying to get into the industry are going to have a much more difficult time finding time on the airwaves, because they are going to be like that single A baseball team or that small college team.

And if there is not a return on the investment, we are going to make a decision that that is not what we should be playing.

So the unintended consequence of this bill is going to be that those that have money are going to make a lot more money, and those that are struggling are going to be left out on a lot of radio stations.

It is exactly like the——

Mr. BERMAN. And the musical compositions?

Mr. NEWBERRY. Those people don't have an opportunity to monetize. The composers——

Mr. BERMAN. What is the mechanical?

Mr. NEWBERRY. Excuse me?

Mr. BERMAN. What is the mechanical?

Mr. NEWBERRY. The composers write the songs and hand it off. The only way they have the ability to earn income is from the——

Mr. BERMAN. Wait, wait, wait, wait, wait, wait. You play. People buy. That is your argument.

Mr. NEWBERRY. They don't make any money off of——

Mr. BERMAN. Sales of records, of CDs?

Mr. NEWBERRY. I don't know what the mechanics of that compensation are, but they certainly can't do T-shirts, they can't do concerts, they can't tour.

Mr. BERMAN. No, they have——

Mr. NEWBERRY. A witness here earlier today talked about how there are people that have been involved in writing many, many songs.

Mr. BERMAN. So they have a mechanical.

Mr. NEWBERRY. But you don't know who they are. They do not have the celebrity that our industry has created for the performer.

Mr. BERMAN. My time has expired by a lot.

Mr. ISSA. Mr. Chairman, I was so captivated I didn't notice. But I am going to continue as best I can down somewhat the same track.

Mr. Warfield, I will give you a little bit of a break. I think we sort of beat to death Q & A, other than one question. You did previously testify that the amount paid off to the writer by the industry was about $450 million to $500 million a year. Is that right?

Mr. WARFIELD. That is correct, sir.

Mr. ISSA. Okay. So the industry can afford $450 million a year to the people who created the sheet music, but not anything to the people who actually did the performance. That is what we are saying here.

Mr. WARFIELD. There is a benefit that accrues to those individuals above and beyond the $500 million that is paid by broadcasters. So there is a benefit that they do get.

Mr. ISSA. Okay.

Mr. Newberry, I am going to switch to you for a little bit.

And Ms. Streisand, I hope you understand that you can come up with a question at any time, because you did so well.

But, Mr. Newberry, you said something about the sheet music that kind of got me. Somebody writes a song. They are going to make money when I perform it live in concert, right, if I am a singer. They are going to make money off of my DVD.

They are going to make money if, quite frankly, I need to buy 500 copies of the song so that we could sing it at church. So there are ways to monetize that have nothing to do with your radio station, right?

Mr. NEWBERRY. Sure.

Mr. ISSA. Okay. I just wanted to make sure that if radio goes out of business, that these writers may still make a living somewhere. I agree with you that they can't tour, except maybe doing an American Express commercial saying, "You don't know me," but it is hard getting me through the station.

I mentioned Harry Chapin. He is gone. He is a writer. His family continues to get revenues on that side, but they don't get anything when "Cats in the Cradle" plays, unless he gets it from the writing. He doesn't get it from his rendition of it.

What if we up here determine that every rendition was in fact an original work of art definably separate from the writing? In other words, Ms. Sinatra there, when she did a song, her song was very different from the sheet music. What if we simply decided that we were going to give that a separate right, and as such it would have to be negotiated separately. Would that give you a problem?

Mr. NEWBERRY. First, I don't have copyright experience or expertise, but certainly if I am trying to negotiate with every individual, there is a logistics that would——

Mr. ISSA. Okay. Do you benefit from the mandated?

Mr. NEWBERRY. But we would not play the song.

Mr. ISSA. Okay. Well, if all songs fell under that. But right now you benefit from the fact that you can grab any song and play it—any song and play it.

Mr. NEWBERRY. Any broadcaster can.

Mr. ISSA. Okay. So you have the right to play, but they don't have the right to withhold.

Now, all the bands these days are doing music video. If starting tomorrow, 100 percent of their performances were music video, and they did not in fact produce a separate DVD, you wouldn't have the right to strip it out, so you would lose the ability to play their music on your station, even though they had a music video, because stripping it out would be illegal.

You can't take TV shows and simply rebroadcast them. You can't take music videos and DVDs and broadcast them. You don't have that right. So in a sense they could take away your right by simply moving.

If CDs aren't selling, they might just go to their copyrights being linked to their music video, and as a result, you would lose the

ability to play all the new music, right? What would that do to your business model?

Mr. NEWBERRY. It would change my business model.

Mr. ISSA. Okay. Well, let us do a couple more business models, because I am a hard-nosed businessman. If I went to sing right now, it would end the industry, at least as we know it.

So presently both of your stations are substantially still analog, I assume?

Mr. NEWBERRY. Yes, sir.

Mr. ISSA. Okay. Do you want to make them digital?

Mr. NEWBERRY. We are converting one of our stations.

Mr. ISSA. Okay. But what if we up here—because we have the responsibility; it is actually next door at the Energy and Commerce—but what if we, recognizing that the fair use that has existed—and I came out of the consumer electronics industry; I believe in fair use—the fair use that allowed for copy over the air radio for me to put on to my cassette or eight-track or whatever happened—what if we said, well, you know what? Since you are not paying anything, we can't allow that to continue digitally, because now there is going to be a perfect copy made.

What if we took away that ability? Do you think that would affect your business model, when people just couldn't?

Mr. NEWBERRY. Sure. I would do more talk.

Mr. ISSA. Okay. But in other words, if people couldn't record off the air, because you didn't pay anything for that performance, and if they turned into a personal digital copy——

Mr. NEWBERRY. I am just saying I would not program that station. If I made the decision to go to digital, I would either, a, not go digital, or I would put a product on there that didn't require me to.

Mr. WARFIELD. In many cases it is just business not to go digital.

Mr. ISSA. Okay. So you may stay analog, and that is fine. Some people do that.

Just one last question. What if we simply gave all the individual artists the right—or the record labels—to withhold, and said, look, you have the right to withhold from terrestrial broadcasts?

And what would you do? Would you simply only play the ones who in fact didn't withhold? Or would you negotiate with the ones who had the right, and chose to withhold? And I am talking about the major labels or individuals.

Mr. WARFIELD. Being the business manager, I would make a business decision. I would make a decision where I wanted to invest the money. And if they wanted to withhold, and I determined it wasn't worth it, I wouldn't play it.

Mr. ISSA. Okay. So if we changed it, and the Beatles label was withhold for separation negotiation, you would suspect some station would step forward and pay 3, 4, 5 percent and play them, and as a result there would be revenue where there isn't, regardless of the historic promotion. Is that fair to say?

Mr. NEWBERRY. You would have a dramatically different broadcast industry. You would have communities that would suffer dramatically because of that decision.

Mr. ISSA. No, I understand. I just suspect that "Abby Road" would get a little more play for pay.

Mr. Chairman, I only have one question sort of for the record.

Mr. Newberry, I gave Mr. Warfield so many questions I missed one that I would appreciate it if you would answer it for the record.

You talked about your promotion. Would you deliver to this Committee a record of what songs, labels and individuals over the last year you feel you have promoted by your playing—separately from simply playing? In other words what benefit you have analyzed in your company you gave by promoting the singer, label, the song, a concert coming up.

Mr. NEWBERRY. Sure.

Mr. ISSA. Okay. I would appreciate it if you would deliver that for the record.

Mr. NEWBERRY. Absolutely.

Mr. ISSA. Thank you very much.

Thank you, Mr. Chairman.

Mr. BERMAN. The gentlelady from Texas?

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

All of us, I guess, will put on the record that any song coming from our lips would run everybody out of the room. So we admire all of you for the fact that you know music and enjoy music.

Mr. Chairman, this is a comment that I hope that you will listen to. I think as we have had this very open discussion, it really comes down to numbers. I think that when I say numbers—profit—how much this would ultimately cost, what the burden would be on the various broadcast owners.

And it think it is important to note on the record that we do have Section 3 in the bill that deals with the special treatment for small noncommercial, educational and religious stations and certain uses. And I know that one of my colleagues raised the question, and there is a certain amount, and, Mr. Chairman, I am going to on the record now indicate that I would like to work with you.

I believe in this present market that number might need to be increased, because I think the intent is to—but it might need to be increased, because small numbers because of inflation, small stations, whether religious or otherwise, might be worth more than what the figure is in this bill.

But I do want, for example, the station in Houston, Texas, KCOH, in case anybody is running back to report on this hearing, to be aware that I am aware of their circumstance. And as I am aware of their circumstance, I am concerned about the underlying issues.

Mr. Lee, I am not going to leave you out—my namesake—and so I want to pose this question, that I think has been represented by Mr. Newberry and Mr. Warfield very eloquently, and that is that they pay a licensing fee. The radio stations will say we pay what they call—contribute to the licensing of music. So they pay some money.

And you represent your side of the industry. So the question they would ask is why then they don't need to pay an artist fee, because they make a payment that contributes to the licensing of music.

Can you explain that argument from your perspective, maybe? Does that substitute for paying the artist, in your instance?

And you are in the industry. Do you think the framework of this legislation—you have heard the two gentlemen; I respect their in-

dustry; I am concerned about what they have represented here—do you think this is the final act that breaks the camel is back, with respect to this legislative framework?

Is this going to put, from your perspective, these gentlemen and others out of business? Mr. Lee?

Mr. LEE. Five thousand——

Ms. JACKSON LEE. You have to turn on your mike and speak loudly. Thank you.

Mr. LEE [continuing]. Five thousand dollars I cannot believe is going to put any small radio station out of business. It is going to recognize that artists have created something of value. It is a very small amount of money to pay. And by the way, all of us own the airways, and they are free.

And it is really appalling that people, who create the kind of value that is played over and over and over for the last 40 and 50 years, are perceived as having—"Gee, we just don't have enough money to recognize your talent and ability."

Ms. JACKSON LEE. And how do you respond to their point that they contribute to the licensing of music. They pay some kind of fee, and so they shouldn't have to pay an artist.

Mr. LEE. I am not sure that I understand it. They pay a licensing fee. They pay the songwriters, and that is whom they pay at this point in time. But licensing fee to the musicians—there is nothing.

Ms. JACKSON LEE. And so the payment to the songwriters you don't think equates as a business expense that could substitute for what they might have to pay to the artist.

Mr. LEE. I believe there is enough money in radio ads, and it is clear the kind of money that is being made. It is a $4 billion industry for talk shows.

I believe that if the radio industry felt that they could make more money with talk shows—and by the way, they have to pay people when they do talk shows—if they could make more money by doing $20 billion in talk shows, I think you would see that take place.

It is clearly there is a huge value for music. And as much as they have tried to walk around that, the fact is it is intellectual property.

It is created by highly talented individuals, and right now those individuals—we are offended that we are sitting here listening to people say there is no value to that. Well, maybe there is, but we can't pay you anything for it.

Ms. JACKSON LEE. And Mr. Lee, this is a game of numbers. And if small stations are now exceeding in revenue, and they are still small, you would see the reason for possibly lifting the cap so that you would include more small stations.

You are not here trying to harm real Mom and Pop stations, are you?

Mr. LEE. We absolutely are not. And it is important to our local musicians to be able to have their recordings broadcast on their local stations.

Ms. JACKSON LEE. So if the cap was raised just a little bit to meet inflation, you would be okay with that. You think that would be reasonable.

Mr. LEE. Certainly.

Ms. JACKSON LEE. Mr. Warfield and Mr. Newberry—if I could finish this Chairman, Mr. Chairman—you heard the comparison about talk radio, which I think Mr. Newberry commented on.

Frankly, would you in essence shut down all of your music stations, if this legislation was passed, and go to talk? And do you think the market would tolerate that?

Mr. WARFIELD. I would say that no, that is not realistic that everyone would go to talk. What you would see is there would be more broadcasters' formats, certain formats, would not be viable, would not be played.

Gospel would certainly be one of those formats that would be challenged if it had to pay a fee, simply because it is not one that gets a significant amount of advertiser support relative to some other formats.

You would see some of those formats just go away. Smooth jazz might be another one of those. It would probably just go away, because there would not be enough support to offset any additional fees that would be attempted to be charged against some of these formats.

Ms. JACKSON LEE. Mr. Newberry?

Mr. NEWBERRY. In our size market, there is a tremendous amount of talk programming that is available on a barter basis, barter being that there is imbedded advertising from national services, so we are able to broadcast at no additional cost. That makes it very appealing.

I would also agree that while all of the music stations would not go away, in Glasgow, Kentucky, I have four stations that are currently playing music.

I would expect I would take the most successful stations that I had—one or two—be willing to pay some type of fee, move some other products to talk, and then play only the songs that I thought would give us the highest return on that investment, and wouldn't be taking as many risks with new artists.

Ms. JACKSON LEE. Mr. Chairman, I know my time is up.

Mr. BERMAN. Your time is.

Ms. JACKSON LEE. And I will simply say I think this is a story that we heard before the FTC came into business or the STC.

I frankly believe these distinguished businessmen would make it work. They would have music stations. They would pay the fees, and all would be well. I would like to work with them. I think we can, as we make our way through this legislative process.

I thank the witnesses.

And I thank the Chairman.

Mr. BERMAN. Thank you.

The gentleman from California?

Mr. ISSA. Ms. Sinatra, I want to close on——

Mr. BERMAN. We will be out of here by nine. [Laughter.]

Ms. JACKSON LEE. Now there is a third round. Good.

Mr. ISSA. Ms. Sinatra, I just want to close on sort of an upbeat, downbeat note. Not only did you have your own personal success, but you come from a legendary family. You grew up in the music business.

If you could just close by telling us not about your success, not about your father's success, but about just briefly the hundreds of

artists that you remember that did great work that you don't hear played on the radio today.

They have no revenue from performance. They were probably played in the 1950's, 1960's and 1970's. They are not played today, and their CDs are out of print. But if you would just give us a little inkling, because you lived with those people going in and out of your life.

I would appreciate it, because this hearing is concentrated on what is played and what the value is. And I think uniquely somebody who has had so many decades—successful decades—in this business knows about the people that were left behind. And if you would close on that, I would appreciate it.

Ms. SINATRA. Well, thank you for that question for two reasons—one because of my friends that I grew up in this music business with, and the other because I have my own radio show on satellite radio.

And I purposefully play those people, such as Joanie Sommers, who is probably one of the best singers who ever lived. And I heard a terrible rumor that she is not doing well right now. Jerry Southern. I am trying to think of who else I would play that you might know.

I play the early band singers—Helen Forrest, of course, and Helen O'Connell. I am naming all women, but, believe me, there are a lot of men in this thing.

And my listeners email me and call me. I have a way of receiving phone calls. And they are so grateful to hear their favorites again, like Harry James, Betty Grable, Alice Faye, Tommy Dorsey.

I am also playing people like Neil Diamond, even though the station is called Seriously Sinatra, I am playing what I consider to be the new American songbook—writers like Burt Bacharach, Neil Diamond, Paul McCartney.

So I am trying to present to people, in my 3-hour show, a vast array and eclectic array of artists. And, yes, you are right, many of whom are never played—that I know of—on other stations.

Mr. ISSA. Thank you, Ms. Sinatra. And if you would play Dolores Hope for me sometime, you will play—I have her album. Almost nobody does.

Ms. SINATRA. I promise.

Mr. ISSA. I look forward to it. Thank you.

I yield back, Mr. Chairman.

Mr. BERMAN. Just in closing, I would be curious if 77 percent of the stations receive the $5,000, or in some cases, $1,000 cap under this legislation, if $5,000 were too much, is there a reasonable "affordable" figure here that is less than that? Or is zero the only reasonable amount?

Mr. NEWBERRY. Mr. Chairman, I think one thing that was stated earlier that I want to make sure I clarify. There is value for what these artists have done. There is no question about that.

I think Mr. Lee said that all I have created—and I think speak for Mr. Warfield—we are not saying that there is not a tremendous value of the products that have been created.

What we are saying is there is that there is tremendous value in the promotions we have provided.

Mr. BERMAN. But that is the point. We can't—we don't know quite how here, and we shouldn't be weighting that. That is what existing law says. "Whether or not the service may substitute for or may promote the sales of phono records or otherwise may interfere with or may enhance the sound recording of the copyright owners' other streams of revenue from a sound recording."

That is just the kind of argument that is right to make before a copyright royalty judge or panel, and put into evidence. And if this bill needs to make that more explicit, tell us how to.

No one is trying to deny the promotional value. You are conceding the value of what these artists and these sound recordings contribute to your stream of revenue. We have a meeting of the minds about values. We just don't know how to monetize them.

That is what this process will produce. It is how to weigh all of that. And I don't think anything we are doing in this bill takes way from your argument. It just requires you to risk paying some money for what you are now using that somebody else owns.

Mr. NEWBERRY. And I think that—again, I can only speak from the perspective of the small market broadcaster—record labels used to work with stations in our size markets very aggressively to break artists and make sure that they got played. They have made financial decisions, and we don't hear from record label representatives anymore.

We do hear from independent artists that are looking to get played. We do hear from people that are trying to do it.

But I think in the Glasgow, Kentuckys, of the world it is going to be extremely difficult to quantify the value of the promotional outlet. I think it is absolutely. I think it is real.

But I think it is much more diversified and spread among many, many more artists than it is as it is concentrated as you move up, and those artists become more successful.

So I am not trying to not answer your question. But I think that there is a principle there that we obviously disagree with. And that is not intended to say—to Mr. Wexler's point earlier—this is not intended to say we don't see value. We just want to make sure that the value of what we provide is seen.

Mr. BERMAN. Mr. Goodlatte has seen that we were still in the fourth hour of this hearing and has come to join us and is recognized.

Mr. GOODLATTE. Imagine how much more time would have been, if I had not joined you this early for your third round of questions.

But thank you, Mr. Chairman.

Mr. BERMAN. You are welcome.

Mr. GOODLATTE. I do appreciate your forbearance, and I would just like to explore one area that I understand in my absence hasn't been addressed, and that is the Nielsen report related to impact that playing songs on the radio has in terms of the sales of the song.

And I wondered if Ms. Sinatra or Mr. Lee were familiar with that report, and if you have any reaction to it.

Ms. SINATRA. Yes, I know what it is, I think. The Nielsen report is the rating——

Mr. GOODLATTE. It is a rating service, but in this case they did a study, which indicated that when an artist's song is played on the radio, the sales of the song increase. I wondered if you had——

Ms. SINATRA. Oh, no, sir. I haven't seen that.

Have you, Tom?

Mr. LEE. No, I haven't seen it. And I would like to have seen it before we sat down here. I don't know who paid for the report. I have no idea what the parameters were.

I do know that if a company is commissioning a report, and a predetermined outcome is adjusted, that it is not difficult for any well-run company to come out with a report that may be positive to the person who is paying the bill.

Mr. GOODLATTE. Well, and since I have a copy of the report here, and it has the National Association of Broadcaster's name on it, that certainly would cause us to ask Mr. Newberry and Mr. Warfield if they would like to comment on it.

But let me——

Mr. WARFIELD. There certainly has been——

Mr. GOODLATTE. Mr. Warfield, if I might put it in context first, because I agree that this appears to show that there is promotional value in playing songs over the airwaves.

I am wondering, though, don't the sales numbers and the data also reflect that there is a value of playing those songs over the other media that do pay performance rights royalties, like satellite radio and online broadcasters.

Mr. WARFIELD. Well, first of all, that is Nielsen's report that is being distributed by the NAB. And I don't believe that that report reflects any other promotional support behind that. It does show what happens with a trusted radio and spin and sales.

Mr. BERMAN. Would the gentleman yield just on that?

Mr. GOODLATTE. Yes, sir.

Mr. BERMAN. A quick look at this chart, without any offer of expertise, indicates that it is ambiguous. If there is a clear relationship, it is what extent do sales lead to greater radio play, or radio play lead to greater sales.

And just a quick look at the chart, it is not so clear that it is the greater the radio play that leads to sales as it is that there is an equally likely conclusion that when those sales start going up, the radio starts playing those songs.

And I just throw that out as a possible alternative reading to this NAB perspective.

Mr. NEWBERRY. Not to be argumentative, Mr. Chairman, but I believe the report clearly indicates that it is the airplay that helps drive the sales of those individual artists, whether they were being played on satellite or other alternative formats and then were played on terrestrial radio, that there were spikes—clear spikes—in the sales of their material.

Mr. GOODLATTE. Well, if I might ask a follow-up question to this very excellent question of the Chairman, would the spin numbers for satellite radio and online broadcasters generally correspond to the spin numbers shown in the Nielsen report?

In other words, in general do a Top 40 station on a satellite radio and a Top 40 terrestrial broadcast station play a similar assortment of songs a similar number of times during a given period?

Mr. WARFIELD. On certain channels, they could. But I think I know where you are going with that, but there is a difference in the number of subscribers for a satellite network in total, and then divide it by 100 channels, versus the 270 million listeners that we reach each week.

So terrestrial radio is so much more ubiquitous than satellite radio. It is certainly at this point. I don't know whether it will always remain that way. But you would think that, yes, on the Top 40 channel on one of the satellite services, the spins might increase. But this is based on terrestrial spin time.

Mr. GOODLATTE. Let me ask all of you in my closing moments here to tell me what you think about the future of music delivery. Where will the recording industry structure its delivery and sales in the future in a way that allows recording artists and record companies to reap the reward of their work? Anybody have any thoughts about that?

Ms. SINATRA. I don't know, but it looks like it is going to the Internet, doesn't it?

Mr. LEE. It may. It may.

Mr. GOODLATTE. Mr. Lee, go ahead. You jumped in first. Go ahead, Mr. Lee.

Mr. LEE. Okay. I think the recording industry and the artists and the musicians are all exploring what is the best business model. There are potentials, as you see now, for catalogs to be licensed to iPhones—not for sure, but catalogs to be licensed to organizations or a company that allows a legal download.

We are all concerned about piracy, and I think all of us understand that the business model has to change. But in the same context, the business model with radio listening has changed as well. There are more people that are listening to music on the radio, in our estimation, than ever has been in the past.

And so, as people have more choices to listen to the different styles of music, that is terrific, because when you have a Sirius or a satellite that has something like 70 or 80 or however many channels they have, you can actually pick out the style of music you want to listen to on a regular basis.

And I believe Congress recently passed a piece of legislation that allows radio companies to have several HD channels. So it would be possible for a radio station to do that—I believe this is the case—to have a classic rock station and three substations, one for 1970's rock, one for 1980's rock, and one for 1990's rock.

So we believe it is important that all of those streams of income, which may be the new business model for musicians and for the holders of copyrighted material, have to be incorporated into income for musicians and copyright holders.

Mr. GOODLATTE. Mr. Chairman, if I might allow the broadcasters to share their thoughts on whether that is a correct vision, or whether you think you would set it a different way.

Mr. NEWBERRY. I think you can look back on the radio industry, that we have made efforts to adapt to increased competition. I think just as an observer, the record industry really struggled with how to modify from traditional retail sales to distribution in the digital age.

So I do think in the future—to Ms. Sinatra's point—I do think you are going to see distribution by the Internet. But I think, Mr. Chairman and others, this is a classic case where our two industries could be partnering with each other to help the end result, as opposed to being at opposite ends.

I think the radio industry would certainly help monetize the value of our promotion, and many stations are already doing this.

You hear a song on the radio. You can go to the Web site, and it will show you the last 10 songs that were played. You are able to say I would like to download that song or I would like to make the purchase.

Radio stations are doing that all across the country, and I think that is how the partnership is intended to work between radio stations, recording artists. And certainly the record labels are part of this three-legged stool.

Mr. BERMAN. Is this what you meant earlier by bartering?

Mr. NEWBERRY. No, sir.

Mr. BERMAN. Oh. [Laughter.]

Mr. NEWBERRY. We would certainly be glad to profit share with you on it.

Mr. LEE. It is the listeners' choice as to whether they want to purchase it or not. As long as they can listen to it for free, or listen to it for whatever a subscription fee is, they don't necessarily have to purchase it. And if they are going to listen to it, then the musicians and the artists and the intellectual property holders are entitled to be compensated.

Mr. WARFIELD. There is a history in this industry and in the country that as these songs are heard, and they are heard on free over the air terrestrial radio, that it does drive sales.

It is no question about that. These artists continue to benefit from it, unlike any other platform that is available to them. It shows that this business model, as it has been in place, is still working for all parties.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. BERMAN. I think it is a good time to end.

[Whereupon, at 6:51 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Comment Of Sen. Patrick Leahy (D-Vt.),
Chairman, Senate Judiciary Committee,
On Performance Rights Legislation
June 11, 2008

WASHINGTON (Wednesday, June 11, 2008) – The House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property today held a hearing on pending legislation to recognize the rights of musical performers. Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.), last year introduced legislation to end an exemption benefiting traditional, over-the-air broadcasters and ensure that performing artists are compensated when their sound recordings are played on the radio. Companion legislation to Leahy's Performance Rights Act was introduced simultaneously in the House of Representatives by Rep. Howard Berman (D-Calif.), and that bill was the subject of Wednesday's House subcommittee hearing. In November, Leahy chaired a hearing in the Senate Judiciary Committee, during which musical artists Lyle Lovett and Alice Peacock testified.

"Performance rights for artists are a matter of simple fairness. I applaud Representative Berman for holding a hearing on this important issue today. The legislation that we have introduced in the Senate and in the House is a significant step toward recognizing and protecting the rights of performers, while protecting the needs of noncommercial and small commercial radio stations, including many radio stations in Vermont, as well as the rights of songwriters. I am glad the House is continuing this important discussion today, and that the administration has declared its support for this measure. I hope we can act to end this inequity and ensure that artists are fairly compensated."

#####

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

Sales vs. "Spins" Data Shows Significant Revenue for Artists and Record Labels Derived from Local Radio Airplay

June 4, 2008

Sales vs. "Spins" Data Shows Significant Revenue for Artists Derived from Local Radio Airplay

The following charts demonstrate the extraordinary promotional value local radio provides to artists and the record labels. As these charts clearly and unequivocally show, there is a direct correlation between the number of "spins" (plays on free, local radio) and the sales of albums or singles. It is this promotion – free advertising – that drives record sales and represents just one of the many ways local radio provides value to artists and contributes to their financial and commercial success.

The promotional value of free local radio airplay translates into significant revenues for artists and record labels:

- According to the Recording Industry Association of America (RIAA), record sales in the United States in 2007 were approximately $10.4 billion;
- Touring revenue in 2007 in the U.S. was approximately $5 billion;
- The above figures *exclude* the several billion dollars derived annually from merchandise, songwriting royalties and licensing deals for commercials, films, etc.; and
- Also excluded is the boost that U.S. popularity provides for foreign sales and concerts.

Local radio also actively promotes artists by:

- Devoting considerable and valuable airtime to promoting artists' concerts;
- Featuring artist weekends (e.g. the "Toby Keith Weekend" coinciding with his concert at Nissan Pavilion);
- Providing opportunities for live in-studio performances; and
- Creating buzz through on-air ticket and album giveaways, helping to drive concert and merchandising revenue.

The attached exhibits demonstrate radio's direct, positive and irreplaceable impact on record sales across multiple and diverse genres. Examples include:

- Breaking artists (e.g. Taylor Swift);
- Established artists (e.g. Bruce Springsteen);
- Artists who derived initial success from other media platforms (e.g. Colbie Caillat);
- New album sales; and
- Multiple genres, such as country, rock, pop, easy listening and rap/hip-hop.

Without doubt, the engine driving these billions of dollars into the pockets of the record labels and artists is free, local radio promotion.

Artist Examples of Increased Sales From Local Radio Airplay

Each of the attached slides* details and compares the spins on over-the-air radio (highlighted in red on each slide) with the retail sales and downloads of the artists' releases (highlighted in blue on each slide). The results are consistent in every artist example: Significant play on radio results in significant sales of the artist's song, demonstrating the significant promotional and economic impact that free, local radio provides to the recording industry.

The recording industry suggests that the Internet and viral marketing is now the way to break a new artist, such as Colbie Caillat who gained popularity in 2007 due to her hit single "Bubbly." However, despite numerous new methods for artists to showcase their music, such as MySpace.com, retail outlets, etc., radio's promotional value in spiking and sustaining sales is clearly demonstrated by the attached slides. As shown in the Colbie Caillat example, when radio airplay decreased, sales also decreased and then quickly dissipated. When radio airplay later increased, sustained sales did likewise, propelling the song and the album to Platinum certification.

The following charts include artists representing a cross-section of genres and varying levels of notoriety and success. Artists represented by the attached charts include:

- Velvet Revolver
- U2
- Rascal Flatts
- Linkin Park
- The Killers
- Kenny Chesney
- Kanye West
- Green Day
- Fall Out Boy
- Def Leppard
- Bruce Springsteen
- 50 Cent
- The White Stripes
- Colbie Caillat
- Taylor Swift
- Sean Kingston
- Josh Groban

* All chart data produced and provided by The Nielsen Company (Nielsen SoundScan and Nielsen BDS) and Pollstar.

Velvet Revolver

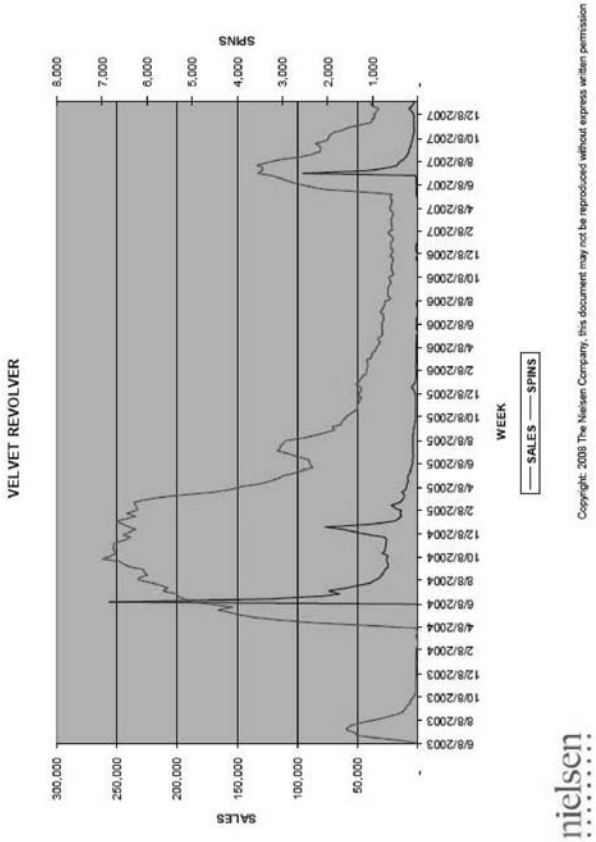
Velvet Revolver is a Grammy Award-winning hard rock supergroup consisting of Slash (guitarist), Duff McKagan (bassist, backing vocals), Matt Sorum (drums), all formerly of Guns N' Roses, Scott Weiland (lead vocals) formerly of Stone Temple Pilots and Dave Kushner (guitarist) formerly of Wasted Youth.

Albums

Both of their first two albums – "Contraband" and "Libertad" – reached the top five in the *Billboard* album charts with their debut peaking at #1 and reaching RIAA Double-Platinum certification.

Tours

Velvet Revolver has been on tour worldwide fairly consistently since April 2004, headlining 260 dates with an average gross of $188,446 per date. (Source: Pollstar Artist Profile Report, © 2007)


VELVET REVOLVER
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8/8/2007
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12/8/2007
WEEK
SALES
SPINS
nielsen
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U2

U2 is a rock band from Dublin, Ireland. The band consists of Bono (vocals and guitar), The Edge (guitar, keyboards and vocals), Adam Clayton (bass guitar) and Larry Mullen Jr. (drums and percussion). Since their inception, U2 has developed and maintained a distinctly recognizable sound, with emphasis on melodic instrumentals and expressive, larger-than-life vocals.

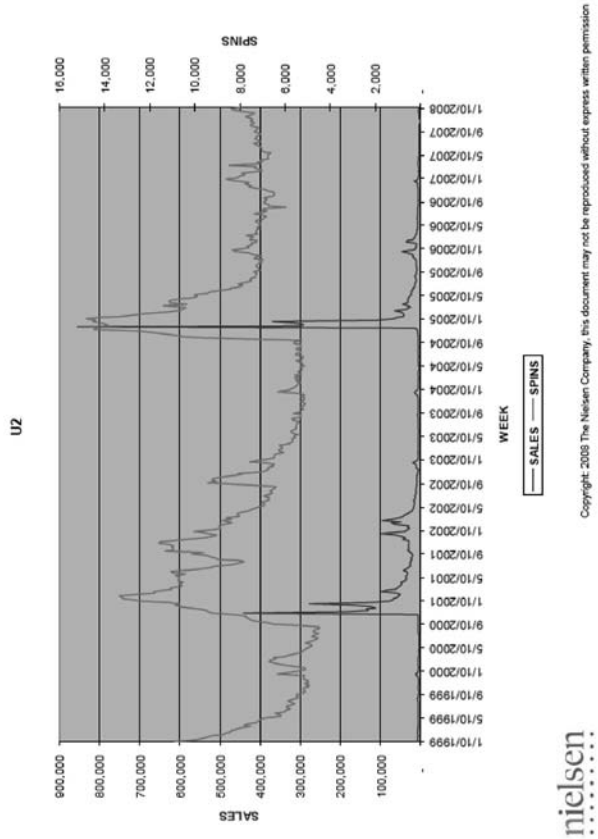
Albums

U2 has sold more than 170 million albums worldwide and has won more Grammy Awards than any other band. In 2005, the band was inducted into the Rock and Roll Hall of Fame in their first year of eligibility. *Rolling Stone* magazine listed U2 at #22 in their list of the 100 greatest artists of all time.

U2 has consistently released albums since 1981, with most albums and singles peaking at the top of the charts. According to the RIAA, U2 has 15 releases certified Gold, 15 releases certified Platinum and 11 releases certified Multi-Platinum and has certified sales of 50.5 million albums in the United States.

Tours

U2 has produced a series of extravagant tours worldwide throughout its career. Between 2001 and 2006, U2 headlined a total of 217 dates, selling an average of 35,229 tickets and grossing an average of $3,020,340 per date between 2005 and 2007. The average ticket price for U2's dates in 2005 was $96.92. (Source: Pollstar Artist Profile Report, © 2007)


U2
SALES
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Rascal Flatts

Rascal Flatts is an American Grammy Award-winning country pop group founded in Nashville, Tenn. Since its inception, Rascal Flatts has been composed of three members: Gary LeVox (lead vocals), LeVox' second cousin, Jay DeMarcus (bass guitar, harmony vocals) and Joe Don Rooney (lead guitar, harmony vocals).

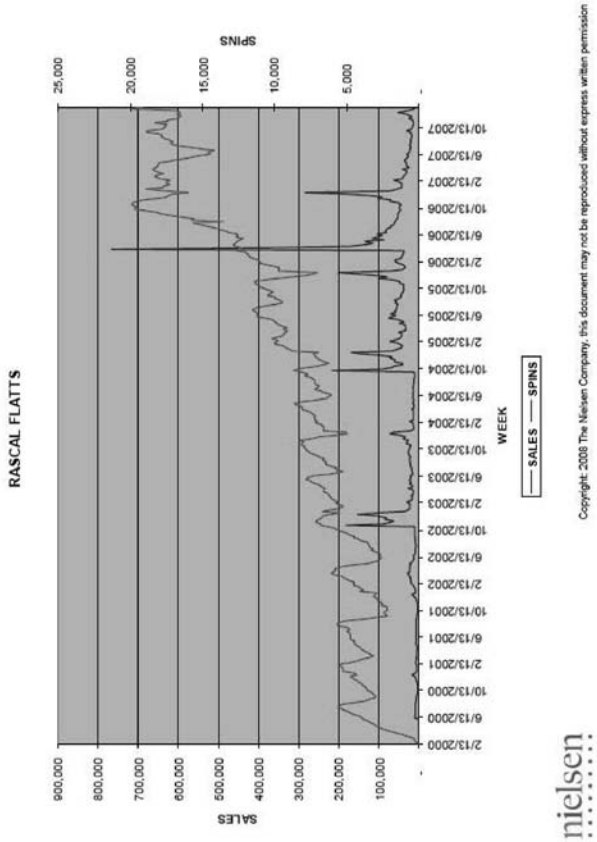
Albums

Rascal Flatts has released five studio albums and a live compilation. Their first two albums, 2000's "Rascal Flatts" and 2002's "Melt," have been certified Double-Platinum and Triple-Platinum, respectively, in the United States, while 2004's "Feels Like Today" and 2006's "Me and My Gang" have each received four times-Platinum certification. Their 2007 release "Still Feels Good" is certified Platinum.

To date, they have also had 20 singles appear on the *Billboard* Hot Country Songs charts; of these, eight have reached #1. Rascal Flatts albums have RIAA certified sales of 15 million albums in the United States.

Tours

Between 2000 and 2007, Rascal Flatts headlined 373 shows, grossing an average of $580,541 per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)


RASCAL FLATTS
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WEEK
SALES
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nielsen
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Linkin Park

Linkin Park is a rock band from Agoura Hills, Calif.

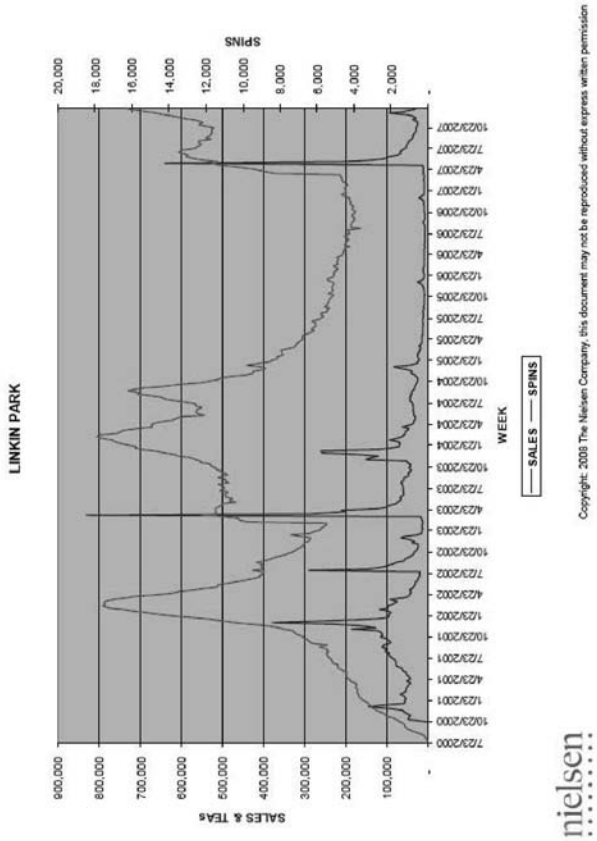
Albums

Since their formation in 1996, the band has sold more than 50 million albums and won two Grammy Awards. They achieved mainstream success with their debut album, "Hybrid Theory," which was certified Diamond (shipments in excess of 10 million in the United States) by the RIAA in 2005. Both "Hybrid Theory" and "Meteora" intertwined the nu metal and rap rock sound with influences and elements from hip-hop, alternative rock and electronica, utilizing programming and synthesizers.

Linkin Park has RIAA certified sales of 19 million albums in the United States.

Tours

Between 2000 and 2007, Linkin Park headlined 233 dates with an average gross of $559,042 per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)


LINKIN PARK
SALES & TEAS
SPINS
WEEK
SALES
SPINS
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The Killers

The Killers are an American rock band from Las Vegas, Nev., most famous for their hit singles “Somebody Told Me,” “Mr. Brightside,” “When You Were Young,” “Read My Mind,” “Bones,” “Smile Like You Mean It” and “All These Things That I've Done.” The band formed in 2002 and is made up of Brandon Flowers (vocals, keyboards), Dave Keuning (guitar, vocals), Mark Stoermer (bass guitar, vocals) and Ronnie Vannucci Jr., (drums, percussion). Much of The Killers' music is based on British influences (indeed, the band is often described as the "Best British band to have come out of America") and on the music of the 1980s.

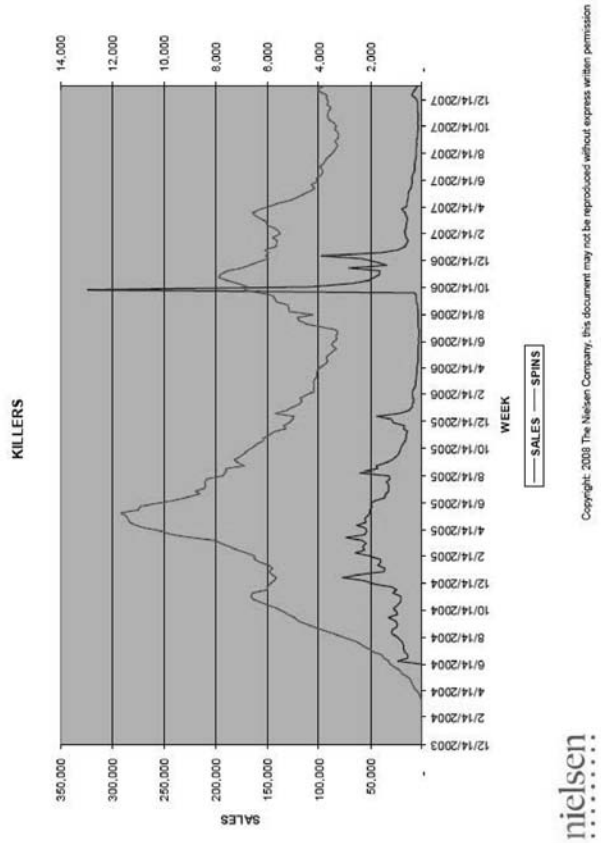
Albums

The Killers released their debut album, “Hot Fuss,” in 2004. Their second album, “Sam's Town,” was released in 2006. The compilation album “Sawdust,” containing B-sides, rarities and some new material, was released in 2007. “Hot Fuss” and “Sam’s Town” are certified Triple-Platinum and Platinum, respectively, by the RIAA.

Their first two albums to date have sold in excess of 10 million albums worldwide combined.

Tours

The Killers headlined 253 concerts worldwide between 2004 and 2007, grossing an average of $205,081 and selling an average of 5,357 tickets per date. (Source: Pollstar Artist Profile Report, © 2007)


KILLERS
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Kenny Chesney

Kenny Chesney is an American country music singer-songwriter.

Albums

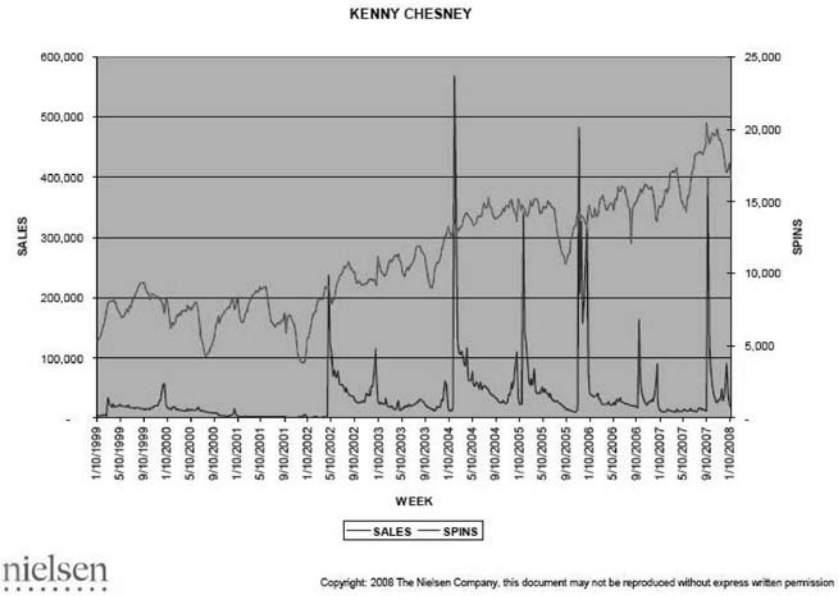
Having made his debut on Capricorn Records in 1993, Chesney has recorded 13 albums, 11 of which have been certified gold or higher (shipments in the United States of at least 500,000 each) by the RIAA.

To date, he has also produced 31 Top Ten singles on the U.S. *Billboard* Hot Country Songs charts, 13 of which reached #1. In addition, Chesney has received six Academy of Country Music Awards (including three consecutive Entertainer of the Year), as well as three Country Music Association awards. Chesney is also one of the most popular touring acts in country music, regularly selling out the venues at which he performs. His 2007 Flip-Flop Summer Tour was the highest-grossing country road trip of 2007.

Chesney has RIAA certified sales of 22.5 million albums in the United States.

Tours

Kenny Chesney headlined 606 concerts between 1999 and 2007, and between 2005 and 2007 grossed an average of $1,053,224 and sold an average of 17,883 tickets per date. (Source: Pollstar Artist Profile Report, © 2007)



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Kanye West

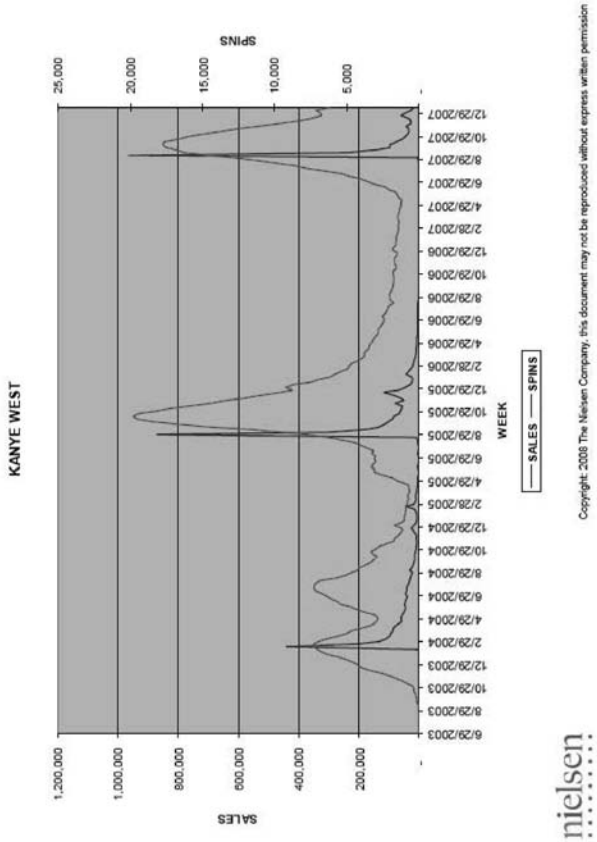
Kanye West is an American record producer and is a multiple Grammy Award-winning rapper and singer who rose to fame in the mid 2000s.

Albums

He released his debut album "The College Dropout" in 2004, his second album "Late Registration" in 2005 and his third album "Graduation" in 2007. His first three albums have received numerous awards (including nine Grammys), critical acclaim and commercial success. The first two singles from "Late Registration" sold over 860,000 copies in its first week, and earned him eight Grammy Award nominations including Album of the Year and Record of the Year for the song "Gold Digger." His first three albums have certified sales of three million, three million and two million copies respectively by the RIAA.

Tours

Kanye West headlined 190 concerts between 2004 and 2007, grossing an average of $244,669 and selling an average of 5,235 tickets per date. (Source: Pollstar Artist Profile Report, © 2007)


KANYE WEST
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WEEK
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Green Day

Green Day is an American rock band formed in 1987.

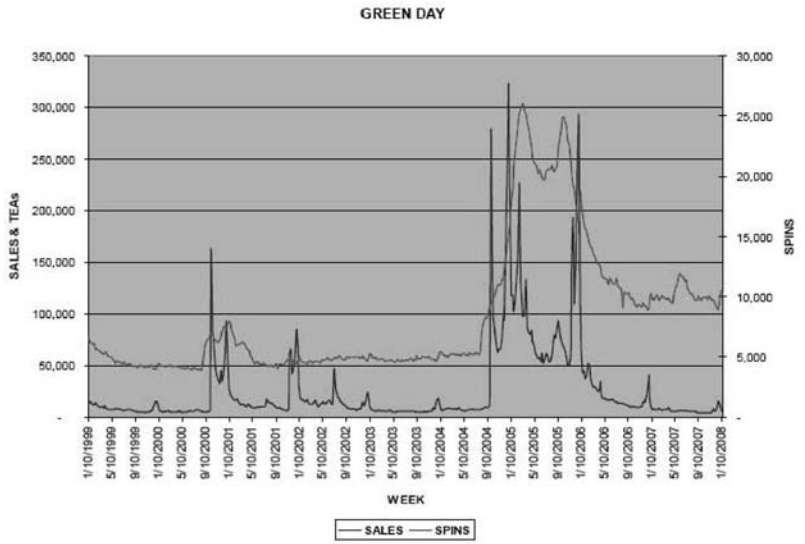
Albums

Green Day's major label debut "Dookie" became a breakout success in 1994 and eventually sold over 10 million copies in the U.S. alone. As a result, Green Day was widely credited, along with fellow California punk bands The Offspring and Rancid, with reviving mainstream interest in and popularizing punk rock in the United States. Green Day's three follow-up albums, "Insomniac," "Nimrod" and "Warning" did not achieve the massive success of "Dookie," but they were still successful, reaching Double Platinum, Double Platinum and Gold status respectively. Its 2004 rock opera "American Idiot" reignited the band's popularity with a younger generation, selling five million copies in the U.S.

The band has sold over 65 million albums worldwide, including 22 million in the United States alone. They also have three Grammy Awards: Best Alternative Album for "Dookie," Best Rock Album for "American Idiot" and Record of the Year for "Boulevard of Broken Dreams."

Tours

Green Day headlined 241 concerts worldwide between 2000 and 2006, grossing an average of $557,072 and selling an average of 14,069 tickets per date between 2004 and 2006. (Source: Pollstar Artist Profile Report, © 2007)



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Fall Out Boy

Fall Out Boy is an American band from Wilmette, Ill., that formed in 2001.

Albums

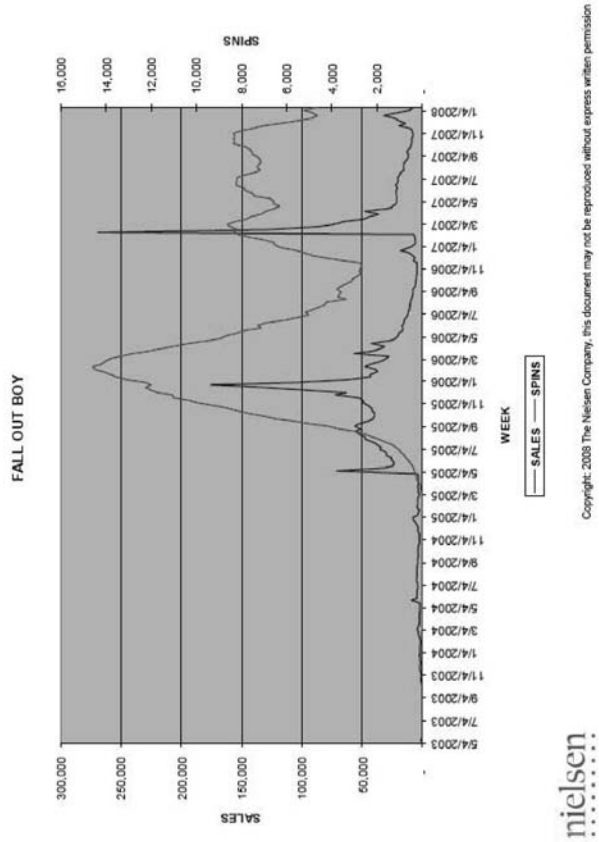
Fall Out Boy has won several awards for their album "From Under the Cork Tree." Released in 2005, the album sold more than 2.5 million albums in the United States. In support of the album, Fall Out Boy headlined tours in 2005 and 2006 in the United States, Canada, Japan and Europe.

In February 2007, the band released "Infinity on High" to major chart success, reaching #1 on the *Billboard* 200 and selling 260,000 copies in its first week. The first single, "This Ain't a Scene, It's an Arms Race," reached #1 on the Pop 100 and #2 on the *Billboard* Hot 100.

Their first two albums are certified Double-Platinum and Platinum respectively by the RIAA.

Tours

Fall Out Boy headlined 274 concerts worldwide between 2003 and 2007, grossing an average of $146,048 and selling an average of 5,124 tickets per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)


FALL OUT BOY
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11/4/2006
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9/4/2007
11/4/2007
1/4/2008
WEEK
SALES
SPINS
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Def Leppard

Def Leppard is an English hard rock band from Sheffield, England who formed in 1977 as part of the New Wave of British Heavy Metal movement.

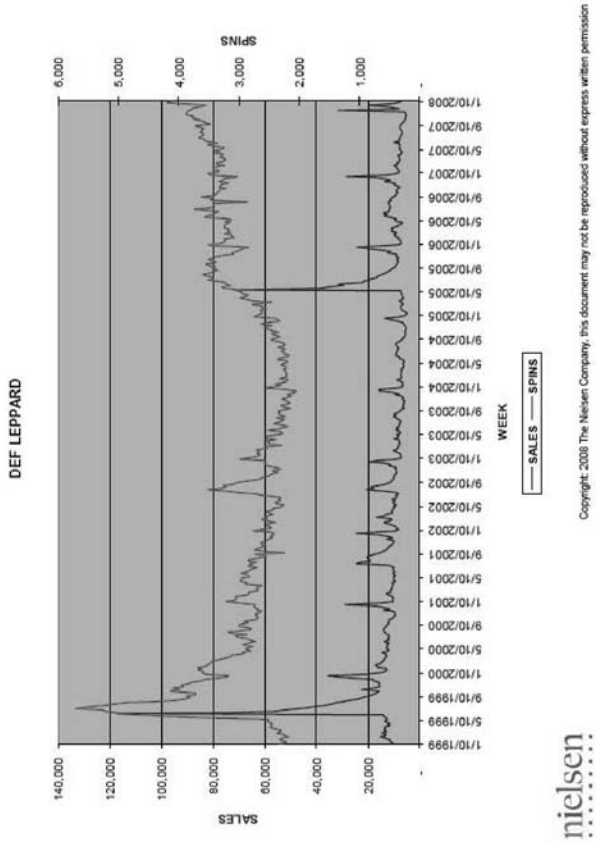
Albums

Largely on the strength of their two albums, "Pyromania" and "Hysteria," Def Leppard became one of the top-selling rock bands throughout the 1980s.

Def Leppard is one of only five rock bands with two original albums selling over 10 million copies each in the United States. Def Leppard has total RIAA certified sales of 35 million albums in the United States.

Tours

Def Leppard headlined 466 concerts worldwide between 1999 and 2007, grossing an average of $413,976 and selling an average of 9,447 tickets per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)


DEF LEPPARD
SALES
SPINS
140,000
120,000
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Bruce Springsteen

Bruce Springsteen is an American songwriter, singer and guitarist. He has frequently recorded and toured with the E Street Band. Springsteen is most widely known for his brand of heartland rock infused with pop hooks, poetic lyrics and Americana sentiments centered around his native New Jersey. His eloquence in expressing ordinary, everyday problems has earned him numerous awards, including 18 Grammy Awards and an Academy Award, along with a notably dedicated and devoted global fan base.

Much of his iconic status stems from the concerts and marathon shows in which he and the E Street Band present intense ballads, rousing anthems and party rock and roll songs, amongst which Springsteen intersperses long, whimsical or deeply emotional stories.

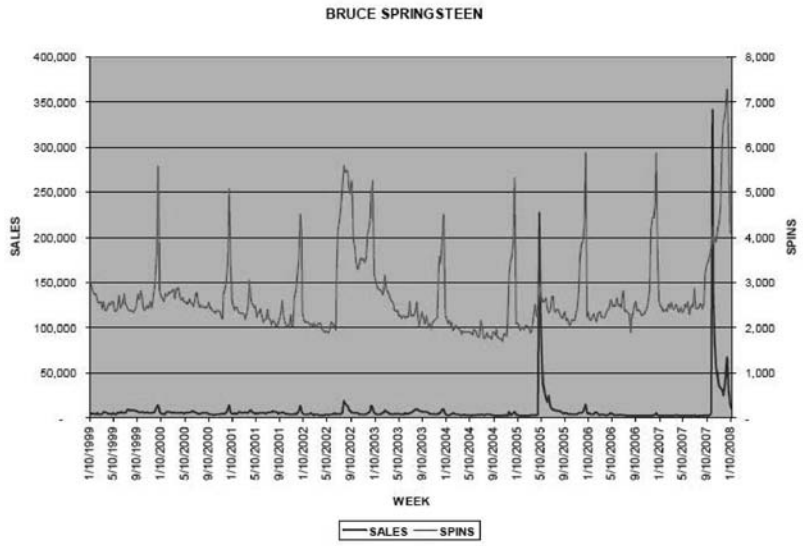
Albums

His most famous albums, "Born to Run" and "Born in the U.S.A.," epitomize his penchant for finding grandeur in the struggles of daily life. He has RIAA certified sales of 63.5 million albums in the United States alone.

Springsteen has won 18 Grammy Awards and an Academy Award for Best Song for "Philadelphia" in 1993.

Tours

Springsteen headlined 314 concerts worldwide between 1999 and 2007, grossing an average of $807,468 and selling an average of 9,277 tickets per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)



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50 Cent

50 Cent is an American rapper.

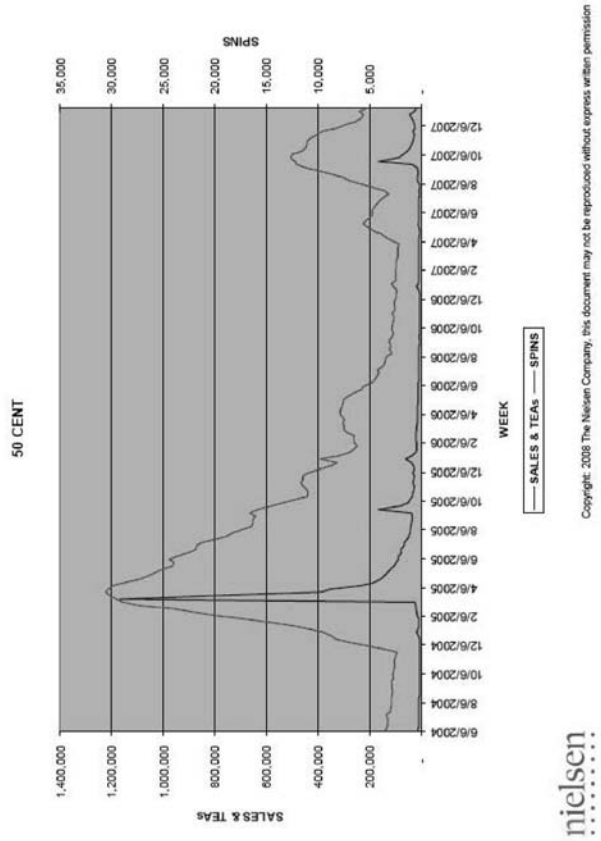
Albums

He rose to fame with the release of his albums "Get Rich or Die Tryin'" (2003) and "The Massacre" (2005). Both albums achieved multi-platinum success, selling over 21 million records worldwide, including 11 million RIAA certified sales in the United States.

The lead single from "Get Rich or Die Tryin'," "In da Club," which *The Source* noted for its "blaring horns, funky organs, guitar riffs and sparse hand claps" broke a *Billboard* record as the most listened-to song in radio history within a week.

Tours

50 Cent headlined 199 concerts worldwide between 2002 and 2007, grossing an average of $632,272 and selling an average of 11,406 tickets per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)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The White Stripes

The White Stripes is an American alternative rock band from Michigan.

Albums

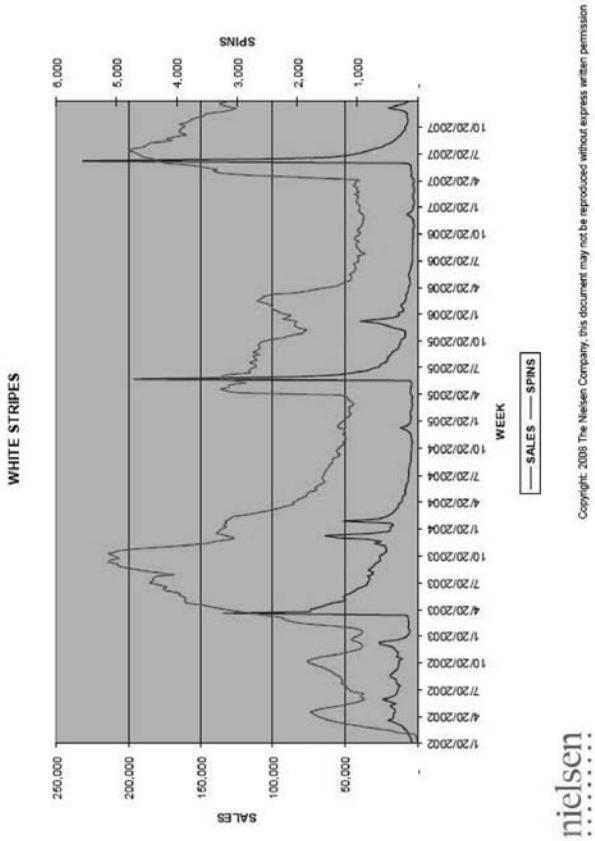
The group rose to prominence as part of the garage rock revival with their successful albums "White Blood Cells," "Elephant and Icky Thump." The White Stripes play lo-fi music stressing a simplicity of composition and arrangement, mostly inspired by punk rock, blues rock, folk rock and country music.

Their first three albums were certified Gold, Platinum and Gold by RIAA.

In 2004, the album "Elephant" won a Grammy for Best Alternative Music Album, while "Seven Nation Army" won a Grammy for Best Rock Song.

Tours

The White Stripes headlined 212 concerts worldwide between 2000 and 2007, grossing an average of $159,089 and selling an average of 4,199 tickets per date between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)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Colbie Caillat

Colbie Caillat is an American pop singer-songwriter and guitarist from Malibu, Calif.

According to her biography on allmusic.com, "[t]o her astonishment, when she added the single 'Bubbly' to the site, people latched on to the catchy hook. As word of mouth spread, her page pulled in a few thousand hits a day; after she had accumulated 6,240 friends, Rolling Stone highlighted her as one of the top female artists on MySpace. For four months, she was the number one unsigned artist, and garnered over 14 million plays."

As the attached slide shows, the MySpace exposure, combined with radio play resulted in an initial burst of sales. But when radio airplay decreased, sales also decreased and then quickly dissipated. When radio airplay later increased, sustained sales did likewise, propelling the song and the album to Platinum certification.

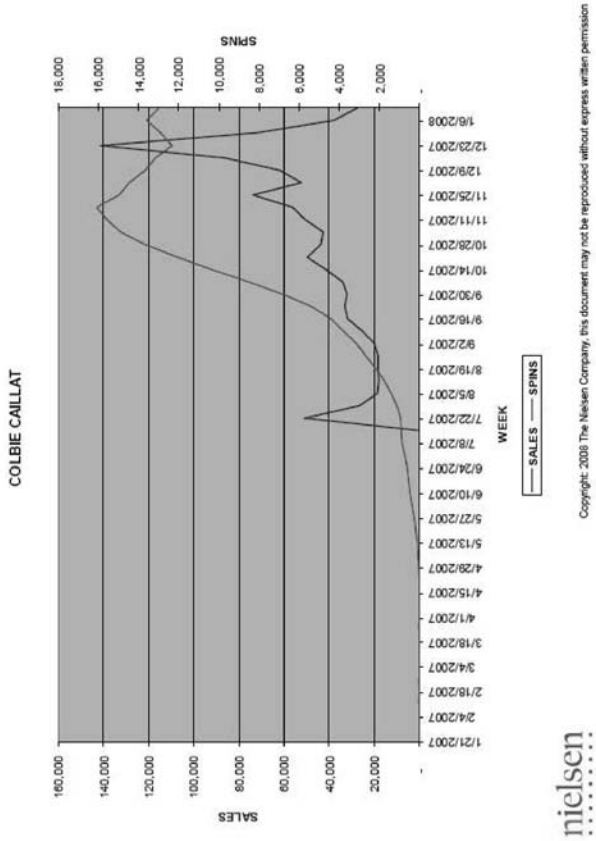
Album

Caillat is widely recognized as an artist broken in a "new way" due to her popularity on the social networking site MySpace. While the initial recognition – and a small portion of her sales which quickly dropped back to insignificant levels – can be credited to her MySpace profile, it was only after radio played the song that her sales climbed to significant levels.

Both her album "Coco" and the lead single "Bubbly" were certified Platinum by the RIAA.

Tour

Colbie Caillat headlined 64 concerts in 2007, grossing an average of $16,798 and selling an average of 914 tickets per show. (Source: Pollstar Artist Profile Report, © 2007)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Taylor Swift

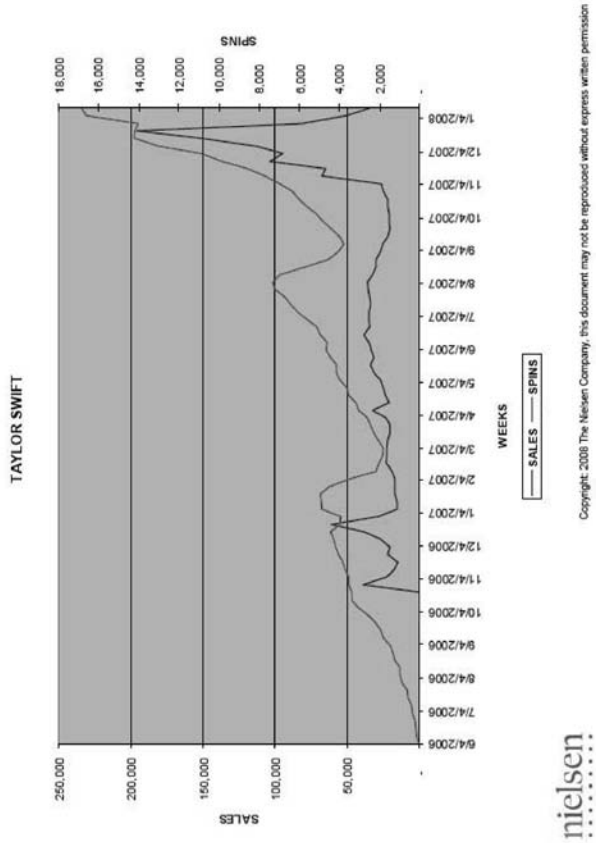
Taylor Swift is a Grammy-nominated American country music singer-songwriter.

Album

On October 24, 2006, her self-titled album was released. Swift wrote or co-wrote all of the songs on the album, which debuted at #19 on the *Billboard* 200 and sold more than 61,000 copies during its first week. It later peaked at #1 at *Billboard* Top Country Albums and number five at *Billboard* 200. It also spent eight consecutive weeks at the top of the Top Country Albums charts and has since sold over two million copies.

Tours

Taylor Swift headlined 54 concerts in 2006 and 2007, grossing an average of $43,693 and selling an average of 1,805 tickets per show. (Source: Pollstar Artist Profile Report, © 2007)


TAYLOR SWIFT
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Sean Kingston

Sean Kingston is a Jamaican reggae singer and rapper.

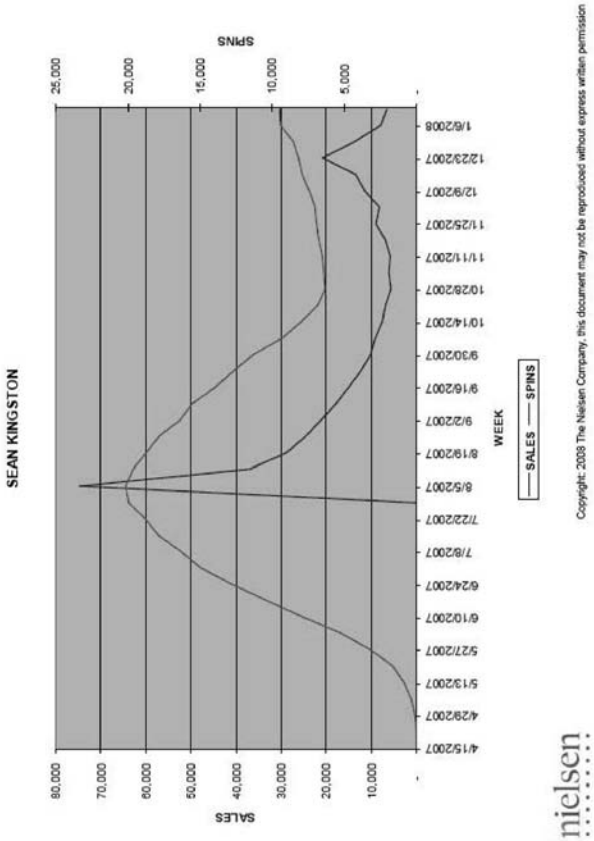
Album

Kingston released the single “Beautiful Girls” in summer 2007. The single, based on the bass line and lyrical "association" of the 1961 hit “Stand By Me” by Ben E. King, reached #1 on the U.S. *Billboard* Hot 100 for three weeks and topped the U.K. Singles Chart. Similarly, the song “Me Love” is a loose derivative work of Led Zeppelin's “D'yer Mak'er.” The song also debuted at #1 in Australia, topping Fergie who had been #1 for nine weeks. The song stayed on the Canadian Hot 100 #1 spot for over six weeks before getting knocked down to third place by the Plain White T's. “Beautiful Girls” was the longest a song has ever stayed at the #1 spot in 2007, in Canada.

Kingston’s first two singles were certified Double-Platinum and Gold by RIAA.

Tours

Kingston has not headlined any tours.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9/30/2007
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12/9/2007
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Josh Groban

Josh Groban is a Grammy-nominated American singer/songwriter known for his lyrical baritone voice.

Albums

The singer's eponymous debut album "Josh Groban" was released in 2001 and is certified four times Platinum.

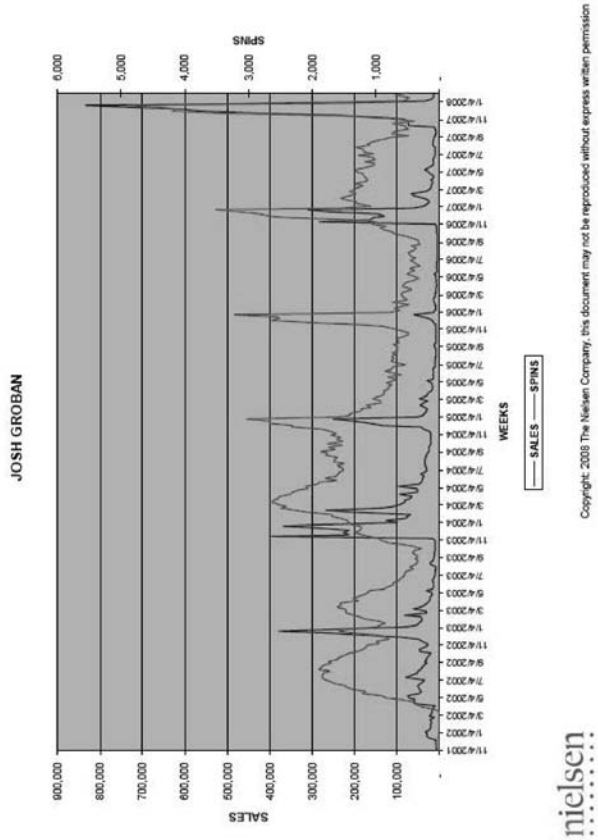
Groban's second album "Closer" was released in 2003 and is also certified four times Platinum.

In June 2007, Josh spent time in London recording a Christmas album with the London Philharmonic and the African Children's Choir. It was released on October 9, 2007 and is titled "Noël." The album has been highly successful in the U.S., breaking numerous records for a Christmas album, as well as becoming the best selling album of 2007 in only its tenth week of release, at sales of 3.6 million copies.

Groban has RIAA certified sales of 16.5 million albums in the United States.

Tours

Groban headlined 201 concerts worldwide between 2003 and 2007, grossing an average of $670,834 and selling an average of 9,069 tickets per show between 2005 and 2007. (Source: Pollstar Artist Profile Report, © 2007)


JOSH GROBAN
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U.S. House of Representatives
Subcommittee on Courts the Internet and Intellectual Property
Hearing on the "Performance Rights Act"
June 11, 2008

Statement of

DIGITAL MEDIA ASSOCIATION

Today the Subcommittee considers a very important issue – whether over-the-air radio should pay royalties to recording artists and record companies. However, the issue and the bill before the Subcommittee are actually components of a much larger issue – whether our laws should treat all forms of radio (broadcast, cable, satellite and Internet radio) equally, and should promote competition by imposing the same royalty rules and business rules for all. DiMA, on behalf of our members that provide Internet radio services including Yahoo!, AOL, RealNetworks, MTV, Live365 and Pandora, respectfully urges the Subcommittee to address the issue of radio competition and parity comprehensively, and to avoid adding another "patchwork" to the messy quilt that currently defines digital radio performance rights and royalties.

As the Subcommittee is aware, the sound recording performance royalty system (found in 17 U.S.C. 114) is far from a system, and is far from equitable. It is instead a set of misaligned rules and royalty standards that impose higher or lower burdens based on the technology used to deliver programming, rather than the quality or value of the programming. For lawyers Section 114 is difficult to read and harder to understand. For businesspeople it is simply perplexing.

The problem in current law is perhaps best exemplified by the Sirius Stiletto (see http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=ProductAsset&cid=1158082417240). The Stiletto is a marvelous technological device that offers the ability to hear more than 130 channels of subscription radio (including 69 channels of music) using both satellite technology or a wireless Internet connection. If a consumer is within range then the programming is delivered by satellite; otherwise the programming is delivered by wireless broadband. To the consumer, the experience is seamless and uninterrupted, but to Sirius, to record companies and to artists the impact is dramatic, because satellite-delivered radio pays royalties of only 6% of revenue while Internet-delivered radio pays vastly higher royalties.

Last year the Copyright Royalty Board issued two decisions regarding digital radio royalties. Using the traditional copyright arbitration royalty-setting standard (17 U.S.C. 801), the CRB set royalties for XM and Sirius at an escalating amount between 6 and 8 % of revenues. Using the Internet radio-specific standard (17 U.S.C. 114) the CRB set royalties for Internet radio that are effectively several multiples higher than the satellite radio royalties. Large Internet radio services, such as AOL Radio, Yahoo! Radio, Pandora and Live365, will pay royalties of 40 – 80% of revenue under the CRB decision.

Small Internet radio services such as Accuradio and SomaFM will pay royalties exceeding 100% of their revenue. Moreover, the CRB gutted one of Internet radio's greatest advantages that serve artists and listeners alike, its unlimited capacity for adding new channels that are effectively the best promoters of new music, by imposing an unlimited $500 per-channel minimum royalty that would have immediately bankrupted many innovative services if recording artists and record companies had not recognized its unfairness and agreed to a maximum cap for each service.

These examples – one of practical technology and one of competitive disadvantage – demonstrate the uniquely difficult environment that Congress has defined for radio innovators and competitors. Some listeners and some artists may favor broadcast radio; others may favor satellite radio or Internet radio. But Congress has an opportunity to ensure that competition thrives and that artists are fairly paid. We urge the Subcommittee to take a broad approach, and a technologically neutral approach, so that the Copyright Act will promote innovation, promote competition, and will ultimately promote artists' and consumer welfare as the Constitution calls for.

Thank you for your consideration of DiMA's views.

U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON THE COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
HEARING ON H.R. 4789, THE "PERFORMANCE RIGHTS ACT"
JUNE 11, 2008

STATEMENT OF LIVE365.COM

Since the Copyright Royalty Board issued its new performance royalty rates for webcasters in March 2007, the Internet radio industry has undergone a structural change that does not bode well for the small webcasters that we serve or the music industry as a whole. While Live365 supports the legislative direction of the Performance Rights Act, we also respectfully request that you go further in promoting rate parity across all Internet radio broadcast media by lowering webcaster rates in line with what is offered to satellite and cable radio. The higher webcaster rates have distorted competition in the Internet radio world by penalizing legal webcasters, encouraging piracy, and ultimately hurting the very musicians it was intended to benefit.

Live365 was established in 1997 and currently serves 6,000 small broadcasters by providing broadband hosting and streaming, and software tools to make their playlists available to over three million listeners worldwide. We provide the tracking, reporting of online performances, enforce the performance complement rules dictated by the Digital Millennium Copyright Act, and pay songwriter and performance royalties on behalf of our broadcasters. Live365 does not stream any music itself—an important distinction to understand.

To generate revenue, we aggregate the 6,000 small broadcasters to achieve scale in order to sell listener subscriptions and negotiate advertising contracts with major ad agencies. Individual small webcasters are simply too small to be able to build a revenue-generating business out of their limited listenership. In fact, even with our 6,000 small broadcasters, Live365 was too small to attract national advertisers so we had to join an ad network with other webcasters to achieve the large listenerships necessary to secure advertising contracts.

It is hard to increase revenues for small webcasters so significant increases in rates and annual minimums are difficult to offset and may force individual webcasters to shut down. Since the new higher CRB rates were put into effect, the number of webcasters that stream with us has plummeted 20% down to 6,000. We will not be able to stay in business if this continues.

Moreover, we believe that the higher performance royalty rates will hurt not just Live365—but the music industry as a whole. Small webcasters tend to play twice as much music from independent artists and niche genres as compared to terrestrial radio stations. In the overall Internet radio industry, over 40% of the music played by webcasters is from independent artists and labels, and over 72 million listeners tune in each day to hear them. Thus small webcasters provide a critical promotional vehicle for artists to reach new listeners.

The new CRB rates, and Small Commercial Webcaster terms offered by SoundExchange, have made it cost-prohibitive to be a webcaster. By its own admission, SoundExchange has only registered 900 webcasters, yet third-party streamhosters and Internet radio tool providers claim to have over 70,000 webcaster customers. Clearly, the industry has a large compliance problem on its hands with thousands of webcasters failing to comply and pay royalties.

Negotiations with SoundExchange have not been fruitful and rate disparities between Internet radio media continue to distort the market. We respectfully urge the Subcommittee to reduce webcaster royalty rates to level the playing field for all who seek to be compliant and pay royalties. Thank you for your consideration.

950 Tower Lane • Suite 400 • Foster City • CA • 94404 • 650.345.7400 • 650.345.7497 FAX
www.live365.com

OutboundMusic.com
7037 Hwy 6 North, PMB 145 Houston, TX 77095
281-859-6715 toll free 1-866-859-6715

A Statement for the Record of the June 11, 2008 Hearing on H.R. 4789, the "Performance Rights Act", U.S. House of Representatives Subcommittee on Courts, the Internet and Intellectual Property

We are an online music retailer and Internet Radio that only deals with Independent Recording Artists (IRAs), those not signed by one of the four major record labels. It is our goal is to assure that our artists have ALL the tools they need to make a living through their music. That includes being fairly compensated when others use their music plus having the promotional advantages of airplay. The current royalty rate system is structured in a way that is unfair to our artists and to all IRAs.

I can think of no valid reason that Terrestrial Radio should not pay a royalty while both Satellite and Internet Radio does. The service that radio provides is to deliver music to the ears of fans. It does the same whether it's via satellite, a terrestrial broadcast tower or the Internet. But any royalty needs to be reasonable across the board. If it's too little the artist isn't fairly compensated. If too large and not tied directly to the benefit it offers broadcaster—their revenues—then terrestrial radio will face the same problems Internet Radio is currently dealing with.

Having an unreasonably high royalty rate really promotes a legalized form of payola. Those companies controlling large numbers of copyrights can offer their catalogs to specific broadcasters at a reduced rate while dictating what is given airplay. Those broadcasters not graced with the special rate and unable to meet an unreasonably high statutory royalty are driven out of business.

The Internet royalty will top out at 0.19 cents per song per listener in 2010. That works out to $1.90 per 1,000 listeners. Internet radio Ads sell for between $2 and $5 per 1,000 listeners. Factoring in the cost of selling an Ad and webcasters make under $1.50 per Ad per 1,000 listeners. That means just to pay the royalty webcasters will need to play more than one Ad for each song—but no audience would stand for that. The royalty requires an unsustainable business model.

My concern for Terrestrial Radio is that some of the major players promoting this legislation, RIAA and SoundExchange, are the same ones who created the Internet fiasco. Unless there is a fair and reasonable royalty that is the same for all types of radio broadcasts, Independent Recording Artists will suffer.

Albert Delaney-OutboundMusic.com

PANDORA created by the Music Genome Project

U.S. House of Representatives
Subcommittee on Courts the Internet and Intellectual Property
Hearing on the "Performance Rights Act"
June 11, 2008

Statement of Pandora Media, Inc.
Oakland, California

Ten years ago, Congress had the wisdom and foresight to establish a statutory framework for a new form of radio—radio delivered over the Internet. The statutory license was intended to ensure that Internet radio could develop and compete against broadcast and other forms of radio, while also ensuring that artists and record companies would be paid reasonable royalties. Today, as the Subcommittee considers extending the statutory royalty system to broadcast radio, Pandora – an independent innovator with more than 13 million registered listeners – urges you to also ensure that the system works fairly for licensees and does not put us out of business.

Uninhibited by the spectrum limitations of traditional radio, Internet radio is starting to live up to its promise. Internet radio today offers a vast diversity of music to millions of Americans, and Pandora is proud to be the largest Internet radio service in the United States. We have invested; we have innovated; and we have had some very good initial success. We employ more than 100 people, most of whom are trained, experienced musicians working at our headquarters in an enterprise zone in Oakland, California.

Launched in 2005, Pandora plays the music of over 60,000 different artists, most of whom have never been heard on traditional radio. Our repertoire spans the full range of musical diversity created and enjoyed in America: Pop, Rock, Country, Jazz, R&B, Hip-Hop, Country, Folk, Gospel, Blues, Christian, Latin, Electronica, Classical, etc.

Americans have embraced this diversity and more than 13 million music fans have registered as users since our launch. Artists and labels benefit from the increased music purchases of Pandora listeners - a fact confirmed by independent, third party research.

Pandora Media, Inc.
360 22nd Street, Suite 440
Oakland CA 94612

510.451.4100
fax 510.451.4286
www.pandora.com

However, despite the promise for artists, music fans and record labels, Internet radio royalty rates set over a year ago by the Copyright Royalty Board are simply unaffordable for webcasters. In 2008, Pandora is on track to earn more than $25 million in revenue, yet under the CRB rates we will be forced to pay $18 million in sound recording royalties alone. Paying more than 70 percent of our revenue in performance royalties is not sustainable and will force Pandora out of business – denying royalties to labels and musicians, and music to millions of fans.

By contrast, our competitors XM and Sirius will pay only 6% of revenue in sound recording royalties this year, and of course terrestrial radio pays nothing. Due to the different royalty standards for various forms of radio, Internet radio, which has the smallest of all radio revenue streams, pays proportionately the highest royalties. The application of different royalty standards to differing platforms makes no sense in today's convergence driven world.

In addition to your attention to broadcast radio today, please support resolution of the Internet radio royalty crisis so our industry can continue to grow, and continue to benefit artists by paying fair royalties and developing new audiences. As you consider the future of terrestrial radio, we urge you to create a fair and balanced royalty system across radio platforms.

Pandora Media, Inc.
360 22nd Street, Suite 440
Oakland CA 94612

510.451.4100
fax 510.451.4286
www.pandora.com

Randall E. Krause
Small Webcaster Community Initiative
108 W Green St, Ste 110
Champaign, Illinois 61820

Statement for the Record

of

Randall E. Krause, Executive Director

Small Webcaster Community Initiative

Hearing on

H.R. 4789, "Performance Rights Act"

Submitted to the Subcommittee on Courts, the Internet, and Intellectual Property
U.S. House of Representatives

June 10, 2008

Chairman Howard Berman and Committee Members:

I would like to thank you for the opportunity to submit this statement for the record regarding the Performance Rights Act.

I write to you both as the founder and executive director of Small Webcaster Community Initiative as well as an independent online broadcaster and a professional nightclub disc jockey. I am passionate about music, and I can appreciate the outstanding opportunities that music continues to provide for my lifelong career in entertainment.

It is from this deep-rooted interest that I formed Small Webcaster Community Initiative in 2003. Our organization aims to promote and protect independent online music radio — from entrepreneurs to enthusiasts — through grassroots civic campaigns, including political action and educational outreach.

Today's hearing provides a unique opportunity to review the current system for sound recording performance royalties in the framework of both modern and traditional broadcasting mediums.

Currently, the United States still does not recognize a broad sound recording performance right. This is in contrast with most other nations where remuneration in the form of royalties is afforded to sound recording copyright holders for any public performance of their work, regardless of the physical means in which the sound recording is conveyed. (In other words, any transmission or amplication of a sound recording for public reception implicates the performance right – whereas the United States continues to provide an exemption for those public performances that are not a digital broadcast transmission.)

Following the passage of the Digital Millennium Copyright Act of 1998, all digital broadcasters have been required to pay royalties pursuant to the applicable provisions of the DMCA. Congress is now revisiting this issue with respect to "over the air" broadcasters; however, there has been no clear demonstration that the newly proposed legislation will actually be equitable to *all* broadcasters.

On March 2, 2007, the Copyright Royalty Board ruled that small commercial Webcasters must pay significantly higher royalty rates retroactive to January 2006. This has proven to be an insurmountable financial burden for many fledgling businesses. However, notwithstanding this controversial decision, entirely separate – and substantially more reasonable – royalty rates were soon thereafter established for cable radio providers and satellite radio providers.

To not formally address such an inexplicable disparity, while nonetheless moving eagerly forward with yet another phase in the sound recording royalty agenda, is to do a disservice to all broadcasters.

SoundExchange has concluded that Internet radio is thriving under the new royalty rates, yet it has failed on numerous occasions to negotiate in a timely manner with various Webcaster groups. In fact, to date, there has been no significant progress toward a settlement – every reasonable offer has been outright rejected or silently ignored by SoundExchange.

Now the recording industry is approaching Congress to institute a royalty distribution mechanism under copyright law for "over the air" radio. However, by effectively shifting the spotlight away from Internet radio, the voices of our constituents and of our allies – all of whom have been patiently awaiting a resolution to the existing royalty crisis – will be effectively silenced once again.

We respect the urgency to establish parity. But we also advocate caution, as a hasty and patchwork amendment to the Copyright Act will merely exacerbate the existing problems with which the royalty-setting standards have clearly proven fallable in their current context.

The Copyright Act must keep pace with the development of new technologies if it is to better serve the public interest. When drafting this or any similar legislation, it is imperative that Congress anticipate its long-term effects on the broadcasting industry as a whole, not merely one segment.

A rate-setting standard that is equitable for all broadcasters, with respect to the content rather than the platform, will ensure that both digital and "over the air" broadcasting can continue to grow and to thrive, while similarly compensating record companies for the exploitation of their works and encouraging more widespread exposure for hard-working recording artists.

Small Webcaster Community Initiative would again like to applaud the Subcommittee on Courts, the Internet, and Intellectual Property for organizing today's hearing and for recognizing the urgency of these matters with respect to small commercial Webcasters.

Respectfully submitted,

Randall E. Krause
Executive Director
Tel: (217) 352-2103
Fax: (312) 803-1661

"Liner Notes"

In 1988, Frank Sinatra sent the following letter to twenty-four of the biggest artists in the world — icons from Paul McCartney and Ella Fitzgerald to Bruce Springsteen and Stevie Wonder*

FRANK SINATRA

Can it be twenty years later? Everything in the music world has changed — except this.

December 12, 1988

Dear Paul:

As you may or may not be aware, whenever one of your performances is played on the radio or on a jukebox, the writer of the song is compensated for the performance, but the performer is not.

It's now over 60 countries — but on this the U.S. is keeping company with the likes of China, Iran and North Korea.

I am of course the songwriter's biggest fan, but there is no logical reason to distinguish why the writer and publisher should be compensated for the performance of a song on the radio or a jukebox but the performer should not. Neither the United States Copyright Act nor any state statutes, however, have affirmatively recognized such a performance right for recording artists. Over 60 foreign countries presently recognize a performance royalty right for artists, but American artists cannot participate in any income received for a performance of their music in a foreign country because the United States does not offer a reciprocal right.

So if the US law changes, U.S. artists will receive income from overseas. Because 30-50% of music played around the world is made in the U.S., a lot of money would be repatriated.

The same thing happened in 1978, 1981 and 1993.

The Copyright Revision Act of 1976 flagged the inconsistency, and a bill was introduced to amend the Copyright Act and provide for payment of royalties to artists and record companies for the use of their copyrighted performances. Unfortunately, the legislation was never enacted.

We are of the opinion that legislation has not been enacted in part because recording artists have not been aware of the problem, while others with vested interests have lobbied heavily for the defeat of such legislation. We believe that with a united effort from fellow recording artists, we may be able to pass such legislation.

The stations that use the public airwaves want to maintain their free ride — even as satellite and Internet radio pay artists who bring their businesses to life.

Bipartisan bills have been introduced in the House and Senate: H.R. 4783 and S. 2500.

I am willing to be part of an initial small group of performers who would establish a non-profit society tentatively entitled the Performance Society of America, for the purpose of implementing legislation to procure performance royalties for artists, and to subsequently collect and distribute such royalties. To give you an idea of some of the numbers involved, ASCAP and BMI, which administer such performance rights for composers, last year collected over $500,000,000 in the United States alone. I should point out that a performance royalty for recording artists would in no way reduce the royalties presently payable to composers — rather, it would create an additional royalty payable to those whose performances appear on a sound recording.

WE DID IT! It's called the musicFIRST Coalition and was founded by nearly 200 well known recording artists — www.musicFIRSTcoalition.org

Absolutely. The bills are clear on that — songwriters deserve to be paid but so do performers.

We are optimistic that with a united effort, we will be able to achieve successful results within a reasonable period of time.

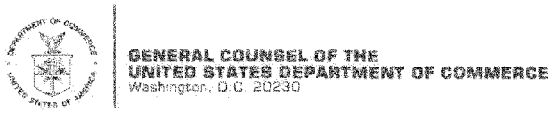
An historical injustice we have been forced to live with has become even more indefensible in the digital age.

Thank you, and I look forward to hearing from you very soon.

Very truly yours,

Frank Sinatra

*Recipients — Beach Boys, Estate of Bing Crosby, Neil Diamond, John Denver, Bob Dylan, Ella Fitzgerald, George Harrison, Michael Jackson, Waylon Jennings, Elton John, Estate Of John Lennon, Paul McCartney, Liza Minelli, Estate of Jim Morrison, Willie Nelson, Estate of Elvis Presley, Lionel Richie, Kenny Rogers, Linda Ronstadt, Diana Ross, Bruce Springsteen, Barbra Streisand, Ringo Starr, Stevie Wonder



GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

June 10, 2008

The Honorable Howard L. Berman
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the preliminary views of the Department of Commerce (DOC) on H.R. 4789, a bill that would grant copyright owners a full public performance right when their sound recordings are transmitted by over-the-air broadcast stations.

Background

The DOC has long endorsed amending the U.S. copyright law to provide for an exclusive right in the public performance of sound recordings. In 1978, for example, the DOC testified before this Subcommittee that establishing a public performance right in sound recording was in the long-range economic interests of all parties, including U.S. recording companies and broadcast stations.[1]

In 1995, the Working Group on Intellectual Property Rights, in its report on Intellectual Property and the National Information Infrastructure, characterized the lack of a performance right in sound recordings as "an historical anomaly that does not have a strong policy justification—and certainly not a legal one."[2]

In 1995, the DOC again supported the efforts of this Subcommittee to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other types of works by endorsing the establishment of a public performance right when sound recordings are transmitted by digital means.

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[1] Subcomm. on Courts, Civil Liberties & the Admin. of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978), Performance Rights in Sound Recordings at 179.

[2] Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights (1995), at 222. The Information Infrastructure Task Force was chaired by Secretary of Commerce Ronald H. Brown.

Although limited to digital transmissions, this partial public performance right was viewed at that time by DOC as a step in the direction of providing a full public performance right in sound recordings.[3]

Against this history of steady support for a full public performance right in sound recordings, the DOC offers its preliminary views on H.R. 4789.

Brief Statement of Views

Section 106 of the Copyright Act sets forth the exclusive rights of copyright owners, including the public performance rights of authors and copyright owners of literary works, musical works, dramatic works, pantomimes and choreographic works, motion pictures and other audiovisual works. Section 106(6), however, singles out sound recordings as the only type of performable work that is not granted a full public performance right. Instead, owners of sound recordings enjoy only a limited public performance right in certain digital audio transmissions, subject to a statutory license codified in section 114 of the Copyright Act.

H.R. 4789 corrects this longstanding asymmetry in the Copyright Act by extending the performance right in sound recordings to analog (in addition to digital) transmissions, and extending the statutory license currently applicable to Internet, satellite and cable radio to include over-the-air broadcasts as well. Specifically, the legislation amends section 106(6) of the Copyright Act to read: "in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission," which makes clear that the performance right is applicable to both analog and digital radio transmissions generally, and amends section 114(d)(1) of the Copyright Act to bring terrestrial broadcasts within the licensing scheme set forth therein for Internet, satellite and cable transmissions.

The legislation recognizes small, non-commercial, educational and religious stations by providing for special treatment for these broadcasters. Individual, terrestrial broadcasters that have annual gross revenues less than $1.25 million may elect to pay a fixed $5,000 per year for nonsubscription broadcast transmissions. Public broadcasting entities may elect to pay $1,000 a year. Finally, the legislation grants an outright exemption for the public performance of sound recordings at "services at a place of worship or other religious assembly" and for an "incidental use of a musical sound recording."

The DOC believes that the changes contained in the legislation are justified as a matter of fairness and equity. Granting copyright owners of sound recordings a full performance right coupled with extending an existing statutory license is an appropriate

[3] Subcomm. on Courts & Intellectual Property, House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995), Digital Performance Rights & Sound Recordings: Hearings on H.R. 1506.

and workable approach to providing compensation to recording artists and record labels for the transmission of their works by over-the-air broadcast stations. With the exception of small, non-commercial, educational and religious stations, the rate and terms for such uses would either be negotiated between the broadcasters and copyright owners, or, if the parties are unable to reach agreement, the rates and terms would be set by the Copyright Royalty Judges. While DOC supports special license treatment for small, non-commercial, educational and religious stations, it has concerns with H.R. 4789's approach to setting fixed license rates rather than allowing rates to be negotiated by the parties or established by Copyright Royalty Judges. H.R. 4789 also provides for a "per program license option" for broadcasters that make "limited feature uses of sound recordings."

As amended, the Copyright Act would treat the owners of copyrights in all performable works alike, thereby bringing to an end the historic disparate treatment of owners of copyrights in sound recordings. More fundamentally, establishing a full public performance right in sound recordings and eliminating the exemption for terrestrial broadcasters is fully justified by bedrock principles of U.S. copyright law. In the words of the Supreme Court, "the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors ...."[4] Consistent with this historic rationale for copyright, providing fair compensation to America's performers and record companies through a full public performance right in sound recordings is not simply a matter of fairness. The creation of a full public performance right in sound recordings will also spur the investment needed to encourage the creation of music for the broadest enjoyment of the public.

In the view of the DOC, expanding the section 114 statutory license to include terrestrial broadcasters brings greater regulatory parity to digital music delivery platforms. Under the current section 114 licensing regime, a digital music service (such as a webcaster) must pay two types of royalties for the digital transmission of a sound recording. Such a music service must pay royalties to the performers and record companies for the performance of the sound recording, as well as to the appropriate performing rights organization for the public performance of the musical work embodied in the sound recording. By contrast, under the current exemption in section 114, terrestrial, over-the-air broadcasters are required to pay only the performing rights organization for the public performance of the musical work. H.R. 4789 would ensure consistent application of the section 114 licensing scheme by requiring over-the-air broadcasters to pay the additional sound recording royalty currently paid by digital music services.

Providing additional incentives such as the ones contained in H.R. 4789 for America's performing artists, recording companies and digital music services is more important than ever. In today's digital music marketplace, U.S. performers and record

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[4] *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

labels are facing both unprecedented challenges and opportunities. Rampant piracy of sound recordings on the Internet remains an immense challenge. However, the same new technologies also offer new ways to deliver and provide access to sound recordings, including through digital downloads, digital subscription services, Internet radio and digital radio, thereby offering the listening public more content, more choices, in more places than ever before. The DOC believes that by providing for a full public performance right in sound recordings, H.R. 4789 will help to channel investments to develop evolving business models for the benefit of the public at large.

Finally, H.R. 4789 addresses not only the domestic concerns noted above, but also concerns generated by a longstanding deficiency in U.S. copyright law that has harmed American performers and record companies and affected the negotiating position of the United States in the arena of international copyright law. Today, the United States stands almost alone among industrialized nations in failing to recognize a full public performance right in sound recordings. Most of these countries belong to international treaties that require protection for performers and producers of sound recordings. In the usual case, however, such protection is extended to foreign performers and producers only on the basis of reciprocity. Filling this gap in U.S. copyright law is the first step in ensuring that U.S. performers and producers of sound recordings could enjoy this protection in our trading partners on the basis of reciprocity. Indeed, each year millions of dollars of royalties for the public performance of U.S. sound recordings abroad are either not collected at all or not distributed to American performers and record companies. Furthermore, in our relations with developing countries, correcting this deficiency in U.S. law will better position the United States to lead by example.

Accordingly, on the basis of a preliminary review, the DOC believes that H.R. 4789 makes a good first attempt at balancing the rights of copyright owners and specific users of their works for the benefit of the public at large.

Conclusion

The DOC commends the Chairman and other Members of this Subcommittee for cosponsoring H.R. 4789, which would end the royalty exemption for terrestrial, over-the-air broadcasters, and provide fair compensation to American performers and record companies for the use of their sound recordings at home and abroad.

The DOC appreciates the opportunity to present its preliminary views on H.R. 4789 and stands ready to work with you, the other Members of the Subcommittee, and staff members as legislation to establish a full public performance right in sound recordings advances.

We have been advised by the Office of Management and Budget that there is no objection to the submission of these views from the standpoint of the Administration's

position. If you have any questions, please contact me or Nat Wienecke, Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Very truly yours,

Lily Fu Claffee

cc: The Honorable John Conyers
Vice-Chair

Congress of the United States
Washington, DC 20515

June 26, 2007

The Honorable Howard Berman
Chairman
Subcommittee on Courts, Internet
and Intellectual Property
Rayburn House Office Building
Washington, DC 20515

The Honorable Howard Coble
Ranking Member
Subcommittee on Courts, Internet
and Intellectual Property
Rayburn House Office Building
Washington, DC 20515

Dear Chairman Berman and Ranking Member Coble,

We are writing regarding the Copyright Royalty Board's recent decision to substantially increase sound recording performance royalty rates. As you know, large and small Internet radio services are distressed by the decision and several commercial and non-commercial services claim that they may have to significantly limit or even abandon their webcasting services on July 15. The increased royalties and even higher administrative "minimum" fees will force many services, including virtually all the small webcasters and some of the largest, to shut down. In fact, under one plausible interpretation of the CRB's decision, three of the leading online radio services will owe more than $1 billion in "minimum" fees alone. We believe those services that do not shut down completely will substantially reduce their programming options, which inevitably will reduce programming diversity, limit consumer choice, impede technological development and ultimately hurt small labels and artists.

Although we support your recent efforts to encourage private negotiations between copyright holders and small Internet broadcasters, we would strongly encourage all of the parties involved to reach an agreement that works for everyone. More importantly, we believe that the public has an interest in this issue that warrants timely examination of the CRB decision by the Subcommittee on Courts, the Internet, and Intellectual Property. As you note in your letter of June 11, the D.C. Circuit Court of Appeals is currently reviewing whether that decision complies with the legal standard we enacted in 1998. However, the court is unlikely to reach a final decision for some months and it is unclear whether the court will grant the emergency request for stay by July 15, if at all. Moreover, the court's review is limited to the CRB's decision and will not consider potential flaws in the underlying legal standard itself. Accordingly, we respectfully ask you to hold an oversight hearing to consider the CRB's decision and whether the

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underlying legal standard is one that promotes copyright balance, as the Subcommittee intended when it passed the standard in 1998.

Thank you for your consideration of our views.

Sincerely,

Joe Lofgren

Anthony Weiner

Keith Ellison

Tom Feeney

Rick Boucher

Steve Chabot

Jerrold Nadler

Elton Gallegly

Sheila Jackson Lee

Lamar Smith

Tammy Baldwin

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