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MUSIC AND RADIO IN THE 21ST CENTURY: ASSURING FAIR RATES AND RULES ACROSS PLATFORMS

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

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MUSIC AND RADIO IN THE 21ST CENTURY: ASSURING FAIR RATES AND RULES ACROSS PLATFORMS

TUESDAY, JULY 29, 2008

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

The Committee met, pursuant to notice, at 10:00 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Dianne Feinstein, presiding.

Present: Senators Feinstein, Cardin, Whitehouse, Specter, and Brownback.

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

Senator FEINSTEIN. This meeting of the Judiciary Committee will come to order. The purpose of this is to have a hearing, "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms." We will ask the witnesses to confine their remarks to 5 minutes so that there is an opportunity for questions. Senator Specter has convinced me that this is the correct way to go that we have the most dialogue back and forth.

I will begin with a statement, turn to Senator Specter, and then to our two distinguished Senate witnesses, and it is great to have you here on an issue like this.

Last Congress, I introduced a bill, cosponsored by Senator Graham, to address some of the inequities that are currently created under copyright law. Senator Leahy worked with me, and the Committee held a hearing on the bill on April 26, 2006. However, we were unable to build sufficient momentum to pass the bill.

This Congress, patent reform took up much of this Committee's time on intellectual property issues, but I am very pleased that we are now turning back to copyright and to the issues addressed by the PERFORM Act: rate parity, condition parity, and content protection.

The one thing that patent and copyright law have in common is that they are both extremely complex. Copyright protection, as we all know, has its foundation in the Constitution. Yet over the centuries, how Congress acts to secure the exclusive right of inventions has become very technical. Not surprisingly, this parallels the evolution of how music is delivered to the public.

Music was once available live at concerts or small gatherings. Then, with the dawn of recordings and transmission, radios were

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born. But a radio used to be as large as a piece of furniture. Now, music radio programs are provided in our cars, on MP3 players that are barely larger than a postage stamp. And we can access radio programming over the Internet and from satellites.

There has been a revolution in the technologies that bring music to vast audiences, and there has been increased consumer demand for music. Unfortunately, this appetite has also created an entitlement mentality that ignores the property rights of the artist and the investment made to create the music in the first place.

Now, we are all familiar with the impact of illegal downloading and stream ripping that have spread throughout the world. For example, a quick search on frequently used software download sites revealed dozens of stream-ripping applications, and that means sites that provide software to allow consumers to record and manipulate music programs without paying for them.

In one case, the software available over the Internet can scan over 15,000 Internet radio stations, and the company states that users can set the application to automatically download up to 22,500 free songs daily from Internet radio stations. As the company's Web page puts it, and I quote, "Target and find music from your favorite artists or fill your hard drive to the brim with hits from your favorite genre." So the challenge facing us as lawmakers is how to encourage innovation, growth, competition, while at the same time protecting artists, musicians, and authors.

The specific area I want to focus on is the compulsory license scheme created by Section 114 of the Copyright Act. Current law requires Internet, satellite, and cable radio companies to pay artists under different rate standards, and current law imposes different restrictions and conditions, depending on what platform is playing the music. This has led to confusion and inequity. The PERFORM Act was designed to bring clarity and fairness to the Government compulsory license.

The PERFORM Act tries to address this by doing three simple things: one, create rate parity; two, evaluate condition parity; and, three, require content protection.

First, rate parity. The bill would require webcasters, cable providers, and satellite radio to use the same rate standard to determine how much to pay musicians, and the rate standard would be set at "fair market value."

Now, some have argued that a different rate standard should be set, and I look forward to hearing the witnesses' thoughts on what the rate standard should be across platforms.

The second, condition parity. Last Congress, I hosted numerous negotiations to address the conditions imposed by Section 114 and, specifically, the laws definition of "interactivity." Unfortunately, we were unable to reach a solution. Therefore, rather than set what conditions should apply to each platform, the bill requires the Copyright Office to hold a meeting and report to Congress on what to do about interactivity. I am still hopeful we will find a way to replace this report with a negotiated solution.

Third, content protection. The PERFORM Act requires cable, satellite, and Internet radio stations to protect against making illegal copies of music. All companies would be required to use reasonably available, technologically feasible, and economically reasonable

means to prevent music theft. This flexibility will ensure that radio companies are not forced to use cost-prohibitive technology and to provide them with flexibility.

I think this legislation is a good step forward in addressing a real problem that is occurring in the music industry. Changes or additions may be necessary as the bill moves forward. But I believe that to wait and do nothing does a disservice to everyone that is involved.

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

So I look forward to working with the Ranking Member, with Senator Leahy, our chairman, and with my colleagues to pass this legislation and to hear the witnesses' thoughts on these issues.

Now, the distinguished Ranking Member, the Senator from Pennsylvania, Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Madam Chairwoman.

I wanted to stop by this morning to make a few comments to assure the witnesses and my colleagues Senator Corker and Senator Wyden, who are testifying, that there is great concern in the Judiciary Committee for these issues. You cannot judge it by the absence of Senators on the dais here today, but there are a great many conflicting schedules which we all have. And, regrettably, I have other commitments, but Senator Brownback is going to step into my spot as Ranking Member for the purpose of this hearing.

As I take a look at the briefing materials, it seems to me we have a crazy quilt patchwork on a very, very complex subject. There is no doubt that legislation has not kept up with the technology, and there are many parties in interest who, candidly, are not really being treated fairly, or at least there has not been a determination by the Congress, which is our responsibility, to make an appropriate decision as to where the compensation ought to be. There has not been a hearing on this subject since November 2007. You have two types of copyright protection applying to music: protection of the musical composition, sheet music and words owned by the songwriters and music publishers; and protection of sound recording, owned by the record label and performers.

We have legislated in 1995 on the Digital Performance And Sound Recordings Act and in 1998 on the Digital Millennium Copyright Act. And, regrettably, but factually, the Judiciary Committee is not functioning too well at the present time. We are having a hard time getting a quorum to attend our executive sessions because of controversies over nominations. In fact, in my judgment, the whole Senate is not functioning very well. We have a situation where the partisanship has reached a level unprecedented, at least in my tenure in the Senate, where we have controversy, as illustrated by very bitter exchanges a couple of weeks ago between the leaders and very heated discussion yesterday evening when we are arguing about whether we are going to take up the oil speculators

bill, and the controversy turns on whether the minority will be able to offer amendments on a process known as "filling the tree."

I mention that to you because those are very realistic factors which are impeding the consideration of this kind of legislation. That happens to be the fact. And it is regrettable, and perhaps soon we will be able to turn aside the partisanship; and if, as, and when do, there will be very close consideration for the very important issues which are here today.

Ryan Triplette, who is my key staffer on it, is extraordinarily knowledgeable. We just plowed through the patent issue and could not come to agreement. And we are hopeful that next year there will be a little better atmosphere, and we can tackle a great many issues, including this one, which I think is very, very important. And I will be studying the testimony closely and trying to find some way to come to a legislative conclusion on these very important issues.

Thank you.

Senator FEINSTEIN. Thank you, Senator.

Senator Brownback, would you like to make an opening comment?

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator BROWNBACK. I would, Madam Chairman. Thank you very much. I want to thank my colleagues for being here—Senator Corker, Senator Wyden. Senator Wyden and I have been working a long time on an Internet radio broadcasting bill, and I am delighted that that is a part of the hearing today so that we can bring these topics out to the front.

I appreciate the Chairman, Chairman Leahy, addressing this in a hearing, and I think this is important. I agree with my colleague Senator Specter on the complexity of the topic and its importance, and I am hopeful we can do something on it.

In March of 2007, the Copyright Royalty Board delivered a potentially lethal blow to the future viability of Internet radio by setting very high royalty rates for digital transmissions of sound recordings on the Internet. Using the broken willing buyer/willing seller standard, the CRB set a $500-per-channel fee and set a fee to be paid per song per listener, resulting in a 300- to 1,200-percent rate increase in royalty payments—a 300- to 1,200-percent increase.

For webcasters such as Pandora that allows users to create their own channels, the $500 fee was essentially a death sentence. This rate was simply unaffordable even for the largest and most profitable companies that engaged in webcasting. The willing buyer/willing seller standard does not even live up to its name. I have difficulty imagining a free and competitive market where a willing buyer would agree to pay a price that exceeds the buyer's total revenue many times over for any product or service.

Despite how unreasonable it may sound, this is exactly what the CRB decision calls for. This decision highlights the need to revisit this section of the Copyright Act. It is clearly broken.

You cannot defend this CRB ruling and claim the system is functioning properly. If the system worked and the willing buyer/will-

ing seller resulted in unfair royalties reflecting marketplace realities, we would not be holding this hearing today. If the system worked, the webcasters and SoundExchange would not be involved in ongoing negotiations for more than a year after the ruling. And if the system worked, Congress would not have to intervene with legislation.

Certainly a privately negotiated rate between the webcasters and SoundExchange is preferable, and I hope that the interested parties are able to arrive at a fair compromise. I was pleased to learn that the exceedingly high $500-per-channel fee has been waived, but there is still significant work to be done. Recognizing the need for reform in this area of copyright law, I joined my colleague Senator Wyden of Oregon to introduce the Internet Radio Equality Act 2 months after the CRB decision, and I have to tell you, Madam Chairman, Senator Wyden and I have received a huge amount of contact about this bill—almost all in support of it. If enacted, our bill would vitiate the CRB decision and set royalty rates for Internet radio at 7.5 percent through 2010, roughly the same rate paid by satellite radio. In 2010, the CRB would set a new rate; however, this time, instead of using the flawed willing buyer/willing seller standard, the CRB would look to Section 801(b) of the Copyright Act.

Section 801(b) directs the CRB to calculate rates based on the following objectives: maximizing the availability of creative works to the public; affording the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions; reflecting the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; and minimizing any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

The objective set forth in Section 801(b) are the same ones the CRB looks to when determining rates for other digital transmission, such as satellite radio. In fact, the CRB recently set a new rate for satellite radio of 6 to 8 percent through 2012 using the 801(b) standard. Experience shows that 801(b) functions well for all parties, unlike the willing buyer/willing seller standard and unlike the untested fair market value standard, which is currently supported by the content industry.

I believe that the proposal Senator Wyden and I have put forward is the best possible solution to this problem. A rate of 7.5 percent will provide a fair rate to the recording industry without being overly burdensome for the webcasters. It accomplishes the goal that I share with Senator Feinstein in finally achieving parity between Internet and satellite radio. The Wyden-Brownback proposal uses the time-tested and workable 801(b) standard.

There should be little debate over the important role of Internet radio. I recognize that the record labels and others in the content industry may dislike not having full control over where, when, and how consumers enjoy music. However, we as policymakers must recognize the great public benefit Internet radio provides. Internet

radio gives consumers more choices and creates competition, which ultimately leads to a better listening experience. Many small and independent webcasters cater to niche audiences that often feel unrepresented on the FM dial. Many webcasters offer musical selections not found on broadcast radio, which significantly benefits artists who would otherwise see no royalties, and at the same time allows lesser known artists the ability to be heard and build a fan base.

There is a lot of talk in this body about media consolidation and the importance of diversity on the airwaves. I can tell you that it does not get much more diverse than Internet radio. I do not know why we would want to silence this important medium. We would be doing a great disservice to artists that depend on Internet radio if we allow the disastrous decision put forward by the CRB to stand and to put these groups out of business.

I ask my colleagues to consider all of these issues, and I look forward to the testimony of my colleagues and the other witnesses, and I hope to work with my colleague Senator Feinstein and others to draft workable solutions on this problem.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you very much, Senator Brownback. I look forward to working with you.

Now we will go to our first panel. We have two Senators before us. Senator Corker has asked to go first. Is that a problem for you, Senator Wyden?

Senator WYDEN. Not at all.

Senator FEINSTEIN. Okay. Senator Corker of Tennessee previously served as the Tennessee Commissioner of Finance and Administration. He was elected mayor of Chattanooga in 2001, joined the Senate in 2006, is a member of several committees, including the Committee on Banking, Housing, and Urban Affairs and the Committee on Small Business and Entrepreneurship.

And if I may, I will just introduce Senator Wyden at the same time. He is the distinguished Senator from Oregon, first elected to Congress in 1980 to represent Oregon's 3rd District. He moved to the Senate in 1996, and he has served with distinction on several committees, including currently chairing the Energy and Natural Resources Subcommittee on Public Lands and Forests. I sit with him on the Intelligence Committee, and previously he served as the Director of the Oregon Legal Services for the Elderly from 1977 to 1979 and as a member of the Oregon State Board of Examiners of Nursing Home Administrators during the same period.

Welcome, my colleagues. Senator Corker, we will begin with you.

STATEMENT OF HON. BOB CORKER, A UNITED STATES SENATOR FROM THE STATE OF TENNESSEE

Senator CORKER. Thank you, Madam Chairman. I am delighted to be here with my friend Senator Wyden. We work together on numbers of issues. We may be a little different on this issue, but I am certainly thrilled to be here with him and be before this Committee.

On my way to the Senate, I had a vigorous primary, and there was a big debate among my opponents about which one would be on the Judiciary Committee. And I quickly said I was assuring ev-

eryone I would never be on the Judiciary Committee, but I am so glad to be among this hallowed group of people and feel like I am on somewhat heavy ground here. So thank you for letting me be here. Senator Brownback, thank you also.

I want to say that my comments basically really respond to Senator Brownback's comments. I know you all have a number of issues that you are working on here today, and I applaud you for that. I know how we pay for music and performers and songwriters is very, very complex. But I am speaking mostly to the comments that Senator Brownback put forth.

Senator Feinstein and Senator Brownback, thank you for giving me the opportunity to testify today on the importance of valuing music. I applaud this Committee for its work in this area that is so very important to the State that I represent.

In the past decade, the evolution of music delivery has been amazing to watch, and I know you alluded to that, Senator Feinstein. We have evolved from the favorite local AM/FM station to a large number of available stations on satellite, cable, and Internet radio platforms. The growth of radio on different platforms has been tremendous, and we can only imagine what offerings await us around the corner. But one basic fact we cannot ignore is that the fundamental element—the reason we all tune in—is the music.

We often take it for granted. We turn the knob, hit the button, click the mouse, and our favorite songs are there, as if conjured up at our whim. It is so easy to forget what goes into creating music. In fact, these works are the product of countless people and countless hours of hard work. Their songs are the record of their struggles, hopes, and dreams.

There are very few places where the power of music is as strong and evident as it is in Tennessee. Our State has been blessed with numerous songwriters, musicians, and small and large business entities that work to bring us the music that we listen to on a daily basis. During my time in the Senate, I have had numerous briefings to learn how the music industry works. It is a complex and multi-faceted industry. I cannot overstate that fact. I know that we are looking at legislation here. It is a very, very complex industry. I have had numerous briefings and feel like I have a mind that understands business particularly well, and this is an industry that is very complex.

It is also an industry that is in severe crisis. Due to the advances in technology, this industry faces numerous challenges, most dramatic of which has been the impact of piracy and the evolution of technology affecting the revenue streams of the various industry entities.

When debating these issues, I believe it is very important to keep in mind that without the songwriters, performers, and various businesses that create the music, there would be no music for us to listen to over our radios.

The Senate, in its wisdom, created the Copyright Royalty Board, and in March 2007 that Board made a decision and set royalty rates for entities that webcast music. The board's process for setting rates was an exhaustive one that involved 18 months of hearings and meetings and at the end produced a result.

I understand that certain groups are not pleased with this result; however, there is an appeals process in place, and that process is currently being played out and utilized by both sides. I urge this Committee to allow this process to take its course instead of forwarding legislation that would overturn a decision that has already been made by the Copyright Royalty Board.

We have a tendency in this body many times to set up organizations that are professionally run and then, when a group does not like the decision, to intervene. And I hope that is not the case here.

Furthermore, the House Judiciary Committee is currently facilitating negotiations between the two parties. That is ongoing right now. I applaud those efforts and remind my colleagues that this entire process is to provide fair compensation for the hard work and sacrifice of musical artists and those who invest in them.

It is in everyone's interest to maintain a vibrant marketplace for music. However, while we are considering legislative action that would drastically affect this industry, we must remember the creators and performers who bring us this music. Without them, there would be no music for webcasters to play and build their businesses around.

Thank you, Madam Chairman.

[The prepared statement of Senator Corker appears as a submission for the record.]

Senator FEINSTEIN. Thank you very much, Senator Corker.

Senator Wyden, welcome.

STATEMENT OF HON. RON WYDEN, A UNITED STATES SENATOR FROM THE STATE OF OREGON

Senator WYDEN. Thank you very much, Madam Chair, and I am very pleased to see you particularly chairing this hearing because you have a track record of bringing people together. And that is what it is going to take on major issues. We certainly, as Senator Corker alluded to, have been trying that on health and other areas, and this is not a debate between, for example, recording labels and radio Internet advocates. It seems to me this is about what do you do for promising technologies, and maybe what I thought I would do, especially since Senator Brownback spoke so thoughtfully, is spare you my prepared remarks and just make a few comments, and I would ask that my prepared remarks go into the hearing record.

Madam Chair, since coming to the Senate, I have spent a substantial amount of time particularly looking at how you promote fledgling technologies. For example, I am especially proud of being the lead sponsor of two important laws: the Interest Tax Freedom legislation that we passed and renewed here in the Senate, and also the law to prevent limitless lawsuits against free and open Internet access. So those are two laws that are on the books that I think are very much consistent with what Senator Brownback and I seek to do now with Internet radio. And we are going to work very closely with Senator Corker. He has made a number of points that I certainly share.

I am the son of an artist. I am the son of a writer. So we have got to make sure that there is compensation for artists. But we have got to do it without putting a stranglehold on new tech-

nologies with old rules. And, in particular, if you look—and this is one area where I will get into one specific. That is what we are doing in some of these Copyright Royalty Board decisions. The example that has concerned us is the Minimum Fee Section of the Copyright Royalty Board decision. The Copyright Royalty Board originally imposed a fee of $500 per channel on all commercial webcasters which they said was needed to cover administrative costs. And it seemed to us that there was no justification for this other than this is the way the old rules, the rules that existed before anybody dreamed of Internet radio, existed. And this regulation went out and was applied despite the fact that just one of the well-known webcasters at that particular moment would have had to spend over $500 million just for administrative fees. So you had a decision that was just divorced from reality, and, in fact, that was actually because it was so far-fetched what led to the negotiations that are now ongoing.

So Senator Brownback and I, through S. 1353, seek to bring new technologies to this debate, and as Senator Brownback has noted, what this, in effect, does is it puts radio programming into vastly more hands. You can have programming that will affect unique needs, say you have a farmer in Corvallis, Oregon, or a musician in Topeka, Kansas. And anybody can, in effect, launch a NetRadio station, and it seems to me this will mean that the epicenter of American music is not just stuck in the commercial capitals of New York and Los Angeles. It can go back to a whole host of areas—small towns in Oregon, Tennessee, and Kansas.

A second problem with the CRB rules that I would note, Madam Chair, specifically, is the costs for Internet radio broadcasters are much higher for the same content than for satellite or traditional radio. And I think, once again, that will impede the development of new technologies in an ill-advised kind of fashion.

I will close, because I know your time is short, by saying again that I feel very strongly, as Senator Corker has outlined this morning, that we have got to compensate artists for their work. I think my father, if he was listening to this hearing, as the author of many books, would relish the fact that his books can now be downloaded onto new technologies like Amazon's Kindle that my wife at the Strand Book Store pays a lot of attention to and read by anybody with a library card while they commute to and from work. My dad's audience would expand beyond his wildest dreams.

So we have got to figure out a way to bring all of these innovations with larger audiences and vast numbers of creators together. And because of your reputation for thoughtfulness and fairness, working with Senator Corker and Senator Brownback and myself—and I see Senator Whitehouse has joined us as well—I am convinced we can get it done. Madam Chair, we did it with the Internet Tax Freedom legislation. We did it by making sure that we were not going to have limitless lawsuits against people who sought free and open Internet access. We can do it here again with yet another promising technology.

I thank you very much for your time this morning.

[The prepared statement of Senator Wyden appears as a submission for the record.]

Senator FEINSTEIN. Thank you, Senator. You are irresistible.

[Laughter.]

Senator FEINSTEIN. We have been joined by Senator Whitehouse. Would you like to make a statement?

Senator WHITEHOUSE. No.

Senator FEINSTEIN. Then, if there are no questions of this panel, we will excuse both of you. We will thank you for your wise words, and we will proceed to panel No. 2.

Senator WYDEN. Thank you.

Senator CORKER. Thank you.

Senator FEINSTEIN. Thank you very much.

Senator FEINSTEIN. Panel No. 2 consists of John Ondrasik, a singer/songwriter; Jeffrey Harleston, head of operations, Geffen Records; John L. Simson, Executive Director, SoundExchange; Joe Kennedy, President and CEO, Pandora Media; and Matt Nathanson, songwriter and recording artist.

I will begin the introductions while these gentlemen are taking their places, and we would ask that you confine your remarks to 5 minutes, summarize for us, give us your main points, and then we can have a good discussion.

I will begin with John Simson. He has been involved in the music industry since 1971 as a songwriter, recording artist, manager, entertainment lawyer, and executive. He has practiced entertainment law since 1980 and is currently the Executive Director of SoundExchange. That is a performance rights organization formed to collect digital performance royalties for sound recording copyright owners and recording artists. Mr. Simson is a trustee of the Recording Academy, a board member of the 21st Century Consort, and lectures frequently on the music industry.

Next is Mr. Kennedy.

Joe Kennedy is current Chief Executive Officer and President of the Internet radio station Pandora. He joined the company in 2004 after spending 5 years at E-LOAN, where he was President and COO. From 1995 to 1999, he was Vice President of Sales, Service, and Marketing for Saturn Corporation.

Mr. Jeffrey Harleston is head of operations for Geffen Records, the home of some of America's most popular recording artists. Prior to assuming his current position in 2003, Mr. Harleston was Senior Vice President of Business and Legal Affairs for MCA Records and, before that, Vice President of Business and Legal Affairs for MCA's parent company, the Universal Music Group.

And now we have John Ondrasik, whom I have been privileged to meet. He is a Grammy-nominated singer/songwriter performing under the stage name Five for Fighting. He has performed for U.S. forces on USO tours in Hawaii, Guam, and Japan, and spearheaded the creation of "For the Troops," a compilation album that is available for free to every active serviceperson in the United States armed forces. Mr. Ondrasik is also an active philanthropist and has recently launched a charity-driven website to help raise money for such organizations as Save The Children, Autism Speaks, the New York Police and Fire Widows, and the Children's Benefit Fund. A very diverse personality.

Matt Nathanson is a songwriter and recording artist from my home town, San Francisco, California. He currently records on Vanguard Records, has been on Universal Records, and has self-fi-

nanced several albums. Mr. Nathanson has toured with some of the country's most popular artists and has had his music featured in many films and television shows. He also credits Internet radio as a factor in his success through the use of iTunes and other digital services.

So, as you can see, we have a diverse and talented lot here, and we will begin with Mr. Simson.

STATEMENT OF JOHN SIMSON, EXECUTIVE DIRECTOR, SOUNDEXCHANGE, WASHINGTON, D.C.

Mr. SIMSON. Madam Chair, Ranking Member Brownback, Senator Whitehouse, and members of the Committee, thank you for inviting me to testify before you today to speak about fair rates for music, a subject—as a former performer, artist manager, entertainment attorney, and now executive director of SoundExchange—with which I am very familiar.

Shortly after Congress granted the right for artists and labels to be paid fair royalties from digital services, one of the great young saxophonists in American music, Art Porter, Jr., of Little Rock, Arkansas, died tragically while on tour in Thailand. Shortly thereafter, his wife also died of cancer, leaving behind their two sons, who were now being raised by their grandparents. We have been able to track them down, and soon they will get a check from SoundExchange for the legacy their dad left behind.

Another great artist, Joe Jones, who had a song, "You Talk Too Much," you might remember; it was a staple of the airwaves. Not a one-hit wonder, as some might think, a Juilliard graduate, another great artist whose widow was very grateful for the royalties we sent her. And then there was the day, shortly after Katrina, we found Ernie K-Doe's widow—he of "Mother-in-Law," another song you may remember—down in New Orleans. Her response when she found out about these royalties was, "Child, you just put the Thanksgiving turkey on my table."

These are just some of the many artists and the stories that we hear, many heartfelt stories, from widows and widowers whose spouses created many valuable recordings; many artists living on Social Security; young artists just starting out, we hear from them, the one-hit wonders, the orchestra members. The creators of music are getting paid because Congress created a digital performance right. And it is the basic principle of intellectual property that performers should get paid for what they create.

In fact, just last week, when the Enforcement of Intellectual Property Act of 2008 was introduced—and we thank you, Madam Chair, for cosponsoring—Senator Leahy noted that, "The protection of intellectual property is vital to our economy." And it is also vital to the livelihood of the recording artists whom we represent.

Every day, you know, the landscape is transforming so dramatically in the music industry. We see a new reminder that music is undergoing a major transformation. In the new landscape of the 21st century, people are accessing music through listening, not through purchasing. But as we go through this transformation, one basic principle has to remain: the people who create the music must be paid, and must be paid fairly.

Over the past 17 months, SoundExchange has addressed genuine business concerns of webcasters because we see them as partners. The $500-per-channel fee minimum was mentioned. You know, the only reason that the judges did that without a limit was because the other side entered no testimony about how many channels they had.

We want webcasters to succeed because we want them to continue paying royalties to our 31,000 artists and over 3,500 labels. But we want fairness as well.

In every instance we try to look at the big picture, including the vibrant business activity that is being generated in webcasting with its over 50 million listeners. Just last August, Bridge Ratings projected that Internet radio advertising revenue will hit $20 billion by 2020. There are lots of examples I could show you about the vibrancy of Internet radio and how it is growing. Just last week, the new iPhone, the hottest application—congratulations to my witness here, Joe Kennedy—belonged to Pandora Radio. I am sure that news alone is enough to send chills down the spines of satellite radio and AM/FM radio operators.

So why, with all this activity, do we hear the constant refrains of doom and gloom—which we have heard for over 10 years now—when, in fact, webcasting is the place to be? Everyone wants to be there. The simple answer is webcasters want to pay less so they can make more. The problem is they want to pay less than what was judged fair by an impartial panel of judges.

For some reason, there are those who think that music is something that they should have for free or below market value. They do not think about the endless practice sessions, the second jobs, the lessons, the road trips, sleeping on friends' couches while on tour, or like me going to law school, eventually, or about the thousands of people who work in the recording industry promoting, investing, marketing, developing, and producing all those recordings. Frankly, the attitude that music should be free or devalued is inherently wrong.

Just a few weeks ago, several of your colleagues in the House from both parties suggested to the recording industry and the National Association of Broadcasters that we get together and negotiate a rate for AM/FM radio broadcasts, which shamefully, right now, pays zero. The next day at a radio conference, we had the opportunity to make that suggestion to the head of the NAB. His response? "I would rather cut my throat than negotiate." His words.

Unlike the NAB, webcasters believe in paying and are paying, but they are going to great lengths, including lobbying Congress, in trying to devalue our music for their own financial gain.

Webcasters are currently advancing an argument they call "parity" but that we more accurately call a "subsidy." To us parity means every radio-like service should pay including AM/FM radio. But it does not mean that artists and owners must subsidize every Internet business model—good, bad, or exploitive—which is what they are asking for. The fact is webcasters were given a huge concession by this Congress in the statutory license. It lets them use any sound recording without permission in exchange for a fair royalty. Little paperwork, no tracking down of artists, no need to negotiate with thousands of independent and major labels. We do all

that work for them. All they have to do is play the music and pay a fair rate.

To establish a fair rate, and recognizing the complexity, Congress set up the CRB process, and it is working. Businesses are growing. The Internet is the place to be. The President of CBS Digital recently said, "[it] is an incredible business—we gotta own this!" The fact is the system is not broken and it does not need fixing. If anything, Congress should be commended for the very fair process it established.

Madam Chairwoman—

Senator FEINSTEIN. Would you conclude, please? Thank you.

Mr. SIMSON. Yes. Madam Chairwoman, thank you very much. Music is like magnets and glue. People are attracted by and stick around for the music. Music is what makes these services have value. All we are asking is for our fair share.

Thank you.

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

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

Mr. Kennedy.

STATEMENT OF JOE KENNEDY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, PANDORA MEDIA, INC., OAKLAND, CALIFORNIA

Mr. KENNEDY. Madam Chairwoman, Senator Brownback, Senator Whitehouse, on behalf of Pandora and the Digital Media Association and the Internet radio industry, I thank you for inviting me to speak today. I will discuss how Internet radio innovation offers unique benefits to listeners and artists, and I will ask your help as we confront a royalty crisis that threatens our company and our industry.

Ten years ago, you had the foresight to establish a statutory framework for a new form of radio: radio delivered over the Internet. This form of radio, unencumbered by the traditional spectrum limitations of traditional broadcast radio, would finally enable the full range of America's wonderful diversity of music and artists to be heard.

By delivering on this promise, Pandora has become this country's most popular Internet radio service. 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: rock, country, jazz, gospel, blues, Christian, Latin, classical, and more. Americans have embraced this opportunity to enjoy this diversity, and it is our privilege to serve 15 million Americans who have registered as users since we launched just 3 years ago.

Artists and labels have benefited as well. Nielsen research shows that Pandora listeners are three to five times more likely to have purchased music in the last 90 days than those who do not use our service.

Our world is converging, and accessing Internet radio is looking more and more like using broadcast and satellite radio. We are attempting to listen to a Pandora station transmitting live over an

Apple iPhone. The AT&T service in here may not be good enough to get the signal.

Senator FEINSTEIN. What does that tell you?

Senator BROWNBACK. That is not your fault. That is AT&T.

[Laughter.]

Mr. KENNEDY. Ah, you can hear it there. As John said, it has become actually the second most popular application on the iPhone.

The iPhone will also play the hundreds of radio stations operated by CBS Radio as well as all of the radio stations offered by XM satellite radio.

But just as the potential of Internet radio is beginning to flourish, it faces early extinction because of the royalty rates set last year by the Copyright Royalty Board. According to an analysis published by JPMorgan, the royalty rates exceed the total revenue of the average Internet radio service, leaving nothing to cover the many other costs of the business.

At Pandora, we have had great success monetizing the usage of our service and plan to reach $25 million in revenue this year. However, the CRB royalties would cost us over $18 million this year, more than 70 percent of our revenue—a crushing amount. If XM or Sirius were to have revenue of $25 million, their sound recording royalties would equal only $1.6 million, or 6.5 percent of their revenue.

We also pay royalties to songwriters through our licenses with ASCAP, BMI, and SESAC. However, these royalties are consistent with what broadcast and other forms of radio pay—between 3 and 4 percent of revenue—further highlighting the absurdity of the CRB rates.

How are these disparities possible? Broadcast radio has a statutory exemption and pays nothing, and cable and satellite radio royalties are set using a statutory standard very different from that used for Internet radio.

Since the CRB decision, hundreds of thousands of listeners—and, notably, more than 6,000 artists—have asked Congress to support the Internet Radio Equality Act, and we all thank Senator Brownback for being our lead cosponsor. This legislation would sent Internet royalty rates at 7.5 percent of revenue, more than what satellite pays and obviously higher than broadcast radio's zero.

We also appreciate Senator Feinstein's support of radio royalty parity. However, the Senator's bill applies only prospectively, and without a solution to the present crisis, Pandora will die. One hundred and twenty employees in an enterprise zone in Oakland will lose their jobs, and an invaluable promotional channel for tens of thousands of artists who rely on Internet radio for exposure will disappear.

Additionally, the PERFORM Act's fair market value royalty standard would subject Internet radio to yet another untested standard, just as Congress did when the willing buyer/willing seller standard was set in 1998.

Pandora and DiMA urge that the balanced royalty standard found at Section 801(b) of the Copyright Act, which has worked well since 1976, simply be extended to Internet radio. Everyone in Internet radio wants artists to be paid fairly, but we also want Internet radio to survive. Neither will happen unless the CRB deci-

sion is remedied, and it will not be a lasting remedy unless the time-tested 801(b) royalty standard is extended to Internet radio.

Thank you very much.

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

Senator FEINSTEIN. Thank you very much.

Mr. Harleston.

STATEMENT OF JEFFREY HARLESTON, EXECUTIVE VICE PRESIDENT AND GENERAL MANAGER, GEFFEN RECORDS, SANTA MONICA, CALIFORNIA

Mr. HARLESTON. Madam Chair, Ranking Member Brownback, Senator Whitehouse, members of the Committee, thank you so much for having us here today. My name is Jeffrey Harleston, and I am head of operations for Geffen Records, located in Los Angeles, California. Geffen is home to legendary artists such as B.B. King, Nirvana, and The Who—as well as contemporary superstars like Mary J. Blige and Nelly Furtado. In addition to this roster of amazing artists, I have the good fortune to work with an exceptional array of managers, producers, marketers, and executives who tirelessly dedicate their talent and experience to delivering great music in the 21st century.

Although our industry is facing some major challenges today, we have plenty to be excited about. An increasingly active part of what we do as a major record label is the licensing of our music, often to those that are perfecting the last great idea—and to those that are working on the next great idea. Today's music marketplace is nothing like it was 10 or 5 years ago. While the sales of CDs have fallen off considerably, we have witnessed a substantial shift in the ways consumers use music. They want music to be portable. They want it instantly. They want it on Facebook and MySpace pages, on cell phones, iPhones, BlackBerrys, and iPods. But this growing digital marketplace can only survive if we ensure that everyone plays by the same rules, that creators are compensated fairly, and that the value of music is protected.

That is why I am pleased to support the PERFORM Act introduced by Senators Feinstein and Graham. The PERFORM Act establishes "platform parity" among music radio services. Right now, the law, as others have noted, is a patchwork of rules written at different times for different emerging radio technologies. Now that these technologies have matured into sophisticated businesses that compete with each other to offer consumers multiple services, it is time to update the law to ensure that the playing field upon which they compete is level and fair. The PERFORM Act accomplishes this by applying the same compensation and protection standards to all radio services that benefit from a Government license.

Under the Government license, radio services pay a Government-set rate for the music they perform. They do not have to ask the creator for permission to use their music. They do not have to negotiate with hundreds of different record labels. They just pay the set royalty, follow the regulations, and they are good to go.

Today, the rules used to determine what the compensation should be for each radio platform are very different. It is inappropriate—and detrimental in the long run—to provide any platform

with a competitive economic advantage over another. To achieve platform parity, the compensation paid by all platforms should be determined according to the same standard, and we feel that standard is the fair market value.

Applying the same standard across different radio platforms does not mean everyone should pay the same price or even have the same pricing structure. For example, in my work at Geffen, we license the use of our recordings to hundreds of companies ranging from Amazon.com to MTV, to MySpace, mobile companies like Verizon, television programs like "Grey's Anatomy" and "CSI," to retail outlets like Wal-Mart, to video games, to toys, to even toothbrushes and greeting cards. What is important is that the negotiation of the license in each of these instance takes into account market considerations, takes into account the uses of the music by the product or the service that is licensing. Yet, the same standard is used to determine the fair cost in each of these instances, and that is the fair market value.

Similarly, the standard applied by the Government to all radio platforms should also estimate and reflect what the market price would be for the use of that music. The Government took away the fair market negotiation when they enacted radio licenses and gave these platforms phenomenal efficiency and ease of use. The very least the Government can do is ensure that if they are going to set the price for our property, it ought to be based on a set of rules that leads to a result that is consistent with what the marketplace would yield.

The other parity issue addressed in the PERFORM Act is the rule that all radio platforms should make sure they are safe and secure, and that all uses of the music they deliver are compensated. Satellite radio services like XM and Sirius already prevent, through encrypted delivery, the taking by others of the music they broadcast. They also have reached agreements with record companies to make sure all uses of the music they deliver are compensated, and we commend them for their partnership. While current law prevents Internet radio stations from making multiple uses of music without paying for those uses, many Internet radio stations are not secured to prevent the uncompensated taking of our music by others.

A real-world example is a software program called "Radio Tracker," one of the hundreds of applications known as "stream-ripping" software. Radio Tracker is published by a German company that charges $30 to download their software program. Once installed, the program simply asks you to enter any artists or songs you wish to copy on a "wish list."

Without the user ever listening, the software searches over 2,500 Internet radio stations, sometimes as much as 5,000, at the same time looking for the these songs or these artists. When it finds them, it copies every one individually, collects them in a permanent library that can be moved easily to an iPod, along with song lyrics. It even allows for ringtones to be downloaded or a CD burned. Basically, you get a digitally perfect copy of any song you want. The German stream-ripping company gets $30—none of which is used to compensate the artist, the producer, the songwriter, or the label. The user never has to buy another song. It is as simple as that.

I would like to thank the Committee for its focus on this important issue, and especially Senator Feinstein for your leadership in crafting the PERFORM Act. Your legislation goes a long way toward establishing a level playing field where all parties and platforms operate under the same rules, providing consumers with the music and experiences they desire, while ensuring that the creators, the artists, and the producers are appropriately rewarded for their valuable work.

Thank you.

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

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

Mr. Ondrasik.

STATEMENT OF JOHN ONDRASIK, SINGER/SONGWRITER, FIVE FOR FIGHTING, LOS ANGELES, CALIFORNIA

Mr. ONDRASIK. Thank you. Thank you, Senator Feinstein. Thank you for inviting me today. Senator Brownback, thank you, Senator Whitehouse, thanks for being here. It is nice to be with my friend Matt here. I have known him for a while, and it is good to have some songwriters on your panel.

My name is John Ondrasik. I am a singer/songwriter. I record under the band name "Five for Fighting," which is a hockey term. Of course, back at home, I am simply known as "Dad." And my message today is one my two wonderful children have heard from me and have understood from the very beginning: Play fair.

I am not in D.C. very often. I have participated in Grammys on the Hill and in events to support our troops. My songs and activities often reflect issues and causes I believe in, and my experiences have shown me the power of words and music. I recently was touched when I heard that Senator Hatch wrote a song for his friend Senator Kennedy. That gesture made me proud as an American and reminded me how music, at times, can express our basic humanity and feelings better than any other medium. I look forward to hearing that song. I wish Senator Hatch was here.

I am here today not on my own behalf, but on behalf of thousands of my fellow songwriters and performers. As with them, as with us, creating brings us great joy. But, unfortunately, joy alone does not put food on the table and allow us to take care of our families. The fact is, as creators of our music, we are actually small businesses. And while we take pride in our ability to move and entertain people, like any businessperson—like every American—we expect, need, and deserve fair compensation for our work. I am here today to ask that you ensure the platforms that deliver the music we make are secure and effective and that all uses of music over those platforms are fairly compensated. In essence, I am asking for platform parity, and I would like to thank you, Senator Feinstein and also a friend of mine, Senator Lindsey Graham, for introducing the PERFORM Act, which recognizes these principles.

As we all know, songwriters and performers get paid for different uses of their work. Whether it is the sale of a concert ticket, a spin on a radio station, a sale on iTunes, each has its own value. Buying a concert ticket does not automatically get you a free album. And I think respecting these different uses and the revenue streams

they provide is crucial to the survival of songwriters and performers. Not all performers write their own songs.

That is why it is necessary for those who broadcast music to prevent the transformation of the radio listening services into services that offer permanent copies of music without paying the appropriate license for that use. By essentially turning radio into iTunes without the proper compensation, part of the essential revenue stream for creators disappears. And no matter how pleasing it is that others appreciate your work, I am sure you would agree that if part of your income was put in jeopardy, you would be concerned about that.

Let me be clear: I am excited about opportunities provided in the digital marketplace. It is amazing what is going on. As a fan, I love Pandora. It is very cool. It is very hip. It has opened up new opportunities for us and for those who deliver music as well. But to benefit from those opportunities, we must all recognize and protect the value of that music. We must provide a landscape that does not discourage the next generation of creators from pursuing their contribution to our culture. That is the key.

At the end of the day, if there is no protection for what we create, it effectively has no monetary value. That not only hurts us, but it hurts our culture, our economy, and every business striving to share in the benefits of the new marketplace. As Mr. Harleston said, we are pleased that satellite radio has recognized this, and they encrypt the delivery of their music that protects us, and they work with us.

I think it is necessary for all music to recognize, like satellite has, the corresponding obligations and responsibilities they have—both to creators and to each other—to protect and value the music they deliver. That music is what drives their business and what will drive it in the future and to compensate the artist for all uses.

What should that compensation be? I believe in the principle established in the PERFORM Act that creators deserve fair market value for their work. Surely it is not too much to ask that when you create something in our great country, you get fair market value for it. Why should music be different from anything else? Why shouldn't Government consider what a buyer is willing to pay for what I am offering? That is exactly what fair market value is, and that is the standard that should be used across the board for all competing platforms.

I think we all want to see a thriving music marketplace. We all do. It is important. By creating a level playing field for all platforms, including establishing equal standards for the protection and market-based compensation of music, the PERFORM Act provides for this and allows all of us—creators, businesses, music lovers—to benefit from these opportunities.

Let me say that personally this has been an extraordinary experience for me. I am honored to speak before you. If the opportunity arises again, perhaps I could bring my kid. I told them all about it. My daughter Olivia, who is 7 years old, she just wrote her first song called "Secret Diary." And if she was here, she would sing it for you. Trust me, she would. I hope we all have the opportunity to hear new music and the works of many more creators for years to come—maybe Olivia. Ensuring that singers and songwriters are

treated fairly across all music platforms is exactly the way to accomplish this. It really just makes sense, and I think we all can work together to make that happen. And as my kids would tell you, it allows us all to play fair.

Thank you.

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

Senator FEINSTEIN. Thank you very much.

Mr. Nathanson.

STATEMENT OF MATT NATHANSON, SONGWRITER, PERFORMER, AND RECORDING ARTIST, SAN FRANCISCO, CALIFORNIA

Mr. NATHANSON. Hi. Thanks a lot for letting me speak.

I have spent the last 17 years creating a career for myself in the music business. I released my first record in March 1993. Promotion for that record was pretty much me going to Kinko's and printing up really crude flyers and handing them out in college and posting sort of neon green flyers for shows at local coffee shops.

I released my most recent record in August of 2007. Promotion for that consisted of, among other things, months of blog posts detailing the making of the record, e-mail blasts to my mailing list, viral video clips posted on YouTube of in the studio, an album presale on iTunes, online listening parties, and promotion through Internet radio.

The Internet has changed the way I run my business. It has changed the way my music is heard. It has changed the discovery process for the music listener. And it has leveled the playing field for the artists. All of this change is good, including the birth of iTunes, YouTube, Pandora, MySpace, Rhapsody.

When I started, there were only really two ways of making a living playing music:

The first was to sign a deal with a label, get a recoupable advance, and hope that when my record was released the label would push my songs to bc radio and to MTV. And then those outlets in turn could choose to push or not push my songs to the public at large.

The second option was to hit the road, sleep on floors, and build fans one show at a time.

Today, if a person makes a record, he or she does not have to struggle and fight as much to find their audience. Self-promotion is not just postcards and flyers and sleeping on floors. With the Internet, there is no audition process for a label contract. There is no retail shelf space to compete for or buy. And artist can post a song to their blog or their MySpace page, and from there it spreads. They can sell songs on iTunes or MySpace or sell their CDs on CD Baby. And with MySpace combined with Internet radio and blogging, the artist can finally build a following and sell out shows in parts of the country they have never even been to. When they finally go, there are people there.

Internet radio is such a crucial part of this new business. I cannot tell you how many times people have come up to me at shows and said, "The first time I heard you was on Pandora," or "The first

time I heard you was on Rhapsody, and now I have got your CD, now I am at your show, now I am a fan."

These websites have been essential to my career growth and, in turn, the overall growth of my small business. Look, royalties are great, right? Like I appreciate the royalty checks I get from SoundExchange and ASCAP. I am not one to—you know, I am into—money is fine.

[Laughter.]

Mr. NATHANSON. But in contrast to some who try to maximize every revenue opportunity, it is more important to me, and I think to most artists at my level, to strike the right balance between promotional opportunities and revenue opportunities. Royalties should be fair, but not so high so Internet radio has to struggle to stay alive and to grow.

It is really an incredibly exciting time for music. What once felt really limited and elite now has sort of broken wide open, right? The scales that once were tipped in favor of a few record labels and a few broadcasters are now more equal and fair, right? This is the first time that the music business has broken open and created a level playing field for artists. This is a new music business, not the old guard. And Internet radio is part of the new opportunity.

It is essential that laws foster this new music business, the business that works equally well for small artists. Please do not let royalties kill Internet radio, and do not pass new laws that favor industry incumbents and harm new competitors that are so beneficial to the creators like John and I.

Internet radio is good for the ecosystem of the music system. It is a fact. If it disappears, it will not necessarily hurt Geffen Records, and it will not even hurt someone who is established, like a household name like John and his band, Five for Fighting. It is going to hurt me, and it is going to hurt everybody like me, the middle class of the music-creating—and it is going to hurt the listener. It is like it is all about distribution, it is all about getting it to the people. And then people like me, working musicians who fly under the radar and make a good living creating and performing music, it is going to hurt us the most.

So thanks for letting me speak.

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

Senator FEINSTEIN. Thank you very much. I think this is very interesting testimony.

I guess if I have a bias, it is for the artist and to see that what the artist does is fairly compensated, because that is what the richness is of the technology. The technology is only as good as what you put on it, and, therefore, fair pay for what you create is extraordinarily important, or else I am afraid you drift really toward mediocrity, because people do not really have the incentive. They cannot earn a living.

So let me ask you this question: Is there anyone that thinks there should not be parity between the platforms, and why?

Mr. Simson.

Mr. SIMSON. Madam Chair, I believe in parity. I think the rate standard should be the same for all of the platforms. And, obvi-

ously, I believe that AM/FM Radio should pay. They do not pay right now, and I think that is an egregious—

Senator FEINSTEIN. See, this is the hard part because they are big, they are powerful, they object, as you just said, in a colorful way. And people say, "Oh, leave it alone for now." And I do not know how we ever really get to a system of rate parity by leaving the 800-pound gorilla out of the room.

Mr. SIMSON. I would certainly agree. I do think, though, that we should be—and I think it was mentioned by Mr. Ondrasik, that rate parity does not mean that everybody pays the same rate. I think the judges very carefully, over an 18-month period carefully examined webcasting as a business, the same way they examined satellite radio as a business. And so you may not end up with the same exact percentage. In fact, if you look carefully at the satellite decision, satellite radio has a lot of different offerings. There is sports, there is talk. Half their channels are not music channels. So the judges there actually halved what we should have gotten and said it was 13 percent after halving it. So 26 percent is really the value of music to satellite radio if they were strictly a music service.

So these numbers that are being thrown around I think are being thrown around a little bit loosely. We have other services where we get 15 percent. iTunes pays 70 percent for their content.

So I think we should let the judges do their jobs, examine these businesses very closely, but under the same rate standard.

Senator FEINSTEIN. Okay. One other quick question. Mr. Harleston, if I may, Internet radio providers have argued that the rate standard should be 801(b) for satellite, cable, and Internet, instead of the fair market value that is in my bill. That is the difference, I think, between us in our bills. What do you think of using the 801(b) factors to set the rate standard to determine what these radio stations should pay for music? In other words, we need to compromise to move this thing, it seems to me. Would that be a fair compromise?

Mr. HARLESTON. Well, let me try and answer it this way: I think that the compromise is getting—I will try and articulate it the easiest way I can. The way I do my business and the way that—you know, Mr. Nathanson talked about his business, and we are actually far closer than I ever realized, having heard him speak. The way I do my business, as any content owner would, is I evaluate the content that I have and the opportunity that is in front of me. And I think, you know, kind of the difficulty that we have is we have a system that is trying to fit kind of a square peg in a round hole. And the round peg is there are many things that are very positive that I as a content holder may want to avail myself of in the world with my music. There are opportunities when I may decide, I may have the choice to take my music and, you know, allow it to be broadcast or distributed however I might choose to do that at whatever compensation scheme I feel I am most comfortable with.

For example—you know, and Mr. Ondrasik said this very well—we all think that Internet radio is fantastic, and we all think it is—the new technologies are keeping music in this music industry vital. In the 15 years that I have worked in the industry, you

know, I have seen it undergo really terrible upheaval, terrible change, and we have had an opportunity with new technologies to really get the consumer back, get the listener back, get the music fan back by exposing it. And the one thing Internet radio does is broaden the scope of what is out there. But I would like to have the choice to decide how I want to license my music and the fair market value—that is why I keep coming back to that—the fair market value of what it is worth.

There may be an artist that needs exposure because they are these so-called, using Mr. Nathanson's term, middle class of the music industry that I may feel is more adept to being exposed through other channels that I may—for example, iTunes has a program, "Download of the Week." Well, major record labels give their music for 1 week to iTunes to download for free, and typically you are choosing artists that you are trying to expose. But an artist that is a superstar artist that does not need the exposure, you might have a different opportunity. I probably would not choose to do a Download of the Week with iTunes because it is a revenue-generating opportunity for me. I am a businessman.

So it is a long, roundabout way of answering your question, but that is why, you know, I feel—I understand your need for compromise—

Senator FEINSTEIN. So the answer is no. Is that right?

Mr. HARLESTON. Excuse me?

Senator FEINSTEIN. The answer is no?

[Laughter.]

Mr. HARLESTON. The answer is no.

Senator FEINSTEIN. I just wanted to know. My time is up.

Senator Brownback.

Senator BROWNBACK. I was going to say the answer is maybe.

[Laughter.]

Senator BROWNBACK. That was what I heard, but I guess that is in the listener's mind, which all of this is. Thank you all for being here. This is very interesting. I think it is fascinating, particularly, Mr. Nathanson, your experience to diffuse the industry and to allow people to break into it, new incumbents to come into it. I think that is just a fascinating story.

Mr. Kennedy, do we know at all how many Internet radio stations there are now? Do we have any idea?

Mr. KENNEDY. I actually could not tell you how many services there are. There are certainly thousands, if not tens of thousands. Again, the beauty of Internet radio is there is no kind of FCC spectrum limitations, and so it really has, you know, as Matt talked about, kind of democratized access. And I think that is why so much music is being exposed to the benefit of listeners and to the benefits of creators.

Senator BROWNBACK. If the CRB rates are put into place that are currently negotiated, how many of those Internet radio stations will be able to survive?

Mr. KENNEDY. I do not know of any Internet radio service that is just an Internet radio business that could survive these rates.

Senator BROWNBACK. Can Pandora survive?

Mr. KENNEDY. Pandora will not survive. How can—

Senator BROWNBACK. And you are one of the two biggest—you are one of the two biggest?

Mr. KENNEDY. We are actually the largest now in the country. I think at these rates—

Senator BROWNBACK. And you could not survive with these rates?

Mr. KENNEDY. It is impossible. There is no way, $18 million on $25 million, it is simply crushing. We could not pay people—

Senator BROWNBACK. So the industry is gone if these are put in place.

Mr. KENNEDY. I think there might be, you know, the great big broadcast conglomerates like Clear Channel and CBS, you know, that is all that will be left of Internet radio.

Senator BROWNBACK. Because they could move and use this as a loss leader or something.

Mr. KENNEDY. Exactly. So they pay nothing on 98 percent of the radio they play, and so they can choose to pay the higher rates on the 2 percent that they stream online. I mean, if I paid nothing on 98 percent, I could pay the CRB rates on the 2 percent. But I think the great loss, though, would be for American listeners and American artists, because in that scenario, all the diversity is lost and all of a sudden Internet radio becomes just like broadcast radio has been for the last 20 years.

Senator BROWNBACK. Now, what is wrong with the fair market rate, then, in your estimation? We heard Mr. Harleston talk about he does not like the 7.5-percent rate that satellite radio pays. What is wrong with fair market then?

Mr. KENNEDY. The 801(b) standard, as I understand it, has been used since 1976 for every other form of copyright arbitration, and it has been used successfully with songwriters, with music publishers, with a wide variety of services in radio; it has been used for cable and satellite. It is tested, it is proven successful.

We are in the mess we are in today because 10 years ago a new standard that had never been tested, willing buyer-willing seller was injected into the statute. I think the worst thing we can do at this point is inject yet another untested standard into the statute. We have this standard, 801(b), that has been used successfully for 25 years for exactly this form of royalty arbitration. Why wouldn't we go with what has been proven successful?

Senator BROWNBACK. So it is really kind of what Mr. Harleston is saying. He would like to be able to float rates differently. I mean, if he wants to break in with somebody, he would like to do it for zero; if he has got it established, he wants more. And you are saying that is just—that gives you no predictability in your marketplace for being able to maintain or operate an Internet radio. Is that correct?

Mr. KENNEDY. Right. We play the music of 60,000 different artists. We play over half a million songs every week. We cannot have a rate negotiation around each song every week, depending on what someone wants to do. If that were the case, the system, again, would fail. No one would ever be able to offer that diversity or artist and music if they had to go through one-to-one licensing—

Senator BROWNBACK. Mr. Nathanson, because my time will be up quickly, how many new artists are breaking in now through Inter-

net radio? Do we have any idea now versus, say, 20 years or 10 years ago before Internet radio?

Mr. NATHANSON. I do not really know those kind of numbers. All I know is that, again, sort of the platform—the landscape has changed to such a point that there is no longer kind of the bottleneck where you have to get signed to a label and then they push you. It comes up through all the different—it is sort of a combination of all these tiny—

Senator BROWNBACK. Routes.

Mr. NATHANSON. Yes, it is all—instead of one big focused center, everything is sort of—artists are rising up through all the difference channels. That is what is so exciting about it. You know what I mean? It is a wild, open sort of new frontier.

Senator BROWNBACK. So if the Internet goes back to just a few channels, like Clear Channel or others, using it for a loss leader, what happens then?

Mr. NATHANSON. We have seen what that has done to the record industry now, so, I mean, it has not done them a service. I mean, it is sort of like we are at a really great place, and it would be a huge step back to go back to this kind of concept of a couple of companies owning the outlets.

Senator BROWNBACK. Thank you.

Thank you, Madam Chairman.

Senator FEINSTEIN. Thank you, Senator.

Senator Whitehouse.

Senator WHITEHOUSE. I got the impression while Mr. Kennedy was speaking that Mr. Ondrasik had some interest in offering a response, so let me offer you that opportunity on my time.

Mr. ONDRASIK. Thank you, sir, very much. I appreciate that. I would just like to express kind of the artist's side of the actual numbers. We really have not talked about the actual numbers, and the way I understand it, currently right now artists are being paid—or the royalty rate is $1.40 for a thousand songs. So in playing 1,000 songs, which, if you factor the programming, that is almost 15 songs an hour, that is 3 days of programming, constant streaming 24/7, $1.40.

I am also told the average check the SoundExchange gives out is $360 per year. I checked mine last night. Last year, my SoundExchange royalties was $9,000. And if I was not a songwriter, that would have been my income. And if that was my income, I would not be making music.

One more global point I think a lot of artists are concerned about. We are worried that certain platforms—and I am not necessarily talking about Pandora. We need Pandora to survive. We do. And I think we should work together to make that happen. But we are concerned about platforms that use our music to gain eyeballs. Once they reach a certain critical mass, they flip their companies for hundreds of millions of dollars that music artists never see a penny of. And that is what we worry about. That is not fair.

If the model cannot sustain $1.40 for 3 days of programming, why should artists be punished for that? I am all for giving away free music. I do it all the time. The CD for the troops was free. But we should not be forced to give our music away for free. And if the model does not sustain that, well, the model will work itself out.

I think that needs to be said. Artists like Matt need this outlet, no doubt about it. There are many outlets for him—MySpace, his own Web pages. I worked 18 years in this business without making a penny. He is close to my heart. It is guys like him and the future songwriters that I am here for. If it was about me, you could have my music. I do not need any more money. But I worry about companies that take advantage of our content to rake in hundreds of millions of dollars at our expense.

Thank you, Mr. Whitehouse.

Senator WHITEHOUSE. I am new to this institution and new to this issue, so I am here more to listen and learn. I am sure this is an issue we are going to be dealing with, and I would like to be as informed as possible.

It strikes me as almost a lay observer that we have a technology that has galloped way ahead of the agreements and understandings that had proliferated through this industry to share its bounty, and now there is a tension between where the technology has taken us and the old means of doing business.

My question is: Are there ways in which you foresee this technology facilitating a further—kind of turning it back around so that we are in a better position to see that the artists and the writers and the musicians are funded as well as they could be?

And, for instance, is it clear now that we can track every use on the Internet of copyrighted artists' material? Or is still the Wild West to the point that except in limited circumstances—Pandora presumably being one of them—we are not even clear on what is being put out there?

Mr. SIMSON. Senator, if I may answer that, SoundExchange is certainly part of the new technology. We have a board that is 50 percent copyright owners and 50 percent performers. We get reports of use from Pandora, from XM, and Sirius that tell exactly what they are playing on a monthly basis. So we know what they are performing.

There are a number of services, though, who are not complying, who do not send us those reports, and as you say, it is the Wild West. We are guessing at what they are playing because they are not compliant with the law. If they are compliant with the law, we will know. We have built technology to basically take in all that information, crunch it down, and then send out checks to the performers and record companies.

If I could also just add one thing on John's comment. You know, Matt's comments are wonderful. You know, I was an independent artist. I managed a lot of independent artists over the years. But the artists that I referenced in my earlier testimony, frankly, the heirs of those artists, they cannot go out and tour anymore. You know, it is not going to help the widows and spouses, many of whom—you know, they have created such a valuable legacy of this country, whether it is jazz, Hawaiian, other niche services that are being performed. They need the royalties. They do not have a choice.

So I think we really need to make sure they are paid fairly, and as John pointed out, you know, it is 2 cents for an hour's worth of music that goes to the performer and the record company.

Senator FEINSTEIN. Mr. Nathanson, why don't you make your comment, and I wanted to ask Mr. Simson a question.

Mr. NATHANSON. Sure, just one comment. I totally get where you are coming from, and I know that you are, you know, sort of supporting me.

[Laughter.]

Mr. NATHANSON. My concern is that you use the word "fair." You throw the word "fair" around in an industry—and I am not really—this is not really my expertise, but the reason that Ernie K-Doe's widow is in the situation that she is is because the record industry sort of put her in that situation. And so it is difficult for me to sit here and hear you want to sort of right the wrongs of the industry you are in by wronging—it is by sort of crushing the technology that is actually creating the new business model now. It is like—I feel like you are—I understand where you are coming from, and I sort of appreciate it. But the idea is that we are sort of entering into a new phase of the way that music is distributed and heard, and we need to work together to make it happen. And the laws that have been in place are not working together. They are working from this fearful place of sort of crushing technology that, like Mr. Whitehouse said, has galloped ahead. And it is like you just cannot do that.

Senator FEINSTEIN. You know, it is interesting, because Senator Whitehouse leaned over and said to me, "This is really an example of the generational changes within the industry." And it is really true. The question is: How do we come out of this with fairness? And it is not fair out there right now.

Mr. Simson, there are two bills: Senator Brownback has the 801(b) standard; I have the fair market value standard. I asked Mr. Harleston the question. Let me ask you the same question.

Which in your view would work if we have to compromise to move this along?

Mr. SIMSON. Madam Chair, thank you for asking. I believe that when you create a statutory license and you effectively take away our option to not license, none of the performers can say, "Oh, the rate is not high enough. I do not want to be part of this." They cannot opt out. You have taken away that option by creating a statutory license. In that kind of situation, they should receive what the fair market would provide them if they did have the right to license.

I think the other key here is I have no interest in seeing Internet radio go away. If they stop paying royalties to SoundExchange, I may be looking for a new job.

Senator FEINSTEIN. Well, let me stop you on that one, because what Mr. Kennedy said—and I was looking at the rate information here. In 2006, it was 0.008 cents per player per listener; in 2007, it was 0.009 cents; 2008 and the current rate is 0.0014. And 2010 is the last year of the rate under this decision, and it would be 0.0019. I guess I cannot translate those numbers into what Mr. Kennedy said, which was $18 million out of $25 million. How does that happen?

Mr. SIMSON. If you take a look at the rates, we had a rate in place from 1998 to 2005 of 0.0762 cents. The judges, when they set the new rate for 2006, increased the rate by just 5 percent. The

2007 rate of 0.0011 of a penny was essentially getting us to where the cost of living would have gotten us had the rate just been adjusted for cost of living over the course of the license.

This year's rate of 0.0014 of a penny is a rate that Yahoo! agreed to pay in a private deal in 2001, and that was actually set by the first arbitration panel. So 7 years later, we have a rate that was agreed to by one of the larger Internet players. But, you know, we have tried to address these issues. We have made very, I think, dramatic attempts to settle with our webcaster partners. We have offered to extend the license out to 2015 to give them a much slower ramp-up to get to these out-year rates.

Senator FEINSTEIN. Stop now. Mr. Kennedy, what is wrong with that?

Mr. KENNEDY. I think it is important to understand—the numbers sound so small on this per performance, per listener basis.

Senator FEINSTEIN. That is right. They do.

Mr. KENNEDY. Which has never been used before in music royalties. But radio is a very big system, and if all of radio—broadcast radio, cable, satellite, Internet—had to pay the rates you mentioned for just this year, the total royalties would be $3.1 billion. If they had to pay the royalties you referenced for 2010, the royalties would be over $4 billion.

The total revenue of the entire recorded music industry in this country is $7 billion, and so the royalties that we are talking about—

Senator FEINSTEIN. Okay, stop. Stop for a minute. How does that happen?

Mr. KENNEDY. It is because—

Senator FEINSTEIN. I mean, they must know that. It cannot be an intent of these rate setters to drive somebody out of business—that cannot be the intent. So why would they do that unless they thought it was the fair rate and that the market was able to absorb it?

Mr. KENNEDY. I think that is a great question. I think we have all been scratching our heads. How could they come up with a minimum fee? How could they come up with the rates? And I am not a lawyer, but I think my analysis would be that this willing buyer/willing seller standard, which on the surface you say, well, that sounds kind of reasonable, when actually applied by the judges took them to very distant places looking for benchmarks that have nothing to do with radio. And in a detailed academic exercise about many adjustments to try and make a very distant benchmark apply to radio, the judges got lost.

Senator FEINSTEIN. Okay. Stop.

Mr. Simson, do you agree with that?

Mr. SIMSON. No, I do not. And, again, I think if we look at—you know, Mr. Kennedy mentioned revenue, that they were going to generate $25 million this year; they have 15 million users. My fuzzy math says that is about $1.70 a user per year.

Just to give you some idea, satellite radio generates $115 per user per year. Over-the-air radio, where you do not pay anything but you have to listen to ads—you "pay by attention" is the parlance—generates about $80 per listener per year. So $1.70 is a very low number, and I think Mr. Ondrasik made the point, you know,

should artists be subsidizing a business that is generating $1.70 per year?

Senator FEINSTEIN. Mr. Harleston, do you want to get into this?

Mr. HARLESTON. I just would like to comment. I think Mr. Simson made a statement in his opening statement that there was a study by Bridges or somebody that had projected ad revenues for Internet radio somewhere in the neighborhood of $20 billion by the year 2020. Is that correct?

So, I mean, it is hard to analyze other people's businesses because I am not in their business. I do not know what the factors are that are driving the revenue. But the last time that we had a technology that galloped ahead, as everyone is talking about, and it was thought about as a technology that was necessary for the industry—for the good of music, necessary for the good of the people, it was called "Napster." And it was a technology that everybody looked at us and said it is generational, you do not understand, it is—

Senator FEINSTEIN. I was part of those hearings, so I remember it very well.

Mr. HARLESTON. You remember it. It was a business model that was based on, you know, appropriating content for free, whether you had a license or not. And it was a business that ultimately, you know, with the help of people here and the private market, we were able to put into a situation where it has not gone away. The delivery of music electronically is more vital now than it has ever been before. And it has given birth to new artists and to new music and opened the door for a lot of consumers to have music that they could not have before. But what it did do is make sure that the artists and the producers and the songwriters and everybody involved in creating the music was compensated, not just Shawn Fanning and his group of friends.

Mr. KENNEDY. Madam Chair, if I may?

Senator FEINSTEIN. Yes, please.

Mr. KENNEDY. I have to say I am offended that Internet radio would be compared with Napster, the very root of piracy. We are legal, licensed service. We have paid—

Senator FEINSTEIN. I do not think he was comparing—

Mr. KENNEDY [continuing]. More than $10 million in royalties to SoundExchange. To compare us to piracy I think is offensive to all of the people who have been trying to build legitimate businesses that compensate artists. We have no interest in getting music for free. We want to pay artists. We have nothing to do with Napster, and we are not interested in devaluing music.

Mr. HARLESTON. I was not intending to equate you with piracy but to equate the arguments that people are making on this panel with respect to technology and the viewpoint that people are trying to stifle technology. In fact, we love your technology. I cannot speak for your business model. I do not know what your business model is. I do not know how much ad revenues play into it. You know, I know that you have—I know Pandora, some of it is ad supported, some of it is subscription supported. You know, I am not—I am not facile enough with your business to be able to answer the Senator's questions with respect to how you are getting your revenues and the numbers are looking so skewed, as you say they are.

The point I was trying to make was in looking at these technologies, there is often business models that are presented that are, you know—that are—I do not want to drag you into this. But there are other business models that have been presented that, you know, are technologically based that actually have been less than on the up and up.

Senator FEINSTEIN. Gentlemen, if I might, we have been joined by Senator Cardin, and I would like to give him an opportunity to ask some questions.

Senator CARDIN. Well, Senator Feinstein, first thank you very much for conducting this hearing. I am really here to learn. I am fascinated by the exchange that is taking place.

I do believe we need to have a fair compensation for royalties that reflects the work of the artist, but we need to be neutral as to the source, and that is the challenge, because it is hard to predict technology changes and consumer desires. And I think the discussion that is taking place is very helpful to all of us. So I think we are trying to get it right.

We do want to protect the work of the artists, but we do want technology to advance and consumers to be able to get the widest possible exposure to the artists' works. And it is difficult when you look at the different technologies and how the compensation is done. It is not an exact science, and we very much appreciate the witnesses that are here because the record that is being done today in this Committee I think is going to be helpful to us trying to establish the right regime here in Congress.

Madam Chair, I really thank you for your leadership. I know that you have been working for a long time to try to make sure the artists are protected, but also to make sure that we have a fair system, and I thank you and look forward to working with you.

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

If you get into this 801(b) versus fair market value, it is very hard for me to sort it out. And it seems to me that what you have to do is provide a mechanism whereby fair-minded professionals make judgments. And that, of course, would be the Copyright Royalty Board. That is what they are supposed to do.

So I gather we have two people here, at least, that want the fair market value—is that correct?—as set by the Copyright Royalty Board. Is that correct?

Mr. HARLESTON. That is correct.

Senator FEINSTEIN. Mr. Simson.

Mr. SIMSON. That is correct.

Senator FEINSTEIN. Mr. Kennedy, you do not. Now, what is it that you want?

Mr. KENNEDY. We do not have any problem with the Copyright Royalty Board process.

Senator FEINSTEIN. Okay.

Mr. KENNEDY. I think our particular case was the first one ever tried by these three judges in this new process. I think they may not have been on the top of their game in the first proceeding that they oversaw, but the basic process is not one we have any argument with.

But, again, we do not understand why we would not be subjected to the same standard that is used for broadcast, satellite, and used for music publishing, for songwriting for 25 years and it is proven

to generate satisfactory resolutions for all parties. And why we would go into a completely new, untested concept for royalties having been through 10 years of another untested concept, that is just really hard for us.

Senator FEINSTEIN. Okay. Let me get a response to that. Who wants to respond to that?

Mr. Simson.

Mr. SIMSON. Yes, Madam Chair. I think one of the issues with the 801(b) factors is that they have not been updated, and they are out of date. I think that, you know, in our proceeding there was a lot of evidence about the substitutional effect that might be created by these technologies that are giving consumers unlimited access to tracks all of the time, where the need to purchase is no longer there as we shift from, as I mentioned, the consumption is now the listen.

So I think we would need to certainly—I am certainly in favor of the fair market standard. I think it is what we need. But if you are going to look at 801(b), I think it clearly needs updating and modernization and taking into the calculation of what these new technologies are doing to other business opportunities.

Senator FEINSTEIN. Okay. I think we have come to the end of this. But for the two artists that are here, my interest in this—and I have been party to these hearings now for more than a decade—is to see that we have a fair system; that people who create the software are fairly reimbursed, because that is the beauty of music. You want music to get better and better and be more and more innovative and interesting, and people have to get a fair rate of return.

How to do that and not kill record companies—but to have a system that is fair across the board, it appears to me that the only way to do it is to have parity across the platforms. And if you really look at it, I do not know the strictures of 801(b), but I do know the concept of fair market value. And the rate has to be set, and it has got to be set by professionals after they look at all of the evidence. That is how we come upon fair market value, not to drive anybody out of business, Mr. Kennedy, but to see that the playing field is level across the spectrum. To me that is the desired thing. The artist gets a fair rate of pay. The exposure is fair. The systems work in a way with competition but fairness. And that is what we have tried to do in this bill.

So what I would really appreciate is that you all take a look at the fine print, and if you have suggestions, get it to us, either to Senator Graham, myself, Senator Leahy, because I think we do need to move a bill, and I think there is interest in moving a bill at this time.

So let me just thank all of you very, very much. It has been a very interesting hearing. The record will remain open for 1 week for comments.

The hearing is adjourned.

[Whereupon, at 11:40 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Jeff Harleston, Executive Vice President & General Manager, Geffen Records to Follow-up Questions from Senator Sam Brownback after the hearing entitled "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms" on July 29, 2008.

1) What do you believe is a "fair market value" royalty rate? How does "fair market value" differ from the current "willing buyer, willing seller" standard?

Under the current compulsory license system, services offering digital transmissions can use sound recordings without first acquiring permission as long as they pay the statutorily-set rate. To accommodate for creators' loss of control of their work, this government-set rate should as closely as possible reflect what parties in the open marketplace would agree to. This would be a "fair market value."

2) Do you believe the royalty rate set by the CRB for Internet radio is fair?

Even though SoundExchange didn't get the rate they sought from the CRB, I still believe the rate set by the panel was fair. The CRB's decision was based on 18 months of review. Before it came to a decision, the CRB listened to dozens of live witness testimony, reviewed tens of thousands of documents, and looked at proprietary financial business information.

This proceeding was the forum created by Congress and demanded by webcasters after the first arbitration proceeding in 2002. In 2004, after the bill was signed into law, DiMA announced they were "thrilled" that "royalty rates would be more fair to all participants" as a result of the revisions to the law that "DiMA worked on for several years."

3) In your testimony, you state that it's important for royalty negotiations to take into account market considerations. Is that not exactly what the 801(b) standard directs the CRB to do?

Although the 801(b) standard directs the CRB to take into account market considerations, fair market value rates have not always been the result in practice. For example, using the 801(b) standard, the Copyright Royalty Board was prepared to set a fair market rate for satellite radio during the most recent rate setting proceeding, but they ultimately discounted that "fair" rate by 50% because of other factors included in the standard.

4) What, if any, home recording rights do consumers have in your opinion?

The protections in the PERFORM Act would in no way change the listening experience consumers have come to expect from radio. Consumers will still be able to "time-shift" radio programming and hit a record button when a song comes on that they like. This is the home recording of radio we all grew up with. The PERFORM Act addresses functionality that would allow radio programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a digital jukebox and organized by artist, song title, genre and any other classification imaginable.

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Listeners will be able to build entire collections of content without the need to ever purchase any of it; indeed, they won't even have to listen to it.

5) Is it the goal of your company to eliminate home recording rights?

No.

6) Is recording a song off of the radio piracy? Is making a mix tape for personal use piracy? Do you believe consumers have the right to transfer songs from a CD to their iPod or other mp3 player in all circumstances?

My company has certainly licensed many services that allow the making of personal use copies in an authorized fashion, and will continue to meet consumer demand and expectations in the marketplace by licensing music in a manner consumers desire to receive it. To my knowledge, no court has applied the fair use factors contained in section 107 of the Copyright Act to the described activity.

7) If a consumer transfers songs from a legally acquired CD to an iPod without the expressed consent of the content owner, is that unauthorized copying? Do you feel the recording industry should take action against consumers engaging in this practice?

See #6 above. To my knowledge, the recording industry has never brought, and has no plans to bring, a lawsuit against an individual for such activity.

8) Do you believe it is appropriate for record labels to encrypt CDs with technologies that prohibit transferring music to a personal computer, iPod, or other device?

We do not encrypt CDs in this way. Each content creator must decide for itself what protections are appropriate for the works they own and create. The fact is, however, while other industries prohibit such transfers, the recording industry remains the most permissive of the content industries in allowing and facilitating backups and transfers of legally acquired content.

9) Do you have any evidence that home recording for noncommercial purposes is hurting the recording industry?

We do not object to traditional "home recording." We are concerned, however, with increased functionality offered by compulsory licensees that mimics options on subscription and download services licensed in the free market.

10) I understand that several major record labels stream music on their websites. Does Geffen Records stream songs on its website? If so, does it employ technology that ensures consumers do not record those streams?

Geffen does stream a small portion of our music from our website. We work with technology partners who have developed our streaming platforms to provide protections for those streams. Importantly, we also carefully select *which* songs to stream. Of course, we do not have that ability in the compulsory license context. Because our site only streams a small selection of music, we are not the likely target of stream ripping applications, which can collect vast quantities of music.

11) In the Betamax decision, the Supreme Court held that it was fair use for a consumer to make a copy of a television program for viewing later. Can you give me an example of a fair use in the audio context?

Fair use is a concept based on four statutorily-defined factors that must be evaluated by a judicial fact-finder on a case-by-case basis. The Betamax case itself was based on a particular set of facts involving time-shifting of free television programs. Fair use has never been considered to be synonymous with "non-commercial" use, and it has never been held to be a broad license to make copies of any work without regard to the nature of the copying, the type of work, the amount copied and the effect on the exploitation of the work.

While there may be disagreement as to what might constitute "fair use" in a particular case under the section 107 factors, the content protection embodied in the PERFORM Act does nothing to impede the activities consumers have engaged in for decades. This legislation allows listeners to record programming and engage in time-shifting.

12) The PERFORM Act appears to outlaw new recording devices if they allow consumer to do more than engage in "reasonable recording" activities. As I read the bill, one of these new devices could be outlawed if it allowed a consumer to make recordings of specific artists. Why shouldn't I or any other consumer be able to make a recording of our favorite artist?

The PERFORM Act in no way outlaws any device. It merely requires services to pay appropriately for the functionality they provide. We are absolutely not against new devices or new business models. The more ways there are for fans to receive and enjoy music, the better it is for us and artists. We all work hard to create that music; keeping it from fans defeats the purpose. But we need to ensure that any new services are offered in a way that doesn't allow them to use the compulsory license to compete unfairly.

13) I note that the website of Blue Note Records – and EMI label – actually points people to specialized radio stations presumably comprised of Blue Note music that are streamed by Pandora. If Blue Note and EMI were really concerned about the phenomena of people stealing music on Internet radio services such as Pandora, would they point people there and allow employees to participate and promote this activity?

As I am not an employee of Blue Note/EMI, I cannot respond on their behalf.

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Hearing on
"Music Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms"
US Senate Committee on the Judiciary
Tuesday, July 29, 2008

Joe Kennedy's Prepared Responses to Questions Asked by Senator Sam Brownback

Question #1
Why do you believe that Pandora, and other Internet radio companies play more independent musicians than broadcast radio?

Response:
Internet radio is not confined by radio spectrum limitations, as is the case with terrestrial radio. Thousands of services can webcast at any one time, and these services are constantly creating new stations and new audiences for their content. This ability to offer an unlimited number of stations enables Internet radio to provide a much more diverse and rich experience. In doing so, Internet radio enables people to find a range of content that is far broader than what is available on cable, satellite or terrestrial radio. For example, while a traditional radio station may have only 30 songs regularly rotated through its playlist to ensure that listeners hear one of a handful of songs during a short car ride, Internet radio stations routinely make available playlists featuring thousands of songs, including many more independent artists.

In the case of Pandora, in particular, our collection includes well over half a million songs across the genres of Pop, Rock, Jazz, Electronica, Hip Hop, Country, Blues, R&B, Latin and Classical. These collections encompass songs from the most popular artists to the completely obscure. In fact, seventy percent of our recordings, representing 60,000 artists, are not affiliated with a major record label, and many recordings were delivered on homemade CDs by unsigned artists – yet they are reviewed on par with CDs received from major labels. Most important, all artists are treated equally because we use musical relevance to connect songs and create radio playlists. As a result, independent music is likely heard more on Pandora than on any other popular radio service. More than 50 percent of Pandora radio performances are from independent musicians, compared to less than 10 percent on broadcast radio.

53214.004

Question #2

Why is 801(b) a more appropriate standard to rely on in comparison to "willing buyer -willing seller" or "fair market value" standard?

Response:
What sets 801(b) apart from the other two standards is the fact that it is the only standard that has produced consistent, fair and balanced results for copyright owners, users and consumers alike. The standards set forth in section 801(b) were first adopted by Congress in the Copyright Act of 1976 to ensure that ratemaking proceedings would result in royalties that were fair to all three of the aforementioned parties. And, since the time of its enactment, in each of the four proceedings that have occurred under the section 801(b) standard, the royalties awarded have been upheld by the courts, and in none of the cases have the parties felt compelled to ask Congress to remedy the determination.

Neither of the other two standards can claim the same level of success. In fact, on the one occasion in which the "fair market value" standard was used to establish rates for satellite television, the outcome (an increase in royalties of as much as 350%) was found to be so severe and unconscionable, that Congress immediately decided to set aside the determination and took decisive steps to provide the satellite television industry with immediate relief.

A similar and equally undesirable outcome recently occurred when the "willing buyer - willing seller" standard was used to establish rates for webcasters. However, in this case of webcasters, instead of just experiencing a 350% increase (as occurred with satellite TV) a select number of webcasters have seen their rates grow by an astonishing 1200%. Needless to say, such dramatic increases in rates have made it all but impossible for webcasters to effectively compete against cable, satellite and broadcast radio.

The problem with using either the "fair market value" approach or the "willing buyer – willing seller" standard to determine sound recording royalty rates is that both standards are premised on the same fundamental flaw. Namely, they both strongly rely upon the establishment and use of hypothetical benchmarks created via secondary markets that simply fail to exist in the real world. Not to mention the fact that pricing decisions under this theoretical construct are always conducted by a single seller (SoundExchange); and often are carefully calculated to set precedent for future arbitration, rather than to reflect a fair market price. In the end, use of either standard will consistently produce an outcome that heavily favors the major record labels at the expense of innovating companies such as Pandora; an outcome that lies in stark contrast to the balanced approach embodied in 801(b).

Question #3

In his testimony, Mr. Simson says that webcasters want to pay less so that they can

53214.005

make more. It seems to me that webcasters have been very willing to pay royalties and it would be more accurate to say that webcasters want to pay a fair rate so that they can simply survive. Can you address this comment made by Mr. Simson?

Response:
Mr. Simson's suggestion that webcasters want to pay less so that they can make more confuses the issue. The issue at hand isn't one motivated by a desire to increase profits. Instead, as you correctly point out, it's a question of fairness and basic survival. The 2007 CRB decision determined that royalties paid to record companies by Internet radio services would increase retroactively by 5% for the 2006 calendar year, and then again by 30% per year in each of the subsequent years through 2009. This dramatic rise in rates has produced a result whereby webcasters are being irreparably disadvantaged as they attempt to compete against cable, satellite and broadcast radio. Under the new rate structure, webcasters are typically being forced to pay more than 50% of their annual revenues in the form of sound recording performance royalties while cable and satellite pay somewhere between 6 and 15% of their revenue in royalties and broadcast radio pays nothing.

To better understand the inherent unfairness that exists under the present system one only need to consider Pandora's current sound recording performance obligations for the 2008 calendar. In this year alone, Pandora will be required to pay $18 million of its $25 million in revenues in the form of performance royalties. Assuming XM Radio or Sirius satellite radio also generated $25 million in revenue, their 2008 sound recording royalties, which were set using the 801(b) royalty standard, would equal only $1.6 million, or 6.5 percent of their revenue

Question #4
Mr. Simson claims that SoundExchange has reasonably addressed the concerns of the webcasters. Do you believe this is true? Please explain.

Response:
No. SoundExchange has addressed one concern of webcasters - the uncapped $500 per-station minimum fee that the CRB absurdly imposed to cover SX's costs of administration. Addressing this one concern did not, in any way, resolve the irreparable disadvantage Internet radio now faces vs. broadcast, cable and satellite radio or the devastating financial impact the royalty rates have on webcasters such as Pandora.

Question #5
What has prevented SoundExchange and the webcasters from reaching a private agreement?

Response:

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In my view, the most fundamental impediment has been the stark divide among SoundExchange's constituencies on this issue. Independent labels and artists welcome the opportunity for the fair and open access that Internet radio offers to all artists and labels. Prior to Internet radio, radio airplay could be accessed only by the very small number of major label artists who had the benefit of traditional big budget record industry promotion to large broadcasters. As Matt Nathanson testified at the hearing, Internet radio has broken the huge bottleneck for artist development and growth that this system represented. On the other hand, the four major labels and their trade association, the RIAA, see the new level playing field that Internet radio establishes as a threat to the old system which they controlled and dominated. The four major labels have a collective blocking veto over all royalty decisions at SoundExchange; as a result, their view has dominated SoundExchange's position.

53214.007

Hearing on
"Music Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms"
US Senate Committee on the Judiciary
Tuesday, July 29, 2008

Matt Nathanson's Prepared Responses to Questions Asked by Senator Sam Brownback

Question #1
New technologies allow anyone to become a recording artist and the Internet has allowed artists to reach consumers and build fan bases. With this in mind, what role, if any, does the record label have in this new paradigm? And, do you believe the current pay structure fairly compensates artists? Should the record label still get such a big percentage of the royalties?

Response:

The role of a record label for an artist has always included one or more of the following: promotional support, distribution of product, financial support or artistic guidance. The degree to which any of the services is actually provided normally depends on the particular artist or band. Some bands have songs, but no fan base. Others have a fan base, but songs that radio won't play.

In the new music industry paradigm, with the new technologies, I think labels are still necessary for artists. Even as the Internet grows and breaks down boundaries between the artist and the listener there is still a need for their infrastructure, money and muscle, if the artist or band wants to effectively reach a broader audience. No matter how important the Internet is for an artist to grow their career, it is only a part of the puzzle. At this point, nothing has yet to replace the effectiveness of a label when it is focused on an artist it wants to promote.

The difference now is that there is not the surplus of money in the business there once was. Where once a label did EVERYTHING, and was essential to EVERY facet of an artist's career from infancy onward, major labels often times now don't have the commitment and fine brushstrokes it takes to develop an artist. That is where the resources that new media provides come in to play and help an artist to develop on their own; and build a brick and mortar fan base for him or herself.

As for the current pay structure, that question is somewhat more complicated. However, I can say unequivocally that in the history of recorded music, the current system has never benefited the middle class artist. It only works to the advantage of superstars who are able to renegotiate once they have the leverage. In theory, this occurs because labels take on significant financial risk when they sign on to promote up-and-coming artists. Having said this, please don't get me wrong. I feel for new artists and do agree that the risk the label takes financially

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merits a royalty rate that should mostly favor them. However, with other artists who have done the work, established themselves, and built a career on their own, they bring more to the table and should be able to recoup a greater share of the reward.

Question #2

Do you believe the goal of the major record labels and the Recording Industry Association of America is to look out for the best interests of all artists?

Response:

No, I don't believe major record labels look out for the best interest of artists. Major record labels are interested in their own bottom line and survival. They will exploit or not exploit artists depending on who can help them flourish financially. When there was more money in this industry, it could support more creative record executives who would champion and promote an artist they loved. Now, in comparison, the industry has been reduced to a business of numbers. And, unfortunately this change has come at the expense of artist development and long-term artist commitment.

As for the RIAA, I do not know enough about what they do to make a judgment about where their interests lay. But, the fact that I don't know what they do, and I am an artist who is actively involved in all aspects of his career, makes me think that they do not serve my needs. From what little I do know, they exist to benefit the major record labels.

53214.009

Responses to Questions for John Ondrasik from Senator Sam Brownback
Hearing on
"Music and Radio in the 21st Century:
Ensuring Fair Rates and Rules across Platforms"
Committee on the Judiciary
United States Senate

1) **On page 4 of your testimony, you suggest that artists should be compensated based upon the "fair market value" of their work. In defining this term, you suggest that the government should consider what a buyer is willing to pay for the music you have to offer.**

   a) Considering the fact that Pandora – the largest, most successful Internet radio company to date – is having trouble paying royalties at the current rate established by the Copyright Royalty Board, is it safe to say that the CRB may have overestimated the amount at which a motivated buyer is willing to pay?

I understand that Pandora made the unfortunate choice to not participate in the CRB proceedings. If they had, they could have pled their particular case under the system the government established for them.

I believe that music creators, like all Americans, deserve fair market value for their work. Why should we deserve less? In the marketplace, users of a product develop their businesses to take into account the wholesale market price for what they are serving. A restaurant has to take into account in its business and pricing the wholesale price of the food it serves. A store has to take into account the wholesale price of the wares it sells. They certainly are not afforded the right to give away the product they are selling, or to offer it to consumers below cost, and then complain to the government that the price needs to be lowered because they gave it away and therefore cannot afford the wholesale price.

Certainly the choice on how to monetize a business is up to individual services, and it may be understandable that many online services want merely to garner as many eyeballs as they can, not to build a music business but to attract potential buyers of their service. However, if a service chooses not to maximize revenue based on the value of the music it carries, such a decision should not be used to discount the rate and thus penalize the creators of that content.

As I mentioned in my statement at the hearing, under the current rate stations would be able to play 1,000 songs for $1.40. Certainly my music is worth at least that. If a service is not able to afford that incredible deal, perhaps some changes should be made by the service as opposed to asking me to subsidize their model.

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2) Do you believe the CRB process is working properly?

I have no reason to believe it is not. Again, I do believe that $1.40 for 1,000 songs is a deal, but the CRB's decision was based on months of hearings, testimony of many witnesses, and countless pages of documents and evidence. Respectfully, I believe that the CRB's panel of copyright experts armed with these exhaustive resources – a factfinding body – is the appropriate venue for establishing a rate.

53214.011

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August 19, 2008

Honorable Patrick Leahy, Chairman
Senator Diane Feinstein
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Att: Justin Pentenrieder, Hearing Clerk
Justin_Pentenrieder@judiciary-dem.senate.gov

Dear Chairman Leahy and Senator Feinstein:

I appreciate this opportunity to answer questions submitted by committee members.

My testimony, my additional letter to you and the answers below reflect the following basic principle: Since the law permits any radio-like service to use sound recordings without having to seek permission of the recording artists and copyright owners, the recording artists and owners who created and own those recordings should receive a fair payment from services who desire to use them. The royalty rates can be considered fair only when they reflect what would be obtained in the open market in the absence of a compulsory license.

Following are answers to questions submitted by Senator Sam Brownback.

1) *The PERFORM Act states the royalties should reflect a "fair market value." Can you please tell me how this differs from the current "willing buyer, willing seller" standard? What do you believe is fair market value for the transmission of sound recordings on the Internet?*

   SoundExchange believes that "willing buyer, willing seller" equates to "fair market value." This is consistent with the prior holdings of the Librarian of Congress in interpreting the willing buyer, willing seller standard. See *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, 67 Fed. Reg. 45240, 45243 (July 8, 2002) (decision of the Librarian of Congress interpreting the "willing buyer, willing seller" to mean "strictly fair market value"). This is also consistent with prior interpretations of the U.S. Supreme Court, which has equated the two terms. *See, e.g., United States v. Cartwright,* 411 U.S. 546, 551 (1973) (describing fair market value as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts") (internal quotations and quotation marks omitted).

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With respect to what is fair market value for a transmission of a sound recording over the Internet, there is no single number that reflects the fair market value in all markets and all situations. As the freely functioning market demonstrates, parties negotiate different rates depending on a host of variables, especially the value placed on a service by the consumer.

2) *You say in your testimony that the system is not broken and does not need fixing. Does that mean you support the CRB's March 2007 decision on Internet radio royalties? Do you think the CRB arrived at a "fair" decision? If the system is working properly, I assume that means you oppose the PERFORM Act?*

In my testimony, when I said the system is not broken, the context was with respect to the Copyright Royalty Board (CRB). The CRB was set up at the insistence and with input from webcasters. This was the system webcasters wanted and for which they advocated. After hearing from dozens of witnesses and reviewing thousands of pages of testimony over an eighteen month process, the CRB did indeed arrive at a fair decision. Webcasters have not identified anything unfair about the CRB's process -- they simply do not like the result.

We support the PERFORM Act not because we believe the CRB process is unfair, but rather because we believe the PERFORM ACT provides the appropriate standard for all services and because it addresses a variety of issues of critical importance to the creative industries -- not simply record companies and recording artists.

3) *When you say that "the system is not broken and does not need fixing," does that mean you believe Internet radio should pay under "willing buyer, willing seller" and satellite should continue to pay under 801(b)?*

As discussed above, the reference in my testimony was to the CRB process, which was demanded by webcasters themselves. They have not identified anything in the CRB process that needs fixing. As to the standard that guides the CRB, as my testimony indicated, I believe all services should have their rates determined under a fair market value standard.

4) *The CRB decision sets a $500 per channel fee. I realize this has been voluntarily waived but I'd like to get some clarification on SoundExchange's interpretation of this fee. Would the fee apply to every individual user created channel on services such as Pandora?*

The per channel minimum fee is an administrative fee SoundExchange requested to cover costs related to the collection and distribution of royalties. As part of the statutory license, webcasters have been freed from the administrative burden involved in negotiating licenses, as well as paying royalties to each appropriate copyright owner and artist. SoundExchange does all the work. During the CRB hearings webcasters did not contest, nor otherwise raise any concerns about the per channel minimum fee. Indeed, DiMA did not even mention minimum fees at all in their arguments to the Court, despite months of opportunities to do so. It was only after the decision had been reached that webcasters raised this as an issue of concern.

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Although webcasters simply failed to raise this issue at an appropriate time, SoundExchange nonetheless agreed to work with webcasters and reached a resolution that was in the interests of both SoundExchange's constituents and the affected webcasters. SoundExchange did not waive the minimum fees, but agreed to cap minimum fees in exchange for more robust reporting and other consideration. As to the interpretation of this fee, neither the CRB decision nor the regulations define a per channel minimum fee.

5) *You say that SoundExchange has addressed "the genuine business concerns" of the webcasters. Can you please elaborate and tell me specifically what concerns you've addressed? Have the webcasters expressed "illegitimate" concerns over the CRB decision. If so, explain.*

As shown by SoundExchange's efforts to reach a resolution on the issue of minimum fees, SoundExchange is willing to address legitimate business concerns. SoundExchange has spent countless hours meeting with webcasters to learn more about their businesses and to work on a possible compromise that would be fair to all concerned. As part of those efforts, SoundExchange has been willing to accept less money today in exchange for the potential for upside that the webcasters all believe is in the future for the webcasting industry. This directly addresses the concerns that webcasters have expressed to SoundExchange. But SoundExchange is not willing to give away the creative efforts of record companies and recording artists to webcasters who are not seeking to monetize their businesses. Many webcasters have demonstrated in their discussions with SoundExchange that they want to use music to attract listeners without attempting to earn the maximum amount they can in revenues. Thus, they limit advertising or, in some cases, refrain from selling advertising; in other cases, they eschew subscription models which might be successful. In some cases, it appears webcasters are not trying to earn revenue, but rather are seeking simply to attract listeners so they can sell their businesses to others at a high price (of which record companies and recording artists would receive nothing). Those webcasters cannot justly claim that the current rates are unfair.

6) *As a percentage of revenue, how does the $18 million Pandora would owe you this year compare with what XM or Sirius radio paid SoundExchange last year?*

Regulations forbid SoundExchange from disclosing payments received from any specific service. Direct comparisons would, however, be misleading for many reasons. First, as discussed above, music and other products do earn different rates in different markets depending on the nature of the business model. Second, because of the differences in the manner of transmission, it is not possible to compare, with certainty the amount of music used by Pandora subscribers and XM/Sirius subscribers. We do know, however, that whereas Pandora reports more users than either XM or Sirius individually, the average XM and Sirius subscriber tends to listen to many more hours of programming per month and XM and Sirius earn vastly more than Pandora does currently.

As you know, SoundExchange is currently in discussions with webcasters under the auspices of Congressman Howard Berman. Regardless of the results of these

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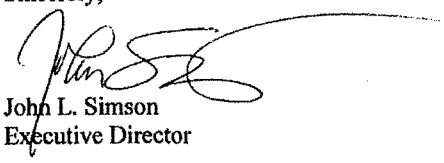
discussions, a new rate proceeding before the CRB beings this coming January (for the 2011-2015 rate period) at which time both sides can present evidence on various issues pertaining to the rates. I hope these responses and the letter to Senator Feinstein provide the additional clarifications and explanations the committee requires. Please let me know if there is any additional information that I can provide.

Sincerely,



John L. Simson
Executive Director

SUBMISSIONS FOR THE RECORD

STATEMENT OF SENATOR BOB CORKER
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
"MUSIC AND RADIO IN THE 21ST CENTURY: ENSURING FAIR RATES AND RULES ACROSS PLATFORMS"
July 29, 2008

Senator Feinstein and Senator Brownback, thank you for giving me the opportunity to testify today on the importance of valuing music. I applaud this committee for its work in this area that is so very important to my state. In the past decade, the evolution of music delivery has been amazing to watch. We have evolved from the favorite local AM/FM station to a large number of available stations on satellite, cable, and Internet radio platforms. The growth of radio on different platforms has been tremendous, and we can only imagine what offerings await us around the corner. But one basic fact we simply cannot ignore is that the fundamental element – the reason we all tune in – is the music.

We often take it for granted. We turn the knob, hit the button, click the mouse, and our favorite songs are there, as if conjured up at our whim. It is so easy to forget what goes into creating music. In fact, these works are the product of countless people and countless hours of hard work. Their songs are the record of their struggles, hopes, and dreams.

There are very few places where the power of music is as strong and evident as it is in Tennessee. Our state has been blessed with numerous songwriters, musicians, and small and large business entities that work to bring us the music we listen to on a daily basis. During my time in the Senate I have had numerous briefings to learn how the music industry works. It is a complex and multi faceted industry. It is also an industry that is in severe crisis. Due to advances in technology, this industry faces numerous challenges, most dramatic of which has been the

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impact of piracy and the evolution of technology affecting the revenue streams of the various industry entities.

When debating these issues I believe it is very important to keep in mind that without the songwriters, performers, and various businesses that create the music there would be no music for us to listen to over our radios.

The Senate, in its wisdom, created the Copyright Royalty Board, and in March 2007 that Board made a decision and set royalty rates for entities that "webcast" music. The board's process for setting rates was an exhaustive one that involved 18 months of hearings and meetings and at the end produced a result. I understand that certain groups are not pleased with this result, however, there is an appeals process in place and that process is currently being played out and utilized by both sides. I urge this committee to allow this process to take its course instead of forwarding legislation that would overturn a decision that has already been made by the Copyright Royalty Board. Furthermore the House Judiciary Committee is currently facilitating negotiations between the parties. I applaud those efforts, and remind my colleagues that this entire process is to provide fair compensation for the hard work and sacrifice of musical artists and those who invest in them.

It is in everyone's interest to maintain a vibrant marketplace for music. However, while we are considering legislative action that would drastically affect this industry; we must remember the creators and performers who bring us this music. Without them there would be no music for webcasters to play and build their businesses around.

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A Statement for the Record of the July 29, 2008 Hearing on "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms", U.S. Senate Committee on the Judiciary.

We are an online music retailer and Internet Radio that only deals with Independent Recording Artists, those not signed by one of the four major record labels. It is our goal to assure our artists have ALL the tools they need to make a living through their music. That includes both being fairly compensated when others use their music and 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 other Independent Recording Artists.

I can think of no valid reason that Terrestrial Radio should not pay a royalty while Satellite and Internet Radio does. Whether by satellite, terrestrial broadcast tower or the Internet, Radio simply delivers music performances to fans. All should pay a royalty and since they all serve an identical purpose that royalty should be the same for each.

But any royalty needs to be reasonable. 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 promotes a legalized form of payola. Those companies controlling large numbers of copyrights and having large marketing budgets can offer their catalogs to specific broadcasters at a reduced rate while dictating what is given airplay. In this scenario the Independent Recording Artist, with little or no marketing budget and no negotiating leverage, is not even considered. Also, those broadcasters not receiving the third-party special rate and unable to meet an unreasonably high statutory royalty are driven out of business—further eliminating an outlet for the Independent Recording Artist.

The Internet statutory 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. That 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.

Thank you for this opportunity to address the committee.

Albert Delaney
VP, OutboundMusic.com

Tree of Moreh Publishing, Inc. D.B.A. OutboundMusic.com

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Supplemental Statement of the Digital Media Association
Senate Judiciary Committee
Hearing on "Music and Radio in the 21st Century:
Assuring Fair Rates and Rules across Platforms"
July 29, 2008

Chairman Leahy, Ranking Member Specter and Members of the Committee:

On behalf of the Digital Media Association ("DiMA"), thank you again for inviting our Board member, Joe Kennedy of Pandora, to testify at the July 29, 2008 hearing on "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms". We are pleased that many Committee members voiced support for Internet radio, and for the value that Internet radio delivers to listeners and recording artists. In the coming weeks we hope that support is manifested in legislation that promotes Internet radio's continuing innovation and development.

As the hearing's subject matter was complex, DiMA appreciates the opportunity to supplement Mr. Kennedy's testimony on two issues: (i) what royalty rate standard is appropriate when determining sound recording performance royalties; and (ii) what steps should be taken to address concerns about "streamripping".

I. Royalty Rate Parity Should Fairly Recognize the Contributions of All Parties.

Throughout the hearing there were no defenses offered in support of the current royalty rate-setting standard for Internet radio – the "willing buyer-willing seller" standard found at 17 U.S.C. § 114(f)(2)(B). Instead witnesses and Senator Feinstein discussed what other standard would be appropriate for all digital radio services that might come before the Copyright Royalty Board in the future. DiMA appreciates that forward-looking legislation will appropriately modify the current Internet radio royalty standard, which has failed on two occasions to provide for royalties that are economically reasonable in the context of Internet radio reality.

Toward the end of the July 29 hearing Senator Feinstein noted that her goal is to ensure that royalty rates set by the Copyright Royalty Board reflect the contributions of all parties – performers, recording companies, and programming services. DiMA agrees.

DiMA believes this goal best can be achieved by legislation applying, for all services subject to the Section 114 statutory license, the standards set forth in Section 801(b) of the Copyright Act, 17 U.S.C. § 801(b). These standards were adopted by Congress in the Copyright Act of 1976 to ensure that ratemaking proceedings would result in royalties that were fair both to creative artists and producers, and to copyright users. Since 1976, in each of the four proceedings that have occurred under the Section 801(b) standard, the royalties awarded have been upheld by the courts, and in none of the cases have the parties felt compelled to ask Congress to remedy the determination.

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By contrast, the "fair market value" standard has also been tried, and proved a dismal failure the one time it was used in a ratesetting proceeding. The results of that proceeding were so disastrous that the ruling was reversed by act of Congress, with a mandate never to use it again.

"Fair market value" is particularly inappropriate in the case of statutory sound recording licensing, where a true competitive market does not exist for the rate-setting tribunal to approximate or use as a benchmark. The market is highly concentrated among a very few licensors, and represented by a single seller, SoundExchange. As a result, there is no price competition among licensors. For these reasons, a standard seeking solely to value this market or to use voluntary licenses as benchmarks inevitably will set rates at supracompetitive prices that, by definition, are not "fair."

DiMA therefore urges the Committee to seek parity of ratesetting standards using the only standard that has proven noncontroversial, and that has produced balanced results for all parties: Section 801(b).

Section 801(b) Produces Fair, Reasonable, and Balanced Royalties for All Parties.

Section 801(b) provides that the Copyright Royalty Board shall set "reasonable terms and rates of royalty payments." ... calculated to achieve the following objectives:

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

Four proceedings have been conducted under the § 801(b) standards, including two by the Copyright Royalty Tribunal,[1] one by a Copyright Arbitration Royalty Panel[2] and one by the

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

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

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Copyright Royalty Board.[3] The latter two proceedings determined rates and terms under the Section 114 statutory sound recording performance license.

In each case, the adjudicatory body began its analysis by reviewing other licenses reached in the marketplace for the same and analogous license rights. The panels then determined whether to accept or adjust these "benchmark" rates according to the degree of similarities and differences between the rights being licensed, the nature of the licenses, and the identities of the parties. Based upon these characteristics, the tribunals established a range constituting a "zone of reasonableness" within which the rates could be set for the licenses that were the focus of the proceeding.

Using the four standard factors of § 801(b), the adjudicators determined a reasonable license rate within that range that reflected the value that the licensors and licensees brought to the license table, and the impact of the rate upon both participating industries. In ratesetting proceedings for the performance right, typically the first factor strongly favors the recording artists and producers. The second factor assures that the royalty payments will equitably compensate artists and producers, while providing a fair return to those services that perform the sound recordings. The third factor assesses the relative strengths of the contributions of each industry. The fourth factor takes into account the economic situation facing each industry and the need for rates or terms to avert potential instability to an industry in flux.[4]

As a result, the rates awarded under Section 801(b) have yielded high royalty payments to artists and the recording industry, without jeopardizing the future economic health of the digital music services.

The Fair Market Value Standard has Never Created Fair Results in Practice.

Congress applied the "fair market value" standard once before in the context of compulsory copyright licenses, with respect to the satellite television industry. As many Committee members may recall, the only rate determination under that statute was so extraordinarily one-sided and unfair that, following a years-long debate, Congress not only reversed the result, it repealed further use of the standard. The lessons learned from that debacle demonstrate why the fair market standard should not be resurrected in the already-contentious debates over webcasting rates.

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

[4] At the hearing, Mr. Simson of SoundExchange suggested that the Section 801(b) factors be augmented to consider the potential substitutional effects of performances on sales. While no significant evidence of substitution has yet been proved to arise from listening to noninteractive digital radio services (and, indeed, all evidence tends to show that such listening stimulates rather than depresses sales), the four Section 801(b) factors, and particularly factors (A), (B), and (D), are capacious enough to address his concerns.

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Section 119 of the Copyright Act provides satellite video services a compulsory license for retransmitting network stations and superstations for private home viewing. The rates for those retransmissions originally were set by Congress by statute from 1988 through 1997, at rates comparable to rates being paid by the cable industry. The statute prescribed thereafter that the rates would be set by arbitration, according to a "fair market value" standard. The arbitrators had the opportunity to apply that standard exactly once, in 1997, and the result was disastrous.

The rates determined in the arbitration were as much as 11 times the amount that similarly-situated cable television system operators paid for analogous rights under their statutory license, and approximately 3 times the amount that Congress had set by statute. As the House Judiciary Committee noted, "Satellite carriers and distributors are irate over the decision." H.R. Rep. No. 105-661 Part 2 at 15-16 (1998). The cause of the problem was that the "fair market value" test did not permit the arbitration panel to properly consider the effect of the royalties on the satellite services, or their ability to compete against cable providers not subject to the Section 119 license:

> The CARP decision, however, appears to overlook the impact a royalty rate increase of as much as 350 percent will have on competition in the distribution of cable and satellite programming. The decision adds about $50 million to the annual costs of the satellite broadcast industry. The Committee views the CARP decision with great concern. The decision not only reduces the likelihood that satellite broadcasters will be able to effectively compete against incumbent cable operators, but it also means consumers will inevitably bear the cost of this government-mandated surcharge.

H.R. Rep. No. 105-661 Part 1 at 4-5 (1998). Similarly, the Senate Judiciary Committee believed it necessary that the rate determination should maintain parity among the two competing industries:

> To that end, it is important that the satellite industry be afforded a statutory scheme for licensing television broadcast programming similar to that of the cable industry. At the same time, the practical differences between the two industries must be recognized and accounted for.

S. Rep. No. 106-42 at 10 (1999).

Because of these concerns over the potential impact of these colossal increases on the satellite television industry, competition in the video services market, and on prices to consumers, Congress enacted The Satellite Home Viewer Improvements Act of 1999. SHVIA slashed the so-called "fair market value" rates by 30-45 percent. Moreover, Congress ensured that there would be no future arbitrations under that standard, by setting the reduced rates in the statute, subject to adjustment only by legislative amendment.

This past experience demonstrates that the "fair market value" standard does not produce a "fair royalty." The only arbitration experience under that standard produced such unfair results that it sparked years of Congressional debate, before being reversed by act of Congress. And Congress

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assured that such a debacle would never occur again, by precluding use of the "fair market value" standard in any future proceeding.

Thus, the "fair market value" standard is hardly the panacea to solve the current unfairness of the internet webcasting rate determinations. As past history demonstrates, a "fair market value" standard would only invite a repeat performance of the SHVIA controversy.

There is No "Market" to Use As a Benchmark When Determing a "Fair" Value.

The fundamental flaw with the fair market value standard is that the "market" the standard seeks to measure does not exist. First, there is no market for licensing these rights other than under the statutory license itself. The sound recording performance right came into existence at the same time as the statutory license. Today, the statutory license is essentially the sole means for licensing noninteractive services. The only "market" for these rights is the compulsory license market.

Second, there is no history of "fair market" licensing for the rights. To the contrary, all licensing negotiations are conducted under an antitrust exemption, by a single seller (SoundExchange), and are carefully calculated by the seller to set precedent for future arbitration, rather than to reflect a fair market price. On this basis, in the first webcaster rate proceeding in 2001-02, the arbitrators threw out 25 of 26 licenses offered as "benchmarks" by the recording industry. Consequently, in past rate proceedings, the recording industry has instead relied on rates from a fundamentally different market, interactive listening services (*i.e.*, where the listener selects the song and time and place to listen, rather than listening to radio programmed by the service), rather than rates for noninteractive webcast programming.

But these interactive license rates suffer from the same flaws identified above. Because interactive service providers need the repertoires of each major recording company, they cannot substitute a license from one record company for a license from another; the result is a complete lack of price competition and near-monopoly rates. In addition, interactive services provide a product – on-demand listening to any song at any time – that record companies believe substitute substantially for CD sales (and certainly much greater than any substitution that allegedly results from noninteractive webcasting); as a result, the record companies demand rates that account for such substitution and are completely inappropriate as benchmarks for noninteractive radio-like services. Finally, because the recording industry knows these rates will be used as benchmarks for the CRB proceedings, the industry has incentives to maintain these rates at artificially high levels, and to set terms that it hopes will later be adopted in the separate, section 114 noninteractive license CRB proceeding.

Third, because the noninteractive service rates are set by arbitration, the only voluntary licenses for these rights are achieved through settlement agreements. However, settlement agreements can be inherently unreliable indicators of the actual value of a license. In the first webcaster license proceedings the only license (of 26 offered) that the CARP relied upon was a settlement agreement that Yahoo! testified reflected the value not only of the sound recordings, but also of millions of dollars in saved litigation fees, the time its executives otherwise would have devoted

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to litigation (instead of business), and value of certainty for business planning purposes (rather than the uncertain outcome of an industry-wide arbitration).

Finally, one cannot conceive of valuing a "fair market" in which the largest users – in this case, broadcast radio stations – get the exact same commodity without restrictions and for free. The ability of the largest competitor in the market to use the licensed goods for free ordinarily would lower pricing of these rights in a true free market. And, if broadcast stations were subject to licensing requirements, their negotiations undoubtedly would influence the nature of the market and the shape of the outcome. However, in past proceedings, the panels have been instructed to ignore radio's free use of the exact same rights, and to price the statutory license as if it had been set on a level playing field.

Therefore, the concept of "fair market value" does not, and should not, apply to statutory licenses. The "market" itself is a fiction, and its characteristics display none of the competitive factors that one would expect in a "fair" market.

A "Market" Dominated by Four Major Labels that Can Demand Above-Market Rates Cannot be Deemed to be "Fair."

Over the last decades, a few major recording labels consistently have exercised market power and an approximately 80-85 percent share over the market for sale of recorded music in the United States. These labels have no incentive to compete for license rights based on price. Each company offers unique content that is not fungible with content from another. The labels understand this need, and leverage it in their negotiations with music services.

To exercise this leverage, the labels rely on "most favored nations" clauses to ensure that the first to deal with any music service gets terms at least as good as those offered every other major label. These clauses have been the rule, rather than the exception, and result in a *de facto* collusion among the labels that distorts the outcomes of licenses, such as the interactive service licenses, that might otherwise be used as a benchmark for "fair market value."

MFN clauses give undue power to the last label to negotiate. If no one can offer a broad-based compelling music service without a license to all major label content, then the last label can hold out for monopolistic terms; and the first licensor, far from being a forward-thinking trailblazer, will reap the same benefit of supracompetitive pricing. A market that can so readily be manipulated by the seller cannot be deemed a "fair" market, or enable assessment of a "fair market value."

A "Fair Market Value" Standard will Perpetuate the Current Disputes.

Finally, there is reason to question whether the proposed "fair market value" standard will be any more equitable or, indeed, any different in practice, than the current "willing buyer - willing seller" standard. In his 2002 decision on the arbitrators' decision in the Webcaster arbitration, the Librarian of Congress opined that the two standards are equivalent: "the standard for setting

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rates for nonsubscription services set forth in section 114(f)(2)(B) is strictly fair market value - willing buyer/willing seller." Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule, 67 Fed. Reg. 45240, 45244 (July 8, 2002).

After the first CARP webcasting decision under the willing buyer-willing seller standard, Congress stepped in to statutorily reverse the arbitrators' decision as it applied to small webcasters. Under the Small Webcaster Settlement Act of 2002, Congress repealed the rates set by the arbitrators, and allowed the parties to put into place rates set by mutual settlement agreement. The latest determination, the first by the Copyright Royalty Board, has extended that uproar to large and small webcasters alike. While SoundExchange agreed voluntarily to reject one of the most egregious aspects of the CRB decision (that is, the $500 minimum fee per channel), all webcasters are appealing the decision as unfair, arbitrary and capricious, and support a legislative solution to the astronomical and unaffordable rates set by the Judges.

For these reasons, DiMA believes that a "fair market value" standard will merely perpetuate the flaws of past ratesetting determinations for statutory licenses. Hypothesizing "fair market value" in an inherently artificial and monopolistic market structure will guarantee continuing future controversies over the same types of issues that plagued arbitrations for the satellite video industry under that standard, and for webcasters under an equivalent standard. The only standard to date that has not required Congressional intervention, and that has resulted in reasonable rates (and the lion's share of royalty payments) is the Section 801(b) standard. Section 801(b) will provide the most reasonable and equitable results, because it requires balanced consideration of the creative contributions and economic needs of both licensors and licensees. Given the success that Section 801(b) has demonstrated in reaching fair determinations without controversy, it should be adopted as the standard for all ratesetting determinations of sound recording performance rights, for all licensees.

II. The Marketplace is Addressing the Streamripping Concern, and Until Substantial Harm is Documented, Government Action is Premature.

The PERFORM Act requires digital radio services to technologically inhibit consumer recording. The PERFORM Act was introduced when the recording industry and recording artists were engaged in a dispute with satellite radio companies, XM and Sirius (since merged), which were authorizing and promoting consumer recording and disaggregation of individual songs for later enjoyment on-demand and in personal playlists. The bill's sponsors were concerned that consumers' ability to easily disaggregate and library digitally recorded songs would diminish the likelihood they would purchase those songs. PERFORM Act sponsors were equally concerned that XM and Sirius were essentially distributing music but paying royalties only for performing the music. We understand that this dispute has ended, so legislation is no longer needed to address this situation.

Additionally, PERFORM Act sponsors are concerned that software products are marketed for the express purpose of "streamripping", allowing consumers to record Internet or digital radio specifically for the purpose of automatically disaggregating the recorded songs and creating a

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permanent personal music library – and thereby never having to purchase music again. The PERFORM Act's content protection technology requirement would apply to all digital radio services, even those that are not – like XM and Sirius – promoting and authorizing the recording and disaggregation of songs.

DiMA and webcasters have a business interest in opposing streamripping.

DiMA and our members appreciate the creative genius of America's recording artists and all whose input makes American music great. Moreover, webcasters agree with the recording industry's sharp disapproval of those who market and use "streamripping" software. In contrast to traditional consumer home recording which requires consumers to hear songs and invest personal time to produce a "mix tape" or "party tape" of their favorite recordings, streamripping software often appears to be marketed expressly to help listeners build a personal music library without paying recording artists or record companies.

The Committee should appreciate that streamripping, if it ever became widespread, would not harm only recording artists and companies; it would also harm webcasters. Webcasters succeed by building and maintaining continuing relationships with consumers, who support our businesses by either paying subscription fees or listening to advertisements. If a listener records and libraries all her favorite songs, e.g., from a "Hits of the 1980s" channel, she may never again return to that station and the webcaster will have lost a listener or subscriber. As a result, webcasters' and recording creators' interests are aligned with respect to streamripping.

There is no evidence that streamripping is popular in the marketplace or that it is causing any harm to creators or webcasters.

Over the course of eight years, in two copyright royalty proceedings and several Congressional hearings, recording industry representatives have asserted that streamripping is a source of piracy, is an imminent threat of significant piracy, and that Congress should require digital radio services to technologically inhibit unrelated 3rd party streamripping software products. However, during that time including several instances testifying under oath, the recording industry has not presented any empirical data that supports a conclusion that streamripping programs are being used by listeners, or have been the source of any piracy, and certainly not that they have been the source of substantial piracy.

DiMA members are aware that several dozen streamripping programs exist and are being marketed, but in the 2006 Copyright Royalty Board proceeding the recording industry witness who testified about streamripping admitted under oath that there is no evidence that listeners find the programs interesting or useful or that they actually pay for these programs. Perhaps the programs are downloaded for trial periods that rarely lead to purchases. But if the programs were popular or a significant threat to commerce we would read about them in the popular press such as the New York Times, Washington Post or the Wall Street Journal; investors would take notice (as they did with the original Napster); and there would be interviews of people who use

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them just as there is ample evidence of people using peer-to-peer software to distribute and acquire music. On August 1, 2008 when DiMA staff checked, there was not one streamripping program listed in the Top 50 most popular software downloads on www.download.com, a leading consumer software website.

Internet radio services already are required by the Copyright Act to take certain steps to defeat streamripping.

Since 1998 Internet radio services have been obligated to utilize content protection technology in situations where it is essentially incorporated into a service's chosen streaming technology. For example, the two most popular streaming media technologies, produced by Microsoft and RealNetworks, respectively, offer radio services an easy cost-free optional copy-protection system that works reasonably well, and the Copyright Act requires radio services that take advantage of the Internet radio statutory license to utilize this technology if they otherwise choose to use streaming technology offered by RealNetworks or Microsoft.

Additionally, acting in their own self-interest, some webcasters take steps intended to inhibit streamripping, including terminating user accounts on very rare occasions when streamripping evidence is substantial.

Developing and integrating software to inhibit streamripping is expensive and technically challenging, and almost guarantees a significantly diminished experience for Internet radio listeners.

In the recent CRB proceeding, a recording industry witness listed several dozen available streamripping programs. With so many programs available and no empirical evidence of which (if any) are more popular, it seems unfathomable that any cost-effective solution is available.

To effectively inhibit several dozen programs' effectiveness, each would have to be analyzed and then broadly applicable content protection software would need to be developed. This protection software would have to work elegantly with a service's underlying streaming software, and would need to be efficient so that the radio service's bandwidth costs do not double or triple because of the size of the protection software. Constant updating would be necessary to ensure that new streamripping programs are addressed, and each update would require careful re-integration with the underlying streaming software, as well as a new media player software download for each of several million radio listeners to ensure that the most advanced software is actually being used.

The recording industry is familiar with the challenging complexities of content protection software. As a result of individual company efforts (e.g., Universal's Blue Matter software and SonyBMG's "rootkit" software) and joint industry action (e.g., the multi-year Secure Digital Music Initiative), RIAA and its members appreciate the difficulties of securing content, especially in the open internet environment where Internet radio lives. Moreover, the record industry's apparent abandonment of protection software in its own music distribution efforts

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seems to reflect that the cost of protection (including the costs of losing frustrated consumers to illegal content) exceeds its value. Some leading technologists believe that content protection will never be effective unless policing software is placed on consumers' personal computers and devices, but all Americans know how quickly that will lead to consumer rebellion and class-action lawsuits.

We are in an era of programmers trying to lighten software, enhance consumers' experience (for example, by quickening the time it takes the music to start playing) and reduce software downloads to consumers. Mandating content protection software in internet radio, where no demonstrable problem exists, will undermine these goals, and will diminish the consumer experience and hinder commercial services' efforts to win consumers away from piracy.

DiMA and SoundExchange have formed a joint industry technology committee to consider the problem of streamripping and possible solutions.

As evidence of our industry's commitment to addressing the potential streamripping problem, DiMA agreed almost one year ago to a SoundExchange request to form a joint industry technology committee. The Committee's charge is to consider the potential threat and jointly review technologies that could promote our industries' mutual interests. It is notable, however, that in the eleven months since this Agreement was signed, SoundExchange has not suggested that Committee members be identified or that an initial meeting be scheduled. If SoundExchange or its recording industry constituents were actually concerned about streamripping, or if there was any evidence that the industry is threatened by streamripping, this delay would not be continuing even to this day.

* * * *

DiMA appreciates the opportunity to submit this supplemental testimony on these two important issues, and again thanks the Committee for permitting our Board member, Joe Kennedy, to testify. We look forward to working with the Committee to further your goals of legislating royalty rate standards that are fair to all digital radio participants, and ensuring that music and creativity are respected by all who appreciate it.

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HEARING BEFORE THE
U.S. SENATE COMMITTEE ON THE JUDICIARY

"MUSIC AND RADIO IN THE 21ST CENTURY:
ASSURING FAIR RATES AND RULES ACROSS PLATFORMS"

STATEMENT FOR THE HEARING RECORD

by

Patrick L. Donnelly
Executive Vice President and General Counsel
Sirius XM Radio Inc.

on behalf of

SIRIUS XM RADIO INC.

Hearing Date: July 29, 2008

Sirius XM Radio Inc. ("Sirius XM") appreciates the opportunity to submit this statement for the hearing record on behalf of the company, its employees, stockholders, and more than 18.5 million subscribers. As the Committee is aware, Sirius XM is the company only recently born of the merger between Sirius Satellite Radio Inc. and XM Satellite Radio Inc.

Sirius XM embodies the cutting edge of "music and radio in the 21st century," exposing its millions of subscribers to an unparalleled breadth and depth of musical and non-music programming. The Company's rich and diverse offering of musical choice benefits all segments of the music industry in the 21st century, including composers, artists, music publishers, record companies, and the listening public.

Sirius XM respectfully submits that S.256, the "Platform Equality and Remedies for Rights Holders in Music Act of 2007" (the "Perform Act") is unnecessary legislation that would

- interfere with ongoing litigation;
- seek to replace the longstanding copyright license fee standard negotiated and agreed by the recording industry (and advocated by the recording industry when it is a licensee) with an uncertain new standard similar to the "willing-buyer/willing-seller" standard that the recording industry has consistently abused;
- seek to impose unequal content protection burdens (not "equality") on the very platform that has done the most to provide protection to music rights holders;
- burden consumers' ordinary and reasonable home recording expectations; and

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- renege on two legislative agreements made by the recording industry.

For these reasons, Sirius XM respectfully opposes the Perform Act.

Introduction to Satellite Radio

In the late 1990s, Sirius and XM paid a combined $170 million to the U.S. Treasury for spectrum rights being auctioned by the Federal Communications Commission. Since then, the companies have invested over $6 billion in the complex infrastructure necessary to run a state-of-the-art satellite radio company – from satellites to the innovative new antenna technology needed to provide a mobile service, to transmitters to receivers to the programming of our channels by our skilled and innovative employees.

There is no question that Sirius XM is changing the way people listen to music – and, for that matter, sports, news, and entertainment. Sirius XM broadcasts over 300 digital-quality channels, including 138 channels of music (with 69 broadcast over the Sirius service and 69 broadcast over the XM service), with the remaining 160-plus channels transmitting sports, news, talk, entertainment, traffic, weather and data, and other programming. Some of these channels are hosted by or feature such well-known personalities and artists as Howard Stern, Oprah, Martha Stewart, Frank Sinatra, Elvis, Willie Nelson, and Bob Dylan.

Sirius XM's music channels cover nearly every genre – from heavy metal and hip-hop to country, dance, jazz, Christian, Latin, classical, and beyond. The music on each channel is selected, arranged, prepared, and hosted by Sirius XM staff, all of whom are recognized experts in their music fields, along with contributing musicians and performers who lend their talent and expertise. This ensures that Sirius XM subscribers are regularly introduced to and can hear unparalleled music selections, insights, and perspectives.

These unique listening experiences are available to Sirius XM's over 18.5 million subscribers from coast-to-coast in the United States. Our service can be used in cars, trucks, RVs, homes, offices, stores, and even outdoors. Boaters around the country, and up to 200 miles offshore, can also hear Sirius XM.

Sirius XM's state-of-the art studios are located in New York City and Washington, DC. Artists including Burt Bacharach, Chicago, the Dixie Chicks, Coldplay, Sheryl Crow, Emmy Lou Harris, Richie Havens, Faith Hill, Janet Jackson, Al Jarreau, Yo-Yo Ma, Paul McCartney, Bonnie Raitt, Lynyrd Skynyrd, Phoebe Snow, The White Stripes, Sting, and Randy Travis have visited the studios for performances and interviews.

In addition, responding to the demands of our subscribers, Sirius XM has introduced a number of portable, hand-held devices, including: the Pioneer Inno; the S50; the Samsung Helix; the Stiletto 100, and the Stiletto 2. These devices represent an intelligent leap forward in satellite radio technology, providing integration of both live content and time-shifted content. Our subscribers enjoy the flexibility these devices offer so that they can enjoy their favorite music while traveling, exercising, commuting, or simply relaxing.

Technological innovation and furthering consumer enjoyment are the core of our business. Unfortunately, there are some in the content owner community who take the myopic

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view that such advancements pose a threat to their well-being and, as such, necessitate legislative or legal attacks that could potentially crush these innovative services before they get off the ground. The Perform Act is a case in point. The bill unfairly targets satellite radio, which has spent billions trying to bring innovative products and services to the public. This is particularly inappropriate given that representatives of both record labels and artists during this very hearing have singled out satellite radio as a service that has worked with the music industry to guard against unauthorized copying and ensure fair compensation to copyright owners. *See infra* Part V.

In our view, this legislation would undermine technological innovation, impose a new home recording tax on our customers, and end up harming musicians and artists whose music is being promoted by satellite radio.

Why Sirius XM Opposes the Perform Act

I. The Perform Act's Stated Goal of "Platform Equality" Is Misguided and Erroneous; Rather, the Bill Is a Targeted Attack on the Most Innovative Service Created in Recent Years.

S.256 is erroneously labeled the "Platform Equality and Remedies for Rights Holders in Music Act of 2007" (or the "Perform Act of 2007"). It would not, however, establish "platform equality," and any such goal is misguided. Rather, as discussed in Parts II and III, the bill's primary effect is adversely to change the standard under which satellite digital audio radio, the most highly innovative service introduced to the music industry in decades, pays fees to the record industry. Further, as discussed in Part V, the bill also would impose discriminatory and unfair copy control restrictions on satellite radio by requiring it to use "technology that is reasonably available, technologically feasible, and economically reasonable to prevent the making of copies" of transmissions except for "reasonable recording," a confusing, ambiguous, and narrowly defined term that would interfere with longstanding consumer home recording rights. Although this provision may appear neutral on its face, as a practical matter, this condition would impose a disproportionately large burden on satellite radio, which is the only digital service that already takes steps to protect content by encrypting its transmissions and controlling the functionality of devices capable of receiving its transmissions. Other services that do not take these steps will be able to argue that there is no technology reasonably available to control the functionality of third-party receiving devices. How can one argue that this represents Platform Equality?

To begin with, "Platform Equality" is a misguided concept. Each type of digital audio service has a different history, has made different agreements and arrangements with the recording industry, and has made different investments. For example, the satellite radio companies have invested over $6 billion to create new platforms, and new revenue streams for the record companies, from scratch. Sirius and XM invented an entirely new technology, launched multiple satellites, and continue to develop and subsidize receiving devices. No other "platform" or audio service has done any of these.

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As mentioned, Sirius and XM paid the federal government a combined $170 million for their FCC licenses. No other "platform" was required to pay the government for the right to exist – not webcasters; not radio broadcasters.

As of today, Sirius XM has more than 18.5 million subscribers, with 8.924 million Sirius subscribers and 9.65 million XM subscribers as of June 30 of this year. Yet the company continues to lose money. The Perform Act's apparent goal is to require Sirius XM to pay more to the record companies, threatening growth, programming enhancements, further consumer adoption of this service, and the viability of the business.

Radio broadcasters are not required to pay the record companies for their analog or digital over-the-air broadcasts, a position justified in part because of the promotional value to the record companies of the airtime given to sound recordings. True platform equality would provide satellite radio with a similar exemption, which is more than justifiable on the basis of promotional value given the opportunity for new music discovery that satellite radio offers, with its broad spectrum of musical genres and depth of play lists.

II. The Perform Act Would Renege on an Agreement Negotiated at the Request of Congress by the Recording Industry and Satellite Radio, and Adopted by Congress Just 10 Years Ago, and Could Interfere with Ongoing Litigation.

Section 2 of the bill would change the standard under which satellite radio sound recording performance fees are set from the longstanding policy-based reasonable fee standard established in Copyright Act section 801(b)(1) to a new, untested "fair market value" standard. This change would undo the agreement, reached at the request, and under the auspices of, Congress, by the recording industry only a decade ago after extensive negotiations with satellite radio and other transmission services. It likely would also interfere with ongoing complex litigation that has spanned two years and cost millions upon millions of dollars.

Sirius and XM paid for their licenses and invested billions more in reliance on the traditional fee standard that long has governed statutory licenses under the Copyright Act. That standard requires statutory license fees to be "reasonable" and is based on four policy factors set forth in section 801(b) of the Copyright Act. The standard was applied to subscription digital sound recording performances when the record companies were first given their performance right in 1995. It also is the standard that long has applied to the record companies when they are in the role of licensee under section 115 of the Copyright Act, which covers the making and distribution of phonorecords embodying musical works.

The record companies tried to change that standard in 1998 to a new standard based on the concept of a "willing buyer" and "willing seller," theoretically designed to approximate "fair market value." Congress recognized that it was unfair to change the rules applicable to the satellite services under those circumstances, and urged the recording industry to negotiate with the satellite radio providers to reach a legislative accommodation.

The industries agreed that the policy-based section 801(b) fee standard would continue to apply to the existing satellite radio services. Congress agreed and adopted this compromise as law in the Digital Millennium Copyright Act ("DMCA"). The recording industry, satellite radio,

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and the webcasting industry supported the DMCA. Congress, in passing the DMCA, made clear that its continuation of the 801(b) standard was "to prevent disruption of the existing operations" of satellite services, particularly given that those services already had "purchased licenses at auction from the FCC and have begun developing their satellite systems." H.R. Rep. No. 105-796, at 81 (1998) (Conf. Rep.).

It would be grossly unfair to change the law now, as Sirius XM continues to invest hundreds of millions of dollars in its service. There has been no change that would justify undoing the deal that Congress encouraged and adopted in 1998. Congress should not ask parties to negotiate settlements and then allow one of those parties to back out of the negotiated deal. That would undermine Congress's ability to urge interested parties to negotiate such deals in the first place.

Moreover, the satellite radio and recording industries have just completed two years of hard-fought, fee-setting litigation before the Copyright Royalty Board ("CRB") under the section 801(b) fee standard to determine "reasonable" fees. The trial included more than 1,500 pages of written testimony, more than 7,700 transcript pages of live testimony over 26 days, and more than 230 exhibits, and the parties, combined, incurred millions upon millions of dollars in legal fees and costs. The recording industry has appealed the decision to the U.S. Court of Appeals for the D. C. Circuit. Any legislative action now could interfere with that pending litigation.

III. The Perform Act Would Scuttle the Section 801(b) Policy-Based Fee Standard, Which Has Served Copyright Owners and Users Well For Decades, and Replace It with a Prejudicial Market-Based Fee Standard Similar to the Willing-Buyer/Willing-Seller Standard that Has Been Abused by the Recording Industry.

The section 801(b) fee standard not only was the standard agreed by the recording industry for satellite radio in 1998 and advocated to obtain passage of its new performance rights – it is the standard that traditionally has applied in setting fees under many copyright statutory licenses.

The traditional section 801(b) standard was the standard that Congress chose to apply in 1995 when it first granted the recording industry a limited performance right applicable only to subscription services (such as satellite and cable radio) and interactive services (such as on-demand streaming services). At that time, Congress made clear that its creation of the narrow new right was "intended to strike a balance among all of the interests affected thereby." S. Rep. No. 104-128, at 14 (1995). It is ironic that the recording industry now complains that the section 801(b) standard is a "subsidy" when the *status quo ante* was not an unlimited sound recording performance right or a right based on fair market value, but no sound recording performance right at all.

Further, the section 801(b) fee standard applies to the section 115 mechanical compulsory license, where the recording industry is the licensee obtaining the right to reproduce and distribute musical works embodied in sound recordings and the music publishers are the licensors. If the recording industry truly believed that "fair market value" was the appropriate standard for statutory license fees, it would advocate a change in the section 115 standard to fair market value. Sirius XM is not aware that the recording industry has advocated this position.

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Indeed, the facts are to the contrary. When the shoe is on the other foot, the labels support the section 801(b) policy-based standard. Only one month ago, the recording industry expressly emphasized to the CRB in the recently concluded section 115 rate adjustment proceeding that the "Appropriate Method to Be Used" for setting those rates was "to set 'reasonable' rates calculated to achieve the four statutory objectives set forth in 17 U.S.C. § 801(b)(1) and the policies underlying Section 115." Proposed Conclusions of Law of the Recording Industry Association of America, Inc., Docket No. 2006-3 CRB DPRA, ¶ 23 (July 2, 2008). It also cited a previous section 115 determination for the proposition that "the statutory rate must be 'a royalty of reasonable resort.'" *Id.* ¶ 28 (citing *Adjustment of Royalty Payable Under Compulsory License for Making and Distributing Phonorecords; Rates and Adjustment of Rates*, 46 Fed. Reg. 10466, 10480 (Feb. 3, 1981). It argued that rates "need not be market rates," *id.* ¶ 26, but that ratemaking involves "'tempering the choice of any proposed [market] rate with the policy considerations underpinning the objectives of Congress in creating the license,'" *id.* ¶ 62 (citing *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, 63 Fed. Reg. 25394, 25049 (May 8, 1998)).

Further, the section 801(b) standard is demonstrably superior to standards asking rate-setters to approximate "fair market value" and has consistently resulted in more reasonable results. The section 801(b) standard allows the CRB to take account of a broad range of factors to reach a reasonable result, including providing a "fair return" to the copyright owner and "fair income" to the copyright user, and preventing disruption of the relevant industries.

By contrast, the "willing buyer/willing seller" standard, which seeks to approximate fair market value, has led the recording industry to advocate, and rate setters to rely on, rates established in markets where the record companies have been able to exploit their substantial market power, arising out of the highly concentrated nature of the recording industry and the particular needs of the services in those markets. The resulting rates have not reflected a competitive fair market value; rather, they have reflected supra-competitive market power. The adoption of such supra-competitive license fees is not in the public interest and does not foster economically beneficial results.

For example, in the initial digital cable radio proceeding, the record companies sought a staggering 41.5% of services' gross revenues – over six times the 6.5% amount ultimately awarded under the section 801(b) standard. Similarly, in the recent satellite radio proceeding, the record industry argued for up to 23% of gross revenues – roughly 3-4 times the amount the CRB ultimately set. SoundExchange based its exorbitant (and thankfully unsuccessful) request on what it claimed were "marketplace benchmarks," including the rates that the four major record companies were able to extract from interactive services that needed licenses from each of the majors.

Unfortunately, SoundExchange has had more success in achieving unreasonable and supra-competitive rates where a "marketplace" standard has been in place. Most notably, in the most recent webcasting proceeding, where a "willing-buyer/willing-seller" marketplace standard governs, the record companies sought fees equal to the "greater of" 30% of a service's gross revenue or up to roughly three times the per performance fee in place for 2003-2005.

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In the webcasting case, the record companies' arguments relied on the concentrated market power of the four major labels. The record industry argued that it should be allowed to profit from the labels' extraordinary degree of market power to extract monopoly rents from services, to the detriment of consumers. One record company expert based his analysis on the license fees charged by the major labels to the interactive subscription services. The second record company expert argued that the record companies would capture an extraordinary 75% of the gross margin available to webcasters "because each of the major record companies has a substantial share of the recordings that consumers want to listen to, [and] webcasters in a free market would have little choice but to seek a license from all four." Testimony of Dr. Erik Brynjolfsson, Docket No. 2005-1 CRB DTRA, at 6 (Oct. 13, 2005).

To illustrate just how concentrated the record industry is, Professor Adam Jaffe, the Dean of Arts and Sciences at Brandeis University, the former Department Chair of Economics, and a witness for DiMA in the most recent webcasting proceeding, analyzed the Herfindahl-Hirschman Index ("HHI") for the record industry, which is a measure of the market concentration of an industry. The Horizontal Merger Guidelines of the Department of Justice and the Federal Trade Commission regard markets with HHIs above 1800 as "highly concentrated." Professor Jaffe demonstrated that the HHI for the record industry in 2005 (consisting of only four labels controlling over 85% of the industry) was at least 2150 – significantly above the "highly concentrated" level. *See* Rebuttal Testimony of Adam B. Jaffe on Behalf of Internet Webcasters and Radio Broadcasters, Docket No. 2005-1 CRB DTRA, at 8-9 (Sept. 29, 2006). In addition, Professor Jaffe pointed out that the four major labels do not compete with each other when they license the interactive subscription transmission services (which formed the benchmark on which the recording industry relied), as (a) they each sell differentiated products and (b) interactive digital transmission services need a license from each of the four to operate a successful service. *Id.* at 4.

In other words, in the record industry's view, fair market value does not contemplate a competitive market in which sellers compete with each other. It contemplates a concentrated market in which each buyer must deal with every seller. That is not a standard that Congress should extend, or, indeed, continue to employ.[1]

Unfortunately, the CRB accepted SoundExchange's arguments and set webcasting performance rates increasing from .08 to .19 cents per listener per song over the course of the 2006-2010 license period. It did not make any adjustments to the benchmark agreements proffered by SoundExchange to account for the record labels' significant market power that they leveraged to extract such fees but simply adopted SoundExchange's proposed per performance rates virtually unchanged. As an ominous precursor to developing business realities, the CRB

[1] Congress should, similarly, reject the attempt, in section 2(b)(3)(B)(viii) of the Perform Act, to interfere with ongoing litigation and to encourage the use of such supra-competitive benchmarks, by removing the existing specific limitations on the types of agreements Congress encouraged the CRB to consider. Under current law, the final sentence of section 114(f)(1)(B) encourages the CRB to consider only comparable agreements within the scope of the statutory license (that is, the agreements "described in subparagraph (A)"). The Perform Act seeks to remove the reference to subparagraph (A), which will further encourage the use of agreements such as the supra-competitive interactive service agreements, and which strikes at one of the pending court challenges to the CRB's over-priced webcasting decision.

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specifically "emphasized that, in reaching a determination, the Copyright Royalty Judges cannot guarantee a profitable business to every market entrant. Indeed, the normal free market processes typically weed out those entities that have poor business models or are inefficient." *Digital Performance Right in Sound Recordings and Ephemeral Recordings: Final Rule and Order*, 72 Fed. Reg. 24084, 24088 n.8 (May 1, 2007). It further stated that ensuring sustainable incomes to webcasters would "involve the Copyright Royalty Judges in making a policy decision rather than applying the willing buyer/willing seller standard of the Copyright Act." *Id.*

Singer/songwriter John Ondrasik and SoundExchange's Executive Director, John Simson, attempted during last Tuesday's hearing to minimize these webcasting fees, but their statements were misleading. While Mr. Ondrasik claimed that it cost only $1.40 to transmit 1,000 sound recordings under the 2008 webcasting rate, he did not make clear that the rate he quoted reflected the cost of transmitting those recordings to a single listener. For a service with 10,000 average listeners, the rate to transmit 1,000 recordings actually is $14,000. Moreover, for a service that transmits 15 recordings per hour, 1,000 songs would be transmitted in less than three days. To transmit sound recordings over the course of a year to 10,000 listeners, the rate would be $1,839,600. By 2010, that rate would increase to $2,496,600.

As the testimony in this Hearing demonstrates, the real world results of employing a "marketplace" rate standard (which does not lead to competitive license fees) have been disastrous for the webcasting industry. *See, e.g.,* Written Statement of Joe Kennedy, President and Chief Executive Officer of Pandora Media, Inc. (July 29, 2008) ("Kennedy Statement") (fee is "simply a crushing amount which will put us out of business if it is not remedied"); Written Statement of Kurt Hanson, founder of AccuRadio.com (July 29, 2008) ("Like most webcasters in our class – and perhaps like the larger operators as well – we will be driven out of business without a negotiated solution (or a fix from Congress) soon."). Mr. Hanson specifically identified the marketplace "willing-buyer/willing-seller" fee standard as the culprit "at the heart of the Internet radio royalty crisis." *Id.*

Rates that threaten to decimate the webcasting industry cannot be what Congress intended. As Mr. Kennedy stated, DiMA previously provided this Committee "with detailed analysis of why the willing buyer-willing seller standard fails to protect against monopoly pricing, as Congress intended when it created a statutory sound recording performance rights license that has only one seller – SoundExchange – controlling all the rights." Kennedy Statement. The CRB's recent webcasting determination and the devastating impact those rates are having on webcasters, large and small, sadly has borne out this prediction.

Congress certainly should not extend application of that standard to satellite radio given the standard's failure to produce reasonable rates for the webcasting industry, particularly given the strong reliance interests of satellite radio services on the section 801(b) standard as they built their businesses.

IV. Requiring Services To Pay for Consumer Recording Is Double Dipping and Confuses the Performance Right and Other Copyright Rights.

Section 2(b)(3)(B) of the Perform Act would require the CRB to take into account in setting fees "the degree to which reasonable recording affects the potential market for sound

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recordings." This provision would override yet another negotiated resolution advocated by the recording industry, lead to double compensation for consumer home recording and confuse the performance right, at issue in section 114, with other copyright rights. It should be rejected.

Record companies and artists already are paid royalty fees for reasonable home recordings under the terms of the Audio Home Recording Act ("AHRA"). That legislation was sought and principally negotiated by the recording industry to address the very kind of home copying that the bill would require to be considered a second time in setting performance fees. The AHRA specifically contemplated digital copying from digital transmissions.

The recording industry's own trade association (RIAA) made the AHRA deal, which includes limitations on serial copying and payment of a royalty fee on certain devices, in the face of serious doubts that music and sound recording copyright owners had any right to control or be compensated for private home recording. As the AHRA and case law confirm, home recording remains a clearly established consumer right. As Jay Berman, then-RIAA President, said when advocating passage of the AHRA: the AHRA "is a generic solution that applies across the board to all forms of digital audio recording technology. Congress will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies." *The Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Patents, Copyrights, and Trademarks, S. Comm. on the Judiciary*, 102d Cong. 111 (1992) (written statement of Jason S. Berman).[1]

There have not been major, unanticipated changes in the technology of digital audio transmissions and recording. The recording industry made (and Congress enacted) a considered, negotiated agreement to resolve doubts that it had any right at all. The recording industry should not be permitted to reject that agreement and seek more.

V. The Copy Control Obligations Included in the Perform Act Would Unreasonably Limit Consumer Home Recording Rights in a Manner Inconsistent with the Audio Home Recording Act, Unfairly Discriminate Against Satellite Radio, Cripple Innovation, and Create Unnecessary Confusion over Permissible Activities.

Section 2(c) of the Perform Act also seeks to override Congress' longstanding recognition of consumer home recording rights by obligating services to block the very type of recording Congress deemed permissible in the Audio Home Recording Act. Moreover, far from promoting platform "equality," section 2(c) actually discriminates against satellite radio, the very service that already takes steps to protect sound recordings from unauthorized copying and distribution. The content protection provisions of the Perform Act should be rejected.

The Audio Home Recording Act, negotiated by the recording industry and enacted by Congress, essentially defines "reasonable recording" in terms of first generation copies and states

[1] Mr. Berman also argued, "Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake." *The Audio Home Recording Act of 1991: Hearing Before the Subcomm. on Patents, Copyrights, and Trademarks, S. Comm. on the Judiciary*, 102d Cong. 120 (1992) (written statement of Jason S. Berman). There could be nothing more deleterious to that process than allowing the recording industry to renege on not one, but two legislative deals that it made, the AHRA and DMCA.

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that no copyright infringement action may be maintained based on such recording. In exchange, manufacturers of audio home recording devices are required to pay royalties on those devices to performers, composers, record companies, and music publishers. The AHRA bill was a careful compromise of competing interests and was understood by all to resolve the issue of consumer home recording.

The Perform Act would rewrite the AHRA by including a requirement to use technology to prevent copying other than a newly defined concept of "reasonable recording." But instead of defining "reasonable recording" in terms of first generation copies, as the AHRA did, the bill defines "reasonable recording" as recording where the user cannot record or even play back selections of "specific sound recordings, albums, or artists" or play back content in a manipulated sequence. The bill also specifies that "reasonable recording" cannot allow transmission of recordings "from the device by digital outputs or removable media, unless the destination device is part of a secure in-home network that also complies with each of the [other] requirements" for "reasonable recording."

By limiting "reasonable recording" in this manner, this bill would give the recording industry unprecedented control over the way consumers are permitted to enjoy satellite radio – far more control than Congress granted it under the AHRA. The recording industry has failed to demonstrate the existence of a problem that would require implementation of such draconian legislation. There is absolutely no reason to deprive the public of its long-settled recording rights or to limit satellite radio's ability to deliver a satisfying listening experience to its subscribers in this manner. Sirius XM applauds and supports the statement of Gary Shapiro on behalf of the Consumer Electronics Association and Home Recording Rights Coalition on the inconsistency of section 2(c) with the Audio Home Recording Act.

Also troubling is the fact that the provision, while appearing neutral on its face, would unfairly and ironically discriminate against satellite radio – which even the record label and artist witnesses in this Hearing recognized has gone the extra mile to protect the sound recordings it transmits against Internet redistribution and to resolve claims that its receiving devices make unlawful copies. For example, Geffen Records Executive Vice President and General Manager Jeffery Harleston acknowledged that:

> Satellite radio services XM and Sirius already prevent, through encrypted delivery, the taking by others of the music they broadcast. They also have reached agreements with record companies to make sure all uses of the music they deliver are compensated, <u>and we commend them for their partnership</u>.

Written Statement of Jeffery Harleston (July 29, 2008) (emphasis added). Singer/songwriter John Ondrasik agreed that "<u>Satellite radio has also done its part</u>, ensuring encrypted delivery that protects our music, and working with creators to compensate for all uses of that music on their service." Written Statement of John Ondrasik (July 29, 2008) (emphasis added).

It is precisely the acknowledged "good citizen" of the digital transmission world who would shoulder the most onerous burdens created by the proposed copy control provisions of the Perform Act. Among the various types of digital transmission services subject to section 114, satellite radio is one of the few that maintains control over the devices that receive its

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transmissions in a manner that arguably would make the adoption of additional copy control technology "reasonably available, technologically feasible, and economically reasonable" to adopt. Webcasters, for example, do not encrypt their transmissions and have no ability to limit the types of third-party devices that receive their transmissions or how those devices handle the received content.

The Perform Act thus would single out the service that even the recording industry and performing artist community candidly have acknowledged already works with them to protect their content and to provide even more compensation for the very recordings that are permitted without compensation by the Audio Home Recording Act. Such a result would be wholly unwarranted and unfair.

In addition, the bill uses a number of undefined terms that would lead to confusion and needless litigation. For example, it is not clear when a technology is "reasonably available" or how a service must respond when one technology is deemed by the recording industry to do a better job of "preventing copying" than another technology. Nor has the recording industry shown itself to be responsible in its view of "reasonable" technology. One need only look to the example of one major record company that included software on some of its CDs that, without proper warning, infected the consumers' computer operating systems with a rootkit and opened the door to viruses and other attacks. *See, e.g.*, Bruce Schneier, *Real Story of the Rogue Rootkit*, Wired, Nov. 17, 2005, *at* <http://www.wired.com/politics/security/commentary/securitymatters/2005/11/69601>.

Nor is it clear when a recording is a "reasonable recording." The definition uses terms such as "automatic recording and playback" that are not defined. Is a manual copy made while a song is playing a reasonable recording? Is it reasonable when the manual copy is made by a one-touch function that does not require hitting a start and stop button? Is manual saving of individual songs in recorded programs while listening permissible? The bill allows "manual recording" that is not "infringement" but does not clearly state when consumer home recording is not infringement.

Worse, these new restraints are written as a condition on the statutory performance license on which satellite radio relies. Failure to qualify for the statutory license would result in potential statutory damages of up to $30,000 per recording played by a service. Even if the court or jury imposed only the minimum mandatory statutory damages award of $750 per recording for each of the tens of thousands of recordings performed, the total award would be crushing. Because of these severe consequences for "guessing wrong" as to the meaning of the condition and the scope of permissible copying, the bill would create an irresistible incentive for satellite radio to err on the side of caution and to stop developing innovative products with recording capabilities (even "reasonable recording" capabilities) that consumers want.

For these reasons, Congress should refuse to adopt the copy control provisions of the Perform Act.

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Conclusion

Sirius and XM have invested billions of dollars in reliance on the negotiated (and congressionally endorsed) agreement satellite radio made with the recording industry ten short years ago. Indeed, the 801(b) standard (based on "fair" royalties and a "fair return") in the Copyright Act is the same standard by which the record labels pay music publishers and songwriters. On the contrary, the standard included in the Perform Act – the so-called "fair market value" standard – is neither fair nor market-oriented. Such a standard has been abused by the recording industry in the past, and there is no reason to believe that such abuse would not continue were this legislation to pass.

In addition, the copy control obligations in the Perform Act undermine long-established consumer home-recording rights, including the right to make first generation copies under the Audio Home Recording Act. The new restraints included in the bill are written as a condition on the statutory performance license on which Sirius XM relies. Because of the severe consequences for "guessing wrong" as to the meaning of the conditions and the scope of permissible copying, the bill would create a tremendous incentive for Sirius XM to err on the side of caution and to stop developing innovative products with recording capabilities (even "reasonable recording" capabilities) that consumers want and expect. Moreover, they unfairly discriminate against satellite radio, as that is one of the few digital transmission services that maintains control over the transmission devices in a manner that would trigger the obligation to comply with that condition.

Sirius XM appreciates the opportunity to present its views on these important issues and respectfully asks Congress to decline to change the standards applicable to preexisting services under section 114 and to decline to impose new restrictions on consumer home recording.

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Statement
United States Senate Committee on the Judiciary
Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms
July 29, 2008

The Honorable Russ Feingold
United States Senator , Wisconsin

Statement of Senator Russell D. Feingold at the U.S. Senate Committee on the Judiciary Hearing on "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms"

July 29, 2008

I am glad that the Judiciary Committee is looking into the complicated set of issues surrounding copyright royalties in the music and radio industry. For some time I have been concerned about the homogenization and loss of independent and new voices on traditional radio. I even have proposed legislation in the past to counter the rapid consolidation that was unleashed with the Telecommunications Act of 1996 and have fought the new form of "corporate" payola that sprang up partly from this concentrated power.

One of the few bright spots for independent and new artists during this decline in over-the-air radio was the development of the Internet, which provided new ways to connect to music fans without going through the corporate radio playlist gatekeepers. While artists have also expressed concerns about Internet users downloading music without paying, for the most part the artists I have heard from want to see Internet radio succeed.

With respect to the specific issues discussed in today's hearing, I was interested to read in the prepared testimony about at least four different platforms that stream music to listeners—all with different royalty rates and standards. On one end of the spectrum are the traditional radio stations that do not pay a performance royalty and contend that the promotional value adequately compensates artists. On the other hand, Pandora Media President and CEO Joe Kennedy indicated in his testimony that a recent Copyright Royalty Board decision could require his company to pay the equivalent of 70 percent of their operating revenue in royalties. Falling somewhere in-between and using different standards for determining the proper royalty are satellite radio and the royalty agreement negotiated for cable music channels.

If it were not already complicated enough, add to these different rates and standards the new technologies that are further blurring the lines between what used to be as simple as listening to whatever song your local DJ decided to play on the radio or buying a record. These new "interactive" technologies clearly are a benefit to listeners who can conveniently listen to a specific song or let the technology introduce them to new music based on what they already enjoy. But concerns have been expressed because some of the technology also allows for time-shifting the recording and even compiling a catalogue of songs disaggregated from the Internet radio streams—like iTunes but without paying for them.

Clearly there is a need for clearer interpretation and enforcement of the current rules, negotiation between the private parties and possibly congressional intervention. For some situations where there should be a common goal, I hope that the private parties that have the most knowledge and stake in the issues can work things out themselves. For example, it seems like it should be in the long-term best interest for both the companies and artists to have Internet radio continue to grow and be successful.

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Throughout these discussions, there needs to be a balance that keeps in mind the overall goal of supporting a vibrant and diverse music industry where the public has access to a range of music, the artists and companies can thrive and innovation is not stifled. I am glad that this hearing has provided a venue to further explore these issues and look forward to working with my colleagues on these important issues affecting the music and radio industry.

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STATEMENT OF JEFFREY HARLESTON

EXECUTIVE VICE PRESIDENT AND GENERAL MANAGER, GEFFEN RECORDS

ON BEHALF OF THE RECORDING INDUSTRY ASSOCIATION OF AMERICA

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

MUSIC AND RADIO IN THE 21ST CENTURY:

ENSURING FAIR RATES AND RULES ACROSS PLATFORMS

July 29, 2008

Chairman Leahy, Ranking Member Specter, Senator Feinstein, Senator Brownback, and members of the Committee. My name is Jeffrey Harleston and I am Executive Vice President and General Manager of Geffen Records, located in Los Angeles, California. Geffen is home to legendary artists such as B.B. King, Nirvana and The Who – and contemporary stars like Mary J. Blige and Nelly Furtado. In addition to the artists, I have the good fortune to work with an exceptional array of managers, producers, marketers and executives who dedicate their talent and experience to delivering great music to fans in the 21st century.

Although our industry is facing some major challenges, we have plenty to be excited about. An increasingly active part of what we do as a major record label is the licensing of our music, often to those that are perfecting the last great idea – and those who have a vision of the next one. Today's music marketplace is nothing like the music marketplace of ten – or even five years ago. While the sales of CDs have fallen off considerably, we have witnessed a substantial shift in the ways consumers use music. They want their music to be portable. They want it instantly. They want it on Facebook and MySpace pages, on cell phones, Blackberrys and iPods. But this growing digital marketplace can only survive if we ensure that everyone plays by the same rules, that creators are compensated fairly and that our valuable music is protected.

That's why I'm pleased to support the PERFORM Act introduced by Senators Feinstein and Graham. The PERFORM Act establishes "platform parity" among digital music radio services. Right now, the law is a patchwork of rules written at different times for different emerging radio technologies. Now that these technologies have matured into sophisticated businesses that compete with each other to offer consumers

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multiple services, it's time to update the law to ensure that the playing field upon which they compete is as level and fair as possible.

The PERFORM Act accomplishes this by applying the same compensation and protection standards to all radio services that benefit from the government license.

Let's start with the rules regarding the compensation standard. Under the government license, radio services pay a government-set rate for the music they perform. They don't have to ask the creator for permission to use their music. They don't have to negotiate with hundreds of different record labels. They just pay the set royalty, follow the regulations, and they're good to go.

Today, the rules used to determine what the compensation (i.e. royalty rate) should be for each radio platform are very different. It is inappropriate - and detrimental in the long run - to provide any platform with a competitive economic advantage over another. To achieve "platform parity" the compensation paid by all platforms should be determined according to the same standard.

Applying the same standard across different radio platforms does NOT mean everyone should pay the same price or even have the same price structure. For example, at Geffen records we license the use of our recordings to hundreds of companies, from Amazon.com, MTV, MySpace and Verizon, to television programs like "Greys Anatomy" to retail outlets like Wal-Mart, to video games, toys, toothbrushes and greeting cards. What is important is that the negotiation of the license in each instance takes into account the market considerations. For example, a license of a recording for a toothbrush will have a different fee than the license of the same recording when it is selected on demand and downloaded to an iPod. Thus, the actual price each licensor pays can be

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very different. Yet, the same *standard* is used to determine the fair cost in each of these instances: the free market.

Similarly, the standard applied by the government to all radio platforms should also estimate and reflect what the market price would be for the use of that music. The government took away the free marketplace when they enacted the radio licenses – and gave these platforms phenomenal efficiency and ease of use. The very least the government can do is ensure that if they are going to set the price for our property, it ought to be based on a set of rules that leads to a result the marketplace would yield.

The other parity issue addressed in the PERFORM Act is the rule that all radio platforms should make sure they are safe and secure, and that all uses of the music they deliver are compensated. Satellite radio services XM and Sirius already prevent, through encrypted delivery, the taking by others of the music they broadcast. They also have reached agreements with record companies to make sure all uses of the music they deliver are compensated, and we commend them for their partnership. Current law prevents Internet radio stations from making multiple uses of music without paying for those uses, but unfortunately, to date, many Internet radio stations are not secured to prevent the uncompensated taking of our music by others.

How does this happen? Here is a real world example of a software program called "Radio Tracker," one of the hundreds of applications known as "stream-ripping" software. Radio Tracker is published by a German company that charges $30 to download their software program. Once installed, the program simply asks you to enter any artists or songs you wish to copy on a "wish list." Without the user ever listening, the software searches 2,425 Internet radio stations at the same time looking for the

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broadcast of those artists or songs. When it finds them, it copies every one individually and collects them in a permanent library that can be moved easily to your iPod, along with the song lyrics. It even fills in any missing pieces that may be lost at the beginning or end of a song to make sure the copy is perfect. Basically, you get a digitally perfect copy of any song you want. The German stream-ripping company gets $30 – none of which is used to compensate artists or labels. The user never has to buy another song. It's as simple as that.

This is obviously unfair to the creator and to legitimate stores such as iTunes. If we want to enable a thriving marketplace for music on multiple platforms we must ensure that all platforms take appropriate and equal precautions to protect the content they carry from this type of abuse.

I would like to thank the Committee for its focus on this important issue, and especially Senator Feinstein for her leadership in crafting the PERFORM Act. Your legislation goes a long way towards establishing a level playing field where all parties and platforms operate under the same rules, providing consumers with the music and experiences they desire, while ensuring that creators are appropriately rewarded for their valuable work.

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National Music Publishers' Association

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David M. Israelite
President & CEO

July 28, 2008

Honorable Dianne Feinstein
331 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Feinstein,

The National Music Publishers' Association (NMPA) applauds you for holding this important hearing on Music and Radio in the 21st century. We also greatly appreciate your introducing the PERFORM Act, which would protect music transmitted over digital radio. It is crucial that Congress continue to update copyright law in this era of constant technological change.

As NMPA has stated numerous time before, "performing" and "distributing" are two distinct rights granted to a copyright owner, requiring two distinct licenses. Congress must make it clear that any service distributing perfect digital copies must obtain a Section 115 license for the reproduction and distribution of the musical work and compensate songwriters and music publishers.

Platforms like High Definition and Satellite radio should be able to thrive and expand, but not at the expense of the creators of music. Ultimately, the PERFORM Act will allow consumers to enjoy high-quality digital music delivered in a myriad of formats, while providing the necessary monetary incentive for songwriters to continue to create music.

We look forward to continuing to work with the Committee on these issues.

Sincerely,

David M. Israelite
President and CEO

cc: Senator Patrick Leahy
Senator Arlen Specter

Statement of

Frederick J. Kass,
Chief Administrative Officer,
Intercollegiate Broadcasting System, Inc.
on behalf of
HIGH SCHOOL AND COLLEGE BROADCASTERS

before the
Senate Committee on the Judiciary

on S. 2500,
a bill for a Performance Rights Act

July 29, 2008

The thousand high school and college broadcasters comprising the Intercollegiate Broadcasting System, Inc. (IBS), a Rhode Island non-profit corporation, oppose S. 2500 (110th Cong., 1st Sess.), unless Section 3 (Special Treatment for Small, Noncommercial, Educational, and Religious Stations and Certain Uses) is redrafted either to exempt or to treat is a proportionate manner the small, academically affiliated FM broadcast stations.

Section 3(1)(E) appears to provide for a reduced rate only for a "terrestrial broadcast station that is a public broadcasting entity." "Public broadcasting entity" is a term of art. These generally are the eight hundred-or-so larger non-commercial stations that qualify for federal grants under Section 397(11), Title 47. Contradicting the adjective "small" in the section heading, the section itself appears to ignore the truly small, academically affiliated, noncommercial stations[1] -- largely staffed by student-volunteers for curricular and/or extra-curricular purposes -- that are too small to qualify for federal grants.

[1] A few of these stations operate on commercial channels assigned by the Federal Communications Commission. Congress dealt with this problem in the Small Webcaster Settlement Act of 2002 in the definition in Section 114(f)(5)(E) of the Copyright Act, 17 U.S.C. § 114(f)(5)(E)

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The most recent survey by IBS reported that the academically affiliated educational FM stations have annual budgets ranging from $ 250 to $ 100,000 per year, with an average of about $ 9000. Net result of Section 3(E)(1) would be that the recorded music fees would be wholly disproportionate -- 55 to 2000 percent of their annual budgets. Even if they qualified under Section 118(f), the annual thousand-dollar fee for a majority of these stations would be disproportionate. Moreover, any fee should reflect the fact that many of the stations at smaller colleges and in high schools do not operate during school vacations and operate only limited hours during term-time.

In addition, the bill would appear to impose burdensome costs on state-owned and non-municipally owned institutions, contrary to the spirit, if not the letter of, the Unfunded Mandates Reform Act of 1955, 2 U.S.C., ch. 25.

Conclusion

S. 2500 should not be reported until redrafted either to exempt or to treat the non-public broadcasting entities at proportionately. A definition for such entities analogous to Sections 114(f)(2)(E) of the Copyright Act should be included.

Respectfully submitted,

INTERCOLLEGIATE BROADCASTING SYSTEM, INC.

by Frederick J. Kass
Chief Administrative Officer
New Windsor Mall
367 Windsor Highway
New Windsor, NY 12553-7900

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U.S. Senate Committee on the Judiciary
Hearing on

"Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms"

July 29, 2008

Testimony of Joe Kennedy
President and Chief Executive Officer
Pandora Media, Inc.

Chairman Leahy, Senator Specter, and Members of the Committee:

On behalf of Pandora and the Digital Media Association, thank you for inviting me to testify today regarding music and radio in the 21st century. I particularly appreciate the opportunity to discuss the hardships that Congress and the Copyright Royalty Board have imposed on Internet radio, as we seek to realize the potential of this new form of radio. Unencumbered by the spectrum limitations of traditional broadcast radio, Internet radio enables the full range of America's wonderful diversity of music and artists to be enjoyed.

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

(a) Establishing a level playing field by legislating royalty parity across all forms of radio, so that the government is not picking winners and losers when broadcast, cable, satellite and Internet radio compete.
(b) Adopting for all radio services the one royalty-setting standard – found at 17 U.S.C. 801(b)(1) – that has consistently yielded reasonable results for sound recording producers, artists, songwriters, music publishers, and radio services.
(c) Protecting recording artists and copyright owners from radio services that promote and profit from consumer recording of their programming, but not imposing uncertain, burdensome and expensive technology mandates on services that are simply using the Internet to deliver radio.
(d) Resolving the longstanding dispute over the meaning of "interactive service" so that consumers, online radio services and recording artists can maximize the benefits of blending Internet technology and radio programming.

If these goals are accomplished, Pandora and the Internet radio industry will continue to innovate, grow, and deliver new opportunities for tens of thousands of artists and record companies that historically were stifled by media and distribution bottlenecks. Legislation like I have described will unleash substantial value for creators and the public alike, just as our Constitutional framers hoped.

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What is Pandora?

Pandora is an Internet radio service that listeners enjoy on their personal computers, through Internet-connected home entertainment devices, and on mobile phones. We are located in an enterprise zone in Oakland, California and employ 140 people.

Pandora is powered by a unique music taxonomy, called the Music Genome Project, developed by our team of university-degreed musicologists. They have identified hundreds of musical attributes, and when analyzing a song they assign values to each attribute in that song. When applied across hundreds of thousands of songs, these analyses literally connect the dots between songs and artists that have something – often quite subtle things – in common. This enables Pandora to offer listeners – quickly and easily – radio stations that play music that matches their taste if the listener simply tells us the name of one favorite song or artist.

The result is remarkable. More than 15 million registered Pandora listeners enjoy a better radio experience. As a result they listen to more music, re-engage with it, and find new artists whose recordings they purchase and whose live performances they attend. In only three years Pandora has become the largest Internet radio service in America and among the top promotional partners of iTunes and Amazon.com. But the real winners are music fans, artists, record companies, songwriters and music publishers.

A distinct feature of Pandora is that all music wins and loses audience in a purely democratic process. If listeners vote "thumbs up" then a song and artist are added to more station playlists, their exposure is greater, and more people can offer opinions about that music. If listeners vote "thumbs down" then the song is performed and heard less.

Equally unique is the breadth of our playlist. Pandora musicologists will analyze any CD that is delivered to us, and in most cases will enter it into our database and make it available to millions. Pandora's collection includes well over half a million songs across the genres of Pop, Rock, Jazz, Electronica, Hip Hop, Country, Blues, R&B, Latin and Classical. These encompass songs from the most popular artists to the completely obscure. Seventy percent our recordings, representing 60,000 artists, are not affiliated with a major record label, and many recordings were delivered on homemade CDs by unsigned artists – yet they are reviewed on par with CDs received from major labels. Most important, all artists are treated equally because we rely only on musical relevance to connect songs and create radio playlists. As a result, independent music is likely heard more on Pandora than on any other popular radio service. More than 50 percent of Pandora radio performances are from independent musicians, compared to less than 10 percent on broadcast radio.

It is also worth noting that Pandora and our DiMA colleague Live365 may be the last of a dying breed – the strong and financially independent Internet radio service. Between us we have fewer than 200 employees, but we compete fiercely with Clear Channel, MTV, Yahoo, CBS Radio and other large media companies. So many of our independent

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competitors – as well as some of our competitors within big media companies – have shut down or stopped growing because they are crushed by backbreaking royalties. We need this Committee's help to fix digital radio laws quickly so that our successful radio services can also become successful businesses.

1. Legislate Royalty Parity – A Matter of Basic Fairness to Creators and Digital Radio Competitors

Since 1998 Pandora and other DiMA members have paid tens of millions of dollars in royalties to recording companies and artists. In part, these payments reflect widespread consumer adoption of Internet radio, which is regularly enjoyed by tens of millions of Americans. However, the fact of and the amount of these payments underscores how the Copyright Act discriminates against Pandora and Internet radio solely because we deliver music radio via the Internet, rather than using broadcast, cable or satellite technologies.

As you know, traditional broadcasters do not pay sound recording royalties, but cable, satellite and Internet radio do pay. You may not be aware that Internet radio has the smallest of all radio revenue streams, but we pay proportionately the highest royalties. While we have made great progress as a 3 year old company in monetizing our service and plan to achieve $25 million in revenue this year, based on the dramatic rate increases established by the Copyright Royalty Board we are facing the prospect of paying $18 million in sound recording royalties in 2008, over 70 percent of our anticipated $25 million in revenue. This is simply a crushing amount which will put us out of business if it is not remedied.

It is important to note that we also pay royalties to songwriters through our licenses with ASCAP, BMI and SESAC. However, these royalties are set at a level that is consistent with that historically paid by broadcast and other forms of radio—just over 3% of revenue—further highlighting the absurdity of the sound recording rates established by the Copyright Royalty Board.

Almost as egregious is a comparison to satellite radio, because if XM Radio and Sirius Satellite radio were to have revenue of $25 million, their 2008 sound recording royalties would equal only $1.6 million, or 6.5 percent of their revenue.

How are these disparities possible? Because broadcast radio services benefit from a statutory exemption to sound recording performance rights and royalties so they pay zero, and cable and satellite radio services benefit from a statutory royalty standard very different from that applied to Internet radio, which historically has resulted in royalties that equal between 6 and 15% of those services' revenue.

It is for these reasons that Pandora and the entire Internet Radio industry thank Senator Brownback, the lead cosponsor of the Internet Radio Equality Act (IREA), and Senator Feinstein, sponsor of the PERFORM Act. Both bills would equalize the standards that govern cable, satellite and Internet radio royalties. IREA would also resolve this industry

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crisis by reversing the Copyright Royalty Board's recent rate-setting decision and setting royalties at a reasonable 7.5% of revenue.

Under the CRB decision Internet music radio is economically unsustainable; it is not even a close call. Pandora has skyrocketed from a standing start to 15 million listeners in three years. We were within sight of cash-flow positive operations under the old royalty rates, but now we are back under water with no hope of ever emerging as the royalty rates continue to increase. Today, we still are hopeful and we believe that some combination of Congress, the courts, or a negotiated resolution with SoundExchange will favorably resolve this threat. But if we conclude that the CRB royalty rates are not going to be rectified, Pandora would shut down immediately and our 140 employees would be out of work.

Which royalty standard is correct?

From 1976 until 1998 a four-factor test codified at Section 801 of the Copyright Act was the basis of royalty decisions associated with compulsory and statutory licenses. In 1998, however, at the request of the recording industry, Congress imposed a new standard only with respect to Internet radio sound recording performance royalties – a standard that directed rate-setters to determine what a willing buyer would pay a willing seller for the performance rights subject to the statutory license. Unfortunately for Internet radio, this rate-setting standard has been an abysmal failure, as both royalty arbitrations that have utilized it have resulted in extraordinarily high royalties that have massively destabilized our industry.

In 2001 testimony DiMA provided the Committee with detailed analysis of why the willing buyer-willing seller standard fails to protect against monopoly pricing, as Congress intended when it created a statutory sound recording performance rights license that has only one seller - SoundExchange – controlling all the rights. DiMA stands by that legal analysis, but perhaps more to the point I offer the following anecdotal support: There is no possible way that Pandora or our sophisticated investors would be a "willing buyer" of sound recording performance rights at a cost equaling nearly 70% of our revenue – because that royalty level is simply unsustainable and will bankrupt us and force the layoff of our 140 employees. Pandora has been more successful than any other Internet radio service in growing its revenues – but this royalty decision pays far too much of those revenues to copyright owners.

Fortunately the time-tested four-factor royalty standard remains viable, and in the last two years it has been the basis for two industry arbitrations and several successful industry negotiations. Under this standard – which the Internet Radio Equality Act would extend to Internet radio – the Copyright Royalty Board determined that satellite radio royalties should be between 6 and 8% of revenue. An arbitration to determine how much recording companies and digital music services will pay music publishers' was also concluded recently, but no decision has been rendered yet. Additionally several cable radio services operating under the 801(b) 4-factor test have concluded royalty agreements with the record companies, and these agreements are expected to be in the 12-17% of

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revenue range. All these figures are much more reasonable than the results for Internet radio under the willing buyer-willing seller standard.

Senator Feinstein's PERFORM Act proposes a new "fair market value" standard to apply to all sound recording performance royalties. This standard sounds reasonable at first blush, but determining "fair market value" in a single-seller marketplace is a very complex undertaking, and the Copyright Royalty Board could require several proceedings before getting comfortable with a new standard and its application to different business models. Instead, it seems prudent to rely on the traditional four-factor test that has served so well for so long, and which seems to balance all the competing interests fairly.

2. Legislate Content Protection Obligations, But Only on Those Whose Business Activities are Problematic.

Record companies and Internet radio companies agree that consumer recording of radio programming is a time-honored tradition that is generally not harmful to either of our interests. Similarly, record companies and Internet radio companies would be concerned if consumers' personal recordings from radio were disaggregated into individual song files and thereby replaced on a significant scale consumers' need to purchase music or continue listening to the radio.

Since 1998 Internet radio services have been required to use content protection technology in situations where it is essentially incorporated into a service's chosen streaming technology – which is often the case. For example, Microsoft and RealNetworks, in their streaming technologies that are used by many Internet radio services, include a cost-free copy-protection technology that works reasonably well.

However, the PERFORM Act proposes much stronger content protection obligations, presumably in response to (a) the availability of software that enables listeners to record Internet radio and then divide the programming into individual song files for storage and playback as they choose, and (b) satellite radio services' development of affiliated devices and software that enable consumers to accomplish essentially the same result.

DiMA views these two situations as justifying different rules. First, DiMA agrees that services that affirmatively authorize or promote consumer digital recording of radio programming should also inhibit consumers from disaggregating and permanently storing individual songs. Services that protect content in this manner should pay performance royalties each time the recorded programming is enjoyed, but because they have protected against the consumer recording substituting for sales the recording should not obligate distribution royalties nor should the affiliated devices obligate Audio Home Recording Act royalties. In essence, those that enable "portable" digital radio by caching large blocks of programming for future enjoyment as presented by the service (and not as re-ordered or refined by the listener), should pay performance royalties in association with all performances of that music but should not pay distribution royalties or AHRA royalties for merely enabling consumers' further enjoyment of non-interactive radio.

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In contrast, Congress should not require digital radio services to police against consumers' use of independent software or devices to record digital radio. This obligation would require radio services to engage in software development cat-and-mouse games against unlimited numbers of potentially conflicting 3rd party software providers, and would make an already difficult business financially impossible.

Internet radio companies succeed by maintaining continuing relationships with listeners and encouraging them to return frequently to our services. We have no incentive to promote consumer recording and in fact our incentives are aligned with the record companies. It is for this reason that DiMA agreed with SoundExchange almost one year ago to form a joint industry committee to consider the recording industry's concerns about "streamripping" and to jointly review technologies that could perhaps inhibit harmful consumer recording. DiMA members doubt that "streamripping" is a problem but are very open to evidence that the problem exists, and have committed to work with the recording industry and SoundExchange if evidence proves otherwise. It is notable, however, that in the eleven months since this Agreement was signed, SoundExchange has not suggested that this Committee actually form or that an initial meeting actually be scheduled.

There is no reason, therefore, and certainly no compelling justification, for imposing technology mandates that will create financial and technological burdens on Internet radio services that are in the business of programming and promoting music, not consumer recording.

3. Resolve "Interactive Service" Confusion, which Inhibits Innovation, Stunts Internet Radio Growth and Reduces Recording Artists' Royalties.

Congress enacted the statutory Internet radio license to promote the growth of Internet radio as an innovative, competitive medium. Whether a particular Internet radio service qualifies for the statutory license is dependent on several factors, including that the service is not "interactive" as defined in the law.

Unfortunately current law is ambiguous, and whether an Internet radio service is "consumer-influenced" and qualifies for the statutory license, or is "interactive" and does not qualify has been the subject of nearly a decade of litigation and a Copyright Office proceeding, and still remains a question that vexes lawyers, product managers and investors.

The problem is fairly simple: In the 1995 Digital Performance Right in Sound Recordings Act and its 1998 amendments, Congress sought to promote Internet radio as a competitive consumer-friendly medium that benefits the recording industry by generating royalties and promoting sales of sound recordings. The 1995 Act imposed programming restrictions on the radio services (e.g., limiting how many times a single artist can be played in a 3-hour period) and – in an effort to ensure that Internet radio promoted (rather

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than substituted for) sales of sound recordings - disqualified "interactive" programming that provided on-demand or near-on-demand service. There was no uncertainty or any litigation regarding this standard.

The 1998 amendments modified the definition of "interactive" service, changing it from a fairly straightforward and objective test to one requiring a complex subjective analysis. Typically American law is comfortable with "reasonableness" standards and balancing tests, but in the copyright environment where there is strict liability with high statutory damages, uncertainty can chill innovation and destroy the entrepreneurial spirit.

The Register of Copyrights and the RIAA (in public filings and its licensing practices) have agreed that services can benefit from the statutory license even if they permit consumers to express preferences as to genre, artists and specific songs. But the recording industry's litigation position has been markedly different, going so far in one instance as to assert that webcasters are not permitted to allow any level of individual consumer influence over a program to qualify for the compulsory license. Such a view would destroy the potential of the Internet to surface all of America's wonderful diversity of music and artists. In fact it is consumer-influenced programming that enables the introduction of new music and artists to radio listeners. It is because we know something of our listeners' tastes that Pandora can offer the music of 60,000 artists each day, promote their music directly to listeners more likely to enjoy and purchase it, and pay royalties to all of those artists every month. The 60,000 artists played on Pandora every week contrasts dramatically with the dozens of artists heard on most broadcast stations in a given week or even a month.

In furtherance of fully-licensed litigation-free online music, DiMA urges the Subcommittee to amend the "interactive service" definition to ensure that programming based on user preferences falls squarely within the statutory license, so long as the generally applicable programming restrictions for the statutory license are not violated and so long as users are not permitted to control how much a particular artist is heard, or when a particular song might be played. DiMA companies want to focus our energy on developing exciting services that surprise and delight listeners and promote great music, not on lawyers and litigation.

4. Performance Royalty Inequity is Exacerbated by the "Aberrant" Ephemeral Sound Recording Reproduction Royalty that is Imposed only on Internet Radio.

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

Since 1976 broadcast radio has enjoyed a statutory exemption to make reproductions of compositions so long as the reproduction remains within the radio station's possession

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and is used solely to facilitate licensed performances of the same music. Internet radio services also require ephemeral recordings to enable their webcasts, but while broadcast radio typically requires a single ephemeral copy, webcasters require several copies to accommodate competing consumer technologies (e.g., RealNetworks or Windows Media formats), services and access speeds (e.g., dial-up or broadband Internet access). Each of a webcaster's ephemeral recordings functions precisely like the copy exempted for radio broadcasts, but Internet radio is saddled with having to license and pay for these copies, rather than enjoying the benefit of an exemption. In the first Internet radio CARP, the recording industry was awarded nearly a 9 percent bonus on top of the performance royalty for the making of these ephemeral copies which add no independent value. They are simply a by-product of modern technology.

In its 2001 Section 104 Report to Congress, the Copyright Office stated that the compulsory license for sound recording ephemerals, found in Section 112(e) of the Copyright Act, "can best be viewed as an aberration" and that there is not "any justification for imposition of a royalty obligation under a statutory license to make copies that . . . are made solely to enable another use that is permitted under a separate compulsory license." Section 104 Report, p. 144, fn. 434. The Copyright Office urged repeal of this licensing obligation; DiMA asks the Committee to act on this request.

* * * *

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

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

Thank you.

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Statement
United States Senate Committee on the Judiciary
Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms
July 29, 2008

The Honorable Patrick Leahy
United States Senator , Vermont

Statement of Senator Leahy
Chairman, Senate Judiciary Committee
Hearing on "Music and Radio in the 21st Century:
Assuring Fair Rates and Rules Across Platforms"

July 29, 2008

Earlier in this Congress, I introduced S. 2500, the Performance Rights Act, with Senators Hatch, Feinstein and Corker. Musicians should be compensated fairly for the use of their work, whether it is transmitted by broadcast radio, Internet radio, satellite radio, or cable radio. The Performance Rights Act would codify that important right. Today's hearing focuses on the related and important topic of parity in the rate standards across those platforms. Senator Feinstein has been a leader on this issue, and I want to thank her for chairing this important hearing.

Today's hearing also fulfils a commitment I made to Senator Brownback. When the Judiciary Committee considered, and unanimously approved, the Shawn Bentley Orphan Works Act, Senator Brownback requested that we hold a hearing on public performances of songs on Internet radio. I have long been a strong supporter of the development of Internet radio. A robust Internet radio system could be, and should be, good for both consumers and for artists. I share the interest of Senators Feinstein and Brownback in how the rates paid to artists for public performances are calculated, and I am pleased that the hearing will address this issue.

I am disappointed that another unrelated intellectual property bill, the Shawn Bentley Orphan Works Act, is being stalled from Senate passage by an anonymous Republican hold. It was during the Judiciary Committee's consideration of that legislation that Senator Brownback requested that we hold this hearing. I have held it. I hope he will now join with Senator Hatch and me and will work to remove the impediment to passage of the Shawn Bentley Orphan Works Act so that we can make progress on behalf of the American people without further delay.

I appreciate the testimony of today's witnesses, and I anticipate that this hearing will move us closer to considering legislation that ensures artists are compensated fairly when their work is performed, regardless of the platform over which the performance takes place.

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U.S. Senate Committee on the Judiciary

Hearing on "Music and Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms"

July 29, 2008

Testimony of Matt Nathanson

Songwriter, Performer and Recording Artist

Chairman Leahy, Senator Specter, and Members of the Committee:

Thank you for the opportunity to speak with you today about the importance of Internet radio and Internet music to my career and my life.

My name is Matt Nathanson. I am an ASCAP-affiliated songwriter and I have recorded eight albums (including one on a major label, one on an independent label and several that were self-funded). I have played shows for free and for money; I have opened for other bands in half-empty nightclubs; and I have played coffee houses nationwide. Now my music is heard on television shows like Private Practice and Scrubs and I sell out shows across the country at venues like the Warfield Theatre in San Francisco, the Nokia Theatre in New York, and the 9:30 Club here in Washington, D.C.

I have tens of thousands of friends on MySpace, tens of thousands of fans on my email list, and my latest CD, Some Mad Hope on Vanguard Records, has, to date, sold 72,000 copies. My latest single is played dozens of times each week on radio stations nationwide, and I very much appreciate all that Congress does to support creators and protect copyright. But occasionally the pendulum swings too far in one direction, and when that occurs it is important that Congress re-balances.

For decades there has been a tight bottleneck in the music industry that meant only a few recording artists could succeed and most would fail. This was not caused by devious people, but was simply a fact: a handful of major recording companies, CD distributors and broadcasters collectively controlled an extraordinary share of the radio airwaves and retail shelf space. A small selection of artists benefited from extraordinary investment from that group and succeeded on a grand scale. Most artists received little or no investment, and

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the results were unsurprising: the small group of artists captured an extraordinary share of the market and the large mass of artists divided the remainder.

But recently the bottleneck has been exploded. In retail, Amazon.com, iTunes and CD Baby have unlimited shelf space and can present to each consumer the very types of music – including new music – that a customer is likely to enjoy. As a result, the customer buys more music from a dramatically broader group of artists, and the big winner is independent artists and labels.

In radio, the bottleneck was exploded by RealNetworks, Pandora, Yahoo! and SomaFM, which perform the songs of several thousand of artists each week, rather than the several dozen that are typically played by a broadcast station. With unlimited channels, these radio services can also tailor their programming to individual tastes and again, the result is that more fans hear more new music, and they buy it, and they go to our MySpace pages, and they come to our shows. I am proof that today's working professional musician artist can make a very good living without a major label contract or a Top 10 hit. I could not have done this without the Internet- including Internet radio and Internet retail.

I am here today for a very simple reason – because it is in this Committee's power and this Congress's power to protect one of the mediums that has enabled me to have a career in music.

Some naysayers have suggested that Internet Radio is not promotional, that only terrestrial radio repeating the same songs over-and-over again helps artists. That is flat out wrong. i have had hundreds of fans send me emails and approached me at shows and say "I heard you first on Pandora or Rhapsody and now I've bought a CD or downloaded you on iTunes and I'm here at your show." Internet radio should absolutely pay artists royalties, but artists also recognize that the value flows both ways.

I am not a lawyer or a major label executive or an Internet company CEO, but i am a college graduate and one thing is crystal clear. When a song I write is played on broadcast, satellite or Internet radio, they pay me an amount which is reasonably related to their revenue. Higher revenue stations pay a bit more; smaller stations and services pay a bit less. But when a song that I perform is played, broadcast radio pays me nothing; satellite radio pays me a reasonable royalty that when combined with other artist payments effectively equals 6% of its revenue; but Internet radio services pay me and other artists a per-song fee that is unrelated to the revenue of the service, which when combined with other artist payments effectively equals 30 or 40 or 70 percent of their revenue or more.

It is wrong that the smallest industry, which plays the most music by independent artists and labels, pays disproportionately high royalties, while broadcasters pay nothing. I like that Internet radio pays me, but if the royalties are disproportionate

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to the medium, that will end up doing in internet radio and cut off a crucial avenue for independent artists and their success...

I am a successful singer-songwriter, who is fortunate enough to make a living doing what I love. Internet radio has helped me to broaden my fan base immensely. They have helped me spread the word and continue to find an audience that supports me. Pandora, Rhapsody and MySpace have introduced me to millions of listeners and helped me sell thousands of albums and thousands of tickets. Please level the playing field for Internet radio; please protect the next generation of artists.

Thank you for inviting me to testify and for listening to me today.

STATEMENT OF JOHN ONDRASIK
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
MUSIC AND RADIO IN THE 21ST CENTURY:
ENSURING FAIR RATES AND RULES ACROSS PLATFORMS

July 29, 2008

Chairman Leahy, Ranking Member Specter, Senator Feinstein, Senator Brownback, and members of the Committee. Thank you very much for inviting me here today to speak on the topic of Music and Radio in the 21st Century, Ensuring Fair Rates and Rules Across Radio Platforms. My name is John Ondrasik. I am a singer/songwriter. I record and perform under the band name Five for Fighting. Of course, back at home, I am simply known as "Dad." And my message today is one my two wonderful children have heard from me and have understood from the very beginning: play fair.

I'm not in D.C. often. I have participated in Grammys on the Hill and in events to support our troops. My songs and activities often reflect issues and causes I believe in, and my experiences have shown me the power of words and music. I recently was touched when I heard that Senator Hatch wrote a song for his friend Senator Kennedy. That gesture made me proud as an American, and reminded me how music, at times, can express our basic humanity and feelings better than any other medium. I look forward to hearing that song.

I am here today not on my own behalf, but on behalf of the thousands of creators who have their own talents to share and their own messages to convey. I have been extremely fortunate in my success and I sincerely hope many others have the

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opportunities I've had. As with them, creating brings me great joy. But, unfortunately, joy alone doesn't put food on the table and allow us to take care of our families.

The fact is, as creators, we are actually small businesses. Our product – our music – is borne of our own struggles, hopes, fears, dreams, and sheer hard work. And while we take immense pride in our ability to move and entertain people, like any businessperson – like every American – we expect, need, and deserve fair compensation for our work. I am here today to ask that you ensure the platforms that deliver the music we make are secure and effective, that all uses of music over those platforms are compensated, and that the compensation is fair. In essence, I am asking for platform parity.

I would like to thank Senators Feinstein and Graham for introducing the Perform Act which recognizes these principles, establishing fair and equal procedures and standards across radio platforms.

Songwriters and performers get paid for different uses of their work. If you are selling a concert ticket, that's one value. If a radio station is playing your song, that's another value. If iTunes is selling a copy, that's yet another. Each use has value. You would never think that buying a concert ticket allows you to get an album for free. Respecting these different uses and the revenue streams they provide is crucial to the survival of songwriters and performers who depend on them.

One issue that needs to be addressed by those who broadcast music is the transformation of their radio listening service into a service that offers permanent copies of music, without paying the appropriate license for that use. By essentially turning radio into iTunes without the proper compensation, part of the essential revenue stream for the creator disappears. I'm certain that, no matter how pleasing it is that others appreciate

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your work, each one of you would have something to say if part of your income was put in jeopardy.

Let me be clear: I am excited about the opportunities provided in the digital marketplace. The simple over-the-air radio and neighborhood record store we all grew up with has expanded into unprecedented options for hearing and buying our favorite artists and music. And though I must say I miss that corner record store, this new world has opened up extraordinary new opportunities for music creators, as well as for those who deliver and listen to their music. But for all of us to benefit from these new opportunities, we must all recognize and protect the value of that music . We must provide a landscape that does not discourage the next generation of creators from pursuing their contribution to our culture.

Creators have certainly done their part, including taking action to address theft. Of course, this has sometimes been met with criticism; but at end of day, if there is no protection for what we create, it effectively has no monetary value. And that ultimately hurts not only creators, but our culture, economy, and every business striving to share in the benefits of the new marketplace. Satellite radio has also done its part, ensuring encrypted delivery that protects our music, and working with creators to compensate for all uses of that music on their service.

It's necessary for all music services to recognize, like satellite has, the corresponding obligations and responsibilities they have – both to creators and to each other – to protect and value the music they deliver, the very driver of their business, and to compensate for all uses.

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What should that compensation be? I believe in the principle established in the Perform Act that creators deserve fair market value for their work. Surely it's not too much to ask that when you create something, in our great country, you get fair market value for it. Why should music be different from anything else? Why shouldn't the government consider what a buyer is willing to pay for what I'm offering? That's exactly what fair market value is, and that's exactly the standard that should be used across the board for all of the competing platforms.

The bottom line is that we all want to see a thriving music marketplace. By creating a level playing field for all platforms, including establishing equal standards for the protection and market-based compensation of music, the Perform Act provides for this and allows all of us – creators, businesses and music lovers – to benefit from these new opportunities.

Let me say that this has been an extraordinary experience for me. I am honored to speak before you and if the opportunity arises again, perhaps I could bring my children. My daughter Olivia, who is seven years old, just wrote her first song, "Secret Diary" and I'm sure she'd sing it for you. I hope we all have the opportunity to hear new music and the works of many more creators for years to come. Ensuring that singers and songwriters are treated fairly across all music platforms is exactly the way to accomplish this. It just makes sense and, as my kids would proudly tell you, allows all of us to play fair.

Thank you.

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Before the

U.S. Senate Committee on the Judiciary

"Music and Radio in the 21st Century: Assuring Fair Rates and Rules Across Platforms"

Statement for the Hearing Record

By

Gary J. Shapiro

for

The Consumer Electronics Association and
The Home Recording Rights Coalition

July 29, 2008

On behalf of the Consumer Electronics Association (CEA) and the Home Recording Rights Coalition (HRRC), I appreciate the opportunity to submit this statement for the hearing record.

CEA is the principal trade association promoting growth in the consumer technology industry through technology policy, events, research, promotion, and the fostering of business and strategic relationships. CEA represents more than 2,200 corporate members involved in the design, development, manufacturing, and integration of audio, video, mobile electronics, wireless and landline communications, information technology, home networking, and multimedia and accessory products, as well as related services that are sold through consumer channels. Last year, our members contributed approximately $173 billion to our economy and served almost every household in the country. We thus believe it is vital to preserve the innovation, integrity, and usefulness of the products that our members deliver to consumers, in particular those that allow them to listen to music via radio and other devices.

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HRRC was founded more than 25 years ago in response to a court decision that said copyright proprietors potentially could enjoin the distribution of a new and useful product--the VCR. Fortunately, for the record industry (and Hollywood), the U.S. Supreme Court reversed the decision. Even the motion picture industry has admitted that it is glad that the VCR was allowed to come to market. But elements of the entertainment industry, after repeatedly suggesting that they want cooperative licensing and marketing initiatives rather than new legislation, keep returning to the Congress with unilateral proposals that would subject new and legitimate consumer devices to prior restraints on how they work.

In the wake of the Supreme Court's *Grokster* decision, HRRC had thought that the record industry would rely on its legal rights with respect to bad actors rather than seek additional legislation that would limit consumer freedom to choose useful devices. The latest legislation recommended by the record industry is but one in a series of disappointments from an industry that apparently has little interest in adapting to new technology. In assessing the future of the music industry in the digital radio revolution, HRRC unfortunately sees the same old song being played over again.

As the Committee considers ways to promote technology and to ensure artists are adequately compensated, it should reject the record industry's incessant requests for more limits on devices. To help the record industry survive in the 21st century, Congress should instead consider narrowly crafted service platform parity legislation. In our view, all radio-like "noninteractive" music services should be treated the same way--using the same criteria that apply to satellite radio today. All these services should enjoy the same rights and exemptions. Treated the same way, they could focus on delivering the best quality programming to consumers, using the most innovative products to do so, and ultimately helping artists and the

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recording industry by encouraging consumers to sample more music, to hear more varied music, and ultimately to spend more money on music.

S. 256, the proposed PERFORM Act, Would Send Consumers "Back To The Tape Age." The legislation would take away the longstanding rights of consumers to enjoy the benefits and flexibility of digital technology. Indeed, it would undo decades of progress. If the bill were enacted, recording onto digital memory chips would be less useful to consumers than recording onto magnetic tape was 40 years ago.

The proposed PERFORM Act would essentially outlaw a digital satellite radio service (and other services subject to section 114, such as a non-interactive music service offered by a cable company) under copyright law unless it "uses reasonably available technology to prevent copying of [a] transmission, except for 'reasonable recording'. . . ." The bill defines "reasonable recording" as recording where the user ***cannot record or even play back*** selections of specific sound recordings, albums, or artists. Thus, a consumer paying $150 a year to receive programming from a satellite radio service could not select and then later listen to individual songs by his or her favorite artist. Because the bill does not allow a "transmission" of a musical recording, it also would appear to block consumers from moving one song from one room to another within their own homes via a digital network, unless the device in the other room also met all the onerous conditions imposed on the transmitting device.

The legislation does not purport to have anything to do with redistribution of content over the Internet. In other words, this is not an anti-piracy bill. It is a bill to limit the options of honest consumers in their own homes, cars, and trucks.

This bill would give the music industry powerful control over the way consumers can enjoy satellite radio--control the industry has never had over AM and FM radio. Four decades

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after the introduction of the first cassette tape recorder, the only thing the bill seems to allow is "manual recording and playback in a manner that is not an infringement of copyright." Since "manual recording" is undefined, even home recording for private noncommercial purposes could still be a copyright violation, and therefore not permitted. This looks like a music industry-inspired "circumvention" of Section 1008 of the Audio Home Recording Act of 1992 (AHRA), which provides consumers with an immunity from copyright infringement suit for the use of "digital audio recording" devices. It would also circumvent the deal struck by the RIAA in the AHRA, which already makes clear that first generation home recordings made from digital transmissions are "reasonable" and provides compensation to the record companies for those recordings.

Here They Go Again. We have been down this road before, but somehow enough is never enough. From 1989 through 1992, we worked with the Recording Industry Association of America and other rights holders to draft and propose the Audio Home Recording Act. The AHRA still produces revenue for the recording industry and music publishers, and protects them against serial copying on the latest generations of our industry's lawful and legitimate products. Yet, except at royalty collection time, the music industry seems to want to forget that this law exists.

Whatever consumers will be able to do with new satellite radio services in the future--including the recording, indexing, storing, and compilation of playlists--it has been equally feasible for decades to do the same things with existing FM radio service, with comparable quality. Yet, every time the Congress has reformed the Copyright Act, the Congress has declined to grant phonorecord producers any right or control over home recording or even over whether albums are broadcast over the radio in the first place.

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There is no demonstrated problem, and there is no reason to take control of these services away from satellite radio providers, or to interfere with the customary enjoyment of these services by consumers, and put those controls solely in the hands of the record companies. The Congress has consistently declined to do so.[1] As a result, the United States remains a world leader in developing new broadcast and consumer technologies and services.

The constraints now being sought by the recording industry seek to limit what a consumer can do with content lawfully acquired from a satellite radio service. But, at the behest of the RIAA, the Congress already addressed this issue in the AHRA. The AHRA provides for a royalty payment to the music industry on Digital Audio Recording devices and media. At the specific request of the RIAA and the National Music Publishers Association, the AHRA explicitly does not prevent consumers from making a first-generation copy, but limits a device's ability to make digital copies from digital copies. In 1991, Jay Berman, then head of the RIAA, told the Judiciary Committee that the AHRA

> will eliminate the legal uncertainty about home audio taping that has clouded the marketplace. The bill will bar copyright infringement lawsuits for both analog and digital audio home recording by consumers, and for the sale of audio recording equipment by manufacturers and importers. It thus will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits . . . .[2]

[1] When Congress first granted copyright protection to sound recordings in the 1970s, it affirmed consumers' historical right to record radio transmissions: "In approving the creation of a limited copyright in sound recordings it is the intention of the Committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17. ***Specifically, it is not the intention of the Committee to restrain the home recording, from broadcasts or from tapes or records, of recorded performances, where the home recording is for private use and with no purpose of reproducing or otherwise capitalizing commercially on it.*** This practice is common and unrestrained today, and the record producers and performers would be in no different position from that of the owners of copyright in recorded musical compositions over the past 20 years." House Judiciary Committee Report No. 92-487, 92nd Cong., 1st Sess. at 7 (1971) (emphasis added).

[2] *The Audio Home Recording Act of 1991: Hearing before the Senate Committee on the Judiciary*, S. Hrg. 102-98 at 115, October 29, 1991, written statement of Jason S. Berman.at 119. Mr. Berman, in fact, emphasized that the comprehensive compromise nature of the AHRA was a reason for the Congress to pass it: "Moreover, enactment of this legislation will ratify the whole process of negotiation and compromise that Congress encouraged us to undertake." *Id.* at 120.

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Indeed, the AHRA provides explicitly that copyright infringement suits ***cannot*** be based on products that comply with the AHRA, or based on consumers' use of such devices or their media. And, don't believe RIAA's revisionist claims that the AHRA had a narrow, limited focus. When urging passage of the AHRA, RIAA was singing a different tune. Again, in Mr. Berman's own words: "[the AHRA] is a generic solution that *applies across the board to all forms of digital audio recording technology*. Congress will not be in the position after enactment of this bill of having to enact subsequent bills to provide protection for new forms of digital audio recording technologies."[3] Moreover, the AHRA was specifically intended to address recordings made from digital transmissions as well as from prerecorded media.[4] We see no justification to undo the provisions of the AHRA that safeguard the right to manufacture, sell, and use devices to record transmissions by digital and satellite radio services.

Enough is Enough. The proposed PERFORM Act seems aimed at destroying the utility of new digital consumer products that, like the VCR, will enhance consumer enjoyment of music and broaden the market for entertainment programming. Even though the record companies already receive millions of dollars annually in royalty payments for the satellite radio transmissions and millions more under the AHRA, the RIAA appears to be looking for double protection and triple compensation. We urge you to reject this effort to enrich the music industry at the expense of consumers.

Instead, the Committee should promote technology by supporting measures that would advance small webcasters and encourage innovative new services that allow consumers to

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[3] *Id.* at 111 (emphasis added).

[4] 17 U.S.C. § 1001(1), (3) (digital audio recording devices include those primarily designed to copy from transmissions); S. Rep. No. 102-294, 102d Cong., 2d Sess. 65-66 (June 9, 1992) (rules allow one generation recordings of digital broadcast transmissions).

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experience all types of artists, both established and emerging. Such policies should work to ensure that artists are fairly compensated, while advancing new technologies and not limiting fair use. The Internet Radio Equality Act of 2007, for example, would help innovative companies such as Pandora Media, Inc., devote limited financial resources to helping emerging independent artists build their fan bases while ensuring that artists are fairly compensated. This legislation recognizes that the Internet has changed the face of music distribution. No longer does an artist need a big record label to succeed. Times have changed and policies need to reflect this new and exciting paradigm.

Thank you for considering our views.

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STATEMENT OF JOHN SIMSON
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MUSIC AND RADIO IN THE 21ST CENTURY:
ENSURING FAIR RATES AND RULES ACROSS PLAFORMS

July 29, 2008

Madam Chairwoman, Senator Brownback, and Members of the committee, thank you for inviting me to appear before you today to speak about fair rates for music, a subject – as a former performer, artist manager, music attorney and now executive director of SoundExchange – with which I am very familiar.

Shortly after Congress granted the right for artists and labels to be paid fair royalties from digital services, one of the great saxophonists in American music, Art Porter, Jr. of Little Rock Arkansas, tragically died in a boating accident while on tour in Thailand. A few years later, his wife died of cancer. Their two sons are being raised by their grandparents and will soon receive a check from SoundExchange. Most recently, SoundExchange tracked down the widow of Joe Jones, who sang, "You talk too much, you worry me to death." And there's the day we tracked down the widow of Ernie K-Doe, a New Orleans R&B singer who recorded the Allen Toussaint song "Mother-in-Law." When she heard we had a couple thousand dollars for her from her late husband's recordings she replied "Child, you just put the Thanksgiving turkey on the table." These are just some of the many artists and their families who are benefiting from the performance right in digital radio that Congress granted.

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We hear many heartfelt stories – from widows and widowers whose spouses created valuable recordings; artists living on social security; from young artists just starting out, or one hit wonders, or members of orchestras. The creators of music are getting paid from digital radio services because Congress created the performance right. And that is what is fair, people being paid for their work product – a basic principle of intellectual property rights. In fact, just last week, when the Enforcement of Intellectual Property Act of 2008 was introduced – and we thank you Madam Chairwoman for cosponsoring – Senator Leahy noted that, "The protection of intellectual property is vital to our economy." It is also vital to the livelihood of those who create intellectual property like sound recordings.

Music is undergoing a transformation. In the new landscape of the 21st century, people are accessing music through listening, not through purchasing. But the basic principle of fair pay cannot change – the people who create music must be paid.

Over the past 17 months SoundExchange has addressed genuine business concerns of webcasters because we see them as partners. We want them to succeed and continue paying royalties to the 31,000 artists and 3,500 labels we represent. But we also want fairness for our artists and labels who should benefit from the sacrifices they are being asked to make.

In every instance we try to consider the whole picture, including the vibrant business activity generated in webcasting with its 50+ million listeners. Just last August, Bridge Ratings projected that Internet radio advertising revenue is expected to reach $20 billion by 2020. There are lots of examples, but let me share with you the most recent. Just last week we learned that the hottest ticket on the new iPHONE belongs to my fellow witness, Joe Kennedy of Pandora radio. That news alone is enough to send chills down the spines of satellite radio and AM/FM radio operators.

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So, why, with all this activity, the constant refrains of doom and gloom – which we've heard for over ten years now – when, in fact, webcasting is the place everyone wants to be? The simple answer is webcasters want to pay less so they can make more. The problem is that they want to pay less than what is fair, and what has been judged fair by impartial judges.

For some reason, there are those who treat music as something they should have for free or below its real value. Ignored in all of this is the hard work of the performers – the endless practice sessions, the second jobs, the lessons, the road trips – or about the thousands of people who work in the recording industry promoting, investing, marketing, developing, producing all those recordings. Frankly, the attitude that music should be free or devalued is inherently wrong.

Just a few weeks ago, several of your colleagues in the House from both parties suggested to the recording industry and the National Association of Broadcasters that we get together and negotiate a fair rate to pay for music broadcast on AM/FM radio which shamefully and unfairly now pays zero. The very next day at a radio conference we made that offer to the NAB, and, what did their leader say? That he'd rather cut his throat than negotiate. His words.

Unlike the NAB webcasters believe in paying and are paying, but they are going to great lengths, including lobbying Congress, in trying to devalue our music for their own financial gain.

Webcasters are currently advancing an argument they call parity but that we more accurately call a subsidy. To us parity means every radio-like service must pay including AM/FM radio. It doesn't mean artists and owners must subsidize every Internet business model good, bad or exploitive which is what they are asking for. The fact is, webcasters were given a huge concession by Congress in the form of the statutory license. It lets them use any sound recording without permission in exchange for a fair royalty. Little paperwork, no finding recording artists, no need to negotiate with thousands of independent labels – that's what SoundExchange does. All they have to do is play the music and pay a fair rate.

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To establish a fair rate, and recognizing the complexity of such an endeavor, Congress set up the CRB process, and it is working. Businesses are growing. The Internet is the place to be, as exemplified by the President of CBS Digital who exclaimed about Internet radio, "[it] is an incredible business – we gotta own this!" The fact is, the system is not broken and it does not need fixing. If anything Congress should be commended for the very fair process it established.

Madam Chairwoman, music is like magnets and glue. People are attracted by and stick around for the music. Music is what makes these services have any value at all. All we are asking, is for our fair share.

Thank you.

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July 28, 2008

Written Statement of Val Starr, Founder, GotRadio.com

Respectfully submitting this statement for the Record of the July 29,2008 Hearing on "Music And Radio in the 21st Century: Assuring Fair Rates and Rules across Platforms, U.S> Senate Committee on the Judiciary.

My name is Val Starr, and I'm the founder and owner of GotRadio.com. GotRadio was launched in February of 2003. We are a professionally programmed network of internet radio stations, and are a premier content provider for Windows Media and Itunes. We currently have an estimated 250,000 monthly listeners, averaging over 1 million listener hours per month.

GotRadio's programming philosophy is to not niche down to hundreds of radio formats; however, we do feature many channels that have never been available to listeners on terrestrial radio. These channels have quickly become some of our most listened to channels. Music channels such as our blues, bluegrass,, soundtracks, musicals, new age, folk, big-band and classic country offer promotion to music artists and direct music buys for listeners in these music categories that have never before in history been available to them. Our indie rock channel provides exposure to the scores of unsigned and non-major label music product. Internet Radio is opening the doors to music artists that were all but ignored by traditional radio and is opening the ears of listeners across the country.

Unfortunately, due to a flawed standard in the DMCA, as well as the subsequent Copyright Royalty board decision, which was unduly influenced by the lobbying and legal power of the R.I.A.A., internet radio is very much in danger of being strangled to death by misguided and miscalculated performance royalties.

As you are aware, terrestrial radio currently pays no royalties for its sound recording performances. At present, cable and satellite radio pay approximately 7.5% of their revenues for their performances. However, despite the repeated request of Internet Radio to pay a similar royalty rate based upon revenues, our rate was set on a per-performance basis, which when calculated out, raised the current Small Webcasters rate of 10% by 75% to 200%!

I have personally flown out to New York City, on my dime, and at the request of the Sound Exchange. I have met with their board members and have opened up my company books freely. I have provided concrete proof that under the current rates my current yearly royalty payment, which amounts to around $20,000.00 will increase as follows. Please note that this is assuming that I have no increase in listenership over the next 4 years:

2006 @ .0008/performance - $108,441.86
2007 @ .0011/performance - $149.107.56
2008 @ .0014/performance - $189.773.26
2009 @ .0018/performance - $243.994.19
2010 @ .0019/performance - $257.549.42

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GotRadio's current yearly ad revenue is in the $180,000 to $220,000.00 range. So as you can see, the royalty rate far exceeds even our U.S. government's taxation of 33% of revenue. There is not a business on the planet that could survive this type of royalty tax. These rates are not only unfair, they are outrageous!

For the past three years, the Small Commercial Webcasters have been trying in good faith to negotiate a fair royalty rate with Sound Exchange. My letters to Sound Exchange asking for open negotiations remain unanswered. We are continuously harassed and rebuffed by the SoundExchange, and despite their assurances to congress that they would negotiate in good faith, I do not know of a single webcaster that has been approached by Sound Exchange to negotiate, including GotRadio.

I would urge the Judiciary committee to consider the disastrous consequences that have resulted from the current Internet Radio royalty requirements before extending an additional performance royalty to any other form of radio. I would further urge that the Judiciary Committee consider the revenue share rate that is currently in place for cable and satellite radio as a starting place for fair "across platform" rates for all digital music transmissions and to deem the per-performance rate an "unfair and unreasonable" rate based upon the current economic conditions of our industry.

Internet Radio's continued lifespan will ensure the continued exposure of a world of yet to be discovered music and talent to our country's citizens. I urge you to help to assure FAIR rates and rules across ALL platforms of digital transmissions.

Sincerely,

Val Starr, Founder
GotRadio

Chairman Leahy, Senator Specter, and Members of the Committee:

I want to thank you for inviting me to testify before the Committee on this important issue: the fair treatment of Internet radio. I appear on behalf of myself and Senator Brownback, the co-sponsor of S.1353, the Internet Radio Equality Act. But I also speak for tens of thousands of musicians and other artists who want to use this new medium and the millions of Americans who would be their audience.

The core problem facing the committee today is a one that applies across the board when dealing with new technologies. Internet radio is a fledgling industry that has unlimited potential. It has less in common with old AM radio than a Model T has in common with the latest hybrid car. But Congress is approaching this new industry using the same tools that it used on player pianos and AM Radio. Just as the Internet continues to revolutionize countless other industries, changing the way we live, work, and learn, it has changed the idea of radio beyond the imagination of any member here, myself included. Using old tools on new technologies could be like the sledgehammer that smashes this new industry to pieces.

When regulators don't fully understand a technology they produce bad decisions and worse outcomes. One good example of this is the Minimum Fee section of the Copyright Royalty Board (CRB) decision. The CRB originally imposed a fee of $500 per channel on all commercial webcasters, which they stated was needed to cover administrative costs. There was no justification for this decision other than it was what the old industry, the folks the CRB was familiar with, asked for. This regulation was made despite the fact that if applied to just one of the well known webcasters of the time it would have cost over $500 Million dollars – for administrative fees… This particular part of the decision was so divorced from reality that the rights holders have already agreed to limit it, regardless of the outcome of our efforts here.

This sort of fundamental misunderstanding is unavoidable when we apply old rules to new technology, and that's why the Senate has to insure that ignorance does not trump innovation in our new economy. S.1353, The Internet Radio Equality Act, nullifies that unfortunate royalty decision and brings an understanding of new technologies to the process. It's precisely the freedom to reach listeners wherever and with whatever content they can that is the strength of this new medium. Let's not get in its way.

Net Radio has brought every American an almost infinite choice of stations. It can even allow folks to create a station, or a number of stations, designed specifically for a listeners' unique needs and tastes. NetRadio takes control of radio programming out of the hands of a few powerful conglomerates, and puts it in the hands of consumers. Radio programming can address the unique perspectives of a Professor in Corvallis, Oregon or a musician in Topeka, Kansas. Almost anyone can launch a NetRadio station. Lowering the barriers to entry for this industry means the epicenter of American music doesn't have to be stuck in the commercial capitals of New York and Los Angeles. It could shift back

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to the decentralized creative centers of Memphis, New Orleans, Detroit, Minneapolis or Portland. The newest NetRadio powerhouse could come out of your own home.

Today, I can, as an individual, listen to the exact same music, at the same level of quality, with the same level of impermanence on three different types of technology: traditional radio, satellite radio, and internet radio. The problem is that the cost to the broadcaster will be different depending on the technology. In fact, the cost will be higher as the level of innovation increases. We are allowing the royalty process to serve as a tax on technology, and that is discrimination against innovation.

Essentially what the committee is asked to address today is this discrimination – and it's something I've been fighting against for many years. What typically happens when new technologies emerge is that government steps in thinking that litigation, regulation and taxation will put this new technology into a box that will manage and limit change. That strategy tends to strangle new technologies in their infancy and preserve a status quo that's stuck in the past. It's been a constant battle from fight the taxation of Internet access and services to keep revolving rounds of court battles from destroying free and open Internet access. But so far, so good. My attitude is that it's critical to treat new technologies with fairness that is based on neutrality, which can be tough when old technologies have loud voices in the debate.

It's never clear when a new technology emerges how far it will take us. NetRadio could be used someday for educational purposes, for communications in a disaster, or for a hundred things we can't imagine today. If we are to truly serve our constituents, we have to encourage new technologies and their potential, not stifle them.

I'm not suggesting that artists not be compensated for their work. To the contrary, as the son of an author I'm excited about the possibility that these new technologies could bring greater attention to artists and their work. My father would relish the fact that his books can now be downloaded onto new technologies like Amazon's Kindle and read by anyone with a library card while they commute to and from work. His audience would expand beyond his wildest dreams.

It's up to us to recognize the ways in which innovations bring audiences and creators together. We have to insure that all parts of government promote and advance new technologies and their potential to serve society rather than creating barriers that separate us from the benefits they can bring us.

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