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PARITY, PLATFORMS, AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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PARITY, PLATFORMS, AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

WEDNESDAY, APRIL 26, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Cornyn, Leahy, Biden, Feinstein, and Schumer.

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

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed with our hearing titled "Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution."

This morning, we revisit a topic involving the tension between protecting artistic works and encouraging technological innovation. Specifically, our hearing today will examine whether current applicable copyright law is keeping pace with emerging digital radio technologies. Whereas at one time we had radio on AM and FM, now we have the Internet, satellite, high-definition, and the question is whether our laws are adequately compensating artistic work.

In 1995, there was a major revision of the copyright law. Satellite radio producers are charged different royalty rates than Internet service providers, while traditional broadcasters are almost totally exempt from paying a royalty unless the same programming is retransmitted over the Internet. So it is again a clash between technology and artistic effort, and we are going to try to move into the field on the Judiciary Committee, understand the complex issues involved and see if we can provide a fairer, level playing field.

Before turning to our witnesses, let me recognize Senator Feinstein and ask if she has an opening statement.

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

Senator FEINSTEIN. I do, if I may, Mr. Chairman, and let me thank you very much for holding this hearing.

Yesterday, I, along with Senators Graham and Frist, introduced the Platform Equality and Remedies for Rights-Holders of Music Act, called in the ubiquitous acronym the PERFORM Act. This bill is designed to address two problems that have recently been brought to my attention.

First, although we have a statute creating a compulsory license for new forms of radio, this license actually treats Internet, cable and satellite service providers differently, even though as technology advances their services they have become increasingly similar.

Second, some businesses that are granted a performance right under this compulsory license are exploring new technologies that effectively turn a performance into a distribution, thereby not paying separate royalty rates.

While I support advancements in technology and believe it is important that these new service providers succeed and grow, I believe our law must strike the proper balance between fostering new businesses and technology and protecting the property rights of the artists whose music is being played. As the modes of distribution change and the technologies change, so must our laws.

This bill does two things. First, it creates rate parity for all service providers under the compulsory license. Any company covered by this compulsory license will be treated the same. This means that Internet, cable and satellite will all be subject to the same rate standards.

Second, it requires that Internet, cable and satellite providers employ technology that will prevent downloading, manipulation and sorting of the music that they play to prevent individuals from creating their own personalized play lists.

I also want to be clear about what this bill does not do. It does not deal with traditional, over-the-air radio broadcasting. I understand that the Commerce Committee is examining this issue and that private negotiations are underway at the same time.

Finally, let me say I believe this is the beginning of the legislative process. There may be disagreements over how to strike the proper balance on these difficult issues and we are certainly open to a robust dialog. We have tried over a 6-month period now to negotiate between the parties. These were the two points about which there were the clearest agreement. I know there were people that did not want me to introduce this bill at this time, but I believe I should introduce it.

I believe that the two points that are made in the bill are essentially unassailable, but I also agree that there are other things that can be added to the bill if there is agreement. I would like to say, though, that it is very difficult to achieve that agreement, and we have done the best we possibly could over the past 6 months and at least have reached these two points.

So thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

We now turn to our first witness. Ms. Anita Baker has gained critical acclaim as a soul, rhythm and blues singer with such chart-topping hits as "Sweet Love" and "I Just Want to Be Your Girl." She has performed duets with Frank Sinatra and Joel Davis, and won Grammy awards in 1987, 1988, 1989, 1990, 1991 and 1996.

That is quite a record, Ms. Baker. You are part of history all by yourself, but especially having sung with Frank Sinatra.

Our Senate rules provide for 5-minute opening statements and then we will come to the panel for questions.

Ms. Baker, you are recognized. If you would care to do it in song, we would be pleased to hear it in any way you—would you withhold for just a moment? We have been joined by our distinguished ranking member, and before he can catch his breath I would like to call on Senator Leahy, with whom I work very closely on progress and productivity of this Committee.

Senator Leahy.

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

Senator LEAHY. Thank you very much, Mr. Chairman, and I apologize for being late. Unfortunately, we got into a number of conflicts. I see several people here I know, and I appreciate being here.

The issue raised is an important one, and I know Senator Feinstein has worked so hard on this. The principles that guide us here are simple. We should be supporting and promoting the artists who write and perform the music that enriches all of our lives. We should be helping everybody else to hear and enjoy that music.

The copyright laws exist in this arena to define how creators can control and profit from the use of their works. Then we have all the technological advances of recent years and all the improvements in quality and quantity of music that the digital age has brought us. It ought to mean that more people can hear more music more easily, while everyone gets paid their due.

I recognize and appreciate the fact that many other people and businesses are involved in getting music from the artists to the listeners. The record companies, from the smallest independents to the largest of the majors; the broadcasters, whether they own one station or thousands; digital music providers, including cable and satellite and Internet—all of these play crucial roles in turning the copyrights of artists into the listening pleasure of the consumer. But they are not ends in themselves. They are best when they are helping to develop new artistic talent to nurture creative endeavors and to facilitate ever-better ways of getting people, wherever they may be, the music they love.

The statutory license in Section 114 is complicated. Nobody denies that. Maybe it is too complicated. Maybe it is outdated. Maybe in Congress should take a whole new approach to this situation. We have legislated in a piecemeal fashion partly because the technology has moved so much faster than a legislative body can work. We have tried to make reasonable and effective changes to the licensing scheme when new technologies have changed the music marketplace.

Maybe it is time for us, both those up here on the dais and those at the witness table, to step back and try to consider music licensing from its first principles. Maybe we should primarily focus not so much on the technologies, but on the rights that are at stake. Maybe then we could produce a licensing scheme that has a real foundation on the rights of creators and the interests of consumers.

Maybe then the purposes of the Copyright Act, and of this Committee, will be better realized in the marketplace for music.

I love music. I was coming back from a long trip the other day and I was listening to music on the plane. The music was eclectic, ranging from Puccini to the Grateful Dead and a whole lot in between. I am glad that we have the ability to do that. Just a few years ago, I couldn't carry a 7- or 800-song library with me.

So I thank my colleagues, Senators Feinstein, Graham, Cornyn, and Frist, for taking up the formidable task of beginning this inquiry. And, of course, I especially thank the Chairman, my good friend from Pennsylvania, who has just been nationally recognized as one of the best Senators in the country of either party, and I agree with that.

So let's see where we can go. This is not an easy subject, and when we listen to the people all across the spectrum who are involved, it gets less easy. But I have an enormous amount of respect for the people who are here. Some of you are close personal friends and I am anxious to hear the testimony.

So thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Senator Leahy.

I had introduced Ms. Baker, and we look forward to your testimony.

STATEMENT OF ANITA BAKER, PERFORMING ARTIST, GROSSE POINT, MICHIGAN

Ms. BAKER. Thank you, sir, and thank you to Mr. Rundgren for engaging my microphone. Thank you.

Mr. Chairman and members of the Senate Judiciary Committee, thank you for inviting me to testify before you today. I will be brief. I have something really simple to say, and that is that artists should be compensated in a fair and standardized way by businesses that distribute their music. It is essential that this compensation reflect a fair market value.

Satellite radio is planning on selling devices that allow their listeners to find and record individual songs and then create permanent libraries and play lists of these songs. So as an advertisement for XM Satellite Radio says, their radio is not a pod, per se, but it the mother ship, a distribution outlet. Traditional radio may be about to do something similar soon as well.

The technology is here, the cat is out of the bag, the genie is out of the bottle. There is no going back, so let's move forward to negotiate a standardized fair market value for this amazing commodity. As the digital revolution has arrived, it brings with it exciting new ways of listening to and using radio. As someone who listens to radio, I think it would be great to be able to record big blocks of music from the radio and then pick individual songs out of them so that I can keep them and listen to them later at my discretion.

I think it would be great to 1 day be able to tell my computer radio to beep me and tell me the minute that the next new Bonnie Raitt single comes over the airwaves. And I would love to be driving in my car listening to a song and have the option to hit a button and immediately save that whole song. All of these technologies

are exciting and tremendous ways for connecting music with the fans.

However, I hope this Committee considers and supports legislation that recognizes that the folks who create music, an amazing commodity, need some consistency. We need to know, as these technologies develop with mind-blowing speed, that we will be able to look forward to a standardized fair market rate of compensation. This idea doesn't just affect me. It affects my entire family and colleagues that I work with—the songwriters, the musicians, the engineers, all of whom make great music.

So I hope this Committee understands that I support radio and listeners being able to do this. I have spoken with EMI and Blue Note, two of the companies that work with me, and they have promised me that they support this, too. I just happen to think that when a radio station is acting as a download service/distribution outlet, the artists should be paid appropriately.

I am also glad to be able to say that many of my fellow music groups like the National Academy of Recording Arts and Sciences, the Rhythm and Blues Foundation, AFM, AFTRA and a variety of other coalitions and organizations support this view.

I truly appreciate the time that you have given me, and I would like to say also personally that I respect each artist represented here and their right to express their opinions about the commodity that they create. I would also like to say that as an artist and as someone who has been in the business for over 20 years, I have come to a place where I have been in the artist's shoes, I have been in the producer's shoes, and on occasion I have even been in the engineer's shoes. And as I sit before you today, I am somewhat of an independent myself in the sense that I have come from an artist signed to a label, as an artist who is owner of their property represented by a joint venture with my record label. So, essentially, we are partners and I come to you not as just an artist, but as somewhat of an independent, and this is my view and I appreciate the time that you have given me.

Unfortunately, I do have another engagement and I will be saying good morning.

Chairman SPECTER. Thank you very much for coming in, Ms. Baker, and for your testimony. We understand you are busy and we wish you well.

Ms. BAKER. Thank you, sir.

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

Chairman SPECTER. Our next witness is Mr. Todd Rundgren, recording artist, songwriter, producer, and current lead singer for The New Cars. I am pleased to tell you that he hails from Darby, Pennsylvania, right around the corner, and began his musical career in Philadelphia with the Philadelphia-based band Woody's Truckstop.

Throughout his career, he has written and recorded notable hits such as "Hello, It's Me" and "Bang the Drum All Day," and is acknowledged by Rolling Stone magazine as having one of the 500 greatest rock albums of all time. He has produced albums by Cheap Trick, Meatloaf, XTC and All the Notes.

Thank you for coming in today, Mr. Rundgren, and we look forward to your testimony.

STATEMENT OF TODD RUNDGREN, LEAD SINGER, THE NEW CARS, DARBY, PENNSYLVANIA

Mr. RUNDGREN. Thank you, Chairman Specter, Senator Leahy and members of the Committee. My name is Todd Rundgren. I am 58 and I am a professional musician. I have also been employed as a record producer, composer for film and television, technology spokesman and computer programmer. I am the designed and developer of PatroNet, an Internet-based subscription service that allows audiences to provide direct underwriting of artists in exchange for insider information, direct communication, discounted merchandise and first-look experiences of the artist's work, all within a community structure.

This is my 40th year as a musician and 18th year as an independent. I left Warner Brothers in 1998 with the conviction that the major labels were unprepared for, and were indeed hostile to the inevitable changes that digital technology would effect in the way that music would be created, marketed and experienced. I wasn't so prescient that I foresaw the rise of the Internet, but I was convinced that I would be hindered in any attempt to use new developments to alter the ground rules.

One of the first cutting-edge projects I was involved in concerned digital rights management, a concept that did not yet exist. I was hired by, ironically enough, the Warner Full Service Network, an interactive television pilot project that sought to merge video computers and high-bandwidth home delivery. The plan was to create on-demand music services that could be navigated on one's home TV, kind of like an iTunes for the early 1990s.

When it came time to plug the music in, everything I had suspected about the savvyness of the industry was crystallized. To a label, every one of the majors refused to consider the possibility of putting music they controlled onto a server. Ironically, even the Music Division of Warner Brothers would not cooperate, even though this was only a demonstration project.

Ever since then, the behavior of the majors has been that of a mindless parasite contributing nothing, yet trying to get its snout into the bloodstream of any new development. The knee-jerk justification is the protection of artists, which would more accurately be represented as the interests of highly bankable artists still under contract. For every one of those, there are a hundred with a lifelong bad taste in their mouths over the way they were treated when sales began to lag.

I have striven to tie together the replacement parts an independent musician would need to build enough audience for a sustainable living. Amongst these is, of course, the Internet and a raft of contractors who can press and distribute disks for you, if you can afford it, and take on the promotion and production and marketing normally provided by a label. The only problem is getting heard. Terrestrial radio, especially of the syndicated flavor, is not available to most artists even if they do have a traditional label deal.

I am opposed to any measures that would insinuate the major labels into an area they have failed to husband and to capitalize off

of artists they have abandoned or never had any interest in. The myth that you could survive very long on record company advances has long been debunked. Players need to play to get paid and need audiences to play to. All the majors have ever done is try to claim the audience as theirs alone and to lower expectations by exposing them only to the generally sub-standard product the majors begrudgingly underwrite.

Worse yet, across-the-board fee structures like those proposed discourage the exposure of new talent in deference to audience favorites as broadcasters try to recover those fees. And worst of all, syndicated radio, the majors' partner in neglect, does not deserve exemption for the abysmal quality of product they deliver. The fantasy that this type of legislation helps music or musicians should be summarily exposed for what it is—yet another futile attempt to turn back the clock to the days when they were the sole gatekeepers to an artist's future.

Thank you for inviting me here to testify and I would be pleased to respond to your questions.

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

Chairman SPECTER. Thank you very much, Mr. Rundgren.

Our next witness is Ms. Victoria Shaw, a songwriter based in Nashville, Tennessee. Her songs have been performed by a variety of recording artists, including Garth Brooks, Ricky Martin and Christina Aguillera. She has won two Emmys for her work, the first in 1999 for the song "In This Moment," featured on the daytime drama "As the World Turns," and the second in 2000 for the song "When I Think of You," featured on the daytime drama "One Life to Live."

Thank you for joining us today, Ms. Shaw, and the floor is yours for 5 minutes.

STATEMENT OF VICTORIA SHAW, SONGWRITER, NASHVILLE, TENNESSEE

Ms. SHAW. I am happy to be here. Thank you, Chairman Specter and members of the Committee. Thank you very much for having me here today to speak on the issue of parity among the different platforms offering digital music.

These are exciting technologies in an exciting time, and we are all here today not to keep them from taking root, but to ensure an environment in which they all can thrive. That environment is only possible when everyone plays fairly.

As a composer, musician, and owner of my own label, Taffetta Records, I get to experience the thrills of the music business on many different levels. I have been lucky enough to have my songs recorded by some of the biggest artists, and even got to open for Garth Brooks in Central Park. And trust me, this is a lot scarier, but I consider among my honors this opportunity to come before you to speak on behalf of the many, many artists and composers who will be greatly harmed if they are denied appropriate compensation for their work.

We want to help usher in the digital radio revolution, but to continue to be a part of it we need your help. Undoubtedly, you are aware of the extremely difficult times the music industry has faced

these past few years due to online theft of music. Nashville, in particular, where I live, home to one of the greatest songwriting communities in the world, has seen a massive reduction of those able to make a living from their craft.

This is why we have been so excited by the many new digital services offering our work. For those who want our songs in digital form, the choices now range beyond unauthorized and free. From cable and satellite, to Internet radio, to download services, licensed services offer music fans the music they want in the way they want, all for the prices that are appropriate to consumers and fair to those of us who create it. This is the bright future of the music industry.

But whether we are operating in the physical world or in that bright digital future, one truism remains: Artists, composers, record labels and everyone involved in making music depend on sales to survive. In the digital world, those sales are made through download services like iTunes and Napster. The licenses required by these services to allow people to purchase our music is what will sustain us as we move further away from the physical world of tapes and CDs.

Yet, it is precisely those licenses and those sales that are being threatened by the new offerings of radio platforms. By allowing listeners to record broadcasts and buildup entire jukeboxes of music on portable devices, radio services are becoming download services, but without paying the down license.

I am not talking about casual recording off the radio. Certainly, we have all done that, and I have no interest in seeing that disappear. Just imagine how proud I am when I see someone race to the radio to record one of my songs that came on. But now imagine my frustration if I saw someone with an entire collection of my work automatically recorded, labeled, sorted and transferred to them in pristine, permanent and portable digital copies without seeing a cent from a sale in return. This is not radio. This is iTunes, this is Napster or Yahoo!, or any of a number of other download services that pay the appropriate license for this type of distribution. Those are the services that make the sales we need to survive, but those services can't compete with others that offer the exact same functionality without paying the same license.

This is a matter of fairness to other broadcasters, to download services, and to all of us making the music for those services. This is a matter of treating platforms that offer the same services equally. This is a matter of parity.

The PERFORM Act, recently introduced by Senators Feinstein and Graham, accomplishes this parity by ensuring that all services follow the same rules in how they offer music. By giving everyone equal footing, we give everyone an equal opportunity to grow. This is important legislation that places value on the music we work so hard to create.

As I look back on my career, I am grateful for all the opportunities I have had to share my music with others and to experience the works of all those who have chosen to share with me. My own songs come from stories of love and loss and fear and faith, but the story of digital radio should be simply one of hope. On behalf of ev-

eryone in the music community, and my kids, I hope you will support this bill and secure for all of us that bright digital future.

Thank you so much for your time.

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

Chairman SPECTER. Thank you very much, Ms. Shaw.

Our next witness is Mr. Edgar Bronfman, Chairman and CEO of Warner Music Group, and general partner of the venture capital firm Creative Technology Partners. Warner Music Group is one of the leading music companies in the world, consisting of both a record label and a music publishing arm.

Thank you for joining us today, Mr. Bronfman, and we look forward to your testimony.

STATEMENT OF EDGAR BRONFMAN, JR., CHAIRMAN AND CHIEF EXECUTIVE OFFICER, WARNER MUSIC GROUP, NEW YORK, NEW YORK

Mr. BRONFMAN. Thank you, Mr. Chairman. Thank you for having me here. I come here today not just as the CEO of a major American music company, but as a representative of the intellectual property industry. IP is the backbone of the U.S. economy today and in the future. The U.S. Government rightly seeks to protect American IP around the world, and we must ensure that it receives appropriate protection here at home as well.

Although piracy remains a plague on the IP industry, Warner Music operates now on the premise that as a result of the digital revolution, there will be more music delivered to more consumers in ways that we never before imagined possible. No one at this table has a greater incentive to embrace digital distribution than we have. Digital distribution allows us to offer more music to more people in more ways than ever before, and I would like to underscore three points.

First, if there is going to be a compulsory license for performances of recordings, then at least the royalties should be set at market rates. XM has paid market rates for everything from electricity to satellites. It has paid market rates for content like "Oprah Winfrey" and Major League Baseball. It is only fair that XM pay market rates for the music on which it has built its business.

Second, a performance is distinct from a distribution. A performance allows someone to listen, while a distribution allows someone to keep a copy. They are different consumer experiences, require different licenses, and command different royalty rates. It is not fair for satellite services or anyone else to turn performances into distributions without obtaining and paying for a distribution license. It is unfair to the creators who lose royalties when satellite services give away their music for satellite's own business purposes without paying for it. It is unfair to satellite's competitors, who actually pay for the right to distribute our music under a license negotiated in the marketplace.

We already license a large number of distribution services across all platforms, everything from the Internet to mobile phones, and we are excited about licensing new distribution services like XM. Indeed, we already have market rate licenses with companies like

Napster to Go and Rhapsody for the very functionality that XM desires to offer without compensation to artists and labels.

Third, and more broadly, the same rules should apply to services competing across all digital platforms. Whether we are talking about rate-setting standards or the obligation to protect our content, the law should treat all digital music services the same. No category of services should enjoy advantages over its competitors because of arbitrary differences in the law.

Music is licensed along a continuum, with royalty payments depending on how much control the user has over the music. At one extreme is the purely passive listening experience provided by traditional radio. At the other extreme is ownership of copy which is provided by services like iTunes and Yahoo! and Rhapsody.

Unlike a passive listening experience, distribution services offer consumers varying degrees of control to determine what music they hear and how and when they hear it. Cable, satellite and Internet performance services are regulated by the Government and by this Committee through a compulsory license. I am generally not a fan of compulsory licenses and feel they are only appropriate when ordinary market mechanisms cannot work.

Unlike contractual arrangements negotiated in the marketplace, compulsory licenses are more difficult to fix if the passage of time or technological innovation makes them outdated, and there is no better example of this than the treatment of satellite services under Section 114 of the Copyright Act. These services are obtaining their content through compulsory licenses that were designed only for listening.

Now, satellite services are going even further, offering new devices that transform a performance service into a distribution service. The device permits consumers to record satellite programming, see a list of songs recorded, disaggregate the specific tracks they want and library them for future and permanent use. This device is not only similar to an iPod, but it is like an iPod linked to a supply of free iTunes music.

The law already prevents an Internet webcaster from engaging in similar attempts to transform their listening services into distribution services. Why shouldn't satellite services be subject to the same rules?

The PERFORM Act that Senators Feinstein, Graham and Frist have introduced requires just that. It would ensure that competition is based on the marketplace, not on arbitrary legal advantages. It would ensure parity across all platforms, parity in the way a fair price is derived, parity in the ways that content is protected, parity plain and simple. At the same time, it protects consumers' expectations when it comes to being able to record music off of these services, as consumers have traditionally done while listening to the radio.

Mr. Chairman, no one appreciates the promise of the digital era more than Warner Music. We believe that the integrity of the digital marketplace represents the very future of music. I urge you to support this legislation and move it to enactment in order that all of the parties here today and all others who seek to legitimately bring content to consumers can make beautiful music together.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you very much, Mr. Bronfman.

Our next witness is Mr. Gary Parsons, Chairman of the Board of XM Satellite Radio and Chairman of Mobile Satellite Ventures. XM Satellite Radio is America's leading satellite radio company, providing consumers access to digital radio in the home, car, or on portable devices.

We appreciate your coming in, Mr. Parsons, and you have the floor for 5 minutes.

STATEMENT OF GARY PARSONS, CHAIRMAN OF THE BOARD OF DIRECTORS, XM SATELLITE RADIO, INC., WASHINGTON, D.C.

Mr. PARSONS. Thank you very much, Mr. Chairman, Senator Leahy, members of the Committee, and thank you for inviting me to testify this morning.

XM Radio is America's first and largest satellite radio service. Although our industry is in its infancy, over 6.5 million subscribers pay an average of $10 per month to receive 170 channels of programming, including Major League Baseball, Fox News, CNN, C–SPAN, and even Spanish-language broadcasts.

While most of our channels are non-music, our 69 commercial-free music channels give every music fan something to enjoy, whether they are discovering a new artist or reconnecting with favorites like Todd Rundgren, Anita Baker or Victoria Shaw. And at XM, we are passionate about music. I fell in love with music and radio 40 years ago when I was a disc jockey and attending high school in South Carolina.

Unfortunately, during the ensuing decades, radio play lists became dominated by narrow, canned formats that excluded the lesser-known artists and, in fact, entire genres of music. XM play lists feature thousands of artists from a library of more than two million tracks. Our radios display the artist and song names, and our announcers educate listeners about music that they heard for the first time on XM. And it is working. Our research shows that XM subscribers buy more music than the average consumer. In fact, the longer a person subscribes to XM, the greater variety of music they buy and the more concerts they attend.

In addition to exposing customers to new music, XM also pays tens of millions of dollars to performing artists, songwriters, record labels and music publishers. While the terrestrial radio giants are exempt from paying performance rights, XM Radio is the largest single payer of sound recording performance royalties.

In spite of this disparity in treatment, we are not here asking for a change in copyright law. We launched our service in late 2001. We invested more than $3 billion, we launched our satellites, and we negotiated and paid performance royalties on music to the record labels and the artists. We pay these royalties under the structure set in place by Congress in 1998, and supported by the major record labels at that time.

Now, the record industry is back asking you to rewrite the established rules of performance rights just a few years after they were created by Congress and, interestingly, just as we began the re-

negotiation of those rates for the next 5 years. Based on our current rates alone, satellite radio will pay hundreds of millions of dollars over this period.

The labels also unfortunately seek to eliminate long-held consumer rights. For decades, a consumer's right to record material for their personal use off the radio has been upheld by the courts. It has been honored by Congress and reinforced by the Audio Home Recording Act.

Not only does XM Radio pay for performance rights under the Copyright Act, but our manufacturing partners pay millions of dollars in additional payments under the Audio Home Recording Act for the portable radios that we distribute. These radios should be viewed as a boon, not a bane.

Consumers do want more choice about where and when they hear and see entertainment, and we have introduced a new generation of innovative devices to let subscribers hear live XM Radio on the go. Like a TiVo for the radio, subscribers can save XM programming for later listening at their convenience of for when they are in places where the satellite signal cannot reach, like in this hearing room.

We made the process simple and we made it convenient. But just because it is convenient, it doesn't make it illegal. XM and its manufacturing partners designed these devices to fully comply with copyright law. And despite the record companies' claims, recording from the radio is not a download service. You can't choose to record any song that you want right when you want it. Anything recorded from the radio is locked to the device. It cannot be transferred to computers or out to the Internet, ensuring it is only for personal use. And you can only hear the recorded material as long as you remain an XM subscriber.

Satellite radio is an American success story and we have played by the rules. We pay for the right to play the music and our manufacturing partners pay again for our subscribers' right to record what was played. The PERFORM Act is not about piracy, and given that it changes the rules for XM but not for broadcast radio, it is really not about parity either. Congress created very balanced copyright laws to protect the rights of users, as well as the rights of the rights-holders. XM pays and protects the interests of the content owners, but we also will strongly fight to defend consumers' rights to record as well.

Thank you for the opportunity to share my views here today and I am pleased to answer your questions.

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

Chairman SPECTER. Thank you very much, Mr. Parsons.

We now turn to Mr. Bruce Reese, President and Chief Executive Officer of Bonneville International Corporation, based in Salt Lake City. Bonneville operates 35 radio stations throughout the country. He serves on the board of directors and is Chairman of the Radio Board of the National Association of Broadcasters.

Thank you for appearing here today, Mr. Reese, and we look forward to your testimony.

STATEMENT OF BRUCE T. REESE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, BONNEVILLE INTERNATIONAL CORPORATION, SALT LAKE CITY, UTAH, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

Mr. REESE. Thank you, Chairman Specter and members of the Committee. We appreciate the opportunity to be here. As was noted, I am here in my capacity as joint board Chairman of the National Association of Broadcasters. The NAB advocates on behalf of more than 8,300 free local radio and television stations, as well as broadcast networks, before Congress, the FCC and the courts.

I have two simple points here today. First, Congress should not take any actions that would delay the continued role out of the new digital radio service for terrestrial radio stations. Second, Congress should improve current copyright law so that it does not inhibit Internet radio streaming.

As to the first point, local broadcasters are engaged in an exciting transition to digital. Currently, 765 AM and FM stations are on the air in digital, with many more that will roll out in the near future. HD radio will enable us to better serve our local communities and remain competitive in the evolving digital media marketplace.

Digital radio not only offers crystal-clear audio. It also permits the broadcasting of multiple, free over-the-air program streams. Radio stations will be able to bring additional local content to the public within their current spectrum, as well as providing expanded opportunities to promote more and varied artists and music.

But we face many challenges as we work toward a successful and timely transition to digital radio. The HD radio revolution involves not just radio stations, but the consumer electronics industry, the auto industry and, most importantly, consumers. 2006 and 2007 promise to be pivotal years for this revolution in radio. Automakers are signing up for factory-installed radios. Retail outlets are featuring many new digital radio products, and many major radio groups are engaged in a marketing campaign to make consumers aware of digital radio.

We must not add to these challenges by a premature adoption of a quick-fix technical system to jury-rig some copy protection device into digital radio. To that end, NAB is working with the recording industry to develop options for content protection, so long as those options don't slow down radio's digital transition. These discussions have been very productive so far and the NAB strongly believes that the broadcast industry, the recording industry and other stakeholders can work toward a consensus on a digital radio copy protection system. While those discussions continue, Congress should refrain from adopting an unnecessary legislative mandate at this time.

As to my second point—the changes needed in copyright law to promote Internet radio streaming—first, Congress should exempt from sound recording fees streams to a station's local over-the-air audience. This Committee has recognized on several previous occasions that the mutually beneficial relationship between the radio industry and the recording industry is a more than appropriate offset for a performance fee.

It simply makes no sense to impose a tax on a model that has worked well for decades simply because the same audience hears a radio station through a computer rather than over the air. The same local public service benefits are provided, as well as the same promotional benefits to the recording artists.

Second, the sound recording performance fee and the standard by which it is set must be reformed. The willing buyer, willing seller standard set in 1998 has been a recipe for abuse. It has inflated royalty rates to levels that have inhibited radio streaming services. Instead, Congress should establish a fee comparable to what is paid to BMI, ASCAP and SESAC.

Third, Congress should reform the statutory license conditions to make them consistent with broadcast practices. By way of example, some of these conditions prohibit DJs from pre-announcing songs and prohibit the playing of any three tracks from the same album within a 3-hour period. Radio stations should not be forced to choose between either radically altering their programming practices or risking uncertain and costly copyright infringement litigation.

Fourth, Congress should eliminate additional copyright liability for ephemeral recordings that simply exist to facilitate a licensed or exempt performance. And, fifth, Congress should ensure that the reporting and recording recordkeeping requirements do not discourage broadcasters from streaming.

NAB believes that these changes in copyright law are necessary so that Internet radio streaming can reach its full potential both for the benefit of broadcasters and for the listening public.

Mr. Chairman, the radio industry is indeed at the beginning of a revolution. The successful deployment of digital radio and the growth of Internet radio streaming will significantly improve services for our listeners and your constituents. The future of digital radio also holds much promise for the very industries and groups represented here at this table.

Thank you.

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

Chairman SPECTER. Thank you, Mr. Reese.

We now turn to Mr. Mark Lam, Chairman and Chief Executive Officer of Live365, which is one of the world's largest Internet radio providers, with over 10,000 broadcasts and 2,600,000 listeners a month.

Thank you for coming in today, Mr. Lam, and you may proceed.

STATEMENT OF N. MARK LAM, CHAIRMAN, EXECUTIVE COMMITTEE, AND CHIEF EXECUTIVE OFFICER, LIVE365, FOSTER CITY, CALIFORNIA, ON BEHALF OF THE DIGITAL MEDIA ASSOCIATION

Mr. LAM. Yes, thank you. On behalf of Live365 and the Digital Media Association, thank you, Chairman Specter and Senators Hatch, Biden and Feinstein, for the opportunity to speak today about how the Copyright Act discriminates against Internet radio.

I am Mark Lam, CEO of Live365. In a world of giants such as RIAA, Clear Channel, XM and Yahoo!, we are the Internet radio

service which is most at risk. I often analogize us to the little mouse amongst all the elephants in this field.

Today, I ask the Committee to build on the PERFORM Act introduced by Senators Feinstein and Graham to, one, legislate royalty and programming parity among all digital radio services; two, protect recording artists and copyright owners from radio services that promote and profit from substitution of consumer recording; and, three, resolve the dispute over the definition of interactive service so that consumers, radio services and creators can maximize the benefits of Internet technology and radio.

On the issue of royalty parity, consider two comparisons. Live365's audience compares to a good-sized radio station in Harrisburg, Pennsylvania. The radio station pays about 3.5 percent of revenues to songwriters and music publishers. Live365 pays 6.5 percent. The radio stations pay nothing to record labels and artists, but in 2005 Live365 paid $1.2 million to labels and artists, more than one-third of our radio revenue. Most outrageously, in the current royalty arbitration, the RIAA is demanding that we pay two-and-a-half times more royalties. This will put us out of business.

Satellite radio is similar. I have heard that XM and Sirius pay 5 to 7 percent of their subscription revenue to record labels and artists, substantially less than the 10.9 percent paid by subscription Internet radio. Even worse, royalties for advertisers' support of free Internet radio are based on music usage only, so the royalties have no relationship to revenue. As a result, advertiser-supported Internet radio pays an extremely percentage of revenue to record labels and artists, and some companies' royalties exceed their total revenue.

The issue of programming parity is simple. Congress should eliminate restrictions that were intended to ensure that digital radio does not offer music on demand, but which instead have prevented us from engaging in common broadcast practices that promote labels' and artists' interests. If royalty-paying Internet radio is to compete against royalty-free broadcasters, we should be allowed to announce songs and events to keep listeners tuned in and to play more than two songs by an artist consecutively, just as radio stations do.

Regarding the issue of content protection, today's law requires Internet radio services to reasonably protect sound recording creators from substitution of consumer recording, but the existing requirement is not balanced like the reasonable recording definition in the PERFORM Act, introduced by Senator Feinstein. Therefore, DiMA agrees that the reasonable recording limitations should extend to all digital radio platforms, but only when a service is promoting and profiting from consumer recording.

Live365 and other services that are mainly broadcasting music in digital form should not be obligated to police or technologically inhibit independent consumer conduct. Services such as XM that are promoting and profiting from consumer conduct should act reasonably.

Third, I turn to interactivity and how much consumers may influence radio programming before service is deemed interactive and ineligible for the statutory license. Congress enacted a statutory license to promote Internet radio as an innovative, competitive me-

dium. Unfortunately, the interactive service definition is so unclear that it has not been resolved by Copyright Office proceedings or 5 years of litigation.

Internet radio innovation has been stymied, harming services and recording artists who had joined DiMA in seeking a legislative resolution. The problem is simple. If Internet radio programming is less interesting than broadcast or we are mired in complex negotiations about royalties that our competitors do not pay at all, we cannot compete, succeed, or generate even more royalties. DiMA companies want to focus on developing exciting royalty-paying products and services that combat piracy and pay the creators rather than on lawyers and litigation.

Thank you, Mr. Chairman. DiMA members and the sponsors of the PERFORM Act agree that the Copyright Act treats Internet radio inequitably, but that platform parity, content protection and continued innovation are all achievable. Thank you for the opportunity to testify today about a legislative solution that would benefit consumers, promote competition and increase royalties to creators. This is the balance that the Copyright Act is intended to accomplish. We look forward to working with you to make sure that it succeeds.

Thank you.

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

Chairman SPECTER. Thank you, Mr. Lam.

We now will proceed with questions from the panel of Senators with 5 minutes each.

Mr. Parsons, satellite had a tremendous publicity surge when there was the announcement of the contract of Mr. Howard Stern for $600 million. That is from a competitor of yours, Sirius. That created a very substantial public awareness of satellite.

What is there in the operation of satellite and its profit-making potential which would bear on the subjects we are talking about here which would warrant such a phenomenal contract for Mr. Stern?

Mr. PARSONS. Well, Senator, since that deal was struck by my competitor and not myself, I certainly did not see the economics of that amount of a paycheck. However, that being said, the one element that I would put in there that is——

Chairman SPECTER. Well, I am interested to know the import, the scope, the profit-making potential. When we call upon you or may call upon you to pay parity, as Mr. Bronfman, Mr. Shaw and Mr. Rundgren have urged, it is a complex subject to grapple with, and when I saw the Stern contract, it gave some insight. They are still a competitor of yours even after paying the money. They are not bankrupt, they are not out of business.

Mr. PARSONS. That is true, Mr. Chairman, and the element that I would put there that I think is critical to understanding that is the exclusivity nature of it. I mean, that certainly does bring an enormous difference in the price that is paid for the different content. Clearly, we have long said that——

Chairman SPECTER. Well, Sirius obviously calculates that by having Mr. Stern on their program, they are going to get listeners and

they are going to make money. So what is there about satellite which has such great profit-making potential?

Mr. PARSONS. I think in this particular case, the exclusivity of that nature is the answer because obviously Mr. Stern was making enormous amounts when he was exclusive on terrestrial radio as well. And we have said relative to music rights that the minute that the top new star that Warner Music wants to bring out will be taken off of the air anywhere else and put exclusively on satellite, then we would be very happy to start talking about fairly significant additional amounts of compensation beyond the amount, when it is certainly available through many different mediums. And I will speak for my competitor in this sense: They have indicated they would never have paid fees of that enormity as long as it was available in other formats, as well, too.

Chairman SPECTER. I see you want recognition, Mr. Bronfman, and I will come to you in just a minute.

But, Mr. Parsons, why shouldn't satellite pay the same royalties as others? Parity has a ring of equality and justification. Why not have satellite pay the same royalties?

Mr. PARSONS. Senator, I believe the Congress acted appropriately in establishing the rules that were there. And by the way, those rules don't necessarily say there is a different rate for the Internet streamers versus XM Satellite Radio.

Chairman SPECTER. Wasn't the action of Congress really at a time when satellite radio was in its infancy and it is a different commercial situation today?

Mr. PARSONS. I think those laws were placed to look at all different digital mediums and, in fact, looked at all different digital mediums from what were the investments they put in. And if you look at the fairness of the rates, I think many of the Internet suppliers have also indicated they would be reasonably handled under the same 802(b) provision that, in fact, satellite radio is because it takes into account a fair return for the artist, a fair return for the record labels, as well as a fair return for the investment that the distributors have put in place.

Chairman SPECTER. Mr. Reese, why shouldn't satellite pay the same as other payers of royalties?

Mr. REESE. I guess I am not sure that I have a position on that one, Mr. Chairman. I think that they have a very——

Chairman SPECTER. Well, if you don't have a position on it, how do you expect us to have a position on it?

Mr. REESE. I am not here speaking on behalf of the satellite folks here.

Chairman SPECTER. But you are an expert in the field. OK, we will pass on you and go to——

Mr. REESE. Thank you.

Mr. LAM. May I have——

Chairman SPECTER. Well, all right. Before my time expires, you may comment, Mr. Lam, and then Mr. Bronfman may comment. I will ask no further questions. I have only 4 seconds left.

Mr. LAM. Thank you, Senator Specter. Well, we do have a position because on the issue of performance royalties, terrestrial radio pays nothing, zero, whereas satellite radio pays much less than

what we pay. We are really, really unfairly discriminated against. We pay many more times than they do.

In the case of regular radio and terrestrial radio, it is infinity; you know, they pay nothing. We pay performance royalties for songs that we stream over the Internet for essentially the same thing, for essentially the same functionality. People listen to us just like radio, except through Internet streaming. That is all.

Chairman SPECTER. Mr. Bronfman.

Mr. BRONFMAN. Yes, Mr. Chairman, thank you. Mr. Parsons's answer, I think, really gets to the heart of the matter because satellite is trying very hard to have it both ways, and it is really a disingenuous position to take. To suggest that he would pay a great deal of money for an exclusive right, knowing that music is subject to compulsory license, and therefore has no ability to offer music exclusively to XM or Sirius. We are subject to a compulsory license, so to suggest that he would pay money in a circumstance which he knows is not possible, I think, is disingenuous on its face.

And then on the other side, to suggest that the laws that exist are perfectly appropriately, which, of course, include that compulsory license—so, you know, it is one thing or the other, and that is why we have argued, frankly, for recognizing that if we are going to be subject to a compulsory license, which we think is probably inappropriate, at least let that be a standard because it is our content that is providing such great momentum for satellite. And we want satellite to succeed. We just want our artists and our creators to get a fair shake and they are not getting that.

And the other thing is, just to be clear, a distribution service and a performance service are two different things, and the fact that XM refuses to see that and hides behind the Audio Home Recording Act in order to become a distribution service without paying our artists is just an untenable position. And we are here to say that as the march of technology goes forward, the best way to resolve differences between parties is to allow the free market to operate. But to the extent that compulsory licenses are the order of the day, we must make a clear distinction between a distribution service and a performance service.

Chairman SPECTER. Thank you, Mr. Bronfman.

Senator Leahy.

Senator LEAHY. I was interested in these last couple of answers when we go back through all the definitions, of course, in the Copyright Act. But just to kind of followup on that, the Act doesn't define distribution, which is probably one of the reasons why we are here. We have these new satellite devices, XM To Go and the like. You can hang on to a song that has been played Mr. Parsons on something like your radio prescription service.

So let me ask each one of you this question: Is this a distribution or not? As you can imagine, a lot hangs on the answer to that question.

Mr. Rundgren?

Mr. RUNDGREN. Well, my feeling is that, first of all, the record industry has depended on a commoditized view of music that makes all artists equivalent. In the case of the iTunes store, we are all worth exactly $.99. As I understand the device, it is incapable of decontextualizing any music that is played over the radio. It can

certainly label it, but that is not a unique feature. I have seen prototypical devices where you can hold up a cell phone to a piece of music that is playing in the air and have it be identified by a data base that is on a remote server.

So my feelings are that even while they are making something a little more convenient, they are not doing anything unique and the likelihood is that some hacker somewhere will find a way to do this anyway.

Senator LEAHY. But is it a distribution?

Mr. RUNDGREN. What is that?

Senator LEAHY. Is it a distribution?

Mr. RUNDGREN. Internet distribution, in general? As I say, I believe that artists make the most income when they go out and play somewhere and need to have things like radio for the purposes of promotion. The fact that people may make an illegitimate copy of one of your songs has never bothered me at all because I feel it increases my audience.

Senator LEAHY. Let me ask Ms. Shaw, if you have something like XM To Go and you could hang on to a song that has been played on satellite radio, a subscription service, is that a distribution?

Ms. SHAW.. I think it is a simple answer of yes, I mean absolutely. I used to do things off of radio, too, as a kid. It was bad quality and I went and bought the record. This is pristine, perfect quality.

And I have to say in respect of Mr. Rundgren, I think it is great if you want to get one of your songs out there for free and you don't mind that and it helps to increase your touring. I don't tour. I make 9.2 cents per song that is sold. That is how I feed my children. I am the parent that works out of the house, so it is a distribution.

Senator LEAHY. I got you.

Mr. Bronfman.

Mr. BRONFMAN. The services allow you to record 10, 20, 30 hours of music, see exactly what you have recorded by song title, disaggregate and delete those that you don't want and keep the ones that you do want permanently so long as you are a subscriber, which benefits XM. So, Senator, with respect, if it swims like a duck and it quacks like a duck, it is a duck.

Senator LEAHY. Mr. Parsons.

Mr. PARSONS. Well, Senator, when I was a high school disc jockey 40 years ago, I made eight reel-to-reel recordings off the radio. I still have some, I guess, permanently archived or something in my basement. I can do it on a cassette tape. This device does it off the FM radio, separates it by song directly off the air, stores it not only in memory but on a——

Senator LEAHY. Distribution or not?

Mr. PARSONS. No, no different distribution than the distribution that has gone on for 50 years.

Senator LEAHY. Mr. Reese, distribution or not?

Mr. REESE. If, as this Committee has recognized, the consumer has a right to—and I think this Committee has recognized the consumer's right to make a personal copy, and if you want to redefine that, I guess that is appropriate.

Senator LEAHY. Without redefining it, is it distribution?

Mr. REESE. I think if that is not a distribution, I am not sure why this is.

Senator LEAHY. Mr. Lam?

Mr. LAM. I agree completely.

Senator LEAHY. A consumer asks for a specific piece of music, receives it, pays for it. Is that the definition of distribution? Or the music service transmits a piece of music and the consumer can keep it or not, as he chooses. Is that a distribution or is it something else?

Mr. Parsons?

Mr. PARSONS. That is a very close analogy between it. I think the only other element of it that I would add is, yes, it clearly is distribution. If it goes out, you can find it, you can bring it down, and then you can use it as you want, which is a critical differential. If a radio station is playing a collection of songs that you did not request, but you hear one that you like and you record it, you have done that for 50 years.

The critical additional differential that has always been put into the law is, yes, every consumer has the right to make that one copy, and you are pleased when they run to the radio and they put down that one copy. They do not have the right to then distribute it, turn it digitally, put it on the computer and distribute it. We forbid that and keep our devices from being able to allow that to occur.

Senator LEAHY. Mr. Bronfman?

Mr. BRONFMAN. Sir, I think a performance is the right to listen. A distribution is the right to keep a copy. The point for consumers is not to get their music off of their device onto their computer. The trick for consumers is to get the music off of the services, onto a mobile device, so that you can travel wherever you are traveling, sir, and can have a 700 or 800-song library. Mr. Parsons proposes that his consumers should have that library for free.

Senator LEAHY. I want to add I bought and paid for everything. I even have the record. I am buying and paying for every single song.

Mr. BRONFMAN. We are delighted, Senator.

Senator LEAHY. A lot of them were from your company.

Chairman SPECTER. Thank you, Senator Leahy.

Senator Hatch.

Senator HATCH. Mr. Reese, welcome back to the Committee. I always enjoy having you here from our home State of Utah. Could you please explain for us what differences exist between satellite radio and over-the-air radio?

While you are explaining that, please address whether these differences warrant different treatment with respect to paying for performance rights. And after Mr. Reese gives his answer, I would be happy to have any of the rest of you on the panel respond.

Mr. REESE. I think the terrestrial radio business is now in its 86th year, starting in the Chairman's home State, and it is a local service. It is in that respect largely unique in the world. It is based on 15,000 radio stations who serve a finite area, depending upon the power they operate and their tower locations. But it is a local service with public service obligations imposed by this Congress in the 1920 Act and again in the 1934 Act.

The satellite business, on the other hand, is licensed as a national distribution service and it is a subscription service. It is not free over-the-air; it is by and large not advertiser-supported. This Committee has recognized numerous times, and specifically in the 1995 copyright legislation and the 1998 copyright legislation, the differentiation between—or the value that the record industry gets from promotion of its recordings on our radio stations and has identified that as an adequate basis for not imposing that performance right.

But I would add that to the extent radio stations use their programming expertise and become webcasters, as the kinds of folks Mr. Lam's organization represents, we do pay those fees when we distribute over the Internet. And at this point, one of the recommendations we would strongly make again is that when we simply redistribute our radio stations over the Internet, within the service areas of those stations we ought not to have to pay those performance rights. When we create new products over the air, we are webcasters and we pay a fee.

Senator HATCH. Anybody else? Mr. Lam?

Mr. LAM. Yes, I would like to address that point. I think if we look around the world, almost all countries require terrestrial radio to pay performance rights royalties, if I am not mistaken. I think it is a fact that we have very antiquated legislation that needs to be looked at and addressed.

I think terrestrial radio is enjoying an incredibly unfair advantage over Internet radio. I think if we were to grant the exemption that Mr. Reese is asking for, we would forever be disadvantaged and we wouldn't have a business because there is no parity.

Senator HATCH. Anybody else? Mr. Parsons?

Mr. PARSONS. Senator, I would say, yes, a good characterization of some of the differences between the subscription services versus the free over-the-air. I think there are differences there, predominantly local, predominantly national, and room for both. I think we both have that.

When it comes to the issues before this Committee—can you record music played and should the artist be compensated for that music that is played—there is not that great dissimilarity, and particularly as digital radio emerges each of those should pay. We pay twice. We pay for the performance rights. Our manufacturers pay for the right to record.

The only difference I will have in the characterization of whether it is a distribution versus a listening—the characterization is not just simply listening or making a recording. If so, once again, every cassette tape and every TiVo and every reel-to-reel recorder would be considered a distribution and paying royalties.

Senator HATCH. Ms. Shaw.

Ms. SHAW. I have sat here and listened to Mr. Parsons and written down how many times you have said "performance rights," "performance rights," or "we pay for the right to play the music," and never once said "to download," "to distribute."

You are paying for playing and I appreciate that, but you are not paying for the sale, for the download, for the person taking it on the plane with them. And you have used these words, and I don't know if it is purposely phrased perfectly, but you have used the

word "play," "play," "play," and never "download," and I think there is a significant difference to that.

Senator HATCH. Mr. Parsons?

Mr. PARSONS. Yes, sir. I mean, there is definitely a difference, and that is the reason I say we pay twice. We pay both for the performance and through the manufacturers under the Audio Home Recording Act that did say if you create a digital device to record a digital transmission over the radio or over the air, then, in fact, there is an additional payment that then goes to the artist and to the record labels.

Ms. SHAW. I am not an artist or a record label. I am a songwriter, so I am not getting anything here. I am getting something stolen from me.

Senator HATCH. Mr. Bronfman, you have the final comment.

Mr. BRONFMAN. Yes, Senator Hatch, thank you. Again, Mr. Parsons, when he says he is paying twice—first of all, he is paying for a performance and he is paying significantly below market rates for that performance, No. 1. No. 2, he seeks to have a distribution service and not pay for it at all.

And No. 3, when he talks about how the manufacturers are paying under the Audio Home Recording Act, the manufacturers pay approximately $1 to $2 million a year to the industry. By contrast, the digital music service, the business will be a $1 billion-a-year business this year, growing dramatically. The industry gets $2 million a day. So the Audio Home Recording Act and the manufacturer's royalty does nothing to address artists' concerns. Mr. Parsons knows that full and well.

Senator HATCH. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Hatch.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much. Mr. Chairman, as you can see, it has been somewhat difficult to put this together, but I do think we have a good bill. I would like to put in the record, if I can, letters from the American Federation of Musicians, the American Federation of Television and Radio Artists, the Recording Academy, the Recording Artists Coalition, the National Music Publishers Association, and the Recording Industry Association of America.

Chairman SPECTER. Without objection, they will all be made a part of the record.

Senator FEINSTEIN. Thank you very much.

Let me thank you, Ms. Shaw, for your presentation because I really think you illustrated what the problem is. America's greatness is our pioneering soft products, the talent that we have, and the expression of that talent. As technology improves and takes over, we have to change our laws so that the talent is protected, and that is what we are trying to do in this legislation.

I think Mr. Bronfman put his finger on it when he said performance is listening, distribution is keeping. You have something you keep forever, and when digital radio comes about, you will be able to do it right off the radio. So the Commerce Committee is looking at that because you lose your rights as the technology increases, no question about that. So what we are trying to do is change that.

Now, let me ask Mr. Parsons a question. In your testimony, you talk about this new device that will allow a subscriber to store up to 50 hours of programming and how XM wants to provide a device that would be supportable so a subscriber could listen to your service at the gym or on an airplane. I think you even showed it. The manufacturers pay for it, but nobody pays for the distribution of it.

Both of these characteristics would be allowed under my bill, as would some modifications, including sorting by programs, channels or time periods. What would not be allowed is the disaggregating of songs and the ability to allow consumers to create personalized play lists. This seems to me like a fair balance. Consumers get a lot of flexibility and functionality, but it does not allow for a complete substitution of sales.

So how can you argue that to give this functionality to consumers is not a distribution? This puzzles me. I just can't understand your logic.

Mr. PARSONS. Senator, I appreciate the question, and certainly we appreciate the artists' concerns as well. That is why we say we pay for the performance; we also from the manufacturing end through the Audio Home Recording Act pay for the devices that do the recording. If that is not the right rate, then great, we will revisit the rate. We have discussions ongoing relative to what those rates should be. We are in the process of that renegotiation to find what is the right economic balance for that on a fair value type of a basis.

But we also need to understand that all of those items that you just mentioned—the ability for a consumer to record one song versus two songs, or erase one song if they want to—are all rights that have been long in place. Whether it was tape, whether it was digital or not, those are all functions that have been there for years. They have served essentially as a marketing venue in many cases for getting exposure to new products.

But there is nothing that is new. This one does it off the FM radio and this one does it off the XM radio. Both can create individual copies and rearrange them. I make a jogging tape off of my cassette tape off of the radio, and they are all the same.

Senator FEINSTEIN. But let me just argue this with you for second.

Mr. PARSONS. Certainly.

Senator FEINSTEIN. So you are giving everybody individual CDs, effectively, but there is no royalty paid on them by the individual or by you.

Mr. PARSONS. The ongoing royalties that continue to be paid—and we can debate whether they are the right amount or the wrong amount, but they are the up-front costs that Congress decided needed to be paid by every manufacturer to have a recording device in the first place. Then, second, at least with our service, not with regular radio, but with our service, we continue to share a portion of our revenue on an ongoing basis for that right to continue to hear and have that information available.

Senator FEINSTEIN. Mr. Lam, you wanted to comment.

Mr. LAM. Yes. I think I disagree with Mr. Parsons on his analogy. I think in our case, when people listen to us, every song stream that we stream we have to pay for. In your case, when you

get your listeners downloading or recording on XM, that is the end of paying for that stream. So, basically, you are benefiting unfairly from that.

If we are talking about parity here, that means should we be entitled to the same kind of conditions or legislation? I think one thing that we do appreciate and that we want to do as Internet radio is that we have been paying lots of royalties. In fact, every month I sign a big check, paying ASCAP, BMI, SESAC and the artists. I am very happy to do that because we fully support them, we fully support them.

On the other hand, we have to be careful not to over-legislate or to over-assert intellectual property rights because in our particular case we are bearing the brunt of it, and as a business we cannot continue to operate under this unfair circumstance.

Senator FEINSTEIN. Yes?

Mr. RUNDGREN. I would be interested to know if this random bunch of songs that you have recorded is considered a distribution, would not XM be entitled to a refund when somebody erases one off the device?

Senator FEINSTEIN. No more than if you break your CD.

Mr. RUNDGREN. Well, the whole point is it is an arbitrary bunch of songs and the likelihood is you might not keep any of them.

Senator FEINSTEIN. But the point is you have them, just as you have your record library or——

Mr. RUNDGREN. Well, you are making the assumption that it is kept just because it is recorded. It may be immediately discarded afterwards.

Senator FEINSTEIN. No, because it is distributed.

Mr. Bronfman?

Mr. BRONFMAN. Yes, I think that is a fundamental misunderstanding of the legislation and the proposal. The legislation actually allows people to record blocks of programming. When it becomes a distribution is when those recordings are disaggregated and libraried, and that is a distribution.

What Mr. Parsons is arguing for is that the compulsory license covers a distribution as well as a performance, and that will result in his not having to pay a fair market rate. We want consumers to disaggregate, we want consumers to store music, we want consumers to buy, we want songwriters like Ms. Shaw to be compensated. What we don't want is a situation where the misuse of copyright law is used to allow a distribution to be delivered under a compulsory license.

Then why would iTunes ever exist? It shouldn't exist because this service substitutes for iTunes. And as Mr. Parsons advertises, his device is not a pod; it is the mother ship. In other words, it is better than an iPod because it is a distribution service and you don't have to pay for it. It is absolutely free.

Mr. RUNDGREN. You cannot get a song on demand from XM radio. You cannot get a single piece of music on demand.

Mr. BRONFMAN. Mr. Rundgren, you can record 50 hours of music. You can identify the five songs that you wanted.

Mr. RUNDGREN. But you can do that off of terrestrial radio.

Mr. BRONFMAN. No, you really cannot do that off of terrestrial radio. And I think the other distinction that is clear here is that

this is a single service. Terrestrial radio is a broadcast service and some third-party device manufacturer that Mr. Parsons is holding up consistently is not part of a single service, which is what XM is doing.

Chairman SPECTER. Mr. Rundgren, do you care to respond?

Mr. RUNDGREN. I mean, just insisting something is different doesn't make it different. As I say, there may be some convenient elements that are built into this device. It doesn't mean that everybody is going to use them. We are making the assumption that just because that capability exists, people will use it to the extent that justifies additional fees.

On top of that, this is not the record industry's problem. The record industry's problem is peer-to-peer networks, where people do get the songs they want and they get them without paying royalties and they are fully decontextualized direct from the record.

Chairman SPECTER. Thank you.

Senator Schumer.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman. I want to thank you for having this hearing and thank all of our witnesses for a lively discussion. It is a very important discussion because many of the issues our Committee deals with come when technology bumps up against intellectual property. And we want to see both furthered, so you have difficult situations all the time.

I told my kids the other day I had that record and they didn't know what I was talking about, and they are 21 and 16. Like most people, I guess, we have this big collection of records that we don't want to get rid of because I remember buying them all when I was a teenager and in college and later. They are sentimental, but they take up all this space and they are so heavy and we don't know what to do with them, but they are still in our house.

Digital music technology is allowing more people to enjoy music in more places than ever before. That is great. The advance is a huge step forward for everyone involved in music, from the artists who want to see as wide a distribution of their work as possible, and producers, to broadcast companies and listeners.

But as I said, while we support the advance of music and technology and all the new possibilities it brings, we have to make sure it is done in a way that treats all parties involved fairly. And to me at least, that means making sure intellectual property is protected because average people would say, hey, I don't want to—in China, there is a whole different mentality and they don't even believe in protecting intellectual property right now. They don't think there is anything wrong with taking somebody else's work and not paying for it.

So to me at least, this argument here is Napster all over again, except it is radio. I remember when Napster first appeared on the scene. It was great. Everyone loved it, and then people realized as it became more and more prominent that it wouldn't lead to more music, but it would lead to less music because people weren't being rewarded for the work that they put in.

I think what happened with Napster was very good. We have a whole new view that it was wrong, and people now, because all the companies got together, don't mind paying the $.99. I don't. I give my kids $20 a month so I can have 20 new songs on my iPod. It is great for everybody. So Napster taught us we need balance, that we should support the progress being made in new technology for music listeners, but we need to do it in a way that treats parties fairly, promotes healthy competition, and rewards intellectual property.

That is why I am glad you are holding this hearing and that is why I am glad Senators Feinstein and Graham have introduced their legislation which I intend to support. I think it does strike that fair balance. The best new ideas should be allowed to compete in the marketplace, but to truly promote healthy competition, everyone needs to be competing on a level playing field that makes sense.

The standards that apply to one provider of digital music should apply to others providing the same kind of services. That is basically my view. As we learned from Napster, even when exciting new ways of getting music to listeners are created, it shouldn't be simply at the expense of people who make that music possible in the first place. Our laws, simply put, need to keep pace with rapid technology.

The basic framework of rewarding people for the efforts of their labors has to keep pace with technology. Just because a new technology comes in doesn't mean you throw that away, even if it makes it a little easier and more convenient for the listener, because in the long run the range and the depth of entertainment, music, joy, whatever you want to call it, will decrease if we do that, not increase. So that is why I support this legislation.

I just have one quick question, Mr. Chairman. I only have a minute left, so I am only going to ask it of Mr. Parsons. Let me just ask you, at what point do we draw the line? At what point does recording a radio show turn into creating your own personal music library? The devices you are holding up are made for the purpose of providing music for listeners to record and keep, not just listen to once. Where is the line? You would draw it in a different place than I would or Senator Feinstein would.

Mr. PARSONS. Senator, probably so, and I agree with you a hundred percent, by the way, on all of the Napster comments. The primary difference between the Napster issues and these issues are the in the Napsters issues there were no payments; it was for free. In these issues, we are the single largest payer of performance rights existing of anyone at this table.

The large companies pay nothing. We pay more than all other distribution mechanisms combined, and so that element of paying for performance, and particularly on a compulsory license where, in fact, the little artist as well as—Madonna doesn't need much help; Warner watches after her well. But the smaller artist—when it is compulsory, the little guys get played and the little buys get paid, and that has been the elegance behind this system.

Where, in fact, it becomes a difference and where across the line does it, in fact, go when you record is a question that I think has been seminal to the question of whether it is a cassette, whether

it is a reel-to-reel tape, whether it is recorded off of FM radio, whether it is recorded off of ours. Certainly, where this Committee has come out in the past and where Congress has come out in the past is it is permissible to make one copy for your personal use, not for distribution, not for sending it out across the Internet, at which point it becomes illegal.

So what we have done is we have looked at the laws and we have designed the products consistent with the laws. We have paid for the manufacturing of them and we have paid again for the performance of them. But we have made the things that are legal easy to do. We have made the things that are illegal almost impossible to do.

On this device, you can pull out a card, slide it into your computer and, boom, it is out on the Internet. Your music is compromised forever. We actually had a service that tried to abuse a product of ours 2 years ago by, in fact, putting it on to the computers, being able to tag it and get it off of the Internet. We worked very quietly and very cooperatively with the recording industry who, by the way, have been our partners in this process, I mean, really for a while in developing this business.

We shut that down. How did we shut it down? Well, actually, we removed our product from the market. No one even noticed it. We terminated that product completely because someone had found a way to abuse it and get it out on the Internet and distribute it beyond their own personal use.

But when this Committee or this industry decides that it is time to deny the American public the right to make a single copy over the air for their own use, then there are far larger issues at play than XM radio. There is TiVo and HBO and the Internet and tape. So those are the issues that the laws are in place. We pay under the laws. We pay for recording, we pay for performance, and we are willing to continue to do that, but not to be isolated and picked out as a single industry to enforce.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Schumer.

Mr. Bronfman, do you have another comment?

Mr. BRONFMAN. Yes. I just want to say Mr. Parsons continually hides behind the consumer and this notion that they have the right to record one song off the radio. Certainly, they do, and there is nothing about this bill or nothing about our arguments that suggests that we want to stop consumers from recording off of the radio.

This is not a radio. This is an iPod, this is a distribution. This is clearly what XM calls their devices. It is in no way an iPod, and to suggest that librarying thousands of songs is somehow the same thing as a consumer with a reel-to-reel tape recording off of a radio is just, as I said before, completely, utterly and without question disingenuous. It is not the case, and we must insist that a distribution is a distribution, not a performance.

My only other point to Mr. Parsons, who continually says that he is the largest payer of performance royalties, is that is true. It just shows how under-compensated our artists are in relation to the rest of the industry.

Chairman SPECTER. Thank you very much, Mr. Bronfman. Thank you all. Senator Cornyn was here earlier, but had other commitments and had to leave. Without objection, his statement will be made a part of the record.

This has been a very illuminating hearing, and it is obvious that it is very complicated, very technical and very controversial. We make an effort, as Senator Feinstein alluded to earlier, to try to bring the parties together to see if we can't find some accommodation. I am prepared to undertake that further as Chairman of the Committee to invite you in for a roundtable discussion on a less formal basis, more informal basis. Senator Feinstein, I hope, will join us to see if we can work it out.

Very frequently, all of your interests are best served by coming to an agreement rather than leaving it up to the Congress because you know the issues much better than we do. We will try to become familiar with them, but our expertise is not going to match yours. Ultimately, we have the responsibility for making a public policy judgment as to what is fair and what is equitable, but we have found that a better path on many, many similar controversies is to try to bring the parties together. You are better off in working it out than in relying on our judgment very frequently.

Senator Feinstein.

Senator FEINSTEIN. I would thank you for that, Mr. Chairman. These are the two least controversial areas. Wait until you get to interactivity. These are the two areas where I thought there was considerable consensus, I guess, outside of XM, and so I am rather puzzled how anybody could have a problem with just allowing everyone to do the same thing, which is parity, under the compulsory license. To me, it is the fairest thing that could be out there. In any event, we will see.

Chairman SPECTER. Well, beauty is, as we know, in the eye of the beholder. I heard a fair amount of controversy here today. Perhaps it is contagious when you come to a hearing room occupied by Democrats and Republicans. We sometimes have disagreements between the two parties.

That concludes the hearing. Thank you all very much.

[Whereupon, at 11:06 a.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Submitted Questions by Chairman Arlen Specter
For Edgar Bronfman, Chairman and CEO, Warner Music Group
Senate Judiciary Committee
"Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution"
April 26, 2006

(1) In your written statement and oral testimony, you argue for a uniform royalty standard for all platform providers. Would your stated purpose of "parity along the platforms" be met by expanding the standard currently used to set satellite radio royalty rates to all platforms? If not, why not? Are there elements of the satellite radio standard that you think might be worthy of consideration to incorporate into a uniform standard for all platforms?

Creators should receive fair market value for their works. The statutory license is already a limitation on the free market; we should ensure it's not a subsidy as well, something Congress never intended. If these services pay for other content at fair market rates, why shouldn't they pay for the music that is the core of their business?

In creating the section 114 statutory license, Congress intended to provide fair and efficient access to recordings through "fair and efficient licensing mechanisms." See H.R.Conf.Rep. 105-796, at 79-80. Such goals can only be achieved through the adoption of an unambiguously fair "fair market value" standard.

Numerous other licenses determined through litigated proceedings are also based upon a fair market value royalty. These include compensation for government use of patents and copyrights under 14 U.S.C. §1498, as the minimum damages for patent infringement under 35 U.S.C. §284, as damages for trade secret misappropriation under Section 3(a) of the Uniform Trade Secrets Act, and as the fee payable for musical work performance under the ASCAP and BMI consent decrees.

The first Copyright Arbitration Royalty Panel (CARP) proceeding to set rates under Section 114 inappropriately set a "low" royalty, basing its decision just on the objectives set forth in Section 801(b)(1) and unconstrained by marketplace reasonableness. When Congress extended the Section 114 statutory license to webcasters and other new services in 1998, it specifically adopted a fair market value type standard – that of a "willing buyer and a willing seller." 17 U.S.C. §114(f)(2)(B). This standard was in direct response to (and soon after) the CARP's setting of a "low" royalty in its first proceeding. Unfortunately, "pre-existing services" (including satellite services) were grandfathered, allowing the first CARP's inappropriate lower standard to continue to apply for them.

From 1976 to 1998 it was generally understood that the "reasonable rates" payable under all compulsory licenses were market rates. The determination of the first Section 114 CARP upset that understanding. The proper action now is not to shift all services to the misguided standard based on the CARP's first Section 114 proceeding, but to bring all

services within the fair market standard intended by Congress, as evidenced by its 1998 addition.

It should be noted that the PERFORM Act would retain factors currently in Section 114 that are drawn from 801(b)(1). These factors, such as consideration of the "economic, competitive and programming information" including substitutional and promotional effects and the relative roles and investment of the copyright owner and user, specifically address two of XM's main concerns: the economic investments made in launching its service, and the belief that it promotes the sale of sound recordings. Therefore, the standard in the PERFORM Act incorporates what XM believes to be the most important factors while ensuring that copyright owners and artists are not paid below-market rates.

(2) Senator Feinstein's PERFORM Act would implement a uniform royalty rate structure for all radio platforms based on a "fair market value" standard. Can you elaborate on how a "fair market value" differs from the existing royalty rate structure for satellite radio? Do you have economic estimates on how much more satellite radio would pay in royalties if a fair market value standard is adopted?

A "fair market value" represents the true worth of a work and more directly reflects the standard intended by Congress in establishing a statutory license based upon fair and efficient licensing mechanisms. Unfortunately, the first Section 114 CARP apparently disagreed and, as the only arbitration panel to interpret Section 801(b)(1), found that its factors compelled a rate below market value.

The appropriate standard shouldn't be based upon whether a service would lose what amounts to an unintended and unfair benefit. Again, the statutory license shouldn't be a subsidy for a company that has found $3 billion to invest in everything else – its satellites, salaries for its employees, and electricity. Simply, they shouldn't be able to build their business on the backs of creators.

It is very difficult to determine the amount of additional royalties that XM and Sirius would pay under a fair market value standard. The outcome of rate proceedings under either standard is dependent upon the evidence presented. Because rates for XM and Sirius have never been set under the 801(b)(1) standard, there is no decision upon which to base an estimate on how much more XM and Sirius would pay.

(3) Your written statement notes that new digital radio services that enable consumers to save broadcasted music for future enjoyment could undermine music sales. Has your industry been able to attribute its economic losses because of the recording features on these portable digital radio devices? Can you isolate your economic losses so that this decline in sales is not attributed to download piracy?

While there has not been any comprehensive study on how these services and devices would affect the market for music sales, it is important to remember that they are still truly in their infancy. We know anecdotally and through informal surveys, however, that consumers perceive such devices as alternatives to the iPod and such services as alternatives to paid download services like iTunes and Napster, with the added benefit of no purchase necessary. For example, in referring to a portable satellite receiver, customer reviews stated the following: "[It's] even better than the iPod because you will never need to buy another song. No sooner than you get sick of a song you can record the newest and best songs." "This device is great and I'm putting my iPod in mothballs. No more downloading, no more 99 cents a tune...Stores more music than I will ever need..." One service's advertisement made the substitution point itself by stating "It's not a pod, it's the mothership."

The result is, and will continue to be, the displacement of sales by these distribution services. We have been criticized in the past for waiting until it is too late to address certain threats to our business, which is why we are here at the early stages. If we had to wait and quantify the harm, it would be too late. The goal is to address the problem early and ensure that everyone has an opportunity to succeed on equal footing.

(4) Some have argued that copyrights are an affirmative right that must be asserted by the owner to protect. However, one could also argue that statutorily mandated content protection amounts to Congress requiring third parties to protect a property that is not their own. Mr. Bronfman, on what basis can Congress rationalize such a mandate?

Legislation intended to protect copyrighted works is perfectly in line with the Constitution's Article 1, Section 8, Clause 8 mission to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The requirements embodied in the PERFORM Act and similar legislation work to secure these exclusive rights and to protect the works of music creators which, as part of the core copyright industries, account for 6% of this country's GDP.[1]

Legislation also prohibits parties from taking actions that would directly or indirectly lead to the harm of copyrighted works and their owners. The particular services and devices at issue that XM and others are offering threaten the exclusive rights enjoyed by copyright owners and, thus, the stated mission of the Constitution's Copyright Clause as well. Congress certainly has the authority to enact legislation to address such a threat.

Given the compulsory license, we are deprived of our ability to negotiate rates and terms in the free market, all in the name of more efficient licensing. Establishing efficient licensing is fine, but we shouldn't in the process be robbed of things like content protection that we'd otherwise get in the marketplace. If Congress is going to grant compulsory use of our works, it must somehow replace the content protection for which

[1] "Copyright Industries in the U.S. Economy 2004 Report," Stephen E. Siwek, Economists Incorporated.

we are no longer able to bargain. The PERFORM Act is legislation that accomplishes this.

(5) *How can Congress mandate content protection in a manner that protects and honors consumer fair use expectations?*

While there may be disagreement as to what constitutes "fair use," the content protection embodied in the PERFORM Act and similar legislation does nothing to impede the activities consumers have engaged in for decades. These bills still allow listeners to record blocks of programming and engage in time-shifting. What's not permitted without a license is chopping up programs and automatically organizing by artist, song, etc., to create a music library. Such activity is not fair use.

Questions Submitted by Senator Dianne Feinstein
On "Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution" April 26, 2006

Questions for Edgar Bronfman, Chairman and CEO, Warner Music Group

1. *One of the issues I have tried to resolve was the definition of interactivity. Despite two weeks of intense negotiations, a compromise solution was not reached. However, it appears that something should be done on this issue. Do you believe that companies like Live365 and Yahoo! should be allowed to personalize their music programs for individual listeners since they have to compete with broadcast radio that does not pay for a performance license?*

We want these services on the market, but as a general matter it is inappropriate to include interactive services within the statutory license. The statutory license was created for radio; personalized music services are not radio because they are tailored in a way that satisfies an individual's listening desires, mimicking the experience provided by other services that must negotiate terms in the free market. Congress drew the line at interactive services for a reason.

That said, we are willing to modestly expand the statutory license to include some personalized services, but it is only fair that we agree on a rate for those services. Personalized radio services currently negotiate licenses in the free market. Including them in the statutory license shouldn't result in a diminution of those rates or a subsidy to services like Yahoo!. Unfortunately, the personalized radio services have refused to discuss rates. Part of their reason may be that rates for other services are currently being considered by the CRB. Thus, it may be best to wait until after the CRB proceeding is completed. We support the provision of the bill that would bring the parties back together after the CRB rules.

2. *In his written testimony, Mr. Lam of Live365 argues that Grokster addresses the issue of protecting music sufficiently and that companies like his should not have to implement technologies to protect music unless they are working with an electronics manufacturer to develop devices like the ones being proposed by XM and Sirius. In your opinion why isn't Grokster sufficient? I am sure your company does not like to bring lawsuits, but why shouldn't this be left to the courts?*

The U.S. Supreme Court's unanimous *Grokster* decision emphasized the importance of protecting copyrighted content, a major purpose of the PERFORM Act. Businesses, the Court found, should not be able to benefit at the expense of those who create that content. While *Grokster* was extremely positive for our industry, it dealt with the issue of inducement.

Here, we are concerned with a company's integration of a service and device that serves to duplicate the experience of a download service, but without paying the appropriate fee. To protect our rights, it is necessary to ensure that radio broadcast programs are enjoyed, as

intended, as a passive listening experience. That's why the PERFORM Act is the solution – an equal obligation placed on everyone creates a level playing field.

In addition, content protection requirements are routinely included in free market content licenses. If we are stuck with a statutory license, then that license should include adequate content protection. After all, the statutory license is for radio, not downloads.

We always view lawsuits as a last resort. Engaging in legal proceedings is expensive and time consuming, and promotes uncertainty when decisions vary among Circuits. It is in everyone's best interest to work out differences in the marketplace, and to ensure a swift and legally certain rollout of new services.

3. *Mr. Parsons of XM argues that the Audio Home Recording Act is sufficient protection for musicians and songwriters. He argues that since his company would have to pay you a royalty for the production of the device that should be sufficient. Why doesn't that cover it?*

XM's contention is that, because it is paying royalties under the AHRA, it is not obligated to make payments for the sound recordings it distributes to its listeners. But payment for one in no way substitutes for payment for the other, and the numbers clearly reflect this: record companies and their artists make $2 million in *one year* from royalties under the AHRA; conversely, the same parties will make the same amount through online sales in *one day*.

In addition to this vast difference in payment, the AHRA is misapplied here is for several reasons:

When the AHRA was passed by Congress in 1992, it was not intended to cover an end-to-end service that profits from the copies – that's a distribution service, not home taping. Further, in *RIAA v. Diamond Multimedia*, the only judicial decision arising under the AHRA, the Ninth Circuit interpreted the AHRA to exempt most activities involving a computer, such as those of an MP3 player. The court's decision severely limits application of the AHRA to devices other than those that were its focus.

The AHRA's text and legislative history make clear that Congress intended the AHRA to provide immunity only for claims based on the manufacture of the device, and nothing else. Here, XM is providing subscribers with an integrated service consisting of the satellite radio transmission and the portable receiver (a device which is, in XM's own words, the functional equivalent of – and a substitute for – an iPod). Such an end-to-end service completely under the control of XM is not what Congress intended to immunize from liability through payments under the AHRA.

Simply, the AHRA is not a replacement system for a distribution payment and does not exempt XM from paying creators when it distributes their content to users. Allowing XM to shoehorn a new distribution service into the Section 114 compulsory performance license or the pittance that is an AHRA royalty is not and should not be permitted under the law.

Responses of Gary Parsons, Chairman, XM Satellite Radio to Submitted Questions by Chairman Arlen Specter Senate Judiciary Committee "Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution" April 26, 2006

(1) Both the written and oral testimony of the witnesses representing a diverse group of industries appearing before the Committee during the hearing supported the adoption of a uniform standard for all music service providers. What one argument would you pose to the Committee against the adoption of a uniform standard?

Response:

XM does not oppose the adoption of the Section 801(b) factors as a uniform standard applicable to all services that perform copyrighted sound recordings under the Section 112 and 114 statutory licenses.[1] That Section 801(b) standard has been used successfully to set "reasonable copyright royalty rates" for music rights since 1976 and it has been the standard applied to determine sound recording performance rights for digital cable and satellite radio services since 1995. It is the standard that *the recording industry itself operates under* when it negotiates or arbitrates the amount of money recording labels must pay to music publishers for the reproduction and distribution of musical works under the section 115 compulsory "mechanical" license. Consistent with the policies underlying our Copyright laws, the 801(b) standard guarantees copyright owners

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[1] The four Section 801(b) factors are:

"(A) To maximize the availability of creative works to the public;

"(B) To afford the copyright owner a fair return for his 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."

and performing artists a "fair return" for their creative efforts,[2] while also taking into account the innovative contributions and cost structures of the various types of licensed services. Under this well-established standard, XM and Sirius each have paid tens of millions of dollars of performance royalties to recording labels and artists, and are expected to pay hundreds of millions of dollars in such royalties over the next five years.

What XM does oppose is a change to the so-called "fair market value" standard. "Fair market value" is an inherently flawed concept where the largest users of the rights (*i.e.*, terrestrial broadcasters) *are completely exempt from any royalty obligation or license restrictions*; where t*here are no marketplace transactions within the precise market to provide a benchmark*, and where the market is dominated by four companies that do not compete against one another with respect to performance rights and that wield sufficient market power to charge higher than competitive rates. In short, it is impossible to assess a "fair market value" here because there is no "market" for these rights, and the "marketplace" itself is not fair.

Congress recognized that the so-called fair market standard is unworkable when, after a 1997 ratesetting proceeding for satellite television signals, Congress legislatively slashed the arbitrators' award by up to 45 percent and changed section 119 of the Copyright Act to ensure that this "fair market value" standard never could be used again to set satellite television royalty rates.

The only standard that has never required Congressional intervention is the standard set under § 801(b). That standard requires fair treatment of both licensor and licensee, and should be maintained as the standard for sound recording performance rights. Thus, if Congress wishes to achieve a uniform ratesetting standard, XM would support the extension of the Section 801(b) standard for all statutory performance and ephemeral recordings licensees.

(2) You have stated that XM Satellite Radio pays more in royalties than any other industry. Can you please explain that amount and the royalty rate that on which it is based?

Response:

In my testimony, I stated that XM is the single largest payor of sound recording performance rights, and that the satellite radio industry (XM and Sirius together) pays more in sound recording performance rights than all other licensees combined. The

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[2] "The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.'" *Twentieth Century Music* v. *Aiken*, 422 U.S. 151, 156 (1975), *cited in Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings*, Docket No. 96–5 CARP DSTRA, 63 Fed. Reg. 25394, 25406 (May 8, 1998).

royalty payments by XM and Sirius to SoundExchange were established in a license agreement resulting from a voluntary industry-to-industry negotiation in 2001, as contemplated by Section 114. The agreed-to payments are not based on a "royalty rate," but rather are flat fee payments made on an annual basis. The specific amount of the payments are not public information. However, our annual 10K report states that, in 2005, the amount of the performance royalty payments made by XM to SoundExchange, ASCAP, BMI and SESAC collectively totaled approximately $22 million. By contrast, as you are aware, our largest competitor, the terrestrial broadcast industry, does not pay SoundExchange any royalties for their AM, FM or HD radio broadcasts.

The term of the five-year license with SoundExchange ends on December 31, 2006. The satellite radio industry (XM and Sirius) is in a period of negotiations with the recording industry regarding appropriate royalties for the next five-year license term. We fully expect that those license fees will generate hundreds of millions of dollars over the next five years (based upon published analysts' estimates of satellite radio growth and the current rates we are paying). We anticipate similarly large royalty payments for songwriters and publishers upon the renewal of our ASCAP, BMI, and SESAC licenses.

(3) Do you have an estimate on how much more in royalties XM will end up paying if a uniform fair market value standard is imposed on all radio services?

Response:

XM cannot estimate the amount of royalties that might be assessed under a "fair market value" standard. For the reasons discussed generally in response to Question (1), there is no actual "market" against which to compare license payments, and any hypothetical market would not be a "fair" market.

As noted above, under the Section 801(b) standard, XM expects that sound recording performance license fees for satellite radio over the next five year license period will generate hundreds of millions of dollars in royalties for the benefit of recording labels and performing artists. Those anticipated payments would be a "fair" royalty, well in parity with the royalties paid by XM to the composers, songwriters and music publishers for the performance of their copyrighted works on the XM service.

(4) Your written testimony notes that the services you provide are distinctly different from those of Apple iTunes, Napster, and other music downloading services. How can XM distinguish its service when it compares its new XM2GO services and devices to the Apple iPod by stating, "It's not a pod, it's the mothership"?

Response:

I thank the Chairman for giving XM the opportunity to clarify an unfair and misleading characterization of both our advertising slogan and our device.

Our new portable radio devices perform multiple functions. They receive live XM transmissions, so you can listen to XM whenever you are in range of our satellites or repeaters. They display live data feeds such as sports scores and stock quotes, as well as identifying song titles and artist names. They allow you to save content recorded from XM -- to "time-shift" programming you cannot hear live, to listen to saved XM where you cannot receive the live signal, or to save particular songs to listen to at later time.

When connected to a personal computer, our subscribers can use these devices to purchase downloads of songs our subscribers hear on XM, through our partnership with the new Napster service, or, they can store their own MP3 files, on up to half the storage capacity of the device. (But, as I noted in my testimony, any XM programming recorded on the device can only be output in analog form, and cannot be digitally transferred or copied from the device.) This provides our subscribers with the same convenient opportunities to purchase music by download that is available from iTunes for the iPod, or through Napster for other MP3 players as well as for our new XM portable radios.

An iPod or similar MP3 music player has no utility unless it first has been connected to a personal computer so that music can be loaded on to it. In this sense, the new XM devices have greater functionality than an MP3 music player since, as free-standing portable live radio receivers, they do not need to be a "pod" connected to another device. That is why our marketing people hit upon a slogan that conveyed that these new XM2Go radios combine on a single device the ability to hear live satellite radio with the ability to purchase and take your own MP3 files with you.

Combining all these functions into a single device has been recognized by many technology writers as a major evolutionary step forward for satellite radio, for personal technology, and even for e-commerce. For example:

- "getting live XM Satellite Radio, being able to see constantly updated scores for the New Jersey Nets, and listen to my own MP3s and WMAs all on the same device is pretty much my holy grail of audio devices." PC Magazine, review April 7, 2006

- "XM Radio, Samsung, Pioneer open the door to the promise of 'see it, hear it, buy it' era." Advertising Age, February 20, 2006

- "If you hear a song you like right when you're out of the house, well, you just bookmark it, go home and plug it into your PC. The device will purchase the song from Napster. A brave new world out there." CNN Live Today, January 4, 2006

- "Despite all the extras, the best part of this player is on-the-go access to XM radio, with its 24-hour local traffic and weather and its vast library of music – much of which you'll never hear on playlist-limited broadcast radio." The Washington Post, May 21, 2006 F7, "A Music Player Only the RIAA Can't Love."

These are but a few of the reasons why these devices have received accolades not only from technology journalists, but also from consumers -- whose votes awarded these devices a Consumer Electronics Show award in 2006 as a "Best in Show."

(5) Can you explain to the Committee XM's views concerning the difference between a performance right and a distribution right? When does a performance of copyrighted music become a distribution?

In my letter to you and Senator Leahy, dated May 4, 2006, I explained at length the reasons why, when enacting the Digital Performance Right in Sound Recordings Act of 1995, your Committee and Congress clearly distinguished between digital *performances* under Section 114, and digital *distributions* by transmitting downloads ("Digital Phonorecord Delivery") under Section 115. I would ask that letter to be included in the record of the hearing. A copy of that letter is attached to these responses.

Responses of Gary Parsons, Chairman, XM Satellite Radio to Questions Submitted by Senator Dianne Feinstein On "Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution" April 26, 2006

1. ***In your written testimony, you seem to argue that consumers will pay Napster to buy their music even if they can use your new recording devices because the quality of music is better from Napster and they don't have to worry about commercials, background noise, or DJ chatter.***

   However, XM advertises it has almost 70 music channels that are commercial free, and even the Broadcaster's witness, Mr. Reese, argues that digital music is "crystal-clear." Given that satellite radio markets its service by saying there are no commercials and you have higher quality sound and less DJ talk, it seems hard to believe that consumers will buy a song from Napster when they could record it from your service for free. Wouldn't it be bad for your business if the music quality was actually poor?

As I noted in my testimony, our research suggests that XM subscribers buy more music than the average consumer. To help fill that market need, we partnered with Napster to give our subscribers a convenient way to buy the music they enjoy. We believe there are many reasons why our subscribers will want the ability and convenience of downloading songs they could record from XM.

First, a download service enables our subscribers to receive any song they choose, when they want it. By contrast, our subscribers do not know whether or when a particular song ever will be played on an XM channel. Consumers are willing to pay for that convenience. Anyone could record "Desperate Housewives" on their VCR or TiVo, yet consumers purchase downloads of the same program to watch on their portable Video iPod, and DVDs of television programs are among the biggest selling video products. Anyone today could record songs off the radio (including satellite radio) on an audio cassette deck or CD recorder – and they have done so for decades. Yet consumers for decades have also purchased that same music on vinyl lps, tapes and CDs, and they currently buy downloads of the same songs to listen to on their MP3 player. That experience tells us that the possibility of recording from XM does not substitute for the immediacy, certainty, and convenience of purchasing downloads.

Second, a recording made on our new portable radios from XM radio transmissions is locked to the device. The subscriber can listen to the recording via the headphone jack, but the recording cannot be digitally transferred off the device. By contrast, a download gives the consumer much greater flexibility. A download from the Napster service can be copied digitally to a PC or to other handheld MP3 players, or even burned to CD. We believe that consumers also will be willing to pay for a download, due to the limitations we imposed in our devices for content recorded from XM radio.

Third, as you note in your question, a recording made from an XM radio transmission is not the same in quality or character as a purchased download from the XM + Napster download service. Recordings from XM are more compressed than either CDs or commercially-marketed Windows Media or MP3 files. An individual song taken out of the context of an XM program will rarely, if ever, be a complete version of the song, given that our programming includes disc jockey announcements, and continuous transitions between songs. Saving a song from an XM transmission is, in that respect, no different than taking a razor blade to audio tape.

For that reason, we believe that giving our subscribers the ability to purchase downloads from Napster will be good for our business, good for Napster, good for our subscriber base and good for the music industry.

2. ***In your written testimony, you argue that because the legislation only addresses content protection for Internet, satellite and cable radio and not broadcasters that it is "discriminatory." However, I am sure you are aware that: the Commerce Committee has jurisdiction over broadcasters and is looking into the transition to digital radio as well as the "audio flag"; and the National Association of Broadcasters and the Recording Industry are in the middle of negotiations on how to protect music broadcast by traditional radio stations.***

   Given that the Judiciary Committee only has jurisdiction over companies regulated by Section 114 (Internet, satellite, and cable) and these other efforts are on-going, how is it discriminatory for the Committee to examine these issues?

The exemption of terrestrial broadcasts from both the programming restrictions and royalty payment obligations under Section 114 creates a fundamental discriminatory impact between satellite radio and our dominant broadcast radio competitors. Satellite radio currently pays more royalties annually for performances of sound recordings than webcasters, cable radio and all other services combined -- whereas AM, FM and HD digital radio broadcasters pay nothing. The programming on XM under the Section 114 license is subject to restrictions, such as the sound recording performance complement, whereas terrestrial broadcast radio has no such content-based limitations. Terrestrial radio stations can publish program guides or tell their listeners what songs are coming up next; XM cannot do that under the Section 114 license. XM invested in technology so that its radio receivers display the name of the artist and the song being played; terrestrial radio stations do not. XM incurs very substantial expenses in money and resources to store and to provide to SoundExchange massive amounts of data each month detailing the number of times each song was played on the various XM channels; terrestrial radio stations have no similar expense or obligation with respect to their broadcasts.

With due respect, the Perform Act would do nothing to eliminate or even to alleviate any of these fundamental disparities that prejudice XM's ability to compete against terrestrial radio broadcasters. To the contrary, the changes that the Perform Act proposes to make to Section 114 will significantly exacerbate this unjustifiable

discrimination against satellite radio in favor of the terrestrial radio sector, and make it more difficult for XM to compete against terrestrial radio.

3. ***In your written testimony, you argue that the device you want to offer is no different than in the days of "reel-to-reel tape and analog cassettes" when consumers could use "a razor blade to cut the tape and with the help of Scotch tape rearrange songs to make a party list of favorites." Do you really believe there is no difference between that and the functionality you want to provide? If nothing else, won't you concede that the quality of the recording is very different from digital music?***

As I noted in my testimony, and as noted above, recording off XM ***is*** recording off the radio. Our subscribers have no control over what is played on XM channels, and they do not know if or when or if ever a particular song will be played. The reverse also is true, in that XM has no control over what or how much programming our subscribers may be hearing or may choose to record.

XM programs its channels using live announcers and transitions between songs. It is very different from a "digital jukebox" or the typical internet webcast, which plays individual songs in their entirety, separated by silence. Any song saved out of the context of a continuous stream as originally programmed by XM will rarely, if ever, be a complete version of the song. The saved version of the song may begin after the song already has started. The beginning of the song may include parts of the disc jockey announcements or station identification or promotional messages, or parts of the prior song. The end of the recording may terminate before the song has completed, or it may also include parts of the next song, disc jockey announcements or station identification or promotional messages. There is no way using the device that a subscriber can avoid this or edit the saved tracks.

Thus, each song sounds the same as if you sliced it out of an audio tape of a radio broadcast. A playlist that includes saved individual tracks will have the same rough-edged transitions as an audio tape that spliced together individual songs. Recordings from XM transmissions are significantly more compressed in audio quality than the fidelity of downloads offered for sale through the XM + Napster service. In our view, these "home tape" recordings made on the XM portable devices are not substitutes for the perfect quality copies that the subscriber can purchase from XM + Napster or on a CD.

In my view, the major differences are that, on the one hand, using the XM portable radios is more convenient than razor blades and tape, and on the other hand, that a consumer who records on tape or CD can keep that recording forever (whereas saved content on the XM devices are inaccessible without a current subscription). But, as I said in my testimony, making "fair use" personal recording more convenient does not -- and should not -- make it illegal.

As I noted in my testimony, we designed our devices in full accordance with the Audio Home Recording Act. The devices do not permit digital serial copying. Royalty payments are made on each of these devices. If our new recording devices succeed in the marketplace, we are optimistic that they will generate tens of millions more dollars in royalty payments under the AHRA.

Submitted Questions by Chairman Arlen Specter

For Bruce Reese, CEO and President, Bonneville International, Corporation

Senate Judiciary Committee "Parity, Platforms and Protections: The Future of the Music Industry in the Digital Radio Revolution"
April 26, 2006

(1) Mr. Reese, can you explain to the Committee what royalty rate your industry is currently paying for its Internet retransmissions? And can you explain why your industry does not pay performance royalties for traditional over the air transmissions of music?

1(a) We do not know the final rate radio broadcasters are currently paying the recording industry for sound recording performance rights for its Internet simulcasts. There is currently an ongoing proceeding before the Copyright Royalty Board that will set rates retroactively from January 2006 through December 2010. For 2005, radio stations had the option of paying a per listener/per song fee of .0762 cents (less 4% for incomplete transmissions) or a fee based upon aggregate tuning hours ("ATH") of listeners equal to .88 cents per ATH for music programming and .0762 cents per ATH for news/talk programming. There were minimum fees of the lesser of $500 per station or $2,500 per statutory license.

1(b) For decades, the recording industry sought and Congress has consistently rejected, providing a performance right for sound recordings.

Congress specifically and definitively rejected applying performance rights in sound recordings played by terrestrial analog and digital radio stations because they posed no threat to sales of sound recordings and for the following additional reasons:

- Congress has long recognized that the recording industry reaps huge promotional benefits from the exposure given its recordings and artists by radio stations. These include airplay of the recordings, on-air interviews, and concert promotion publicity. Many stations, such as WGMS here in Washington provide specific opportunities to feature new and emerging artists.

- In the words of the Senate Judiciary Committee: "Free over-the-air broadcasts are available without subscription . . . and provide a mix of entertainment and non-entertainment programming and other possible interest activities to local opportunities to fulfill a condition of the broadcasters' license."

- Again, in the words of the Senate Judiciary Committee, Congress did not want to "upset longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades."

With respect to this last point, the symbiotic relationship among the various industries is a complex one. Music composers and publishers receive enormous compensation through public performance licensing fees paid by broadcast radio stations to performing rights organizations such as ASCAP, BMI and SESAC. In 2006, the radio industry will pay these organizations approximately $435 million in royalties. Music producers and publishers also receive some royalty payments from producers of sound recordings that record their works, but those sums are small relative to the receipts by the record companies from the sale of recordings. The record producers and recording artists, on the other hand, receive the vast majority of their revenues from the sale of sound recordings. While receiving no copyright fees from broadcasters, they enjoy tremendous promotional values from fee over-the-air broadcasting. In 1995, Congress granted record companies a very limited performance right with respect to interactive and subscription digital audio transmissions of sound recordings (over both cable systems and the Internet). The granting of this new limited right was not premised on any recognition that the producers and performers of sound recordings were suddenly entitled to a new revenue stream. Rather, the rights were granted in response to recording industry concerns "that certain types of subscription and interactive audio services might adversely affect sales of sound recordings and erode copyright owners' ability to control and be paid for their work." Senate Commerce Committee, 1995 Report.

(2) Mr. Reese, your testimony indicates that your industry currently pays royalties based on a "willing buyer / willing seller" standard and that you prefer harmonizing the royalty standard to what satellite providers currently pay. Can you explain to the Committee why you believe your industry's current royalty standard is unreasonably high? And how does your "willing buyer / willing seller" standard rate differ from the "fair market value" standard proposed in Senator Feinstein's bill?

2(a) A point of clarification on the first part of this question. Broadcasters prefer and feel they should be subject to the criteria established in 17 U.S.C. § 801(b) used for satellite providers to determine the royalties they should pay for performance rights in sound recordings. We do not believe we should pay what satellite providers pay because the two types of service are completely different. The section 801(b) standard is the traditional fee standard that, until the private deal struck in 1998 between DiMA and the RIAA that led to the current system, applied generally to copyright statutory licenses. It also is the same standard embraced by the recording industry when it is the *licensee* under a statutory license, as it is under the section 115 mechanical license.

There are several reasons why we believe the willing buyer / willing seller standard radio broadcasters are currently subject to in determining their royalty

rate is unreasonable. First, the standard was distorted in 2001 into the fee that a cartel of the major record companies, acting together through their trade association, under antitrust immunity, could obtain from a single webcaster, Yahoo!, that was intent on saving litigation costs. Second, the standard is now being distorted by the recording industry into a standard that seeks to duplicate what the four major record companies, exercising their near-monopoly market power, could obtain in an non-competitive market, where every buyer must deal with every major record company and the record companies don't compete on the basis of price. That is not reasonable or a fair market. Third, even if you required the CRB to assume a truly and vigorously competitive market (which we believe is the correct rule under current law), the standard creates enormous difficulties in modeling a hypothetical competitive market for sound recordings that does not exist today. Moreover, the standard fails to acknowledge the important policy considerations that have long been a feature of copyright law under section 801(b).

With respect to why we believe that the rate broadcasters are paying for performance rights in sound recordings is unreasonable, there are at least two reasons. First, the Copyright Arbitration Royalty Panel that set the original rate for 1998-2005 based its decision entirely on an agreement between the Sound Recording Industry's negotiating committee and Yahoo which was not based on any arm's length negotiations. The agreement was designed to create evidence to set the royalty rate. Moreover, Yahoo admitted the deal did not reflect a competitive sound recording fee, but rather was done to avoid the costs of litigation estimated at $2 million. Finally, the former chief executive of the company that Yahoo bought later admitted the deal was designed with the anti-competitive purpose of driving Yahoo's competitors out of the internet music delivery market. Second, the fee far exceeds the fees we pay on the Internet to music publishers and songwriters for the musical work performance right in the same recordings. That fee has been set in arms-length negotiations in the shadow of a long history of rate-setting under the ASCAP and BMI consent decrees. There is no basis for concluding that the value of the sound recording right is any greater than the value of the musical work right.

2(b) The notion of a "willing buyer / willing seller" and "fair market value" are indistinguishable. The definitions of the two terms are so intertwined that reverting to a "fair market value" test is, essentially, no change in the willing buyer, willing seller standard.

Black's Law Dictionary defines "fair market value" as the "price at which a willing seller and a willing buyer will trade." Other formulations in the Black's definitions include the notions that neither the seller nor the buyer is under any "compulsion" to buy or sell.

The Internal Revenue Service, Publication 561 also defines fair market value as "the price that property would sell for on the open market. It is the price that

would be agreed upon between a willing buyer and a willing seller with neither being required to act and both having reasonable knowledge of the relevant facts."

In NAB's Direct Case in the 1990-1992 cable royalty proceeding, Paul Much, Senior Managing Director of Houlihan, Lokey, Howard & Zukin, who had 23 years experience in valuation consulting involving many different industries re-affirmed the IRS definition of fair market value as being "widely accepted in the investment/financial community as the basis for value."

Given the inextricable links between willing buyer, willing seller and the definition of fair market value, there appears to be little difference in replacing one standard with the other. Such a substitution would seem to provide little relief in the context of Section 114, and if changes in the definition of fair market value were made only for 114 purposes, considerable ambiguity and confusion with unsettling effects could be created in other legal and commercial contexts, where the definition of fair market value is well settled.

(3) Mr. Reese, it is my understanding that while the broadcasting industry must meet certain public service obligations, they receive their spectrum for free and do not have to obtain a license or pay a royalty for music played on traditional AM/FM broadcasting formats. By contrast, services like XM Radio, who admittedly are not obligated to provide public service announcements, have managed to establish a successful business model despite spending up to $90 million to obtain spectrum, investing billions of dollars to launch satellites, and paying the recording industry a royalty for the sound recording license. In light of your industry's apparent competitive advantage, please explain to me why granting recording artists and labels a full performance right would prove potentially lethal to the broadcasting industry.

I would first like to clarify a number of apparent misunderstandings reflected in your question. First, while it may be true that pioneer radio broadcasters receiving allocations decades ago paid no fee for their spectrum, virtually every current radio broadcast operation has paid anywhere from tens of thousands of dollars to tens of millions of dollars to acquire those operations and collectively the industry has paid hundreds of billions of dollars in such acquisition costs. Our industry also has paid billions of dollars to build and upgrade our facilities, and bring value to the American public over what is otherwise simply air. Terrestrial radio broadcasters continue doing so today as we convert to digital. These acquisition costs include the cost of acquiring the right to use the spectrum on which these stations operate. Second, since 1997, new commercial radio stations must obtain their licenses by way of auctions just like any other spectrum user. Third, it is absolutely untrue that broadcasters do not have to obtain a license or pay a royalty for "music played." Collectively radio broadcasters pay approximately $435 million annually to music performance right collectives in royalties to play music.

In addition to the points above, it should be noted that broadcasters' licensing and public service obligations are by no means insignificant. Licensing requirements include: providing and reporting on programming giving significant treatment to community issues; providing "equal opportunities" to candidates and favorable rates to certain candidates; program sponsor identification; regulated contests and promotions; indecency regulations; maintaining public inspection files; and regulation of lotteries. In 2003, the radio industry provided $6.7 billion in free air time and fundraising for worthy causes. Results for 2005 will be available shortly.

With respect to broadcasters' purported "competitive advantage", satellite providers have none of these obligations. Moreover, broadcasters built their business model on the presumption there would be no performance rights for sound recordings. Satellite operators have known, virtually from the inception of their business, that they would be subject to such fees. Satellite operators gain revenues from subscribers; broadcasters do not. Satellite operators have hundreds of channels available to them. Given these significant differences, one finds it difficult to understand why the presence of satellite should cause Congress to reevaluate its longstanding recognition of the symbiotic relationship between terrestrial radio and performers. (See Answer 1.)

(4) Mr. Reese, what is the current status of the "simulcasting," or simultaneous transmission of over the air radio broadcasts over the Internet, in light of the Bonneville decision?

In April, 2000 the radio industry believed that simulcast streaming was not subject to the sound recording performance right, and therefore was not subject to the fees and conditions imposed by the statutory license contained in Sections 112 and 114 of the Copyright Act. By industry estimates, there were more than 1,700 U.S. radio stations streaming their programming via the Internet. Nearly one hundred (100) radio stations were expected to begin broadcasting over the Internet each month.

These bright expectations have not materialized. By the end of 2002, well over 1,000 U.S. radio stations had stopped streaming their signal on the air due to copyright and other rights issues. Many of the stations to come on line since that time are news/talk/sports stations that are not hamstrung by the sound recording licensing issue.

In the ongoing fee proceeding, the radio broadcasters presented data showing that, as of October, 2005, only about 1/3 of the stations in the top 25 markets were streaming, and only about ¼ of the stations in the next 25 markets were streaming. That is hardly a vindication of the bright promise of streaming. As a result, the public is not getting access to the radio stations they want to hear in the way they want to hear them.

Our company, Bonneville International, was an early adopter of simulcast streaming, with some of our radio stations streaming as early as 1996. In 2001, all of our stations ceased streaming because of the many hurdles with royalties and rights. One by one they have come back online, but it has been very challenging and difficult. For instance, we have had stations that "capped" the number of simultaneous listeners at a very low level in order to control costs. While this helped to somewhat manage expenses, our relationship with our listeners at those stations was severely damaged in the process. Even our stations that attempt to sell advertising that runs during the stream find it difficult to be successful. All it takes is some hour of programming to unexpectedly become "popular" and all advertising revenues are consumed by the additional royalty fees – there are no economies of scale and the last hour of streaming costs the same as the first. On the contrary, we have found that all of our streaming service providers offer discounts based on volume. Our local listeners, which by far make up the vast majority of our simulcast streaming audience, look at our streams as "just another transmitter" in the market and have no idea that each time they connect, they are causing our stations to incur a royalty expense.

In addition, we have found that broadcast simulcast streaming is a much more difficult activity to operate and sell than even "Internet-only" streaming (*i.e.*, webcasting). Most of our over-the-air advertising spots have to be covered and replaced during the simulcast due to AFTRA rights issues. This creates a nightmare in managing in-stream advertising traffic, especially since the technology to handle all of the synchronization, replacement, etc. doesn't exist or is in its infancy. And to complicate matters, the advertisers who do have rights to stream their ads expect them to be streamed at no additional cost, as they too consider our streams "just another transmitter". Webcasting is a straight-up process, not at the mercy of an over-the-air broadcast.

Virtually no broadcaster has found a viable business model for simulcasting streaming. Stations consistently lose money on streaming. The sound recording performance fees are simply too high – right now, the license fees are by far the single largest expense of streaming budgets, and the vast majority of those license fees are for the sound recording right. In fact, stations are paying many times more for the sound recording rights than are paid to the music works copyright owners for the right to make the same Internet performances of all the musical works embodied in the sound recordings. Moreover, the musical works licenses are broader and do not contain the limitations and conditions included in the sound recording statutory license.

Most broadcasters stream in order to provide local listeners with an alternative means of hearing their stations. There are places radio waves do not easily reach, particularly inside of buildings. Studies consistently show that about as many people listen to the handful of stations within their local listening area, as those who listen to all other stations (U.S. and worldwide) combined.

Streaming is a very small, ancillary part of any broadcasters' business. Audiences for simulcasts are universally a small fraction of a station's over-the-air audience.

In addition, the content of a broadcast simulcast is driven by local and over-the-air needs, not by considerations relevant to the development of a viable Internet business. Programming is selected to compete with the local, over-the-air market, not an Internet market characterized by webcasters with tens, or hundreds, of genre-specific channels. A single radio station on the Internet simply cannot, and does not, try to compete with the likes of AOL's Radio@Network, Yahoo!'s LAUNCHcast, Live365, or Virgin Radio. The audience, and the business model, is dramatically different.

AvaRu Music

Submitted Questions by Chairman Arlen Specter
For Victoria Shaw, Songwriter
Senate Judiciary Committee
"Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution"
April 26, 2006

(1) Your written statement indicates that evolving radio services now enable consumers to record broadcasts and build entire jukeboxes of music on portable radio devices. Do songwriters oppose consumer use of these portable devices to build a jukebox of broadcasted music for their own personal use?

While I can not answer for all songwriters, for me and those I know, the answer is an unequivocal "no." As I stated in my testimony, I take great pride in knowing that the public is collecting, listening to, and enjoying recordings of songs I have written. What I do oppose, however, is when my works are being offered as distributions without paying me for them. These songs reflect the time, sweat, and tears poured into my work. They have value. That is why I, and many others, feel victimized when services offer copies of our works for free.

Undoubtedly, radio has been invaluable in introducing my works to the public. As a songwriter, I do receive a little compensation for the performance of those works. But it is the sale of those works that songwriters, artists, and labels rely on to continue making the music fans enjoy. That is how I make my living. Radio is intended to promote those sales, not supplant them. But the new features and devices that some radio services are offering accomplishes exactly that – they supplant the sale that would be made through download services and devices like iTunes and iPod. That is simply not fair.

Portable devices are great. Building up a jukebox of my music is fine. But with that collection should come compensation to me by the services that distribute that music. Only with such appropriate payment can songwriters continue to make the music fans demand and services require.

1600 17th Ave. South, Nashville, TN 37212 / phone:615-297-5533/ AvaRu Music/BMG/SESAC

(2) Senator Feinstein introduced the PERFORM Act on April 25, 2006, that would, among other things, impose a uniform royalty rate on all digital transmissions of music irrespective of the radio service. How will uniform royalties affect you and other songwriters?

As I understand it, the PERFORM Act establishes a royalty rate that reflects the "fair market value" of the work. This seems to me perfectly fair, reasonable, and practical. Allowing some services to pay a royalty below market rate robs songwriters of the compensation we are rightfully due. And establishing a rate that exceeds the fair market value of a work would place a burden on those services we are all eager to see succeed in order to get more of our music out to more fans. Applying a uniform rate ensures that all services have equal opportunity to prosper; applying a fair market value standard to that uniform rate allows everyone – songwriters, artists, labels, and services – to benefit and realize the full value of their work.

May 24, 2006

The Honorable Arlen Specter, Chairman
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6276

Dear Chairman Specter:

Thank you for your letter to me dated May 5, 2006 in reference to my presence and testimony at the United States Senate Judiciary Committee hearing regarding "Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution" on April 26, 2006.

Enclosed please find answers to the additional written questions submitted by Members of the Committee. An electronic version of our responses has been emailed to Mr. Barr Huefner of your staff to his email address at Barr_Huefner@judiciary.senate.gov.

Please do not hesitate to contact me regarding any further questions or comments you may have on this subject.

Sincerely,

LIVE365, INC.

N. Mark Lam
Chief Executive Officer
Live365, Inc.

Enclosure

Answers to Questions Submitted by Chairman Arlen Specter
For Mark Lam, Chairman and CEO, Live365
Senate Judiciary Committee
"Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution"
April 26, 2006

(1) *Mr. Lam, what royalty rate do you currently pay and for what services?*

Live365 currently pays composition royalties as well as performance royalties for copyrighted music. These are the two distinct sets of royalties we pay. In contrast, traditional radio pays only composition royalties.

On the composition side, Live365 pays roughly 4% of revenue for composition royalty to the Performing Rights Organizations ("PROs" – consisting of ASCAP, BMI, and SESAC). Here is the breakdown of our composition royalties paid to the PROs based on revenue:

The American Society of Composers, Authors and Publishers (ASCAP) – 2%;

Broadcast Music, Inc. (BMI) – 1.75%;

The Society of European Stage Authors and Composures (SESAC) – 0.30%;

On the performance side, Live365 pays digital sound recording performance royalties to SoundExchange, Inc. on a per-performance basis for nonsubscription services and on a percentage-of-revenue basis for our subscription services. We currently pay the following rates:

Nonsubscription service – $0.000762 per performance

Subscription service – 10.9% of total subscription revenue

It is important to note that we pay royalty to Sound Exchange as well as the PROs for every song we stream from our system, whether we receive any revenue or not. In contrast, traditional radio pays nothing to Sound Exchange and record labels have been under scrutiny by Congress for

Payola. Recently, major record labels reached settlements with the New York Attorney General for tens of millions of dollars.

(2) *As you understand it, what is the difference between the proposed "fair market value" in Senator Feinstein's PERFORM Act and the "willing buyer, willing seller" under current law as applied to your internet-based operations?*

In general, the accepted definition of fair market value is the price upon which a willing buyer and a willing seller would agree, neither being under any compulsion to buy or to sell.

Implicit in this definition is the premise that either party, buyer or seller, is free to reject the deal and walk away if it is of the opinion that the proposed transaction is not to its perceived benefit.

Although the Digital Millennium Copyright Act (DMCA) requires the "willing buyer, willing seller" standard, as more fully discussed below, the "willing buyer, willing seller" standard was not properly applied in the royalty-rate-setting negotiations related to webcasting.

In our view, the Copyright Arbitration Royalty Panel (CARP) misapplied the "willing buyer, willing seller" standard. This result has been disastrous for the webcasting industry.

The DMCA provides for a compulsory license. The DMCA also mandates that, in the absence of a successful negotiation which results in an agreement between record labels and webcasters, the CARP would determine the royalty rate and recommend such rate to the Librarian of Congress.

In the prior CARP proceeding, and at present, the record labels, represented by RIAA (and now Sound Exchange), were not, and are not, willing sellers negotiating without any compulsion.

Likewise, webcasters were not negotiating as willing buyers under no compulsion to reach an agreement.

Without an agreement with labels, webcasters are faced with the alternative of going out of business. Without an agreement, webcasters would be copyright infringers and subject to injunctive relief to cease operations. This is a major compulsion on webcasters to reach agreement and completely negates the concept of negotiations under the premise that webcasters are willing buyers under the "willing buyer, willing seller" definition.

Of course, the DMCA provides for a compulsory license which obviates the risk of copyright infringement. But, under the circumstances, the concept of "willing buyer, willing seller" cannot apply to negotiations between the record labels and webcasters.

For the webcasters, negotiating with the record labels is tantamount to negotiating with the sword of Damocles hanging over their heads. But for the compulsory license, the webcasters must reach agreements with the labels or go out of business.

This is no small thing. LIVE365 has invested some $60 million in developing its webcasting business and still is struggling to become a viable business. And it remains at the mercy of the various licensors including but not limited to Sound Exchange (alter ego of RIAA), ASCAP, BMI, SESAC, and others.

If the goal is to encourage dissemination of musical content legally with reasonable compensation to copyright holders, the existing system is flawed. It does not achieve the goal contemplated by Congress.

The CARP process, which established the previous and current royalty rates in June 2002 misapplied the "willing buyer, willing seller" standard.

In addition, while not known at the time, it became later known that the CARP process, and its resulting royalty rate, was the result of blatant manipulation to create an artificially high royalty rate for webcasters.

This is evidenced by an email sent by Mark Cuban, who was previously at Yahoo, to Radio And Internet Newsletter (RAIN) after the Librarian of Congress had announced the royalty rates for webcasters in June 2002.

The text of Mark Cuban's email to Kurt Hanson at RAIN is as follows:

> It's very interesting that they built this on the Yahoo!/RIAA deal.
>
> When I was still there (the final deal was signed after I left Yahoo!), I hated the price points and explained why they were too high. HOWEVER, I was trying to get concession points from the RIAA. Among those was that I, as Broadcast.com, didn't want percent-of-revenue pricing.
>
> Why? Because it meant every "Tom, Dick, and Harry" webcaster could come in and undercut our pricing because we had revenue and they didn't. Broadcasters could run ads for free and try to make it up in other areas so they wouldn't have to pay royalties.
>
> As an extension to that, I also wanted there to be an advantage to aggregators. If there was a charge per song, it's obvious lots of webcasters couldn't afford to stay in business on their own. THEREFORE, they would have to come to Broadcast.com to use our services because with our aggregate audience, if the price per song was reasonable, we could afford to pay the royalty AND get paid by the webradio stations needing to webcast.
>
> More importantly – and of course I didn't tell the RIAA this – we had a big multicast network (remember multicasting? Yahoo! didn't seem to after I left). Well, multicasting only sends a single stream from our server, so that is what we would record in our reports for the RIAA, and that is what we would pay on.
>
> So that was the logic going into the Yahoo!/RIAA deal. I wasn't there when it was signed, but I'm guessing and I've been told that there weren't dramatic changes.
>
> Now, no one asked me any of these things prior, during, or after the first or second pricing. I'm not sure that this matters. But if it does, here it is: The Yahoo! deal I worked on, if it resembles the deal the CARP ruling was built on, was designed so that

> there would be less competition, and so that small webcasters who needed to live off of a "percentage-of-revenue" to survive, couldn't.
>
> There you have it, if anyone cares.
>
> Mark Cuban
> Dallas Mavericks

If the facts set forth in Mark Cuban's email to Kurt Hanson are correct, it would indicate that millions of dollars have been paid to the record labels as a result of Mark Cuban's actions.

In the prior CARP proceeding which arrived at a royalty rate based upon the "willing buyer, willing seller" standard, the CARP not only failed to properly apply the standard set forth by the DMCA, it was also misled.

In the Digital Millennium Copyright Act (DMCA) of 1998 (excerpted here), Congress instructed the Librarian of Congress, in the absence of a successful negotiation between record labels and webcasters, to set a rate as follows:

> "The copyright arbitration royalty penalty panel shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms, the copyright arbitration royalty panel shall base its decision on economic, competitive and programming information presented by the parties, including –
>
> > (i) whether use of the service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings; and

> (ii) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.
>
> In establishing such rates and terms, the copyright arbitration royalty panel may consider the rates and terms for comparable types of digital audio transmission services and comparable circumstances under voluntary license agreements..."

The CARP, and subsequently the Librarian of Congress, ignored virtually all of Congress' instructions.

Instead, the arbitrators decided that if any agreement had actually been negotiated in the relevant marketplace, it would reflect the "willing buyer,willing seller" price.

In other words, instead of looking at what a willing buyer and willing seller would have agreed on, the CARP chose to simply look at what one grudging seller (the RIAA negotiating as a collective) and one extremely-atypical buyer (Yahoo) agreed on.

As for all the other criteria that Congress instructed the CARP to consider, the arbitrators wrote in their report, "We would expect these considerations to be fully reflected in any agreements actually negotiated between webcasters and copyright owners in the relevant marketplace."

In reality, however, the considerations Congress asked to be considered were trivial compared to the actual motives of the parties in this deal. In the events described above, the RIAA was constructing a case for the upcoming CARP and Yahoo wanted to squeeze out less well-funded competitors.

In setting royalty rates which should have been designed to encourage the growth and diversity of a new industry, the CARP and the Librarian of Congress ignored Congress' instructions and used the terms of a manufactured deal between RIAA and Yahoo that was specifically constructed to have the opposite effect.

The hoped-for results by Mark Cuban were successful. As a result of the royalty rates promulgated by the Librarian of Congress, a number of webcasters were forced out of business.

Congress now has the opportunity to rectify the injustice of the prior CARP.

(3) *What factors should Congress take into consideration in outlining a "fair market value" standard?*

Congress should review past and current royalties of other services such as traditional radio, cable radio, and satellite radio.

Congress should also look carefully at the negotiated rates paid by internet radio services for composition royalties to the PROs vis-à-vis the CARP recommended rate for performance royalty paid to Sound Exchange which is substantially and unreasonably higher.

In addition, Congress should consider the degree of "listener control" vis-à-vis the negotiated royalty rates for other forms of digital music delivery. The more a listener can control a digital music file, the higher the royalty rate should be paid. For example, downloads provide the greatest degree of listener control as the purchaser of a download can use it as she sees fit, with limited or no restrictions. The negotiated rates for on-demand subscription services (e.g. Real's Rhapsody, Napster) provide slightly less control and, accordingly, these rates are lower than those negotiated for downloads. Interactive radio, in turn, provides even less control, which should translate to lower royalties than for on-demand streaming. Finally, non-interactive radio (such as that offered by Live365) provides no immediate listener control (just like terrestrial, satellite and cable radio), and this thus deserves the lowest royalty rate amongst the existing forms of digital music delivery.

(4) *Your written testimony states that XM is exploiting a "loophole" in the law in order to develop a device that allows subscribers to store music for future listening. Could your company produce or develop a similar device, or does current law bar you from creating a similar "jukebox" service?*

The current law established under the Digital Millennium Copyright Act (DMCA) bars us from creating a similar "jukebox" service.

17 U.S.C. § 114(d)(2)(C)(v) –
the transmitting entity cooperates to prevent, to the extent feasible without imposing substantial costs or burdens, a transmission recipient or any other person or entity from automatically scanning the transmitting entity's transmissions alone or together with transmissions by other transmitting entities in order to select a particular sound recording to be transmitted to the transmission recipient, except that the requirement of this clause shall not apply to a satellite digital audio service that is in operation, or that is licensed by the Federal Communications Commissions, on or before July 31, 1998;

DMCA –
Subparagraph (C)(v) provides that, in order to qualify for a statutory license, a transmitting entity must cooperate with sound recording copyright owners to prevent a transmission recipient from scanning the transmitting entity's transmissions to select particular sound recordings. In the future, a device or software may be developed that would enable its user to scan one or more digital transmissions to select particular sound recordings or artists requested by its user. Such devices or software would be the equivalent of an on demand service that would not be eligible for the statutory license. Technology may be developed to defeat such scanning, and transmitting entities taking a statutory license are required to cooperate with sound recording copyright owners to prevent such scanning, provided that such cooperation does not impose substantial costs or burdens on the transmitting entity. This requirement does not apply to a satellite digital audio service, including a preexisting satellite digital audio radio service, that is in operation, or that is licensed by the FCC, on or before July 31, 1998.

SUBMISSIONS FOR THE RECORD

Statement of the

American Federation of Musicians of the United States and Canada

Before the

United States Senate Committee on the Judiciary
109th Congress, 2nd Session

Hearing on

Parity, Platforms, and Protection:
The Future of the Music Industry in the Digital Radio Revolution

April 26, 2006

The American Federation of Musicians of the United States and Canada ("AFM") thanks Chairman Specter, Ranking Member Leahy and the entire Senate Committee on the Judiciary for their continued concern and attention to music issues. Many thousands of Americans try to earn their livings and do enrich American culture (and business) through the creation and performance of music. The AFM appreciates your commitment to attend to and try to solve the pressing problems performers face in their artistic and commercial lives.

The AFM is an international labor organization with over 100,000 professional musician members in over 250 affiliated locals across the United States and Canada. AFM members perform live music of every genre and in every size and type of venue, and over 10,000 of them are actively involved in recording music as featured artists or studio musicians. The AFM negotiates basic standards covering musician employment in the recording, motion picture, TV, radio and commercial announcements industries

through its multiemployer collective bargaining agreements. AFM members, and all musicians who work under AFM-negotiated agreements, are profoundly affected by the ongoing transformation of the technologies and business models that the Committee is examining.

The three "P's" in this hearing's title – parity, platforms and protection – not only embody the power and pleasure of alliteration, they also demarcate three important issues. But some critical "P's" are missing. Performers are the first missing "P", and our statement begins there. The public performance right in sound recordings contains the other missing "P's", and that is where our statement will conclude.

Performers

We begin with performers because they are at the heart of the sound recording. We have often acknowledged that a sound recording begins with the creative work of the songwriter. Then performers transform the song into a new work of art when they bring it to life in the recorded performance. Without our creative work, there would be no recording industry, no digital music service industry, no radio industry as we know it today, no emerging businesses in devices designed to make music portable, and nothing like the U.S. presence as nearly one-third of a multi-billion dollar world market. When it comes to music, people don't want devices, or software, or hardware, or advertising. They want music, and performers make it.

These days, recorded music is ubiquitous. But even if it feels that way to many listeners, in truth music doesn't come out of pushing a button. It isn't magic. It is created because individuals are talented, and work hard, and pour their souls into making something that *feels* like magic to eager listeners. Those individuals – the ones who

make the product, not to mention the culture – have to live, eat, pay rent, raise their families. Our fundamental message to the Committee is that in considering "the future of the music industry in the digital radio revolution," it must first and foremost consider whether its policy judgments will promote business contexts that recognize and reward the individual creators. Otherwise, creators won't survive and make music.

There is one fundamental fact about the business contexts in which musicians work that surprises many: most musicians are not rich celebrities. Talent and hard work abound without resulting in riches; success is fairly defined as being able to survive without (or with) a "day job" by cobbling together many varied income streams from a variety of sources (depending on the performer) including recording sales, publishing, live performance, touring, merchandising, licensing, teaching, compensation under AFM agreements including recording session fees, new use fees and Special Payments Fund payments, and any other endeavor that can be formulated to advance the individual's creative and financial needs.

Of the varied income sources, there is no question but that for recording musicians, the sale of recordings always has been of paramount importance. This is obviously true for royalty artists, who – even though the recoupment clauses in their contracts may mean they never or rarely see royalty checks – need sales to boost careers as well as to pay for old recording costs and fund new recordings. It is no less true for studio musicians whose session work as background or "non-featured" performers becomes an integral part of the creative structure of the recording. This is true for two reasons. First, musicians who record under AFM agreements share in the proceeds of recording sales through the following mechanism: signatory recording companies

(including all the majors and hundreds of small and mid-size companies) make payments into the Special Payments Fund based on sales, and then the Fund is distributed as a form of deferred compensation to musicians. Second, and obviously: any serious downturn or retrenchment caused by sales losses in the industry results in less recording employment for musicians. If the recording companies die, so dies a great deal of important work.

Speculation abounds as to whether (or when) recording sales will lose the premier economic place they have had historically, and technological and business changes will elevate the importance of "listens" to that first place. Certainly it is already true that webcasting and simulcasting on the internet, satellite digital radio, cable and satellite television music stations, and interactive digital subscription services are increasingly important and offer the public a broad palate of listening choices that is musically diverse and both culturally and economically compelling (some are free) to listeners. The rollout of HD radio will bring even more diverse listening options and will capture even more consumer attention.

We think it is fundamental that the services that are offering "listens" of our recordings are building business based on our work, and therefore should compensate us on a fair basis. As "listens" grow in importance relative to sales – as consumers begin to listen to favorite music services *in lieu of* buying recordings – it is even more important that the compensation schemes for performers (and recording companies) be fair, rational and appropriate. But the present reality is filled with anomalies, inconsistencies and tilted playing fields. "Parity, platforms and protection" therefore are important areas for the Committee to scrutinize.

Performer Income from "Listens": Parity and Platforms

Thanks to the foresight of Congress in 1995, performers do receive compensation as a result of some of the new services that provide music listens. In creating the digital performance right in sound recordings, Congress recognized the critical importance to performers and recording companies of compensation for the use of their recorded music by digital music services. As the digital performance right is embodied in Section 114, certain digital music services are allowed to benefit from a compulsory license, the proceeds of which Congress required to be shared by copyright owners and performers on a fifty-fifty basis. Services that don't qualify for the compulsory license, including interactive digital music services, must negotiate licenses with copyright owners, who are required to share the proceeds with performers in accordance with their contracts or industry agreements (such as existing union agreements).

This scheme has created new income streams for performers that are increasingly important and that likely will become critical to our survival in the world where a recording's success is marked by many listens but not necessarily by many purchases. But there are many inconsistencies and problems in the scheme that amendments to Section 114 should repair. A number of these are addressed in the new legislation introduced just this week by Senator Feinstein; others could and should be addressed as well.

Harmonization of Rate Setting Standards. The varied types of services that are permitted to benefit from the compulsory license – pre-existing subscription services on television, non-interactive webcasters and simulcasters, and satellite digital radio like XM and Sirius – are not all governed by the same standards in rate-setting proceedings

convened under the Act. The rate-setting standards should be harmonized for all services – and the resulting standard should be one best designed to result in fair compensation to performers.

Compulsory License Restrictions. Similarly, the restrictions or requirements of the compulsory license are not uniform for all services under the current Section 114 language; they should be harmonized.

The Line Between Interactive Services and Services Entitled to the Compulsory License. Currently there are many uncertainties as to which types of user-influenced programming should be allowed to benefit from the compulsory license, and which are, instead, appropriately characterized as interactive services that must negotiate individual licenses with copyright owners. This uncertainty harms the industry as a whole – it inhibits the creation of new digital services, it deprives copyright owners of appropriate compensation in some cases and forces them to expend resources in monitoring and enforcing the proper boundary in other cases. Either way, performers are hurt. For all of our good, the line between interactive programming and the compulsory license should be clarified.

The AFM believes that when that clarification is made, the coverage of the compulsory license should be expanded. This would benefit performers, because their fifty percent share of compulsory license proceeds is not subject to recoupment, and is paid to them directly and transparently through SoundExchange. The AFM also believes, however, that the digital music services should pay an enhanced or "bumped up" rate for the enhanced functionality and increased certainty that they would gain from such expanded coverage of the compulsory license.

Administrative Issues Under the Compulsory License. Performers and copyright owners jointly created and jointly run SoundExchange, which acts as the collective to collect and distribute the compulsory license proceeds. SoundExchange's operation under the compulsory license over the past few years has revealed certain problems that could and should be resolved in any reform of Section 114.

For example, digital music services resist reporting *all* of their transmissions to SoundExchange, preferring to report only limited numbers of transmissions on a sample basis. This harms all of the non-"top 40" artists whose work is digitally transmitted but not reported by the sampling methods. The promise of the digital era is musical diversity, but that promise will be empty if the many diverse artists that gain a digital audience do not receive their fair share of the resulting digital royalties. The AFM believes that Section 114 should be modified to require census reporting under the compulsory license.

In addition, SoundExchange bears all of the costs of litigating compulsory license rates if negotiations over those rates fail. The AFM believes that a proper reading of Section 114(g) allows SoundExchange to deduct all of these costs from the license proceeds prior to distribution, so that all copyright owners and performers share in them. However, some potentially ambiguous language has given rise to the suggestion that some copyright owners or performers may be allowed to be "free riders" who enjoy the benefits of the license but share none of the burdens of establishing its rates. Any such ambiguity should be corrected.

Finally, it now has become clear that the new, expanded discovery rules for rate-setting proceedings adversely affect artists. At the insistence of the broadcasters, the

judges in the current rate-setting proceeding have ordered artist witnesses to produce personal and business proprietary information and documents, including their personal income tax returns from 1999 to the present. Some artists may withdraw from the proceeding rather than face such an unfair and irrelevant invasion of their financial and business privacy, and it is plain that discovery burdens like these will intimidate and dissuade artists from testifying in future proceedings. Artists' voices should not be lost in the rate-setting proceedings; the Act should contain specific language prohibiting such abusive discovery tactics.

Performer Income from Sales: Content Protection

In a perfect world, sufficient social and economic structures might exist to assure performers of the ability to survive economically from their creative work, no matter how freely – in all senses of that word – the product of that work was disseminated. But the world is not perfect. Any analysis of new business models and new functionalities must consider the desires of consumers, music services and technology manufacturers and developers, to be sure. But a critical part of the examination, and of the eventual balance to be struck, must be this fundamental principle: if the new models and functionalities allow copying and redistribution on an entirely new order which competes devastatingly with the current distribution systems upon which performers rely to earn a living, the heart will be cut out of the musical body. In the present world, appropriate content protection and usage rules are a necessity.

The Public Performance Right in Sound Recordings

No discussion of parity, platforms and protection – and no discussion of the future of the music industry in the digital radio revolution – is complete if it does not address

the single most fundamental platform parity issue facing performers today: the absence from U.S. law of a full-scale public performance right in sound recordings that applies not only to the new digital music services covered by Section 114, but also to analog radio and to the new digital or HD radio soon to be rolled out by the FCC-licensed radio stations that currently are exempt from Section 114.

The AFM has been one of the entities at the forefront of efforts to amend the law to provide a full public performance right in sound recordings ever since sound recordings were granted coverage by the Copyright Act. It has never been fair nor has it been good policy to allow the broadcast business to thrive on the use of recorded music with no compensation to the performers whose hard work and talent brought those recordings into being. Not only is it unfair, it results every year in the loss of significant income to performers from foreign countries that collect broadcast fees for the use of U.S. recordings in their countries, but refuse to distribute those fees to U.S. performers on the grounds that there is no corresponding right in the United States. As the Copyright Office has pointed out in other contexts, it is anomalous to allow every other creator to benefit financially from their work when others perform it publicly, but to deny that right to sound recording performers and copyright owners. The AFM calls for the creation of a comprehensive public performance right in sound recordings.

The partial solution of this problem in 1995 – the creation of the digital performance right – was a response to the threats of the new digital technologies, and was an appropriate and helpful advance at the time. Once again, technology is changing circumstances, and it is clear that the creation of the full performance right is the proper and necessary response to new developments.

Under the current law, HD radio will be exempt from the digital public performance right *even though it is a digital music broadcast.* It therefore has the potential to undercut the foundations of performer income in at least three ways – indeed, it may undercut the foundations so far that the house falls over. First, HD will offer music services in many ways comparable to the digital music services that are covered by the digital performance right, but it will have an unfair advantage over them because they pay performance royalties and HD radio will not, absent a change in the law. Second, it will contribute to the ubiquitous presence of music "listens" that may lessen the public's incentive to buy recordings, but unlike digital services subject to the digital performance right, it will not pay any performance compensation to help close the income gap it contributes to creating. And third, to the extent that copying devices are allowed automatically to harvest recordings by artist or title (or similar preferences), it may quite explicitly substitute for sales – without paying performers any of the compensation they normally obtain from sales, *and* without paying performers any of the compensation they normally obtain from digital performances.

The lack of a full public performance right is a lack of parity that must be addressed if musicians are to thrive or even just survive in the new business and technological environments.

Conclusion

Over one hundred years of representing musicians leaves the AFM firmly convinced of the following reality: musicians will play their hearts out for music lovers, music partners and the world at large. The AFM's message to the Committee and all of our partners – recording companies, digital music services, broadcasters, fans, technology

creators – is a simple one. No solution to today's challenges will be an adequate one if it is not developed in consultation with performers, or if it leaves performers without the kind of fair compensation that will enable them to create the art that individuals and industries desire.

American Federation of Musicians

of the United States and Canada
AFFILIATED WITH THE A.F.L.-C.I.O.

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April 26, 2006

The Honorable Dianne Feinstein
SH-331, Hart Senate Office Building
Washington, DC 20510-0504

The Honorable Bill Frist
SH-509 Hart Senate Office Building
Washington, DC 20510-4205

The Honorable Lindsey Graham
SR-209 Russell Senate Office Building
Washington, DC 20510-4003

Dear Senators Feinstein, Frist and Graham:

The American Federation of Musicians strongly supports S.2644, the Perform Act, and thanks you for your sponsorship. The AFM is an international labor organization with Locals in every state of the union and over 100,000 professional musicians. AFM members perform music of every genre and record music throughout the recording, motion picture, TV, radio and commercial announcements industries.

The AFM appreciates your commitment to solving the pressing problems that recording musicians face in their artistic and commercial lives. The creation of many platforms to deliver music in recent years has been beneficial to the wide distribution of music. However, performers are not always adequately compensated from this distribution. Your bill will help to achieve this goal by harmonizing rate-setting standards and by establishing appropriate usage and content protection rules for recordings transmitted under the Section 114 compulsory license.

One issue that is of paramount importance to musicians is uncertainty that surrounds the line between which types of user-influenced programming should be entitled to use the Section 114 compulsory license, and which instead should be treated as interactive services that may not use the license. We appreciate that in your bill there is a placeholder allowing the issue of what is interactive to be determined in the future.

Again, we appreciate your efforts to address the issues of consequence to musicians. We will work with you to secure the passage of this legislation. Thank you again for your support.

Sincerely,

Thomas F. Lee

Thomas F. Lee
President
AFM

TFL:tn

Statement of

American Federation of Television and Radio Artists ("AFTRA")

Hearing on

Parity, Platforms, and Protection:
The Future of the Music Industry in the Digital Radio Revolution

Before the

Senate Judiciary Committee
109th Congress, 2nd Session

April 26, 2006

The American Federation of Television and Radio Artists, AFL-CIO, would like to thank Chairman Specter, Ranking Member Leahy and the Members of the Senate Judiciary Committee for holding this hearing on the reform of Section 114 of the United States Copyright Act, which, among other things, grants to artists and copyright owners a performance right in the digital transmissions of sound recordings.

AFTRA is a diverse national union representing over 70,000 recording artists, professional performers, and broadcasters throughout the country. AFTRA's membership includes approximately 14,000 recording artists and singers who make their living creating and performing on sound recordings. Any reform of Section 114 that is being considered by the U.S. Senate will have a significant impact on the livelihoods of our members.

AFTRA deeply appreciates the tremendous effort and commitment the Senators and staff have demonstrated in addressing the complex issues contained in Section 114. AFTRA fully supports legislative reforms to Section 114 that would strengthen content protection and establish greater parity among platforms.

One of the main sources of compensation for sound recording artists is revenue from the sale of their sound recordings. Any technology that allows users to capture and disaggregate streamed content in a manner that substitutes for the sale of that content deprives artists of compensation which is due to them under their recording contracts. Technological developments in the digitization and distribution of music have the potential to create new and innovative avenues of exposure for sound recording artists. However, when such developments operate to undermine the ability of artists and copyright holders to earn fair compensation for the creation of their work, it is incumbent upon Congress to take action.

Accordingly, AFTRA supports reforms in the areas of content protection and platform parity as proposed in legislation to be introduced by Senator Dianne Feinstein, et al. Protection of an artist's creative work is essential to sustaining his or her ability to continue creating new works. Platform parity is necessary to level the uneven playing field among all of the delivery platforms with respect to the rates and requirements governing the use of music.

In order to adequately protect the rights Congress specifically provided for recording artists under Section 114, it is imperative that Congress address not only content protection and platform parity, but also address issues critical to ensuring that artists receive fair and meaningful compensation for their creative work.

Any Reform of Section 114 of the United States Copyright Act Must Include a Thorough Examination and Revision of the Definition of Non-Interactive Digital Audio Services Subject to a Compulsory License.

Under the Digital Performance in Sound Recordings Act of 1995, Congress provided that sound recording artists and copyright owners are entitled to a limited statutory public performance right in sound recordings played on certain digital audio services, including satellite and webcast radio, that were "non-interactive" in nature. At that time, webcast radio

was primarily a one-way streaming service that played audio content over the Internet. Congress mandated that such services were required to obtain a compulsory license for the performance of sound recordings, and pay statutory rates to a collection society. The collection society, in turn, distributed the receipts directly to the copyright holder (i.e., the record label) and the featured and non-featured artists on the sound recording based upon percentage splits mandated by Section 114.

The question of what now constitutes non-interactive webcast radio is of particular importance to the recording artists and singers who earn their livelihood creating and performing on sound recordings. Our experience shows that recording artists are best assured to receive fair and meaningful compensation for the public performance of their works as intended by Congress when they are paid directly by a third-party collection society, like Sound Exchange, pursuant to a statutory license. In contrast, fees for interactive uses collected directly by the record labels under negotiated exclusive licenses are as a practical matter, often never seen by the recording artist. Non-featured artists face similar challenges in receiving fair and meaningful compensation for the use of their recordings when the payment is governed by interactive licenses. Therefore, the question of whether services qualify as non-interactive versus interactive services is critical to the interests of recording artists and singers. Fairness requires that Congress re-examine and revise the statutory definition of non-interactive digital audio transmissions.

In 1995, when non-interactive radio was in its infancy, the distinction between non-interactive radio and interactive services was clear. However, during the past decade, Internet radio has changed radically with respect to the options available to the public through Internet radio. Internet radio listeners can now customize "playlists" to match their individual tastes. In other words, listeners can now select artists in general categories and "playlists" are

automatically compiled to include sound recordings of specific artists as well as other artists of a similar genre which listeners tend to favor. For example, a listener may select the British alternative pop band *Coldplay* as one of his or her preferred artists, but a song by the band *Keane* may also be included in the playlist because other *Coldplay* listeners rated *Keane* highly on their list of preferred artists. The essential nature of the digital radio service has not changed with respect to its function, i.e., (to provide a good listening experience to the public); but the options available to the public have evolved considerably. The statutory definition of non-interactive digital radio has become antiquated and must be revised to reflect current, and indeed, to anticipate future incarnations of radio.

The question of what currently constitutes a non-interactive service subject to a compulsory license has been the subject of intense and prolonged negotiations between the licensors (record labels) and the licensees (Internet services) of sound recordings. A broader definition of "non-interactive" would increase the scope of services for which artists are directly compensated. Recording artists and singers would be better protected by broadening the definition of non-interactivity, as well as by a higher rate for the use of sound recordings by the services. The inability of the record labels and the licensees to reach an amicable agreement has not only had an adverse impact on the financial well-being of recording artists, but has also stymied innovation in the marketplace.

It is the creators of the sound recordings who suffer the most from the parties' inability to resolve their differences. Because of the significant adverse impact to recording artists as a result of the parties' failure to reach agreement, it is in the public interest for Congress to exercise its authority and ensure this issue is resolved in a fair and reasonable manner with respect to artists.

To Achieve True Platform Parity Among the Digital Services, Over the Air Digital Radio Must be Subject to the Same Rate Standards as the Other Digital Platforms.

Over the air digital radio is specifically exempt from the licensing conditions applied to other digital audio transmission services in determining rates for a compulsory license. One can only surmise that over the air digital radio was granted an exemption from the requirements of Section 114 in 1995 because the technology had not yet come into use in the marketplace. However, with the approval by the Federal Commerce Commission of HD radio in 2002, and the subsequent roll out of digital over the air radio, the same rules that apply to other digital platforms should apply to over the air digital radio. Artists should be compensated for the use of their sound recordings, regardless of the digital platform used in their distribution. There is no logical or practical reason to continue the arbitrary and vestigial exemption that was granted over ten years ago to over the air radio.

The Providers of Over the Air Digital and Analog Terrestrial Radio Should Be Subject to all of the Same Section 114 Requirements as Other Digital Audio Transmission Services, Including the Payment of a Public Performance Right to Recording Artists.

Each time a song is recorded by a different artist, a unique musical expression is born from the particular style and interpretation a recording artist brings to that song. A good song can be arranged in various musical styles. It is the recording artist's job to give the song new life by bringing his or her own talents and abilities, skills, creative energy and perspective to the recording process. When the recording artist succeeds in his or her efforts, a gift is given to the public and our culture is enriched.

Recording artists, including both "featured" and "non-featured" artists, work hard at their craft. While recording artists may be born with a unique musical gift, they work a lifetime

to harness and perfect that gift. AFTRA's recording artist members dedicate their careers and their lives to creating new sound recordings.

In a previous submission to Congress filed jointly by AFTRA and the American Federation of Musicians, this point was highlighted in a description of the work of AFTRA member and recording artist Jennifer Warnes. In 1986, she recorded *Famous Blue Raincoat*, which was a tremendous commercial, critical, and audiophile success. Ms. Warnes conceived of the album as a tribute to songwriter Leonard Cohen, and in it, she reframed many of his songs from folk renditions to edgy combinations of acoustic, electronic and synthesized sounds. She invested a year of her life to the project, and worked on all the creative and practical elements necessary to bring her concept to fruition. She not only contributed to the featured vocals, but secured funding, chose material to be recorded, rented the studio, found musicians, and, in collaboration with her fellow artists, she arranged, recorded, mixed and mastered the album. [1]

The creative contributions of everyone on a sound recording, from the featured artist to the background singers and musicians, are critical, and when the recording is played on the radio, whether it is satellite, Internet, or over the air digital or analog radio, the performers deserve to be fairly compensated for their work.

The United States is one of the only industrialized countries left in the world that does not provide its recording artists a public performance right when their work is played on over the air digital and analog radio. In most countries, both sound recording artists and songwriters are compensated when their sound recordings and compositions are played. There is no

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[1] Jennifer Warnes described the creative process involved in *Famous Blue Raincoat* in her written testimony submitted to the Copyright Arbitration Royalty Panel that set certain Section 114 compulsory license rates for digital performances of sound recordings. Direct Case of the American Federation of Television and Radio Artists, In the Matter of: Digital Performance Right in Sound Recordings and Ephemeral Recordings, Docket No. 2000-9 CARP DTRA 1&2, April 2001.

evidence to indicate that this well established practice has diminished the amount of compensation paid to songwriters in those countries.

However, because the United States does not provide sound recording artists with a full public performance right, foreign countries refuse to make the customary performance rights payments to any American recording artists when their recordings are played in the foreign countries. The effect on U.S. artists is severe. Millions of dollars that would normally be distributed to U.S. sound recording artists and copyright holders by foreign countries is instead kept by the foreign countries.

In the United States, sound recording artists are granted a public performance right when their work is played on the other digital radio platforms, including satellite and Internet radio. There is no logical or reasonable rationale for denying recording artists and copyright holders a public performance right in the performance of their recordings on over the air digital and analog radio.

When an artist's sound recording is played on the radio without compensating the artist, the contributions of the artist are devalued. It is not in the interest of the artist, our culture or our economy to continue this inequity. Any broadcaster, who benefits from the playing of sound recordings, whether via satellite, Internet or over the air digital and anolog radio, should fairly compensate those whose work forms the basis of the broadcasters' benefit.

Conclusion

At the root of the complex issues presented in Section 114 of the Copyright Act lie the creative spirit of the sound recording artist and the manifestation of that creative spirit – the sound recording. Accordingly, AFTRA respectfully requests that the distinguished members of this Senate Judiciary Committee consider the welfare of the recording artist in the consideration of these important issues.

American Federation of Television and Radio Artists
260 Madison Avenue, 7th Floor
New York, NY 10036

Branch Of The Associated Actors and Artistes of America
AFL-CIO

Kim Roberts Hedgpeth
National Executive Director

Phone: (212) 532-0800
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April 25, 2006

By Facsimile

Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

Re: "Platform Equality and Remedies for Rights Holders in Music Act of 2006"

Dear Senator Feinstein:

The American Federation of Television and Radio Artists (AFTRA) wishes to express its sincere gratitude for the leadership, vision and commitment you have evidenced in grappling with the complex issues presented in Section 114 of the Copyright Act. AFTRA represents over 70,000 professional performers and broadcasters around the country, 14,000 of whom are sound recording artists and singers. We thank you for introducing the "Platform Equality and Remedies for Rights Holders in Music Act of 2006" which addresses issues of critical importance to our members.

Recording artists dedicate their lives and their careers to creating new sound recordings that enrich our lives. It is incumbent upon us to ensure that the creators of those sound recordings are fairly compensated, regardless of the platform over which the music is played.

The radical technological developments in the broadcast and distribution of digital music have created the urgent need to pass legislation that protects the property rights of sound recording artists and copyright holders in the performance of the artists' creative works and preserves the income stream derived from the sale of music. It is of vital importance that we not allow technological developments to effectively deprive artists of compensation due to them for the sale of their sound recordings.

Furthermore, as web-based radio delivery methods continue to evolve, it is of paramount importance that the law reflects a music licensing scheme that is fair to the creators of the sound recordings. Recording artists would be most equitably protected under a compulsory license that provides for direct and transparent payment to artists for the use of their music. Broadening the range of webcasting services that fall under the compulsory license (i.e., expanding the definition of "non-interactive services") will therefore greatly benefit sound recording artists. The issue of what constitutes a non-interactive versus an interactive service is contentious and complicated. AFTRA is grateful for your demonstrated commitment to resolving this issue and promises to become a full participant in devising an equitable solution.

AFTRA is deeply grateful to you for your introduction of the "Platform Equality and Remedies for Rights Holders in Music Act of 2006", and looks forward to participating in any way we can, to help pass this legislation.

Sincerely yours,

Kim Roberts Hedgpeth
National Executive Director

TESTIMONY OF ANITA BAKER

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
PARITY, PLATFORMS AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

April 26, 2006

Mr. Chairman and members of the Senate Judiciary Committee, thank you for inviting me to testify before you today.

I will be brief. I have something really simple to say: artists should be fairly compensated by the businesses that distribute their music.

I've heard recently about a number of new services that radio companies are planning on offering. Satellite radio is planning on selling devices that allow their listeners to find and record individual songs and then create permanent libraries and playlists of those songs. So as XM says, their radio is not a "pod" but is the "mother ship." Traditional radio may be about to do something similar soon.

I think this is a great idea. I think it would be wonderful for consumers to have a new and even better way of listening to and using radio. As someone who listens to radio, I think it would be great to be able to record big blocks of music from the radio and then to pick individual songs out of it so I can keep them and listen to them later -- over and over.

And I think it would be great to one day be able to tell my computer or radio to beep and tell me the minute the next new Bonnie Raitt single gets played. And I would love to be driving in my car, listening to a song and then to hit a button and immediately save that whole song.

All of these technologies are exciting and tremendous ways for connecting music with fans.

However, I hope this Committee considers -- and supports -- legislation that recognizes that the folks who bring music to life need some consistency. We need to know, as these technologies develop with the mind-blowing ability to stockpile music, build huge libraries and/or make it all portable, -- that the people who create music are fairly compensated and with some logic and sense. And this doesn't just affect me, the artist whose name the public knows. It affects my entire "family" that I work with - the songwriters, musicians, producers and engineers who have always made music great.

So I hope this Committee understands that I support radio and listeners being able to do this. I've spoken with EMI and Blue Note – two of the companies that work with me – and they have promised me they support this too. I just happen to think that when a radio station is acting like a download service that the artist should be paid appropriately.

I am also glad to be able to say that many of my fellow artists groups like the National Academy of Recording Arts and Sciences, the Rhythm and Blues Foundation, AFM, AFTRA, the Recording Artist Coalition, and the Songwriters Guild support my view.

I'm not here to talk about whether the music industry has done a good job dealing with the digital revolution. A lot of that is ancient history. And it's time to get over it and move forward. I hope this Committee can help resolve this matter.

STATEMENT OF EDGAR BRONFMAN, JR.
CHAIRMAN AND CEO
WARNER MUSIC GROUP
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
PARITY, PLATFORMS AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

April 26, 2006

Chairman Specter, Senator Leahy, and Members of the Committee, thank you for inviting me to testify today. My name is Edgar Bronfman, Jr., and I am Chairman and CEO of Warner Music Group.

I come here today not just as the CEO of the only major American music company, but as a representative of the intellectual property, or "IP", industry. IP, in its many forms and permutations is the backbone of the U.S. economy—today and in the future. To support, expand and enhance our economy, the United States government seeks to protect American IP around the world. Intellectual property should receive the same respect here, within our own national borders, as we would have it receive internationally.

The digital revolution has had—and will have—a profound effect on our society and specifically on most forms of intellectual property and no other form of IP has been more profoundly affected than music.

When a group of investors and I purchased Warner Music Group from Time Warner two years ago, many people in the investment community thought we were crazy. Piracy, both physical and digital was growing rapidly, resulting in billions of dollars and thousands of jobs lost and artist rosters cut. This meant less opportunity to invest in new music and new talent. It was a crisis for which there was no clear solution.

Since then, while piracy remains a debilitating plague on our industry and other IP industries, Warner Music has been meticulously rebuilt on the premise that as a result of the digital revolution, there will be more music available, in more ways and to more people, than ever before. And it will be delivered to consumers in ways that we never before imagined possible—and with that will come great economic benefit to our nation—but only if there is parity among platforms in this new, emerging, digital world. It requires a balance that allows both content companies and new digital services to thrive. Neither can, nor should be sacrificed for the sake of the other.

No one is a stronger believer in the promise of digital music than Warner Music. We seek to lead the industry's transformation into the digital era. And digital is, by far, the fastest-growing part of our business.

We also know that we can't do this alone. We are pleased to work with the many services and manufacturers who help to bring new digital offerings to listeners. Through a myriad of digital distribution services, consumers today dictate how they experience music. Consumers decide whether they prefer to purchase a whole album, a single song ... or a monthly subscription. They can have music delivered to them in their homes or directly to a portable device—or both simultaneously—at any time of day.

There are substantial benefits for everyone in this digital music ecosystem—artists, music companies and distribution companies. But it is both nascent and fragile. Most of the companies, technologies and models that help make up this ecosystem are relatively new—or at least relatively new to the music business.

And so, the growth of these digital services and the extension of these extraordinary benefits to consumers must rely on a key principle: "parity." With parity across all the platforms on which digital music is delivered will come a level playing field among multiple technologies and players as will all the attendant consumer and artist benefits of true competition. Without parity, one technology—or certain companies—are unfairly favored... competition evaporates... and the entire digital music ecosystem is in peril—and with it, the potential economic benefits of a once again healthy and growing music industry.

Music is licensed along a continuum, with royalty payments varying depending on how much control the user has over the music. At one extreme is the purely passive listening experience provided by traditional radio. At the other extreme is interactivity or permanent ownership of the music, which is provided by so-called "distribution services" like iTunes, Rhapsody and Yahoo! Unlike the passive listening experience, distribution services offer consumers varying degrees of control to determine what music they hear and how and when they hear it.

Cable, satellite and Internet music services are regulated by the government—and by this Committee—through a compulsory license. I am generally not a fan of compulsory licenses and feel they are only appropriate when there is some reason why ordinary market mechanisms cannot work. By their very nature, they place IP companies at a great disadvantage because they aren't negotiated on arm's-length terms and because the IP company can't say "no." In addition, compulsory licenses can be subject to misuse when the licensees who are the beneficiaries exceed their scope. Lastly, unlike contractual arrangements negotiated in the marketplace, with compulsory licenses, if you later discover some flaw or if the passage of time makes them outmoded, they are far more difficult to fix because they are statutory.

There is no better example of this than the treatment of satellite services under Section 114 of the Copyright Act. These services are obtaining their content through compulsory licenses that were designed for listening-only, or purely passive services traditionally referred to as "radio."

It's important to note that, even though throughout this hearing you'll hear the term "radio" to describe such satellite services, they offer a lot more than what we commonly think of as "radio." These services provide scores of channels of narrowly themed programming, so they can cater to the very particular tastes of any individual listener, and by virtue of the rapid advancements in technology, they are quickly being transformed into much more than the traditional, passive, listening-only experiences from which their original compulsory license was derived.

Many of these services have already morphed from listening services into download services. Satellite services are now offering new devices, which can essentially transform a satellite service like XM and Sirius into a distribution service like iTunes. Many of the satellite devices about to be released are not only similar to iPods—but iPods linked to a free iTunes supply feature.

Let's be very clear about this: we're not concerned about the simple recording of blocks of music for time-shifting purposes by listeners of traditional radio. Everyone agrees that that should be permitted. Instead, we are concerned about technologies which these services are embracing today which allow their broadcast 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 type of classification imaginable. And with the inevitable march of technology, we can only imagine what other services might be offered in the future.

What's that old saying? "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Well, when I see a device that permits consumers to identify the specific tracks they want from a satellite broadcast, record them and library them for future use, I call that device an iPod and I call the satellite service making that device available a download service. What is clear to everyone is that these services no longer resemble and will increasingly stray from our collective understanding of what constitutes a traditional radio service.

I recognize that some satellite services have agreements with distribution services like Napster. We view that as a positive development, but as long as they simultaneously offer the ability to take the same content for free, it's just disingenuous.

A solution to this problem, within the confines of continued compulsory licenses, is The PERFORM Act, introduced by Senators Feinstein and Graham. It is a critical step towards ensuring that IP continues to be respected in the digital world. It does so by making sure that the same rules apply to all of the satellite, cable and Internet services, which avail themselves of a compulsory license under Section 114. It helps protect the IP community from under-market rates by applying to satellite services the same "fair

market value" standard that currently applies to Internet music services. It also protects the value of IP by applying the same effective content protection requirements to satellite, cable and Internet music services equally.

Today, Section 114 embodies an imbalance that gives satellite services an unintended advantage over Internet services. The PERFORM Act attempts to create parity—to rectify that imbalance—for all of the satellite, cable and Internet services subject to the statute. In addition, it provides that if a Section 114 service is for all practical purposes acting like a distribution service, outside the scope of the compulsory license, then for those additional services or functionalities, it must enter into arm's-length negotiations with the IP community.

If Section 114 is left as is, this lack of parity will, in effect, continue to serve as an unfair subsidy for the satellite services much of whose foundation rests upon the many decades of work produced by the music industry. And yet under the current system, artists and labels are essentially subsidizing both the satellite services' acquisition of non-musical content and the cost of the subscription itself. How valuable, I would ask, might these services be without music? And whatever the answer, I would advocate that the answer should be found through the exercise of the free market.

To devalue music content, to suggest that the creators and owners of content should be forced to share their property in a manner that ignores the free market, and that disadvantages other services is as outrageous as it is wrong. It also means, in the end, the digital music ecosystem will fail and the promise of a resurgent marketplace for musical content will disappear. And where will these so-called new services be then? Because what new service can prosper without the content it carries?

What we have today is a fragile ecosystem that is out of balance and a business model that is unfair. It's unfair to the legitimate music distribution services that are struggling to gain traction in a nascent business. And it is unfair to the music companies and artists, whom it robs of proper compensation for the use of their work.

We prefer the free market to compulsory licensing, but if we are all going to have to live with these licenses there must be parity in practice and application.

The PERFORM Act, is a critical step towards creating parity among satellite, cable and Internet music services. It provides content protection requirements for content distributed on all of these platforms and it creates parity for the rate-setting rules among disparate platforms thus leveling the playing field and enabling these services to compete fairly with each other.

At the same time it levels the playing field between satellite and distribution services, the bill specifically protects consumers' expectations when it comes to being able to record music off of these services as consumers have traditionally done from time to time while listening to the radio. We want consumers to be able to enjoy music in many

different ways and continue to enjoy the kind of personal home recording that listeners have experienced for decades.

The PERFORM Act accomplishes this by ensuring equal opportunity for satellite, cable and Internet platforms and services, establishing rules that respect and value the music that makes such a difference in our lives.

Mr. Chairman, no one appreciates the promise of the digital era more than we do. We believe that the integrity of the digital marketplace represents the very future of music. We want all of these services to survive and prosper and to continue to expand the ways in which consumers can access and enjoy music. In doing so, the benefits for consumers, artists, labels, device manufacturers and services are immense. But to achieve this promise... to achieve these benefits... there must be parity. The PERFORM Act provides parity.

We come here today not to ask for a subsidy for our industry. We do not seek a "floor" on the value of our content. But we do ask for the equitable and reasonable concept of parity among platforms. Parity in the way a fair price is derived. Parity in the ways content is protected. Plain and simple: parity.

Without it, our licensing regime is riddled with flaws resulting in unintended adverse consequences that jeopardize the great promise of the digital revolution. I urge you to support this legislation and move it to enactment in order that all of these parties here today, and all others who seek to legitimately bring content to consumers, can make beautiful music together.

Thank you.

U.S. Senator John Cornyn
Hearing Statement

"Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution"

Wednesday, April 26, 2006

Mr. Chairman, thank you for holding this important and timely hearing, and for your dedication to addressing important issues facing our nation. The issue before us today, while perhaps technical in nature, may very well affect as many of our fellow citizens as anything we do.

Each and every one of us can in some way identify with music. And some of us, I'm sad to say, may identify more with an old "33" or "8 track" than the iPod…

But whatever the medium, music surrounds us every day –on the radio, the television, a CD, our cell phone rings or – as my constituents in Austin, Texas, "the live music capital of the world" – most prefer… on stage. The benefit music creators provide society is in many ways invaluable.

But when we listen to music, we don't often think about the economics involved. Who gets paid, and how much… when a CD is sold? When a song is played on the radio? When a band plays cover songs at a wedding? The answers are not always easy to determine.

But as our guests here today can attest, the answers and related policy choices we make are of profound importance to the singers, songwriters, musicians, investors, broadcasters, satellite companies, device manufacturers and others whose efforts bring us the music and other content we enjoy every day.

Unfortunately, the market for getting music from the artists to the consumers is somewhat convoluted, and depends on a complicated and an often inequitable government regulatory scheme.

After years of artists receiving virtually no royalties for the performances of sound recordings, the digital age brought a partial re-thinking of how performance rights are treated. Today, certain digital transmissions, including satellite radio and internet broadcasts, of copyrighted works are subject to a compulsory license and other requirements to maintain that license.

These changes – for better or worse – often have come through reactive legislation that ends up treating similar parties unequally. For example:

- A performance of a sound recording results in a royalty to the artist and record label if it is transmitted over the internet or satellite, *but not* if it is transmitted over the air.
- A performance of a sound recording results in *a different* royalty payment if that performance is transmitted over the internet as opposed to via satellite or cable.
- A songwriter receives royalties for all public performances, while the musicians who perform receive royalties *only for some* public performances.

- Some rates are established through compulsory licenses, *while others* are negotiated in the marketplace.

And the requirements to maintain a compulsory license – even though they are potentially necessary in some form - are complex and burdensome. For example, one of the requirements reads as follows:

- A transmission cannot be: "…part of an archived program of less than 5 hours duration; …part of an archived program of 5 hours or greater in duration for a period exceeding two weeks; … part of a continuous program which is less than 3 hours duration; or… part of an identifiable program in which performances of sound recordings are rendered in a predetermined order, other than an archived or continuous program, that is transmitted at… more than 3 times in any 2 week period that have been publicly announced…" and so on, and so on…

Regardless of the need for such requirements, this scheme seems pretty far from a "free market" in virtually all respects… and it would be my goal to achieve as close to a free market dynamic as possible.

I commend Senator Feinstein for her work in authoring the PERFORM Act that she introduced yesterday in order to address some of these issues. Our staffs have worked hard together to try to address her laudable goals of rate "parity" and increased content protection.

But while this bill promotes a number of worthy objectives, I am hopeful that we can achieve a comprehensive, market-oriented approach to reforming section 114 of the Copyright Act. It is time for a 21st Century approach to music licensing – one that acknowledges our new digital world and the challenges it represents.

Achieving this goal will require willingness by all parties to think beyond today and to think beyond self-interest. To those who equate tape recording with mass downloading of digital content – you ignore the scale of the digital world and its impact on the property rights of those who create content. To those who seek restrictive layer after restrictive layer of "protection" for content – you risk the alienation of the very consumers you seek to buy your products.

With this hearing, I hope we are beginning what will be a thorough discussion of the complex world of music licensing, as well as the distribution of music and how we can achieve our common goal: *market-driven delivery of creative works that affords maximum flexibility to consumers and just compensation for artists.*

Rebecca Greenberg
National Director
Recording Artists' Coalition
9903 Santa Monica Blvd., Suite 343
Beverly Hills, CA 90212
Phone: (800) 841-9113, Fax: (310) 209-3101

April 26, 2006

Honorable Dianne Feinstein
331 Hart Senate Office Building
Washington, DC 20510

Re: "Platform Equality and Remedies for Rights Holders in Music Act of 2006"

Dear Senator Feinstein:

On behalf of the Recording Artists' Coalition (RAC), I thank you for introducing the PERFORM Act.

RAC is a non-profit recording artist advocacy organization representing over 130 well-known featured recording artists, including Don Henley, Sheryl Crow, Jimmy Buffett, Natalie Maines, Billy Joel, Stevie Nicks, Bonnie Raitt and Bruce Springsteen. RAC is primarily concerned with political, legal, and business issues affecting the interests of recording artists on a federal and state level.

Content protection and platform parity are imperative to recording artists' ability to be fairly compensated for their work. Artists must be paid when their music is performed and distributed, regardless over which platform this occurs.

RAC is especially grateful to you for your willingness to address interactivity in the bill. We know that these issues are complicated and intricate, and we greatly appreciate your commitment to resolving them.

Again, thank you for your leadership, and we are here to help your efforts in any way possible.

Sincerely,

Rebecca Greenberg
National Director
Recording Artists' Coalition

U.S. Senate Committee on the Judiciary
Hearing on "Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution."
April 26, 2006

Testimony of N. Mark Lam
Chairman, Executive Committee and CEO
Live365, Inc.

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

On behalf of Live365 and the Digital Media Association, thank you for inviting me to testify today regarding digital radio, and particularly about the hardships that face Internet radio as we compete to offer consumers and artists a better experience than they enjoy on competing radio platforms.

Live365 and DiMA urge the Committee to accomplish the following:

(a) Legislate royalty parity and programming parity among all digital radio services, so that government is not picking winners and losers when broadcast, cable, satellite and Internet radio compete.
(b) Protect recording artists and copyright owners from radio services that promote and profit from consumer recording of their programming, and thereby exploit their performance license to engage in a more lucrative distribution business.
(c) Resolve 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.

In contrast to our competitors, Internet radio has always paid royalties to recording artists and copyright owners and has always taken reasonable steps to protect sound recordings. We are pleased, therefore, that the Committee is considering whether to ensure parity among competing services and enhance protection of copyrighted sound recordings, because we agree with the ideas behind Senator Feinstein's Perform Act of 2006 – parity and protection are necessary. Our industry also believes, however, that additional related provisions of Section 114 of the Copyright Act must be amended, particularly the "interactive service" definition that is also addressed in the testimony submitted by the Recording Artists Coalition. When digital radio legislation achieves parity, protection and clarity, it will unleash competition and innovation that will enhance consumer enjoyment, increase royalties to creators, and be a critical marketplace factor in the effort to reduce piracy. More Internet radio listeners means fewer music pirates, which benefits the entire music economy.

Live365, based in Foster City, California (just south of San Francisco) is one of the largest Internet radio networks. With tools we provide, individuals or organizations with

a computer and a broadband connection can create their own radio station from their own music collection, and collectively we offer thousands of stations that are enjoyed by several million people every month. We are Arbitron-rated and a member of the largest network of advertiser-supported Internet radio services.

Live365 is also the largest Internet radio "pure play". You know of many of our Internet radio colleagues, such as Yahoo, AOL, MSN, MTV, and RealNetworks. Each of these companies is blessed with a variety of revenue streams and internally generated capital that permits them time to develop their business. But Live365 is different – our 36 employees have only one business: Internet radio, and we have seen many of our competitors go out of business so we have very little time. We need your help to fix digital radio laws quickly so that our successful radio service can also become a successful business.

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

Since 1998 Live365 and other DiMA members have paid tens of millions of dollars in royalties to recording companies and recording artists. In part, these payments reflect widespread consumer adoption of Internet radio, which is regularly enjoyed by more than 30 million Americans. However, the very fact of and the amount of these payments underscores how the Copyright Act discriminates against Internet radio based solely on our choice to deliver music to consumers via the Internet, rather than broadcast, cable or satellite technologies.

Live365 and all Internet radio services compete directly against terrestrial radio for a limited universe of listeners and advertisers, and compete directly against cable and satellite radio for an even smaller universe of subscribers and advertisers. Paying higher royalties than our competitors requires Internet radio to reduce programming or performance quality, or increase advertising prices or frequency. Every option is unpleasant, and they unfairly inhibit Internet radio's growth and competitive opportunity.

Consider this comparison: Arbitron's audience measurements for Live365 suggest that we are comparable to a good-sized radio station in Harrisburg, Pennsylvania. That station would pay approximately 3.5 percent of its revenue to songwriters and music publishers; Live365 pays 6.5 percent. In contrast, the Harrisburg radio station and all radio stations pay nothing – absolutely zero – to sound recording copyright owners and recording artists; but in 2005 Live365 paid $1.2 million dollars to sound recording copyright owners and recording artists for U.S. performances alone – an astonishing 33.4 percent of our radio revenue.

Another comparison is satellite radio. XM Radio and Sirius Satellite Radio have confidential royalty rate agreements with the recording industry, so I can only tell you what I have heard and let them or the RIAA dispute it if they choose to. I have heard that satellite radio services, whose customers are subscribers, pay sound recording royalties of

approximately 5-7 percent of their revenue, a significant discount from subscription Internet radio royalties, which are 10.9 percent of revenue. The situation is even worse for advertiser-supported free Internet radio, in which the royalties are set by music usage rather than revenue and so the royalties have to no relationship to revenue. As a result, many free radio services supported by advertising pay royalties that consume a large proportion of (or even exceed) revenues, as described above in the case of Live365. Remarkably, the recording industry is seeking to increase these rates in a pending Copyright Royalty Board proceeding by 250 percent.

How are these disparities possible? Because satellite radio services benefit from a very different royalty standard than Internet radio (17 U.S.C. § 801) which, the recording industry says, was the reason for these substantially lower royalties. Fortunately the PERFORM Act proposes to amend the royalty standard so that all digital radio services except broadcast will have royalties set according to the same "fair market value" formula. XM Radio will testify that the §801 standard has worked successfully since 1976 and that ironically it is preferred by RIAA when recording companies license musical work copyrights from songwriters, so Congress should leave it in place. DiMA agrees that the §801 standard is more applicable, but it is only appropriate if it applies uniformly to all digital radio services, and not just to the so-called "pre-existing subscription services" – a category comprised solely of satellite and cable radio services, with Internet radio on the outside looking in. Above all else Internet radio services deserve competitive parity – and this Committee should create a level playing field for digital radio services to compete against one another.

Unfortunately, the Perform Act would not extend the sound recording performance royalty to terrestrial broadcasters, not even for their high definition radio programming. Rather, broadcasters have asked to instead extend their terrestrial royalty exemption online and to thereby exempt all Internet radio webcasts transmitted within 150 miles of their towers. DiMA urges the Committee to reject this request, and to boldly consider enacting the fairest possible legislation, a sound recording royalty across all competing platforms and services.

2. Legislate Programming Parity and Clarity: Competing Radio Services Should Play by the Same Programming and Functionality Rules, including Reasonable Content Protection Requirements, and the Rules Should be Clear and Unambiguous so as to Promote Innovation and Not Litigation

    a. Relax Digital Radio Programming Limitations That are Overly Restrictive and Outdated.

Several programming restrictions are imposed only on satellite, cable and Internet radio, and they highlight the disparate treatment of these competing services. Two examples are the prohibition against advance announcements of upcoming songs and the required playlist diversity, which is actually a regulation restricting the number of songs

performed by any given artist within a three-hour period (the "sound recording performance complement"). *See* 17 U.S.C. § 114(d)(2)(c)(i) and (ii). While intended by Congress to ensure that the statutory license does not permit on-demand music, in reality these provisions prevent Internet radio from engaging in many of the most common practices of radio broadcasters that have proved, over decades of experience, to promote rather than harm the interests of the record labels and performing artists.

For example, radio stations typically announce specific songs that are going to be performed either next or at an unspecified time in the near future, as an inducement to keep listeners tuned to their stations; Internet webcasters cannot. Or, when a famous artist such as Ray Charles or Patsy Cline passes away, radio stations have complete latitude to pay tribute by playing extended blocks of the artist's work; the sound recording performance complement limits the ability of Internet radio to honor the artist to no more than two songs consecutively, and four songs total over a three-hour period.

There is no evidence, however, that the broadcasters' pre-announcements of upcoming songs or performances of album blocks or artist blocks of music have harmed the record industry, or that webcasters' adoption of these practices would be harmful. Given the clear promotional benefits of webcasting to the recording industry and performing artists, there is no reason why webcasting should not also be permitted this additional programming latitude to better attract and maintain its audience against broadcast competition.

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

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 so the law requires radio services to utilize this technology if they otherwise choose to use streaming technology offered by RealNetworks or Windows Media.

This content protection obligation has never been applied to satellite radio services, however, and as Warner Music CEO Edgar Bronfman has testified, XM has exploited this loophole by developing and offering for sale a portable device that will not only record music programming, but will also enable consumers to simply save only those tracks that they want and dispose of the remainder, and to add the saved tracks seamlessly into the content owners playlist in whatever order the consumers choose to listen. Essentially XM Radio is offering a distribution service to consumers, while seeking only a performance license from sound recording owners.

With regard to content protection, the PERFORM Act proposes an important equalizer by imposing an obligation on all digital radio services (except broadcast, of course). Reasonably, the PERFORM Act proposes that digital radio services which take

affirmative steps to authorize, induce or actively encourage consumer recording of radio-like programming must also utilize digital rights management technology to ensure that consumers are unable to disaggregate individual songs in that recorded programming, because to do so would enable such flexible enjoyment of those recorded performances that consumers would never again need to purchase a sound recording or subscribe to a music service. This limitation appropriately recognizes that commercial radio enterprises with performance licenses should not exploit those licenses unfairly to create distribution businesses absent another license and royalty payment.

The PERFORM Act is overprotective, however, when it obligates all digital radio services to utilize content protection technology, even when the services is NOT taking affirmative steps or making a business associated with consumer recording. In contrast, the Supreme Court recognized in its Grokster decision that consumer policing obligations should appropriately be placed only on those who take affirmative steps – particularly for commercial reasons – to promote others' activities. Basic radio services that are merely performing music for consumers' listening enjoyment – like those who are merely offering technology that has legitimate purposes but can also be misused – are not making a business from or otherwise promoting consumer recording, and accordingly should not have a technological policing obligation imposed.

Internet radio companies succeed by maintaining continuing relationships with consumers, and encouraging them to return frequently and for long periods of time to our services. We have no incentive to promote uninhibited consumer recording and in fact our incentives are aligned with the record companies. There is no reason, therefore, and certainly no compelling justification, for imposing DRM technology mandates that will create financial and technological burdens on Internet radio services that take no affirmative steps to encourage and are not seeking to profit from consumer recording.

c. 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 statutory factors, including that the service is not "interactive" as defined in the statute.

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 two lawsuits and a Copyright Office proceeding and is not yet close to being resolved. As a result of this uncertainty, Internet radio innovation has stopped and audience growth is inhibited.

The "interactivity" dispute creates a very straightforward problem. Internet radio pays millions of dollars in royalties every year to artists and the recording industry. Broadcast radio – even digital broadcast radio – pays zero. If Internet radio is saddled by rules forcing our programming to be less interesting than broadcast radio, or forcing company-

by-company negotiations regarding royalties that our broadcast competitors are not required to pay at all, then how are we to compete, succeed, and generate even more royalties for sound recording companies and artists?

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 limited the benefits of the statutory license by imposing programming restrictions on the radio services (e.g., limiting how many times a single artist can be played in a 3-hour period) and disqualifying "interactive" programming that essentially provided on-demand or near-on-demand service. There was no uncertainty nor 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.

Moreover, where an online music service provides on-demand streaming and digital download or subscription offerings alongside statutory radio offerings, the direct licenses necessary for the on-demand services provide the labels with significant leverage through which to enforce their view of the scope of the statutory license.

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 webcasts are not permitted to allow any level of individual consumer influence over a program to qualify for the compulsory license.

To compete against broadcast radio – which pays no royalties – and cable and satellite radio – which do pay, but pay less that Internet radio, Internet radio must be able to create innovative consumer-influenced offerings using the power of our technology. Instead of holding back the royalty-paying medium, we urge the recording industry and Members of Congress that believe sound recording companies should be paid, to consider unshackling Internet radio's programming restrictions and promoting the medium that pays.

And let's not forget the artists. The statutory license requires that 50% of royalties paid by statutory license Internet radio services be paid directly to recording artists. The recording companies' efforts to restrict the scope of the statutory license by defining all innovative services as "interactive" directly decreases the amount of royalties paid to artists by Internet radio services.

In furtherance of fully-licensed litigation-free royalty-paying 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 royalty-paying products and services that combat piracy, rather than on lawyers and litigation.

3. 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 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, it is obvious to DiMA members and sponsors of the PERFORM Act that the Copyright Act treats Internet radio inequitably, but that platform parity and content protection are both achievable.

I appreciate the opportunity to testify today about how Live365 and Internet radio services suffer under today's inequitable legal regime, and to offer solutions that will benefit consumers, promote competition and increase royalties to creators.

Thank you.

Statement of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
"Parity, Platforms, and Protection:
The Future of the Music Industry in the Digital Radio Revolution"
April 26, 2006

The principles that guide me here are simple: We should be supporting and promoting the artists who write and perform the music that enriches all of our lives, and we should be helping everyone else to hear and enjoy that music. The copyright laws exist, in this arena, to define how creators can control, and profit from, the use of their works. All of the technological advances of recent years, all of the improvements in quality and quantity of music that the digital age has brought us, should mean that more people can hear more music, more easily, and that everyone gets paid their due.

I recognize and appreciate the fact that many other people and businesses are involved in getting music from the artist to the listener. The record companies, from the smallest independent to the largest of the majors; the broadcasters, whether they own one station or thousands; and the digital music providers, be they cable or satellite or internet – all of these play crucial roles in turning the copyrights of the artists into the listening pleasure of the consumer. But they are not ends in themselves; they are at their best when they are helping to develop new artistic talent, to nurture creative endeavors, and to facilitate ever-better ways of getting people the music they love, wherever they may be.

The statutory license in Section 114 is complicated. Nobody would deny that. Maybe it is too complicated, and maybe it is outdated. Maybe we in Congress should take a new approach to this whole situation. Congress has legislated in a piecemeal fashion, trying to work reasonable and effective changes to the licensing scheme when new technologies have changed the music marketplace. Maybe it is time for all of us, both those of us up here on the dais and those of you at the witness table, to step back and try to consider music licensing from its first principles. Maybe we should primarily focus not on the technologies that are delivering music today, but on the rights at stake. Maybe then we can produce a licensing scheme that has a real foundation in the rights of creators and the interests of consumers. Maybe then the purposes of the Copyright Act, and of this Committee, will be better realized in the marketplace for music.

I must thank my colleagues, Senators Feinstein and Graham and Cornyn, as well as Senator Frist, for taking up the formidable task of beginning this inquiry. Delving into the morass of this statute, and trying to make some sense out of it, is an act of real optimism and courage. I look forward to hearing from our witnesses today, and I am grateful to all of them for their time and expertise.

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NATIONAL MUSIC PUBLISHERS' ASSOCIATION WELCOMES INTRODUCTION OF THE PERFORM ACT

For Immediate Release (April 26, 2006) -- National Music Publishers' Association President and CEO David Israelite today released the following statement regarding the Platform Equality and Remedies for Rights Holders in Music Act of 2006, or the "PERFORM Act," new legislation to protect songwriters and music publishers while encouraging the growth of digital radio:

"The National Music Publishers' Association supports this important legislation, which will protect music as it is transmitted over digital radio. It is crucial that Congress update antiquated copyright laws in these days of rapidly emerging technologies.

"The songs we love and their creators need to be protected under the law. By passing the PERFORM Act, Congress will make certain that songwriters, music publishers and other members of the music community are compensated for their intellectual property.

"Platforms like High Definition and Satellite radio should be able to thrive and expand, but not at the expense of those who worked so hard to create the music that fans crave. Ultimately, this bill will allow the consumer more ways than ever to get high-quality digital music, while fostering an environment that will lead to the creation of more music.

"The NMPA applauds Sens. Dianne Feinstein (D-CA), Lindsey Graham (R-SC) and Bill Frist (R-TN) for their efforts on the behalf of music publishers, songwriters and music fans everywhere."

About the NMPA
Founded in 1917, the National Music Publishers' Association (NMPA) is a trade association representing more than 600 American music publishers. The NMPA's mandate is to protect and advance the interests of music publishers and their songwriter partners in matters relating to the domestic and global protection of music copyrights.

TESTIMONY

of

GARY PARSONS
CHAIRMAN OF THE BOARD OF DIRECTORS
XM SATELLITE RADIO INC.

on

PARITY, PLATFORMS AND PROTECTION:
THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

BEFORE THE COMMITTEE ON THE JUDICIARY
U.S. SENATE

April 26, 2006

Mr. Chairman and Members of the Committee, I am pleased to appear on behalf of our 800 employees who have made XM Satellite Radio America's most popular satellite radio company. Thank you for providing us with the opportunity to share our vision for creating a powerful new broadcast medium that promotes the enjoyment, sale, and distribution of music. As we look to the future of the music industry, we hope to help it grow by enhancing the discovery of music by our six and a half million subscribers and, with Sirius, our combined industry audience of some eleven million subscribers across the country.

Today, XM subscribers pay approximately $150 per year to listen to over 170 channels of entertainment, sports, news, talk, and other programs, including 69 channels of commercial-free music programming. Until recently, most of our subscribers heard their favorite programs only at home or in their cars and trucks. To add to their enjoyment, we first developed a hand-held device that could receive XM live and store up to five hours of programming. In response to growing consumer demand, we are bringing new portable personal products to market that will allow our subscribers to store up to 50 hours of programming, to enjoy their music on the go, and to purchase additional music tracks -- even entire albums -- with ease from the new Napster online music service.

Unfortunately, as often is the case with new technological innovations, some apparently believe that what is good for consumers is bad for content owners. As a result, we have been threatened with litigation and now face the prospect of device-crippling legislation in this and other Congressional Committees.

I am here to tell you why the proposed Perform Act would impose a new tax on your constituents, would stifle technological innovation, would discriminate against satellite radio, and in our view would even harm performing artists and the music industry. But before talking about the legislation, I will tell you about our company, our new products, and what we are doing to promote the sale of music as an alternative to illegal peer-to-peer file sharing networks.

About XM

XM is one of the great American high-tech success stories of this decade. Using spectrum purchased at auction for nearly $90 million, we launched our subscription service late in 2001. Since then, we have invested nearly $3 billion in building a state-of-the-art network for the delivery of radio programming. Despite the challenges of launching a business in an economic recession and at the height of the dot.com bust, XM has grown into an enormously popular consumer business. And we soon hope for it to be a cash-positive business as well.

We continue to make huge investments not only in technology, but also in gifted individuals. We employ rocket scientists, electrical and broadcast engineers, consumer electronics wizards, athletes, a public radio legend, traffic reporters, marketing experts, and some of the world's foremost music experts. Unfortunately, we also have been forced to employ more and more lawyers.

Relationship to the Music Industry

Since the launch of our service, XM and the music industry have enjoyed a symbiotic relationship. Without compelling content, our multi-billion dollar, state-of-the-art delivery system would not have attracted nearly seven million subscribers. Nor would the music industry have received tens of millions of dollars from us. Having made that investment, we are now delivering a wide diversity of music to millions of enthusiastic, paying music fans. We have demonstrated that you can build a business that promotes the interests of both consumers and the music industry.

As an industry, satellite radio is the single largest contributor of performance royalties to artists and record labels. In fact, XM and Sirius pay more in performance royalties than all other digital broadcasters and webcasters combined. Likewise, XM and Sirius pay huge royalties to composers and publishers. We respect, appreciate, and *compensate* creators of music. In short, through the investment of enormous amounts of risk capital, we have created a new source of royalty payments for rights holders.

In addition to these new royalty payments, we continue to provide the music industry with a powerful promotional platform. Airplay has long been an essential promotional tool for music. In fact, Congress exempted traditional radio from paying sound recording performance royalties precisely because it recognized its promotional value. XM provides the same if not greater promotional value to artists and labels, and yet we do not enjoy this same exemption. Even for HD digital radio, broadcasters are exempt from the sound recording performance royalty obligations that XM pays. In fact, as you know, recent payola allegations suggest that record labels (that *collect* money from satellite radio) actually *pay* traditional radio stations to play their music. Despite this disparate treatment, we are not here today to ask you to change current law, but instead to help you understand the competitive environment in which we operate.

Over the past two decades, playlists at traditional radio stations have been shrinking, forcing the public to endure an endless repetition of the same handful of songs. The variety of formats has declined as well. By contrast, XM offers our subscribers 69 channels of commercial-free music. We have over two million titles in our collection, and play approximately 160,000 different tracks each month.

We have something for everyone: 24-hours per day of bluegrass, blues, classical, country, hip hop, jazz, opera, pop, and rock and roll. We have channels devoted to emerging artists. We have a channel for artists that as yet are unsigned to any major record label. Our "Deep Tracks" channel has helped reinvigorate the careers of many rock stars of the 1960s and '70s, and we have provided the opportunity for bands to perform live in the "XM Café" at our recording studios. XM presents a series called "Artist Confidential" and music shows hosted by stars as diverse as Bob Dylan, Quincy Jones, Tom Petty, Wynton Marsalis, and Snoop Dogg to help our listeners understand more about music from the artists' perspective. Our channel 73, "Frank's Place," features the greatest singers of American Popular Song, from its namesake Frank Sinatra to greats such as Ella Fitzgerald, Sarah Vaughan, Tony Bennett, and Rosemary Clooney.

At the touch of a button, XM listeners see the name of the performing artist and the name of the song they are hearing. Unlike broadcast radio stations, which rarely announce what they play, XM is a powerful tool for educating consumers hungry to discover and buy more music.

In doing so, we provide promotional value and royalty compensation never offered to the record industry by traditional radio. And yet the music industry continually attacks us for bringing great new products to market.

New Devices

From the outset, we have been committed to offering consumers the best and most innovative products, while respecting copyright. Our subscribers want more than just the ability to hear great music at home or on the highway. Last year, we introduced a line of products called XM2GO. These portable products allow consumers to listen to XM live or to record up to five hours of programming, and thus to enjoy XM even when they cannot receive a satellite signal, such as at the gym or on an airplane flight.

We are building on the success and the functionality of the XM2GO devices with the Samsung Helix and the Pioneer Inno. Like the XM2GO, these new personal portable devices enable consumers to listen to live XM or to record content they receive over satellite radio. A subscriber can program these devices, like "time-shifting" on a VCR, to record a program that they cannot listen to live. The devices also will offer the type of functionality consumers have come to expect from their everyday personal portable music devices. The XM Helix and Inno players give consumers the ability to organize and hear the content they have recorded in any order they choose. In addition, the new devices include the ability for consumers to store songs from their personal music collection, and even to mix those songs with new music they hear on satellite radio. And if they enjoy a song they have heard or recorded, they can "bookmark" a song to buy later on CD, or they can purchase that song lawfully online from Napster and have it downloaded directly to the device.

As a responsible business, we specifically designed our products to comply with the Audio Home Recording Act (AHRA). When it adopted the AHRA in 1992, Congress created the legal framework for companies like XM to manufacture and distribute devices that can record digital music. As you will recall, that legislation allows consumers to digitally record music from CDs and broadcast transmissions for personal use, but prevents making digital copies from copies. In addition, under the AHRA manufacturers pay royalties on the sale of devices. The millions in revenues paid by manufacturers are shared with everyone in the music industry, under a formula

enacted by Congress with the support of all music industry stakeholders. In return, manufacturers, distributors, retailers, and consumers are immune from lawsuits based on copyright infringement. This represented a balanced compromise that won the unqualified support from the recording industry, the music industry, and the consumer electronics industry.

Congress intended the AHRA as a comprehensive and forward-looking compromise solution for the recording industry's concerns, for all new digital recording devices. And so did the recording industry. Then-RIAA president Jay Berman testified before this Committee that the AHRA "will eliminate the legal uncertainty about home audio taping that has clouded the marketplace," and "will allow consumer electronics manufacturers to introduce new audio technology into the market without fear of infringement lawsuits... ." In supporting the passage of the AHRA, Mr. Berman assured Congress that they would not have to revisit the home recording controversy for every new generation of digital recorder, proclaiming that 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."

In reliance on the AHRA, XM has invested in the design and manufacture of our new generation personal portable radio products. In compliance with the AHRA, these new generation devices do not allow any of the recorded content to be moved off the device in digital form. The only output on these devices goes to your headphones, in analog form. The new Helix and Inno products promote personal listening, not Internet piracy.

Notwithstanding payment of millions of dollars in performance royalties, millions more in AHRA royalties, and the limitations we designed into the devices so that XM content will not be uploaded to the Internet, XM still faces opposition from the music industry. We have heard it said that allowing consumers to record satellite radio turns our radio service into an unlawful download business. We disagree. We have heard it said that we are now giving consumers for the first time the ability "to slice and dice" music as they see fit. We disagree. And we have been told our devices will cannibalize the sale of recorded music, rather than promote sales as XM has done since its inception. We emphatically disagree.

As an initial matter, we strongly reject the music industry's efforts to roll back the long-established ability of consumers to record off the radio for personal use. We are particularly disappointed that the head of the RIAA has sought to vilify our law-abiding customers in testimony before the House Judiciary Committee, when he accused home tapers using new technology of "boldly engag[ing] in piracy with little fear of prosecution." XM listeners are avid music fans and some of the music industry's best customers, not pirates. And XM, and the consumer electronics manufacturers that build our new products in compliance with the AHRA, are not pirates either.

Recording content off of satellite radio is <u>not</u> the same as downloading music and has nothing to do with piracy:

- When a consumer wishes to download a song from Napster or iTunes, he can acquire that specific song on-demand within seconds of entering the name of the song. By contrast, XM subscribers have no ability to choose what XM plays or, therefore, what songs they can record.

- When a consumer buys a download from an Internet service, she can typically copy the song onto multiple devices and even burn it on to CDs. If a subscriber records a song from XM, the song is output only to her headphones. It cannot be burned directly to a CD, moved to any other device, or uploaded to the Internet.

- When a consumer purchases a download, he gets the full song from beginning to end. When a subscriber records a song off of XM, the recording is no substitute for the original. Just like recordings made using a tape recorder from FM radio, songs recorded off XM include DJ chatter, overlapping parts of the preceding and following songs, and they may even have a few seconds cut off.

- A download service, unlike XM, knows exactly what the consumer is downloading and can charge for every download. XM, like any radio service, has no way to know how many subscribers are listening at any given time, no less whether or what any subscriber may be recording. That is precisely why Congress created a royalty payment pool under the AHRA of funds to be shared among the music industry, based on general digital recording for personal use.

In short, we are providing our subscribers greater value from their XM subscription: the ability to take XM with them everywhere, on the go in their busy lives.

These new personal portable XM devices are merely today's equivalent of recording off the radio, with the kinds of flexibility that consumers have come to expect from new digital technology. We are giving our subscribers the tools to enjoy music they have lawfully acquired, with the capability to listen to that music in any order they want, to skip over songs they don't like, and to put together lists of songs for listening when jogging, commuting, or shopping – including when shopping for CDs. When a consumer records television programming on a TiVo, he or she can search for a particular episode and disaggregate it from the other recorded content. Like TiVo, we give consumers the tools to maximize their personal, non-commercial listening experience. But unlike a TiVo recorder, we cannot offer a program guide to tell our subscribers what songs are coming or when to record.

As in the days of reel-to-reel tape and later with analog cassettes, consumers can record from XM programming and decide when and in what order to listen to it. No doubt a few of you remember the experience of recording a song off the radio, using a razor blade to cut the tape, and with the help of Scotch® tape re-arranging the songs to make a party list of favorites. Our devices, like many other lawful products on the market today, simply update the tools for personal recording into the 21st century. These devices offer our subscribers the convenience of digital recording technology that they get from every other new digital media device they own. But just because a device makes personal recording convenient does not, and should not, make it illegal.

Concerns with Proposed Legislation

The proposed Perform Act would give the recording industry unwarranted control over the business of satellite radio, and would unfairly change the rules governing our upcoming royalty rate arbitration just as that arbitration is about to begin. We have three principal concerns.

First, the proposed Perform Act will lead to a new tax being imposed on our subscribers. Under current law, enacted just a few years ago in 1998 -- with the full support of the recording industry -- we pay performance royalties to record labels under the formula set forth in section 801(b) of the Copyright Act. Congress specifically chose that formula for satellite radio because it would take into account our "technological contribution, capital investment, cost, risk, and contribution to the opening of new markets," and would avoid disruption to our business. Moreover, Congress perceived that standard as fair to the recording industry, because that same section 801(b) formula governs the rates that the recording industry pays to songwriters and music publishers under their compulsory license. At the beginning of this year, the Copyright Office initiated the next statutorily-mandated arbitration between the recording industry and satellite radio to set those royalty rates for the next five years, and we are now in a period of negotiations over those rates. The Perform Act – on the very eve of those statutory license negotiations and arbitration – would unfairly change the rules for these negotiations and arbitration by taking away the 801(b) standard.

Under the bill, royalties would be set instead pursuant to the "fair market value" rule -- a rule that in practice would be anything but fair to XM, and that the recording industry apparently hopes will grant them an unwarranted windfall.

Members of this Committee may remember their past experience the only time that the "fair market value" standard was ever used to set compulsory license rates. In 1999, Congress by law in the Satellite Home Viewer Improvements Act had to step in and slash by as much as 45 percent the crippling rate that had been set by the Copyright Royalty Arbitration Panel under the "fair market value" standard, because it threatened to destroy the satellite television broadcasting industry. The proposed Perform Act bill would only create a repeat performance of the SHVIA controversy for satellite radio.

Unlike the existing section 801(b) formula, the "fair market value" standard does not take into account costs that are disproportionately incurred by XM (and Sirius) over any other entity currently subject to a performance license. Of all the entities that pay performance royalties, satellite radio is the only industry that creates and pays for its entire delivery infrastructure. Webcasters like Yahoo! did not have to create the Internet, and did not have to license spectrum from the FCC. By contrast, we acquired an FCC broadcast license at a cost of $90 million. We have spent close to a billion dollars to purchase our own dedicated transmission satellites and launch them into orbit, and we must repeat that investment to replace them on an ongoing basis after a relatively few years. We created and designed the XM transmission and receiving technology. In total, we have invested more than 3 billion dollars to create the satellite radio business, and expect to invest billions more on an ongoing basis. And still, under the section 801(b) standard, the satellite radio industry currently pays greater royalties to performers and recording artists than all other industries combined – while, of course, terrestrial radio continues to pay nothing.

Let me be clear: XM is not asking for any exemption or change to the law. XM simply wants the existing section 801(b) standards to continue to apply to our satellite radio service. That is what Congress decided in 1995 before XM obtained its broadcast license from the FCC, and what Congress re-affirmed in 1998 as we were preparing to launch our satellites and our service. If Congress truly wishes to create parity among the standards under the section 114 performance license, XM would have no objection if the section 801(b) factors were applied to all licensees. That balanced standard guarantees a reasonable royalty and a fair return to the recording industry and to

all performing artists. Every service could receive an appropriate rate under section 801(b) based on the value each brings to the table. That would be a fair result that XM would support.

The reason the recording industry is now insisting on a different standard has nothing to do with fairness. XM and the record industry are in the middle of renegotiating their performance license. By changing the standard now, the recording industry hopes to stack the deck in its favor. It would be grossly unfair to change the standard we built our business on or to force us to accept a standard that does not take into account the huge initial and ongoing investments made by our company. We cannot understand why Congress, just as these negotiations have begun, should preempt or upend the very statutory negotiation and arbitration process it prescribed for XM.

Mr. Bronfman recently told Wall Street and the press that he believes satellite radio should pay ten times to the recording industry what it currently is paying under the statutory license, and evidently the Perform Act is the vehicle he hopes will do it. XM cannot simply absorb a substantial increase per subscriber. The Perform Act would force XM to add that fee to our monthly subscription, courtesy of the recording industry and the U.S. Congress.

Second, as an equally unwarranted but far more punitive measure, the proposed Perform Act suggests that we can no longer qualify for a statutory performance license under section 114 at all if we bring our new personal portable radios to market with the recording and sorting features we have built into them. In other words, if we want to add new features our subscribers want and expect from new technology, then we must lose the protection of a statutory license and instead be forced to get hundreds of thousands of individual licenses from artists and record labels for the more than two million songs in the XM library. That of course would be impossible. Indeed, Congress created the section 114 license in part because it recognized that such negotiations were impossible both for the services and for small recording labels and artists. Thus, by offering the new devices as now configured post enactment of the legislation, we would turn our entire business into one of willful copyright infringement.

The Perform Act would wreak massive changes to existing law, based on speculations and fears of the recording industry that, time and again, have proven wrong. For more than 50 years, consumers have been lawfully taping music off the air, producing "mix tapes", and otherwise exercising their "fair use" rights to enjoy music in the privacy of their homes. Just as TiVo made the functionality of the VCR more user friendly, our new devices allow consumers to basically do what they have been doing for decades -- in a simple, convenient way. We can expect the RIAA to continue to wrongfully attack home tapers as pirates, but we cannot understand why anyone on this Committee would support such a fundamental attack on personal, private, and traditional home taping practices or would brand our company a willful infringer for bringing to market a device that allows your constituents to record and then listen to musical selections in whatever order they want. Again, just because our devices make personal recording off the radio more *convenient* does not make personal recording *illegal.*

Finally, we find it particularly unfair that the bill would single out satellite radio for these punitive measures. The bill would not restrict in the least the ability of anyone else to offer the same type of device. The same kind of devices that will record HD Radio programs and even current FM programs would be unaffected by this bill. Nor does the legislation affect the ability of a third party from making a radio that can record webcasts. A quick Google search for "record Internet radio" will turn up dozens of current lawful products that do all these things. And of course the bill does

nothing to stop consumers from turning to illegal P2P networks as the principal source of music if we lose them as customers. The essence of this bill is not parity – it is discrimination against satellite radio.

In our view, in the end the proposed legislation would hurt the music industry by discouraging technological innovation, pricing some of our existing and future subscribers out of the market, limiting the valuable airplay exposure that XM gives to emerging and classic artists, and paradoxically reducing the royalties that performers and record labels otherwise might receive from a thriving satellite radio industry. It will not be the first time the music industry has tried to kill the golden goose. The record industry historically has failed to appreciate how it could capitalize on new services and new products. We are here today to stand up for our subscribers' right to enjoy XM programming for their private, personal use, and to fight for the ability of entrepreneurs to bring lawful new products to market in the face of device-crippling legislation backed by an industry reluctant to adapt to new technology.

Conclusion

Today, we are offering more than six and a half million subscribers and a combined industry audience of some eleven million consumers the ability to enjoy music wherever they go. We are doing so lawfully, pursuant to the statutory framework Congress established in 1992 under the Audio Home Recording Act and in 1998 when it chose the 801(b) standard to govern our performance license under section 114. We are doing so in a way that delivers tens of millions of dollars in new royalty payments to the music industry and millions more in additional royalty payments under the AHRA. And we are doing so in a way that facilitates the purchase of music and thus gives the music industry another way to compete against illegal P2P networks.

In short, we are doing it right. We are following precisely the laws that Congress designed to apply to XM and to our new generation portable personal products. Like the companies behind every new technology from the transistor radio to the iPod, XM Satellite Radio is changing existing business models. We are doing so lawfully and we are paying more in compensation to copyright owners than any other industry. So, if sued, we will vigorously defend our business, our technology, and our subscribers. And we will fight any legislation that would turn back the clock on technology or impose a new tax on the music fans who are devoted to our service, or that threatens the long-honored right of consumers to record off the radio for their private personal enjoyment.

Thank you for your consideration of our views.

gary parsons
CHAIRMAN

May 1, 2006

Dear Chairman Specter and Senator Leahy:

Thank you again for allowing me the privilege of testifying before your Committee on April 26, 2006, in the hearing on "Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution." We recognize the Committee's interest in considering whether current law still strikes the right balance between the rights of copyright holders and the interests of broadcasters, subscription services such as satellite radio and their subscribers. In XM's view, it does. In this letter, I wish to elaborate on my responses to the following key points:

- Current law clearly distinguishes recording radio transmissions for personal use, on the one hand, from "distribution" by downloading, on the other. In law as in fact, the new XM portable radios are *not* a distribution service. They do allow subscribers to record individual songs or segments from channels programmed by XM; but unlike "distribution," our subscribers cannot choose what we play or when (and thus cannot request particular works on demand), and XM cannot control what subscribers may save. Moreover, the songs stored on a device cannot be moved from it, burned onto a CD, or distributed over the Internet.

- These devices enable precisely the type of recording covered by the Audio Home Recording Act where, just like a DAT or CD recorder, the consumer and not the service or manufacturer controls what, when and how much to record. Royalties paid under the AHRA benefit all the creative community, from songwriters to performers and from music publishers to record labels. XM designed its devices in full compliance with the AHRA and all applicable laws, and no one at the hearing contended otherwise.

- Finally, we oppose any effort to move away from the Section 801(b) ratesetting standards established by Congress -- and endorsed by the recording industry just a few years ago when Congress created digital performance rights. The Committee should not change the rules governing negotiations with the satellite radio industry *after* those negotiations have already begun – particularly because the current standards undoubtedly will result in the payment of hundreds of millions of dollars by the satellite radio industry to the recording industry, songwriters and artists over the next statutory license period. Recognizing the interest of Senator Feinstein and other Committee Members to achieve parity among the various entities that perform sound recordings, we believe Section 801(b) should be the starting point – particularly since the RIAA benefits from Section 801(b) when record labels pay royalties for music use.

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Consumer Recording from XM is Not a "Distribution."

During the hearing, Senator Leahy asked whether recording from digital radio was a "distribution." As he suggested, "a lot hangs on the answer to this question." I answered that recording from XM is *not* a distribution, and that this type of recording is no different in kind than the recording off the radio that consumers have done for the last 50 years. My fellow witnesses Mr. Reese and Mr. Lam agreed.

Given the importance of this question, I appreciate this opportunity to amplify my answer. I believe it is clear that this Committee already has considered, acknowledged and maintained under current law the fundamental distinction between distributions, and recording from radio performances. In fact, Congress has already drawn that distinction in the context of digital distribution, transmission and recording.

Despite the implications of its name, the Digital Performance Right in Sound Recordings Act of 1995 was not just about digital performances. That Act as you recall accomplished two essential purposes. The first was to grant the recording industry and performing artists a limited performance right in digital transmissions, under a statutory license in Section 114. The second, distinct purpose was to ensure that the Section 115 mechanical license right to make reproductions of sound recordings would extend to distributions of music by digital transmission. While we colloquially refer to these today as "music downloads," these distributions under the DPRSRA are called "digital phonorecord deliveries" or "DPDs."

Pursuant to the 1995 DPRSRA, the first sentence of Section 115(d) of the Copyright Act defines a "digital phonorecord delivery" as:

> each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

The key phrase in that definition, "which results in a *specifically identifiable reproduction,*" distinguishes transmissions of songs that the sender specifically causes to be recorded from generic transmissions which are recorded at the election of the home consumer. The former are to be characterized as DPDs; the latter are to be treated in the same manner as traditional home taping.

This Committee in its Report on the DPRSRA emphasized this bright-line distinction. To be a distribution by DPD, the entity making the transmission must cause and intend that the recipient record that specific song:

> The Committee notes that the phrase "specifically identifiable reproduction," as used in the definition, should be understood to mean a reproduction specifically identifiable to the transmission service. Of course, a transmission recipient making a reproduction from a transmission is able to identify that reproduction, but ***the mere fact that a transmission recipient can make and identify a reproduction should not in itself cause a transmission to be considered a digital phonorecord delivery.***

S. Rep. No. 104-128, at 44. This language clearly showed Congress' intention to distinguish between distribution by downloading and home recording of broadcasts, and Congress's deliberate determination that a home recording made solely at the instigation of the transmission recipient should not be considered to be a distribution.

This Committee's report continues with specific examples underscoring that recording from transmissions exactly like XM's should not be considered DPDs:

> For example, a transmission by a noninteractive subscription transmission service that transmits in real time a continuous program of music selections chosen by the transmitting entity, for which a consumer pays a flat monthly fee, would not be a ''digital phonorecord delivery'' so long as there was no reproduction at any point in the transmission in order to make the sound recording audible. Moreover, ***such a transmission would not be a "digital phonorecord delivery" even if subscribers, through actions taken on their own part, may record all or part of the programming from that service.***

S. Rep. No. 104-128, at 45.

XM is a noninteractive subscription service (since users cannot determine what songs XM will transmit, and XM makes the same channels available to all of its service subscribers). XM subscribers pay a flat monthly fee. Thus, the legislative history from this Committee exactly describes the XM service, and why the *possibility* of consumer recording does not convert the XM service into a "download" or "distribution" service.

Just as broadcast radio listeners may record songs from broadcast radio, XM subscribers may choose to record all or part of the XM programming; but the decision of whether or what to record or to save is solely the decision of the subscriber, and is solely within the subscriber's control. Just like consumers who use their VCRs primarily for playback, many XM subscribers will use their radios to listen to the live XM signal and rarely, if ever, record at all. Some will record talk, special programs, or music channels for later listening, the same way consumers time-shift using a TiVo. Some will only listen to the recordings continuously, as if listening to live XM. Some may save songs for later listening. Some may do it occasionally; some may do it a lot. But all those decisions are made solely by the consumer – not by XM.

To focus the sharp contrasts between distribution vs. home recording from XM, consider these attributes of each:

DPD Distribution	***Recording from XM Radio***
• The consumer chooses the specific songs to be transmitted.	• The consumer cannot choose *any* song to be transmitted. Songs are selected only by XM DJs.
• The consumer chooses when to receive a particular song.	• The consumer never knows when a particular song is going to be played by XM. Indeed, there is no guarantee that a particular song will ever be played on XM. And the law forbids us from publishing a list of upcoming songs.
• The download service knows exactly when and what the consumer records.	• XM does not know whether, when, or (if so) what anyone is recording.
• Every copy is pristine and complete.	• Songs recorded from XM are like recordings from the radio: with DJ voices, or overlapping beginnings and ends of adjacent songs, or are truncated.
• The consumer can copy and listen to the music on a PC or handheld device, burn it to CD, and share those CDs with friends and relatives. Any song burned to a CD can be sent to the internet.	• Any songs recorded from XM are locked to the device. They cannot be copied, transferred, burned to CD, shared with anyone else or sent to the internet, and the device has no digital output
• The consumer keeps the downloaded recording forever.	• Content is recorded over, on a continuous basis when the user records new content. If content has been saved to a playlist, the consumer can only hear content from XM as long as the consumer remains an XM subscriber, thus ensuring performance royalties continue to flow to the recording industry.

In sum, when in 1995 Congress enacted both a limited digital performance right in sound recordings, *and* a compulsory mechanical license for distribution by digital transmission, Congress clearly distinguished between digital performances and distributions. These distinctions are clear in current law, and are well-justified by their fundamentally different factual characteristics.

We at XM recognized the differences between download distribution and recording off the radio when we designed our devices, and we know that our subscribers would see those differences too. That is why we partnered with an established online download service, the new Napster, so that our customers who enjoy a song they hear on XM can buy a full uninterrupted version of the song they can keep forever on their PC, burn to a CD, transfer to the XM portable radio, or transfer to a different compatible MP3 player in accordance with Napster's copy protection limits.

XM designed these new portable radios in full compliance with the law. It was very telling in my view that not a single witness on the panel at the hearing contended the contrary.

The XM Devices Comply with, and Compensate Creators, Pursuant to the Audio Home Recording Act as Congress Intended.

I would like next to address briefly two additional points from the hearing, with respect to the purpose and workings of the Audio Home Recording Act.

First, songwriters like Ms. Victoria Shaw *do* currently receive royalties under the AHRA based on the sales of digital audio recording devices. As this Committee will recall, the AHRA as first considered by Congress contained only provisions to limit serial copying. That version of the bill was opposed by songwriters and music publishers, "because it failed to establish a system to compensate copyright owners and creators for sales displaced by home taping of copyrighted music." Report of the Senate Committee on the Judiciary, S. Rep. No. 102-294 at 32. The AHRA as enacted, with the support of the music industry, includes a Musical Works Fund by which music publishers and songwriters participate in the revenue generated by the AHRA. 17 U.S.C. § 1006(b)(2). As then NMPA President, Edward P. Murphy, testified before this Committee in support of the AHRA, "[Our] enthusiastic support for the Audio Home Recording Act ... stems from its comprehensive approach to audio home taping issues. The proposed legislation incorporates the critical royalty component, and it extends to all digital audio recording technologies, not just to DAT." S. Rep. No. 102-394, at 40. Thus, songwriters and performing artists, music publishers and recording labels, will receive substantial additional revenue from the sale of the XM portable radios, as provided under the AHRA.

Second, although Mr. Bronfman complains that the AHRA pool currently brings in only a few million dollars per year, that is in large measure because sales of MP3 players and personal computer CD burners -- which do not pay AHRA royalties -- have overshadowed the home stereo devices that do generate royalties under the AHRA. If the new XM portable radios become popular, substantial new revenues will be paid into the pool, for the benefit of the recording and music industries, performers and songwriters.

Congress Should Not Repeal the Section 801(b) Standards for Sound Recording Performance Royalty Ratesetting.

Finally, I would like to respond why the Section 801(b) standard remains the only appropriate standard for royalty ratesetting for music services. When Congress created the limited digital performance right in sound recordings in 1995, Congress determined – with the full support of the recording industry – that the proper standard for setting rates for these rights was under Section 801(b). The reasons for using that standard were clear:

- The 801(b) standard was the only rate that had been applied to the determination of royalties involving music rights.
- The 801(b) standard was used when the recording industry, as itself a copyright user, negotiated or arbitrated with the music publishing industry for rates that it would pay under the mechanical license.
- Section 801(b) produced fair results for both copyright owners and copyright users, as it had been designed to do.

Contrary to implications left at the hearing, the Section 801(b) factors are *not* intended solely to be applied to new industries in their start-up phase. To the contrary, those factors first were created to apply to the well-established music publishing and recording industries, and have applied to their negotiations and arbitrations, successfully, for more than 20 years. The Section 801(b) factors are flexible enough to take into account the needs and changing circumstances of various industries, and to permit arbitrators to assess different fees based on the characteristics of the licensor industry and each category of licensee.

A major reason for the success of the four Section 801(b) factors is that they are well-balanced to promote the creation of copyrighted works, and to achieve fairness for both copyright owners and copyright users:

(1) The rates seek to maximize the availability of creative works to the public -- a factor that favors the licensors.

(2) The copyright owner must get a "fair return" for its creative work, and the licensees also are allowed a "fair income." This emphasis on fairness to the licensee, however, does have its limits. It does not require that the licensee obtain a fair "profit" -- only that it receive a fair operating "income." Thus, this factor assures that copyright owners receive a fair royalty return, and are not asked to subsidize the success of the licensee.

(3) Each party's creative contributions and investments, costs, and risks are considered. This is particularly important for both industries, in that each contributes substantially to the creation of new works and business models.

(4) The rates should be calculated so as to minimize disruption on each respective industry and its practices.

In 1998, Congress specifically determined that royalty rates paid by satellite radio should be set under these balanced Section 801(b) standards. The legislative history notes that Congress recognized that satellite radio had acquired FCC licenses at auction, and had begun developing their services, with the understanding that performance royalty rates would be set under Section 801(b); and that changing the rules would potentially be disruptive to their business.

That was the right decision then, and remains the right decision now. Unlike any other statutory licensee, satellite radio must create its entire infrastructure to reach the consumer, from studio to satellite, and from satellite to the radio receiver. The three billion dollars invested to date in XM are not close to being recouped. We are not yet cash-flow positive, and have yet to show a profit. Moreover, the infrastructure investments made in developing and literally launching our telecommunications satellites must be repeated every few years as satellites wear out and must be replaced, at a cost of more than $250 million each. Because the supposed "fair market value" standard fails to take into account the extraordinary investments required to create and maintain this new broadcast medium, changing the standard in the middle of negotiations would be more than unfair or prejudicial; it could prove harmful to our business.

Moreover, there is no evidence that the Section 801(b) standard has failed to serve its purpose, or to fairly compensate copyright owners. In 2001, the recording and satellite radio industries reached a voluntary agreement specifying the payments to be made under the statutory license. That agreement has made XM the largest single payor of performance royalties to the recording industry and performers, and the satellite radio industry the payor of more royalties than all other industries combined. XM currently pays tens of millions of dollars in those royalties. Given the growth of XM over the last few years, we fully expect that any negotiation or arbitration under the Section 801(b) factors will result in sound recording performance royalty payments of hundreds of millions of dollars over the next license term.

Under those circumstances, we cannot understand how anyone could claim that the Section 801(b) factors do not provide fair compensation to copyright owners, or that any need exists to repeal those factors in the midst of our license negotiations and arbitration. By contrast, the proposed "fair market value" standard, in the only time it ever has been invoked in an arbitration, produced results so demonstrably unfair that Congress slashed those results by 30-to-45 percent in the Satellite Home Viewer Improvements Act; and, Congress effectively decided that standard should never be used again for satellite television. Applying that flawed "fair market value" standard to satellite radio would merely invite a repeat performance of the same controversies and contentiousness that

Congress faced in SHVIA. No controversy ever has been engendered by Section 801(b). If the Committee believes that there should be parity of standards among all services – and there cannot be true parity while even terrestrial HD broadcast radio remains exempt from the performance rights obligation -- we would urge the Committee to apply the Section 801(b) standards across the board.

Thank you again, Chairman Specter and Senator Leahy, for allowing me the opportunity to comment on these important questions. We look forward to our active participation in any further consideration of these issues, and would welcome any opportunity to tell you and your Committee more about XM Satellite Radio and the satellite radio industry.

Respectfully submitted,

CC: Senator Orrin G. Hatch
Senator Charles E. Grassley
Senator Jon Kyl
Senator Mike DeWine
Senator Jeff Sessions
Senator Lindsey Graham
Senator John Cornyn
Senator Sam Brownback
Senator Tom Coburn
Senator Edward M. Kennedy
Senator Joseph R. Biden, Jr.
Senator Herbert Kohl
Senator Dianne Feinstein
Senator Russell D. Feingold
Senator Charles E. Schumer
Senator Richard J. Durbin

April 26, 2006

Senator Diane Feinstein
331 Hart Building
Washington DC 20515

Dear Senator Feinstein:

On behalf of the thousands of musicians, songwriters, producers and engineers who comprise The Recording Academy, I want to sincerely thank you for your important efforts on behalf of music creators. The PERFORM Act will ensure fair compensation to creators and hopefully open the door to clarification and proper payment for non-interactive services. We also owe you our gratitude for your insightful questions in today's Senate Judiciary hearing. Witnesses Victoria Shaw (a member of our board in Nashville) and Anita Baker (recipient of our GRAMMY Award) both appreciated your comments.

It has been our pleasure to work with your office in determining final bill language that meets the needs of music creators. I am particularly grateful to Jennifer Duck on your staff who worked with us effectively to ensure that the needs of the artist community were being addressed.

The Recording Academy, the majority of our members, and our GRAMMY Awards are all based in California; we are proud to call you our Senator. Thank you for your commitment to the music creators in your state and around the country. We look forward to assisting you as you work toward passage of the PERFORM Act.

Very best,

Daryl Friedman
Vice President
Advocacy & Government Relations

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STATEMENT OF

RECORDING ARTISTS' COALITION

Before the

SENATE COMMITTEE ON THE JUDICIARY
109th Congress, 2nd Session

Hearing on

PARITY, PLATFORMS AND PROTECTION:
THE FUTURE OF THE MUSIC INDUSTRY IN THE
DIGITAL RADIO REVOLUTION

April 26, 2006

Recording Artists' Coalition
c/o Jay Rosenthal, Esq.
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1101 17th Street, NW, Suite 1100
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Statement on behalf of the Recording Artists' Coalition
Before the Senate Judiciary Committee,
United States Senate
April 26, 2006

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

Thank you for holding a hearing on the important issue of "digital radio" and for the opportunity for the Recording Artists' Coalition ("RAC") to present our views to the Committee. RAC is a non-profit recording artist advocacy organization representing over 130 well-known featured recording artists, including Don Henley, Sheryl Crow, Jimmy Buffett, Natalie Maines, Billy Joel, Stevie Nicks, Bonnie Raitt and Bruce Springsteen. RAC is primarily concerned with political, legal, and business issues affecting the interests of recording artists on a federal and state level.

RAC's testimony today sets forth our continuing concerns with the development of new radio platforms and how these changes will impact recording artists.

1. Content Protection: RAC strongly supports broad-based efforts to protect sound recording copyrights, including incorporation of reasonable digital rights management ("DRM") technology in digital and satellite radio signals and devices. Pro-technology and consumer advocate organizations complain that those creating or exploiting new technology should not be compelled to incorporate DRM into their services or devices because it inhibits or stifles technological innovation. They also complain that digital radio and satellite services should not be compelled to incorporate DRM technology into their services or devices if there is no clear evidence of a pattern of copyright infringement by users.

Both arguments are wrong. In the first instance, digital and satellite radio services would only enhance technological innovation if they incorporate reasonable DRM or some form of

copyright protection into the technology from the inception of the development process. Copyright owners have never been shy about protecting their copyright interests. Digital and satellite radio services should assume at all times that copyright owners will be aggressive in protecting their intellectual property. In order to avoid this problem with copyright owners and recording artists, and to ensure a smooth, problem-free introduction of their products or services into the marketplace, technology creators should work with the copyright owners and recording artists during the development phase so that all copyright concerns will be addressed before the introduction of the device or service, and not after.

The recent introduction of the Sirius MP3 device and the planned introduction of similar devices from Sirius and XM Radio accurately illustrate this problem. The meritorious claim by copyright owners that such devices "cannibalize" music and harm the interests of recording artists and record labels, should have compelled the satellite radio services to work with the copyright owners while the device was being developed. Because of their failure to do so, the satellite services missed an opportunity to introduce an acceptable, problem-free device which may have satisfied consumer demand and greatly benefited recording artists and record labels. Instead, the failure to address copyright concerns during the development stage has resulted in contentious negotiations and conflict, thus crippling the status and potential of the device.

In the second instance, developers of digital radio services and prospective recording devices argue that incorporation of DRM technology in digital radio broadcast services or devices aimed at curbing or stopping the practice of "stream ripping" is premature without clear evidence of users creating hard copies of what would otherwise be "streams" of music. This argument is specious and is contrary to the goal of responding to copyright infringement problems before the technology is introduced to the public. Many parties argue that "stream

ripping" is not only possible, but will most likely be widespread in the immediate future. As such, digital radio services should be compelled to incorporate effective DRM technology into their services at the broadcast source and in special devices created and distributed by the digital radio services or any licensee. Cannibalization of music without appropriate compensation to artists is not acceptable. Effective and non-intrusive DRM technology is the perfect solution to this problem. The user will enjoy digital music, and hopefully that experience will translate into a sale. That is how the music industry should work.

2. SoundExchange/Interactivity: RAC strongly supports SoundExchange and its underlying model. The benefits to recording artists are undeniable, and the model should be used whenever royalties for recorded music are collected from digital platforms now in existence or developed in the future. One direct benefit is that the recording artist's share is paid directly to the artist without recoupment against the artist's account with the record label. Recording artists are also effectively spared substantial auditing costs and are paid more quickly because of the transparent and efficient SoundExchange payment system.

Equally significant is that the webcasting and radio services subject to the SoundExchange compulsory license system enjoy certainty of use of the sound recordings, thus resulting in new, dynamic, and innovative consumer services offered to the public. At a time of diminishing worldwide sales of sound recordings, introduction of new, consumer-friendly services is essential if the music industry is to effectively compete with a myriad of entertainment choices offered to the public.

Expanding the scope of the SoundExchange license would benefit recording artists, record labels, and webcasting services. In order to do this, Congress must amend the Section

114 definition of "non-interactive services" to create a new category of limited interactive services, including an appropriate premium rate for such services, within the statutory license contained in Section 114.

3. Public Performance/Platform Parity: Section 114 granted recording artists and record labels the first public performance right for sound recordings in the United States. However, analog and digital radio broadcasts are still exempt from the requirement to pay recording artists and record labels for broadcast of their sound recordings. This exemption not only dramatically impacts recording artists, it places satellite services, webcasters, and others subject to the Section 114 license at a severe economic and business disadvantage.

Principles of fair competition demand that these services compete on an even playing field with analog and digital radio services. It is for essentially the same reason that Congress should grant recording artists an analog and digital radio public performance right. Recording artists enjoy such a right in almost all foreign countries, and because of this inequity, foreign public performance royalties are withheld from United States recording artists.

Congress should also seriously consider adopting comprehensive platform parity for all functional and rate-setting criteria and factors. The initial rationale for granting different functional and rate-setting factors has long since lost significance. The services are no longer new and no longer need artificial support. Thus, all services should be equally subject to the same functional limitations and rate-setting criteria. An even playing field will guarantee that the best and most deserving services will survive. This is good for recording artists, labels, and consumers.

4. Discovery Abuse: In the event that negotiations on royalty rates between the parties fail,

Section 114 provides for a rate-setting proceeding. As part of these proceedings, interested parties, including recording artists, are offered an opportunity to testify. The judges, who are charged with the responsibility of determining a rate, must take into consideration testimony from all interested parties, including the recording artists, whose testimony is essential to the process.

Quite recently, in the webcasting rate proceeding, litigators representing parties adverse to the recording artists filed incredibly onerous and overreaching discovery requests on recording artist witnesses. The requests were clearly intended to intimidate and scare the recording artist witnesses to such a degree that they would withdraw as witnesses. Congress should immediately amend the expansive discovery request rules so that recording artists will be protected from such heavy-handed, abusive tactics.

We thank you again for this opportunity to provide the Committee with our comments.

JOINT NEWS RELEASE

from

American Federation of Musicians (AFM)

American Federation of Television of Radio Artists (AFTRA)

The Recording Academy

Recording Artists' Coalition (RAC)

SOUND RECORDING ARTISTS APPLAUD

BI-PARTISAN EFFORT BY SENATORS TO PROTECT RIGHTS

WASHINGTON (April 25, 2006)—The four leading organizations representing recording artists today joined together to support copyright reforms introduced by a bi-partisan group of senators that will protect compensation to artists and ensure a thriving environment for the legal digital music marketplace.

The American Federation of Musicians (AFM), the American Federation of Television and Radio Artists (AFTRA), The Recording Academy, and the Recording Artists' Coalition (RAC) endorsed amendments to Section 114 of the Copyright Act introduced today by Senators Dianne Feinstein (D-CA), Bill Frist (R-TN), and Lindsey Graham (R-SC).

The legislation would protect performers' income from sales and transmissions of their recordings by requiring content protection measures in digital transmissions and by providing platform parity in the licensing measures that apply to various types of digital music services. The legislation also requires that uncertainties in the licensing of sound recordings for use on the Internet be resolved.

The organizations praised the senators in a joint statement: "As representatives of recording artists and copyright owners, we deeply appreciate the tremendous effort and commitment that Senators Feinstein, Frist, and Graham have demonstrated in working to resolve these vital issues, and we look forward to assisting them in any way we can to find a solution."

The sound recording artist coalition groups intend to submit testimony supporting the bi-partisan amendments at a Senate Judiciary hearing on April 26, 2006.

AFM President Thomas F. Lee said, "Recording musicians will play their hearts out for music lovers, music partners, and the world at large, but transmissions of their recorded work must be decently compensated and reasonably protected for them to afford to perform. The AFM welcomes this legislation as a step toward those goals."

AFTRA National Executive Director Kim Roberts Hedgpeth said, "Radical developments in the transmission of digital music have created an urgent need for legislation to protect artists' property interests in their recordings and ensure they are fairly compensated regardless of the platform over which their music is played. AFTRA is encouraged by this move towards protecting the artists whose music fuels this industry."

The Recording Academy President Neil Portnow said, "New technologies for delivering music continue to present exciting opportunities—as well as serious challenges—for music creators. We applaud the work of Senators Feinstein, Frist and Graham who seek to ensure that recording professionals who create music will be protected and compensated as these new technologies enter the marketplace. We look forward to continuing our work with the Senators to assure passage of The PERFORM Act."

Recording Artists' Coalition National Director Rebecca Greenberg said, "Recording artists will greatly benefit from the new platform parity rules, which will create an even playing field between the webcasters and radio broadcasters. The Feinstein legislation would guarantee that artists receive a fair market price for their music, and would pave the way for the introduction of new and innovative webcasting and radio services and programs, which will in turn benefit artists."

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About the organizations:

The **American Federation of Musicians** of the United States and Canada is the largest organization in the world dedicated to representing the interests of professional musicians. Whether it is negotiating fair agreements, protecting ownership of recorded music, securing benefits such as health care and pension, or lobbying our legislators, the AFM is committed to raising industry standards and placing the professional musician in the foreground of the cultural landscape.

http://www.afm.org/

AFTRA is a diverse, national union representing over 70,000 professional performers and broadcasters, 14,000 of whom are sound recording artists. Protecting and expanding the intellectual property rights of sound recording artists is a vital component of the AFTRA legislative agenda. AFTRA also negotiates with record labels to secure better health, retirement, and other benefits for recording artists.

http://www.aftra.com

Established in 1957, the National Academy of Recording Arts & Sciences, Inc., also known as **The Recording Academy**®, is an organization of musicians, producers, engineers and recording professionals that is dedicated to improving the cultural condition and quality of life for music and its makers. Internationally known for the GRAMMY® Awards, The Recording Academy is responsible for groundbreaking professional development, cultural enrichment, advocacy, education and human services.

http://www.grammy.com

Recording Artists' Coalition is a non-profit, non-partisan coalition formed to represent the interests of recording artists with regard to legislative issues in which corporate and artists' issues conflict, and to address other public policy debates that come before the music industry.

http://www.recordingartistscoalition.com

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NEW BIPARTISAN SENATE BILL LEVELS DIGITAL MUSIC PLAYING FIELD, ASSURES SATELLITE FIRMS PLAY BY SAME RULES AS OTHERS

Members of Music Community Hail Feinstein-Graham-Frist Legislation, Say Bill Will Help Ensure Fair Payment for Artists and Songwriters

WASHINGTON – The Recording Industry Association of America (RIAA) today hailed the introduction of new legislation to level the playing field for satellite radio as a major step forward in the music industry's drive for parity among digital music services. The bill – introduced late Tuesday by Sens. Dianne Feinstein (D-Calif.), Lindsey Graham (R-S.C.) and Bill Frist (R-Tenn.) – would reform the appropriate section of copyright law to assure satellite services play by the same rules as Internet music services – both in rate setting and content protection standards.

"We are big fans of satellite radio and celebrate its growth," said Mitch Bainwol, Chairman and CEO, RIAA. "At the same time, that growth should not come at the expense of the music community, displacement of licensed sales and the integrity of the digital music marketplace. There is a critical need for the government to harmonize the current protections and rate regimes that make for the haphazard patchwork covering digital music services today. This patchwork is allowing satellite radio to morph into something altogether different – a digital distribution service – with the creators of music left in the lurch.

"This legislation seeks to right that wrong and ensure a marketplace where fair competition can thrive," added Bainwol. "We're extremely grateful for the leadership of Senators Feinstein, Graham and Frist. This bill moves us far closer to achieving the platform parity that is so key to the health of the music industry in years to come."

The digital music marketplace is undergoing a convergence across all platforms – a convergence creating arbitrary advantages for certain services over others at the expense of creators. While offering great opportunities for the music community, satellite

broadcasters and music fans, the convergence of radio-like services and downloading capability requires changes in the law to protect against a satellite company transforming its model into a download service without the appropriate license.

The RIAA and others in the music community have made it clear that satellite radio services should be required to obtain a license in the marketplace to offer the capability to cherry-pick individual songs and then permanently store them in a digital library. Legislation – such as the Feinstein-Graham-Frist bill – is needed to ensure that satellite services play by the same set of rules everyone else does and not profit from becoming a download/subscription model without acquiring the appropriate license and compensating artists and songwriters.

Because traditional terrestrial radio is not covered by the government license or this legislation, private market negotiations on measures to similarly protect high-definition (HD) radio are currently in progress. The RIAA has also praised the introduction of legislation by Rep. Mike Ferguson (R-N.J.) that requires users of free government spectrum to protect content delivered through HD radio receivers through private market agreements.

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[The Recording Industry Association of America is the trade group that represents the U.S. recording industry. Its mission is to foster a business and legal climate that supports and promotes our members' creative and financial vitality. Its members are the record companies that comprise the most vibrant national music industry in the world. RIAA® members create, manufacture and/or distribute approximately 90% of all legitimate sound recordings produced and sold in the United States. In support of this mission, the RIAA works to protect intellectual property rights worldwide and the First Amendment rights of artists; conduct consumer industry and technical research; and monitor and review - - state and federal laws, regulations and policies. The RIAA® also certifies Gold®, Platinum®, Multi-Platinum™, and Diamond sales awards, as well as Los Premios De Oro y Platino™, an award celebrating Latin music sales.]

Statement of Bruce Reese
President and CEO, Bonneville International Corporation
On behalf of the National Association of Broadcasters

Hearing before the Senate Judiciary Committee
Parity, Platforms and Protection:
The Future of the Music Industry in the Digital Radio Revolution

April 26, 2006

Good morning, Chairman Specter and Members of the Committee, my name is Bruce Reese. I am the President and CEO of Bonneville International, which owns and operates 38 radio stations throughout the country, including WTOP here in Washington. I am also the Joint Board Chairman of the National Association of Broadcasters (NAB). NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

My message today can be summarized in two simple thoughts. First, Congress should not take any actions that would deter the continued roll-out of terrestrial digital radio service. Second, Congress should improve current copyright law so that it does not inhibit Internet radio streaming.

Any System to Protect Digital Content Must Not Impede the Digital Radio Roll-Out

Turning first to the issue of terrestrial digital radio, I can report that local broadcasters today are engaged in an exciting transition to digital. The industry sees high definition radio as our future—it will enable us to better serve our local communities and to remain competitive in today's ever-changing digital media marketplace. But we face many challenges as we work toward a successful and timely transition to digital radio. Those challenges would be exacerbated – and the roll-out delayed – by a "quick fix"

technical system to provide copy protection for digital radio. For this reason, NAB and the Recording Industry Association of America (RIAA) are now coordinating on the development of a consensus on digital radio copy protection. We urge you to allow this industry process to continue without the adoption of premature legislative mandates that could well have disastrous consequences for our industry.

The radio industry in America has begun its massive roll-out of digital broadcast transmissions and all-new digital radio receivers. Currently, 765 digital AM and FM stations are on the air. Broadcasters have individually committed to upgrade more than 2,000 stations to high definition (HD) radio technology this year. Why are radio broadcasters embracing HD radio? In short, because it will allow local broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. HD radio not only offers crystal-clear audio. It permits the broadcasting of multiple free, over-the-air program streams to bring additional content (including much more local content) to the public within stations' current spectrum. It also permits other services, including wireless data enabling text information, such as song titles and artists or weather and traffic alerts. Even more innovative features are under development, such as program menus giving listeners instant access to a favorite drive time show, news and information, and special music programming. New features of the future could also include real-time traffic reports broadcast by local stations and visually displayed on a vehicle's navigation system. In sum, digital radio will allow broadcasters to remain a vital and vibrant part of the media landscape of the future.

But beyond thousands of radio stations converting to digital, the HD radio revolution also involves the consumer electronics industry and, most importantly,

consumers. New digital radio receivers have been launched in the marketplace across a range of product categories. Major radio groups are engaged in a massive marketing campaign to promote digital radio to consumers. And auto makers and after-market manufacturers are beginning to produce digital radio products for car sound systems. 2006 promises to be a pivotal year for the roll-out of digital radio, with auto makers signing up for factory-installed radios, retail outlets prominently featuring many new digital radio products, and hundreds more broadcasters commencing digital transmissions. Given this investment by broadcasters and equipment manufacturers and the benefits that consumers will receive from a successful deployment of digital radio, it is of paramount importance that any copy protection mechanism not impede the digital radio roll-out.

NAB remains concerned that developing and implementing a technical system to provide copy protection for digital radio not have a negative impact on the digital radio transition. Reaching a final consensus on the digital television (DTV) broadcast flag mechanism, for example, entailed many years of intense negotiations by scores of participants from a wide array of industry sectors. The purpose, concept and methodology of the DTV flag were then the subject of voluminous comments and reply comments from affected industry and consumers groups, companies and organizations. The FCC scrutinized these comments, heard in-person presentations from many interested parties and concluded that the purpose of preventing widespread indiscriminate re-distribution of digital video content over the Internet was worthy and that the methodology was sound and workable.

NAB has expressed its willingness to participate in developing and forging a consensus on a digital radio copy protection system so long as it would not interrupt the digital roll-out or create uncertainty that would lead to a slow down of adoption rates by manufacturers, consumers or even broadcasters. To that end, NAB and RIAA are in on-going discussions regarding copy protection. We jointly held an executive level meeting in New York City that served as a starting point for our discussions. During that meeting, we agreed to two working groups – an Audio Flag Task Force and a Technical Implementation Working Group – as well as a schedule for each group.

On April 5, 2006, the Audio Flag group held its first meeting at the NAB offices. Steve Marks, General Counsel at the RIAA, and Dan Halyburton, the Chair of the NAB Audio Flag Task Force, led the group. Each industry had member company representation at the meeting and participation via conference call. The meeting was productive in laying a foundation for the work and discussions that will follow.

During the week of April 17th, two meetings were held. The first meeting of the Technical Implementation Working Group was on Wednesday, April 19 at the RIAA offices. This group consists of engineers and technology executives and will address technical issues relating to the implementation of a potential audio flag. On Thursday, April 20, the second meeting of the Task Force took place at the RIAA offices. We expect these two groups to continue to meet and to move forward with discussions that will ultimately involve and include other vital stakeholders in a successful resolution of the issues.

Given these on-going discussions, NAB does not believe that legislation mandating any particular system of digital radio copy protection is necessary at this time.

Terrestrial digital radio is a far different platform from satellite and on-line music services and delivery. The reality or scope of any threat to the recording industry from a scenario in which consumers make good quality recordings from digital broadcasts on their local radio stations is still an evolving concern. Those desiring to obtain and listen to pure, uninterrupted performances of sound recordings, in lieu of the radio, already have an abundant number of means to do so. Satellite and cable digital subscription services, hundreds of thousands of unencrypted compact discs, peer to peer file sharing, and hours of uninterrupted music that can be stored on recordable CDs and hard drives, are but a few such means. These are far different concerns than that of consumers seeking out random digital audio broadcast signals that may contain DJ patter over the recordings in order to create files to make copies of or distribute sound recordings. Moreover, the public's right to make private copies of sound recordings for personal use must be taken into account in developing any technical system of copy protection. Nonetheless, NAB strongly believes that the broadcast industry, the recording industry, and other vital stakeholders can work toward a consensus on digital radio copy protection system as warranted by marketplace conditions and technological developments.

In a similar vein, let me take this opportunity to note the importance of regulatory parity to terrestrial radio's future. One of the FCC's stated goals is to "develop[] a consistent regulatory framework across platforms by regulating like services in a similar functional manner." *Report and Order and Notice of Proposed Rulemaking* in CC Docket No. 02-33, FCC 05-150 at ¶ 1 (rel. Sept. 23, 2005). NAB supports this goal and urges both Congress and the FCC to achieve greater regulatory parity between terrestrial radio and satellite radio. The regulatory disparities between satellite and terrestrial

broadcast radio are well known. For example, broadcasters are subject to public interest obligations that satellite radio providers are not. As you are no doubt aware, terrestrial radio providers are subject to strict indecency regulations that the FCC has not applied to radio programming delivered by satellite. Some have in fact speculated that this disparity in content regulation will give satellite radio operators a competitive advantage in the marketplace, especially among certain demographic groups. Perhaps most worrying, broadcasters fully expect XM and Sirius to pursue local advertising dollars aggressively, even though the FCC believed they would be "national services" when it authorized satellite radio. Small market stations are particularly concerned that if satellite radio – with the ability to put hundreds of programming channels into every market – were to absorb local advertising dollars, terrestrial stations – which are limited by the FCC's ownership rules to a very small number of channels in each market – would not be able to compete, or perhaps even survive.

For all these reasons, NAB remains very concerned about the considerable legal and regulatory disparity between terrestrial radio and satellite radio. Congress and the FCC should not permit any of these regulatory disparities to endanger "the important service that terrestrial radio provides" to local communities throughout the country. Report and Order, *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5763, 5769 (1997).

Changes To Copyright Law Are Needed To Promote Internet Radio Streaming

In July 2004, NAB testified in detail before the House Subcommittee on Courts, the Internet and Intellectual Property about changes to copyright law that Congress

should make so that Internet radio streaming could mature into a workable business model and better serve radio listeners throughout the country. Today, I will briefly summarize the changes we previously proposed, which are needed today more than ever. NAB's very extensive 2004 testimony on these proposals is also attached.

First, Congress should make clear that Internet streaming of a radio broadcast to members of a radio station's local over-the-air audience is not subject to the sound recording performance right, just as the over-the-air performance is not. Internet transmissions to those local audiences are indistinguishable from over-the-air performance, and it makes no sense to treat the same audience differently depending upon whether they listen to the same signal over the air or over the Internet. Transmissions to these local audiences provide the same public service benefits to the community as over-the-air transmission, and provide the same promotional benefits to the record companies as the station's over-the-air broadcasts.

Second, the sound recording performance fee – and the standard by which it is set – must be reformed. In 1998, Congress adopted a new standard by which rates are set: "the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." § 114(f)(2)(B). This standard has been a recipe for abuse and needlessly inflated royalty rates to levels that are suffocating radio streaming services. This is true because there is not a free market in which willing buyers and willing sellers can freely negotiate. In fact, the "willing buyer, willing seller" standard has given rise to a presumption in favor of agreements negotiated by the major recording companies, acting under the antitrust exemption contained in the Copyright Act. The predictable result has been unreasonably high sound recording fees. In lieu of the

manipulable "willing buyer, willing seller" standard, Congress should establish a sound recording performance fee comparable to what is paid to BMI, ASCAP and SESAC.

Third, the statutory performance license imposed nine conditions on broadcasters that stream, three of which are wholly incompatible with broadcasters' over-the-air business model. For example, one condition prohibits the playing of any three tracks from the same album within a three hour period. Another condition prohibits DJs from "pre-announcing" songs, and the third requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist, and the name of the source phonorecords as it is being performed. Congress should eliminate these conditions, which are contrary to long-established broadcast practices and are designed to prevent copying of sound recordings from distribution mechanisms far different than radio. Radio stations should not be forced to choose between either radically altering their over-the-air programming practices or risking uncertain and costly copyright infringement litigation.

Fourth, as the law currently exists, record companies can "double dip," charging royalty fees for "ephemeral" or buffer copies that are simply a technical by-product of the streaming process and which have no independent economic value of their own. These ephemeral recordings exist simply to facilitate a licensed (and thus already fully compensated) performance or an exempt performance. Congress should modify the law to ensure there be no further payment needed to make copies used only to facilitate the permitted performance.

Fifth, Congress should ensure that recordkeeping and reporting requirements do not discourage broadcasters from streaming. Currently, these reporting requirements are

established by a Copyright Royalty Board as part of the rule making process, and can be changed at will, so broadcasters may be subject to uncertain and changing rules. Congress should end this uncertainty by making clear that the "reasonable" reporting obligation under these rules contemplates reasonable sample periods, permits the exclusion of information a station lacks, and would be satisfied by the reporting of sound recording title and artist name.

As we stated in 2004, NAB continues to believe that these changes in copyright law are necessary so that Internet radio streaming can reach its full potential both for the benefit of broadcasters and for the listening public.

Conclusion

The deployment of HD radio is essential for terrestrial broadcasters to better serve their listeners and to remain competitive in today's digital media marketplace. A successful digital transition will allow local broadcasters to compete more effectively against satellite radio operators, which will still have a competitive advantage over local stations due to the disparity in regulatory treatment between radio services offered terrestrially and offered via satellite. Because of the importance of a timely roll-out of digital radio, any system to protect digital content must not impede the transition. NAB and RIAA are now coordinating on the development of a consensus on digital radio copy protection, and this industry process should be allowed to continue without the adoption of premature legislative mandates.

As NAB previously testified, a number of changes to copyright law are needed to promote Internet radio streaming. Congress should consider changes to copyright law in the following areas: (1) the sound recording performance fee for Internet streaming,

including the amount of the fee, and the fact that it is imposed on broadcasters for listeners who are within the broadcaster's local service area; (2) the standard by which that fee is determined; (3) the conditions under which the necessary statutory licenses are available; (4) the law governing the making of copies used solely to facilitate lawful performances; and (5) the threat of difficult and unnecessary reporting and record keeping requirements.

Testimony of Todd Rundgren

Hearing on
"Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution"

Before the U.S. Senate
Committee on the Judiciary
April 26, 2006

Chairman Specter, Senator Leahy and members of the Committee:

My name is Todd Rundgren, I am 58, and I am a professional musician. I have also been employed as a record producer, composer for film and television, technology spokesman and computer programmer. I am the designer and developer of PatroNet, an internet-based subscription service that allows audiences to provide direct underwriting of artists in exchange for insider information, direct communication, discounted merchandise and first-look experiences of the artists' work, all within a community structure.

This is my 40th year as a musician, and 18th year as an independent. I left Warner Brothers in 1998 with the conviction that the major labels were unprepared for, and were indeed hostile to the inevitable changes that digital technology would effect in the way that music would be created, marketed and experienced. I wasn't so prescient that I foresaw the rise of the internet, but I was convinced that I would be hindered in any attempt to use new developments to alter the ground rules.

One of the first cutting edge projects I was involved in concerned digital rights management, a concept that did not yet exist. I was hired by, ironically enough, the Warner Full Service Network, an interactive television pilot project that sought to merge video, computers and high-bandwidth home delivery. The plan was to create on-demand music services that could be navigated on one's home TV -- kind of like an iTunes for the early '90s.

When it came time to plug the music in, everything I had suspected about the savvyness of the industry was crystallized. To a label, every one of the majors refused to consider the possibility of putting music they controlled onto a server. Ironically, even the music division of Warner Brothers would not cooperate, even though this was only a demonstration project.

Ever since then, the behavior of the majors has been that of a mindless parasite, contributing nothing, yet trying to get it's snout into the bloodstream of any new development. The knee-jerk justification is "protection of artists", which would more accurately be represented as the interests of highly bankable artists still under contract. For every one of those, there are a hundred with a lifelong bad taste in their mouths over the way they were treated when sales began to lag.

I have striven to tie together the "replacement parts" an independent musician would need to build enough audience for a sustainable living. Amongst these is, of course, the internet and a raft of contractors who can press and distribute discs for you and, if you can afford it, take on the promotion and

marketing normally provided by a label. The only problem is getting heard. Terrestrial radio, especially of the syndicated flavor, is not available to most artists even if they do have a traditional label deal.

I am opposed to any measures that would insinuate the major labels into an area that they have failed to husband, and to capitalize off of artists they have abandoned or never had any interest in. The myth that you could survive very long on record company advances has long been debunked. Players need to play to get paid and need audiences to play to. All the majors have ever done is try to claim the audience as theirs alone, and to lower expectations by exposing them only to the generally substandard product the majors begrudgingly underwrite.

Worse yet, across the board fee structures like those proposed discourage the exposure of new talent in deference to audience favorites as broadcasters try to recover those fees. And worst of all, syndicated radio, the majors partner in neglect, does not deserve exemption for the abysmal quality of product they deliver. The fantasy that this type of legislation helps music or musicians should be summarily exposed for what it is: yet another futile attempt to turn back the clock to the days when they were the sole gatekeepers to an artist's future.

Thank you for inviting me here to testify today. I would be pleased to respond to your questions.

TODD RUNDGREN PRODUCTION DISCOGRAPHY

ARTIST	ALBUM TITLE	YEAR
The American Dream	"The American Dream"	1969
Great Speckled Bird	"Great Speckled Bird"	1969
The Band	"Stage Fright"	1970
The Butterfield Blues Band	"Live"	1970
The Butterfield Blues Band	"Sometimes I Feel Like Smiling"	1971
Jericho	"Jericho"	1971
Half Nelson	"Half Nelson"	1971
James Cotton Blues Band	"Taking Care Of Business"	1971
Jesse Winchester	"Third Down, 110 To Go"	1972
Mark Moogy Klingman	"Moogy"	1972
Badfinger	"Straight Up"	1972
Grand Funk	"We're An American Band"	1973
Fanny	"Mother's Pride"	1973
Grand Funk	"Shinin' On"	1974
Felix Cavaliere	"Felix Cavaliere"	1974
Daryl Hall & John Oates	"War Babies"	1974
Hello People	"The Handsome Devils"	1974
Hello People	"Brick"	1975
Steve Hillage	"L"	1976
Meat Loaf	"Bat Out Of Hell"	1977
Mark "Moogy" Klingman	"Moogy II"	1978
Tom Robinson Band	"TRB2"	1979
Rick Derringer	"Guitars and Women"	1979
The Tubes	"Remote Control"	1979
Patti Smith Group	"Wave"	1979
Shaun Cassidy	"Wasp"	1980
New England	"Walking Wild"	1981
Jim Steinman	"Bad For Good"	1981
Psychedelic Furs	"Forever Now"	1982
The Rubinoos	"Party of Two"	1983
Cheap Trick	"Next Position Please"	1983
Jules Shear	"Watch Dog"	1983
Will Powers	"Dancing For Mental Health"	1983
The Lords Of The New Church	"Live For Today"	1983
Zerra	"Zerra I"	1984
The Tubes	"Love Bomb"	1985
What Is This	"What Is This"	1985
XTC	"Skylarking"	1986
Hunter	"Dreams Of Ordinary Men"	1987
Bourgeois Tagg	"Yoyo"	1987
The Pursuit Of Happiness	"Love Junk"	1988
La Ppisch	"Karakuri House"	1989
Jill Sobule	"Things Here Are Different"	1990
Hiroshi Takano	"Cue"	1990
The Pursuit Of Happiness	"One Sided Story"	1990
Hiroshi Takano	"Awakening"	1992
Paul Shaffer	"The World's Most Dangerous Party"	1993
Splendor	"Splendor" (Mar '99 release)	1998
12 Rods	"Separation Anxiety"	2000
Bad Religion	"The New America"	2000

Before the
U.S. Senate Committee on the Judiciary

Parity, Platforms, and Protection:
The Future of the Music Industry in the Digital Radio Revolution

Statement for the Hearing Record

By

Gary J. Shapiro

for

The Consumer Electronics Association and
The Home Recording Rights Coalition

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

At CEA, we have more than 2,000 members who contribute more than $125 billion to our economy and serve 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. Legislation such as the proposed Perform Act, which would impair the usefulness of lawful products, is a threat to innovation and longstanding consumer rights. We therefore will fight its enactment.

The Home Recording Rights Coalition was founded more than 25 years ago in response to a court decision that said copyright proprietors could enjoin the distribution of a new and useful product – the VCR. Fortunately, for everyone, 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 products to prior restraints.

In the wake of the Supreme Court's *Grokster* decision, HRRC had thought that the record industry would rely on its legal rights rather than seek additional legislation that would limit consumer freedoms. 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.

The Proposed Perform Act Would Send Consumers "Back To The Tape Age.". The most recently circulated version of 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 Perform Act would penalize, and essentially disable, a digital satellite radio service under copyright law unless it "uses reasonably available technology to prevent copying of the 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, artists, or any other "user preference" (other than selecting a "channel"). Thus, a consumer paying $150 a year to receive programming from a satellite radio service could not select and then listen to individual songs he or she had recorded. 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.

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 and cars.

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 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, 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 Audio Home Recording Act, 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 of 1992 (the "AHRA"). 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.

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 devices' ability to make digital copies from digital copies. In 1991, Jay Berman, then head of the RIAA, told you that the AHRA --

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[1] When Congress first granted copyright protection to sound recordings in the 1970's, 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).

> "... 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]

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 consumer products that, like the VCR and TiVo, will enhance consumer enjoyment of music and broaden the market for entertainment programming. Sirius and XM are introducing new

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[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.

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

[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).

hand-held devices that will allow their subscribers to record and playback content they already have paid for, much like a "radio TiVo." At the 2006 International Consumer Electronics Show, both devices won awards for their innovation and consumer friendliness. Configured to meet the terms of the Audio Home Recording Act, the only outputs from the Sirius and XM devices are headphone jacks for listening. They do not permit songs or talk radio to be moved to another device in digital form, and thus block the very kind of P2P file sharing that the RIAA has fought in its program of lawsuits against individuals. And yet the music industry apparently wants to keep these award-winning listening devices out of the hands of consumers.

The drive for legislation to constrain digital audio devices seems aimed at killing innovative new products, *even though* the music that these subscribers would record is music they have lawfully received via satellite and for which they have paid a fee, a portion of which goes to the very same record companies that want to kill these products. In addition, the manufacturers of these devices will make the royalty payments established by Congress in the AHRA to compensate for these recordings and will prevent serial copying as required by Congress under that law.

In short, even though the record companies already receive millions of dollars annually in royalty payments for the satellite radio transmissions and millions more for the recordings 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. Enough is enough.

Thank you for considering our views.

STATEMENT OF VICTORIA SHAW
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
PARITY, PLATFORMS AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

April 26, 2006

Chairman Specter, Senator Leahy, and Members of the Committee, thank you very much for having me here today to speak on the issue of parity among the different platforms offering digital music. These are exciting technologies in an exciting time and we are all here today not to keep them from taking root, but to ensure an environment in which they can *all* thrive. That environment is only possible when everyone plays fairly.

As a composer, musician, and owner of my own label, Taffetta Records, I get to experience the thrills of the music business on many different levels. I have been lucky enough to have my songs recorded by some of the biggest artists and even got to open for Garth Brooks in Central Park. But I consider among my honors this opportunity to come before you to speak on behalf of the many, many artists and composers who will be greatly harmed if they are denied appropriate compensation for their work. We want to help usher in the digital radio revolution, but to continue to be a part of it, we need your help.

Undoubtedly, you are aware of the extremely difficult times the music industry has faced these past few years due to online theft of music. Nashville in particular, home to one of the greatest songwriting communities in the world, has seen a massive reduction of those able to make a living from their craft. This is why we have been so excited by

the many new digital services offering our work. For those who want our songs in digital form, the choices now range beyond unauthorized and free. From cable and satellite to Internet radio to download services, licensed services offer music fans the music they want in the way they want, all for prices that are appropriate to consumers and fair to those of us who create it. This is the bright future of the music industry.

But whether we are operating in the physical world or in that bright digital future, one truism remains: artists, composers, record labels, and everyone involved in making music, depend on sales to survive. In the digital world, those sales are made through download services like iTunes and Napster. The licenses required by these services to allow people to purchase our music is what will sustain us as we move further away from the physical world of tapes and CDs.

Yet, it is precisely those licenses – and those sales – that are being threatened by the new offerings of radio platforms. By allowing listeners to record broadcasts and build up entire jukeboxes of music on portable devices, radio services are becoming download services – but without paying the download license.

I'm not talking about casual recording off the radio. Certainly, we've all done that and I have no interest in seeing that disappear. Just imagine my pride if I saw someone race to the radio to record one of my songs that has come on. But now imagine my frustration if I saw someone with an entire collection of my works, automatically recorded, labeled, sorted, and transferred to them in pristine permanent and portable digital copies without seeing a cent from a sale in return. This is not radio; this is iTunes, or Napster, or Yahoo!, or any one of the number of other download services that pay the appropriate license for this type of distribution. Those are the services that make the

sales we need to survive. But those services can not compete with others that offer the exact same functionality without paying the same license.

This is a matter of fairness – to other broadcasters, to download services, and to all of us making the music for those services. This is a matter of treating platforms that offer the same services equally. This is a matter of parity.

The PERFORM Act, recently introduced by Senators Feinstein and Graham, accomplishes this parity by ensuring that all services follow the same rules in how they offer music. By giving everyone equal footing, we give everyone an equal opportunity to grow. This is important legislation that places value on the music we work so hard to create.

As I look back on my career, I am grateful for all the opportunities I've had to share my music with others, and to experience the works of all those who have chosen to share with me. My own songs come from stories of love and loss, fear and faith. But the story of digital radio should be simply one of hope. On behalf of everyone in the music community, I hope you will support this bill and secure for all of us that bright digital future.

Thank you.

TESTIMONY
of
RUTH ZIEGLER
DEPUTY GENERAL COUNSEL
SIRIUS SATELLITE RADIO INC.
on
"PARITY, PLATFORMS AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION"

Chairman Specter, Senator Leahy and Members of the Judiciary Committee: My name is Ruth Ziegler, and I am Deputy General Counsel for Sirius Satellite Radio. Sirius very much appreciates the opportunity to submit this testimony on behalf of our company, its employees, stockholders and more than four million subscribers. Our company is not only helping to lead the "digital radio revolution" but is also "the future of the music industry." Sirius provides our millions of listeners with a breadth and depth of musical programming that is unparalleled. Such a rich and diverse offering of musical choice benefits all segments of the music industry – today and in the future.

I would like to open by providing the committee with some general information about Sirius Satellite Radio. In the late 1990s, Sirius paid almost $90 million to the U.S. Treasury for spectrum rights being auctioned by the Federal Communications Commission. Since then, our company has invested nearly $3 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 is changing the way people listen to music, and for that matter -- sports, news, and entertainment. Operating from our corporate headquarters in New York City's Rockefeller Center, Sirius broadcasts over 125 digital-quality channels, including 67 channels of 100% commercial-free music, plus over 60 channels of sports, news, talk, entertainment, traffic, weather and data.

This unique listening experience is available to 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. For a monthly subscription fee of $12.95, Sirius provides premium quality programming delivered by three dedicated satellites orbiting directly over the United States.

SIRIUS' music channels cover nearly every genre - from heavy metal and hip-hop to country, dance, jazz, Latin, classical and beyond. The music on each channel is selected, arranged, prepared and hosted by SIRIUS 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 subscribers can regularly listen to unparalleled music selections, insights and perspectives.

The nerve center for SIRIUS operations is at Avenue of the Americas and 49th Street in New York City, where the company's state-of-the art studios are located. Artists including Burt Bacharach, Sheryl Crow, Emmy Lou Harris, Richie Havens, Al Jarreau, Yo-Yo Ma, 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 has developed a portable, hand-held device called the S50. The S50 is an intelligent leap forward in Satellite Radio technology providing integration of both live content and up to 50 hours of time shifted content storage. Our subscribers enjoy the flexibility this device offers 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, short-term 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. Indeed, legislation recently introduced in the U.S. Senate (the PERFORM Act) is a case in point. The bill unfairly targets the satellite radio companies that have spent billions trying to bring innovative products and services --like the S50 -- to market. In our view, this legislation undermines technological innovation, imposes a new home recording tax on our customers and ends up harming musicians and artists whose music is being promoted by satellite radio.

WHY SIRIUS SATELLITE RADIO OPPOSES THE PERFORM ACT

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

The bill is erroneously labeled the "Platform Equality and Remedies for Rights Holders in Music Act of 2006" (the PERFORM Act). However, it would not establish "platform equality," and any such goal is misguided. Rather, the bill's primary effect is to change the fee standard applicable to the Satellite Digital Audio Radio Services, Sirius and XM -- the two most highly innovative services introduced to the music industry in decades. The bill appears designed to help the record companies achieve a recently declared goal of increasing their revenues from these growing, new services.

- "Platform Equality" is a misguided concept. Sirius and XM have invested nearly $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 bring to market receivers. No other "platform" has done this.

- 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 and XM combined have more than 10 million subscribers and expect to have 15 million subscribers and 33 million listeners by year end. The PERFORM Act would require each company to increase fees to consumers – threatening growth, further consumer adoption of these services and the viability of the businesses. Indeed, this bill would threaten the future profitability and return on invested capital of two of the most visible, successful and widely held stocks of the past few years.

- 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 Sirius and XM with a similar exemption, more than justifiable on the basis of promotional value given the broad spectrum of music genres and depth of play lists aired on satellite radio.

- In fact, the record companies have recently stated their desire to seek higher performance fees from Sirius and XM. Moreover, the satellite services and record companies are currently in negotiations for the licenses applicable to 2007-2011. The PERFORM bill appears designed to put the thumb of Congress on those negotiations or, worse, to change the applicable fee standard to help the record companies accomplish their goal.

The PERFORM Act Would Renege on a Deal Negotiated at the Request of Congress by the Recording Industry, Webcasting Industry and Satellite Services, which Was Adopted by Congress Just 8 Years Ago.

Sirius and XM paid the government a combined $170 million for their licenses and have invested billions more in reliance on the traditional fee standard that has long governed statutory licenses under the Copyright Act. That standard is based on four policy factors set forth in section 801(b) of the Copyright Act and was extended to subscription digital sound recording performances when the record companies were first given their performance right in 1995. It is also the standard that has long applied to the record companies when they are in the role of licensee, under section 115 of the Copyright Act.

The record companies, working with the webcasting industry, 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 a "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 and webcasting industry to negotiate with the SDARS providers to reach a legislative accommodation.

- The three industries agreed that the policy-based section 801(b) fee standard would apply to "preexisting Satellite Digital Audio Radio Services," a defined term including Sirius and XM.

- Congress agreed, and adopted this compromise as law in the Digital Millennium Copyright Act.

- All three industries supported the DMCA.

- It is grossly unfair to change the law now, as Sirius and XM continue to invest hundreds of millions of dollars in their services.

- Congress should not ask parties to negotiate settlements and then allow one of those parties to seek to change the negotiated deal when they decide they don't like the deal. That would undermine the credibility of Congress and its ability to urge interested parties to negotiate such deals in the first place.

- There has been no change that would justify undoing the deal that Congress encouraged and adopted in 1998.

The PERFORM Act Would Adopt a Prejudicial Fee Standard that Has Been Abused by the Recording Industry.

The bill would eliminate the longstanding policy-based fee standard set forth in Copyright Act section 801(b), which provides for payment of a "fair return" to the copyright owner and substitute a fee based on "fair market value." The recording industry has a history of abusing fees based on "fair market value" and Congress should not extend application of that standard:

- In the initial digital cable radio fee proceeding in 1997, the record companies made the extraordinary argument that the "fair market value" of their performance right was 41.5% of a service's gross revenue. They were awarded 6.5% by the Librarian of Congress, in part on the ground that the statutory standard did not require award of "fair market value."

- The record companies sought a still exorbitant 15% of gross revenue in the initial webcasting proceeding under the market value based "willing buyer/willing seller" standard.

- Under that same standard in the current webcasting proceeding, they now seek fees consisting of the "greater of" 30% of a service's gross revenue or roughly three times the current per performance fee.

- The record companies argument relies on the concentrated market power of the four major record companies. They argue that they should be entitled to extract monopoly rents from services, to the detriment of consumers.

- One record company expert argues 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 at 6 (October 13, 2005).

- A second record company expert advocates adoption of fees based on a benchmark derived from the deals of the four major record companies with interactive subscription digital transmission services. This is another market in which there is no price competition and every buyer must obtain a license from all four major record companies. It is also one of the markets being investigated by the DOJ and NY State Attorney General for price fixing.

- In other words, in the record companies' 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 Congress should adopt – or extend.

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

Record companies and artists are already paid royalty fees for reasonable home recordings under the terms of the Audio Home Recording Act. This Act, enacted by Congress, 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, at a time when there was serious doubt that music and sound recording copyright owners had any right to control or be compensated for private home recording. As the AHRA and recent case law confirm, home recording remains a clearly established consumer right. As Jay Berman, 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."[1]

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[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." There could be nothing more

Further, there have not been major, unanticipated changes in technology. The only change has been the recording industry's discovery that it can charge Apple 70 cents per recording for iTunes downloads.

The Recording Devices Used by Consumers Does Not Change a Performance into a Download

The recording industry has attempted to argue that the new recording devices used by Sirius and XM change them from performance services to download services. That is nonsense.

- A download service enables the consumer to select and order a specific song for immediate, high-speed, high-quality delivery. Sirius and XM program their services and do not deliver specific songs on demand. The subscriber can only hear and can only record what the service is broadcasting. And, if the subscriber wants to record a particular song, he or she must be tuned to the particular channel when the song is being played, and must hope that the performance is not interrupted due to poor reception.

- Songs from download services such as iTunes may be exported to multiple devices and may be burned onto a CD for use in the car, or even for unlawful redistribution on peer-to-peer networks. Songs recorded on satellite receiving devices are locked to a single receiving device.

- The claim that satellite recording offers "pristine, high quality" copies that are indistinguishable from those available through download services ignores reality. Like FM radio, and unlike download services which offer pristine copies, recorded songs from satellite are often covered by DJ talk and have transmission noise and artifacts. Worse, it is not uncommon to miss the beginning or end of a song due to the way songs are identified and divided on the service.

The Copy Control Obligations Included in the PERFORM Act Are Inconsistent with the Audio Home Recording Act, Will Cripple Innovation and Will Unreasonably Limit Consumer Home Recording Rights.

The Audio Home Recording Act, negotiated by the recording industry, essentially defines "reasonable recording" in terms of first generation copies and states that no action may be maintained based on such recording. That bill was a careful compromise of competing interests and was understood by all to resolve the issue of consumer home recording.

The bill would rewrite the AHRA, by including a requirement to use "reasonably available technology to prevent copying" other than "reasonable recording."

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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.

- 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 consumer's operating system with a rootkit and opened the door to viruses and other attacks.

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 Sirius and XM rely. Failure to qualify for the statutory license will 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 the services to err on the side of caution and to stop developing innovative products with recording capabilities (even "reasonable recording" capabilities) that consumers want.

Conclusion

Sirius Satellite Radio has invested billions of dollars in reliance on the negotiated (and Congressionally endorsed) agreement satellite radio made with the recording industry eight 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 contained in the bill are written as a condition on the statutory performance license on which Sirius 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 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.

For the foregoing reasons, Congress should not change the standards applicable to preexisting services under section 114 and should not impose new restrictions on consumer home recording.

The Register of Copyrights of the United States of America
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000 · (202) 707-8350

May 1, 2006

Dear Senator Specter:

I am enclosing the U.S. Copyright Office's written statement for the April 26th hearing on "Parity, Platforms and Protection: The Future of the Music Industry in the Digital Radio Revolution."

As always, we would be pleased to assist you in any way in connection with this or other matters.

Respectfully,

Marybeth Peters

Marybeth Peters
Register of Copyrights

The Honorable Arlen Specter
Chairman of the Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20515

Statement of the United States Copyright Office
Library of Congress
101 Independence Avenue, S.E.
Washington, DC

Before the

SENATE COMMITTEE ON THE JUDICIARY`
109th Congress, 2nd Session

Hearing on

PARITY, PLATFORMS AND PROTECTION:
THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO REVOLUTION

April 26, 2006

The Copyright Office is pleased to present the Committee with its views on parity, platforms and protection and the future of the music industry in the digital radio revolution.

Over the past fifteen years, digital technology has revolutionized the way music is delivered to the public, making more music readily accessible to more people. Internet radio, an unexplored channel for music distribution in the early 1990's, has grown exponentially since its inception, and today it offers a wide variety of music programming in both subscription and non-subscription formats. Likewise, cable music services and satellite radio services such as XM Satellite Radio Inc. and Sirius Satellite Radio have enjoyed enormous success as subscription music services, offering hundreds of channels of music, news, and sports programming to subscribers for their listening enjoyment whether sitting at home or driving in their cars. Traditional terrestrial radio also remains a viable option. Local broadcasters continue to offer music programming over-the-air to listeners in their local service areas and in some instances over the Internet as well. Moreover, broadcasters have joined the digital revolution and are in the early stages of rolling out their new high definition radio services. HD radio will offer crystal clear audio performances and permit broadcasters to offer more services to their listeners, like text information identifying song titles and artists or weather and traffic alerts.

These are exciting times for the music industry. Consumers are readily embracing the new music offerings, choosing to use legitimate music services like XM, iTunes, and Rhapsody, among others, rather than the illegal peer-to-peer services which have plagued the industry in recent years. This turn of events is a welcome change and the trend toward use of these new services should be encouraged. Business models should continue to experiment with new technologies and explore alternative ways for consumers to access and experience music, provided that the services play by the rules and fairly compensate the rightsholders for the use of their copyrighted works.

The rules, however, vary under the law depending upon the nature of the music service, and it is this variation in treatment that is the focus of this hearing on parity, platforms and protections. The lack of parity among services making digital audio transmissions was a conscious decision on the part of Congress and exists in at least three key areas: royalty rates, programming rules, and content protection. The question is whether it is reasonable to continue this disparate treatment among the services or reset the rules and create a level playing field for all competitors in the music service business.

Many digital music services operate under the compulsory license for sound recordings set forth in Section 114 of the Copyright Act. The compulsory license includes two different standards for setting royalty rates, one for the two satellite digital audio radio services, i.e., XM Satellite Radio Inc. and Sirius Satellite Radio, and the three pre-existing cable subscriptions services, and a second standard for setting rates for all other digital music services operating under the compulsory license. The standard for the satellite services and the preexisting cable music services requires a balancing of a number of factors to establish a reasonable rate, whereas the standard for setting the rates for all other digital music services is based upon the rate that would have been negotiated in the marketplace between a willing buyer and a willing seller.

Record companies, performers, and webcasters seek a single standard for setting the statutory rates, favoring for the most part, a "fair market value" ("FMV") standard. XM, however, does not support a change to a FMV standard because XM believes that a FMV standard would not require consideration of costs "that are disproportionally incurred by XM (and Sirius)," e.g., the cost of an FCC license and the cost of maintaining and upgrading the satellite system.

Standards for setting statutory license rates have been a perennial problem. In 2004, the Copyright Office testified before this Committee on the Satellite Home Viewer Extension Act, noting that the Copyright Office has always disfavored compulsory licenses in general, viewing them as a derogation of the exclusive rights granted to the copyright owner under section 106 of the Copyright Act. But when, in the view of the Congress, it is necessary to enact a statutory license, the Copyright Office is of the firm position that copyright owners whose works are subject to the license should be compensated fairly for their use. Fair compensation is, in our view, the price of a license that a willing buyer and a willing seller would negotiate in the open marketplace – i.e., fair market value.

However, adoption of a "fair market standard" does not mean that the Copyright Royalty Board, the entity responsible for establishing the statutory rates, must establish a single rate. Ultimately, it is a question of valuation that can vary depending upon the particular business model of a service and perhaps the size of its audience or the ease with which it can deliver the product. In fact, Live 365.com's testimony appears to support this observation. It states that XM Radio and Sirius Satellite Radio have confidential royalty rate agreements with the recording industry and that these services pay rates at a significantly lower level than the rate paid by other services under the statutory license. Such rates, which are the product of arms-length negotiations, presumably reflect fair market value as between these parties, supporting the notion that a seller can value its product differently depending upon what the licensee brings to the

table.

Rate standards, however, are not the only point of contention. Record companies, songwriters, and performers have voiced a need for harmonizing and strengthening the statutory license provisions that protect content from unlawful reproduction and distribution. Specifically, they have expressed concern that new devices offered by the satellite services have transformed these businesses from listening services into download services. Their concern centers on the new functionalities in these devices that allow the consumer to record up to 50 hours of programming, disaggregate the program song-by-song, and store these songs in a personal digital library organized by artist, song title, and genre for later enjoyment by the listener, without ever having to pay anything for the copy extracted from the XM transmission.

XM, for its part, defends its sale of such devices on the basis that the devices are in full compliance with the Audio Home Recording Act ("AHRA"). Congress passed AHRA in 1992 in response to the development of digital audio technology – and in particular, Digital Audio Tape (DAT), a technology that seemed to be cutting edge at the time but that today is little-used and has very limited functionality compared to contemporary devices. AHRA represented a compromise between music interests and consumer-electronics manufacturers. The Act sought to regulate digital audio recording technology by requiring manufacturers, importers or distributors of digital audio recording devices and media to pay royalties prescribed by law and to incorporate the serial copy management system into their devices.

Under the provisions of this Act, a consumer is exempt from an infringement action for use of a digital audio recording device to make a digital musical recording or analog musical recording for noncommercial purposes. It also exempts manufacturers, importers, and distributors from copyright suits based on their manufacture, importation, or distribution of digital audio recording devices.

However, when Congress passed AHRA, it did not imagine the functionality of the new devices on the market today that facilitate automated recording for an extended period of time and the ability to extract, organize and store music selections for use at any time. Nor was the royalty fee for the digital audio recording device set at a level to compensate the rightsholders for the creation of hundreds of copies of sound recordings. The maximum royalty fee for any recording device is $12 – the cost of twelve downloads from iTunes – an amount that does not even begin to compensate the rightsholders for the hundreds of songs that an XM subscriber could record on its new XM Helix and Inno players.

So, while its possible that XM may seek protection under AHRA for its devices, the royalty structure set up in 1992 appears to be woefully inadequate to provide fair and reasonable compensation to the rightsholders, and Congress should reexamine the royalty fee structure for these devices and make whatever adjustments are necessary in light of the new functionalities. Congress should also consider whether the AHRA should apply to devices such as the new devices described in XM's testimony, devices that permit consumers easily to build libraries of sound recordings when they have not paid for those phonorecords.

Alternatively or additionally, Congress could amend section 114 and require all digital music services to incorporate content protection technology. In fact, Congress did adopt a provision that requires a music service to take no affirmative steps to cause or induce the making of a phonorecord by the transmission recipient and, to the extent possible, to adjust its technology to limit the making of phonorecords, 17 U.S.C. §114(d)(2)(C)(vi), when it expanded the scope of the section 114 license in 1998 to cover transmissions made by the Internet digital music services. Congress, however, chose not to impose this provision on the satellite radio services and the preexisting cable music services, in large part because this term was not a part of the original section 114 license as it applied to these services. Nevertheless, the existence of the

term illustrates Congress's very real concern at the time with the potential for widespread copying of music in the context of a digital transmission; and, although Congress did not impose any new restrictions on the preexisting music services when it expanded the license, the rationale for adopting the limitations in section 114(d)(2)(C) applies equally to all digital music services. Again, for the sake of parity, it seems only reasonable to require all digital music services to adhere to the same ground rules in the case where the limitation is crafted to eliminate or reduce the type of copying that would have an adverse impact on record sales.

While most licensees are willing to accept some responsibility for protecting content, they object to the provisions in the compulsory license that prohibit a service from announcing its play schedule in advance and the requirement that a service not play more than a limited number of selections from a particular record album or performed by a particular recording artist within a 3-hour period (the "sound recording performance complement"). Specifically, broadcasters object to the programming restrictions as they apply to their simulcast of their broadcast signal over the Internet. They point out that such restrictions are contrary to standard broadcasting practices and ask Congress to eliminate those provisions that require the broadcasters to modify their over-the-air programming in order to operate under section 114.

Internet music services also support lifting these programming restrictions, albeit for a different reason. They maintain that these restrictions put them at a competitive disadvantage because they cannot use these practices as an inducement to their listeners to stay with their programming or even pay tribute to a particular artist. Live365.com contends that there is no evidence to show that record companies have been harmed by these historical broadcasting practices and that the elimination of the sound recording performance complement and the prohibition against preannouncement practices would cause harm to the record companies interests.

As with the content protection provision discussed earlier, the purpose of the numerous limitations in section 114(d)(2) has always been to make it difficult for a listener to access specific music on-demand for fear of facilitating the making of near perfect reproductions of specific songs and displacing sales in the marketplace. However, when the Office considered the elimination of these provisions two years ago, we concluded that it would be worthwhile to reexamine the value of the preannounced schedules, at least with respect to the simulcast of an AM/FM radio program, noting the tendency of an AM/FM station to play a limited selection of songs repeatedly throughout the day. We also noted that the sound recording complement provision had been drafted to accommodate typical programming practices such as those used on broadcast radio, except to the extent that it prohibited the programming of a retrospective look at the body of works of a particular performer.

While the Office supports the concept of parity among the digital music service providers, it is not clear whether the solution should be to abandon the prohibition against preannouncing upcoming music and the use of the sound recording performance complement, or to extend those requirements to all services operating under section 114 and perhaps even to over-the-air broadcasters, especially when they engage in digital broadcasting. Due to the introduction of the next generation of digital radio receivers, complete with recording options and editing features, a cautious approach may be prudent. However, should the restrictions be shown to pose a substantial burden on programming practices that outweigh whatever protection they provide, then Congress should take another look at their application to music programming governed by section 114.

Of course, such minor changes are only temporary fixes offered in response to recent changes in technology and shifting business models. They are band-aids to particular problems

and not the universal solution that is needed to promote vigorous, competitive and unfettered growth in the marketplace. A more promising approach would be to grant copyright owners of the sound recordings a full performance right so that they can seek marketplace solutions to the problems associated with shifting business models, like the distribution of the new digital receivers and recorders and the double standard for setting royalty rates.

In reality, such negotiations are taking place today. Major record companies have struck deals with Sirius Satellite Radio[1] that will compensate the record companies for recordings made with the Sirius S-50 digital receiver. Such arrangements insure compensation to the rightsholders and provide certainty for the businesses where the extent of the protection from copyright infringement under the law remains unsettled. Similarly, the National Association of Broadcasters and the Recording Industry Association of America are engaged in ongoing negotiations to develop consensus on a digital radio protection system which, if adopted, would prevent wholesale copying and obviate the need to assess and collect royalties for downstream copying of sound recording from digital over-the-air radio transmissions.

[1] Bill seeks music royalties for satellite downloads, CNET News.com (April 26, 2006) located at http://www.news.com/2102-1027_3-6065133.html?tag=st.util.print.

Implementation of a digital radio protection system does not, however, speak to the digital performance right and the fact that broadcasters are exempt from paying a royalty for the public performance of a sound recording. All music services offering digital transmissions of music programming must pay a performance royalty for these transmissions, except for broadcasters when transmitting over the airwaves in a digital format. Broadcasters maintain that they are entitled to an exemption from the digital performance right in this case because they provide public service benefits and promote the sale of records. But it is difficult to understand how the promotional value of radio play would be greater than that offered by the digital music services. Moreover, some of the digital music services also offer local traffic and weather reports as a public service to their listeners. Thus, there is no rationale for treating broadcasters differently from the digital music services. For these reasons, if creation of a full digital performance right is not feasible, the Office would support expanding the section 114 license to cover over-the-air digital radio transmissions.[2]

Broadcasters also weighed in on the requirement that services maintain and report records of use. They contend that the current structure which gives the Copyright Royalty Board

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[2] On the date this statement is being submitted, the 14th session of the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization is convening to consider whether to adopt a broadcasting treaty that would recognize that broadcasters have exclusive rights to their broadcast transmissions. Representatives of U.S. broadcasters are in Geneva to urge adoption of such a treaty. But broadcasters do not appear to recognize the irony of their position that when they broadcast performances of sound recordings, they should be given exclusive rights in those transmissions even though they refuse to recognize that the copyright owners of the sound recordings themselves should have any public performance rights relating to the broadcast of those same sound recordings.

authority to establish notice and recordkeeping requirements exposes the music services to uncertainty because the Board can modify the rules at will. They would prefer that Congress amend the law to require reporting on a sample basis and provide only two elements: the title of the sound recording and the name of the artist. We strongly oppose these suggestions.

Based upon the information that the Copyright Office gathered during its rulemaking proceeding to promulgate these rules, the Office determined that these two elements are not sufficient to adequately identify the sound recording actually performed and insure proper distribution of the royalty fees. Consequently, the Office issued regulations that require, in addition to the title of the sound recording and the name of the recording artist, the reporting of the International Standard Recording Code or, alternatively, the album title and marketing label, as a way to obtain sufficient information to distinguish between sound recordings of the same title. With respect to the adoption of a sampling methodology, we note that reporting tools are available that can track and store actual play information for later reporting. Sampling is at best an imperfect method of reporting which is likely to underreport the play of recordings that receive relatively less airplay, to the detriment of the performers and copyright owners of those recordings. It is hardly much of a burden to require a webcaster (including a broadcaster that is simultaneously webcasting its broadcast) to simply report on each sound recording that it plays, along with basic identifying information.

In conclusion, the Office supports rules that create a level playing field for all licensees. At the very least, a single standard for setting royalty rates for use of the section 114 license should be adopted, terms of the license should be applied uniformly to all digital music services, attention should be given to the threats posed by new receiving devices that facilitate the making of personal music libraries, and consideration should be given to lifting various program restrictions, but only if the elimination of the restrictions does not facilitate wholesale copying to the detriment of the rightsholders.

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