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EXPLORING THE SCOPE OF PUBLIC PERFORMANCE RIGHTS

HEARING

BEFORE THE

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EXPLORING THE SCOPE OF PUBLIC PERFORMANCE RIGHTS

TUESDAY, NOVEMBER 13, 2007

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

The Committee met, Pursuant to notice, at 9:35 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Specter, Hatch, and Cornyn.

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

Chairman LEAHY. I call the Committee to order.

First, I do appreciate very much the fact that Lyle Lovett—who was performing over at the Birchmere until late last night, and I am told by Bruce Cohen you were in his office at 8:30 on a rainy morning. I do not think you get to sleep at all. We first met in Texas, and I want to thank you for being here.

Like most people, I am an avid music fan. Music inspires us, and it connects us to others and to matters larger than ourselves. It fills our memories. I am grateful to broadcasters for all the music I first heard on the radio back in the old days. I also feel strongly that the artists who make our life so happy should be compensated for their work. So the issue of "performance rights on sound recordings" can be stated pretty simply: Should broadcast radio continue to use musicians' work without paying for it?

I think the issue of performance rights raises an issue of fairness. The question is simple; the answer may not be. First, is it fair to continue to exempt broadcasters from royalty obligations?

Second, is it fair to U.S. copyright holders for the United States not to align its practices with every single OECD country? They all recognize, of course, a performance right.

And is it fair for some kinds of radio equivalents to pay royalties to performers but for traditional broadcast radio stations to continue to be exempt from such obligations? Webcasting and satellite radio pay performers for their work, but broadcast radio, which generates advertising revenue by playing the same music, does not.

Fourth, is it fair to require the same payment from small, noncommercial, or religious radio stations as broadcasters that own many stations and generate very large profits?

And, finally, is it fair to impose public service requirements on broadcast radio but not to make those demands of others?

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So I want to be sure that our culture remains vital and vibrant. Radio has been part of that vibrancy, whether it is old-fashioned broadcast radio or new-fangled Internet radio. I want it to survive. I want it to prosper. I want my grandchildren to have the widest possible access to good music, including classics or new creations. But I also want to be sure that the creative artists, those who perform that music, get their due. When we turn on the radio, I want to know that the voices I hear belong to artists who are being treated fairly.

I do appreciate the fact that this panel came together on very short notice. As I was telling Mr. Lovett before we came in, there will be a roll call vote shortly after 10. I will go to that. And something that I think I have only done twice in all my years here, I have gone to Vermont in the middle of the week. I am going to have to take a late morning flight to Vermont. Senator Cornyn has offered to sit in for me and continue the hearing after that.

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

Chairman LEAHY. With that, I would yield to Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman. This is an unusual hearing. I have been on this Committee for a while. I have not seen so many still cameras in my experience here. I think we might have a better public response if we let the performers perform as opposed to hearing the Senators do too much talking.

But we have a very important subject and a very complex one as we have seen how broadcasting has changed from traditional AM–FM, so now we have Internet, satellite, and high-definition broadcasting.

We did make some changes in 1995 to grant the recording industry for the first time a performance right in digital music transmissions. But it is a complex field with a lot of inconsistencies. Satellite radio providers are charged different royalty rates than Internet service providers, while traditional broadcasters are almost totally exempt.

We want to encourage performers to come along with the tremendous entertainment for the American public. At the same time, we want to make the music available in ways that we can appreciate those performances. So it is a complex balancing act, and I think it is time that the Committee took a very hard look at the complex issues which are involved here.

One of the difficulties is that we have such a crowded agenda, last week totally consumed with the new Attorney General, later this week very heavily engaged in the Foreign Intelligence Surveillance Act. But we all enjoy the music, and we all enjoy our radios, and we greatly value the performers. And we want to be fair to all sides, so we will take it up and try to make as equitable a decision as we can.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

I am going to call first of Mr. Lovett, instead of going to further opening statements, if that is all right, just simply because of the

vote, and obviously the time will be available for others. I almost feel it is redundant to offer an introduction, but he is a four-time Grammy Award winner from Klein, Texas. He has released more than ten albums, many best-sellers on the Billboard charts. In addition to being a popular singer and songwriter, he is a gifted performer. He is an accomplished actor. I remember "The Player." He has graciously agreed to take time off from his current tour to help us focus on this, and as I said, Bruce Cohen and others from my staff saw and heard you at the Birchmere last night and gave you rave reviews.

Mr. Lovett, it is all yours. Is your microphone on?

The little red button.

STATEMENT OF LYLE LOVETT, SINGER/SONGWRITER, NASHVILLE, TENNESSEE

Mr. LOVETT. Thank you very much. Thank you, Chairman Leahy, Ranking Member Specter, members of the Committee. I am proud to be here today on behalf of the MusicFIRST Coalition. I am a member of the American Federation of Musicians, the Recording Academy, the American Federation of Television and Radio Artists, and Sound Exchange. I am incredibly lucky to be able to make my living doing something that I love to do—creating art for others to enjoy.

My first public performances was at the age of 7, singing "Long Tall Texan" in a school talent show. I grew up in Texas and still live there in a house that my grandfather built in 1911. My life and music are forever linked to Texas, but I also play with musicians and singers from Nashville and from all over the country. The issue you are considering today matters to performers all across the U.S., recording all kinds of music.

Songwriters and performers rely on lots of different income streams in order to survive. But in this patchwork of income streams, there has always been one incomprehensible anomaly: when a recording is played on over-the-air radio, the songwriter who wrote the words and music receives a performance royalty, as he or she should. But the performer receives nothing.

Of course, the songwriter who created the song deserves to be compensated when that work generates value for another business, as it does for radio. I am proud to be an ASCAP member and grateful for the performance royalties that have helped me to earn my living as a songwriter. But the musicians and singers who perform the song are also creators, and they deserve to be compensated as well.

When radio plays these recorded works, they generate profit for themselves because they attract listeners and advertising dollars. Yet radio has never compensated performers for the value their creative work brings to the radio industry. This must change.

Don't get me wrong. I love radio, and I appreciate the support I have gotten from radio over the years. But business is business and fair is fair, and they should not get to profit from the music we create without compensating us.

It also would be extremely helpful to performers, and to the U.S. balance of trade, to bring our music industry into line with the rest of the developed world. Foreign radio stations often broadcast a

high percentage of American music, but we do not get our share of the royalties due to our lack of a right here in the U.S. This is amazing. We are responsible for 30 to 50 percent of music played on stations around the world, and we do not have a performance right? I can understand why China, North Korea, and Iran might not. But here in the United States?

I have talked a fair amount about myself today, but this issue is not about me. It is about the thousands of performers across the country who work so hard to earn livings that are very modest in relation to their talent. It is also about the future of American culture and its ability to support the creators we need. I am honored to have been given an opportunity to speak for them. I realize that you are at the very beginning of a legislative process and that there will be many issues to consider and to resolve, including how to protect the rights of songwriters while creating new rights for performers. But I am sure we can get this done so it is fair and square for everyone involved.

Thank you for giving me your time today and for all your efforts on behalf of creators as you work on this issue.

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

Chairman LEAHY. Thank you very much, Mr. Lovett.

Before we go to questions, Ms. Alice Peacock has joined us from Chicago. She is a singer, she is a songwriter, she is a recording artist, released two albums. Her songs have been featured on a number of hit television shows and movies. She is the President of the Chicago Chapter of the Recording Academy as well as the President of Rock for Reading, a nonprofit organization that raises awareness and resources for Chicago area literacy programs.

On a purely personal note, my sister, Mary, runs an adult basic education program in central Vermont, and I will be seeing her later today, and I will tell her about your testimony.

Please go ahead, Ms. Peacock.

STATEMENT OF ALICE PEACOCK, SINGER/SONGWRITER, AND PRESIDENT, CHICAGO CHAPTER, THE RECORDING ACADEMY, CHICAGO, ILLINOIS

Ms. PEACOCK. Thank you. Good morning, Chairman Leahy, Ranking Member Specter, and members of the Committee. My name is Alice Peacock, and I am a singer/songwriter from Chicago. I am also a member of the MusicFIRST Coalition, I am President of the Chicago Chapter of the Recording Academy, and a member of AFTRA. I am truly honored to have the privilege of addressing this distinguished Committee about what is one of the most important issues facing those of us in the music community today.

As President of the Recording Academy's Chicago Chapter, I have the honor of working with hundreds of music creators of all types—from those just starting out and hoping to make a career in music, to the few—I should note, the very few—who have achieved superstar status.

But the vast majority are just like me, what I like to call the "great middle class of artists." Like other Americans, we go to work every day to earn a living and support our families. Like other Americans, we produce a product that people value and want to

buy. And like other Americans, we expect to be compensated when businesses make a profit from our work product.

Music may be our calling, but make no mistake, it is also our job.

And for the most part, artists are compensated for their work. When I sell a record, I make a royalty. When I perform a concert, I receive a fee from the promoter. And when my tracks are broadcast on satellite radio, Internet radio, or cable, I receive a performance royalty.

All this seems fair. But there is one glaring, inexplicable exception to the notion of fair payment: There is no performance right for sound recordings for terrestrial radio. AM and FM radio—the platforms I grew up with and grew to love—do not compensate me when they broadcast my recordings.

Now, there are people more qualified than I to address the legal, historic, and economic background of this issue. I am not an expert in copyright law, but I do understand the concept of basic fairness. If a business uses recorded music to earn advertising revenue, then it should compensate those who created that recorded music. It is that simple.

Now, I understand that this concept nearly always turns into a discussion about promotion. Broadcasters say radio promotes record sales and so they should not have to pay a royalty. But I just do not get that. Every performance has the potential to be promotional, but why should that make a difference?

For instance, I just had a gig in Grand Rapids, Michigan. Imagine if the club owner used the same logic about promotion. What if at the end of the night, after I had packed his club with paying customers, he told me that he did not have to pay me because my performance helped promote my record sales. Well, such a scenario would be unacceptable by any standard.

Frankly, the promotion argument sounds a little silly. Last week I bought a pair of Nike shoes. I wear them everywhere—except to perhaps Senate hearings. With the Nike logo on my feet, I am probably promoting their brand wherever I go. Can you imagine if I decided not to pay for the shoes on the grounds that my promoting Nike should excuse me from payment? My refusal to pay would be called "shoplifting." But radio's refusal to pay artists is called "business as usual."

Now, I would like to make one other point, an important point about songwriters, who do enjoy a broadcast performance royalty. I am also a songwriter, and in addition to the affiliations I noted earlier, I am a proud member of ASCAP. Many songwriters are not performers, and many performers are not songwriters. These are two different jobs and, as Congress has legislated, two different copyrights. A new performance right for artists should never be implemented at the expense of the existing right for songwriters. Any new legislation should make this clear. Just as satellite and Internet radio pays songwriters and artists, so should terrestrial radio.

Which brings me back to the issue of fairness.

Is it fair that only one platform—the $20 billion corporate radio industry—be exempt from paying to use the music that is the basis of its business? Is it fair that sound recordings are not protected with a performance right when movies, literary works, and other copyrighted works are? And is it fair that American artists lack

this basic right when our counterparts in every other developed country enjoy fair compensation?

Well, everyone in this room knows the answer is no. But you, distinguished Senators, have the power to make it right.

Now, before I conclude, let me just take a moment to remind us all of what this is really about: the music. So this is something from my song "Bliss."

[Ms. Peacock sings.]

Ms. PEACOCK. So, on behalf of the great middle class of recording artists, I urge you to grant a performance right for sound recordings. It is only fair.

Thank you.

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

Chairman LEAHY. Thank you very much. I am sitting here wondering just how our tremendous reporter gets that into the record.

[Laughter.]

Chairman LEAHY. I think the last time somebody sang part of their testimony at a hearing I was at was my late friend Harry Chapin. It brings back memories.

Steven Newberry is the President and CEO of Commonwealth Broadcasting Corporation. He is also the National Association of Broadcasters Radio Board First Vice Chair. He is from Glasgow, Kentucky, and, Mr. Newberry, we certainly appreciate you taking the time to come here today.

STATEMENT OF STEVEN M. NEWBERRY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COMMONWEALTH BROADCASTING CORPORATION, GLASGOW, KENTUCKY

Mr. NEWBERRY. Thank you very much, Mr. Chairman. Good morning to you Chairman Leahy, Ranking Member Specter, and other members of the Committee that are joining us today. And I do appreciate your inviting me here to offer the broadcaster's perspective on this important issue.

My name is Steven Newberry. I am the President and CEO of Commonwealth Broadcasting. I own and operate 23 radio stations in rural Kentucky, and I am testifying today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

With regard to the issue of creating a new performance royalty fee for sound recordings, which local broadcasters do consider a performance tax, NAB strongly opposes any such proposal. We oppose a performance tax because compensation to the record labels and performers is already provided under the current system. The existing model works for one very simple and significant reason: the promotional value of what the record labels and performers receive from free airplay on local radio stations drives consumers to purchase music. A survey done by critical mass media shows that 85 percent of listeners identify FM radio as the first place they hear music they purchase. And with an audience of over 232 million listeners each week, there is no better way to expose and promote talent.

Beyond just playing music, consider that local radio stations give away free concert tickets, conduct on-air interviews with bands re-

leasing a new CD, or hype a newly discovered artist. Without question, local radio is the engine that drives music sales.

The recording industry knows that music sales soar with airplay. Just last week, at the Country Music Awards, Carrie Underwood, Kenny Chesney, Sugarland, and Rascal Flatts all specifically thanked country radio for their success. And Taylor Swift, who was named Best New Artist of the Year, said, "I want to thank country radio. I will never forget the chance you took on me."

While it is true that the recording industry has seen its revenues dip in their new digital world, in no way can that decline be attributed to local radio. Just the opposite. Local radio is essentially free advertising for record labels and their performers and provides the best and more direct way to reach consumers.

In 1995, when Congress last examined this issue, lawmakers opted to require satellite and Internet radio to pay performance fees because these platforms are often available by subscription and they both offer consumers true interactivity to download songs. Local radio, however, is an entirely different platform. We are free. There is no subscription. It is not interactive. And between disc jockey lead-ins and commercials, no one is stealing music from over-the-air radio. Congress came to this conclusion in 1995, namely, that local radio airplay does not threaten music sales. In fact, local radio directly and positively promotes the sale of music.

What I fail to understand after nearly 30 years in the radio industry is why the recording industry is willing to essentially bite the hand that feeds it. The free airplay for free promotion concept has established a natural symbiotic relationship between local radio and the recording industry. Both grow and both flourish together. But a new performance tax takes this mutually beneficial system and transforms it into an unfair, one-sided scheme that benefits financially only the recording industry and to the detriment of local radio stations.

The negative effect of such a dramatic increase in radio station cost will be felt by radio stations and their listeners across the country and in every one of your States. Many, many radio stations across the country are struggling to be profitable. Since most of our operating costs are fixed, the money to pay for this new performance fee has to come from somewhere.

So as a broadcaster, what are my options? Do I reduce the community affairs programming, including essential news and weather, in times of emergency? Because I cannot cut my electric bill. Am I forced to lay off staff or cut the employee benefits at my station? Because I cannot reduce my FCC regulatory fees. Do I move to a non-music format, which will have the effect of playing less music and will ultimately harm the performers?

There is a reason that the National Religious Broadcasters, the National Association of Black-Owned Broadcasters, the National Association of Farm Broadcasters, and the Independent Spanish Broadcasters Association all oppose the imposition of any new performance fees. The answers are not simple, and the consequences of this debate will hit both industries in unanticipated ways.

There is simply no justification for changing a system that has worked for the music industry as a whole for so many years. The United States has the most prolific and successful music industry

that is the envy of the world. The law as it stands today works. Upsetting the careful balance that Congress struck by imposing a new performance tax on local radio broadcasters would be a shift of seismic proportions. Congress has consistently recognized the mutual beneficial relationships between local radio and the recording industry, and there is no reason to change the law now.

Thank you for inviting me here today, and I welcome your questions.

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

Chairman LEAHY. Well, thank you, Mr. Newberry, and I do appreciate your coming here.

Dan DeVany is the Vice President and General Manager at WETA 90.9 FM based in Arlington, Virginia. It is a public broadcasting station. It switched to an all-classical format earlier this year. Before coming to WETA, he worked with the National Symphony Orchestra. I think that is where we first met.

Mr. DEVANY. That is right.

Chairman LEAHY. And for the Fine Arts Network of Minnesota Public Radio. Mr. DeVany, please.

STATEMENT OF DAN DEVANY, VICE PRESIDENT AND GENERAL MANAGER, CLASSICAL WETA 90.9 FM, ARLINGTON, VIRGINIA

Mr. DEVANY. Thank you, Mr. Chairman, Senator Specter, and members of the Committee, for giving me the opportunity to speak with you today. I am head of Classical WETA, the only classical music radio station here in Washington, D.C., and I am here today in opposition to the proposal that radio stations be required to pay performance fees for broadcasting musical material. These fees would impose a significant constraint on the ability of community music broadcasters such as WETA to provide public service within the publicly funded system in which we operate.

Earlier this year, as you mentioned, Mr. Chairman, WETA made the decision to adopt a full-time classical music format on our radio station's 90.9 FM and 89.1 FM. We did so when it appeared that our Nation's capital would be without any over-the-air station devoted to classical music. The company that owned and operated the last remaining classical music station in Washington, WGMS, had decided to move away from the format in favor of other types of programming. There was going to be no classical music on the radio in Washington.

For many in this community, it was unthinkable that there would not be access to classical music on the radio free and available to all. WETA enthusiastically adopted the format as part of our core mission to serve the Greater Washington Area with programming that is significant, meaningful, and with intrinsic value.

And we did so against a trend in broadcasting where more and more radio stations are abandoning the classical music format in favor of programming that, it is hoped, will be more successful in garnering increased audience and revenue. Last year the National Endowment for the Arts reported that the number of classical music stations in this country was in steep decline and that 6 of

the top 30 markets in the United States had no classical stations at all. Philadelphia still has no classical music radio station.

WETA is a not-for-profit community broadcaster licensed to the Greater Washington Area and chartered to serve the community with programming of value and significance. Our operating budgets are built upon public funding, the vast majority of which comes from voluntary private contributions from our listeners. Needless to say, raising this money year after year is a central challenge for us and any other similarly organized broadcast enterprise.

We at WETA are proud and passionate about our place of service to Washington. And we are not alone in our efforts. WETA is part of a family of community stations most of whom broadcast a genre of music unique to their markets.

The current proposal to require radio stations to pay a performance fee for material played on the air would be an onerous burden on community stations such as WETA who are already greatly challenged to raise the money needed to stay on the air and provide public service. Like WETA, the operations of community music stations are built upon a razor-thin margin that cannot withstand additional tolls or tariffs beyond that which we already pay to music licensing entities. Payment of these additional fees would be difficult for WETA; it might be impossible for smaller stations. By the very nature of the programming we offer, our audiences are limited, as are our resources.

Please let me be clear. I do not suggest that artists should not be fairly acknowledged and compensated for their work. I say this as a former professional musician myself and a member of a family of working professional musicians and music educators.

We community broadcasters who nurture, promote, and preserve art forms such as classical music, jazz, folk music, or any other that is underrepresented in mainstream terrestrial radio do so as a labor of love and with the deep conviction that our efforts support the work of artists most of whom would not be heard on radio if we did not exist. We have built communities of listeners upon this principle. And we have done so in partnership with performers who share our conviction and believe that the music to which they are devoted benefits from free exposure. It is a system that has worked for many, many years, and the ultimate beneficiary is the public we all serve.

As you review this proposed legislation, I urge you consider the effects it would have on community-based music stations.

Thank you very much, Mr. Chairman.

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

Chairman LEAHY. Thank you.

Let me ask this question of both Mr. Lovett and Ms. Peacock to followup on what Mr. Newberry and Mr. DeVany have said. If you were paid by the radio station, aren't you getting paid two different royalties for the same song? How would you respond to that?

Mr. LOVETT. Go ahead, Alice.

Ms. PEACOCK. Well, Senator, I would say that those are two different jobs. I am a songwriter, but I am also a performer, so I should be paid fairly for both. They are two different jobs.

Chairman LEAHY. Mr. Lovett?

Mr. LOVETT. And I also perform my own songs, but in addition to that, I perform songs that I did not write. And it is not just about receiving a performance royalty for me myself with airplay.

Ms. PEACOCK. That is true.

Mr. LOVETT. This performance royalty would extend to the musicians that I record with. Those are people who are usually not credited as writers of a song, but are extremely influential in bringing a song to life and are very much part of the creative process.

Chairman LEAHY. But, you know, we hear the radio stations speak of the promotional value of hearing it, which also would add to your value for concerts and all where others are going to be involved. We have also heard of promoters who will pay stations to play, sort of supporting this theory there is a promotional value to it.

Are you saying that is not enough?

Mr. LOVETT. Well, certainly radio stations may provide promotional value to what we do, but it goes both ways. It is the music that people tune in to hear. It is because of the music radio stations are able to sell advertising. Radio stations work in what we provide, and we are just asking for the opportunity to be given fair compensation.

Ms. PEACOCK. And may I add, Senator, that satellite radio and Internet radio are also playing our material as well and offering promotion, but they are paying a royalty. So we are just really asking for what is fair.

Chairman LEAHY. Well, that goes back—Mr. Newberry, I am trying to tie, in the few minutes I have here, back and forth on this. You say the radio play should be sufficient so they should not receive additional payment.

Now, doesn't that imply the performer would want to give you the incentive to play his or her work perhaps by permitting their work to be played for free? Shouldn't that be the decision of the performer whether they want to forego rights to encourage airplay?

Mr. NEWBERRY. Senator, as you referenced, there is a relationship with the composers, and those persons that write the songs are very limited in their ability to monetize the value of those songs. And that is why the broadcast industry has had a longstanding relationship with BMI, ASCAP, and CSAC to make sure that those who are limited in their ability to monetize their work are fairly compensated.

But I do believe that what the broadcast industry brings to the table in opposition or in contrast to satellite and Internet broadcasters are 232 million relationships each week with our listeners, 232 million people that listen to over-the-air radio, and certainly there is a value by us introducing that artist, by us promoting where the concert is, and that gives the performer, whether it be in a small venue or a large venue, the ability to sell concert tickets, sell T-shirts, go to movie rights, become a celebrity. That is certainly for the performer a much stronger opportunity for them to monetize this side of the relationship, and I would like to think that America's broadcasters have contributed greatly to many, to the recognition factor of many of the artists that we have.

You know, when Mr. Lovett came into the room, there was a certain sense of celebrity. And I would like to think that the broadcast

industry contributed to that. And he has an opportunity to monetize that.

Chairman LEAHY. Mr. Lovett, what do you say to that?

Mr. LOVETT. While radio may provide promotional value to me, certainly, you know, it is just fair is fair. And the other people besides me who participate in these recordings, who do not have the same opportunities that I might have to monetize my exposure, deserve to be compensated as well.

Chairman LEAHY. My red light just went on. I have further questions. If I do not get back, I will submit them in writing. I am told the vote is about to start. I will yield to Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Chairman LEAHY. And when Senator Specter finishes his questions, we will stand in recess for the vote once you have finished, and then, Senator Cornyn, if you would come back and take over.

Senator SPECTER. As I study this issue and listen to the testimony, I think the system is very illogical as it is currently devised. Whether it is fair is a more complex issue. But when you start off and say that analog, no performers' rights, and digital, performers' rights, because analog cannot be copied because it is blurry but digital can, and then in 1998 we legislate and give performers rights on the Internet and satellite and on cable, on TV, that is a mishmosh. That is a crazy quilt, because now you have 1,200 to 1,500 AM-FM radios with high definition where it is capable of being recorded. So by that standard, the high definition ought to have performers' rights. But how you segment that is kind of complicated.

I think that Mr. Lovett and Ms. Peacock make a very strong initial presentation on the issue of fairness, but I think we need to know a lot more. I think we need to know how many performers are discouraged from entering into the profession because they do not receive compensation for their performance. And we need to know more from the radio stations what would be the impact if you had to pay a performer's royalty. The value of radio stations has gone up enormously, just gigantically, from what I have seen, and the commercials pay very, very well.

So the question which is on my mind on commercial radio, can you afford it? You certainly receive tremendous benefit from the recordings, from the performers' work. Mr. DeVany raises a good point about public radio, small stations going out of business. Well, we do not want to do that. We listened to NPR and somehow the Washington station changed its format, and now we hear music instead of the old format. And there is public financing there, so maybe we can make a dichotomy.

Can you quantify in any meaningful way, Mr. Lovett or Ms. Peacock, what the promotional value is? You do sell your records and you do attract people to your shows because you have become famous for what people hear over the air when they are not paying for it. Can it be quantified to any extent? And the subordinate question is: How many performers are discouraged from entering the profession? We certainly want to encourage you to perform, Ms. Peacock. That is the only time I have seen the red light go on when I did not want the—when the speaker was a performer from going on.

Respond to that question. How many people are discouraged—can you quantify it to any extent—by not receiving performers' royalties?

Ms. PEACOCK. Senator Specter, I cannot quantify it. I do not know to what amounts. I do know that people go into music, such as myself, because of we are passionate about it, because we have no other choice. Music is my calling. It truly is. But it is my job, and it is how I support myself. And as I call it, as sort of the great middle class of artists out there, I make my living from different revenue streams. I am also an independent label, so, you know, I am a small business. And so I feel that, you know, if somebody is creating a business model on my work, based on my work, I should be compensated fairly. That is where the fairness issue comes in, and this is my job, that is their business model, and there should be compensation.

Senator SPECTER. So, Ms. Peacock, you say you perform for passion not for money, sort of like Senators who are in this line for passion and not for $165,000 a year.

Ms. PEACOCK. But you do have to pay the bills.

Senator SPECTER. Senator Hatch has royalties, too.

[Laughter.]

Senator SPECTER. But he is entitled to them.

Mr. Newberry, how well are your constituents doing, the radio stations, aside from the public stations? Isn't it a pretty lucrative line these days? Can you afford to pay performers and still stay in business with a significant profit?

Mr. NEWBERRY. Senator, as I was listening to Ms. Peacock's answer to your question just a moment ago, it struck me that we probably find ourselves in the same position. I would consider myself a member of the middle or lower class of the broadcast community. Sixty-five percent of the radio stations in this country are outside of rated markets. It is rural America. And I can assure you that those small market radio stations in today's economy, with the challenges that are being faced, with the consumer confidence level where it is, with gas prices going up, many, many stations, as I said in my oral testimony, are struggling to find profitability. And the impact of these fees being paid by those radio stations would be dramatic and would be devastating because stations would have to make hard decisions. We are a fixed-cost industry.

Senator SPECTER. Mr. Newberry, would it be rational to make a distinction somewhere along the line between the stations you describe and those which are profitable?

Mr. NEWBERRY. Senator, I think it is an issue of principle, because what I would say in response to that is the larger stations that are in the metropolitan areas provide even greater value to the artist. They reach more people. They have more impact. So I think it is a balanced system, and for us to bifurcate the industry I think would be a mistake.

Senator SPECTER. Well, when we establish public policy, we try to do it in terms of stimulating entrepreneurialism, and performers are certainly in the free enterprise system entrepreneurs. But we want to keep radio stations going, too. The first thing all of us do when we get into the car is turn on the radio. The first thing we do. And we hear a lot of commercials. A lot of commercials. The

first thing I do is turn on television—I asked my staffer, I saw in my notes Internet and satellite have to pay performers. I wondered about television. A lot of good music on television. And I was told that on cable they have to pay performers.

Well, it is a vexing issue, and we want to be fair. We want to keep the radio stations going. We also want to keep the performers going.

Senator Hatch has more experience in this field than I do. He can provide more of the answers. But the Chairman has put us in recess until the vote concludes. We will all be right back.

[Recess 10:17 a.m. to 10:27 a.m.]

Senator CORNYN. [Presiding.] I will call the hearing back to order. I hate to interrupt all the good conversation, but I do want to make sure we move our way through the hearing in the interest of your time as well as ours.

First I want to thank Chairman Leahy for convening this important hearing. I was thinking there has not been one I have enjoyed personally as much in a long time because of the entertainment and because of some of the personalities who are here. And I was thinking, Mr. Lovett, as Chairman Leahy was talking about your contributions to music, which are many, that Texas has produced a large number of our Nation's most storied musicians, from Bob Willis—Wills. Excuse me. I do not know why I said "Bob Willis." I was looking at Ray Benson as I was thinking that.

[Laughter.]

Senator CORNYN. I remember his performance, riding with Bob at the Kennedy Center, which I enjoyed a lot. It celebrated the life of Bob Wills. I do not know why I said "Bob Willis." Excuse me.

To Willie Nelson, from Janis Joplin and Norah Jones, from Buddy Holly to Stevie Ray Vaughn, and from Robert Earl Keen, who I understand was your housemate at Texas A&M. Is that correct, Mr. Lovett?

Mr. LOVETT. Well, we were friends. We lived right down the street from one another, and we met there, and, you know, we sat around and played a lot of music together.

Senator CORNYN. Well, I want to also say that my own appreciation for music has overcome some early hurdles in my life when my parents forced upon me trombone lessons in first grade. And then I learned later when I went to college, I learned how to play the guitar badly. But I found that the opposite sex was not attracted to trombones.

[Laughter.]

Senator CORNYN. They were not attracted to my bad guitar playing either.

Then let me just relate one other personal anecdote and then segue into my questions. When I went to law school and became a lawyer, I worked for a senior partner in my law firm in San Antonio, and one of his clients was ASCAP. And he would sue local clubs for non-payment of royalties, and he would give me the responsibility to go about midnight, usually on a Friday or Saturday night, along with a United States Marshal, with a writ of execution, to levy the writ of execution on the cash register and the proceeds that were accumulated during the evening's course of business. And I was always appreciative that we did not encounter

someone with an attitude, and perhaps even a gun, that would have challenged that, or I might not have been here.

But, of course, the royalties that we were helping to collect for ASCAP I would be interested in understanding because—and maybe the record would benefit from knowing how that money is distributed vis-a-vis the author, the writer, versus performer versus the music publisher and others.

Mr. Newberry, could you perhaps enlighten us a little bit on that?

Mr. NEWBERRY. Certainly, Senator. Every radio station in the country pays a fee to ASCAP, BMI, and CSAC through independent licenses with each of those three entities. And it is based on a percentage of revenue that the stations are audited for and remit to those three entities on a monthly basis, generally.

The funds have been distributed—and I am not intimately familiar, but familiar as it relates to being a broadcast owner. The funds have been distributed to the composers based on the airplay of the songs, and we are required by law and by the license agreement to provide to those companies an audited portion of our play list for a given period of time. Sometimes it is 3 days; sometimes it is 7 days. It can be longer or shorter. We provide that, and then they, through a statistical analysis, allocate the funds back to their various composers.

Again, that is my understanding. I am not an employee of any of those three companies, but as a broadcaster, that is my understanding of how the practice works.

Senator CORNYN. Do any of the royalties or fees associated with that flow back to the performer, Ms. Peacock, Mr. Lovett, to your knowledge? Or does it solely go to the benefit of the creator of the music? By "creator," I mean the songwriter.

Ms. PEACOCK. It goes to the songwriter.

Senator CORNYN. Only. Is that right?

Ms. PEACOCK. Only.

Mr. LOVETT. Yes, sir.

Senator CORNYN. Do you know why that has been historically the case?

Mr. LOVETT. Well, songwriting and performing are, as Ms. Peacock said in her opening, two separate jobs. They are two separate things. As a songwriter, someone else might record and perform my song. And as a performer, I might record and perform someone else's song.

Senator CORNYN. Mr. Newberry?

Mr. NEWBERRY. If I could just add, the broadcasters recognize—as stated earlier, the broadcasters recognize that the composers are limited on their ability to monetize their artistic work. They do not have, generally, as much opportunity to go out and perform merchandise sales, et cetera. So the broadcast industry certainly wants to be fair. And for many years, we have been paying those fees to the composers and are very comfortable with that relationship and value that relationship immensely. While they are two different jobs, there are also two different compensation structures for that.

Senator CORNYN. Ms. Peacock, you alluded to the fact that satellite broadcasters already pay a performance fee to recording artists or somebody who performs somebody's music. How did that

come about? As part of a negotiation process? It was not mandated by Congress, I gather.

Ms. PEACOCK. You know, I am actually not familiar with the exact details of it, but I believe it was several years ago that this started happening. I receive royalty rates when my songs are played on XM or Sirius or Internet radio or cable. So I receive checks usually through a SoundExchange or something like that.

Senator CORNYN. Do any of our witnesses know why XM Radio or satellite radio has been treated differently from terrestrial radio when it comes to paying fees to performers as opposed to composers?

Mr. DEVANY. Senator, I believe one of the reasons is that in the case of satellite radio, it is a subscription- based system as opposed to a free, over-the-air system. So that those who receive that service are already paying for it.

Mr. NEWBERRY. The same would apply to the cable industry as well.

Senator CORNYN. And I guess the advertising revenue that is available to terrestrial radio stations is not as available, I guess. As I recall my XM Radio subscription, I do not think there is a lot of additional advertising associated with it. So the fee for service basically is a substitute for advertising revenue. Is that right?

Ms. PEACOCK. Well, that is true. There is not as much advertising on the satellite radio. However, Internet radio is free, and they also pay a royalty.

Senator CORNYN. OK. I think it was Mr. DeVany or you, Mr. Newberry, who talked about a symbiotic relationship between the performers and radio.

Mr. NEWBERRY. It was me, sir.

Senator CORNYN. And it seems clear—and I think Ms. Peacock and Mr. Lovett acknowledged they benefit from the exposure given them on radio, but they, I think, make a pretty compelling argument that that should not be the limit of the benefit that they receive if, in fact, the marketplace would provide for additional compensation by virtue of their performance rights.

Could you speak specifically to that argument, that while certainly they do acknowledge the benefit of promoting their record sales otherwise, that they should not be limited to that?

Mr. NEWBERRY. Absolutely, Senator, and the relationship that I did refer to in my testimony as symbiotic has to deal with the value that we provide in a relationship that has been in place.

I will tell you that it is really a three-party relationship. One of those parties that is not at the table today that I would hope would engage in this discussion, and that is the recording industry, the actual record labels, because many times they own a 50-percent interest in what the performers' rights fee would be, or tax, whatever we wanted to call it.

But we help promote the label, the artist. We help promote their venues. We help promote their celebrity. We help to make them familiar so that you hear the song that is played. We play it on our station, and there is a direct correlation, and you can see that we drive the sales of the merchandise and the sound recordings. And I think that that relationship is very proven. We can provide documentation to show that, the correlation between the two. But I

would encourage that the record labels, the multinational record labels, be brought into this discussion because they are very much a part of this relationship.

Senator CORNYN. As I understand it, there currently are prohibitions against play-for-pay or payola.

Mr. NEWBERRY. Yes, sir, absolutely.

Senator CORNYN. If a performance fee is levied on over-the-air terrestrial radio, would it make sense to remove those payola laws? In other words, I am trying to figure out if Government intervenes in this relationship, this business relationship, as Mr. Lovett says, between the performer, between the creator, the people who actually broadcast it, to what extend should Government be in the middle of this by prohibiting economic relationships that might ultimately work their way out in a free market, a freer market?

Mr. NEWBERRY. First of all, I think from a logical correlation or one step leads to another, if we are paying for the fees, then one could say—if we are paying for the rights to perform the songs, then one should say that we should be compensated for that. I do not think that is the right model. I do not think for artists it should be who has the most money gets the most airplay. I think it should be a case of who provides the best artistic content gets the most airplay.

So I would hate to see us go in a direction that pay for play became the standard because I think that that would be a tragedy for many, many artists that are working to evolve. Broadcast radio, over-the-air radio, we introduce thousands of artists each year, and if I might, I could relate a personal story.

Last year at this time, I had an opportunity to meet a very shy, very retiring, very quiet, very modest young lady by the name of Taylor Swift, who had just released her first song, and she was just very—almost timid. And then when I saw her perform on the Country Music Association Awards the other night, I saw this young lady that had blossomed into a great performer. I am very proud of what radio has done to introduce her to the listening audience, and certainly her talent has taken her beyond—I do not want to say radio contributed all of her success. But I think that seeing artists evolve like Taylor Swift—and if we got into a pay- for-play circumstance, I think we would miss a lot of artists that would be introduced to the listening public otherwise.

Senator CORNYN. I would be interested, Mr. Lovett and Ms. Peacock, talking about the prohibition of radio play for pay and whether that would or should be removed—I am not advocating that. I am just trying to figure out how heavy the hand of Government should be in intervening in basically a business, market-based determination of value and who gets paid for what. I think the arguments you have made are pretty compelling, but I wonder whether there might be some other consequences to increase Government intervention in your business relationships that would not be beneficial in the long run or whether you harbor any of those concerns.

Mr. LOVETT. Our position is really pretty simple. Mr. Newberry has—I appreciate what Mr. Newberry has done for me in a promotional way. Certainly, radio adds value to what I do. But it simply works both ways. Musicians and artists add value to what radio does, and it is just—what we are talking about is bringing

this performance royalty into line with practices that could be viewed as standard across the world, and talking about—Ms. Peacock made the point that Internet radio is free as well, but we are talking about bringing our practices in line with standards that are prevalent in the developed world.

They add value to us. We do not argue that, and we thank radio for that. And in no way are we trying to put small market radio out of business. Goodness gracious, we rely on radio. We need radio. We support radio. We mention radio at all of our shows. You know, at shows that- -we are often in business with the radio station to help promote a show. I make it a point to thank our sponsoring radio station.

It is a symbiotic relationship, and we are just talking about bringing these practices in line with the standard. And I think the coalition is—as performers, we are looking to the Congress for your wisdom and what is fair. We are just asking for a fair look at this, and we appeal to you to help us figure out what is fair. And the coalition certainly I think has in mind ideas that would—where smaller market commercial stations would not pay the same money that larger market stations would, and certainly non——

commercial stations would have a lesser payment as well.

So we appeal to you to—we are interested simply in fairness, and we are grateful for this opportunity to be considered.

Senator CORNYN. Thank you very much.

Senator Hatch?

Senator HATCH. Well, I want to thank the Chairman and the Senator from Pennsylvania for holding this hearing on performance rights. The subject of royalty payments is an important one, and it deserves this Committee's attention. As a songwriter, I have had the advantage of meeting and mingling with some of the finest and talented individuals in the world, and certainly in our country, the best our country has to offer.

Some people are under the wrong impression that everyone in the music industry is making a fortune. But they are not aware that all too often it is a struggle to survive.

I will never forget, I gave the keynote address at the ASCAP national convention 1 year, and a thousand songwriters were there, and I told how I got involved in writing music, and part of it was so I could understand this field and understand all of the problems. And it really has taught me an awful lot about it.

But I had just received my first royalty check for 57 bucks, and I said, "And I just got my first check for 57 bucks," and I held it up and the place went wild. I mean, they screamed and shouted and stood on chairs. And I thought, My gosh, they treat U.S. Senators pretty well.

[Laughter.]

Senator HATCH. I sat down next to Marilyn Bergman, who is the head of ASCAP, and a great songwriter herself, Academy Award-winning songwriter with her husband, Alan, and she said, "Senator, the reason they are so excited is that there are a lot of great songwriters there and hardly any of them will ever get a royalty check."

It is really that tough. It is a tough business. If you are a performer, you have at least a chance. But even there, there are those

who really hit it big, and there are those who just continue to strive who may be every bit as good, but just for some reason do not click like they would like to.

I recognize there is no easy solution to the performance rights issue. It is a complex area of the law, and I am glad that Chairman Leahy has made this hearing possible. And I consider it a valuable opportunity to learn more about this.

Let me just say that the more I get into it, the more I realize that it is very, very complicated. I have to say that it is true, isn't it, that Europe, just as an illustration, pays performance royalties? They pay writers' royalties. I know. I have received royalties from Europe. But I do not get them from America. I have just wondered about that many times and, of course, have gotten into it.

Mr. Lovett, I thank you for your testimony today. I appreciate you and Ms. Peacock taking the time to be here. And I appreciate you two gentlemen who have your own problems here. So as a songwriter, I am sympathetic to royalty payments, not because I ever expect to make any real money at this, although actually it is surprising. But it troubles me that music sales and revenues are in decline. Most writers have to take second jobs—or first jobs in order to write, and then they have to really, really work very, very hard to get even a chance to—and some of them are wonderful writers, but just do not have a chance, and especially when they are not performers themselves.

Now, I believe that we have to do something to keep the up and coming songwriters and performers motivated and able to make a good living. However, I am concerned, as Senator Specter is, about the unintended consequences that may be created by any—and as Senator Cornyn is, that may be created by any action that Congress might take. But common sense tells me that if stations face paying significant sums of money in performance royalty payments, it is going to impact their programming decisions, and here is my concern. This could lead to a scenario where well-established artists benefit at the expense of newer or lesser known artists. And I do not want to see that happen either—not that I do not want established artists to do well.

If I were running a radio station and had to pay for the use of a song, I would likely play music that is more popular to ensure that my ratings remained high and that I could sell my advertising needed to pay for the new royalty expense. Now, that is great for the well-established artists of the world, but what about the artists who are struggling to just break through or just get a chance. And we have new ones every year that come through that are really, really good. But if they do not have a chance, it is going to be something. How would such a royalty payment structure sustain the vast majority of artists who are in that group?

Now, let me just say this: Mr. Newberry, could you explain some of the limitations, the restrictions terrestrial radio faces which do not burden other platforms, such as satellite radio and Internet music services? And if we accept the proposition that parity is a good policy, how do we achieve it given some of the restrictions placed upon terrestrial radio that other platforms may not have?

Mr. NEWBERRY. Senator, as a broadcaster, I am very proud of the relationship that I have with my listeners in the community, and

I think one of the things that you are alluding to is the overriding public interest obligation that we as licensees have for our communities that satellite radio has not had to demonstrate. Certainly someone that is streaming independently does not have those obligations.

So we do have a relationship that we have to maintain in our communities. I am very proud to be a local broadcaster. I love the fact that last Friday night I was doing a high school ball game with some friends. Actually, it was not exactly big listenership, but it was a T-ball football game, Little League football games. And I love the fact that our communities are engaged in that.

Mr. Lovett said earlier that music is what builds relationships with the listeners. It is a component, but it is not the sole component of what builds our listenership. It is the overall relationship that we develop.

So, Senator, you talk about the obligations or the responsibilities, and you raise the question of parity, and I think your point is dead on. But I would also tell you that that is not something that I would ever want to give up. I am very proud of the relationship and the expectations that we have. I am proud to be a broadcaster. I think that that is a unique opportunity for me to contribute in my community, and I think that is what differentiates us also from satellite and from Internet and other forms of broadcasting and makes us a stronger opportunity.

Senator HATCH. All right. Ms. Peacock, I have heard the argument that radio stations should not have to pay performers royalties because they promote the sales of music. We have had that throughout this hearing. Now, is broadcast of your music beneficial to you as a singer and as a songwriter?

Ms. PEACOCK. Yes, it is.

Senator HATCH. Sure, it is. It appears to me that advancing technologies today enable radio stations to further promote the music that they play much easier than in the past, these advance technologies. For example, I am aware that several radio stations provide play lists on their websites and direct links for listeners to purchase artists' music right then and there. Now, it seems that this level of exposure on the Web fostered by radio stations would be a significant benefit to performers. What are your thoughts on that? And I think I understand them

Ms. PEACOCK. It is a benefit to performers, absolutely. And I do not argue with that. Basically, I think as Mr. Lovett said, what we are asking for today is fair treatment for performers, to bring us up to date and up to the standards that are across the world in developing countries that also pay a performance royalty.

If I could comment on Mr. Newberry's comment about broadcasting Little League and public service things, you know, the broadcasters have free air space and so they are supposed to be doing community broadcasts. So that is part of their job as well, to be part of a community. And if you are a radio broadcaster and let's say you are maybe a larger station and you are broadcasting the Cubs game or, you know, the local sports network, you have to pay for that. You have to pay for that content.

So while radio does provide a service, and absolutely it does provide promotion to an artist, we are part of their content. They built

the business model upon our work, and we should be compensated fairly.

Senator HATCH. I have gone over, Mr. Chairman, but let me just take one more second and just say this: I lean very heavily in favor of the artists and writers because I know that Europe is going to drop royalties if we do not provide a means whereby royalties are paid on terrestrial radio. And I do not want to see that happen. Already, at least one country has thrown it in our face in refusing to pay royalties. The question is: Can we do this in a way that does not bankrupt terrestrial radio? Can we do it in a way that is fair to the struggling artists or to struggling people, writers, who really are great but just are not known yet? Can we do it with enough optimism and opportunity on both sides of the equation to be able to make this work?

For instance, I listen to your program all the time. Is it Mr. "Devahn-y" or "De-vane-y"?

Mr. DEVANY. It is DeVany.

Senator HATCH. Yes, well, I knew that you—when you do classical music, I thought maybe it was just pronounced differently.

[Laughter.]

Senator HATCH. But I do not want you to go bankrupt, nor do I want you to have a great deal of trouble. But, also, there is just simple equity here. I do not want to see Europe and other, like you say, Mr. Lovett, developed world drop paying royalties because we refuse to do so. But this problem of the newer artists and those who are up and coming and those who have not been known yet and those who need opportunities is one that bothers me. But I am going to work hard to see if we can come up with some legislation and be fair to both sides but literally does what is right with regard to content. And what is right is when people create something of value and it is used by others, there ought to be some payment for that.

Now, I have not seen the legislation yet, but I am going to be very interested in the legislation. I will not be interested in it if it is all one-sided or all the other. But, on the other hand, I think that terrestrial radio has got to wake up on this a little bit, too. You do provide great services. You do help established artists. You do a lot of good. On the other hand, I hope we have a country where there is a lot of opportunity for up-and-coming people who have ability, and maybe some of those who are older and are no longer capable of going out and performing and getting accepted. And I would think it is in the best interests of all of us to be able to come up with a form like that.

So I would challenge the radio industry, terrestrial radio industry, to help us to come up with some ways of helping you. If you have restrictions and difficulties that make it much more difficult for you to do something that I think is equitable, when you listen to these artists here, you ought to find some way of doing it. And we are not interested in hurting anybody. We just want to make sure that the system works well and that it is an international system that does not just work in Europe but can work here as well, and that we reward talent and we reward innovation, we reward creativity. Because without it, I do not think that the radio stations are going to do well either. And it seems to me there has got to

be an element of give and take here that hopefully we on this Committee and throughout the Congress can resolve. Well, I am going to work hard to see if we can resolve that, and I just personally appreciate the testimony of all of you here today. I have listened. I am not interested in hurting anybody. I just want to make sure that we have a system that works and works fairly and makes sense. And to that degree, I am going to do my very best to work with my other colleagues on this Committee and listen to them and try to come up with some answers here. Thank you, Mr. Chairman. Senator Cornyn. Mr. Chairman, before I completely relinquish any right I have to conduct the hearing back to you, could I ask unanimous consent that my statement be made part of the record? Senator Specter. Without objection. Senator Cornyn. Thank you, Mr. Chairman. Senator Specter. Just a few more questions. Mr. DeVany, you talk about the stations which cannot afford to pay performers. Do they pay the songwriters? Can they afford that?

Mr. DEVANY. At this point, they have been. Like Mr. Newberry said, all stations are paying a fee to ASCAP and BMI.

Senator SPECTER. Do you know how much they pay the songwriters?

Mr. DEVANY. Let me make a distinction here on that particular issue when it comes to public radio. Those stations are non-commercial radio, those stations which fit the criteria to be what is called CPB qualified—that is to say that they are eligible to receive funding from the Corporation for Public Broadcasting—are also the beneficiary of having, through the Corporation for Public Broadcasting, payments made on their behalf to ASCAP and BMI. It is part of the way, as I understand the corporation is chartered, to provide that kind of royalty support.

Senator SPECTER. Payments made on their behalf by whom?

Mr. DEVANY. By the Corporation for Public Broadcasting. Through the Corporation for Public Broadcasting.

Senator SPECTER. Well, would that be a possible way to pay performers like they pay writers?

Mr. DEVANY. It is possible. At this point it is unclear, at least to me, how that would work. However, it is possible.

Senator SPECTER. Would you explore that and get back to the Committee?

Mr. DEVANY. Yes, sir.

Senator SPECTER. Would you let us know?

Mr. DEVANY. Yes, sir, I will.

Senator SPECTER. Because if you are talking about a class of stations which cannot afford to pay, but they pay the songwriters, let's see if we can work that out for the performers.

Mr. DEVANY. I would like to make just one other distinction, if I may, sir. There is a class of station out there that is not, what I said before, CPB qualified, are not eligible to receive that. They are very, very small stations with volunteer staff and that kind of thing. They work very much—

Senator SPECTER. Do they pay songwriters?

Mr. DEVANY. I believe they do, proportionally smaller.

Senator SPECTER. What I am looking for, if they can afford to pay songwriters, why not performers? When you say they cannot afford to pay.

Mr. DEVANY. It is a margin that is so slim, sir, that it can be very, very difficult to do.

Senator SPECTER. Well, could you quantify for us how much do they pay songwriters, who actually makes the payments, so we could explore that—

Mr. DEVANY. I can—

Senator SPECTER. If I may finish—as a legislative channel. Mr. Newberry, you have your hand up.

Mr. NEWBERRY. Yes, sir. Unfortunately, I do not have a Corporation for Public Broadcasting or another entity that pays the fees. I pay the fees. They are paid from the operating income of the radio station. As an industry, it is about $500 million that is paid to the composers. It is based on revenue. It is not based on profitability; it is based on gross revenues. So there is a formula, and it generally runs between 5 and 7 percent of the gross revenues of a radio station.

And your answer to the question of if you can pay one, can you not pay the other, with all due respect, Senator, the pie is only so large. And increasing those additional fees, particularly in the markets that I am referring to, that I—

Senator SPECTER. What would you think about payment on profitability as opposed to payment on gross revenues?

Mr. NEWBERRY. I would still have concerns with the very principle that we are paying by what we are providing to these artists and to the multinational record labels by promoting their products. So I would go back to that and say that, on principle, I am opposed to it. But certainly when you are looking at someone's profitability as opposed to someone's gross revenues, that does enable a different standard of measurement that I think—

Senator SPECTER. Well, I know you would prefer not to pay. I understand that.

Mr. NEWBERRY. We are paying in a different—

Senator SPECTER. I have been listening to your testimony. I understand that.

Mr. NEWBERRY. Yes, sir.

Senator SPECTER. But when you talk about gross revenues, you are talking about something which does not correspond to ability to pay. You talk about profitability, it may.

Mr. NEWBERRY. Yes, sir. Philosophically, I would still disagree with that, but that is a measurement to—

Senator SPECTER. Well, how about a sliding scale, Mr. Newberry, as we structure our tax laws so that the stations way down the line on profitability would be paying a lesser percentage than those in the urban areas who have a greater ability to pay?

Mr. NEWBERRY. I mentioned this earlier, and I am not sure if you were in the room at the time. But one of the things that is of concern to me when we go down that path is that I believe in the equation of fairness. The larger urban stations, metropolitan stations, provide even greater value to the artist and to the recording companies, to the record companies. So I think that the argument could be made that their value is even more—

Senator SPECTER. I was here. I heard that.

Mr. NEWBERRY. Yes, sir.

Senator SPECTER. I heard that promotional argument, and it has a lot of weight. But it may not carry the whole day. Or it may. We really cannot legislate in the dark, and we are pretty much in the dark.

1 Do you know how much the Internet and satellite folks pay or the TV on cable pay?

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

Senator SPECTER. Well, we are going to have to find that out. I am not expecting you to have those answers, but I think that is a relevant question.

Mr. NEWBERRY. Yes, sir.

Senator SPECTER. And it may be that they ought to pay more if there are some who cannot pay as much. We have to make that allocation.

You talked about the number of stations you have, and their profitability and their inability to pay. Could you provide the Committee with some figures on that? How many—

Mr. NEWBERRY. About my personal stations or—

Senator SPECTER. No, no. You are the President—well, let's see. You are a member of the National Association of Broadcasters.

Mr. NEWBERRY. Yes, sir.

Senator SPECTER. Can the association provide us with information about how many members you have, how many radio stations there are?

Mr. NEWBERRY. Certainly.

Senator SPECTER. And give us some idea quantitatively as to revenue and ability to pay and also how much you pay the composers?

Mr. NEWBERRY. Yes, sir. We will cooperate with the Committee in any way that you request, and we will certainly provide that information.

Senator SPECTER. All right. We would like to know what the facts are so we have some way of gauging the merits of your contention, just aside from the generalizations.

Ms. Peacock and Mr. Lovett, are you in a growing profession? Are more people vying to become celebrity star performers? Do you have an organization which gives us some idea as to how many performers there are at work?

Mr. LOVETT. We are certainly in a changing business. The music business has, I think, changed more in the last 10 years than ever.

Senator SPECTER. How has it changed?

Mr. LOVETT. Well, in the way people receive music, in the way people hear music, because there are so many different outlets to hear music, not just terrestrial radio but satellite radio, cable radio, Internet radio; the way people are able to preview and to purchase music.

Senator SPECTER. Well, we would like to encourage more people to be performers. Can you give us some standard as to what we might look to, to encourage more performers?

Mr. LOVETT. You know, people play music. I think people are interested in writing music and performing music because, as Ms. Peacock said earlier, they just cannot help it, because they feel somehow compelled to do it. People love music.

Senator SPECTER. Well, I am looking for some motivation from pay.

Mr. LOVETT. Yes, sir.

Senator SPECTER. They feel compelled to do it. We do not have any business in the field. If they are compelled, they are compelled. But if they would be encouraged, we would like to do that. But we would have to have some handle on how we encouraged people.

Mr. LOVETT. Yes, sir. Well, this—

Senator SPECTER. The last thing you want Congress to do is to legislate not knowing what the facts are.

Ms. PEACOCK. We do have organizations—

Senator SPECTER. And I am groping for some facts.

Ms. PEACOCK. I am thinking of some organizations, Senator, like the Recording Academy that could provide maybe some of those statistics or organizations, I guess, maybe like AFTRA.

Senator SPECTER. The Recording Academy?

Ms. PEACOCK. Yes, the Recording Academy.

Senator SPECTER. Well, if that could be done, it would be appreciated.

Ms. PEACOCK. Sure.

Senator HATCH. Could I interrupt on that point? I have one gold and one platinum record. But I have been told I would have more if it wasn't for piracy. Piracy is basically making it very difficult for even established artists like yourselves to continue to get gold and platinum records—in other words, 500,000 CDs sold or a million CDs sold. And it is almost impossible to get a diamond record.

I mean, the point is the really top artists might be able to do that, but the whole industry is suffering because of piracy and because of lack of compensation. Is that a fair comment?

Ms. PEACOCK. I think that is true. When we talk about changes in the industry, not only are our people getting their music from different sources as well as terrestrial radio, but they are turning to satellite radio and Internet radio, which we are paid a royalty for, but I am also seeing many artists leaving and forming their own labels as well. So I think you have the independent artist out there who I think—that is who I am representing today, the middle-class independent artist that needs those different income streams to make a living, because that is my job.

Senator HATCH. You bet.

Mr. Lovett?

Senator SPECTER. Let me regain the floor here. I am not going to charge you with—or ask you to figure out the piracy issue.

Senator HATCH. No, I am not asking them to do that. But what I am trying to point out is that that is another pressure on artists and writers and performers that adds to the pressures that they have. And I worried about a lot of people who are very, very talented but who have to just get out of the industry because we are failing here to resolve some of those conflicts. And, you know, people think when it is on the Internet it is free. These young kids think it is just free. They do not believe they have to pay anything for that. And that is part of the overall thing. That is the only reason why I bring that up, because it is a very complex, very, very broad set of problems that are very difficult to understand and very difficult to resolve.

Senator SPECTER. Do we have anyone here today representing the pirates?

[Laughter.]

Senator HATCH. I represent the anti-pirates.

Senator SPECTER. Well, trying to work within the confines of the witnesses we have and the issues we have, I think you get the thrust of what we are looking for, some of the hard facts as to why you cannot afford more on the broadcaster side and why the fairness issue is bolstered by the promotion as being inadequate and how you lure more people to your profession to supplement the passion which you have articulated.

We are going to keep the record open for questions. It is a very busy day here, and I think everybody on the Committee is very much interested in this subject, and we are looking to find an equitable solution. And there may be some questions which others will have, so technically the record will be kept open.

Thank you all, and that concludes the hearing.

[Whereupon, at 11:07 a.m., the Committee was adjourned.]

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

QUESTIONS AND ANSWERS

Submitted Questions by Senator Arlen Specter, Ranking Member

For Steven M. Newberry, President and CEO,
Commonwealth Broadcasting Corporation

Senate Judiciary Committee "Exploring the Scope of the Performance Right"
November 12, 2007

(1) In your testimony, you note that Congress created a new limited copyright in sound recordings during the 1990s in response to the potential threat of unauthorized reproductions. Given the emergence of the HD format for radio delivery, does not digital terrestrial radio present the same potential for unauthorized copies as other digital formats?

Answer: Congress previously and correctly decided that neither analog nor digital terrestrial radio facilitates the unauthorized, digital distribution of sound recordings to the extent of other digital formats. Further, although over 1500 radio stations in the United States are currently broadcasting in digital, there is no credible evidence to suggest that digital radio displaces sales of music. In fact, HD Radio actually promotes the sale of music through new "tagging" technology.

Today, analog and digital over-the-air radio is still characterized by the same qualities that Congress considered when it decided in 1995 in connection with the Digital Performance Right in Sound Recordings Act that terrestrial radio did not threaten the sales of music – it is not on-demand, interactive, or a subscription service. Terrestrial broadcasts include advertisements, promotional announcements, and DJ chatter over the beginnings and ends of songs. Songs are tightly segued, in comparison to satellite radio.

Moreover, those desiring to obtain and listen to pure, uninterrupted performances of sound recordings in lieu of legally purchasing sound recordings 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 the hours of uninterrupted music that can be stored on recordable CDs and hard drives are but a few such means.

So-called "stream-ripping" technology has not evolved into the significant threat that the RIAA had previously predicted with regard to the Internet, and there is no credible evidence that any similar type of technology will do so for digital radio. Even in the European Union, the United Kingdom, and in Asia, where the rollout of digital radio is further along, there is no credible evidence to suggest that digital terrestrial radio poses any significant threat of commercial piracy. As noted above, over 1500 digital radio stations are broadcasting in the U.S., but there has been no evidence that connects digital radio with the unauthorized peer-to-peer file sharing of music.

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Far from being a music replacement mechanism, digital radio is actually facilitating the sales of music. HD Radio recently paired with Apple's iTunes to allow for iTunes tagging. With the touch of a special button, listeners can "tag" songs heard on the radio for future purchase for iTunes. When the tag button is pressed, information about the song is transferred to the iPod and put in a special playlist that allows the user to preview, buy and download iTune songs.

(2) If Congress were to revoke the current exemption and require you to pay a royalty according to the same terms as satellite radio stations, how much do you think this would cost your industry?

Answer: Imposition of a fee for the over-the-air performance of sound recordings would have a significant impact on the broadcasting industry. Paying a performance fee based on a percentage of gross revenue similar to that paid by satellite radio stations could devastate smaller stations that operate on meager margins.

The radio broadcasting industry consists of nearly 11,000 commercial radio stations located throughout the U.S. that have a wide variation in the revenues that are generated at individual stations. There are substantial numbers of radio stations generating very little revenues. Given the significant fixed costs of running radio stations, any decrease in these meager revenues or any increase in operating costs may put these stations in peril. In many of these cases, the radio stations at risk of possibly going off the air are serving very rural areas, in which they may be the only station serving their local communities.

There are substantial numbers of radio stations annually generating $100 thousand or less and a larger number generating $250 thousand or less. Radio stations operating at these low revenue levels probably are just breaking even or earning a profit of less than 1-3% of revenues. Given these limited profit margins and at the significant fixed costs of running radio stations, any decrease in these meager revenues or any increase in operating costs could put operations of these stations in peril.

Although the decision of the Copyright Royalty Board (CRB) for the current satellite radio license period has not yet been published in the Federal Register, it has been reported that the CRB determined the rate to be 13% of gross revenue, which was discounted so that it ranges from 6% to 8% for the 2007-2012 license period. Being forced to pay an additional fee based on any of these percentages could force stations operating at low revenues to significantly alter their businesses or to go off the air altogether.

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(3) How much do terrestrial broadcasters currently pay songwriters?

Answer: Terrestrial broadcasters currently pay songwriters approximately $450 million annually through payments made to ASCAP, BMI, and SESAC.

(4) Over the past several years, the broadcast industry has advocated a "broadcast treaty" before the World Intellectual Property Organization. This treaty would mandate the creation of a copyright-like right in the broadcasts of copyrighted work, including the ability to permit or prevent the later use of the broadcast. Although I understand this treaty is more relevant in the context of televised material, my question is how can the broadcast industry on the one hand advocate others pay them to use broadcasts of copyrighted works, while opposing efforts to have the industry pay for use of the copyrighted work itself?

Answer: In urging the World Intellectual Property Organization (WIPO) to update and modernize the rights and protections in broadcasts against the unauthorized exploitations of those signals by third parties, broadcasters seek nothing more than an updating of international law previously established in 1961 by the Rome Convention, which provided certain rights to both the recording and the broadcast industries. The rights of the producers of phonograms were updated in 1996 with the adoption of the WIPO Performance and Phonogram Treaty (WPPT). Broadcasters merely seek a similar updating of their broadcast rights.

Phonogram producers add value to the content they record through their creative and entrepreneurial efforts in producing and distributing sound recordings. Broadcasters do no less through their efforts in producing and distributing the content they broadcast. The recording industry was fortunate in 1996 to obtain a treaty that provides it with modernized rights, protections and the tools necessary to combat piracy and to prevent third parties from inflicting economic harm on its core business—selling and otherwise distributing sound recordings. Unfortunately, broadcasters have yet to achieve these modernized rights and tools, though the Rome Convention certainly suggests they are entitled to do so.

NAB's opposition to performance rights in sound recordings is not inconsistent with its efforts at WIPO to secure new rights and protections in its signal. Cable and satellite systems, unauthorized third party internet retransmitters, and others seeking to exploit broadcasts' signals are competitors to broadcasters for programming, advertisers, and viewers. In some instances these unauthorized retransmissions from distant markets result in broadcasters having to compete against their own programming. By contrast, radio stations do not compete with record companies. Rather, radio stations' use of records promotes their sale.

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SUBMISSIONS FOR THE RECORD

Statement for the Hearing Record – Senator John Cornyn – November 13, 2007

Thank you, Mr. Chairman, for holding this important hearing on the issue of public performance rights for recording artists. In an institution where partisanship so often prevails, it has been a welcomed retreat to join together with you, Mr. Chairman, to introduce and, on numerous occasions, pass legislation to protect the intellectual property behind the music, films, art, and other creative works that are so critical to our national economy, and perhaps more importantly, to our culture and quality of life.

Mr. Chairman, you have assembled an impressive panel—two singer-songwriters and two terrestrial radio broadcasters—each of whom will offer the Committee their unique perspective on the relative fairness and the economic realities of the music marketplace. On a personal note, I am particularly pleased and honored that we could be joined today by Lyle Lovett, a great Texan and one of America's most creative and gifted singer-songwriters.

Mr. Lovett celebrated his 50th birthday just a few weeks ago, but he doesn't appear to be showing any signs of slowing down. In fact, the past two nights he performed locally at The Birchmere in Alexandria. Unfortunately, I could not attend, but members of my staff attended and said your show was as good as ever.

Mr. Lovett, it is often said to be impossible to pigeonhole your music into any category or conventional genre. Rolling Stone magazine has made perhaps the best attempt yet—calling Lyle Lovett a "master of elegant country gospel blues."

In that sense, you, Mr. Lovett, are one of the most compete reflections of the great wealth of music in our nation—and of particular importance to me--in my home state of Texas.

Many are not aware of it, but Texas has a rich musical heritage—in fact, Texas is home to the "Live Music Capital of the World" in our capitol city of Austin. And Texas boasts a community of musicians that define "6 degrees of separation." For example, Mr. Lovett pays tribute in one of his famous songs, "That's Right You're Not from Texas," to a fantastic guitar and fiddle musician by the name of Champ Hood. Mr. Hood was a journeyman musician who backed up a number of artists, including Mr. Lovett.

Now, Champ Hood's son, Warren, is carrying on the family tradition as a first-rate fiddle player. Warren often performs with Kelly Willis—an accomplished singer/songwriter who is married to Bruce Robison who has written many top hits, including fellow Texan George Strait's recent hit "Wrapped," and who is the brother of well-known singer/songwriter, Charlie Robison… I could go on and on, connecting the dots.

Even more, Texas has produced a large number of our nation's most storied musicians - from Bob Wills to Willie Nelson - from Janis Joplin to Norah Jones - from

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Buddy Holly to Stevie Ray Vaughan - and from Robert Earl Keen, who will also perform at the Birchmere tomorrow night, to his Texas A&M housemate, Lyle Lovett.

Mr. Lovett has won four Grammy Awards, including Best Country Male Vocal in 1989 along with his famous "Large Band," Best Country Album in 1996 (for The Road to Ensenada), and in 1994, the Best Country Duo/Group with Vocal (for his performance with the Texas swing group Asleep at the Wheel).

And on that note, I am delighted to recognize the lead singer of Asleep at the Wheel, Mr. Ray Benson, also in town to perform at the Birchmere, who is in attendance today in the audience to support his good friend Lyle Lovett. Welcome.

But as we consider the important issue of performance rights in music, it is not necessarily the artists you have heard of that are most impacted by our policy choices. It is the smaller musician who feels the difference—the kind of artist serving primarily as a backup artist and who gets limited, if any, airtime—artists such as Mr. Hood, whom I mentioned a moment ago.

When we listen to music on the radio, purchase music on iTunes or at the record store, or attend a concert, we don't often think about the economics involved for the music industry. But as our four guests here this morning can attest, the answers and related policy choices we make are of profound importance to all the singers, songwriters, musicians, broadcasters, inventors, device manufacturers, and others who bring us the music and other content we enjoy each day.

I thank each of you for being here today and I look forward to your testimony.

Thank you, Mr. Chairman.

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Opening remarks by Dan DeVany, Vice President and General Manager of Classical WETA 90.9 FM. Submitted to the Senate Judiciary Committee on November 13, 2007

Thank you Mr. Chairman and members of the Committee for giving me the opportunity to speak with you. I am Dan DeVany, Vice President and General Manager of WETA 90.9 FM, the only classical music station in Washington, D.C. I am here today in opposition to the proposal that radio stations be required to pay performance fees for broadcasting musical material. These fees would impose a significant constraint on the ability of community music broadcasters, such as WETA, to provide public service within the publicly funded system in which operate.

Earlier this year, WETA made the decision to adopt a full time classical music format on its radio stations, 90.9 FM and 89.1 FM. We did so when it appeared that our Nation's Capital would be without an over-the-air station devoted to classical music. The company that owned and operated the last remaining classical music station in Washington, WGMS, had decided to move away from the format in favor of other types of programming.

There was going to be no classical music on the radio in Washington.

For many in this community, it was unthinkable that there would not be access to classical music on the radio free and available to all. WETA enthusiastically adopted the format as part of its core mission to serve the Greater Washington Area with programming that is significant, meaningful and of intrinsic value.

And, we did so against the trend in broadcasting where more and more radio stations are abandoning the classical music format in favor of programming that, it is hoped, will be more successful in garnering increased audience and revenue. Last year the National Endowment for the Arts reported that the number of classical music stations in this country was in steep decline and that 6 of the top 30 markets in the United States had no classical stations at all.

Philadelphia still has no classical music radio station.

WETA is a not-for-profit community broadcaster licensed to the Greater Washington Area and chartered to serve the community with programming of value and significance. Our operating budgets are built upon public funding the vast majority of which comes from voluntary private contributions from our listeners. Needless to say, raising this money year after year is a central challenge for us and any other similarly organized broadcast enterer rise.

We at WETA are proud and passionate about our place of service to Washington.

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And, we are not alone in our efforts. WETA is part of a family of community stations each of whom broadcast a genre of music unique to their markets.

The current proposal to require radio stations to pay a performance fee for material played on the air would be an onerous burden on community stations such as WETA who are already greatly challenged to raise the money needed to stay on the air and provide public service. Like WETA, the operations of community music stations are built upon a razor thin margin that cannot withstand additional tolls or tariffs beyond that which we already pay to music licensing entities.

Payment of these additional fees would be difficult for WETA, it might be impossible for smaller stations.

By the very nature of the programming we offer, our audiences are limited as are our resources.

Please let me be clear, I do not suggest that artists should not be fairly acknowledged and compensated for their work. I say this as a former professional musician myself and a member of a family of working professional musicians and music educators.

We community broadcasters who nurture, promote and preserve art forms such as classical music, jazz, folk music or any other that is under-represented in mainstream terrestrial radio do so as a labor of love and with the deep conviction that our efforts support the work of artists most of whom would not be heard on radio if our stations did not exist. We have built communities of listeners upon this principle. And, we have done so in partnership with performers who share our conviction and believe that the music to which they are devoted benefits from free exposure.

It is a system that has worked for many, many years and the ultimate beneficiary is the public we all serve.

As you review this proposed legislation, I urge you consider the effects it would have on community based music stations.

Thank you Mr. Chairman.

Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "Exploring the Scope of Public Performance Rights"
November 13, 2007

Like most people, I am an avid music fan. Music inspires us. Music connects us to others and to matters larger than ourselves. Music fills our memories. While I am grateful to broadcasters for all the music I first heard on the radio, I also feel strongly that artists should be compensated for their work. So the issue of "performance rights on sound recordings" can be stated pretty simply: Should broadcast radio continue to use musicians' work without paying for it?

The issue of "performance rights" raises the issue of fairness. Although the question is simple, the answer may not be. First, is it fair to continue to exempt broadcasters from royalty obligations? Second, is it fair to U.S. copyright holders for the United States not to align its practices with all the other OECD countries, which recognize a performance right? Third, is it fair for some kinds of "radio" equivalents to pay royalties to performers but for traditional broadcast radio stations to continue to be exempt from such obligations? Webcasting and satellite radio pay performers for their work, but broadcast radio, which generates advertising revenue by playing the same music, does not. Fourth, is it fair to require the same payment from small, noncommercial, or religious radio stations as those broadcasters that own many stations and generate large profits? And finally, is it fair to impose public service requirements on broadcast radio but not to make those demands of others?

I want to be sure that our culture remains vital and vibrant. Radio has been part of that vibrancy, whether it is "old fashioned" broadcast radio or new-fangled Internet radio. I want it not only to survive, but to prosper. I want my grandchildren to have the widest possible access to good music, including classics or new creations. But I also want to be sure that the creative artists, those who perform that music, get their due. When we turn on the radio, I want to know that the voices I hear belong to artists who are being treated fairly.

I thank our witnesses today, especially because they arranged to be here on such short notice and with very busy schedules.

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STATEMENT OF LYLE LOVETT
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
on
"Exploring the Scope of Public Performance Rights"

November 13, 2007

Good morning, Chairman Leahy, Ranking Member Specter, and Members of the Committee. I am proud to be here today on behalf of the MusicFIRST Coalition, and to speak on behalf of its 150 Founding Artist members and the thousands of recording artists, musicians and singers who belong to its member organizations.

I am a songwriter, guitar player, singer, recording artist, and sometimes an actor. I am a member of the American Federation of Musicians, the American Federation of Television and Radio Artists, the Recording Academy and SoundExchange, all of whom are working together within MusicFIRST. I am incredibly lucky to be able to make my living creating art for others to enjoy. Performers like me don't spend our days thinking about the Copyright Act, but we know that we depend on the law to help preserve the value of our art. Thank you for all the work you do to protect creators, and for holding this hearing on performance rights today.

One of my first public performances was at the age of seven, singing "Long Tall Texan" in a school talent show. I grew up in Texas and I still live there in my grandfather's house. My life and music are forever linked to Texas, but I also play with musicians and singers from Nashville and all over the country. We draw our music from

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many American traditions, including country, folk, rock, jazz, blues and swing. The issue you are considering today matters to performers all across the U.S., recording all kinds of music.

Making a living in music is difficult and risky. Over the years I've seen how many talented and hardworking creators struggle in this hard business. You have to spend years learning your craft, honing your skills, and developing the ability to do instinctively whatever is needed to communicate musically with your fellow performers and your audience.

Songwriters and performers are both entrepreneurs and small businesses, relying on lots of different income streams in order to survive. But in this patchwork of income streams, there has always been one incomprehensible anomaly: when a recording is played on over-the-air radio, the songwriter who wrote the words and music receives a performance royalty, as he or she should. The performer, however, receives nothing.

Of course, the songwriter who created the song deserves to be compensated when that work generates value for another business, as it does for radio. I'm proud to be an ASCAP member, and grateful for the performance royalties that have helped me to earn my living as a songwriter. But the musicians and singers who perform the song are also creators and deserve to be compensated as well.

When radio plays these recorded works, they generate profit for themselves because they attract listeners and advertising dollars. Yet radio has never compensated performers for the value their creative work brings to the radio industry, because the Copyright Act does not protect sound recordings in the same way it protects the underlying songs. This has been the *status quo* for many years.

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But the more I think about the inherent value that recording performers bring to radio, the more I believe that it has always been unfair for recording performers, and sound recordings alone, to be singled out as ineligible for compensation.

The radio industry says that radio airplay benefits performers by "promoting" a song – the idea that someone else (conveniently not the radio station) may pay for another use of it later – like a listener buying a CD or a concert ticket after they hear a song on the radio. Of course, the radio station benefits under this model because it does not pay for its own use – the use that allows it to draw listeners and get ad revenue.

Let's face it. No one tunes into a radio station to hear the commercials. The fact that someone else might pay for another use of music doesn't excuse radio from paying for its own use. Especially when radio is making money by using music.

Dan Brown sold a whole lot more copies of his book *The DaVinci Code* after the movie came out, but no one would suggest that the motion picture studio could make his book into a movie without paying him for the privilege, just because he got some promotional benefit. In fact, I can't think of any other copyrighted work that has a "promotional benefit exemption." And, as I said, radio pays songwriters when they broadcast their tunes, even though they also get a promotional benefit.

Don't get me wrong. I love radio, and I appreciate the support I've gotten from radio over the years. But business is business, and fair is fair – and they shouldn't get to profit off the music we create without compensating us.

Radio calls paying for the music it uses a "tax." Artists don't deserve the indignity of calling appropriate compensation for their hard work a "tax." Paying me for the use of my property is not a tax. It's compensation.

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It also would be extremely helpful to performers, and to the U.S. balance of trade, to bring our music industry into line with the rest of the developed world. Foreign radio stations often broadcast a high percentage of American music, but we don't get our share of the royalties due to our lack of a right in the U.S. This is amazing. We're responsible for 30-50% of music played on stations around the world, and we don't have a performance right? I can understand why China, North Korea, and Iran might not. But the United States?

I've talked a fair amount about myself today, but this issue is not about me. It is about the thousands of performers across the country who work so hard to earn livings that are very modest in relation to their talent. It is also about the future of American culture and its ability to support the creators we need. I am honored to have been given an opportunity to speak for them. I realize that you are at the very beginning of a legislative process, and that there will be many issues to consider and resolve, including how to protect the rights of songwriters while creating new rights for performers. But I'm sure we can get this done so it's fair and square for everyone involved.

Thank you for giving me your time today, and for all your efforts on behalf of creators as you work on this issue.

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Testimony of

Steven M. Newberry

President and CEO

Commonwealth Broadcasting Corporation

Hearing on "Exploring the Scope of Public Performance Rights"

United States Senate
Committee on the Judiciary

November 13, 2007

Statement of Steven Newberry
Commonwealth Broadcasting Corporation

On behalf of the National Association of Broadcasters

Hearing before the Senate Judiciary Committee
On Exploring the Scope of Public Performance Rights

November 13, 2007

Introduction

Experiencing losses due to illegal file sharing and its misdirected efforts to salvage its failing legacy business model, the recording industry recently has attempted to convince Congress to use the Copyright Act to make up for these losses by imposing a new obligation on local broadcasters, in the form of an additional fee for playing recorded music on free, over-the-air radio. The imposition of what broadcasters consider a "performance tax" would be inequitable and unfair to radio broadcasters, who, throughout the decades, have been substantial contributors to the United States' complex and carefully balanced music licensing system, a system which has evolved over many decades and has enabled the U.S. to produce the strongest music, recording, and broadcasting industries in the world. For more than 80 years, Congress, for a number of very good reasons, has rejected repeated calls by the recording industry to impose a tax on the public performance of sound recordings that would upset this balance. There is no reason to change this carefully considered and mutually beneficial policy at this time.

As we noted in NAB's July 2007 testimony before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, the recording industry's pursuit of a performance tax at this time appears to result in part from illegal peer-to-peer sharing of sound recordings, and in part from the loss of revenues from the sale of

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recorded music and an inability of record companies to timely adapt to rapid developments in digital technology and consumer demands. Broadcasters are not responsible for either one of these phenomena, and, particularly in the current highly competitive environment, it makes little sense to siphon revenues from broadcasters in order to prop up the recording industry's failing business model.

In an effort to make this proposed wealth transfer from the broadcast industry to the recording industry more acceptable to both lawmakers and the public, the recording industry has attempted to characterize it as a means by which to "equalize" the rights of performers with those of songwriters. However, since songwriters and artists do not earn royalties in the same way, the copyrights in their works do not need to be symmetrical in order for the copyright owners to each receive fair compensation. In fact, in order to truly determine whether artists (who usually relinquish all copyright ownership in their works to the record labels) are not being properly compensated for their works, it may be more appropriate to examine the flow of royalties *within* the record industry itself and how the currently collected royalty payments are actually allocated among the parties. Indeed, those countries that have previously implemented a sound recording right have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists. Creating new intellectual property rights will do little to remunerate artists if the artists lack sufficient bargaining power in their relationships with the record labels.[1]

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[1] "Under the sole conditions of the free market and freedom of contract, in the large majority of cases, an increasing extent of 'substantive' protection leads to the paradox result that what is given to the author or performer by the right hand (or the legislators) is often taken from him at a ridiculous consideration by the left hand (or his contractual partner)." Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of

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Royalty distribution to music and sound recording copyright owners has traditionally been unsymmetrical. Music producers and songwriters generally receive the bulk of their royalties via the public performance of their musical compositions, while record labels and recording artists generally receive the bulk of their royalties via the sale of physical copies (*e.g.,* CDs, digital downloads), concert tickets, and merchandise.[2]

For decades, local radio broadcasters have substantially compensated the music and recording industries, including making annual payments of hundreds of millions of dollars in fees to music composers and publishers through ASCAP, BMI, and SESAC and providing record labels and artists with free promotion of their recordings and concerts. Local radio stations have been the driving force behind record sales in this country for generations. Music producers and publishers receive some royalty payments from producers of sound recordings who record their works, but those sums are small relative to the receipts by the record companies and artists who receive the vast majority of their revenues from the sale of sound recordings. While receiving no copyright fees from broadcasters for the over-the-air use of recordings, they enjoy tremendous promotional value from radio airplay, a fact which Congress has consistently recognized over the decades.

Protection of Audio Performers' Creative Activity (commissioned by the Department of Canadian Heritage), 2006, p. 64, citing A. Dietz, "Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers" (2002) 33 I.I.C. 828.

[2] And since Congress created a digital performance right in sound recordings, the recording industry has ample means to exploit the promise of the Internet and mobile devices. Currently, download services (such as iTunes) are the dominant digital format, but, as the recording industry becomes increasingly digitally literate, new revenue streams spring up, and downloads now exist in a mixed economy with subscription services, mobile mastertones, new advertising-supported models, and video licensing deals on sites like YouTube and MySpace.

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Under the Constitution, Copyright is designed: "To promote the progress of science and useful arts."[3] There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound recordings in this country.[4] To the contrary, while many countries have such a tax and the United States does not, we are the most prolific producers of sound recordings in the world.

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

Evolution of the Sound Recording Performance Right

U.S. copyright law confers a bundle of enumerated rights upon the owners of various works of creative expression. These are set forth in Section 106 of the Copyright Act and are, in turn, subject to a series of limitations and exemptions, which are set forth in Sections 107 through 121 of the Act. Among the enumerated rights is a right of public performance which empowers the copyright owners – subject to any applicable limitations, exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium.[5]

While composers have long enjoyed a right of public performance in their musical compositions – for which over-the-air radio broadcasters in 2007 will pay annual

[3] U.S. Constitution, Article I, Section 8.
[4] A government study in New Zealand found that the extension of performers' rights by adding a right of equitable remuneration for performers like the one proposed here, was unlikely to provide further incentives for those performers to participate in and create performances. Office of the Associate Minister of Commerce, Cabinet Economic Development Committee, Performers Rights Review, paras. 41-45 (NZ).
[5] 17 U.S.C. § 106(4), (6).

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royalties exceeding $450 million to the performing rights organizations (*e.g.*, ASCAP, BMI and SESAC) – prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings embodying such musical compositions. As explained below, even that right was very limited.

Congress has considered and rejected proposals from the recording industry for a broad performance right in sound recordings since the 1920s. For five decades, it consistently rebuffed such efforts, in part due to the recognition that such a right would disrupt the mutually beneficial relationship between broadcasters and the record labels. Congress first afforded limited copyright protection to sound recordings in 1971, in the form of protection against unauthorized reproductions of such works. The purpose of such protection was to address the potential threat such reproductions posed to the industry's core business: the sale of sound recordings. And, while the record industry argued at that time for a public performance right in sound recordings, Congress declined to impose one. Had Congress believed that record companies and performers were at risk of not being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings. However, Congress wisely realized that the recording industry was already adequately motivated to serve the public interest and thus did not grant those additional rights.

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

> For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is

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> directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.[6]

Congress continued to decline to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records. Indeed, copyright protection of any sort for sound recordings is of relatively recent vintage. It has been marked throughout by careful efforts by Congress to ensure that any extensions of copyright protection in favor of the record industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades."[7] As to performance rights in sound recordings in particular, Congress has explicitly recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[8]

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services – but not by broadcasting and related transmission."[9]

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[6] S. Rep. No. 93-983, at 225-26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).
[7] S. Rep. No. 104-128, at 13 (1995) (hereinafter, "1995 Senate Report").
[8] Cf. Subcomm. on Courts, Civil Liberties, and the Admin. of Justice, House Comm. on the Judiciary, Performance Rights in Sound Recordings, at 37, 48, 49-50, 54 (Comm. Print 1978).
[9] *Id.* at 17 (emphasis added).

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Consistent with Congress's intent, the DPRA expressly exempted non-subscription, non-interactive transmission, including "non-subscription broadcast transmission[s]" – transmissions made by FCC licensed radio broadcasters, from any sound recording performance right liability.[10] Congress again made clear that its purpose was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

> The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.[11]

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."[12]

In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public

[10] 17 U.S.C. §114 (d)(a)(A).
[11] 1995 Senate Report, at 15.
[12] *Id.*

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performance right in sound recordings. Specifically, over-the-air radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities;[13] (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[14]

It should also be noted that even though the Copyright Office has argued for a performance tax, Congress has strongly and consistently refused to adopt these recommendations.[15]

The Free Benefits Radio Provides to Recording Industry

As Congress has repeatedly recognized, the radio industry provides tremendous practical and other benefits both to performing artists and to the recording companies. In NAB's July 2007 testimony before the House Judiciary Subcommittee, we previously cited numerous examples of acknowledgements and confirmations of these benefits,

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

[14] 1995 Senate Report, at 15.

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

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which are abundant in all segments of the industry. To further illustrate the ubiquity of these sentiments, below are some comments from this past Wednesday's Country Music Association 41st Awards:

- "Country radio, thank you so much for being our mouthpiece. You know what we do means nothing if it never gets played, and no one gets to hear it."

  -- Rascal Flatts, Vocal Group of the Year

- "Thank you...radio for playing this song like crazy."

  -- Carrie Underwood, Female Vocalist of the Year, Single of the Year

- "Thank you country radio. Thank you everybody we opened for. We love you."

  -- Sugarland, Vocal Duo of the Year

- "I wanna thank... my band, my crew, my mom who is with me tonight... I wanna thank the fans and country radio and everybody."

  -- Kenny Chesney, Entertainer of the Year

- "I can't even believe that this is real... I want to thank country radio. I'll never forget the chance you took on me."

  -- Taylor Swift, Horizon Award (for best new artist)

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

The recording industry represents a classical oligopoly, where a small number of firms dominate the revenues of a particular industry. There are four major companies in the recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only U.S.-based company; the other three major players are foreign-owned.[16]

[16] Universal Music Group, a subsidiary of the French corporation Vivendi, is the dominant player in the recording industry, with a 31.6% market share in 2006.

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While the U.S. recording industry was estimated at $11.5 billion in 2006, the recording industry suffered declining revenues in 2006 for the seventh consecutive year. All countries have experienced a decline in physical music sales due to, among other factors, the growth of the Internet, peer-to-peer file sharing and piracy.[17] While all of these factors have hurt the recording industry, there are no facts that even suggest that radio broadcasters are to blame for the economic problems in the recording industry, nor that a performance tax will in any way address the factors that have contributed to declining record sales.[18]

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

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Sony/BMG, which is owned 50/50 by Sony of Japan and German's Bertelsmann, is second at 27.4%; Warner Music Group of the U.S. is third at 18.1% and the U.K.'s EMI is fourth at 12.2%. Together, these four companies control 87.4% of all of the revenue in the recording industry; a number of smaller, independent firms together account for just 12.6% of revenues in 2006. An Examination of Performance Rights, Albarron & Way, July 6, 2001] (hereinafter "Performance Rights Study").

[17] Performance Rights Study at 3.

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

[19] Brandle, Lars, "Music Biz Sales Off for a Seventh Year: Study." *Reuters*, July 5, 2007. Retrieved July 26, 2007 from: http://www.reuters.com/article/entertainmentNews/idUSN0527941020070705?feedType=RSS&rpc=22&sp=true.

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revenue is acquired on music globally through mobile phone and Internet Service Providers, but IFPI and other sources estimate these revenues to be several billion dollars.[20]

What this data suggests is that, in addition to piracy, a major reason for the recording industry's revenue decline is its failure to adjust to the public's changing patterns and habits in how they choose to acquire sound recordings. Any such shortcoming also was not of broadcasters' making; nor should our industry be looked to as a panacea, through a tax or fee, to provide a new funding source to make up for lost revenues of the record companies.

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

Sixty-eight percent of commercial radio stations in this country are located in Arbitron markets ranked 101 or smaller.[21] Many radio stations, especially in these small and medium sized markets, are also struggling financially. It is these stations on which a new performance tax would have a particularly adverse impact. Were such additional fees imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

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[20] Performance Rights Study at 3.
[21] *Media Access Pro, BIA Financial Network Inc.*, Data Retrieved July 25, 2007.

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Comparison with Other Countries' Intellectual Property Laws Does Not Justify the Imposition of a U.S. Performance Tax

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

In many countries, the royalty rate paid to music composers and publishers is significantly higher than that paid for sound recordings, yet the Copyright Royalty Board decisions in the U.S. have provided rates for performing digital audio transmissions

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several times higher than rates paid to the composers.[22] In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

The U.S. has the best radio system in the world, which, among other things, has helped spawn the most lucrative recording industry in the world. The U.S. commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not and do not receive any subsidy from the government or its listeners. Many, in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government or by taxes. The fact that under those systems the governments also chose to subsidize their own recording industries by granting performance rights and paying royalties from government owned or subsidized stations does not mean this is an appropriate system for this country. In this regard, it is significant to note that the U.S. recording industry that operates under a regime with no performance tax, is larger than that of the UK, France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance tax regimes.[23]

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

Advocates for a performance tax often raise the specter of overworked and underpaid performers as the supposed beneficiaries of such a tax. The history of the treatment of performers by recording companies makes any assumptions that performers meaningfully would share in any largess created by a performance tax highly dubious at best. That

[22] Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).
[23] Performance Rights Study at 2.

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history is replete with examples of record company exploitation of performers. Following are just some examples:

> "The recording industry is a dirty business – always has been, probably always will be. I don't think you could find a recording artist who has made more than two albums that would say anything good about his or her record company. . . . Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured. The record company gets all of its investment back before the artist gets a penny, you know. It is not a shared risk at all." (Don Henley, The Eagles, July 4, 2002, http://www.pbs.org/newshour/bb/entertainment/july-dec02/musicrevolt_7-4.html.)
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> "What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts. . . . A bidding-war band gets a huge deal with a 20% royalty rate and a million dollar advance . . . . Their record is a big hit and sells a million copies . . . . This band releases two singles and makes two videos . . . . [The record company's] profit is $6.6 million; the band may as well be working at 7-Eleven . . . . Worst of all, after all this the band owns none of its work . . . . The system's set up so almost nobody gets paid . . . . There are hundreds of stories about artists in their 60s and 70s who are broke because they never made a dime from their hit records." (Courtney Love, Hole, 2000, http://archive.salon.com/tech/feature/2000/06/14/love/.)
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> "Young people . . . need to be educated about how the record companies have exploited artists and abused their rights for so long and about the fact that online distribution is turning into a new medium which might enable artists to put an end to this exploitation." (Prince, 2000.)

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

Even those countries with sound recording performance rights, which proponents of a performance tax often point to as models, have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists.[25] Imposing a new performance tax would not alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.[26]

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

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

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

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Performance Rights for Sound Recordings As Applied to Streaming Need To Be Fixed

Like any industry must in this time of rapid technological advancement, radio is endeavoring to adapt to the changes in the marketplace. Broadcasters are eager to embrace new technologies and new plans to remain relevant in our local communities for decades to come. We are embracing the future by investing significant financial and human resources in new technologies, including Internet streaming, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners.

As I discussed previously, Congress created a limited public performance right in sound recording with the goal of fostering the growth of Internet streaming while preserving the longstanding, mutually beneficial relationship between the radio and recording industries. Broadcasters are struggling to create viable business models for Internet streaming. Coupling the powers of the Internet with the longstanding strengths and benefits of local free over-the-air radio provides exciting possibilities for broadcasters and our listeners. Unfortunately, the current legislative scheme imposes conditions and limitations that are incompatible with traditional and emerging broadcast practices, and the recent decision of the Copyright Royalty Board (CRB) has resulted in oppressive and unjustified sound recording royalty fees that have made a viable business

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

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model for simulcast steaming almost impossible for many broadcasters. The 200% increase in the sound recording performance fees over the 2006-2010 license period established by the CRB is unreasonable and debilitating to growing a profitable business. There are numerous serious flaws in the CRB's decision, but let me mention just two of them. First, the CRB gave no credit to radio broadcasters for the tremendous promotional value we provide to the recording companies and artists. This is a major factor in record sales and revenues from concerts. Second, the CRB based the rates it established on rates paid to the recording industry by interactive webcasting services that provide the ability to purchase recordings online. We believe there are fundamental differences between such services and the free, advertiser-supported services broadcasters provide.

The sound recording performance fee for Internet streaming – and the standard by which it is set – must be reformed. NAB supports H.R. 2060 and S. 1353, which would vacate the CRB decision, establish an interim royalty rate structure, and change the current "willing buyer, willing seller" standard that has been a recipe for abuse and needlessly inflated royalty rates to levels that are suffocating radio streaming services. 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 in the Copyright Act. The predictable result has been unreasonably high sound recording fees.

In addition, the conditions imposed on broadcasters that stream should be modified. The statutory performance license imposed nine conditions on broadcasters that stream, at least three of which are wholly incompatible with broadcasters' over-the-air business model. For example, one condition prohibits the playing of any three tracks

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from the same album within a three-hour period. Another condition prohibits DJs from "pre-announcing" songs, and a 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 phonorecord as it is being performed. These conditions 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 practice or risking uncertain and costly copyright infringement litigation.

We urge the Committee to address these gaping inequities as soon as possible, and certainly not to permit the record companies to expand the existing unfair and unworkable system any further.

Conclusion

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

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

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

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TESTIMONY OF
ALICE PEACOCK
SINGER-SONGWRITER, PRESIDENT, CHICAGO CHAPTER, THE RECORDING ACADEMY
BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
"HEARING ON EXPLORING THE SCOPE OF PUBLIC PERFORMANCE RIGHTS"
NOVEMBER 13, 2007

Good morning Chairman Leahy, ranking member Specter, and members of the Committee.

My name is Alice Peacock, and I am a singer songwriter from Chicago. I'm also a member of the musicFIRST Coalition, President of the Chicago Chapter of The Recording Academy, and a member of AFTRA. I am truly honored to have the privilege of addressing this distinguished committee about what is one of the most important issues facing those of us in the music community today.

As President of the Recording Academy's Chicago Chapter, I have the honor of working with hundreds of music creators of all types. From those just starting out and hoping to make a career in music, to the few—I should note, the *very* few—who have achieved superstar status.

But the vast majority are just like me: what I call the great middle class of artists. Like other Americans, we go to work every day to earn a living and support our families. Like other Americans, we produce a product that people value and want to buy. And like

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other Americans, we expect to be compensated when businesses make a profit from our work product.

Music may be our calling, but make no mistake, it's also our job.

And for the most part, artists *are* compensated for their work. When I sell a record, I make a royalty. When I perform a concert, I receive a fee from the promoter. And when my tracks are broadcast on satellite radio, Internet radio or cable, I receive a performance royalty.

All this seems fair. But there is one glaring, inexplicable exception to the notion of fair payment:

There is no performance right for sound recordings for *terrestrial* radio. AM and FM radio—the platforms I grew up with and grew to love—do not compensate me when they broadcast my recordings.

There are people more qualified than I to address the legal, historic and economic background of this issue. I'm not an expert in copyright law, but I do understand the concept of basic fairness. If a business uses recorded music to earn advertising revenue, then it should compensate those who created that recorded music. It's that simple.

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Now I understand that this concept nearly always turns into a discussion about promotion. Broadcasters say radio promotes record sales, so they shouldn't have to pay a royalty. I just don't get that. Every performance has the potential to be promotional, but why should that make a difference?

I just got back from a gig in Grand Rapids, MI. Imagine if the club owner used the same logic about promotion. What if at the end of the night, after I had filled his club with paying customers, he told me he didn't have to pay me because my performance helped promote my record sales. Such a scenario would be unacceptable by any standard.

Frankly, the promotion argument sounds a little silly. Last week I bought a pair of Nike shoes. I wear them everywhere—well, except to Senate hearings. With the Nike logo on my feet, I am probably promoting their brand wherever I go. Can you imagine if I decided not to pay for the shoes on the grounds that my promoting Nike should excuse me from payment? My refusal to pay would be called "shoplifting." But radio's refusal to pay artists is called "business as usual."

I would like to make one other point, an important point about songwriters, who *do* enjoy a broadcast performance royalty. I'm also a songwriter, and in addition to the affiliations I noted earlier, I'm a proud member of ASCAP. Many songwriters are not performers, and many performers are not songwriters. These are two different jobs, and (as Congress has legislated) two different copyrights. A new performance right for artists should never be implemented at the expense of the existing right for songwriters. Any new legislation

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should make this clear. Just as satellite and internet radio pays songwriters and artists, so should terrestrial radio.

Which brings me back to the issue of fairness.

Is it fair that only one platform—the $20 billion corporate radio industry—be exempt from paying to use the music that is the basis of its business? Is it fair that sound recordings are not protected with a performance right when movies, literary works and other copyrighted works are? And is it fair that American artists lack this basic right when our counterparts in every other developed country enjoy fair compensation?

Everyone in this room knows the answer is no. But you, distinguished Senators, have the power to make it right. On behalf of the great middle class of recording artists, I urge you correct this historic inequity and grant a performance right for sound recordings. It's only fair.

Thank you.

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Trade Facts

Office of the United States Trade Representative *www.ustr.gov*
November 2007

USTR's Mission to Protect U.S. Intellectual Property Rights

USTR promotes intellectual property and innovation around the world. Key parts of this mission include:

- **Free Trade Agreements:** USTR works with countries to strengthen their IPR laws. One way is through negotiation, implementation, and monitoring and enforcement of free trade agreements (FTAs). The FTAs pending Congressional approval with Colombia, Korea, Panama, and Peru all contain world-class IPR provisions.

- **Anti-Counterfeiting Trade Agreement:** The Anti-Counterfeiting Trade Agreement (ACTA) is a leadership initiative, announced in October 2007, to negotiate a new IPR enforcement agreement with a number of key trading partners who share our ambition and commitment to stepping up the fight against global counterfeiting and piracy.

- **World Trade Organization:** The multilateral structure of WTO agreements provides opportunities for USTR to lead engagement with trading partners on IPR issues, in several contexts including accession processes for prospective members like Russia; the Council for Trade-Related Aspects of Intellectual Property Rights (TRIPS); and dispute settlement.

- **Special 301 and Generalized System of Preferences (GSP) reviews:** USTR uses the "Special 301" process to encourage specific trading partners to address key IP problems. Each April, USTR issues a Special 301 Report setting out specific IPR concerns in countries worldwide. In addition, one of the criteria the President must consider before designating a country as eligible to receive GSP benefits is whether that country provides adequate and effective IPR enforcement; USTR leads that process.

- **Bilateral and Regional Dialogues and Cooperation:** USTR leads or is a significant participant in the IPR component of a wide range of other trade and economic policy dialogues with trading partners. A few of the many examples include the Asia-Pacific Economic Cooperation forum; the U.S.-China Strategic Economic Dialogue; the U.S.-China Joint Commission on Commerce and Trade; the U.S.-EU Summit; the U.S.-Russia IPR Working Group; and the Security and Prosperity Partnership.

- **Trade and Investment Framework Agreements:** IPR issues feature prominently in many of our Trade and Investment Framework Agreement discussions.

- **Supporting Pharmaceutical Innovation:** USTR seeks to eliminate market access barriers faced by U.S. pharmaceutical companies in many countries, and to promote affordable health care today, while supporting the innovation that assures improved health care tomorrow.

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- **Coordination of U.S. IPR and Innovation Trade Policy:** USTR leads the interagency IPR trade policy coordination process through mechanisms created by Congress. We consult with stakeholders, including through numerous advisory committees. USTR provides trade policy leadership and expertise across the full range of interagency initiatives on IPR and innovation policy, including executing the Administration's Strategy Targeting Organized Piracy (STOP) initiative to combat piracy and counterfeiting.

Improving Protection and Enforcement of IPR in China

The Administration strongly believes that China needs to do a much better job of protecting and enforcing IPR, and we continue to engage the Government of China to do more. For example:

- In April, USTR requested dispute settlement consultations with China at the WTO in an effort to address certain key barriers to the effective enforcement of IPR and market access for products and services of IPR industries. We have requested dispute settlement consultations with China five times – the most of any of China's trading partners.

- We have used the Joint Commission on Commerce and Trade (JCCT), co-led by USTR, to press for IPR improvements. For example, JCCT commitments to curb software piracy have contributed to a 10 percent reduction in piracy, saving industry $864 million in losses over the past three years, according to an industry report.

- We also use the Special 301 report to identify the specific shortcomings that China needs to address. For example, this year we conducted the first-ever provincial review to spotlight strengths and weaknesses in China's local IPR enforcement systems.

- We continue to raise IPR issues in the U.S.-China Strategic Economic Dialogue (SED). This has already resulted, for example, in a memorandum of cooperation to enhance U.S.-China cooperation in enforcing IPR at our respective borders.

U.S. Government Resources for Right Holders

The U.S. Government has developed resources and programs to help U.S. intellectual property owners deal with overseas infringement. These resources, listed at stopfakes.gov, include:

- Online toolkits giving basic information on IPR enforcement in key markets.

- An International IPR Advisory Program and an SME China Advisory Program established by the Department of Commerce, in cooperation with the American Bar Association, which let American small and medium-sized enterprises request a free, one-hour consultation with a volunteer attorney experienced in overseas IPR issues.

- An IPR Ombudsman at the Chinese Embassy in Washington, Mr. Yang Guohua, posted at the request of the U.S. Government, to serve as a point of contact for U.S. businesses seeking to secure and enforce their IPR in China or experiencing IPR problems there.

- IPR specialists at the Department of Commerce who are trained to work with companies to develop a strategy for confronting IPR problems around the world. Members of the public can learn more by visiting www.stopfakes.gov, or by calling 1-866-999-HALT.

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