

Statement of

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Committee on the Judiciary
Subcommittee on Courts, Intellectual Property and the Internet

Hearing on
"Music Licensing Under Title 17 Part One"

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Chairman Goodlatte, Chairman Coble, Ranking Members Conyers and Nadler, and Members of the Subcommittee: My name is Neil Portnow and I am President and CEO of The Recording Academy. Known internationally for our GRAMMY Awards, The Academy is the trade association that represents music's creators: songwriters and composers, vocalists and musicians, and record producers and engineers. I thank you for the opportunity to address the Subcommittee this morning.

The Framers' Vision: Protecting Music's Authors

Perhaps a good place to begin my testimony is literally at the beginning – with the copyright clause of the Constitution. In Article I, Section 8, the Framers gave authors the exclusive right to their works, for a time, in order to promote the progress of science and useful arts.

As today's hearing is focused on music licensing, we should, at the outset, remember who the "authors" of music are. They are the songwriters and composers who create the very DNA of music. They are the featured and background performers who bring those songs to life. They are the producers and engineers who create the overall sound of the recordings we love.

Over the next two hearings, you will hear from many interests in the music space. But I urge you to keep foremost in your mind music's creators, the authors our founders expressly protected.

Copyright Law No Longer Serves as an Adequate Incentive to Create

Of course, the Framers intended copyright to be an incentive to create. And for the next two centuries, Congress passed bills that mostly accomplished that vision. But today, we have a patchwork of laws that do not address the challenges of the digital marketplace and often create a *disincentive* to make music as a career. Low streaming rates prevent creators from making a living. Performers and composers must police the entire internet to take down infringing works. And traditional radio continues to use artists' recordings without compensation, while leveraging this unfair advantage as they move into the digital world.

Recently, one of our elected Board leaders of The Academy's New York Chapter testified before Congress regarding Section 512 of Title 17, the so-called notice and takedown provision. The multiple-GRAMMY-winning composer Maria Schneider noted the extensive amount of time required to take down all of her recordings from online sites, stating:

"The *majority* of my time is now spent on activities that allow me some chance of protecting my work online. Only a fraction of my time is now available for the creation of music. So instead of the Copyright Act providing an *incentive* to create, it provides a *disincentive*."

But even on sites with legally acquired content, it is important to note how large technology businesses are being built upon the aggregation of recordings, and how little of that revenue returns to creators. As streaming becomes the dominant consumption model, these services must provide meaningful and fair compensation or few will be able to make a living as an artist, writer or producer.

The Corporate Radio Loophole Must Be Closed

There are many serious discussions about music royalty rates today: which are too low, which are too high, and what is fair. Yet AM/FM terrestrial radio broadcasters continue to deny musicians *any* right whatsoever to performance royalties for the use of their music, which radio giants use to make billions in annual advertising revenue.

Terrestrial radio is the only industry in America that's built on using another's intellectual property without permission or compensation. Broadcasters in every other developed country in the world compensate performers. The result is that the U.S., which should be the standard bearer for intellectual property rights, is among such countries as China, North Korea and Iran which do not recognize these fundamental rights.

The National Association of Broadcasters (NAB) has spent a lot of money lobbying to maintain their free ride. During each session of Congress, they spread myths that never stand up to any reasonable assessment of the facts. For example:

NAB Myth: A performance right is a money grab from record labels.

Fact: Artists would be the main beneficiaries of a performance right. Artists would receive 50 percent of royalties for their creative contributions, and an increasing number of artists are also copyright owners and would, therefore, get the other 50 percent too. When the performance right campaign launched, hundreds of artists signed on to join. This quest is about them.

NAB Myth: The campaign started because piracy hurt the record business, so record labels needed to look elsewhere for revenue.

Fact: Artists have been fighting for this basic right for nearly 90 years. Legends such as Bing Crosby and Frank Sinatra have spoken on the issue. The renewed focus on the issue is a result of "new" radio (Internet and Satellite) paying this royalty, exposing the hypocrisy of exempting "old" radio from paying their fair share.

NAB Myth: Promotional support by radio creates a "symbiotic relationship" with artists.

Fact: Even by the NAB's own (dubious) study, the benefit to radio outpaces the benefit to artists by 10 to 1. And any promotional effect would be taken into account by the rate-setting body. Internet and Satellite radio also provide promotion, but pay a royalty. Further, a GAO study found "no consistent pattern between the cumulative broadcast radio airplay and the cumulative number of digital single sales." Even Clear Channel CEO Bob Pittman admitted that, "clearly [promotion] is not enough, or there wouldn't be a decades-long battle over [performance royalties]."

NAB Myth: The royalty would put small stations out of business.

Fact: The last legislation introduced on this subject exempted every small radio station and even medium sized ones, requiring 75 percent of stations to pay as little as a few dollars a day for music.

NAB Myth: The free market is addressing the issue with private deals.

Fact: There is no “free” market when one side of the transaction does not have a right to its property. Without a performance right, there can be no “free” negotiations. And when a bill was introduced to create a free market where musicians would have a chance to negotiate for fair compensation (the Free Market Royalty Act), the broadcast lobby opposed it.

NAB Myth: A performance royalty is a tax.

Fact: In Civics 101, everyone learns that taxes go to the government. Paychecks go to people who provide goods or services for money. Performance royalties would not go to the government, but rather to those who created the sound recordings. Therefore, they are not a tax. This obvious point was made clearly in a letter signed by seven free-market organizations, including Americans for Tax Reform: “A performance royalty is not a tax.... Paying a private citizen or business for the use of their property is clearly not a tax.”

The NAB has run out of arguments and out of time. The White House, the Copyright Office, and political groups ranging from the AFL-CIO and the NAACP to Americans for Tax Reform and Tea Party Nation all agree with us. And while radio touts a nonsensical – and nonbinding – resolution, Congressional leaders from both parties are working on *real* legislation to resolve this issue. Any copyright reform simply must include a radio performance right.

Songwriters Suffer Under Rates Set Below Market

The Recording Academy believes the current mechanical rate as set by the CRB under Sections 115(c)(3)(D) and 801(b)(1) is substandard. These provisions direct the CRB to apply a standard that does not reflect fair market value, but rather a standard based on a collection of vague objectives. The application of these antiquated standards has resulted in depressed mechanical license rates relative to other non-compulsory royalty streams, which have increased at greater rates over the same period of time. The CRB needs to have the authority to recognize and apply fair market standards.

The Songwriter Equity Act (“SEA”), H.R. 4079/S. 2321, is an important step toward modernizing the music licensing system. In particular, SEA would amend Sections 115 and 801 by directing the Copyright Royalty Judges to apply the following standard with respect to compulsory mechanical license rate-setting:

The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In establishing such rates and terms, the Copyright Royalty Judges shall base their decision on marketplace, economic, and use information presented by the participants. In establishing such rates and terms, the Copyright Royalty Judges may consider the rates and terms for comparable uses and comparable circumstances under voluntary license agreements. Further, The Recording Academy believes that the current implementation of 17 U.S.C.

114(i) creates an unacceptable, uneven playing field which results in songwriters and composers receiving royalties that are substantially less than fair market value.

In addition, SEA would amend Section 114(i) to allow federal rate courts to consider all relevant evidence, including sound recording royalty rates, when establishing royalty rates for songwriters. How the rate court would apply the evidence is left to the discretion of the court.

Accordingly, The Recording Academy supports SEA. Like other property owners, songwriters and composers deserve to be paid the fair market value for their intellectual property. The enactment of the Songwriter Equity Act would ensure that songwriters and composers are appropriately compensated for the use of their musical compositions without impacting artist royalties.

Record Producer Payments Must be Streamlined and Consistently Applied

It must be noted that the third, equally important author in the sound recording process (along with the artist and songwriter) is not mentioned at all in statute. Record producers provide the overall creative direction for a recording project (similar to the role of a film director on a motion picture) as well as the overall sound of the recording. Not represented in Washington in 1995, producers were not granted a statutory share of the royalty in the Digital Performance Right in Sound Recordings Act of that year (“DPRA”). Without a statutory share established in the DPRA, producers (and royalty-earning engineers) earn royalties based on contract (usually with the featured artist).

To provide the same fair, direct-payment option of performance royalties available to artists, the agency SoundExchange currently offers a still developing service for producers whereby SoundExchange, upon direction by the featured artist, will process the share owed to producers by contract with the featured artist. The Recording Academy appreciates SoundExchange’s ongoing efforts to develop an efficient system for direct pay for producers.

However, producers should be assured that this process will be consistent and permanent, applied by SoundExchange and any successor or competing agency in the future.

The Recording Academy is continuing productive dialogue with SoundExchange and others on this matter and looks forward to resolving this issue with all relevant stakeholders.

Music Issues Should be Resolved in One Music Omnibus Bill

To resolve some of the above issues, several thoughtful bills have been introduced this Congress. The Songwriter Equity Act as noted, would allow songwriters to be paid the equivalent of fair market value for their work. The Protecting the Rights of Musicians Act would insist that if broadcasters value their *own* content, they must value the content of others. The RESPECT Act would remove a legal loophole that denies royalties to older artists.

But now it is time for a unified, holistic approach to music licensing. It's time for a Music Omnibus Bill, or MusicBus, for short. With copyright review underway, we need our industry and Congress to be visionary and create a unified approach for the future of our business. For all the complexities of the MusicBus concept, its goal is actually simple: Fair market pay, for all music creators, across all platforms. And as a united music community, we can more effectively work with other stakeholders in the music ecosystem – who connect the music maker to the music fan – and create a licensing regime that works for all.

A music omnibus bill need not wait for the entire copyright act to be revised. As Congress' own advisor on copyrights – Register Maria Pallante – noted, “Congress already has had more than a decade of debate on the public performance right for sound recordings, and has given serious consideration to improving the way in which musical works are licensed in the marketplace. These issues are ripe for resolution.”

The Recording Academy strongly urges Congress to pass music omnibus legislation that treats all authors fairly.

Mr. Chairman, a legal framework that includes compulsory licenses, government rate courts and consent decrees already diminishes the Framers' vision of exclusive rights. If music makers must be subject to these restrictions, let's at least assure them that the result will represent what a free market would have provided. We are not asking for special treatment. We are simply asking for what is fair. Fair market pay, for all music creators, across all platforms. A simple concept. A single bill. A just framework for music licensing. Thank you.