



June 10, 2008

The Honorable Howard L. Berman
Chairman, Subcommittee on Courts,
the Internet, and Intellectual Property
Committee on the Judiciary
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter provides the preliminary views of the Department of Commerce (DOC) on H.R. 4789, a bill that would grant copyright owners a full public performance right when their sound recordings are transmitted by over-the-air broadcast stations.

Background

The DOC has long endorsed amending the U.S. copyright law to provide for an exclusive right in the public performance of sound recordings. In 1978, for example, the DOC testified before this Subcommittee that establishing a public performance right in sound recording was in the long-range economic interests of all parties, including U.S. recording companies and broadcast stations.¹

In 1995, the Working Group on Intellectual Property Rights, in its report on Intellectual Property and the National Information Infrastructure, characterized the lack of a performance right in sound recordings as “an historical anomaly that does not have a strong policy justification—and certainly not a legal one.”²

In 1995, the DOC again supported the efforts of this Subcommittee to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other types of works by endorsing the establishment of a public performance right when sound recordings are transmitted by digital means.

¹ Subcomm. on Courts, Civil Liberties & the Admin. of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978), Performance Rights in Sound Recordings at 179.

² Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure, The Report of the Working Group on Intellectual Property Rights (1995), at 222. The Information Infrastructure Task Force was chaired by Secretary of Commerce Ronald H. Brown.

Although limited to digital transmissions, this partial public performance right was viewed at that time by DOC as a step in the direction of providing a full public performance right in sound recordings.³

Against this history of steady support for a full public performance right in sound recordings, the DOC offers its preliminary views on H.R. 4789.

Brief Statement of Views

Section 106 of the Copyright Act sets forth the exclusive rights of copyright owners, including the public performance rights of authors and copyright owners of literary works, musical works, dramatic works, pantomimes and choreographic works, motion pictures and other audiovisual works. Section 106(6), however, singles out sound recordings as the only type of performable work that is not granted a full public performance right. Instead, owners of sound recordings enjoy only a limited public performance right in certain digital audio transmissions, subject to a statutory license codified in section 114 of the Copyright Act.

H.R. 4789 corrects this longstanding asymmetry in the Copyright Act by extending the performance right in sound recordings to analog (in addition to digital) transmissions, and extending the statutory license currently applicable to Internet, satellite and cable radio to include over-the-air broadcasts as well. Specifically, the legislation amends section 106(6) of the Copyright Act to read: "in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission," which makes clear that the performance right is applicable to both analog and digital radio transmissions generally, and amends section 114(d)(1) of the Copyright Act to bring terrestrial broadcasts within the licensing scheme set forth therein for Internet, satellite and cable transmissions.

The legislation recognizes small, non-commercial, educational and religious stations by providing for special treatment for these broadcasters. Individual, terrestrial broadcasters that have annual gross revenues less than \$1.25 million may elect to pay a fixed \$5,000 per year for nonsubscription broadcast transmissions. Public broadcasting entities may elect to pay \$1,000 a year. Finally, the legislation grants an outright exemption for the public performance of sound recordings at "services at a place of worship or other religious assembly" and for an "incidental use of a musical sound recording."

The DOC believes that the changes contained in the legislation are justified as a matter of fairness and equity. Granting copyright owners of sound recordings a full performance right coupled with extending an existing statutory license is an appropriate

³ Subcomm. on Courts & Intellectual Property, House Comm. on the Judiciary, 104th Cong., 1st Sess. (1995), Digital Performance Rights & Sound Recordings: Hearings on H.R. 1506.

and workable approach to providing compensation to recording artists and record labels for the transmission of their works by over-the-air broadcast stations. With the exception of small, non-commercial, educational and religious stations, the rate and terms for such uses would either be negotiated between the broadcasters and copyright owners, or, if the parties are unable to reach agreement, the rates and terms would be set by the Copyright Royalty Judges. While DOC supports special license treatment for small, non-commercial, educational and religious stations, it has concerns with H.R. 4789's approach to setting fixed license rates rather than allowing rates to be negotiated by the parties or established by Copyright Royalty Judges. H.R. 4789 also provides for a "per program license option" for broadcasters that make "limited feature uses of sound recordings."

As amended, the Copyright Act would treat the owners of copyrights in all performable works alike, thereby bringing to an end the historic disparate treatment of owners of copyrights in sound recordings. More fundamentally, establishing a full public performance right in sound recordings and eliminating the exemption for terrestrial broadcasters is fully justified by bedrock principles of U.S. copyright law. In the words of the Supreme Court, "the encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors"⁴ Consistent with this historic rationale for copyright, providing fair compensation to America's performers and record companies through a full public performance right in sound recordings is not simply a matter of fairness. The creation of a full public performance right in sound recordings will also spur the investment needed to encourage the creation of music for the broadest enjoyment of the public.

In the view of the DOC, expanding the section 114 statutory license to include terrestrial broadcasters brings greater regulatory parity to digital music delivery platforms. Under the current section 114 licensing regime, a digital music service (such as a webcaster) must pay two types of royalties for the digital transmission of a sound recording. Such a music service must pay royalties to the performers and record companies for the performance of the sound recording, as well as to the appropriate performing rights organization for the public performance of the musical work embodied in the sound recording. By contrast, under the current exemption in section 114, terrestrial, over-the-air broadcasters are required to pay only the performing rights organization for the public performance of the musical work. H.R. 4789 would ensure consistent application of the section 114 licensing scheme by requiring over-the-air broadcasters to pay the additional sound recording royalty currently paid by digital music services.

Providing additional incentives such as the ones contained in H.R. 4789 for America's performing artists, recording companies and digital music services is more important than ever. In today's digital music marketplace, U.S. performers and record

⁴ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

labels are facing both unprecedented challenges and opportunities. Rampant piracy of sound recordings on the Internet remains an immense challenge. However, the same new technologies also offer new ways to deliver and provide access to sound recordings, including through digital downloads, digital subscription services, Internet radio and digital radio, thereby offering the listening public more content, more choices, in more places than ever before. The DOC believes that by providing for a full public performance right in sound recordings, H.R. 4789 will help to channel investments to develop evolving business models for the benefit of the public at large.

Finally, H.R. 4789 addresses not only the domestic concerns noted above, but also concerns generated by a longstanding deficiency in U.S. copyright law that has harmed American performers and record companies and affected the negotiating position of the United States in the arena of international copyright law. Today, the United States stands almost alone among industrialized nations in failing to recognize a full public performance right in sound recordings. Most of these countries belong to international treaties that require protection for performers and producers of sound recordings. In the usual case, however, such protection is extended to foreign performers and producers only on the basis of reciprocity. Filling this gap in U.S. copyright law is the first step in ensuring that U.S. performers and producers of sound recordings could enjoy this protection in our trading partners on the basis of reciprocity. Indeed, each year millions of dollars of royalties for the public performance of U.S. sound recordings abroad are either not collected at all or not distributed to American performers and record companies. Furthermore, in our relations with developing countries, correcting this deficiency in U.S. law will better position the United States to lead by example.

Accordingly, on the basis of a preliminary review, the DOC believes that H.R. 4789 makes a good first attempt at balancing the rights of copyright owners and specific users of their works for the benefit of the public at large.

Conclusion

The DOC commends the Chairman and other Members of this Subcommittee for cosponsoring H.R. 4789, which would end the royalty exemption for terrestrial, over-the-air broadcasters, and provide fair compensation to American performers and record companies for the use of their sound recordings at home and abroad.

The DOC appreciates the opportunity to present its preliminary views on H.R. 4789 and stands ready to work with you, the other Members of the Subcommittee, and staff members as legislation to establish a full public performance right in sound recordings advances.

We have been advised by the Office of Management and Budget that there is no objection to the submission of these views from the standpoint of the Administration's

The Honorable Howard L. Berman
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position. If you have any questions, please contact me or Nat Wienecke, Assistant Secretary for Legislative and Intergovernmental Affairs, at (202) 482-3663.

Very truly yours,

A handwritten signature in black ink, consisting of a stylized 'L' followed by a long, sweeping horizontal line that curves slightly upwards at the end.

Lily Fu Claffee

cc: The Honorable John Conyers
Vice-Chair