

TESTIMONY OF

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Los Angeles, CA

Before the
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Washington, D.C.

QUALIFICATIONS

My name is Glen Barros, and I am the President and CEO of the Concord Music Group, Inc., an independent record company and music publisher. I have been at Concord since 1995. As President and CEO, I oversee all of Concord's operations and I am heavily involved in Concord's business deals, from acquisitions to market strategy.

Prior to joining Concord, I was the Chief Operating Officer of the AEC Music Group, a division of Alliance Entertainment Corporation, where I was significantly involved in the acquisition and management of record companies and record distributors with collective annual revenues in excess of \$100 million. I have spent my entire professional career within the music industry, in various positions in the music publishing, record production and record distribution fields. I currently serve on the boards of the Recording Industry Association of America, the Jazz Alliance International and the American Association for Independent Music. My association with the latter organization provides me with a good understanding of the particular issues relevant to independent record companies throughout the United States.

With respect to my educational background, I knew from an early age that I wanted to pursue a career within the music industry and, to prepare myself accordingly, earned a Bachelor of Science Degree in Music & Business from New York University, summa cum laude, in 1988.

Because Concord is both a record company and a music publisher, I have a special perspective on the challenges facing both record companies and publishers, and a personal desire to see both sides of the business succeed and be appropriately compensated. I understand how the mechanical rate determined in this proceeding will affect the future of all participants in the music industry, and I want an outcome that is good for the whole industry. Most importantly, I would like to see the outcome of this process result in a new mechanical rate structure that

facilitates and encourages growth in all areas of the music industry, while abolishing the existing obsolete structure that is clearly an impediment to growth.

INTRODUCTION AND SUMMARY

Independent record companies like Concord play a unique and important role in the music industry. Independent record companies are often the producers of music in niche genres, such as jazz in Concord's case. In addition, independent record companies serve as a laboratory for new kinds of music and an entry point into the music business for promising new artists and writers.

The music industry has changed enormously over the last decade, and these changes have caused a very difficult time in the recording industry. Competing demands for consumer attention and money, retail concentration, the migration from physical albums to online sales, the consolidation of the radio industry, piracy, and other factors have created a marketplace in which it is hard to sell records and there is intense downward price pressure. At the same time, mechanical royalty rates have risen faster than record prices, are out of proportion to the relative roles of the various industry participants, and are out of line with historical and international norms. These factors, coupled with an antiquated licensing structure, are creating severe upward cost pressure, discouraging investment and experimentation, and making it extremely difficult to give consumers the extra value it takes to sell recordings in today's environment.

Determining a mechanical royalty rate structure, and setting a mechanical royalty rate, calibrated to today's market conditions is critical to the future prospects of independent record companies and the music industry in general. If the music industry is to grow, and record companies and publishers are not merely to fight over shares of a shrinking economic pie, I believe that two things must happen:

- First, the mechanical royalty rate structure must be based on a percentage of actual wholesale revenues to encourage innovation by record companies and more evenly share risks and rewards between publishers and record companies.
- Second, I believe that the rate must be lowered from its current level, because it does not properly reflect the contributions of artists and record companies relative to writers and publishers, and is much higher than historical and international levels. This must be done to correct the excessive inflation of mechanical rates relative to average record wholesale prices over time, and in particular over the last half dozen years.

In my testimony, I first describe the Concord Music Group. Second, I describe the important role of independent record companies in the music business. Third, I describe today's difficult business environment for independent record companies. Fourth, I describe the relative roles of record companies and music publishers - and particularly the vastly larger investments and risks of record companies. Finally, I describe the changes in the mechanical royalty rate and rate structure that I believe are necessary for the health of the whole music industry.

DISCUSSION

I. The Concord Music Group

The Concord Music Group is an independent record company and music publisher devoted to producing timeless music within numerous genres, but with a special emphasis on a uniquely American form of music, jazz. Concord Records has been considered a leader in the jazz and traditional pop fields for over 30 years. Two years ago, Concord acquired and merged with Fantasy, Inc., home to one of the world's most prestigious catalogs of jazz, blues, R&B and rock music, to create the Concord Music Group. In December of 2005, Concord acquired Telarc International Corp., a thirty year old record company devoted to recordings of superior sound quality, primarily within the genres of jazz, classical, and blues. Today, the Concord Music

Group employs approximately 170 people and is one of the largest independent record companies in the world.

Over the years, numerous legendary artists such as Ray Charles, Rosemary Clooney, Sam Cooke, Count Basie, John Coltrane, Creedence Clearwater Revival, Miles Davis, Duke Ellington, Bill Evans, Ella Fitzgerald, Vince Guaraldi, John Lee Hooker, Barry Manilow, Thelonious Monk, Mel Torme, Little Richard and Otis Redding have recorded for labels that are now part of Concord. The company has active recording relationships with approximately 120 recording artists, with current releases by such world-class artists as George Benson, Michael Bolton, Dave Brubeck, Chick Corea, Michael Feinstein, John Fogerty, Boney James, Al Jarreau, Sergio Mendes, Eddie Palmieri, Sonny Rollins, Dionne Warwick, and many more. In all, our catalog contains over 10,000 master recordings, ranging from the 1940s through today. We currently have nearly 5,000 albums in print and will issue over 150 new releases this year, approximately half of them new recordings and the other half developed from our rich catalog.

Because of our focus in the jazz and adult pop genres, even our new recordings tend to contain a disproportionate share of “cover” recordings – that is, new recordings of previously released songs that are performed in a new style on the album. Cover recordings breathe new life into existing songs – both classics and previously undiscovered gems – and ensure that publishing catalogs remain fresh and relevant to new generations of music listeners.

A correspondingly smaller number of the recordings we release are of songs written and performed by the same artist (a so-called “singer-songwriter”) or written by the producer. As a result of the nature of our recordings and the high incidence of “covers,” most of our mechanical licenses are at the full statutory rate, while the majors, whose repertoire of new recordings is more concentrated in genres such as urban, rock and current pop, more often enjoy a reduced rate

under a “controlled composition clause.” Mechanical royalties are one of our most significant cost items, and at 9.1 cents per track, we often need to limit the number of tracks we put on an album because of excessive mechanical royalty costs.

In addition to being a record company, Concord is a music publisher. Concord holds a prominent catalog of music publishing rights, including many of the best known songs written by John Fogerty while he was a member of Creedence Clearwater Revival. We therefore receive mechanical royalties, as well as pay them. In fact, it often happens that artists who record for other record companies cover songs in our publishing catalog. For example, Rod Stewart just featured a new version of the John Fogerty classic “Have You Ever Seen The Rain” on his most recent album. Consequently, the mechanical royalty income that we receive is very meaningful to our overall business.

II. The Role of Independent Record Companies

The recorded music industry is comprised of companies of widely varying size and business models, including the four major record companies and numerous independent record companies, of which Concord is one. Indies and major record companies each have an important role to play in maintaining a healthy music industry.

The major labels are responsible for bringing much of America’s most popular music to listeners. Collectively they produce about 70-75 percent of units sold and distribute about 80-85 percent of units sold. However, they generally focus on “hit-oriented” recordings with widespread appeal to a large fan base in the most popular genres such as urban, pop, rock and country. The focus and approach of independent labels is generally different from that of the majors. Indies play a critical role in assuring the availability to the public of diverse music options and in opening new opportunities for creative expression by artists and writers. In fact, although recordings produced by independents represent only 25-30 percent of unit sales of

albums in the U.S., independent releases account for 80-85 percent of the total number of albums released each year.

Independent labels often produce music in niche genres outside of what the majors typically produce. Independent record companies deserve significant credit for preserving and investing in great music genres that do not have a fan base sufficient to be profitable for the major labels. Moreover, independents serve as a laboratory for new kinds of music and an entry point into the music business for promising new artists and writers.

III. Changing Industry Circumstances Have Hurt Independent Record Companies

The last ten years have been a period of remarkable change in the music industry. Ten years ago, CD sales were strong, the retail environment was good the recorded music market was booming. Today, we face a list of dire trends that threaten the continued existence of the music industry as we know it unless we can figure out a business model that will cause the industry to once again expand rather than continuing to contract:

- Competing demands for consumer attention and money and the devaluation of music.

When we were growing up, music was a more important form of entertainment. With fewer entertainment options, we all had a much deeper connection to our favorite artists, and had to run to the record store to get their next release. Now, competition for the entertainment dollar is intense. Consumers have computer game systems like the Xbox, the Internet, online games, DVDs, satellite radio, cell phones, pay television, TiVo and a host of other new entertainment options competing for their time and money. As a result, they are devoting less time, attention, and money to music. At the same time, music is becoming ubiquitous. It is available from numerous sources, and is, despite the highly publicized lawsuits against Napster, Grokster, and others, readily available to download for free over the Internet without

the authorization of the copyright owners. This abundant supply of music, coupled with diminished demand, places a tremendous downward pressure on prices and sales.

- The rise of big box retailers. So-called “big box” retailers, such as Wal-Mart, Target, Best Buy, and Circuit City, carry a much smaller selection of CDs than a traditional record store and sell music at a deep discount. For example, we currently have approximately 100 active titles in the Wal-Mart system and about 20 active titles in Target stores, as compared to the more than 4,000 that we had in the Tower Records system just prior to Tower’s recent demise. Because independent record companies generally sell music that is not hit oriented or not sold at very low budget prices, it is difficult to get many releases onto the shelves of the big box retailers. Even when we can, the downward pricing pressure and the cost of co-op advertising (*i.e.*, payments made to retailers to inspire sale pricing and prominent in-store positioning) negatively affects our margins.
- Piracy. Piracy is a huge problem for the industry in general, although it has less of a direct impact upon labels that focus on the adult demographic and niche genres that we market to at Concord. We feel the bite of piracy intensely, but indirectly, through the negative impact that it has on the overall industry. Piracy has greatly contributed to the decline in the overall market, which has contributed to the decrease in record retail space, which has in turn significantly reduced distribution opportunities and impulse sales for labels like Concord.
- The demise of specialty record stores. All these other trends have caused industry sales to plummet, forced many traditional specialty record stores out of business, including recently Tower Records, and decreased foot traffic in the remaining

traditional record stores. I find it staggering to consider that, according to Nielsen Soundscan, as recently as 2000, independent record stores accounted for nearly 15% of all albums sold in the U.S., while in 2006, independent stores are not likely to break 6%. Sales of albums by record chain stores over the same period fell from about 55% down to 40%. Collectively, this means that less than half of all the albums sold in the U.S. today are sold in traditional stores specifically dedicated to the sale of records.

- Fewer impulse buys. We estimate that two out of every three purchases of Concord CDs by adults are “impulse buys,” meaning that the consumer goes to a record store without a specific purpose or is looking for a particular CD and ends up buying an unplanned CD or two that happen to catch their eye. If people are not visiting record stores, or our product is not on the shelves (as is the case with the vast majority of our catalog with respect to the of the big box retailers), those “impulse buys” upon which Concord depends will happen less and less. The online marketplace does not currently allow for the same level of easy browsing as walking through the aisles of a well-stocked store.
- The demise of physical albums. Industry-wide, CD sales are falling fast. And while online sales are growing fast, they are not growing fast enough to offset declines in physical sales. Moreover, a large part of online sales are of single tracks, not albums. To the extent that online sales of a track or two from an album substitute for, rather than supplement CD sales, selling singles rather than albums means far less revenue and a far greater risk of a low or negative return on investment.
- The need to provide extra value. To get people to spend more money on music in the face of the trends I have just described, it is imperative that we give the consumer

good value for his or her entertainment dollar. That could take the form of a lower price, more tracks on an album, bonus content on newer types of physical product, or an attractively-priced online bundle. But the trends are clear – we can't expect to keep selling the same products, at the same prices, through the same channels, and see any result other than declining sales and smaller margins.

- Lower profits on digital sales. Download prices are low relative to CD prices. The chart below illustrates the actual gross profit we would generally realize on a new front line CD with 12 tracks (at the minimum statutory rate of \$0.091) when compared to the same album sold on iTunes for \$9.99. This is the profit realized before considering our very substantial distribution costs, artist royalties, co-op advertising costs, marketing costs, production costs and overhead.

[Material Redacted Pursuant to Protective Order]

Apart from the manufacturing and inventory costs reflected in the chart above (labeled as “finished goods costs”), the only other cost that varies between the CD sale and the download sale is “co-op advertising” paid to the retailer in order to inspire sale pricing and prominent positioning. Because these are payments to the retailer, economically they are much like discounts. We estimate that we typically spend approximately \$[REDACTED] per unit on co-op advertising in the initial phase of a CD's release. This effectively reduces the gross profit listed above to \$[REDACTED] per unit for CDs. After the initial phase, we spend much less on co-op advertising, and our average discounts are also less, so the gross profit (less co-op advertising cost) on each CD sold is likely to

be in the range of \$ [REDACTED]. While it is true that there are no manufacturing and inventory costs with respect to digital sales, there are significant distribution costs. In fact, because the costs of developing asset management, distribution and accounting infrastructure for online sales are very high, we found it more economical to enter into a distribution arrangement with a major record company to help us distribute music over the Internet than to do it ourselves. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Therefore, for the initial (and most costly) phase of an album's release, we are left with \$ [REDACTED] from CDs and \$ [REDACTED] from digital downloads, less [REDACTED] artist royalties and distribution. These amounts have to cover the fixed costs of production, general marketing to the consumer, and overhead. Consequently, the reduced profit per unit generated by the sale of a downloaded album has direct negative consequences on our ability to cover our fixed costs.

- High mechanical royalty rates. Mechanical royalty rates have risen as margins have fallen. In the last ten years, the per track mechanical royalty rate has increased by about 30%. At the same time, Concord's average actual wholesale prices have increased by only [REDACTED], and co-op advertising funds paid to retailers as an incentive to discount and prominently position products have increased considerably, partially offsetting the price increase. Moreover, when we put more tracks on an album to give the consumer a little extra value, we pay more in mechanical royalties

without getting a higher wholesale price. Our average actual wholesale album price in the U.S. (blending top-priced and mid-priced products) is approximately \$[REDACTED]. Assuming an average of 12 tracks per disc (which is probably less than our actual number of tracks), the statutory rate is nearly [REDACTED]% of wholesale. Rates are particularly out of whack for downloads: 9.1 cents is 13 percent of a 70-cent download wholesale price, and in the case of a download of a 12-track album, mechanical royalties are 15.6 percent of a \$7.00 wholesale price.

These long-term trends make this unlike any previous time in the industry's history, and Concord, like all record companies, has not been immune to their effects, as we have certainly seen our margins drop accordingly. As a publisher, we have also suffered from these trends.

If the mechanical royalty rate is not reduced in this proceeding, our bottom line will continue to suffer from the changes in the marketplace that I just described. Record companies will be increasingly unable to support new artists, new projects, and new forms of music. Indies, which typically have less financial wherewithal than do the major record companies, will be hit harder than the majors and, like their independent retail counterparts, may start disappearing quickly.

Nonetheless, in the long run, I am hopeful that the public's continued high demand for music, coupled with innovative technology, will create new business opportunities for record companies. Technology has given consumers easier access to a wider range of recordings than has ever been possible before through download services, subscription services, and other kinds of new offerings. This is important for independent record companies like Concord that produce niche music, such as jazz, which doesn't get a lot of retail shelf space. We are hopeful that having our catalog online will eventually allow us to make a wider selection of our creative

works available to a larger audience than has previously been possible. The question is whether we can navigate the dire trends I have outlined and get back to a music market with robust sales and healthy margins. The challenges are formidable. I believe that adopting a mechanical royalty rate that is in line with the relative roles of the parties and historical and international norms is an important part of the solution.

IV. The Relative Roles of Record Companies and Publishers

As I have said, mechanical royalty rates are not only high in absolute terms, they are out of line with the relative investments of publishers on the one hand and record companies on the other. By no means do I intend to minimize the important role that the publisher plays in the music industry, but as the head of a company with both recorded music and music publishing interests, I know that record companies' contributions, investments, costs and risks far exceed those of music publishers. Furthermore, these investments are much riskier and more often fail to pay off. Thus, a record company frequently will lose money on a release that makes good money for the writer and publisher. I will describe the relative roles of record companies and publishers in turn.

A. Investments and Risks of Independent Record Companies

Indies, and record companies in general, make huge investments to bring songs alive both musically and commercially. As an independent company, we have little room for error in our investment decisions. Although we want to promote as many new quality artists as we can, we need to be cautious in the way we commit our resources. Therefore, at Concord, we take a fairly conservative approach to making records. We have a portfolio of established artists with whom we make records, with a fair degree of confidence that the records will succeed. We take chances with certain new artists, in the hopes that we can help turn them into established artists, but we cannot afford to take a significant number of these risks. We consider new artists and

new product concepts to be similar to the “research and development” costs incurred in other industries. We would love to invest more in this area, but the downward market and margin pressures that we have experienced in recent years limit our ability to increase or even maintain R&D investment levels. I am fairly certain that we are not alone and that the entire record industry’s R&D investments have gone down in recent years.

Accordingly, if the mechanical royalty rate were lower and structured as a percentage, to be more in proportion to record companies’ contribution to the product made available to the public, and more in line with historical and international norms, this downward margin pressure would be reduced, it would be easier to provide the consumer with greater value, and record companies would be in a position to take more risks, creating more opportunities for artists and making more creative works available to the public. This would hopefully result in growth for the entire music industry, including both record companies and publishers.

I will describe in turn record companies’ contribution to production, promotion and product innovation.

1. Investments in Production

Record companies make enormous investments in finding and developing new musical talent and producing records.

We have an artists and repertoire (“A&R”) staff that manages our existing artist rosters and actively searches for new recording artists. Once we have signed an artist, the process of making an album begins. This often involves our A&R staff working with the artist to develop the concept for the album and identifying songs that are appropriate to the artist’s style. Concord must arrange and pay for studio time, equipment, sound engineers, musicians, arrangers, and often a producer to create the initial studio recordings and then edit, mix and master the music to create the final, high-quality sound for release. We also design album cover artwork and

produce additional content, such as video content, that are associated with the album release. Most of the time, we also have to pay an advance to the recording artist. Our overall cost of producing an album can be anywhere from \$ [REDACTED] to \$ [REDACTED], with many of our albums requiring a production investment of \$ [REDACTED].

2. Investments in Promotion

Even great songs and great recordings don't make money for their creators unless they connect with an audience. The music we produce is generally geared to an adult audience, and adult audiences have many demands on their time and attention that crowd out their consideration of music. Fans of our style of music are generally excited by the new music we produce, but we need to design creative marketing programs to make sure they know that that music is available and easily obtained. Developing those marketing programs is a key creative contribution of the record company, and it is typically our largest category of investment. Our costs of promoting a release are usually much more than our costs of production.

Because our releases generally do not get meaningful commercial radio airplay, Concord must be creative, innovative, and flexible in developing a strategy to connect an album with an audience. Every artist's circumstances are different, so there is no set formula for promoting new releases. A few examples illustrate the kinds of investments we make and risks we take to find an audience for our recordings:

- Television Advertising. With some of our better-known artists, we invest in television advertising. For example, we recently spent nearly \$ [REDACTED] on marketing Michael Bolton's new release "Bolton Swings Sinatra," with a major portion of this amount being devoted to a television campaign. This album of songs made famous by Frank Sinatra has been one of Michael's dream projects for years. We do not usually do television advertising, as the economics of our typical records would not support it.

However, Michael has sold over 50 million records, and while the consolidated radio community no longer provides Michael or the type of music he performed on this album with commercially meaningful airplay, he has a huge audience among the public. We thought it worth investing in the expensive television advertising campaign to make the audience aware of the release.

[Material Redacted Pursuant to Protective Order]

- Press Campaigns. It is almost impossible to break new jazz artists, but at Concord we have three incredibly talented new artists for whom we are trying to buck the odds – Christian Scott, Taylor Eigsti and Erin Boheme. In addition to producing and promoting albums for each of them, we recently sent them on a multi-city tour together to bring them closer to the market, help them develop a fan base and garner favorable press to enhance our marketing efforts. We invested well over \$ [REDACTED] in trying to develop this market for them and, to date, the three have only collectively sold about [REDACTED] units. Clearly, this has not been a profitable endeavor thus far, but we feel that it will pay off in the long run and that it's important for us to develop new talent if the jazz genre that we love so much is to survive.

- Corporate Partnerships. To target our adult audience, Concord has teamed with Starbucks Coffee to promote and sell two releases by the legendary Ray Charles. Our first was “Genius Loves Company,” Ray’s final recording. In addition to being a multi-platinum seller, it received eight Grammy awards, including Album and Record of the Year.¹ More recently, we partnered with Starbucks on “Ray Sings, Basie Swings,” a CD that technologically combines archival recordings by Ray in the 1970s, backed by current-day recordings by the Count Basie Orchestra.² The sales potential of teaming with Starbucks does not come cheaply. [REDACTED]

Nevertheless, we are grateful for this relationship, and we have done well through this nontraditional channel.

[Material Redacted Pursuant to Protective Order]

It is easy to focus on the initial release of a new album. But if we want to sell a recording, we need to promote it. That means that if we want to keep moving an album, or repackage and re-release a recording, we need to keep doing things to promote it. Of course, we continue to incur substantial costs when we do so.

3. Investments in Product Innovation

We are always looking for ways to give the consumer good value and to give people a reason to devote more of their attention and disposable income to music.

¹ A copy of the album “Genius Loves Company” in CD format is included as Exhibit I-101-DP.

² A copy of the album “Ray Sings, Basie Swings” in CD format is included as Exhibit I-102-DP.

A couple of years ago, we invested in producing releases in a new physical format known as the Super Audio Compact Disc or “SACD.” SACDs are multilayer discs (sometimes called multisession discs) that include both a high definition stereo version of each recording and a “surround-sound” version. At the time, we thought that this new format, which clearly delivered a better experience to the consumer at roughly the same price as a standard CD, could provide a great lift for the industry. Sadly, it looks as though this is not to be. There are many reasons why the SACD has not gained traction, but one contributing factor was music publishers’ claims that they were entitled to be paid twice – once for the stereo and once for the surround sound version of the same recording. Record companies, including Concord, could not afford double the usual mechanical costs on a product with greater production costs and basically the same wholesale price as a CD release, and it was not practicable to negotiate. As a result of this and other factors, just about everyone seems to have abandoned the pursuit of SACDs as anything more than a niche format servicing audiophiles. To be fair, it is not clear that consumers really value the extra audio fidelity that SACD provided enough to buy additional equipment (which the SACD required), but I believe that the industry-wide delay in bringing these kinds of products to market, in part, prevented them from catching on with the public.

We face a similar issue with a new product that we are exploring called a “Super Disc,” released through a partnership with a high end audio manufacturer named Monster, LLC (makers of the superior audio cables marketed as “Monster Cable”). One such title that we have recently released in this format is a new recording jointly featuring the legendary artists George Benson and Al Jarreau, entitled “Givin’ It Up.” RIAA Exhibit I-103-DP is a copy of this album on a Super Disc. Each Super Disc package contains a standard CD along with a separate DVD containing versions of the same recordings in High Definition Surround Sound (providing the

listener with audiophile surround sound through their home audio/video system's standard DVD player and speakers) and High Definition Digital Music files that can be downloaded to most computers or portable music players (thereby providing a superior audio quality for portable music players, such as the Apple iPod). In addition, the Super Disc contains Dolby Headphone music files that simulate surround sound through any pair of headphones. The Benson/Jarreau package even contains some promotional video footage.

Despite the considerable extra value that the Super Disc delivers, the market will not accept a price point that is much greater than the price of the standard CD. The thinking behind this is that we are still selling the same music, regardless of the fact that it is provided in multiple formats. As with SACDs, however, music publishers have taken the position that we have used the music three times (in the standard CD format, the High Definition Surround Sound format and the High Definition Digital Music format). Of course, we disagree with their position that a multiple payment is required. In general, we have been able to negotiate with the publishers involved [REDACTED]

[REDACTED] This process, however, is extremely laborious and not guaranteed to be successful, and even if we are able to achieve a compromise rate, our resultant publishing costs are still a much higher percentage of revenue than on a normal CD. When you add this to the extra production and manufacturing costs associated with the Super Disc, we are operating at a very reduced margin.

Despite the reduced margin, we still see some logic in promoting this new format, with the main reason being that it enables us to market our music through electronic channels, thereby finding a new outlet for our recordings. Given the high costs and the considerable efforts required to negotiate with multiple publishers, however, we are forced to limit these new

packages to only a few high profile releases. We simply cannot afford to roll out this new product line in a major way. Consequently, everyone loses.

B. The Risks and Rewards of Music Publishing

The music publishing business is very different from what record companies do. In addition to being a record company, Concord is also a music publisher. We hold the rights to a large catalog of songs, which we license to generate mechanical royalties as well as performance, synchronization and other royalties. Concord's role as both record company and music publisher gives me a first-hand understanding of the relative roles of the parties to this proceeding, and I can compare the relative creative contributions, technological contributions, investments, costs, and risks of music publishers and record companies.

A music publisher's main investment is acquiring songs. Sometimes that means buying rights to existing songs, such as when we acquired the Fantasy catalog in 2004. While we do not actively seek to sign new writers, most publishers also acquire songs by signing active writers, including sometimes new songwriters.

Most publishers have an A&R function associated with signing writers and sometimes producing demos of their songs. However, artists are more often "discovered" by record companies and then sign publishing deals than vice versa. And the costs of producing the occasional songwriter demo pale in comparison to the costs of producing high-quality commercial recordings.

Publishers have a limited marketing function – typically marketing songs to producers of motion pictures, television programs and advertisements. But publishers don't invest in branding their composers through expensive consumer advertising. When is the last time anyone saw a television commercial for a hot songwriter? At one time, decades ago, music publishers were actively involved in promoting songs to record companies. However, in most genres today,

those efforts so seldom pay off that we do not do much of that, and I am reasonably sure that, outside of Nashville, other publishers do not either. In fact, I can say with certainty that, as a very active record company engaged in the production of numerous new recordings per year, we rarely get calls from publishers suggesting songs to be included in those productions. As a result, where record companies have huge promotional costs, publishers have very little. Further, publishers benefit from the promotional investments made by record companies. Not only do they receive the mechanical royalty income directly from record companies, but they receive performance, synchronization, and other types of income from the awareness generated by record companies promoting recordings that embody their songs.

Music publishers have some costs of administration, but the staff necessary to grant and administer licenses is a fraction of that required on the recorded music side to create and promote new recordings. Publishers need to have computer systems for royalty accounting and rights management, but they do not invest in developing other new technologies.

Acquiring songs is a relatively safe investment. In the case of established catalogs, there is a history of how much revenue they generate, and they are typically bought and sold at a multiple of the "net publisher share" of the licensing revenue they generate. Then, the business challenge is simply to license the songs in the catalog as widely as possible to maintain or increase the revenue generated by the catalog.

When signing a new writer, there is not that track record, but I understand that the advances typically paid new writers are small. And if a new writer has a recording contract, a publishing advance can be calibrated to the mechanical royalties expected to be generated by the writer's own recordings.

In our role as a publisher, I do not need to worry about the success of particular recordings. Our publishing business incurs only a small administrative cost to license use of a musical work in a recording, and we get paid from the very first record sold. As a publisher, we like to see recordings of our songs succeed, because it is recordings that give commercial life to songs. When recordings succeed, we see bigger mechanical royalty checks, as well as meaningful performance royalties, and have a better chance of licensing synch uses in motion pictures, television programs and advertising and even selling sheet music. But our publishing business suffers no loss from the failure of a recording of one of its songs, because our publishing business does not incur the costs of recording and distributing songs.

Despite the relatively bad times in the recording business, it is a pretty good time to be a music publisher. Without making significant investments on the publishing side of our business, our music publishing revenue has shown steady growth. I believe this is likely to be the case with other similar music publishers. While our third party mechanical licensing income has declined due to decreased record sales, this has been mitigated by increases in the mechanical royalty rate. More importantly, other publishing revenue sources such as performance income, synchronization income, and foreign sub-publishing have more than offset the decline in mechanical revenue.

Due to the steady growth and stable nature of the music publishing industry, the capital markets view the music publishing business as a more attractive business than the recorded music business. This is evidenced by the recent influx of private equity investment firms that have invested in companies formed to acquire music publishing assets and have charged these companies to acquire other music publishing assets. I know of at least six such platform companies that have been capitalized with aggregate private equity funds believed to be in

excess of \$300 million. Conversely, I do not see anywhere near the same level of activity from the investment community with respect to record companies or recorded music assets.

As a further illustration of this point, I am informed that small to mid-size stable music publishing companies are regularly bought and sold at an average of 15 times the net publisher share of the revenue they generate. Record companies, by contrast, tend to sell for considerably lower multiples of their comparably calculated operating profit. Thus, the market places a significant premium on music publishing revenue, reflecting the perception that under current market conditions, including the current mechanical rate, an investment in music publishing is safer and more profitable than an investment in recorded music.

V. The Proposed Royalty Rate

The current cents rate royalty structure is too inflexible, creates the wrong incentives, and is too prone to dispute. Current royalty rates are also too high, both in cents per track and as a percentage of the actual wholesale price. That does not serve the music industry well:

- A cents rate per track doesn't give record companies flexibility to find new ways to increase consumer value, drive sales, and maximize the revenue from the CD format before it becomes obsolete.
- The 9.1 cent rate means that we must regularly limit the number of tracks on an album. If it were affordable to put additional tracks on a CD, we could provide more value to the consumer and that many more songs would be generating income for their writers and publishers.
- A cents rate structure does not fairly share the risks and rewards of price variation. Record companies' margins are squeezed if prices fall, while publishers are paid at the same level (if their track gets used and they are paid anything). Yet if prices rise, publishers do not share in the benefit.

- The current rate is out of line with the relative investments made and risks taken by record companies and music publishers. As a result it encourages investment dollars to flow to the purchase of publishing catalogs rather than to the creation of new sound recordings that serves the public interest and is the economic engine of the music industry.
- The cents rate structure equates to wildly varying percentages of a record company's wholesale revenues depending on the number of tracks and configuration, the retail outlets, and the discounts given, when there is no justification for such variations in terms of the writer's and publisher's contribution or the basic economics of the release.
- The current cents rate structure is too prone to dispute. Publishers have exploited it to, for example, demand double payment for SACDs, or triple payment for Super Discs.
- The current rate is not sustainable if the download market replaces the physical product market within today's basic economic structure. There is simply not enough money to be made selling 70 cent singles to pay for what it costs to create and promote recordings.

I have reviewed RIAA's rate proposal in this proceeding and support it. I believe that the best way to maintain and expand music's share of the entertainment marketplace is to create fresh and compelling new products for consumers, products that give consumers maximum value and exciting content. By creating new physical products that maximize consumer value, we can slow the decline of the physical marketplace and maximize the revenue still available from physical recordings. Moving to a percentage royalty rate based on actual wholesale revenues

received, in the range proposed by RIAA, would encourage more experimentation and risk-taking by music companies.

As important as the change to a percentage royalty rate would be to the marketplace for physical records, it is far more important to expedite the transition to a robust online future. Different types of online delivery, such as permanent download services and subscription services, both portable and non-portable, present different value propositions for consumers. We don't know what prices the market will ultimately bear for all these kinds of offerings. A percentage rate will allow us the most flexibility in creating business models based on these new distribution methods. Models that succeed with consumers will result in larger revenues for publishers, as they will receive a percentage of a larger revenue stream. A percentage royalty rate is the simplest and most effective way to address licensing of all these new avenues of music distribution we have seen in the last five years and newer ones that we will surely see over the course of the next statutory royalty rate period. It will also fairly distribute the risks and rewards of the new music industry among all of its participants. Although RIAA's rate proposal will not cure all of our industry's ills, it is certainly an important step in the right direction, and I urge the Copyright Royalty Judges to adopt such a system. If the Judges do not, it is likely the current system will continue to contribute to sales erosion, and we will all continue to find ourselves fighting over pieces of a shrinking pie.

Music publishers and writers will share in the benefits of a percentage rate. A record company's success is the publishers' success too – when we can reach more listeners, sell more products, and grow the pie, everybody wins. My goal as the CEO of an independent record company, and indeed the reason I am in the music business, is to reach as many consumers as I can with the forms of music that we at Concord love, including jazz, and to do that in a way that

maximizes revenues. By granting the publishers a percentage royalty, we are granting them a stake in our success.

There is another significant benefit to moving to a lower rate and implementing the percentage rate structure: it allows record companies to release more songs. As a publisher, I know that songs do not generate revenue when they are not recorded and available. I think the whole music industry would be better off with a lower rate that allows more songs to be released and sold so that they will generate not only mechanical income but also performance and synch income for their writers and publishers.

Finally, if RIAA's rate proposal had been in place when the SACD format was rolled out, it would have avoided disputes with publishers and allowed us to pursue the technology more vigorously. SACD and even Super Disc may never prove to be commercially significant formats, but there will always be new formats - both physical and digital. The Copyright Royalty Judges should adopt a percentage royalty rate that does not lend itself to these kinds of disputes.

CONCLUSION

The music industry has been transformed over the last decade, and the transformation will continue over at least the next five years. Some of the changes are good – music is more available than ever before. Some of the changes have required difficult adjustments on the part of record companies. Many of the changes have increased uncertainty and risk for record companies. This is especially true for independent record companies like Concord.

Today's recording industry is sick. Sales of physical products are down, and nobody has yet developed a legitimate online business model as robust as the physical distribution model it is replacing. However, the sickness is not necessarily terminal. I believe that underlying demand

for music remains high, and there are good opportunities for companies that can bring consumers compelling musical offerings while achieving an appropriate return on investment.

In this environment we need a percentage royalty rate, and a lower rate, to encourage the kind of innovation that can once again put the music industry on a trajectory of growth.

PUBLIC

I declare, under penalty of perjury, that the foregoing testimony is true and correct to the best of my knowledge.


Glen Barros

Date: November 29 2006

Exhibits Sponsored by Glen Barros (Public)

Exhibit Number	Description
I-101-DP	CD copy of the album "Genius Loves Company," by Ray Charles
I-102-DP	CD copy of the album "Ray Sings, Basie Swings," by Ray Charles and the Count Basie Orchestra
I-103-DP	Super Disk copy of the album "Givin' It Up," by George Benson and Al Jarreau (on a Super Disk)