

Testimony of

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**Hearing on Ensuring Artists Fair Compensation: Updating
the Performance Right and Platform Parity for the 21st
Century**

**United States House of Representatives
Committee on the Judiciary
Subcommittee on Courts, the Internet, and Intellectual
Property**

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Introduction

The United States enjoys broadcasting, music, and sound recording industries that are the envy of the rest of the world. This is due, in no small part, to the symbiotic relationship and proper balance that has existed among these three industries for many decades. For more than 80 years, Congress wisely has rejected repeated calls by the recording industry to impose a tax on the public performance of sound recordings that would upset this balance. It has done so for a number of very good reasons and this mutually beneficial policy should not be disturbed.

Radio broadcasters pay more than \$450 million annually in royalties to ASCAP, BMI and SESAC, the performing rights organizations that collect royalties on behalf of the composers and publishers of the music they play. Radio stations also provide tens of millions of dollars in free publicity and promotions to the producers and performers of sound recordings in the form of air play, interviews with performers, concert promotions and publicity that promotes the sale of sound recordings and concert tickets. Through the years, Congress had found these promotional benefits appropriate and valuable compensation. And, there is no doubt that those promotional benefits are important. The saying “I heard it first on the radio” is a refrain that purchasers of sound recordings recited in the 1920s and are still repeating today. The acknowledgments for performing artists that “I owe my success to radio” and from recording executives that “without radio my records would never have made it on the charts” have also, over the years, been repeated over and over, and over again.

So, what is the purported justification, at this point in time, for changing a system that has produced the strongest music and recording industries in the world and provides more than sufficient economic rewards for performers as well as record companies to continue to produce new sound recordings? The impetus for change comes from record companies, many under

foreign ownership, that want to increase their profits. Not satisfied with current amounts of revenue from the sale of sound recordings, frustrated by their inability to deal with pirates, the labels suggest turning to the radio industry that already pays license fees for music and streamed sound recordings and provides hours and hours of free news, sports, information and public affairs programming, essential local news and weather information in times of emergency, and hundreds of millions of dollars of time for public service announcements and local fund raising efforts.

There are many radio stations, especially in small and medium sized markets, that are facing challenges. These stations would be particularly hard-hit by any new performance tax. So too would the many other small businesses caught by this new tax. Every bar, restaurant, retail establishment, shopping center, sports and other entertainment venue, transportation facility, juke box owner and everyone else who publicly performs sound recordings could be caught in this web. I submit that such a drain on the American economy to support private interests is not warranted, and is not wise.

Under the Constitution, Copyright is designed: “To promote the progress of science and useful arts.”¹ There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound recordings in this country or that the imposition of such a tax would stimulate additional revenues of sound recordings.² 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.

¹ U.S. Constitution, Article I, Section 8.

² 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).

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 series of enumerated rights upon the owners of various works of creative expression. These are enumerated 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. 17 U.S.C. § 106(4), (6).

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

Congress has considered and rejected proposals from the record 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 this 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.

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 directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.³

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.” S. Rep. No. 104-128, at 13 (1995) (hereinafter, “1995 Senate Report”). 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.⁴

³ S. Rep. No. 93-983,, at 225-26 (1974) (minority views of Messrs. Eastland, Ervin, Burdick, Hruska, Thurmond, and Gurney).

⁴ The symbiotic relationship among the various industries is a complex one. Music composers and publishers receive enormous compensation through public performance licensing fees paid

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. In granting this limited right, Congress stated it: “should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.”⁵ 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.”⁶

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.⁷ 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

by broadcast radio stations to performing rights societies such as ASCAP, BMI and SESAC. The record producers and recording artists, on the other hand, receive the vast majority of their revenues from the sale of sound recordings, as well as from the concerts, both of which are promoted by radio. While receiving no copyright fees from broadcasters for their over-the-air performances of sound recordings (radio stations do pay the recording industry when their signals are streamed), they enjoy tremendous promotional value from free over-the-air broadcasting. 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).

⁵“1995 Senate Report at 15;” *accord, id.* at 13 (Congress sought to ensure that extensions of copyright protection in favor of the recording industry did not “upset[] the long-standing business relationship among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades.”).

⁶ *Id.* at 17 (emphasis added).

⁷ 17 U.S.C. §114 (d)(a)(A). All statutory citations are to the Copyright Act, Title 17 of the United States Code, unless otherwise noted.

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.⁸

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.”⁹

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 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;¹⁰ (4)

⁸ 1995 Senate Report, at 15.

⁹ *Id.*

¹⁰ 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.*, 4 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).

promote, rather than replace, record sales; and (5) do not constitute “multichannel offerings of various music formats.”¹¹

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.¹²

The Free Benefits Radio Provides for the 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. Examples of acknowledgements and confirmations of these benefits of all segments of the industry are abundant.

From Recording Artists:

- “Radio is that big amplifier in the sky.”

-- Chely Wright (2004)

- “That’s the most important thing for a label, getting your records played.”

-- Eddie Daye (2003)

- “Radio helped me a lot. That’s the audience. I can’t see them, but I know they’re there. I can’t reach out and touch them with my hand, but I know they’re there.”

-- B.B. King (2002)

¹¹ 1995 Senate Report, at 15.

¹² *Id.* t 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.”)

- “I want to thank the radio stations for promoting my music throughout my 30-year music career.”

-- *Juan Gabriel (2002)*

- “I am so grateful to radio. Their support has truly changed my life, and I hope they know how appreciative I am for that.”

-- *Jo Dee Messina (1999)*

- “This happened to me because of country radio.”

-- *Trisha Yearwood, Grammy Award Winner (1998)*

- “They [radio tours] are unbelievably important . . . I only regret I couldn’t do it more and do it longer . . . You guys are so important to us.

-- *Pam Tillis (1993)*

- “I’m really glad I had the opportunity to do that [go on radio tours], because I feel that it has really, really helped me.”

-- *Lisa Steward (1993)*

- “This one’s going out to radio.”

-- *Garth Brooks, Country Music Entertainer of the Year
Acceptance Speech (1991)*

- “In answer to the question, How important is radio to you: ‘Well, that is it. What you’re doing is you’re advertising.’”

-- *Bobby Colomby, Blood, Sweat & Tears (1975)*

From Recording Industry Executives:

- “I have yet to see the big reaction you want to see to a hit until it goes on the radio. I’m a big, big fan of radio.”

*-- Richard Palmese, Executive Vice President of Promotion
RCA (2007)*

- “It’s still the biggest way to break a band or sell records: airplay.. It’s very difficult to get it, but when it happens, it’s amazing.”

-- Erv Karwelis, Idol Records (2007)

- “Radio has proven itself time and time again to be the biggest vehicle to expose new music.”

*-- Ken Lane, Senior Vice President for Promotion,
Island Def Jam Music Group (2005)*

- “It is clearly the number one way that we’re getting our music exposed. Nothing else affects retail sales the way terrestrial radio does.”

*-- Tom Biery, Senior Vice President for Promotion,
Warner Bros. Records (2005)*

- “If a song’s not on the radio, it’ll never sell.”

*-- Mark Wright, Senior Vice President,
MCA Records (2001)*

- “Square one is a lot farther from the finish line without a radio hit. With a hit record, those opportunities walk through the door.”

*-- Ted Wagner, Vice President for National Promotion,
Columbia Records (2001)*

- “Air play is king. They play the record, it sells. If they don’t, it’s dead in the water.”

-- Jim Mazza, President, Dreamcatcher Entertainment (1999)

- “We are in this business to sell product. You sell product by airing it, liking it and going out and buying it. Without the airplay nobody knows what it sounds like. If they don’t know what it sounds like why would they want to buy it?”

It is the repetition that’s the reason for the chart numbers, the heavier the rotation, the more exposure the more likely someone is to buy the product.”

*-- Jack Lameier, Vice President/Promotion,
Epic Records (1993)*

- “I, like every other head of a record company, need and want radio to play our records. Without airplay, we’d all be in the door-to-door aluminum siding sales business.”

*-- Bob Sherwood, President
Phonogram/Mercury Records (1979)*

- “What would happen to our business if radio dies? If it weren’t for radio, half of us in the record business would have to give up our Mercedes leases. We at Warner won’t even put an album out unless it will get airplay.”

*-- Stan Cornyn, Vice President,
Warner Records (1975)*

- “Our whole method of promotion in this business is normally through radio stations and television stations. Until the public actually hears your product, you can’t tell whether you have a hit or not.”

*-- Cecil Steen, President
Records, Inc. (1960)*

From Other Segments of the Recording Industry:

- The 2003 Billboard R&B and Hip-Hop Conference included a session titled “Let’s Get It On” about the importance of securing radio airplay.
- “Ticket sales are driven by airplay. It’s every concert promoter’s dream to increase airplay on an act that’s coming into a local market.

-- Gary Bongiovanni, Editor, Pollstar Magazine (2000)

- “I guarantee you that radio will continue to play a vital role in the future of the music business.”

-- Jeff McClusky, Music Promoter (1998)

- “What influenced music consumers the most when it came to purchasing a particular piece of music? Radio.”

-- National Association of Recording Merchandisers survey (1996)

- The 1991 Country Music Awards included six awards to disc jockeys and radio stations for their contribution to the success of country music.
- “Sales of new records to the public are generated largely by air play on various radio stations through the United States.

Pop radio air play is a critical factor in the success of a record label.”

-- Motown Record Company v. MCA (1991)

- A 1984 survey showed that over 80 percent of rock albums were purchased because people heard cuts off the album over the radio.

-- Office of Technology Assessment

- 80% of singles buyers learned about the records they purchased from radio.

-- CBS Records survey (1979)

- The 43% of the total population who listen to music on the radio at least 10 hours per week comprise 54% of all buyers and account for 62% of the total dollar market.

-- Warner Communications survey (1977)

These acknowledgements are consistent with a 2006 Omnitel survey in which 63% of respondents rated local radio as their primary source to learn about new music,¹³ and are consistent with a Critical Mass Media Study that 85% of listeners from all audio services identify FM radio as the place they first heard music that they purchased.¹⁴

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 US-based company; the other three major players are foreign-owned.¹⁵

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

¹³ www.americanmediaservices.com/news/radio_index/survey/3.5html (Question 21).

¹⁴ Clear Channel Critical Mass Media Study attached as Exhibit 1.

¹⁵ 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. 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"), attached hereto as Exhibit 2.

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.¹⁶ 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.¹⁷

International Federation of the Phonographic Industry (“IFPI”) Chairman and CEO John Kennedy claims the current economic data “reflect an industry in transition.”¹⁸ 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 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.¹⁹

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

¹⁶ Performance Rights Study at 3.

¹⁷ Radio stations provide the recording industry with substantial additional revenues through fees they pay for simultaneously streaming their signals.

¹⁸ 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>.

¹⁹ Performance Rights Study at 3.

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 tax, 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.²⁰ 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 royalties 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.

²⁰ *Media Access Pro, BIA Financial Network Inc.*, Data Retrieved July 25, 2007.

A New Performance Tax Could Apply to Thousands of Business and Facilities Large and Small

The Committee should be aware of the fact that in those countries that have adopted a performance tax, it applies in every instance where a non-exempt public performance in sound recordings is made. Indeed, there is no basis or precedent for singling out radio broadcasters for such a tax. Hence, to be clear, any change in the law to provide for this new tax may impose a new hardship on every bar, restaurant, retail establishment, shopping center, sports and other entertainment venue, juke box owner and dance and concert where recorded music is played, not merely radio stations. The Committee needs seriously to consider the economic and other consequences on these entities, and on consumers who would ultimately foot the bill.

Justification for Performance Rights in Sound Recordings Cannot Be Gleaned By Comparison With the Intellectual Property Laws of Other Countries.

While proponents of the performance tax for sound recordings in the U.S. often point to the laws of many 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 and less generous than under U.S. law. 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 several times higher than rates paid to the composers.²¹ 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. Among other things, it 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 one cent 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.²²

In many countries, broadcasters might pay lower fees to the composer and/or the record companies might have to pay more to the composers than is true in the U.S. So, the whole music, sound recording, broadcaster pie is split differently.²³

²¹ Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).

²² Performance Rights Study at 2.

²³ AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement, June 2007 at pp. 23-24 ("AEPO-ARTIS Study").

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 who would be 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. That 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.)

“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/>.)

“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.)

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 performers.

Need to Fix Performance Rights For Sound Recordings As Applied to Streaming

While the focus of this hearing is whether the current narrowly defined performance right in sound recordings should be expanded, it is imperative that this Committee keep in mind the critical need of radio broadcasters to obtain reforms in the laws governing the simulcast streaming of radio broadcasts over the Internet. This is a subject about which NAB testified at length in July 2004 before this Committee.

Coupling the powers of the Internet with the longstanding strengths and benefits of local free over-the-air radio provides exiting possibilities for broadcasters and our listeners. Unfortunately, the current legislative scheme imposes conditions and limitations that are totally incompatible with traditional and emerging broadcast practices and the recent decision of the Copyright Royalty Board has resulted in oppressive and unjustified sound recording royalty fees that have made a viable business model for simulcast steaming almost impossible. 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.

²⁴ AEPO-ARTIS Study at II.1.5.a.

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 performance royalty 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.

The recording industry's pursuit of a 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 tax 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.