Statement of

Michael Huppe
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before the

HOUSE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET

**"Music Licensing Part One: Legislation in the 112th Congress"**

on

November 28, 2012

Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee, I appreciate the opportunity to appear before you to discuss the importance of true parity for all radio services and the adoption of rules of the road which ensure musicians are treated fairly. Ultimately, the question before you boils down to this: Should artists be entitled to a fair market price for their works, which form the core input of digital music services, or should they instead be forced to subsidize services that exploit those works for their own commercial gain?

I am Michael Huppe, and I am the President of SoundExchange. SoundExchange represents more than 70,000 artist and 24,000 copyright owner accounts. SoundExchange administers the statutory license for digital radio used by services reaching more than 100 million Internet radio listeners and 23 million satellite radio subscribers.[1] In fact, more than 2,000 digital radio services – like Pandora, iHeartRadio, SiriusXM and Music Choice – rely on the statutory license every month for the rights to the sound recordings that make their businesses possible. Without SoundExchange serving as the "one-stop" administrator for the statutory license, they would all face the difficulty and expense of locating and paying each of the thousands of copyright owners whose sound recordings they want to use.

Our operations are overseen by a board of directors comprised of representatives of those on whose behalf we work – artists and record labels (both major and independent) – meaning that our focus is maximizing the distribution of royalties to those who have earned them. We have built state-of-the-art systems that are always evolving, and we maintain one of the lowest administrative rates in the industry – 5.3 percent in 2011. Our payments to artists and record labels are based on an open and transparent process supervised by our joint board, and we've paid out more than $1 billion in performance royalties to artists and copyright owners since our inception.

In my testimony today, I wish to discuss four topics: First, the statutory license works best when it results in the fair compensation of artists and record labels, which, by definition means that they receive the fair market value of their recordings. Second, there are a number of fundamental problems with the so-called Internet Radio Fairness Act (H.R. 6480) ("IRFA") – a bill that departs significantly from the principle of fairness which must be the foundation of the statutory license. Third, I want to shed some light on the real economics of Internet radio to show how much of the rhetoric has concealed the reality of the statutory regime, and demonstrate that the system, including the Copyright Royalty Board ("CRB"), has worked well and exactly as Congress intended.

[1] Edison Research and Arbitron, "The Infinite Dial 2012," available at http://www.edisonresearch.com/home/archives/2012/04/the-infinite-dial-2012-navigating-digital-platforms.php. SiriusXM's 10Q report for the quarter ending September 30, 2012, available at http://investor.siriusxm.com/sec.cfm.

Fourth, and finally, I discuss the "elephant in the room" whenever we are talking about performance rights for sound recordings. Namely, the fact that terrestrial (i.e., over-the-air) radio is required to pay nothing for the sound recordings that drive its business. IRFA ignores this glaring injustice. Representative Nadler's draft bill, by contrast, both seeks to establish true rate parity and takes the first important step toward rectifying this major defect in U.S. law.

## I. The "willing buyer/willing seller" standard is the proper standard to determine the royalties to be paid by Internet radio services.

The willing buyer/willing seller standard is proper as a matter of principle, and complaints regarding its application to Pandora and other Internet radio services are both inaccurate and grossly overblown.

### *a. If the law is going to give services the right to use sound recordings, at a minimum the law should ensure that creators receive market value for the use of those recordings.*

At its essence, a statutory license involves the forced surrender of property at the direction of the government so that third parties may use it to build their business. The owner of the property (the music) has no say about which services get to use it. The owner has no say over the conditions of its use or the timing of when it will be used. In essence, the owner does not have the ability to withhold that right from anyone seeking to use it for any purpose, as long as they meet the requirements of the statute. For instance, from the moment Pandora started using the statutory license, it had more rights to the repertoire of artists like Adele, Metallica, AC/DC or the Black Keys than did Spotify, which had to directly license music for its on-demand service.

If we are going to have this mandatory surrender of property, the least we can do is ensure that creators receive fair market value when their work is used.

The willing buyer/willing seller rate standard is the best way to fairly compensate creators because it is a standard that ensures that the CRB will base its decisions on actual market evidence. In practice, of course, there is no actual market for noninteractive digital radio because the "market" is distorted by the existence of the statutory license itself. Instead, the CRB has considered evidence of market value derived from *other* parts of the digital music industry that are not subject to a statutory license. In these referential areas, there are sophisticated and willing buyers engaged in arms-length negotiations with sophisticated and willing sellers. This is exactly the type of marketplace evidence on which the rates for the statutory services should be based. By relying on evidence of freely negotiated agreements in the market outside of the statutory license, the CRB also gets the benefit of the market's assessment of the wide variety of factors that are taken into account by parties to those negotiations.

To be sure, there is no way to replicate an exact market price through a judicial proceeding, but the current standard at least ensures that the CRB will attempt to set a rate based on what parties in non-statutory markets have done – thus getting as close as possible to ensuring that artists are being paid a market rate for their work. It is, in short, the best way to determine a fair market price within the statutory regime.

***b. The claims that the current rates are "too high" are wrong, overblown, and based on an incomplete and premature record.***

i. Pandora's rate is not statutorily set at 50 percent of revenues; it is a per-performance floor against 25 percent of revenue.

Pandora's founder, Tim Westergren, has been making the argument that because Pandora's royalty payments last year amounted to 50 percent of its revenue and SiriusXM's royalty payments last year amounted to 8 percent of its revenues, Pandora should pay musicians less. While Pandora's description of its effective royalty rate may be technically accurate, it is misleading in several respects.

First, the current rate for non-subscription streaming under the Pureplay rates used by Pandora is a formula: the greater of 25 percent of total U.S. gross revenues *or* a per-performance rate of $0.0011, rising to $0.0014 in 2015. This means that at its current $0.0011 per-performance rate, Pandora would owe only $4 *per year* for every user who listened to Pandora for 20 hours *a month.*

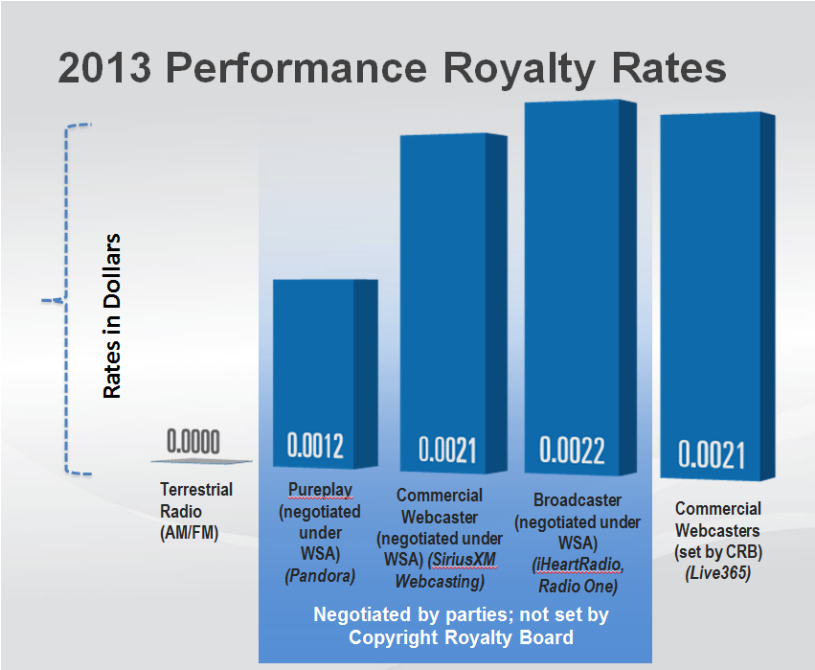
Pandora's statutory royalty rate is thus *not* 50 percent of revenues. The fact that Pandora may currently pay 50 percent of its revenues in performance royalties simply reflects Pandora's (deliberate) choice to focus on building its audience – and thus its usage – while keeping its advertising load and subscription fees low. This is not an uncommon path for Internet companies to take. Like many Internet companies before it, Pandora has focused first on building an audience, growing its user base, and promoting its brand. It has only relatively recently focused on monetizing its audience.

A perfect example of Pandora focusing on growing its user base instead of revenue is demonstrated in a fee that Pandora used to charge its non-subscription users. In 2009, Pandora began to charge "heavy users" in any given month a supplemental fee. Under this policy, if a non-subscription user chose to stream in excess of 40 hours in any given month, that user would be assessed a surcharge of $0.99 for that month. Pandora elected to cease the fee in September 2011, presumably because it was a disincentive for users. In other words, Pandora placed a higher priority on gaining and retaining listeners than on earning revenue.

There may be nothing inherently wrong with this approach. Many companies have followed a similar path, and it is, in any event, Pandora's choice to determine what business model it elects to follow. But it is misleading and inappropriate to suggest that because Pandora has chosen a path which prioritizes growing its listener base over growing revenues, then musicians should therefore be forced to subsidize its choice.

ii. Pandora's per stream rate is actually much lower than its competitors.

Pandora pays a much lower per-stream rate versus its commercial competitors, even among those that negotiated rates rather than have them set by the CRB – parties such as SiriusXM and the National Association of Broadcasters ("NAB"). To illustrate, for 2013, the default commercial webcasting rate set by the CRB, $0.0021 per stream, is the same as the negotiated rate for SiriusXM and lower than the negotiated rate with the NAB ($0.0022 per stream). Pandora, however, will only pay $0.0012 per stream – representing a discount of over 40 percent from what these other services pay.



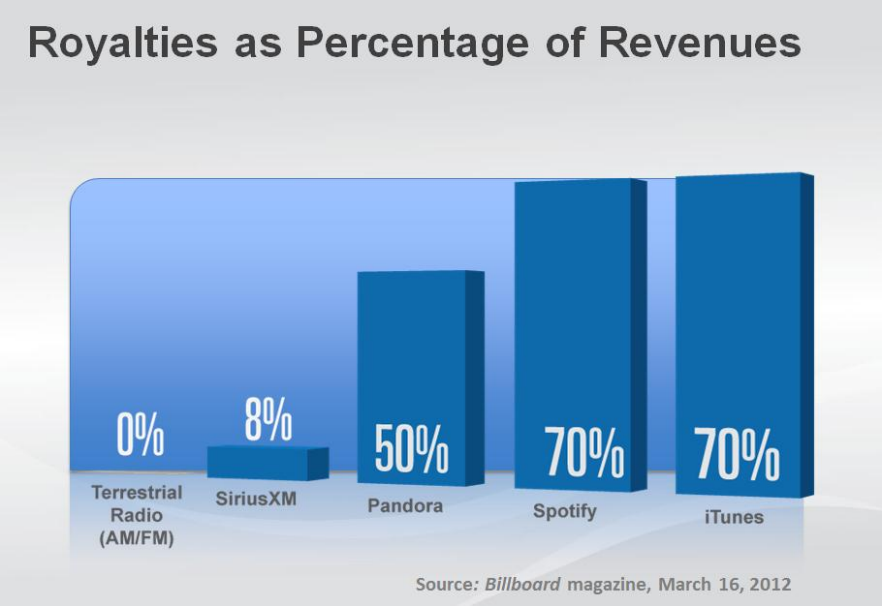

Importantly, Pandora celebrated these rates just three years ago, immediately following the announcement of the Pureplay rates that became available pursuant to the Webcaster Settlement Act of 2009. Specifically, Tim Westergren exclaimed that "the royalty crisis is over" and that "Pandora is finally on safe ground with a long-term agreement for survivable royalty rates."[2] A critical component of the Pureplay rates and terms, as well as the settlements negotiated with the NAB, SiriusXM, and the other parties to the Webcaster Settlement Act deals, was that they were not only for the prior period – the Webcasting II proceeding – but they were forward looking as

[2] http://blog.pandora.com/pandora/archives/2009/07/important-updat-1.html.

well, covering the period that was the subject of the Webcasting III proceeding. In other words, and as a result of voluntary settlements among the parties, SoundExchange settled with more than 90 percent of the webcasting industry *before* the Webcasting III rate case really got underway. In fact, we negotiated rates with the NAB and with SiriusXM (for webcasting) that were in the same range as the market rates that the CRB ultimately adopted. Thus, the argument advanced by some that the statutory system makes it impossible for parties to reach settlements is not only wrong – it is exactly backwards.

iii. <u>It is appropriate for digital music services to pay a substantial portion of their revenue to the musicians that make the services possible in the first place.</u>

Pandora suggests that its rates are out of step with the norm based on a comparison of its rates to the below-market rates enjoyed by SiriusXM. In fact, however, it is SiriusXM's rates which are out of step with the marketplace, given the fact that other competitors in the digital music marketplace actually pay more in royalties relative to revenues. If one looks at competitors to Pandora like Spotify or iTunes, the ratio of cost to revenues for Pandora is certainly within industry norms. As the chart below demonstrates, Spotify's and iTunes' costs for content (i.e. their main input) are approximately 70 percent of their revenues – demonstrating that the effective percentage of revenue rate about which Pandora complains is in fact perfectly consistent with the outcome in the private market.




Again, I must emphasize, when a service's entire business depends on music (or any single input), one should expect music (or that input) to receive a substantial part of the revenue generated by that business. In fact, this is typically the outcome in the market.

iv. As Pandora and other webcasters monetize more effectively, the effective percentage of revenue will drop.

Whether Pandora's costs relative to its current revenues are higher or lower than its competitors, it is interesting that Pandora has been making this "disparity" argument – not only because it is misleading – but because Pandora made a conscious business decision *not* to maximize revenues in the early stages of its business. Pandora followed a purposeful strategy of prioritizing the number of listeners over maximizing revenues. It initially decided *not* to run many advertisements, and its audio advertising load is still very low. It decided *not* to charge a monthly subscription – not even 99 cents – for its services to most listeners. It decided *not* to charge users a small fee for downloading its mobile device app (as many services do), but instead to give it away for free. Pandora's strategy has so far been successful: it was able to undertake a successful IPO in 2011 and currently sits with a market cap of $1.3 billion (as of November 21, 2012). And as I mentioned earlier, it is not SoundExchange's position or intention to dictate to Pandora how to run its business.

But for that same company to run to Congress – after having just raised an enormous sum of money in a successful IPO – and ask for a hand-out is an outrage. Even now, when its shareholders are asking the company to shift strategy and focus more on revenues and profitability, Pandora only runs about 2 to 3 audio ads per hour,[3] and recently many of those ads appear to be filled with calls to action in connection with IRFA. Similarly, Clear Channel has announced that it isn't going to run any ads at all on iHeartRadio until at least April 2013.[4] To be clear, we are not suggesting that Internet radio services need to run as many advertisements as traditional terrestrial radio – or even that they have to run advertisements at all. Indeed, the nature of Internet radio is such that there are many new and creative ways to monetize a service beyond advertising. And even for the advertising, the mechanics and functionality of Internet radio services means they have the potential to run better, more effective, and more lucrative advertising once they tap fully into the market. But whether it is an ad supported or some other revenue model, the statutory license must have a fair market philosophy in order to drive services to build a business that fairly compensates artists. If Pandora chooses to focus on an ad supported model, that choice should not mean that artists receive less than they are due.

We believe in the future of advertising supported Internet radio, but if Internet radio companies choose to prioritize number of listeners over revenues at this stage, there's no reason the artists and copyright owners on whose backs the new services are built should be forced to subsidize that strategy.

v. Internet radio is on the verge of a breakthrough – the disruption of traditional radio.

[3] http://www.fi-magazine.com/Article/Story/2012/10/Dealers-Tuning-In-To-Pandora/Page/2.aspx.
[4] http://kurthanson.com/news/iheartradio-custom-stations-remain-commercial-free-%22until-april%22.

SoundExchange believes that the growth of Internet radio will continue, and that Pandora and other Internet radio companies will in turn increase their revenues and profits. One need look no further than the statements of Pandora's executives themselves:

> "*We generate considerable revenue from mobile. I believe we're one of the biggest mobile advertising sites in the country. Today, mobile advertising is more nascent than desktop advertising, which took 10 to 15 years to develop, but mobile is growing far faster. Key pieces of the puzzle, like third-party measurement, are just coming in. We'll benefit tremendously from that,"* Joe Kennedy, Pandora CEO, June 2011.[5]
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> *"With now almost 6 percent share of all radio listening in this country we are effectively larger than the largest AM or FM radio station in many markets in this country and on our way to being larger in most markets. What that means is to the traditional radio advertiser Pandora is a highly relevant compelling choice,"* Joe Kennedy, Pandora CEO, CNBC, May 2012.
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> *"We've seen tremendous growth in the adoption of mobile by advertisers. In fact, we more than quadrupled our mobile ad revenue last year from about $25 million to over $100 million,"* Joe Kennedy, Pandora CEO, CNBC, May 2012.

So who are we supposed to believe? The Pandora that tells Wall Street its best days are ahead? Or the Pandora that is asking Congress to bail it out?

We think Pandora is fundamentally right about the promise of Internet radio. For example, look at the growth in its revenues. According to a report by BIA/Kelsey, Internet radio revenue in 2010 was $410 million. In 2011, that grew to $440 million, and 2012 is projected to reach $510 million in revenue.[6] Pandora's revenue has grown from $55 million in its 2010 fiscal year to $274 million in 2012.[7] And more than a year after its successful IPO, the company is valued at $1.3 billion.

Clearly, Pandora does not need to be subsidized by artists, especially when it is in its infancy and the numbers are so promising. In light of the relative youth of Pandora as a company, and its projected growth pattern (as demonstrated in recent years and lauded for the future years), it would be ill-advised for Congress to step in and manipulate the market to subsidize a thriving and innovative company.

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[5] http://allthingsd.com/20110617/pandora-had-a-good-wednesday-and-a-terrible-thursday-what-about-the-next-couple-years/.

[6] http://www.biakelsey.com/company/press-releases/120410-Radio-Industry-Revenues-Flat-in-2011,-While-Online-Revenues-Jump-15.1-Percent.asp

[7] Pandora's 10K report for the fiscal year ending January 31, 2012 available at http://sec.gov/Archives/edgar/data/1230276/000119312512120024/d280023d10k.htm.

Internet radio, for all its recent explosive growth, is still in its relative infancy, especially when it comes to the disruption of traditional radio. Discussing Pandora's current revenue model, based on this year's numbers, is like assessing Google in 1999 or Facebook in 2006. It's simply too early to tell where Internet radio is headed, but it is clear that it is poised for continued explosive and transformative growth.

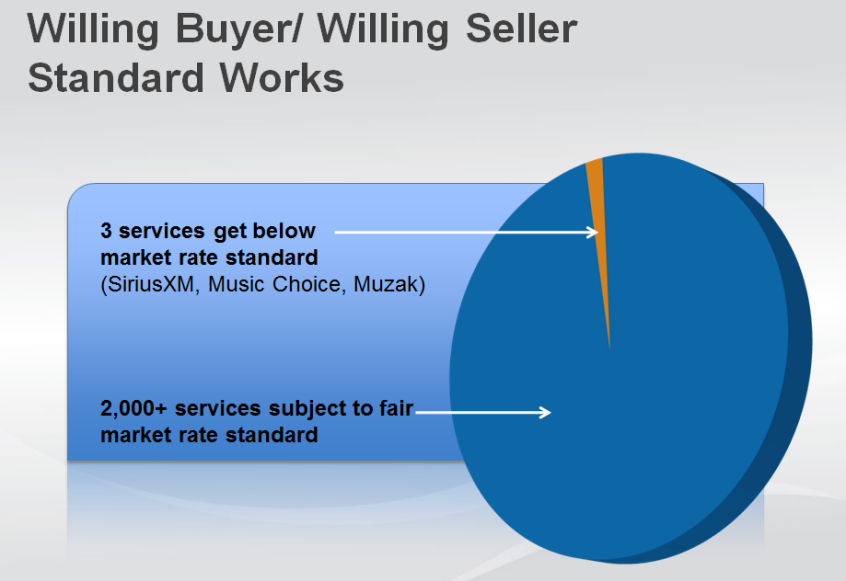
## II. Any new legislation should be fair in fact, not just in name, and establish true rate standard parity.

### *a. IRFA would drag the thousands of services now subject to a market rate standard down to the below market rate standard that only three services now enjoy.*

At its core, the driving motive behind IRFA is clear. It is, quite simply, an attempt by webcasters to reduce the royalty fees that they pay to recording artists and copyright owners for the privilege of using their sound recordings on digital radio. This bill would be a huge step backwards – applying an old standard currently used by only three "grandfathered" digital services (SiriusXM for satellite radio, Music Choice, and Muzak) for their performance of sound recordings.

Congress should not be asking whether 2,000 services should enjoy the perks enjoyed by the three grandfathered services. Rather, Congress should be asking why the law forces artists to subsidize successful companies like SiriusXM under the outdated 801(b) standard – a company that is now sitting on hundreds of millions of dollars in cash and continues to outperform expectations in growth and revenues.

It is important to note that the three grandfathered companies operating under the 801(b) standard are granted that below-market subsidy merely because they happened to be in existence in 1998 – in other words, because they are "old." At the time of passage of the Digital Millennium Copyright Act, these companies were given this exemption based upon a theory of business reliance. While we might dispute whether this theory was justified in 1998, any possible justification for providing a subsidy to these services no longer has merit following the intervening 15 years. It should not be the case that 801(b) is used to subsidize any company – regardless of its size, business model, or degree of success – simply because it had the good fortune of existing in 1998.




Wouldn't true "fairness" dictate that SiriusXM and the other two "grandfathered" services simply pay at the modern fair market value standard? That is the fairest, most economically-sound path to true rate standard parity, a goal which SoundExchange supports.

The main goal of the IRFA, however, is radically different. It is to lower the rate standard for all digital services down to the antiquated below-market rate, rather than requiring that all services pay at the more reasonable fair market rate. This isn't "fair;" it is predatory – particularly when you consider that the law allows digital radio services to build their businesses off any commercially available work without music creators' having the ability to withhold. At the very least, the law should require that those creators be compensated at a fair market rate.

***b. IRFA suppresses innovation by subsidizing a specific category of businesses.***

Let's talk about why it is not appropriate for Pandora (and other would-be champions of innovation and technological disruption) to be supporting the antiquated 801(b) standard. The 801(b) standard favors old technology over new technology. It also favors status quo over innovation by allowing the CRB to insulate Pandora and other Internet radio services from the so-called "disruptive impact" of market rates.

It is ironic that Pandora and others in the technology world now ask the government to step in to protect them from the consequences of the market. Under the antiquated 801(b) standard, which Pandora seeks, the CRB Judges are directed to set the rates according to the following criteria:

(A) To maximize the availability of creative works to the public.

(B) To afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions.

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication.

*(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. (Emphasis supplied.)*

That last factor bears repeating – "to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices." The IRFA would extend this protection against "disruptive impact" to every online radio service taking advantage of the statutory license. But don't this country's most innovative companies embrace "disruption?"

Look at what this country's technological leaders have said:

- "*One of the things about technology is that technology is fundamentally disruptive … and my experience now, and I've done this for a long time, is that people are always shocked at how real disruption occurs and how much change can occur through empowerment,"* Eric Schmidt, Google Executive Chairman, October 2010.[8]

- *"As a company, one of our greatest cultural strengths is accepting the fact that if you're going to invent, you're going to disrupt,"* Jeff Bezos, Amazon Founder and CEO, November 2011.[9]

- *"Wired was founded on the notion that change is good…Disruption is the ultimate change,"* Chris Anderson, *Wired* Editor-in-Chief, May 2011.[10]

And Pandora has followed suit, emphasizing its role in disrupting traditional radio:

- *"We have the audience to massively disrupt this market,"* Joe Kennedy, Pandora CEO, May 2012. [11]

- "*We now find ourselves at an exciting moment, at the cusp of a…substantial disruption in one of the largest consumer media categories – radio,"* Joe Kennedy, Pandora CEO.[12]

- "*Pandora is transforming the last medium yet to be disrupted by the Internet,"* Tim Westergren, Pandora Founder and Chief Strategy Officer.[13]

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[8] http://arstechnica.com/tech-policy/2010/10/does-google-still-qualify-for-sainthood/.
[9] http://www.wired.com/magazine/2011/11/ff_bezos/2/
[10] http://www.businessnewsdaily.com/929-distruptive-technologies-jumpstart-economy-wired-conference.html
[11] http://www.radioworld.com/article/pandora-looks-to-disrupt-am-fm-advertising/213619
[12] http://soundcloud.com/edwardryan/joekennedy-0

But while Pandora champions its own disruption of the consumer media industry to Wall Street, it wants Congress to protect it from the ostensibly "disruptive" impact of paying fair market value for the music it plays.

Arguing for business progress while at the same time seeking to minimize "disruption" through artificially low rates for its own use of music is inherently contradictory. After all, innovation is based on disruption. And capitalism rewards disruption. Pandora and those from the technology sector who support it should not be able to glorify disruption when it suits them, and yet bemoan it when they are seeking a subsidy.

### *c. IRFA contains a litany of other unfair provisions clearly designed to tip the balance decidedly in favor of Internet radio services.*

Just as bad, the bill amounts to a wish list for copyright users, with a host of one-sided provisions that would politicize the CRB and impose limits on copyright owners' and artists' ability to participate fairly in rate setting proceedings. It would also require the CRB to base its decision on evidence that doesn't exist and ignore available evidence of how the market and the music industry actually works.

To name just a few of the troubling provisions proposed in this bill:

- The requirement that at least one judge should have expertise in economics would be eliminated, even though the judges are supposed to be setting rates based on market evidence.
- The ability of copyright owners and artists to effectively participate in rate settings, and their ability to speak freely about critical public policy issues regarding the statutory license, would be radically hamstrung.
- The bill would inexplicably place the burden of proof solely on copyright owners and artists.
- Normal and customary market benchmarks, such as rates paid for on-demand services, or any rates agreed to by major record labels, would no longer be usable as evidence, even though that is the best evidence of how the industry actually works.
- Marketplace evidence would be limited to agreements that do not currently exist or shed light on the market.
- The bill would impose new, one-sided burdens on record companies and recording artists in the rate-setting proceedings.
- Copyright judges would need to be confirmed by the Senate rather than appointed by the Librarian of Congress, exposing the rate-setting process directly to electoral politics.

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[13] http://www.nysemagazine.com/pandora?utm_medium=etoc&utm_term=jan12&utm_source=pandora&utm_campaign=article

Indeed, it is these provisions (and more) that in many ways reveal IRFA for what it is: a wish list for the digital music services completely unmoored from any principles of fairness.

## III. The reality instead of the rhetoric: the Internet radio industry is thriving under the current statutory regime.

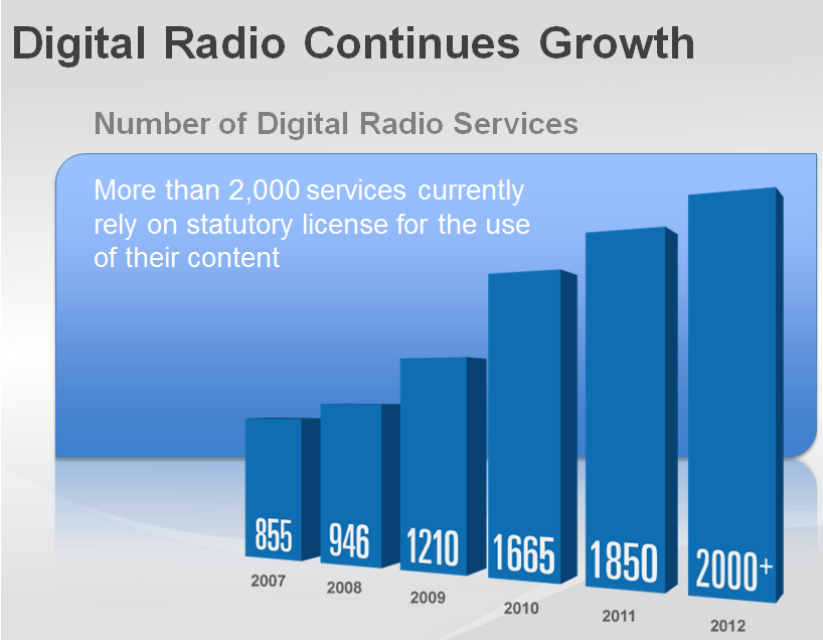
### *a. The statutory license has enabled tremendous growth, in part, by providing services a "one stop shop" for sound recording rights.*

Congress created the statutory license for digital music to make it easy for webcasters or satellite radio to pay for the music they use to operate their businesses. As a result, these digital radio services do not need to negotiate individual deals with thousands of rights holders and recording artists – or ask permission to play every track. This is an incredible gift for online music services, and Pandora itself has confirmed that it depends on the statutory license for the rights to the sound recordings on which its entire business is based. For Pandora and other entrepreneurs seeking to start a digital music service, the statutory license provides an easy and quick method of obtaining a license and paying royalties. The statutory license gives these services the right to stream every sound recording ever commercially released, merely by filing a short document and meeting the terms of the statute.

SoundExchange, as the steward of the statutory license, thus offers a one-stop shop for sound recording rights. Not only does the statutory license eliminate the need to seek thousands of license agreements; the collective management of the license by SoundExchange eliminates the need for services to make thousands of separate payments and deliver thousands of separate reports to copyright owners and artists.

The growth of digital radio services using the statutory license is astounding. Digital radio is an increasingly substantial portion of all radio listening in this country, and, as we have stated above, today more than 2,000 music services use the statutory license, representing tens of thousands of individual channels and stations. These 2,000 services represent a huge increase over the past five years (see chart),[14] and are a testimony to the benefits that the current licensing regime provides.

[14] Based on number of services reporting to SoundExchange, with prior years adjusted to account for broadcast industry consolidation since 2007.




***b. Internet radio provides a critical growing revenue stream for the music industry at a time when other sources of revenue are shrinking.***

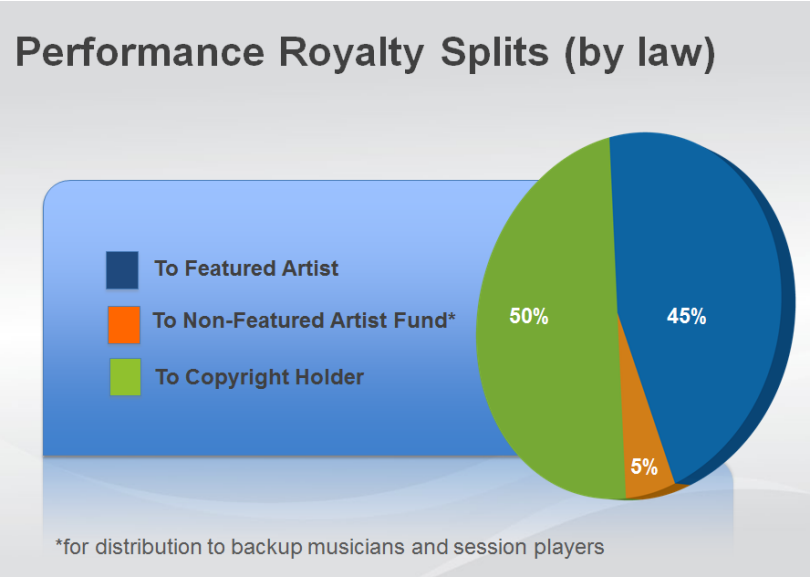
According to the "Music Acquisition Monitor," a November 2012 report from market research company The NPD Group, in the past year, the Internet radio audience has grown 27 percent, as the on-demand music audience has grown by 18 percent, year-over-year. As Internet radio and on-demand listening has increased, the number of consumers who reported listening to CDs dropped 16 percent, and the number of consumers listening to digital downloads declined by 2 percent.[15] This means that Internet radio provides a critical growing revenue stream for record labels and recording artists at a time when other sources of revenue are shrinking.

***c. Artists participate directly and immediately in this new revenue stream.***

One critical component of the revenue stream generated by the statutory license is that digital performance royalties are split 50/50 between the sound recording owners on the one hand and the featured artists (who receive 45 percent of the performance royalties), session vocalists and session musicians on the other (who receive 5 percent of the royalties). If the featured artist is also the copyright owner, that artist receives 95 percent of the royalties. This split was built into the law in response to the efforts of the artists' unions, AFM and AFTRA (now SAG-AFTRA) to ensure that performers would benefit immediately, directly and transparently from the new digital performance right. Importantly, the artist money is paid *directly* to the artists on a nonrecoupment basis,

[15] https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-internet-radio-and-on-demand-music-services-rise-putting-pressure-on-traditional-forms-of-music-listening/.

meaning that the artists keep 100 percent of their digital radio royalty regardless of whether they are recouped under their record deals, current or historical. And the fact that non-featured musicians and performers meaningfully participate in the downstream revenue opportunities from this new and growing revenue source means that not only does the current digital radio model provide new and growing sources of income for artists, but it distributes that income across a larger and larger number of recipients.




## IV. Any Legislation Related to the Performance Right Must Address the Lack of a Terrestrial Performance Right

### *a. IRFA does not address the single biggest injustice – the lack of a terrestrial right.*

The "Internet Radio Fairness Act" is fair in name only. This bill seeking supposed "fairness" and "parity" utterly fails to address the biggest inequity of all when it comes to radio: the fact that terrestrial radio pays absolutely nothing for the sound recordings on which that multi-billion dollar business is based. It is futile to even begin discussing "fairness" or "parity" in radio while ignoring the most egregious inequity of the system.

Of all the ways we listen to music, terrestrial radio is the only one that doesn't pay anything to the performers that bring the music to life. The U.S. continues to be an outlier in this regard and is the only industrialized country that does *not* recognize a copyright for the performance of sound recordings for terrestrial transmissions. Every music platform, including terrestrial radio, should pay a performance royalty.

A bill aimed at genuine fairness must necessarily address this omission in U.S. law. Legislation that maintains such a glaring inequity on one of the music industry's biggest performance platforms is hardly "fair" at all.

***b. Prior bills, and current draft legislation, are a move in the right direction.***

In order to create true parity and fairness, Congress must create a legal performance right for sound recordings played on all platforms – and most importantly terrestrial radio.

In that regard, I want to thank this Committee and former Chairman Conyers for favorably reporting on a bipartisan basis the Performance Rights Act in 2009. Many of the stalwart supporters of that bill are here today. I also want to thank Representative Nadler for working on an interim solution to this decades-long injustice. Representative Nadler's draft legislation recognizes the injustice of denying "fair pay for airplay." His discussion draft proposes a 21st century marketplace standard that treats artists and music services fairly and equally and takes a step toward remedying the lack of a performance right for terrestrial radio. Specifically, his draft bill would not only adopt true rate-standard parity – establishing the "willing buyer/willing seller" standard for all digital music services – it would also take a first, important step forward toward correcting the decades long injustice of the absence of a performance right. While Representative Nadler's draft would not actually create a terrestrial performance right, it would require broadcasters who also simulcast their terrestrial streams to pay a surcharge that reflects what the market value of their over-the-air broadcast would be if a terrestrial performance right properly existed.

SoundExchange agrees with Representative Nadler that the current lack of a performance royalty for terrestrial radio airplay is a significant inequality and grossly unfair. Indeed, it is arguably the single greatest injustice in the music licensing landscape today. We cannot condone a race to the bottom when it comes to rate standards and compensation for artists, and we applaud Representative Nadler for providing a discussion draft that would provide artists with fair compensation for the valuable creations they share with the world.

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This is an exciting time for music fans. Radio is being transformed as we speak. But the law should not lose sight of the fact that these services are nothing without music, and that it is the musicians who give life to Pandora and its peers. If you are going to force creators of music to relinquish their property, they at least deserve a market rate for their work. As musical artists like Rihanna, Billy Joel, Maroon 5 and Sheryl Crow stated in their message in *Billboard* magazine earlier this month, let's not gut the royalties that thousands of musicians rely

upon. Instead, let's work this out as partners and continue to bring fans the great musical experience they rightly expect.


Mr. Chairman and Ranking Member Watt, I appreciate the opportunity to testify today. Moreover, SoundExchange looks forward to working with Congress to develop a comprehensive approach that treats creators of music fairly and ensures that all music platforms properly compensate the musicians upon whose backs their very businesses are built.

I look forward to your questions.