



**Hearing on H.R. 4789, the "Performance Rights Act"**

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

**June 11, 2008**

**Statement of Steven Newberry  
Commonwealth Broadcasting Corporation**

**On behalf of the National Association of  
Broadcasters**

Good afternoon, Chairman Berman, Ranking Member Coble and members of the subcommittee, and thank you for inviting me to testify today. My name is Steve Newberry, and I am President and CEO of Commonwealth Broadcasting Corporation, which operates 23 stations in Kentucky. I am testifying today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

### **Introduction**

For decades, American radio broadcasters and the music and recording industries have worked and thrived together. Record labels and performing artists profit from the free exposure provided by radio airplay, while local radio stations receive revenues from advertisers that purchase airtime to sell their products and services. As a result of this mutually beneficial relationship, the United States proudly claims the strongest music, recording and broadcasting industries in the world.

I urge the Committee to see H.R. 4789, the Performance Rights Act, for what it is, an enormous fee 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.

### **H.R. 4789 Does Not Create “Equity” – It Takes a Fair System and Makes It Unfair**

The recording industry attempts to characterize the issue as one of “parity.” But today there is no actual “parity” in the world of music licensing, at

least not in terms of symmetry of compensation. Artists and songwriters are compensated differently, and different media are subject to different royalty rates, depending on the nature of the delivery system. In fact, that was the very reason Congress created a limited digital performance right in the first place – to compensate for perceived threats from certain types of digital transmissions but not others. While the question may be asked whether current royalty rates for various media reflect a rational basis to account for their differences, there is no reason to believe that levying a performance fee on local radio broadcasters will establish any sort of real “parity” in the complex arena of music licensing.

Although years ago it was an open question as to whether an artist’s rendition of a song contained any copyrightable material, today no one seriously questions that performers bring artistic value to the songs that they interpret. Musical performers are respected as artists who create for fulfillment of their own creative passion, for the enjoyment of audiences and for the consuming public worldwide. And if they are both talented and lucky, performers might be able to fashion a viable career in the music industry. Today no one would seriously suggest that performers do not enrich and enhance musical compositions with their artistry, experience and interpretations of the songs. It is, however, indisputable that performers and composers are compensated for their contributions to sound recordings quite differently.

Royalty allocation to musical work and sound recording copyright owners has traditionally been unsymmetrical. Music producers and songwriters generally receive the bulk of their royalties via the public performance of their musical

compositions, while record labels and recording artists generally receive most of their royalties via the sale of physical copies (*e.g.*, CDs, digital downloads), concert tickets, and merchandise.

This structure has developed piecemeal over the years, with Congress granting a certain limited number of monopoly rights sufficient to motivate composers and performers to create and disseminate musical works for the good of the public. For example, Congress granted composers a limited monopoly over their compositions with regard to deciding the first person who may record them. Once that first person has recorded it, any other performer is free to record the song without obtaining the composer's permission. Composers would receive the statutory mechanical royalty of a few pennies per song if their song is, for example, recorded on a CD, but they were expressly denied unlimited control of their creative output.

Not only are artists and songwriters compensated differently, but different media are subject to different royalty rates, depending on the nature of the delivery system. Moreover, differing standards apply to different services. Thus, the Copyright Royalty Board set royalties for satellite radio – XM and Sirius – at 6 to 8 percent of revenue (originally set at 13 percent and then adjusted downward, due to consideration of so-called “fairness factors”), far lower than the rate assessed on Internet radio, which can run to several hundred percent of a small webcaster's revenues (based on the onerous “willing buyer/willing seller” standard).

The recording industry also contends that broadcasters should pay a performance fee as a matter of “fairness.” But the symbiotic relationship that has evolved over the decades is actually the very essence of fairness. Both the radio and recording industries profit from the tremendous promotional value of the performance of music on local radio stations, a fact which Congress has repeatedly recognized over the decades. The recording industry invests money promoting songs in order to garner radio airplay and receives revenues when audiences like and purchase the music they hear. Reciprocally, playing music generates value for local radio and its advertisers. The result is that radio stations have been the driving force behind record sales in this country for generations.

Data from The Nielsen Company (Nielsen SoundScan and Nielsen BDS) and Pollstar track the relationship between “spins” of songs on the radio and the resulting sales and clearly demonstrate that artists and record labels derive significant value from local radio airplay.

Although there have been few efforts to quantify the value of this promotional benefit, a soon to be released study finds that a significant portion of industry sales of albums and digital tracks can be attributed to radio airplay – at minimum 14 percent and as high as 23 percent. Local radio is providing the recording industry with significant, incremental sales revenues or promotional sales benefit that range from \$1.5 to \$2.4 billion annually.

The recording industry claims to be trying to close a “loophole” in the law but neglects to point out that H.R. 4789 is specifically targeted at the over-the-air broadcasts of local radio, leaving untouched numerous other entities and venues

that play recorded music and are covered in foreign jurisdictions, such as hotels, restaurants, bars, nightclubs, sporting arenas, shopping malls, retail stores, health clubs, etc.

Further, by providing a \$5,000 cap for what the recording industry estimates to be 75 percent of broadcasters (which would be devastating for each small broadcaster, although considered minimal by the recording industry), the purpose of the proposed legislation is clearly not to remove an existing “exemption” but, instead, to siphon funds from the coffers of the top 25 percent of radio broadcasters into a recording industry suffering from flagging revenues due to piracy and an antiquated business model.

**The Impact of a New Performance Fee on Local Radio Broadcasters Would Harm the Health of Local Radio Stations Across the Country**

The recording industry’s legitimate difficulties with piracy and its failure to adjust to the public’s changing patterns and habits in how it acquires sound recordings was not a problem created by local radio broadcasters, and local radio broadcasters should not be required, through a new 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 new fee 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 fee, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, ultimately providing less exposure to music. This could not only adversely impact the recording industry, but the music composers and publishers as well.

A new performance fee would have a particularly adverse impact on local radio stations in small and medium-sized markets that are already struggling financially. Were such additional fees 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, the coverage of local news and public affairs, and other valuable programming. In addition, as broadcasters try to adapt their traditional business models to include new technologies, they are required to pay sound recording performance fees on these new digital uses on the Internet and other new technologies, including streaming, podcasting, digital downloads, etc.

As local radio broadcasters have demonstrated on many occasions, stations serve the public interest by airing local and national news and public affairs programming and a variety of other locally produced programming that serves the needs and interests of their audiences, including sports, religious and other-community-oriented programming.<sup>1</sup> No other radio service, including satellite or Internet, provides this amazing level of service to communities across the county.

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<sup>1</sup> See, e.g., FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Alan Harris at 2 (May 26, 2004) (three Wyoming radio stations broadcast 72 local newscasts every week, about 40 sportscasts, and a daily public affairs interview program); FCC Broadcast Localism Hearing, Monterey, CA, Statement of Chuck Tweedle at 3 (July 21, 2004) (three Bonneville radio stations in Bay area broadcast more than four hours of locally produced newscasts every week); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry Hanszen at 2-3 (Jan. 28, 2004) (on a typical day, two small market Texas radio stations broadcast five local newscasts).

The commitment of local radio broadcaster to public service and their local communities can be further measured by their tangible community services. In calendar year 2005, the average local radio station ran 169 public service announcements (PSAs) per week. This is the equivalent of \$486,187 in donated airtime per radio station per year, or a total for all radio stations of \$5.05 billion.<sup>2</sup> Sixty-one percent of the PSAs aired by the average radio station during 2005 were about local issues, and 71 percent of radio stations aired local public affairs programs of at least 30 minutes in length every week during the year. *2006 Broadcast Community Service Report* at 5.

Moreover, about 19 out of 20 radio stations reported helping charities and needy individuals, and supported disaster relief efforts in 2005. Radio stations across the country raised approximately \$959 million for charity and additional sums for disaster relief. *Id.* Awareness campaigns organized and promoted by local broadcasters covered the full range of issues confronting American communities today, including alcohol abuse, education and literacy, violence prevention, women's health, drug abuse, and hunger, poverty and homelessness. Local stations further supported and organized community events such as blood drives, charity walks and relays, community cleanups, town hall meetings, health fairs and many others. *Id.* To illustrate the service provided by radio broadcasters to their communities, in just one day last month, Dick Purtan, the morning host of WOMC-FM in Detroit, raised a stunning \$2,398,783 in his

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<sup>2</sup> National Association of Broadcasters, *National Report on Broadcasters' Community Service* (June 2006) (Online available at <http://www.nab.org/publicservice>) (*2006 Broadcast Community Service Report*).

annual radiothon for funds for the homeless and hungry via the Salvation Army's Bed and Bread Program.<sup>3</sup>

Additionally, broadcasters provide a unique community service – when a broadcast station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. A broadcaster can help an organization make its case directly to local citizens, to raise its public profile and to cement connections with in local communities. As a trusted source, a broadcaster can help an organization better leverage its fund raising resources and expertise, its public awareness and its educational efforts.

It goes without saying, however, that maintaining this high level of local programming and other services requires radio stations to be economically sound. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the FCC concluded 15 years ago, the radio “industry’s ability to function in the ‘public interest, convenience and necessity’ is fundamentally premised on its economic viability.”<sup>4</sup> Any one concerned about the service of radio stations to their local communities and listeners must necessarily be concerned about these station’s abilities to maintain their economic vibrancy in light of new fees that could be levied though H.R. 4789. All of these local and community services could be jeopardized under this bill.

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<sup>3</sup> John Smyntek, *Purtan/Salvation Army Radiothon Passes \$2 Million Mark in Spite of Tough Economy*, Detroit Free Press (Feb. 23, 2007).

<sup>4</sup> *Report and Order*, 7 FCC Rcd 2755, 2760 (1992).

## **Comparison with Other Countries' Laws Does Not Justify the Imposition of a New Performance Fee in the United States**

While proponents of a new U.S. performance fee for sound recordings often point to the laws of foreign countries to justify a performance fee, such an argument ignores key differences in the American legal and broadcast structures. 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 than under U.S. law. Although U.K. copyright owners have a right of remuneration for the performance of their sound recordings, protection in the U.K. extends only 50 years after the date of the release of a recording, as compared to 95 years in the U.S. This was no oversight or anomaly on the part of the British Government, which recently considered and declined to extend the term past its current 50 years, despite fierce lobbying from the British music industry.

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.<sup>5</sup> In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

Governments in many foreign countries adopt policies to promote local artists, composers and national culture through a variety of means, including imposing performance fees on recordings and exercising control over broadcasting content. For example, the Canadian Broadcasting Act states that the purpose of the Canadian broadcast system is to provide “a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,”<sup>6</sup> and that it should “serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada.”<sup>7</sup> Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.<sup>8</sup> French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.<sup>9</sup>

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<sup>5</sup> Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).

<sup>6</sup> Canadian Broadcasting Act, § 3(1)(b).

<sup>7</sup> *Id.* at § 3(1)(d)(i).

<sup>8</sup> <https://www.cab-acr.ca/english/keyissues/primer.shtm>.

<sup>9</sup> <https://www.cab-acr.ca/english/keyissues/primer.shtm>; see also, [http://www.media-awareness.ca/english/issues/cultural\\_policies/canadian\\_content\\_rules.cfm](http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm).

The U.S. has the most robust and diverse radio system in the world which, among other things, has helped spawn the most lucrative recording industry in the world. The American commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not, and do not, receive any subsidy from the government or their listeners. Many, and in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government and tax dollars. The fact that under those systems the governments also chose to subsidize their own recording industries and national artists by granting performance fees and paying royalties from government-owned or subsidized stations does not mean this is an appropriate system for the U.S. In this regard, it is significant to note that the U.S. recording industry that operates under a regime with no performance fees, is larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance fee regimes.<sup>10</sup>

## **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 local radio stations across America, the recording industry would suffer immense economic harm. Local 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

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<sup>10</sup> Performance Rights Study at 2.

music and where the desire on the part of the consumer to acquire the music begins.

Efforts to encourage Congress to establish a new performance fee 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 new performance fee 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 levy, and local radio should not be responsible for the loss of revenue from physical sales in the recording industry. A new performance fee 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.