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

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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 on H.R. 4789, the Performance Rights Act. My name is Charles Warfield, and I am President and COO of ICBC Broadcast Holdings serving primarily African American communities in New York City, San Francisco, Columbia, South Carolina and Jackson, Mississippi. I am testifying today on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

Introduction

Recently, the financial dominance of the major record labels has been threatened by the emergence of digital technologies, alternative distribution channels, changes in consumer behavior and a reduction in market entry barriers. Consequently, the recording industry has gone in search of new revenue streams to make up for these losses. One of its most potentially lucrative strategies is trying to convince Congress to use the Copyright Act to impose a new obligation on local radio broadcasters, in the form of an additional fee for the benefit of the artists and record labels for playing recorded music on free, over-the-air radio.

But radio broadcasters already contribute substantially to the United States' complex and carefully balanced music licensing system, a system which has evolved over many decades and has enabled the U.S. to produce the strongest music, recording and broadcasting industries in the world.

The simple reality is that broadcasters are not responsible for the financial woes of the recording industry. Particularly in the current highly competitive environment, where local radio broadcasters are struggling to develop their own business models that address the realities implicit in new media, it makes little sense to siphon revenues from broadcasters in order to prop up the recording industry's failing business model.

The recording industry characterizes its attempts to develop a new revenue stream at the expense of broadcasters as the closing of a "loophole" and the ending of an "exemption." But prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings. At that time, Congress created only a narrow digital performance right, in order to address very specific concerns about copying and piracy issues. And for more than 80 years, Congress, for a number of very good reasons, has rejected repeated calls by the recording industry to impose a fee, which broadcasters would consider a "performance tax," on the public performance of sound recordings. There is no reason to change this carefully considered and mutually beneficial policy at this time.

Since Congress created a digital performance right in sound recordings, in response to perceived threats from certain digital technologies, the recording industry has ample means to exploit the promise of the Internet and mobile devices. Currently, download services (such as iTunes) are the dominant digital format, but, as the recording industry becomes increasingly digitally literate, new revenue streams spring up, and downloads now exist in a mixed economy with

subscription services, mobile mastertones, new advertising-supported models, and video licensing deals on sites like YouTube and MySpace.

Recent changes in production, distribution and consumer behavior patterns have caused recent losses for a recording industry that has been slow to adapt to them, but they also hold promise for the future. The explosion of digital sales, the proliferation of MP3 players, Internet activity and the comfort of younger generations with new technologies all suggest that new opportunities for profit abound. Although the two billion dollar decline in CD sales from 2004 to 2006 is not yet offset by the $878 million in digital download revenues in 2006, these figures are somewhat misleading since the profit margins generated by digital sales are larger than those associated with physical CD sales, and digital sales are increasing exponentially. Further, there are no longer physical constraints on inventory. Thus, independent artists are no longer restricted by a store's ability to carry expanded inventories that may or may not include their recordings. Combining these new opportunities for artists and record labels to succeed in the competitive marketplace with cost savings due to digital distribution, it is easy to conclude that potential revenue from paid downloading bodes well for the future of the recording industry.

Local Radio Broadcasters Provide Significant Promotional Value to Artists and the Recording Industry

As Congress has repeatedly recognized, local radio broadcasters provide tremendous practical and other benefits both to performing artists and to their record labels. 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. As the NAB has previously testified on this issue, artists consistently and effusively recognize the fact that local radio airplay is invaluable. On behalf of the Recording Artists' Coalition, Don Henley candidly admitted in his 2003 testimony before the Senate that getting a song played on the radio is "the holy grail" for performers and record labels.[1]

But the promotional value of local radio airplay is also tangible and quantifiable. 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. See Attachment A. The data shows that the when music is aired on the radio, record sales go up.[2] Moreover, the vast majority of listeners identify FM radio as the place they first heard music they purchased. With an audience of 235 million listeners a week, there is no better way to expose and promote sound recordings.

Importantly, a soon to be released study by economist James Dertouzos indicates that radio airplay increases music sales. 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

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[1] Transportation Committee Hearing on Media Ownership: Radio Industry, January 30, 2003.

[2] Music airplay and sales were analyzed for 17 artists covering all genres and varying levels of success such as Velvet Revolver, U2, Rascal Flatts, Linkin Park, Green Day, Bruce Springsteen, The White Stripes, Taylor Swift, and Josh Groban.

recording industry with significant, incremental sales revenues or promotional sales benefit that range from $1.5 to $2.4 billion annually.

In the Dertouzos Study, five econometric models were tested to determine the relationship between the sale of albums and digital tracks and exposure to music on local radio. Each of the five models indicated that music exposure had a positive and statistically significant impact on retail music sales. Across all models, results were especially noteworthy because of their magnitude, their high statistical significance and because they were remarkably insensitive to a variety of econometric methods, assumptions and measurement techniques.

The analysis of economic models indicates that new performance fees imposed on local radio stations may induce stations to change program format and/or the amount of music played. Some smaller stations could find a new fee too burdensome and go out of business. And, ultimately, much of the promotional benefit would be lost.

The Undercompensation of Artists Is the Result of Their Contractual Relationships with the Record Companies

Advocates for H.R. 4789 often raise the specter of overworked and underpaid performers as the supposed beneficiaries of such a fee. The history of the treatment of performers by record labels makes any assumptions that performers meaningfully would share in any largess created by a performance fee highly dubious at best. 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 percent of the performers.[3] A performance fee will take money out of the pockets of local radio stations and

[3] AEPO-ARTIS Study at II.1.5.a.

other businesses, and put it in the hands of record companies and a few top-grossing performers. Even under H.R. 4789, a full 50 percent of the fee would go to the record label, although the performers are arguably the reason this bill is being considered.

Even those countries with sound recording performance rights, which proponents of a new performance fee often point to as models, have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists.[4] Imposing a new performance fee would not alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.[5]

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[4] "Indeed, in the past ten years, there has been a growing mount of evidence to confirm that the economic status of artists has diminished under the prevailing copyright regimes, not only in the new countries of the EU25, but also in the north and east of Europe. They show that, with the exception of a few big stars, the majority of contemporary artists in Europe can not live from the supposed economic returns on their professional activities provided to them through copyright instruments." European Institute for Comparative Cultural Research, The Status of Artists in Europe, November 2006, p. 51. Not only this cited study but many other studies and evaluations undertaken since the 1980s, including more recent ones of the European Parliament in 1991, 1999 and 2002, have all suggested that addressing the precarious socio-economic status of artists through other means, such as tax relief, labor laws, tailored social security frameworks, and unemployment benefits. *Id.* at 51-52. "[O]ne can wonder if performers' protection will really be increased where they are granted exclusive rights. Whereas the introduction of new rights provides for an improvement of the legal protection, it remains unsure whether it achieves the cultural policy objectives of improving the socio-economic status of performers." Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, p. 64.

[5] "[D]espite the beneficial aspects that specific collective agreements introduced in some performers' contractual clauses, for most performers common use consists of having no alternative but to waive all their exclusive rights at once, for a one-off fee, on signing their recording or employment contract… [I]n practice

Moreover, in this increasingly competitive environment record labels seek new revenue streams to make up for revenue lost from decreasing CD sales. This has resulted in a recent seismic industry shift towards so-called "360 deals" between record labels and performers, which are contracts that allows a record label to receive a percentage of the earnings from all of a band's activities (concert revenue, merchandise sales, endorsement deals, etc.) instead of just record sales, as well as a renewed interest in exacting monetary payment from local radio stations.[16]

The Recording Industry's Flagging Revenues Provide No Basis For Adopting a New Performance Fee that May Ultimately Decrease the Amount of Music Played on the Radio

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,

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most performers have to renounce the exercising of these rights to the benefit of those who will record and make further use of their performances." AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement - Summary, June 2007, p. 3. Germany has amended its law on copyright for the purpose of strengthening the contractual position of authors and performers, and France has considered the integration of labor law in copyright as a means to increase contractual bargaining power. Jean-Arpad Français and Geneviève Barsalou, Canadian Elements of Protection of Audio Performers' Creative Activity (study commissioned by the Department of Canadian Heritage), 2006, pp. 70-71.

[6] http://www.economist.com/business/PrinterFriendly.cfm?story_id=9443082

Warner Music Group and EMI. The Warner group is the only U.S.-based company; the other three major players are foreign-owned.[7]

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 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.[8] Although all of these factors have hurt the recording industry, there are no facts that even suggest that local radio broadcasters are to blame for the economic problems in the recording industry, nor that a new performance fee will in any way address the factors that have contributed to declining record sales.[9]

International Federation of the Phonographic Industry ("IFPI") Chairman and CEO John Kennedy claims the current economic data "reflect an industry in transition."[10] Despite the decline in physical sales of recordings, many sectors of

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[7] 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").

[8] Performance Rights Study at 3.

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

[10] Brandle, Lars, "Music Biz Sales Off for a Seventh Year: Study." *Reuters*, July 5, 2007. Retrieved July 26, 2007 from:

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 percent in 2006 to $2.1 billion. Live performances were up 16 percent from 2005 to 2006 to an estimated $17 billion. Merchandising and sponsorship grew by 30 percent 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.[11]

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 oflocal 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 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 new fees, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, providing less

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http://www.reuters.com/article/entertainmentNews/idUSN0527941020070705?feedType=RSS&rpc=22&sp=true.

[11] Performance Rights Study at 3.

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.[12] Many local radio stations, especially in these small and medium sized markets, are also struggling financially. It is these stations on which a new performance fee would have a particularly adverse impact. 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, coverage of local news and public affairs and other valuable programming.

Evolution of the Sound Recording Performance Right Does Not Justify a New Performance Fee

When Congress created a narrowly tailored digital performance right for sound recording, it did so in order to address very specific concerns about copying and piracy issues.

As a threshold matter, U.S. copyright law confers a bundle of enumerated rights upon the owners of various works of creative expression. These are set forth 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,

[12] *Media Access Pro, BIA Financial Network Inc.*, Data Retrieved July 25, 2007.

exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium.[13]

While composers have long enjoyed a right of public performance in their musical compositions – for which over-the-air radio broadcasters in 2007 will pay annual royalties exceeding nearly half a billion dollars 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. As explained below, even that right was very limited.

Congress has considered and rejected proposals from the recording 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 the 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. Had Congress believed that record companies and performers were at risk of not being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings.

[13] 17 U.S.C. § 106(4), (6).

However, Congress wisely realized that the recording industry was already adequately motivated to serve the public interest and thus did not grant those additional rights.

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.[14]

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."[15] As to performance rights in sound recordings in particular, Congress has explicitly

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

[15] S. Rep. No. 104-128, at 13 (1995) (hereinafter, "1995 Senate Report").

recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[16]

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. 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."[17]

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.[18] 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 airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes

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[16] 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).

[17] *Id.* at 17 (emphasis added).

[18] 17 U.S.C. §114 (d)(a)(A).

> 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.[19]

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."[20]

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;[21] (4)

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[19] 1995 Senate Report, at 15.

[20] *Id.*

[21] 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.,* 47 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

promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[22]

It should also be noted that even though the Copyright Office has argued for a new performance fee, Congress has strongly and consistently refused to adopt these recommendations.[23]

Under the Constitution, Copyright is designed: "To promote the progress of science and useful arts."[24] There is absolutely no evidence that absent a performance fee there has been a dearth in the production of sound recordings in this country.[25] To the contrary, while many countries have such a fee and the United States does not, we are the most prolific producers of sound recordings in the world.

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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).

[22] 1995 Senate Report, at 15.

[23] *Id.* at 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.")

[24] U.S. Constitution, Article I, Section 8.

[25] 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).

Conclusion

With respect to the performance of sound recordings on local over-the-air broadcasting, NAB urges the subcommittee to recognize that H.R. 4789 and a new performance fee on broadcasters is neither warranted nor equitable. The frustrations of the recording industry in its inability to deal with piracy and an outdated business model are not sufficient justification for imposing a such a fee at the expense of the American broadcast industry, which has been instrumental in creating hit after hit for record labels and artists and whose significant contributions to the music and recording industries have been consistently recognized by Congress over the decades.