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Before the House Judiciary Committee
Subcommittee on Courts, the Internet & Intellectual Property

May 16, 2006

Good afternoon, Mr. Chairman, Mr. Berman and Members of the Subcommittee. I appreciate this opportunity to appear before the Subcommittee today to address music licensing in the digital age and the proposed Section 115 Reform Act (SIRA) of 2006. I testified before this subcommittee a little over a year ago on digital concerns. At that hearing, I committed to work diligently to find solutions to the problems that have emerged with digital music licensing. Over the last year, we have been hard at work negotiating not only with the organizations represented at this table today, but also with other music groups. I am pleased to report that we are close to agreeing on a monumental reform of Section 115 that is supported by both the licensees and licensors in the digital world. I would like to thank you, Mr. Chairman and Mr. Berman, for your leadership on this important issue.

HISTORY

For those not familiar with Section 115 of the U.S. Copyright Act and music publishers, let me provide a quick overview.

A music publisher is a company or, in some instances, an individual, that represents the interests of songwriters by promoting their songs and by licensing the use of their songs for reproduction and distribution on CDs, over the Internet and for public performances, and by exercising the other rights available under copyright law. Music publishers are often involved at the very beginning of a songwriter's career. After

signing a writer to a publishing deal, a publisher will do everything from helping the writer find co-writers to securing artists to record the writer's songs. Often when a songwriter enters into a relationship with a publisher, the publisher will advance desperately needed money to the writer to help pay living expenses so the writer can focus on what he or she does best – write music.

Nearly a century ago, a new technology emerged that changed the music publishing industry forever by leaving a lasting impact on the law. That new technology was the piano roll — essentially long perforated sheets that operated a player piano's keys. To make sure that musical compositions were widely available for reproduction as piano rolls and in other forms, Congress in 1909 enacted the Section 115 mechanical compulsory license. This statutory mechanism allows anyone who wants to make use of a musical work to obtain a license to reproduce and distribute phonorecords of the work, in exchange for paying a royalty set by statute, as long as the terms and conditions of Section 115 are followed.

In the original 1909 Act, Congress set the statutory rate for reproducing and distributing musical works at 2 cents per song. Remarkably, this rate did not change for almost 70 years, until 1976 when Congress added a rate-adjustment mechanism for the statutory rate. Since that time, the statutory rate has increased only a few pennies — usually by industry negotiation — and today stands at 9.1 cents per song. If the mechanical statutory rate had increased commensurate with the Consumer Price Index, the rate today would be *40 cents* per song.

On the other side of the coin, the record industry has been able to thrive over the years in the marketplace and negotiate freely without suffering under the burden

of a compulsory license regime. When it comes to the use of master recordings to make and distribute CDs or digital downloads, there is no compulsory license – indeed, no obligation to license whatsoever. For example, exercising their unfettered right to license their master rights for reproduction and distribution, record labels have negotiated licenses with digital subscription services that call for payments of 50% or more of the services' gross revenues for the use of sound recordings, while in many cases the songwriters who wrote the songs in those recordings, and the music publishers who represent them, have yet to be paid a penny. This is because no statutory rate has been set for the use of musical works by digital subscription services, and publishers have been unable to reach voluntary agreements for a fair share of royalties in an environment where they are forced to license their works anyway.

This legal regime has placed songwriters and music publishers at an inherent disadvantage in negotiating mechanical rates, especially for new digital services where no mechanical rate has been established.

CHALLENGES OF DIGITAL LICENSING

The emergence of new technologies in the digital world is revolutionizing the music industry. The most significant change is the ability to distribute phonorecords electronically over the Internet. According to the International Federation of the Phonographic Industry (IFPI) World Sales 2005, global digital music sales nearly tripled in 2005. We know that digital music is the future of the music business. Indeed, music publishers have every economic incentive to issue as many licenses to as many new, legitimate Internet music services as possible. It is only through such license agreements that music publishers and songwriters are compensated. For this reason, the songwriting

and music publishing communities have consistently worked with new businesses to promote broad public access to their works. However, the influx of new online music companies that want immediately to offer a million or more tracks has put enormous strain on the music publishing industry in licensing mechanical rights. Despite the continued assistance music publishers have provided to foster the development of online music distribution, music publishers recognize the need to reform Section 115 of the Copyright Act for the digital delivery of music.

Online music services have expressed concern regarding the availability of licenses for their services. In order to offer a track through a digital music service, the music provider must obtain a license for both the sound recording and the underlying musical work. The music provider obtains the sound recording license from the recording industry, at a price negotiated in a free market. And the same music provider obtains the musical work license from the publishing industry, at a price controlled by the government through Section 115.

Online music services may obtain the musical work license from the music publisher directly, from the Copyright Office, or through The Harry Fox Agency. Obtaining a mechanical license from each music publisher directly or being forced to go through the Copyright Office when the music publisher cannot be located is expensive and burdensome and is by no means a real option for digital music services that seek to offer a million plus tracks over the Internet.

Most digital services therefore use The Harry Fox Agency to obtain mechanical licenses. Founded in 1927, The Harry Fox Agency, Inc. (HFA) is a subsidiary, and the licensing affiliate, of the NMPA. It provides an information source,

clearinghouse and monitoring service for the licensing of copyrighted musical works, and acts as licensing and collection agent for more than 27,000 music publishers, which in turn represent the interests of over 160,000 songwriters. With its current level of publisher representation, HFA licenses the largest percentage of physical and digital uses of music in the United States — on CDs, tapes and records and by digital services. However, even though HFA represents most commercially relevant musical works, it does not currently represent all music publishers or all musical works, and, therefore, digital music services cannot receive all the licenses they need from HFA.

PROPOSED SECTION 115 REFORM ACT (SIRA)

NMPA continues to support eliminating the compulsory license regime, but until Congress is ready to do this, music publishers are willing to help create a new licensing system for digital uses under Section 115.

In his testimony before this subcommittee in March 2005, Jonathan Potter, Executive Director of the Digital Media Association (DiMA), stated that the solution to the problem with Section 115 is to create a simple, comprehensive statutory blanket license that can be triggered on one notice. This is exactly what NMPA has offered to DiMA, as reflected in the proposed SIRA legislation. NMPA has agreed to establish a common industry agent, or General Designated Agent, to represent music publishers and their musical works, and to provide blanket licenses for the use of those works by digital music services.

The blanket license reflected in the SIRA draft would cover all digital uses subject to compulsory licensing under Section 115, including full downloads, limited downloads and interactive streaming. The statutory royalty rates for these uses would be

set by the Copyright Royalty Judges. In addition, the SIRA legislation would grant DiMA royalty-free licenses to make the server and temporary copies of musical works that are required to engage in noninteractive, radio-style streaming.

Right now, under the statutory provisions of Section 115, the administrative burden is on users to obtain song-by-song licenses at their own expense. The blanket license in the draft SIRA would shift the administrative burdens of the licensing process to music publishers and songwriters. The draft bill therefore includes a provision under which digital music providers who are benefiting from the new system will contribute to the costs of getting the new blanket system up and running, and to its continued administration. If music publishers take on the responsibility of creating and maintaining a common designated agent administering over a million works, the digital music providers who will benefit from the new system should make a financial contribution to that effort. We are pleased that the DiMA companies have committed to do that.

The proposed SIRA legislation solves many problems for digital music providers. It also needs to resolve two critical concerns of songwriters and music publishers.

First, the legislation must clarify — as it does in its current form — what Congress intended all along with respect to interactive streaming: that it constitutes a digital phonorecord delivery and is licensable under Section 115. This is vital to the future of songwriters and music publishers, who will increasingly depend on the royalties earned by digital distribution of their works — whether as full downloads, limited downloads or interactive streams. All of these are substitutes for the sale of physical

products. Songwriters and music publishers are technology neutral – they want their works distributed in the way the public wants to receive them. If the world moves to an all-streaming model rather than a download model because that's what consumers want, copyright law should accommodate this. The draft legislation therefore confirms music publishers' and songwriters' right to collect mechanical royalties for interactive streaming – but leaves the royalty rates for this activity to be set by the Copyright Royalty Judges based upon a fair review of its economic value.

Songwriters and music publishers also want to end the practice of pass-through licensing of musical work copyrights by the record labels. The proposed SIRA legislation ends pass-through licensing, and this is critical to our support of the bill. There is no reason that the record labels should continue to act as middlemen or bankers when the digital service provider can take a license and pay the music publisher directly. In addition to speeding up the payment of royalties to the music publishers and songwriters who have earned them, ending pass-through licensing will increase the transparency of the royalty payment process and allow publishers to conduct royalty examinations of digital services to ensure they are complying with their obligations.

There are some in the music industry who may oppose digital licensing reform because it does not also radically transform the licensing regime for CDs and other physical products. This does not seem logical to us. The physical licensing process has been in effect for close to a century and is not broken. Physical products are licensed on a song-by-song basis as CDs and albums are released – and the vast majority of such products are, of course, already licensed. Unlike digital music providers, record labels are not in the position of suddenly needing licenses for a million different CDs.

There are also those who may view this as an opportunity to expand what the universe of what is subject to compulsory licensing under Section 115. While songwriters and music publishers are ready and willing to help facilitate the efficient licensing of musical compositions as contemplated by the proposed legislation, we would strongly oppose any attempt to expand SIRA to impose still more government control over publishers' and songwriters' copyrighted works – or create an even less level playing field for musical work copyright owners. Just as we know that the record labels would never agree to a compulsory license for those uses for which they enjoy the ability to negotiate in a free market, nor can we.

We thank you, Mr. Chairman, Mr. Berman and the entire Committee, for your work on this important issue and your efforts on behalf of the songwriter and music publishing community.