

**STATEMENT OF MITCH BAINWOL
CHAIRMAN AND CEO
RECORDING INDUSTRY ASSOCIATION OF AMERICA
BEFORE THE
HOUSE COMMITTEE ON THE JUDICIARY
ON
H.R. 848, THE “PERFORMANCE RIGHTS ACT”**

MARCH 10, 2009

Chairman Conyers, Ranking Member Smith, and Members of the Committee, I appreciate the opportunity to be with you this morning. My name is Mitch Bainwol and I am Chairman and CEO of the RIAA¹. But today I am here as a member of the MusicFIRST coalition, which represents American labels big and small, artists, managers, musicians, and producers who are all united in supporting the Performance Rights Act to finally end the special subsidy over-the-air radio has been receiving.

This Committee has spent considerable time on this issue over the past couple of years and you know it well. The Performance Rights Act ends an anomaly under U.S. law that provides broadcast radio with a unique, special interest exemption under which broadcasters avoid making payment for the property that drives their business. Every OECD country and virtually every industrialized nation in the world requires radio to pay for the sound recordings broadcasters play. Every other platform that plays music in the U.S. also pays, whether that’s satellite, cable or Internet webcasting. I would like to highlight this inequity with five key points.

First, this issue isn’t complicated as the broadcasters suggest. On the contrary, it’s pretty simple when you get down to it. This year radio will spin almost a billion songs in the United States, leading to billions in revenue from advertising. The payment to artists and labels for use of those recordings, however, will not amount even to a penny. As George Carlin famously said, what a ratio!

And the lack of a performance right in the U.S. is not just about a loss of compensation domestically. Our music gets more airplay around the world than any other country, yet because our own laws prevent payment for radio performances, other countries won’t compensate us when they play our music even though they compensate their own and other countries’ artists. Our laws have not only denied us and our economy hundreds of millions of dollars from abroad, they unfortunately continue to set a poor example as we strive to strengthen intellectual property laws around the world.

The broadcasters brandish hyperbolic diversionary rhetoric. They like to say this is a tax. But you know better than I that a tax is what government collects, not payment

¹ The Recording Industry Association of America, Inc. (“RIAA”) is a trade association whose member companies create, manufacture and/or distribute approximately 85% of all legitimate sound recordings produced and sold in the United States.

between private parties for the use of property. This is payment for intellectual property from entities that use that property as the foundation for their profit-making business model. The fact that broadcasters use this outlandish characterization demonstrates how far they will go to distort the debate. If anything, this has been a government subsidy to the broadcasters, allowing them to use property for free in an anticompetitive manner

No, what's going on here is entirely different. It's effectively a taking. The broadcasters use music to build their business. But investors, artists and musicians don't get paid when our music is broadcast over the air. And we don't have the ability to tell broadcasters not to use our property. That's a taking.

Every Administration in recent times, Republican and Democrat, has recognized there is no policy or legal basis to maintain this special interest exemption that enables the taking of our property. The politics of this issue shouldn't be complicated; the substance certainly is not.

In fact, broadcasters themselves have acknowledged the simple and fundamental point of this right: that use of someone else's property requires the ability to negotiate for compensation. After all, broadcasters have argued forcefully (most recently in the Satellite Home Viewer hearings before this Committee) that cable and satellite operators who retransmit a broadcaster's signal into that broadcaster's local market – and therefore “promote” the broadcaster by bringing the signal to new viewers in the market and thus produce more revenue for the broadcaster – must still pay them for use of their TV programming. Unfortunately, broadcasters have argued just as forcefully against payment when it's their radio stations using others' music. Of course, that's not complexity; it's just hypocrisy.

Second, the United States and the case of terrestrial radio are unique. We're the only OECD country and virtually the only industrialized nation that doesn't provide the creator compensation for performance on the radio, putting us in the company of nations such as Iran, China, and North Korea. And, ironically, the most economically secure platform that broadcasts music – over the air radio, dominated by big corporate players – is the only platform in the U.S. that doesn't pay. Satellite does. Internet companies do. Cable does.

Terrestrial radio is an anomaly. The competitive landscape thus is biased in favor of the old establishment players and against new start-up and innovative technologies. Of course, this is because the broadcasters have traditionally been more politically powerful than those of us who make up the creative community. And they've done an effective job throwing up smoke screens to cloud the issue.

Third, the broadcasters' promotion argument is not a basis for denying fair compensation to creators. Here are some of the reasons why:

- Let's face it, music promotes radio. Broadcasters are in the business of selling advertisements, not music. Music is what broadcasters use to attract listeners,

which in turn allows them to earn billions from advertising. Indeed, radio plays the music that their surveys tell them their listeners want to hear. And in many cases, radio only plays music to make money after that music has garnered exposure.

- So what if radio provides some promotion? Virtually every distributor of music lays claim to being promotional, but they still pay for the music that they use. In fact, radio's promotion argument applies to songwriters, yet radio stations still pay songwriters, as they should.² And radio pays professional sports teams even though broadcasts of games promote ticket and merchandise sales. The bottom line is that promotional value does not obviate the requirement for payment under our laws. If it did, why would Tom Clancy get paid when his novels become movies even though it undoubtedly promotes the sale of his books?
- Everything has changed about the music industry, and everything has changed about the consolidated radio business, except this anachronistic law. The fact is, we are no longer in a world in which listeners hear a song on the radio and they run down to the corner store to buy it. We are increasingly moving toward a world where consumers get their music through performance of it – whether through standard radio, niche programming, or on-demand access. Promotion for sales is quickly becoming a thing of the past.

Of course, the promotional argument makes no sense for other reasons:

- In an economy predicated on property rights, it's property owners, not those using the property, who should decide whether or not to give away their product in the name of promotion.
- More than half of what big radio plays on the air is oldies. I love it and you do too. But the reality is that oldies don't sell very much. The promotional value is hollow.
- Broadcasters want to be paid when their programming is retransmitted into the broadcaster's local market by cable and satellite, even though carriage on those platforms promotes revenue increases and helps broadcasters sell more commercials at higher rates.

We're not saying there is no promotional value in some cases. There is. But it is substantially diminished. The fact is, whatever value promotion represents should be made a factor for determining the rate of payment. That's exactly what this bill provides.

Fourth, this bill focuses on big corporate radio, and we would be delighted to roll up our sleeves to work with smaller stations like those of Mr. Patrick and Mr. Newberry,

² Songwriters' creativity underlies all great performances. But let's face it – no one is turning on the radio to hear me perform any of those songs. Audiences are drawn to the renditions of those songs by their favorite performers. Ultimately, it is those performances that draw listeners.

to find responsible ways to address their concerns. As it is, the vast majority of the stations in the country have a special accommodation under the Performance Rights Act:

- Small stations: Small broadcast stations, including small religious stations, will pay a nominal flat fee of only \$5,000 per year for an unlimited use of music – with no litigation, negotiation or arbitration costs. This fee is set in statute and cannot be raised without an Act of Congress. That is less than \$420 per month (less than their electric bill) for all the music a station wants to play – and music is their core business. More than 75% of all radio stations and more than 80% of all religious stations in the country will pay only this amount. This will ensure that small stations are not economically hurt while creators of the property they are using are respected and compensated.
- Noncommercial, Public and College Radio stations: Noncommercial and public stations such as NPR, nonprofit religious stations, and college radio stations will pay a nominal flat fee of only \$1,000 per year for an unlimited use of music – with no litigation, negotiation or arbitration costs – no matter what their revenues are. That is less than \$85 per month for all the music a station wants to play. This will ensure that nonprofit stations can continue their mission while creators of the property they are using are respected and compensated.
- Talk Radio, Religious and Mixed Format stations: Talk radio, Religious and Mixed Format stations would not pay for incidental uses of music at all, and formats that make more than incidental uses but do not play music all the time would only pay for the music they use.
- Religious stations: In addition to benefiting from the small, nonprofit, per program and incidental accommodations above, the broadcast of religious services would be completely exempt from any payment.
- Promotion of music: In determining what large corporate radio stations should pay, the promotional value will be taken into consideration. If broadcasters show a great deal of promotion, the rate will be lower, so that fairness is provided to both the broadcaster and the creator.

But, to be clear, this issue in the end is not about Mr. Patrick or Mr. Newberry or other small station owners. It is about big corporate consolidated radio and whether they can continue to flex their muscles to perpetuate a taking that in today's world sticks out like a sore thumb.

Instead of dialogue, these broadcasters have dedicated their energies to generating political support for a non-binding resolution rejecting reasonable compensation for the taking of property. It's not shocking that a non-binding resolution that sounds like apple pie and tells less than half the story can be made to look innocent and even attractive. But not only does the Performance Rights Act directly address concerns reflected in the resolution, it is, contrary to the resolution's fabrication, limited only to broadcast radio. The Performance Right bill does NOT apply to other businesses such as bars, restaurants,

entertainment venues or other establishments. It addresses *only* parity in radio in a manner that levels the playing field for all radio platforms and provides performers with appropriate compensation for the use of their music to attract advertisers for the profit of the radio station.

Fifth and finally, this issue is not merely about transferring revenue from one company to another. Far from it. Half of the payments will go directly to the performers, by statute, without going through any third party – they go from the radio station that uses the recording to SoundExchange to the artist – period. Many of the recipients are artists and musicians who are struggling to make a living and this income is necessary for them to continue creating the music we love.

We in the music community pledge to work with you and the other stakeholders in this debate in a constructive way to try to find a responsible compromise that everyone can live with, so long as the answer is not simply perpetuating the taking of our property without compensation. We're prepared to work with the smaller stations to build phase-in ramps to deal with the economic downturn. We just can't find anyone who is willing to sit down with us. Despite the call from members of this Committee last year for the parties to sit down, the NAB is saying "No." Mr. Rehr, who runs the NAB, said he "would rather slit his throat" than engage on this issue. Candidly, that makes it tough to negotiate. Despite Mr. Rehr's comments, we remain ready and willing to discuss specifics with the broadcasters.

Broadcasters receive a government handout – corporate welfare – in the form of free broadcast spectrum and a significant economic advantage over every other radio platform – all of which have to pay. It's no mystery why broadcasters are fighting so hard to maintain their special interest exemption. What business wouldn't love to avoid paying for their key input? Imagine Morton's not paying for beef or car manufacturers alleging economic hardship to suggest they should get free steel. Preposterous. I'm not aware of any business elsewhere in the American economy where the primary input isn't compensated.

No, it's not hard to understand why broadcasters oppose correcting the law and eliminating this profitable exemption. But today it is impossible to understand their unfair advantage over every other radio platform and the United States' unfortunate distinction as the only OECD country to deprive creators of this right. It is impossible to understand how we can continue to allow broadcasters to take others' property to build a multi-billion dollar industry without paying a cent to those who create it.

Once again, we thank you for your attention to this issue and your consideration today of the Performance Rights Act.

Thank you.