Hearing on H.R. 848, the "Performance Rights Act"

United States House of Representatives Committee on the Judiciary

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On behalf of the National Association of Broadcasters

Good morning, Chairman Conyers, Ranking Member Smith and members of the committee, 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 operate 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. During his visit to Capitol Hill last week, musician/composer Herbie Hancock summed it up nicely -- "Just as radio promotes music, music promotes radio," he said.

Recently, however, there has been some shifting in the industry. The financial dominance of the four 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 record labels have gone in search of new revenue streams to make up for these losses. For example, the labels now insist on so-called “360° deals” between

record labels and performers. These contracts allow a record label to receive a percentage of the earnings from all of a band or artist's activities (concert revenue, merchandise sales, endorsement deals, fan clubs, websites, artist management, publishing rights, etc.) instead of just record sales.[1]

As the labels insist on sharing in revenues that previously went solely to artists, the artists' share of the pie has decreased substantially. Now we are seeing both the record labels and performers searching for new sources of revenue. Both are trying to convince Congress to use the Copyright Act to impose a new obligation on local broadcasters, in the form of an additional fee for playing recorded music on free, over-the-air radio.

It is important to recognize that broadcasters are not responsible for upsetting the relationship between the labels and artists or for the financial woes of the recording industry generally. Broadcasters have continued to do their part in presenting music to the public. Particularly in the current highly competitive environment, where 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 to prop up the recording industry's past failings and ill-advised business decisions.

Promotional Value of Radio Airplay to the Recording Industry

As Congress has repeatedly recognized, the radio industry provides tremendous practical and other benefits both to performing artists and to record companies. The recording industry invests money promoting songs in order to

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

garner radio airplay, and receives revenues when audiences like and purchase the music they hear. Artists consistently recognize the fact that 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.[2] Simply put, when audiences hear music they like on the radio, they are likely to purchase that music.

The promotional value of radio airplay is tangible and quantifiable. As NAB has previously testified, data from the Nielsen Company clearly demonstrates that artists and record labels derive significant value from local radio airplay. The data shows that the when music airs on the radio, record sales go up.[3] Moreover, a recent study by economist Dr. 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 recording industry with significant, incremental sales revenues or promotional sales benefit that range from $1.5 to $2.4 billion annually.[4] Moreover, the vast majority of listeners identify FM radio as

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

[3] 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.

[4] This study was limited to the effect on sales of sound recordings and does not address promotional value for other revenue streams, such as concert sales.

the place they first heard music they purchased.[5] With an audience of 235 million listeners a week, a figure that dwarfs the reach of satellite radio and the listenership of Internet radio, there is no better way to expose and promote sound recordings.

The fact that consumers have new ways in which to locate and obtain music does not diminish the value of over-the-air radio's marketing and promotion. Over the past few years, a plethora of new digital channels are giving consumers the opportunity to acquire music legally in many new ways, but the sheer volume of music available online creates a cacophony of voices. In the new, fragmented world of the digital environment, in which millions of bands are vying for the attention of hundreds of millions of fans, on millions of websites, one of radio's greatest strengths is that it cuts through the clutter.[6] Radio exposes listeners to new music and drives them to the websites where their desire for the music that they heard can be monetized. For example, Douglas Merrill, president of digital business at EMI Music and former Google employee, recognized that labels need to focus not on consumers' destination sites but on the ways they

[5] Bridge Ratings has examined where media consumers go to find new music and has found that terrestrial radio comes out on top. In a 2006 survey, sixty-one percent of those aged 35-54 said that terrestrial radio was their primary source of new music. Even among younger consumers with stronger affinities for P2P networks, terrestrial radio was still the leading source for discovery about new music. For consumers aged 12-54, Bridge found that terrestrial radio was the preferred source of new music for 45 percent of those surveyed, beating out both Internet radio and P2P networks. *See* Bridge Ratings, *Bridge Ratings Industry Update – New Music Discovery*, July 21, 2006, http://www.bridgeratings.com/press_07.21.06.New%20Music.htm.

[6] MySpace, for example, lists more than 2.5 million hip hop acts and 1.8 million rock artists alone.

actually discover music: “Social networks have been terrific for fans looking for bands they know, but far more challenging as a way of finding new bands.”[7] As singer-songwriter Jewel observed on *Nashville Star*, “That’s what our job is, to have a radio hit. Without radio, we couldn’t do what we do, but the job is to have a radio hit that sounds unique.”

Local radio stations provide new and emerging artists with needed exposure and access to a listening audience. Record companies and their artists benefit not just from radio airplay, but also from on-air interviews and promotions of local concerts and new albums. Similarly, established artists with classic hits benefit from radio airplay, as well.

Record labels use their catalogs of recorded music as a source of material for re-releases (in traditional or digital formats), compilations, box sets and special package releases. The sale of catalog material is typically more profitable than that of new releases, given lower development costs and more limited marketing costs. In the first three quarters of 2008, according to SoundScan, 43 percent of all U.S. album unit sales were from recordings more than 18 months old, and 31 percent were from recordings more than three years old.[8] For example, Warner Music Group’s music catalog generates approximately 40 percent of its recorded music sales in a typical year.[9] It is also important to

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[7] Digital Music Report 2009, IFPI, p. 5.

[8] 2008 Annual Report, Warner Music Group, p. 18.

[9] *Id.,* p. 8. “Relative to our new releases, we spend comparatively small amounts on marketing for catalog sales.”

remember that sales grow with each advance in technology. Many consumers have likely purchased the same music multiple times as the phonograph market moved to cassette tape, then moved to CD, and now has migrated to digital downloads.

The Recording Industry's Flagging Revenues Provide No Basis For Adopting a Performance Tax

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 worldwide recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only U.S.-based company; the other three major players are foreign-owned.[10]

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.[11] Although all of these factors have hurt the recording industry, there are no facts that suggest that radio broadcasters are to blame for the economic problems in the recording industry, nor that a performance fee on radio – which

[10] 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 Germany'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").

[11] Performance Rights Study at 3.

broadcasters consider a performance tax – will in any way address the factors that have contributed to declining record sales.[12]

Moreover, things are starting to look up for the recording industry. The most recent report of International Federation of the Phonographic Industry ("IFPI") takes a more optimistic tone than it has in years, as Chairman and CEO John Kennedy reports that "[t]he recorded music industry is reinventing itself and its business models. Our world in 2009 looks fundamentally different from how it looked five years ago."

Many sectors of the music industry 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. In 2008, the digital music business internationally saw a sixth year of expansion, growing by an estimated 25 percent to $3.7 billion in trade value. According to Pollstar, U.S. concert industry ticket sales climbed steadily from 1998 to 2008 from slightly over $1 billion to over $4.2 billion. Single track downloads were up 24 percent in 2008 to 1.4 billion units globally, and digital albums were up 37 percent. The top-selling digital single of 2008 was Lil Wayne's *Lollipop,* with 9.1 million in unit sales. In fact, after the Grammy Awards, Universal Motown Records sent an email blast thanking local radio stations for contributing to Lil Wayne's success and helping him earn four Grammys -- "Thank You Radio" "4 Grammy Awards Last Night!!!"

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

In its 2008 Annual Report, Warner Music Group reported that its revenue grew by 39 percent to 639 million in fiscal 2008, and that the proportion of digital revenues continues to grow. Most significantly, IFPI reports on the “unflagging consumer demand for music.” In the U.S., research by NPD Group found that total music consumption (both licensed and unlicensed) increased by one third between 2003 and 2007. According to Nielsen SoundScan reports, overall sales in the U.S. hit an all time high in 2008, with music purchases across all formats totaling $1.5 billion, up 10.5 percent.

What this data suggests is that the recording industry is finally beginning to adapt to changes in production, distribution and consumer behavior patterns. 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. Profit margins generated by digital sales are actually larger than those associated with physical CD sales, and 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.

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

Any past or current failings of the recording industry in adjusting to the public's changing patterns and habits in how it acquires sound recordings or difficulties with piracy were not problems created by local radio broadcasters, and local radio broadcasters should not be required, through a new tax or fee or royalty, 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 news, talk and/or sports, ultimately providing less exposure for 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.[13] Many radio stations, especially in these small and medium sized markets, are struggling financially. It is these stations on which a new performance tax 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

[13] *Media Access Pro, BIA Financial Network Inc.*, data retrieved July 25, 2007.

announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

This would be the worst time to impose additional fees on local radio stations. Across the industry as a whole, radio revenue fell by 9 percent in 2008.[14] A performance tax would result in significant cuts at local radio stations, which would directly impact diversity of music played and diversity of station ownership. The recording industry and some Congressional supporters have argued in the past that, if a performance fee was adopted, stations could simply raise their advertising rates to get the money to pay for it. But that assumption was faulty then (if broadcasters could get more money for their advertising spots, why wouldn't they already be doing so to maximize revenues?), and it's even more faulty in today's radio environment. With the current recession, radio is reporting sales declines of as much as 20% from the prior year. Layoffs are hitting stations in almost every market. In this environment, it is difficult to imagine how any significant royalty could be paid by broadcasters without eating into their fundamental ability to serve the public – and perhaps threatening the very existence of many music-intensive stations.

The Evolution and Nature of the Digital Performance Right

The recording industry characterizes its attempts to develop a new revenue stream at the expense of broadcasters by mischaracterizing it as the closing of a "loophole" and the ending of a "decades' long exemption." History is

[14] Analysts have recently forecast a 13 percent drop in radio revenues in 2009, and even that prediction may be "too optimistic." Radio Ink, *Analyst: Radio Revs Will Fall 13 Percent in 2009. Or More*, radioink.com (Jan. 7, 2009).

important here: Prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings. And at that time, Congress created only a narrow digital performance right, in order to address very specific concerns about copying and piracy issues. Numerous other venues that play recorded music -- hotels, restaurants, bars, nightclubs, sporting arenas, shopping malls, retail stores, health clubs, etc. -- would remain untouched by H.R. 848, which is specifically targeted at over-the-air broadcasts of local radio.[15] Further, by providing a $5,000 cap for what the recording industry estimates to be 75 percent of broadcasters (which would be devastating for many small broadcasters, 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.

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 on the public performance of sound recordings.

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

[15] According to IFPI, the restaurant and hotel sector is valued at US$2.3 trillion internationally in comparison to US$32.5 billion for radio.

the Act. Among the enumerated rights is a right of public performance which empowers the copyright owners – subject to any applicable limitations, exemptions, or compulsory licenses – to grant or deny another permission to perform a work in a public forum or medium.[16]

While composers have long enjoyed a right of public performance in their musical compositions – for which over-the-air radio broadcasters pay annual royalties of nearly $500 million 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

[16] 17 U.S.C. § 106(4), (6).

being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings. 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.[17]

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

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

broadcasters that have served all of these industries well for decades."[18] As to performance rights in sound recordings in particular, Congress has explicitly recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.[19]

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."[20]

Consistent with Congress's intent, the DPRA expressly exempted non-subscription, non-interactive transmissions, including "non-subscription broadcast transmission[s]" – transmissions made by FCC licensed radio broadcasters, from any sound recording performance right liability.[21] Congress again made clear that its purpose was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

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

[19] 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).

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

[21] 17 U.S.C. §114 (d)(a)(A).

> 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 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.[22]

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."[23]

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

[22] 1995 Senate Report, at 15.

[23] *Id.*

programming and other public interest activities to local communities;[24] (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."[25]

It should also be noted that even though the Copyright Office has argued for a performance tax, Congress has strongly and consistently refused to adopt these recommendations.[26]

Under the Constitution, copyright protection is designed: "To promote the progress of science and useful arts."[27] There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound

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[24] 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 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).

[25] 1995 Senate Report, at 15.

[26] *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.")

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

recordings in this country.[28] To the contrary, while many countries have such a tax and the United States does not, we are the most prolific producers of sound recordings in the world. In fact, the U.S. recording industry is larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance fee regimes.[29]

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.[30] 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

[28] 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 currently proposed, 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).

[29] Adopted from IFPI Market Research available at www.ifpi.org.

[30] See, generally, the attached NAB report on international issues, "Should the U.S. Lead or Follow? Why Other Countries' Imposition of a Tax on the Performance of Sound Recordings Does Not Justify Such a U.S. Tax."

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.[31] 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

[31] Digital Performance Right in Sound Recordings and Ephemeral Recordings; Final Rule 72 F.R. 24084 (May 1, 2007).

essential to the maintenance and enhancement of national identity and cultural sovereignty,"[32] and that it should "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[33] Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.[34] French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.[35]

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.

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[32] Canadian Broadcasting Act, § 3(1)(b).

[33] *Id.* at § 3(1)(d)(i).

[34] https://www.cab-acr.ca/english/keyissues/primer.shtm.

[35] https://www.cab-acr.ca/english/keyissues/primer.shtm; see also, http://www.mediaawareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm.

Any Undercompensation of Performing Artists May Be the Result of Their Contractual Relationships with the Record Companies

Advocates for a performance tax 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 recording companies makes any assumptions that performers meaningfully would share in any largess created by a performance tax highly dubious at best. That history is replete with examples of record company exploitation of performers. Artists routinely sue to obtain royalties and benefits. For example, last week, a court date was set for Eminem's suit against Universal Music Group over royalties from digital distributions. Last year, in a case of first impression that could have significant implications for the recording industry, the Allman Brothers sued their label for royalties connected with the digital exploitation of their music. Soul legend Sam Moore and other artists previously sued record companies and the AFTRA Health and Retirement Funds (a separate entity from the union) for pension benefits. Moore's record label, which had sold his music for over 30 years, had never deposited a nickel into his pension because of convoluted formulas tied to royalties.

Musicians have declared bankruptcy not only because of lack of royalty payments from record labels, but also to free themselves from one-sided, byzantine contracts and accounting practices. The singing group TLC declared bankruptcy after they reportedly received less than 2 percent of the $175 million earned by their CD sales. Toni Braxton also declared bankruptcy individually in

1998. She had sold $188 million worth of CDs but received less than 35 cents per album.

Moreover, artists sign away all rights to their master recordings and rarely get the opportunity to reacquire them. Indeed, Sen. Orrin Hatch previously described the musicians' predicament with major labels as follows: "it's kind of like paying off your mortgage, but the bank still owns the house."[36]

Following are just some sample quotes from artists:

> "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/.)

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[36] See http://www.usatoday.com/life/music/news/2002-09-15-artists-rights_x.htm.

> "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 royalty distribution system for performance rights in sound recordings is 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.[37] It is important to note that 50 percent of the performance fee proposed in H.R. 848 would be paid to the record labels, rather than the artists. A performance tax will take money out of the pockets of local radio stations and other business, and put it in the hands of record companies and a few top-grossing performers.

Even those countries with sound recording performance rights, which proponents of a performance tax 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.[38] Imposing a new performance tax would not

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

[38] "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 recommended addressing the precarious socio-economic status of artists through other means, such as tax relief, labor laws, tailored social security

alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.[39] Moreover, creating new rights will never provide enough revenue to support artists, as the record labels continue to encroach on revenue streams that were once the dominion of artists (touring, merchandise, sponsorships, etc.).

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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.

[39] "[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 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.

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 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 come 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.

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. The current frustrations of the recording industry in its ability to create new revenue streams are not sufficient justification for imposing a wealth transfer 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.