Statement of

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Hearing on "Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century"

Chairman Berman, Ranking Member Coble, and Members of the Subcommittee, thank you for the opportunity to appear before you to testify about the need to update the public performance right for sound recordings. The marked decline in record sales and its ripple effects throughout the industry bring us together once again to discuss legislative options that would allow performers and record companies to receive reasonable compensation for their creative endeavors, while at the same time ensuring that the use of new technologies for bringing music to the consumer are not hampered.

As you know, in 1995 Congress passed the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA")[1] that, for the first time, granted to copyright owners of sound recordings[2]

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[1] Pub. L. No. 104-39, 109 Stat. 336 (1995).

[2] When discussing sound recordings, it is important to consider their relationship to other related copyrighted works. A CD, the embodiment of a sound recording, actually includes two copyrighted works. The first is the sound recording itself - the aggregate sounds of music, lyrics and musical instrumentation and production. The second is the underlying musical composition - consisting of the written notes and lyrics - that is contained in the sound recording. Although both works are protected under copyright law, they do not share equal protection. Currently, musical works enjoy a full right of public performance, while the performance right in sound recordings is limited to performances by digital transmission.

a limited public performance right. Congress took this step after carefully considering the effect that new digital technologies would have on the sale of records - a primary source of revenue for performers and the record industry. It determined at that time that copyright owners of sound recordings required more protection under the law to guard against unlawful copying and believed that a limited performance right for public performances by means of digital transmission subject to a statutory license was an adequate solution.

I believe the creation of this limited performance right for sound recordings was a step in the right direction. This initial step helped foster the growth of new services that make legitimate use of music transmitted over digital networks such as the Internet and satellite radio services. However, continued technological developments as well as new business models – both legitimate and illegitimate – have given consumers more choices and greater flexibility in how they listen to and obtain their music, but often they do not allow the creators to share in the profits gained from the use of their works. This is particularly true of the technological developments in the area of broadcasting and the services that compete with broadcasting. Terrestrial broadcasters have long enjoyed the freedom to use the newest record releases without any payment to the artists or the record companies. While in the past, broadcasters' argument that airplay promotes the sale of records may have had validity, such a position is hard to justify today in light of recent technological developments and the alternative sources of music from other music services, and declining record sales. So what is to be done?

In answering that question, it is important to gauge the extent of the problem and craft an appropriate response just as Congress did when it first created the limited performance right. Then as now, the goal of any legislative change would be to preserve and "protect the livelihoods of the recording artists, songwriters, record companies, music publishers and others who depend upon revenues from traditional sales, . . . without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters."[3] Of course, in 1995, Congress accepted the notion that terrestrial over-the-air broadcasts offered no threat to the record industry and actually promoted the sales of records. The actual turn of events since that time, however, casts doubt on this premise and the sufficiency of the limited performance right to achieve this goal.

Record sales continue to drop precipitously and revenues from other sources are not making up the short fall. Last year, consumers purchased 588.2 million albums. This figure is a marked decrease over the number sold just six years earlier when the number of album sales topped out at 785.1 million.[4] But the decline in record sales tells only part of the story.

A recent article in Rolling Stone recounts how the decline in music sales has had ominous consequences for everyone associated with the record industry, noting that "more than 5,000 record-company employees have been laid off since 2000" and that "about 2, 700 record stores have closed across the country since 2003."[5] Such numbers might suggest that the interest in music has waned, but that is not the case. The article goes on to observe that "[d]espite the industry's woes, people are listening to at least as much music as ever. Consumers have bought more than 100 million iPods since their November 2001 introduction, and the touring business is thriving, earning a record $437 million last year. And according to research organization NPD Group, listenership to recorded music -- whether from CDs, downloads, video games, satellite radio, terrestrial radio, online streams or other sources -- has increased since 2002. The problem the business faces is how to turn that interest into money."[6]

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[3] S. Rep. No. 104-128, at 14-15 (1995).

[4] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

[5] *Id.*

[6] *Id.*

While I have long supported a full performance right for sound recordings, I recognize that the time may still not be right to seek this change.[7] Nevertheless, I strongly urge Congress to expand the scope of the performance right for sound recordings to cover all analog and digital by broadcasters as a way to enable creators of the sound recordings to adapt to the precipitous decline in revenue due to falling record sales. Such an approach has multiple benefits. It would provide performers and record producers with an ongoing and growing source of revenue, and it would also level the playing field between, on the one hand, digital music services and webcasters who today pay a performance royalty on each digital transmission and, on the other hand, broadcasters who pay nothing for their use of sound recordings when transmitted over-the-air.

Is an exemption for terrestrial broadcasters justified?

Although Congress recognized the existence of a "mutually beneficial economic relationship between the recording and traditional broadcasting industries"[8] when it passed the DPRA in 1995, a claim broadcasters' continue to assert,[9] significant doubts exist with regard to the amount of promotional value gained from the performance of sound recordings by terrestrial radio as compared to exposure to new music from other sources. Today listeners are not limited to what they hear on traditional radio to inform their choices. Consequently, whatever promotional value that may have existed in 1995 has been diluted by the increase in alternative media, such as satellite radio and digital music services, through which listeners can listen to the current top 10 or find and experience music by new groups. In fact, a finding was made in the

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[7] An overview of the history of the struggle to obtain a full performance right for sound recordings and the Office's longstanding position in support thereof is recounted in David Carson's statement to this subcommittee during hearings on "Internet Streaming of Radio Broadcasts." See Statement of David Carson, General Counsel, United States Copyright Office before the House Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property, July 15, 2004. http://www.copyright.gov/docs/carson071504.pdf

[8] S. Rep. No 104-128, at 15 (1995); and H. Rep. No. 104-274 at 13 (1995).

[9] NAB, *NAB Responds To musicFirst Coalition*, NAB Press Release (June 14, 2007).

2002 webcasting ratesetting proceeding that whatever promotional value that existed for webcasting was similar to that of traditional over-the-air broadcasting.[10] Moreover, broadcasters' claims ignore the fact that songwriters and music publishers receive payments for the same public performances for which performers and record companies do not. The broadcasters' rhetoric never accounts for this inconsistency and it fails to explain why airplay provides promotional value to performers and record companies but not to the songwriters and music publishers.

It is also worth noting that the exemption for broadcasters was based upon an understanding that promotional airplay led to record sales. Sales, however, have plummeted and continue to spiral downward. One reason for declining sales is the continued widespread use, even in the wake of the Supreme Court's ruling in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.*,[11] of peer-to-peer file sharing services which permit millions of users to obtain infringing copies of sound recordings, with devastating effect on the legitimate market for phonorecords. Alongside this practice is the availability of new technology that allows a listener to rip a stream of music and copy the song for future use.

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[10] 67 FR 45252, 45255 (July 8, 2002).

[11] 545 U.S. 913 (2005).

Of course, terrestrial broadcasters are not responsible for the actions of its listeners. Nevertheless, this $20 billion broadcast radio industry continues to advocate for the right to use sound recordings, without payment. Why? So it can use the music as a hook to get listeners and, by extension, profit-generating advertising dollars.[12] This arrangement stands in stark contrast to most of the other businesses, such as satellite radio and digital music services, that derive their existence from the public performance of sound recordings and are direct competitors of broadcasters. These services compensate the performers and record companies for the works they use even though such businesses presumably provide at least as much promotional value to sound recordings as broadcasters. Understandably, digital music services have been pushing back and seeking parity with terrestrial broadcasters on this point as a way to strike a competitive balance in the marketplace.[13] They maintain that terrestrial broadcasters should also pay the performance royalty for sound recordings especially now that terrestrial radio is positioned to transition to a digital format on a wide scale basis.

Certainly, when the transition is complete, and that time is near,[14] broadcasters stand to gain an even greater marketplace advantage over the other music services. Electronic companies are manufacturing and marketing digital radio receivers for those who wish to receive clear, digital radio signals over the airwaves. Today, consumers can choose from a variety of receiver models which are available in thousands of retail outlets at prices that continue to drop. The automotive industry is also feeding the market for

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[12] Olga Khafir, Traditional Radio to Pay for Play, Business Week, (July 4, 2007), http://www.businessweek.com/technology/content/jul2007/tc2007073_639316.htm

[13] Kenra Marr, *Shaken Internet Radio Stations Face Specter of New Fees Sunday*, Washington Post, (July 13, 2007), D03, http://www.washingtonpost.com/wp-dyn/content/article/2007/07/12/AR2007071202169.html

[14] HD Digital Radio Alliance, *HD Radio Celebrates Major Milestone: Rollout in Top 100 Markets* (May 14, 2007), http://www.hdradio.com/the_buzz.php?thebuzz=93 (Noting that earlier this summer, HD Radio completed rollout of services in the nation's top 100 markets).

HD radio. BMW already offers HD radio as a factory-installed option across its entire product line, with Jaguar and Hyundai offering it in their premium sedans scheduled for introduction in 2008. In addition, eleven automotive manufacturers will begin offering HD radio as an option on 55 models in the next 18-24 months.[15]

As HD radio technology enjoys wider implementation, innovative features continue to arise. Companies are busy designing and manufacturing new products to capture and record HD radio signals. In fact in the UK, one of the more popular HD radio devices, sold under the brand name "The Bug," features functions that allow the listener to record over 30 hours of audio; program the device to record specific programs at specified times; and upload recorded programs onto a personal computer in a transferable file.[16] The combination of these capture and transfer capabilities provides recipients the means to edit and store specific sound recordings from a prerecorded program, and allows for further distribution of these sound recordings to others via electronic transfers over the Internet or by other means. Capabilities such as these in combination with the digital quality of HD radio transmissions further threaten traditional sales of sound recordings.[17]

The answer to the problem is to find a way to minimize the threat of unauthorized copying and to ensure that performers and record companies receive compensation from the use of their contributions.

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[15] *Id.*

[16] PURE Digital, *Radio With Attitude - Bug Too: Fact Sheet* (June 2006), http://www.videologic.com/Factsheets/VL-60802.pdf

[17] While a court recently and, in my view, correctly rejected a motion to dismiss a claim of copyright infringement based on the marketing of a similar device by a satellite radio service as part of its subscription service operating under the section 114 statutory license, *Atlantic Recording Corp. v. XM Satellite Radio, Inc.*, 2007 WL 136186, 2007 Copr.L.Dec. ¶29,312, 81 U.S.P.Q.2d 1407, 35 Media L. Rep. 1161 (S.D.N.Y., January 19, 2007), a similar suit against a consumer electronics manufacturer offering a similar device for use with free over-the-air digital broadcasts might well reach a different result.

Reevaluating the Sound Recording Performance Right

This hearing provides the opportunity once again to consider how to address the latest threats to the market viability of creators of sound recordings. The answer is clearly not to inhibit the roll out of HD radio; nor is anyone suggesting a slowdown on this or future technological fronts. A piecemeal solution is also not the answer. Instead the answer is removing the current limitations placed on this increasingly crucial right, so that performers and producers of sound recordings can enjoy the ability to adapt to market changes armed with the same set of rights as other copyright owners. Thus, I believe the best approach would be to grant copyright owners of a sound recording a performance right for all audio transmissions, both digital and analog, subject to a statutory license.

Such an approach has a number of advantages. First, it would establish legal equity among similarly situated parties with respect to users and creators. Second, it would provide a much needed and dependable source of income to performers and record companies from performances both in the United States and abroad, thereby ensuring that the creators have an incentive to invest their time and talents in producing new works. And finally, it would ensure that minimal safeguards are utilized to protect the copyright owners from unauthorized copying in accordance with the conditions already set forth in the statutory license.

a. Legal equity

Earlier, I discussed why broadcasters are no longer justified in receiving an exemption from the performance right from sound recordings. Primary among those reasons is the need to establish parity among those commercial competitors who depend upon the use of sound recordings. Currently, digital music services pay two different groups of rightholders for each digital transmission of a sound recording. They pay the performers and record companies for the performance of the actual sound recording and they also pay the appropriate performing rights organizations, e.g., BMI, ASCAP and SESAC, for the performance of the musical work embodied therein. Terrestrial broadcasters, on the other hand, pay only the latter royalty due to an exemption in Section 114, based on the purported promotional value they provide to the record companies. However, in light of declining sales over the past seven years, the expansion of new avenues for distribution of music, and the continuing threat from unauthorized copying, this argument is unsustainable.

Congress has the power to remedy this situation and strike the proper balance in favor of producers as well as performing artists who create sound recordings. The question should no longer be whether Congress should provide performance rights for sound recordings, at least with respect to audio transmissions, but whether the right should be subject to statutory licensing and, if so, how to evaluate and tailor such a license in order to ensure innovation and monetary incentives for the creation of works for the enjoyment of the public. Stated another way, the challenge of copyright in this context, as it is in general, is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand."[18]

In striking this balance, I would propose expanding the section 114 license to cover all non-interactive audio transmissions and to remove the current exemptions for broadcasters and for business to business establishments. Like the broadcasters and the digital music services, the core of their businesses rely heavily upon the use of sound

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[18] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

recordings to generate its revenues and there is no apparent reason why either of these businesses should not pay a performance royalty to the performers and record companies.

Although some have asserted that granting performance rights to copyright owners of sound recordings amounts to a tax, this is clearly not the case. A tax is a charge levied by, and paid to, the state. A payment for use of a property right, on the other hand, is made to the owner of the right and the amount and terms of the payment are set by negotiations between a willing buyer and a willing seller. In fact, aside from not being a tax, a grant of performance rights to copyright owners of sound recordings would be exactly the type of private property right the Constitution indicates should be available to authors in order "To promote the Progress of Science and useful Arts."[19] In addition to providing strong incentives for the continued creation of new works, granting performance rights to copyright owners of sound recordings offers the advantage of providing legal equity. It also offers increased harmony with international law, which I will discuss shortly.

However, in expanding the license to cover terrestrial broadcast programming, it would be appropriate to reexamine the conditions set forth in the license to protect against unauthorized copying. I recognize that it has been asserted that certain provisions within the existing 114 statutory license, such as programming restrictions designed to limit unauthorized copying by the recipient of the performance, may pose problems to the current broadcast business model. At this time, I am not persuaded that those problems would be significant or that it would be undesirable to require broadcasters to comply with those restrictions. However, to the extent that there would be such problems, any amendments to the 114 license to cover broadcast transmissions

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

could surely address them, while at the same time including broadcast-friendly measures to reduce unauthorized copying by the recipient of performances.

It is also worth noting that expansion of the section 114 license to include all audio transmissions will result in a direct payment of these additional royalties to featured artists and non-featured musicians and vocalists by guaranteeing that they collectively receive 50% of the distributions of receipts from the statutory licensing of transmissions,[20] an outcome of great importance to the performers. Moreover, expansion of the statutory license would include a provision protecting copyright owners of musical works from having their royalty fees affected by the royalties granted to owners of sound recordings.[21] Certainly, the purpose underlying any expansion of the public performance right for sound recordings is not to disrupt or diminish the generation of revenues for the public performance of musical works. These are separate streams of income that flow to different rightsholders for the use of different works. In fact, ASCAP reported a five percent increase in performance royalties in 2006[22] underscoring just how important these revenue streams are to the songwriters and publishers and why they need to be preserved.

This increase in ASCAP's stream of revenue is likely due to the fact that songwriters and publishers receive a performance royalty from all performances of their works, including royalties for terrestrial airplay. Because songwriters and publishers

[20] 17 U.S.C. 114(g)(2)

[21] 17 U.S.C. 114 (i) "No Effect on Royalties for Underlying Works.— License fees payable for the public performance of sound recordings under section 106 (6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6)."

[22] Brian Hiatt and Evan Serpick, *The Record Industry's Decline*, Rolling Stone (June 19, 2007), http://www.rollingstone.com/news/story/15137581/the_record_industrys_decline, citing sales figures provided by Nielsen SoundScan.

receive these royalties for performances of their works, they appear to have been able to offset the noted decline of revenues due to decreased sales of phonorecords. Performers and record companies, on the other hand, having only a limited performance right for some, but not all, digital transmissions have not received sufficient revenues to weather the shift in market preferences from sales to performances. Thus, amending the statutory license to include all audio transmission would level the playing field for those businesses providing music in today's market, and it would have the beneficial effect of compensating performers and record producers for their efforts in creating the sound recording in the same way that songwriters and publishers receive compensation for their efforts in writing and publishing the music embodied therein.

b. The International Situation

Our failure thus far to recognize a meaningful performance right for sound recordings (the term phonograms is used in many countries) places the United States, which considers itself a world leader in copyright protection, well outside the mainstream of international law.[23] Many countries of the world, and virtually all industrialized countries, recognize performance rights for sound recordings, including performances made by means of broadcast transmissions. Most of these countries belong to international treaties that provide protection for performers and producers of sound recordings.

The first international treaty including a performance right for sound recordings was the International Convention for the Protection of Performers, Producers of Phonogram Recordings and Broadcasting Organizations, known as the Rome

[23] The US, UK and other common law countries frequently provide copyright protection; other countries protect the contributions of performers and producers of sound recordings under "neighboring (related) rights" regimes. No international treaty offering protection for the performers or producers of sound recordings is considered a copyright treaty per se.

Convention.[24] It was concluded in 1961 and entered into force in 1964. Abraham Kamenstein, U.S. Register of Copyrights, served as rapporteur-general of the Diplomatic Conference. Article 12 provided protection for secondary uses of phonograms; secondary uses were defined as use of phonograms in broadcasting and communication to the public. The U.S. never adhered to the Rome Convention.

In 2002 the WIPO Performances and Phonograms Treaty (the WPPT), concluded in 1996 and ratified by the U.S. in 1998, came into force. Today, that treaty has 62 members with many additional European Union countries soon to join.[25] Article 15 of the WPPT provides for the right to equitable remuneration to performers and producers for the broadcasting and communication to the public of their phonograms., i.e., secondary uses of phonograms. This Article, however, allows a country to declare that it will apply this right only to certain uses or declare that it will not provide this right at all. Because of the inadequacy in our law in the area of performance rights for sound recordings, the U.S., in its instrument of ratification, included a reservation concerning its commitments under Article 15; specifically the U.S. stated that it would limit itself to protection of only certain acts of public performances by digital means. It made clear that public performances of sound recordings in over-the-air broadcasts were not subject to equitable remuneration.

Thus, the U.S., a leader in the creation, distribution and world-wide licensing of recorded music, is not a party to the Rome Convention; and, while a party to the WPPT, the U.S. has limited its obligation for protection to only certain digital transmissions, and specifically has exempted over-the-air broadcasts. With respect to the lack of protection

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[24] This treaty is administered by the International Labor Organization, UNESCO and WIPO.

[25] Item Note, Council of European Union, Brussels, 12 July 2007 on Agreed principles with regard to the ratification of the 1996 WIPO Treaties.

for over-the-air broadcasts of sound recordings, the United States stands out as the most prominent industrialized country without this protection.[26]

In most countries of the world broadcasters pay royalties to recordings artists and record producers. These countries recognize the incredible value of a recording artist's interpretation of a musical composition or other artistic work. More often than not, a performer is the reason for the popularity and endurance of a particular musical recording.

Equally important is the fact that when our sound recordings are exploited in countries that are signatories of only the Rome Convention, there is usually no payment for the performance of those sound recordings despite the fact that royalties have been collected in these countries for their use. And, the breadth of our reservation in the WPPT also results in WPPT member countries denying payment for broadcasting and other public performances of sound recordings. U.S. performers and producers would have much to gain if Congress broadened the public performance right to include analog and digital broadcasts of sound recordings. One industry estimate, in 1990, suggested that U.S. performers were losing $27 million a year in potential foreign performance royalties.[27] A more recent industry estimate places the loss due to performers and labels for performances in foreign broadcasts at about $70 million.

c. Incentives for continued creation

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[26] Ironically, two countries that the United States has long urged to upgrade their copyright laws – China and Singapore – have used the United States' example as an excuse to adopt weaker performance rights for sound recordings.

[27] Mathew S. DelNero, *Long Overdue? An Exploration of the Status and Merit of a General Public Performance Right in Sound Recordings*, Vanderbilt Journal of Entertainment and Technology Law, Vol. 6, No. 2, Spring 2003, at 191.

Congress has repeatedly recognized the emergence of technological threats to the creators of sound recordings. In 1971[28], 1976[29], 1995[30] and 1998[31] it re-calibrated the rights of copyright owners of sound recordings to address these threats. Now, as traditional record sales continue to decline[32] (and the rate of decline far outpaces the emergence of download sales) and HD radio has begun to experience wide implementation and acceptance, Congress again finds itself considering how to address the latest threat to the market viability of creators of sound recordings. And something must be done.

What is needed is a change to ensure that performers and record companies can continue to make a viable living from their craft. As I have suggested, an expansion of the performance right for sound recordings would I believe provide fair compensation to the creators and serve as a significant stimulus to ensure that creators continue to develop new works throughout the 21st Century. But whatever course Congress chooses, it should be aware of the need for strong incentives for creators to continue their artistic endeavors and the equal need for incentives to encourage the continued development of new technological advances that enable legitimate exploitation of and access to musical and other works. In the absence of corrective action, new technologies will pose an unacceptable risk to the survival of what has been a thriving music industry. In order for the industry to continue to enrich society, performers and record labels must be able to

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28 Sound Recordings Act of 1971, Pub. L. No. 92-140, 85 Stat. 391 (1971).

29 Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541 (1976).

30 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995).

31 Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2286 (1998)

32 Lars Brandle, *Piracy, Shrinking Sales Send Global Music Market Down 5%*, Billboard, (July 3, 2007).

make a living by creating the works that broadcasters, webcasters and consumer electronic companies are so eager to exploit for profit.

Mr. Chairman, as always, we at the Copyright Office stand ready to assist you as the Committee considers how to address the new challenges that are the subject of this hearing