Statement of Representative Howard L. Berman of California

On the "Performance Rights Act" of 2007

December 2007

Howard L. Berman: Madam Speaker: Today, I join my colleagues in both the House and the Senate in introducing "The Performance Rights Act" of 2007. This legislation is a first step at ensuring that all radio platforms are treated in a similar manner and that those who perform music are paid for their work.

This narrowly tailored bill amends a glaring inequity in America's copyright law - the provision in Section 114 that exempts over-the-air broadcasters from paying those who perform the music that we listen to on AM and FM radio. For as long as I have been working on the intellectual property subcommittee, I have been troubled by this policy that sets America apart from every other developed country in the world. The purpose of the bill is to take a necessary step towards platform parity so that any service that plays music pays those who create and own the recordings – just as satellite, cable and internet radio stations currently do.

I understand that this legislation raises some difficult political issues. Several people have expressed some very legitimate concerns – like the need to accommodate small broadcasters, the possibility of jeopardizing the revenues earned by songwriters and music publishers, or expanding the scope of the law governing music played in restaurants and other public venues. So let me begin by clarifying how we have narrowly tailored this legislation –

1) The bill repeals the current broadcaster exemption – but it does NOT apply to bars, restaurants and other venues, or expand copyright protection in any other way.

2) The bill provides an accommodation of protection for small and non-commercial broadcasters by setting a low flat annual fee with no negotiation, litigation or arbitration expenses. Nearly 77% of existing broadcasting stations in this country – including college stations and public broadcasters – will pay only a nominal flat fee, rather that having to pay a percentage of their revenues as royalties.

3) The bill extends copyright protection to artists, musicians and the sound recording labels – it does NOT harm or adversely affect the revenues rightfully paid to songwriters and other existing copyright owners.

For over 20 years I have been convinced that fairness mandates that all those in the creative chain from the artist, musicians and others who bring the recording to life -- get compensated for the way they enrich our lives. The U.S. is the only developed country in

the world that does not require privately owned over-the-air radio stations to compensate those performers who create the music that broadcasters use to attract the audience that generate their ad revenues. Because of music, radio is able to profit. Not compensating those who create the music is unfair and ultimately harmful to music creation that benefits everyone – including the broadcasters. Furthermore, the law requires all other platforms in the U.S. (including satellite and Internet radio) to compensate the copyright owner.

Songwriters and music publishers rightly do get paid when their song is played on the radio, but the artist whose voice or musical talent brings in the ad revenue for the station never receives a penny from the station. That means that under existing law, when you hear" White Christmas" on the radio this holiday season, the estate of Irving Berlin will get paid for the words and music that he wrote. But the estate of Bing Crosby will not – even though it is the tone and texture of his voice that symbolizes Christmas for so many. This disparity makes no sense. Therefore, in an effort to begin the journey towards parity among platforms and fairness to artists, the bill as introduced, will affect three areas where there is currently disparate treatment:

Platform parity – Never in the past have there been more engaging technological platforms which offer music to consumers at almost any time, in any format. Especially with the roll-out of HD ('hybrid digital") radio which will provide greater choice, it becomes harder to justify an exemption for any one platform. Both the radio station (regardless of the platform) and the performer benefit from the playing of music over-the-air. But only one party, the station, gets to keep the revenue it generates. While stations use music to get their ad revenue, they gladly leave others to pay the artist for another use of the music. It is certainly true that on all platforms there are differing degrees of promotion that may benefit the artist. That is why the Copyright Royalty Board takes into consideration any promotional element and adjusts the compensation to the artist appropriately.

While calling the performance right a "tax" might make for good rhetoric, it is also good rhetoric to call it "corporate welfare" when the U.S. Code compels copyright owners, artists and musicians to give broadcasters their music for free. It is simply time to eliminate this anachronistic and unjustified subsidy.

International Parity – During a recent meeting in Nashville President Bush was asked about this issue. When he was told that broadcasters in every country in the world except for China, Iran, North Korea, and Rwanda pay a performance right, he rightfully observed, "it sounds like we're keeping interesting company."

Because America does not have an adequate performance right, our own artists and musicians cannot receive royalties when their music is played on radio stations outside the U.S. In many countries between 20- 50% of the music played abroad is "American-made" and because of the lack of reciprocity, we are denying our performers millions of dollars in revenue.

Rights Parity – Songwriters have long been compensated for the songs that are played on the radio – as they should be. However, just as there would be nothing for musicians to play without notes, and nothing for the artist to sing without the words, there is also nothing for a DJ to play without a recorded song.

Our kids know the song "Breakaway" because Kelly Clarkson recorded it – but few know that it was written by Avril Lavigne. Does it make sense for Lavigne to get paid but for Clarkson not to get paid? The fact that Patsy Clines' estate is NOT compensated for over-the air performances of her singing "Crazy" seems crazy. Shouldn't performers be paid as well?

One of America's greatest treasures is its intellectual property. In cities and towns across the nation and in countries around the world, American music is heard throughout the streets. People are consuming more music than ever. Yet the music industry is in crisis. The total value for the music industry at retail declined from $14.5 billion in 1999 to $11.5 billion in 2006. So, any claim that radio should get a free ride because so-called "free airplay" contributes to record sales just isn't true. Record sales have fallen 18% since 2000.

In 1995 Congress took a step forward and established a limited performance right for digital sound recordings. Yet, the performance right Congress created with one hand was taken away with other, by exempting all terrestrial broadcasts.

Cable, satellite, and Internet radio services are granted a statutory license to broadcast music as long as they pay the defined fee determined by the Copyright Royalty Board. This bill extends the statutory licensing requirement to terrestrial broadcasters to avoid an unfair advantage. I do note however, that as we discuss reform of the Section 114 license – other issues will likely arise such as, the standard to be used in determining royalty rates, the sound recording complement, and treatment of ephemeral copies.

We are fortunate that with the evolution of new technologies there are many legal music distribution services currently available. Cable, Internet, and satellite platform providers all compete to provide consumers their choice of music, anytime, in any place, in any format. While I am encouraged by the many options, I am concerned that the government seems to be giving preference to one platform over the others by exempting over–the-air broadcasters from compensating owners of the music which they use to grow their business. This bill seeks the appropriate balance between promoting the creativity of music and fostering innovation. Following is a section-by-section summary of the legislation:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Performance Rights Act''.

SECTION 2. EQUITABLE TREATMENT FOR TERRESTRIAL BROADCASTS.

This section repeals the exemption for terrestrial broadcasters and makes conforming changes by deleting references to the word “digital” from the types of audio transmissions that are subject to a performance right. With these changes, all terrestrial (over-the-air) broadcast transmissions, including analog audio transmissions, would be subject to sound recording performance rights thereby providing parity for the technologies currently covered under the section 114 license.

SECTION 3. SPECIAL TREATMENT FOR SMALL AND NONCOMMERCIAL PUBLIC BROADCASTING STATIONS; AND RELIGIOUS STATIONS AND CERTAIN USES.

This section would create an accommodation for certain qualifying broadcasters from the negotiation and arbitrated rate-setting. Instead, such broadcasters would pay a prescribed flat fee or would retain their current exemption.

For small broadcasters who make revenue less then $1.25 million and therefore are concerned about the uncertainty of the rate and the impact on the growth and viability of their business - this section sets a flat annual royalty fee of $5,000 per year for any individual station (even those part of a larger radio network) with no litigation, negotiation, arbitration, royalty board proceeding or licensing costs.

Furthermore, for non-commercial/ public broadcast stations (irrespective of size) the rate is capped at $1,000 per year per station.

Finally, for those stations that broadcast religious services or make “incidental use of musical sound recordings” such as brief musical transitions in and out of commercials or program segments, or brief performances during news, talk and sports programming there is an outright exemption.

SECTION 4. AVAILABILITY OF PER PROGRAM LICENSE.

This section allows terrestrial radio stations to obtain program licenses for sound recordings (at separately set rates), in lieu of blanket licenses. In some cases, a radio station may not make many featured uses of music, for example a mixed-format station. In such cases, rather than requiring a station to pay a general blanket license fee in the same amount paid by a station that primarily makes featured uses of music, this section requires the Copyright Royalty Board to establish a "per program license" so that such stations can choose only to pay for the music they use, which may be less costly than the general blanket license. This parallels the licenses offered by the performance rights organizations for performing the underlying musical copyright.

SECTION 5. NO HARMFUL EFFECTS ON SONGWRITERS.

Finally, this section protects the songwriters from the impact of providing this new performance right. In the first instance, the bill adopts the songwriters’ suggestion to remove the prefatory language which merely expressed “the intent of Congress” not to

diminish the royalties of the songwriters. Furthermore, it includes the express indication that nothing in the Act shall adversely affect the royalties to songwriters.

I do not want to suggest that this bill is a "perfect" solution. But it is an appropriate **starting** place. I know there are other parts of Section 114 that need to be reformed as well, and therefore will begin to examine additional provisions in the coming months. Furthermore, I remain open to suggestions for amending the language to improve its efficacy or rectify any unintended consequences.

This bill attempts to strike a balance between providing adequate protection to our musicians and artists and continuing to support new innovative technologies. My goal is to preserve the legitimate marketplace by providing a technology neutral structure or at least one with parity for all services that appropriately pay for the music. I hope the parties can work together to reach further consensus on how to achieve parity between technologies and provide rightful compensation to our artists and musicians.

We hope that with introduction of this companion bill in the House to the Performance Rights Act in the Senate, Congress will act quickly to level the playing field between technologies and ensure rightful compensation to performers.