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TESTIMONY OF RICK CARNES  
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Before the  
HOUSE COMMITTEE ON THE JUDICIARY  
Task Force on Competition Policy and Antitrust Laws

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Hearing on Net Neutrality and Free Speech on the Internet

Chairman Conyers, Congressman Smith, and Members of the Committee Task Force, thank you for this opportunity to testify regarding potential regulation of the Internet and how that might effect the digital copyright piracy that is killing off the American songwriting profession. In summary, I believe the current proposals to regulate the Internet -- whether from the FCC perspective or the antitrust perspective -- are more likely to harm than to help the fight against music piracy, and therefore I suggest you proceed with great caution.

My name is Rick Carnes and I am President of The Songwriters Guild of America (SGA). SGA is the nation's oldest and largest organization run exclusively by and for songwriters. I am a working songwriter and have lived in Nashville since 1978. While I have been fortunate to have had a modicum of success in my career -- including co-writing number one songs for Reba McEntire ("I Can't Even Get the Blues") and Garth Brooks ("Longneck Bottle") along with songs for Steve Wariner, Alabama, Pam Tillis, Conway Twitty, and Dean Martin among others -- I am reminded constantly of the perilous economic existence that all of us who have chosen songwriting as a profession labor under daily.

Let me begin by noting that there has been no greater advocate for songwriters over the years than John Conyers. You have been our champion for as long as I can remember on the many intellectual property challenges that we have faced, and we truly appreciate it. And to Ranking Member Lamar Smith, Former Chairman Sensenbrenner, and other Members of the Committee, we fully appreciate and respect all of the support you have given to songwriters and the copyright community over the years. While we may be starting from different perspectives than some of you on the issue considered today, I am confident that you will give our views full and fair consideration, and I look forward to working with you on it.

## Net Neutrality and Copyright Piracy

SGA began focusing on the "Net Neutrality" issue when communications companies started commenting that they were investigating technological solutions to combating piracy on the Internet. At the time of the DMCA debate, ISPs desired to be a "mere conduit" for the material distributed through their networks. In recent months, however, we became aware that some communications companies desire to manage their networks more actively to reduce congestion, which would also have the effect of reducing the significant downloading of pirated content. Additionally, we understand that some companies, including ISPs and content owners, are studying whether pirated content could be identified and stopped before it can be retransmitted for downloading and replication. Others are looking at programs that would encourage or facilitate downloading of legal content. Each of these would be a significant positive development for songwriters and other music copyright owners -- whose livelihoods have been devastated by Internet piracy. Given this prospect, we strongly urge the Committee to fully examine the current situation before placing limits on the ability of broadband companies to manage their networks and implement anti-piracy measures.

## The Problem of Internet Piracy for Songwriters

The unfortunate reality of the current situation in the digital world is that online piracy of digital music is rampant. Such piracy has deeply and materially adversely affected the songwriter community. SGA has spoken out frequently and in great detail on the grave harm to the songwriter community that is being caused by the theft of music in cyberspace. For example, we were at the public forefront of the legal battle that led to the seminal 2005 anti-piracy decision by the U.S. Supreme Court in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster Ltd.* One of the most startling facts today that shows the devastation caused by the loss of songwriter revenue to piracy is SGA's observation that over half of the staff songwriter positions that existed at music publishing houses across the country as recently as five to ten years ago have disappeared. Some companies appear to have eliminated the practice of hiring staff songwriters altogether. Piracy, in other words, is destroying the American community of songwriters through the elimination of songwriting as a viable livelihood. As a result, an important piece of American culture and global commerce is being decimated.

Given the digital nature of this grave threat to the future of the songwriting profession, I have had to become a lay expert in Internet technology. I therefore read with great interest the opinion of network experts, cited by NBC Universal in its FCC comments, that 70% of the volume of traffic on broadband networks is Peer to Peer, or P2P traffic relating to 5% of the users, and easily 90% of such traffic is unlawful. A 2008 UK study by the Wiggin media group found that 70 % of all people polled said they would stop illegally sharing files if their ISP notified them in some way that it had detected the practice.<sup>1</sup> Mr. Chairman, the current situation is simply unacceptable. If a broadband network operator is considering taking technological steps to stop this occurrence, SGA would say, "more power to you." And, "the sooner, the better." And finally, "how can we help?"

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<sup>1</sup> <http://arstechnica.com/news.ars/post/20080303>, visited March 7, 2008.

## Competition in Broadband Networks and Addressing Piracy

As noted, recent events indicate that some network operators, such as AT&T, are investigating whether there might be a technological means to identify and/or filter unlawful content transmitted over the internet. This would make perfect economic sense in my mind, because lawful owners of copyrighted content would rush to make their works available on those networks that incorporated such technology -- given the lower risk of digital theft of their works. If the free market is working the way it should, then these networks might risk alienating some customers because of the filtering, but would also stand to gain significantly from having more robust content to offer to a wider audience. And that is what the free market is all about: creating a distinctive product and challenging competitors with an inferior product. In a market that is free of undue or unwise regulation, the economic winners and losers would be chosen by consumers who have a wide range of choices about what type of Internet service to purchase, and what kind of material might be distributed over those networks. I can tell you as a songwriter and as a copyright owner that my choice would be to have my works distributed by someone that invested in trying to stop digital theft of intellectual property. And I believe that competition would be enhanced if broadband network operators were free to decide to manage their networks in this manner. At the moment, the marketplace can decide which networks made the right choice, and that strikes me as a rational result.

## Recent Regulatory and Legislative Proposals.

I think the greatest risk of an anti-competitive result comes from current regulatory and legislative proposals to prohibit or limit responsible ISPs from managing their networks. At the moment, the free market is the best weapon we have for combating Internet piracy. Technology created the illegal file sharing monster, but more technology can detect and deter those practices that are illegal. In other words, we must fight technology with technology. Unfortunately, a number of pending regulatory and legislative proposals would prevent the nascent technological counter-attack against Internet piracy.

The songwriting profession right now is like a person drowning in the quicksand of digital piracy. Of those whose heads remain above the surface, many of us are up to our armpits. There is a chance that some new technology will be the rope thrown to us before it is too late. But companies and entrepreneurs need an economic incentive to develop those anti-piracy technologies. Regulations restricting the ability of ISPs to manage their networks would discourage the development of these necessary technologies and would eliminate the last bit of hope that songwriters have to survive the digital onslaught. We might drown even if these new technologies are deployed -- or we may not. But we will almost certainly slip from sight if they are not developed. And this is an important policy consideration for Congress and the FCC.

Some regulatory proposals before the FCC, and legislation currently in the Commerce Committee, are clearly detrimental to responsible network management, and therefore would harm songwriters. The antitrust legislation introduced in 2006 by Congressmen Conyers and Sensenbrenner recognizes that network operators should be able to protect the security of their networks, and to prevent a violation of Federal or State law. To the extent that this covers copyright enforcement actions, we greatly appreciate your understanding that this is an issue.

Unfortunately, it is our reluctant conclusion that the bill from the prior Congress would still have significant adverse effects on anti-piracy efforts on the Internet -- even though I am confident that is not your intent.

H.R. 5417 from the 109th Congress makes it an antitrust violation to fail to provide broadband network services on reasonable and nondiscriminatory terms and conditions, or to block, impair, or discriminate against, or interfere with the ability of any person to use a broadband network. While an exception exists for measures to manage the functioning of the network, to protect the security of such network, and to prevent violations of law, these measures themselves must be "reasonable and nondiscriminatory." The exception is far from clear, particularly in the area of actions taken to prevent copyright violations. When such an ambiguity exists, the likelihood that companies will spend money to develop technologies to deter broadband piracy falls precipitously. New anti-piracy technology could well be discouraged. While I doubt this result was intended, I am quite concerned that that would be the actual result.

Even if the exceptions in H.R. 5417 were determined to permit ISPs to *discourage illegal* copyright practices, the bill clearly would not allow ISPs to *encourage* their customers to patronize sites that adopt *lawful* copyright practices. I think such flexibility on the part of ISPs is critical to reducing Internet piracy of music, and yet this bill would likely prohibit it.

I am not a lawyer, let alone an antitrust lawyer, but I understand that current antitrust law is quite broad. And I am confident that if the broadband network operators engaged in anti-competitive conduct, DOJ, the FTC, and perhaps this committee as well, would take action against those who are responsible. Given that even the FTC has determined that such conduct has not occurred so far, and given the risks that regulation in this area poses to copyright owners in general -- and to songwriters in particular -- I would strongly encourage the Committee to think twice before further legislative action in the current direction.

My final thoughts on regulating the Internet are as follows. It strikes me as odd that the problem of broadband network congestion caused largely by illegal file sharing has been addressed so far by proposing that ISPs be denied the ability to manage such congestion. If regulation is to be considered, then the heart of the problem should be at the top of the agenda -- *illegal file sharing*. The current proposals seem to have it all backwards. I am comfortable letting the market reward those ISPs who behave responsibly and letting current law apply to those who misbehave. But if regulation or legislation is the course chosen, then the first order of business is to detect and stop illegal file sharing.

### Conclusion

Mr. Chairman, Mr. Smith, Mr. Sensenbrenner, and my many other friends on the Committee, SGA truly appreciates your efforts over the years on behalf of the songwriting community. We may not be in agreement on this particular issue at the moment, but I look forward to working with you so that we may resolve this thorny problem, just as we have resolved many other thorny issues in the past. SGA and I stand ready to be a part of that process.