PERFORMANCE RIGHTS ACT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

H.R. 848

MARCH 10, 2009

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PERFORMANCE RIGHTS ACT

TUESDAY, MARCH 10, 2009

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:08 a.m., in room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Nadler, Scott, Watt, Lofgren, Jackson Lee, Cohen, Pierluisi, Sherman, Gonzalez, Weiner, Sánchez, Wasserman Schultz, Maffei, Smith, Sensenbrenner, Coble, Goodlatte, Lungren, Issa, Forbes, King, Franks, Gohmert, Jordan, Poe, Chaffetz, Rooney, and Harper.

Staff Present: Stacey Dansky, Majority Counsel; Benjamin Staub, Majority Professional Staff Member; and David Whitney, Minority Counsel.

Mr. CONYERS. Good morning, everyone. The Committee will come to order. I would like to welcome all here in connection with the Performance Rights Act, H.R. 848.

[The bill, H.R. 848, follows:]

I

111TH CONGRESS
1ST SESSION

H. R. 848

To provide parity in radio performance rights under title 17, United States Code, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2009

Mr. CONYERS (for himself, Mr. ISSA, Mr. BERMAN, Mrs. BLACKBURN, Mr. HODES, Ms. WASSERMAN SCHULTZ, Mr. WEINER, Mr. COHEN, Mr. NADLER of New York, Mr. WEXLER, Mr. PETERSON, Mr. JOHNSON of Georgia, Mr. SCHIFF, Mr. SHERMAN, Mr. SHADEGG, Ms. JACKSON-LEE of Texas, Ms. LINDA T. SÁNCHEZ of California, Ms. HARMAN, and Mr. WAXMAN) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To provide parity in radio performance rights under title 17, United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

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

SEC. 2. EQUITABLE TREATMENT FOR TERRESTRIAL BROADCASTS.

(a) PERFORMANCE RIGHT APPLICABLE TO RADIO TRANSMISSIONS GENERALLY.—Section 106(6) of title 17, United States Code, is amended to read as follows:

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of an audio transmission.".

(b) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING PERFORMANCE RIGHT.—Section 114(d)(1) of title 17, United States Code, is amended—

(1) in the matter preceding subparagraph (A), by striking "a digital" and inserting "an"; and

(2) by striking subparagraph (A).

(c) INCLUSION OF TERRESTRIAL BROADCASTS IN EXISTING STATUTORY LICENSE SYSTEM.—Section 114(j)(6) of title 17, United States Code, is amended by striking "digital".

SEC. 3. SPECIAL TREATMENT FOR SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS STATIONS AND CERTAIN USES.

(a) SMALL, NONCOMMERCIAL, EDUCATIONAL, AND RELIGIOUS RADIO STATIONS.—

(1) IN GENERAL.—Section 114(f)(2) of title 17, United States Code, is amended by adding at the end the following:

"(D) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that has gross revenues in any calendar year of less than $1,250,000 may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $5,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.

"(E) Notwithstanding the provisions of subparagraphs (A) through (C), each individual terrestrial broadcast station that is a public broadcasting entity as defined in section 118(f) may elect to pay for its over-the-air nonsubscription broadcast transmissions a royalty fee of $1,000 per year, in lieu of the amount such station would otherwise be required to pay under this paragraph. Such royalty fee shall not be taken into account in determining royalty rates in a proceeding under chapter 8, or in any other administrative, judicial, or other Federal Government proceeding.".

(2) PAYMENT DATE.—A payment under subparagraph (D) or (E) of section 114(f)(2) of title 17, United States Code, as added by paragraph (1), shall not be due until the due date of the first royalty payments for nonsubscription broadcast transmissions that are determined, after the date of the enactment of this Act, under such section 114(f)(2) by reason of the amendment made by section 2(b)(2) of this Act.

(b) TRANSMISSION OF RELIGIOUS SERVICES; INCIDENTAL USES OF MUSIC.—Section 114(d)(1) of title 17, United States Code, as amended by section 2(b), is further amended by inserting the following before subparagraph (B):

"(A) an eligible nonsubscription transmission of—

"(i) services at a place of worship or other religious assembly; and

"(ii) an incidental use of a musical sound recording;".

SEC. 4. AVAILABILITY OF PER PROGRAM LICENSE.

Section 114(f)(2)(B) of title 17, United States Code, is amended by inserting after the second sentence the following new sentence: "Such rates and terms shall include

a per program license option for terrestrial broadcast stations that make limited feature uses of sound recordings.''

SEC. 5. NO HARMFUL EFFECTS ON SONGWRITERS.

(a) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS; NECESSITY FOR OTHER LICENSES.—

(1) IN GENERAL.—Section 114(i) of title 17, United States Code, is amended to read as follows:

''(i) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS; NECESSITY FOR OTHER LICENSES.—

''(1) NO ADVERSE AFFECT ON LICENSE FEES FOR UNDERLYING MUSICAL WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to set or adjust the license fees payable to copyright owners of musical works or their representatives for the public performance of their works, for the purpose of reducing or adversely affecting such license fees. License fees payable to copyright owners for the public performance of their musical works shall not be reduced or adversely af-

fected in any respect as a result of the rights granted by section 106(6).

"(2) NECESSITY FOR OTHER LICENSES.—Notwithstanding the grant by an owner of copyright in a sound recording of an exclusive or nonexclusive license of the right under section 106(6) to perform the work publicly, a licensee of that sound recording may not publicly perform such sound recording unless a license has been granted for the public performance of any copyrighted musical work contained in the sound recording. Such license to publicly perform the copyrighted musical work may be granted either by a performing rights society representing the copyright owner or by the copyright owner.".

(2) CONFORMING AMENDMENT.—Section 114(d)(3)(C) of title 17, United States Code, is hereby repealed.

(b) PUBLIC PERFORMANCE RIGHTS AND ROYALTIES.—Nothing in this Act or the amendments made by this Act shall adversely affect in any respect the public performance rights of or royalties payable to songwriters or copyright owners of musical works.

(c) PRESERVATION OF ROYALTIES ON UNDERLYING WORKS PUBLICLY PERFORMED BY TERRESTRIAL BROADCAST STATIONS.—Section 114(f) of title 17, United States

Code, is amended by adding at the end the following new paragraph:

"(6) Notwithstanding any other provision of this section, under no circumstances shall the rates established by the Copyright Royalty Judges for the public performance of sound recordings be cited, taken into account, or otherwise used in any administrative, judicial, or other governmental forum or proceeding, or otherwise, to reduce or adversely affect the license fees payable to copyright owners of musical works or their representatives for the public performance of their works by terrestrial broadcast stations, and such license fees for the public performance of musical works shall be independent of license fees paid for the public performance of sound recordings.".

SEC. 6. PAYMENT OF CERTAIN ROYALTIES.

Section 114(g) of title 17, United States Code, is amended—

(1) by amending paragraph (1) to read as follows:

"(1) Except in the case of a transmission to which paragraph (5) applies or a transmission licensed under a statutory license in accordance with

subsection (f) of this section, the following shall apply:

"(A) A featured recording artist who performs on a sound recording that has been licensed for public performance by means of a digital audio transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the artist's contract.

"(B)(i) In a case in which the copyright owner of a sound recording has licensed the sound recording for the public performance of the sound recording by means of a digital audio transmission, the copyright owner shall deposit 1 percent of the receipts from the license with the American Federation of Musicians and American Federation of Television and Radio Artists Intellectual Property Rights Distribution Fund (or any successor entity) (in this subparagraph referred to as the 'Fund') to be distributed to nonfeatured performers who have performed on sound recordings. The sound recording copyright owner shall make such deposits for receipts received during the first half of a calendar year by August 15 and for receipts

received during the second half of a calendar year by February 15 of the following calendar year.

"(ii) A sound recording copyright owner shall include with deposits under clause (i) information regarding the amount of such deposits attributable to each licensee and, subject to obtaining consent, if necessary, from such licensee, for each sound recording performed by means of a digital audio transmission by such licensee during the applicable time period, and to the extent included in the accounting reports provided by the licensee to the sound recording copyright owner—

"(I) the identity of the artist;

"(II) the International Standard Recording Code of the sound recording;

"(III) the title of the sound recording;

"(IV) the number of times the sound recording was transmitted; and

"(V) the total amount of receipts collected from that licensee.

"(iii) The Fund shall make the distributions described in clause (i) as follows: 50 percent shall be paid to nonfeatured musicians

(whether or not members of the American Federation of Musicians) and 50 percent shall be paid to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists). The Fund may, prior to making such distributions, deduct the reasonable costs related to making such distributions.

"(iv) The sound recording copyright owner shall not be required to provide any additional information to the Fund other than what is required under this subparagraph. Sound recording copyright owners shall use reasonable good faith efforts to include in all relevant licenses a requirement to report the information identified in subclauses (I) through (V) of clause (ii). Amounts required under clause (i) that are not paid by the date specified in such clause shall be subject to interest at the rate of 6 percent per annum for each day of nonpayment after the date the payment was due."; and

(2) by adding at the end the following new paragraph:

"(5) Notwithstanding paragraph (1), to the extent that a license granted by the copyright owner

of a sound recording to a terrestrial broadcast station extends to such station's nonsubscription broadcast transmissions otherwise licensable under a statutory license in accordance with subsection (f), the station shall pay to the agent designated to distribute statutory licensing receipts from the licensing of transmissions in accordance with subsection (f), 50 percent of the total royalties that the station is required to pay for such transmissions under the applicable license agreement. That agent shall distribute such payments in proportion to the distributions provided in subparagraphs (B) through (D) of paragraph (2), and such payments shall be the sole payments to which featured and nonfeatured artists are entitled by virtue of such transmissions under the direct license with that station.".

○

Mr. CONYERS. I think H.R. 848 is an important piece of legislation and I think that it is fair to say that the current situation involving recording artists is not one that we can be very proud of. We hear a song on the radio and someone is singing or playing melodies, who receives absolutely no compensation. But it's okay, I am told; someone will go out and buy their records, so you folks should be glad you're on the radio.

And speaking candidly, I've heard about some performers that are a little reluctant to speak publicly in support of the bill because of the threatening tone that they have been told about why they shouldn't do something like that. And even in the Congress, amazingly, some of my colleagues have expressed hesitation to cross their local broadcaster, even though they say privately, Sure, we support the bill on its merits.

Now, I have a prediction that sooner or later this measure is going to become law. And so the sooner that everybody in this room recognizes this and comes to the table in a spirit of negotiation, the better it is going to be and the sooner we'll get this subject off the table.

Can you believe that there are only four countries, developed countries, on the planet that don't pay performance rights? The other three are Iran, North Korea and China.

And so what we want to do today is to try to fairly examine this. Some would have us believe that the artists are being done a great favor by getting played at all. But every other platform for broadcast music, including satellite radio, cable, Internet, Web casters pay a performance royalty; terrestrial radio is the only platform that doesn't. And this exemption from paying a performance royalty to artists doesn't make much sense; and many of them—I don't know about my colleagues on the Committee, but I have been to so many charity events for musicians that were down on their luck—they've got big health care bills or they don't get work. I mean, everybody rises and falls.

So I'm here to begin this discussion. I'll put the rest of my statement in the record and yield to my friend, the minority Ranking Member, Lamar Smith of Texas.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Statement of the Honorable John Conyers, Jr.
Hearing on H.R. 848, the "Performance Rights Act"
2141 Rayburn House Office Building
March 10, 2009

I would like to welcome everyone to this hearing on H.R. 848, the "Performance Rights Act." I believe the legislation before us will both add equity and responds to the concerns of its detractors. I say this for several reasons:

First, the current situation is not fair to recording artists, musicians or the recording labels. When we hear a song on the radio, the person singing the lyrics or playing the melodies receives absolutely no compensation.

The bill's opponents would have us believe that radio stations are doing artists a great favor by playing their music in the first place. But every other platform for broadcast music – including satellite radio, cable radio, and Internet webcasters – pay a performance royalty. Terrestrial radio is the only platform that doesn't pay. This exemption from paying a performance royalty to artists no

longer makes sense and deprives artists of the compensation they deserve for their work.

Let me also be clear that this legislation is not a tax – not a penny of the performance royalties are going to the government. All royalties generated will go to the copyright owners and creative artists who deserve compensation for their talent.

Our legislation will bring over-the-air broadcasters in line with the same standards we require of other music platforms. Moreover, this bill will bring the United States in line with every other nation that currently grants performers a right to be compensated for their work when it is broadcast on terrestrial radio.

Second, the underlying bill protects small broadcasters who make less than $1.25 million by setting a flat annual royalty fee of $5,000. For non-commercial/public broadcast stations, the rate is capped at $1,000 per year per station. And the bill provides an outright exemption for religious broadcasters or stations that make "incidental use"

of musical sound recordings.

In addition, the bill addresses concerns of the artists and songwriters. The bill makes it clear that rate setting proceedings for songwriters cannot include any evidence or discussion of royalty rates for sound recordings. This should ensure that royalty rates for songwriters are in no way reduced or adversely affected by the new royalties paid to performing artists.

The bill also makes clear that all public performances of a sound recording first require a license granted by the owner of the underlying musical composition.

The bill also protects nonfeatured musicians and featured artists by ensuring they always receive 50% of the performance royalty, regardless of whether the license is awarded under the statute or privately negotiated.

Finally, I'm well aware there are still plenty of issues that we must work out before this bill goes to

markup in the full Committee. I have pledged to many of you that we will attempt to address these issues in a manner that is fair to everyone. Immediately following this hearing, I want to start discussions that include all the various stakeholders, members and staff. This includes broadcasters, performers, songwriters, record labels, and consumers. I come into this hearing in good faith, and hope that others will reciprocate by engaging in a reasonable and meaningful dialogue, so that we can finally provide some reasonable level of equity to the music business.

Mr. SMITH. Thank you, Mr. Chairman.

The purpose of copyright law is to promote the public interest by encouraging the creation of new works of authorship. To accomplish this, the law seeks to balance the interest of creators in receiving compensation for their work with a public benefit that is derived from encouraging greater access to such works.

The fundamental question presented by H.R. 848, the Performance Rights Act, is to what extent the copyright law should give rise to a royalty payment each time a sound recording is performed publicly. Requiring a full statutory performance right for sound recordings is a change that has been sought by performing artists in the record industry for years.

H.R. 848 amends Section 106 and 114 of the copyright act to eliminate the exemption that AM and FM radio stations have enjoyed since the development of broadcast radio. The exemption permits these stations to broadcast sound recordings to the public without having to compensate performing artists. Proponents of current law assert that performing artists, particularly those with an active recording contract, benefit financially from having their songs performed extensively over free radio. They have asked why, if radio does not promote music sales, do artists and record labels send free CDs to radio stations and encourage programming managers to have their tracks spun as often as possible.

On the other hand, copyright owners note they should be entitled to exercise their rights to license the use and distribution of their works. They assert that when the law restricts them from doing so, they should at the very least be compensated for the commercial use of such works.

The economic downturn has resulted in a double hit for radio stations. It affects the ability of radio stations to generate revenue through advertising sales, which have decreased over 20 percent in the last 2 years. It also affects their ability to raise capital and secure financing to continue operations.

While the economic future of radio stations, recording artists and record labels is uncertain, my own view is that they are likely to need each other for some time to come. The sooner the parties recognize and accept this fact, the better for all concerned. Frankly, though, negotiation on the subject of performance rates is unlikely in the near future. So in the short term, what I propose is that the parties agree to have a third party entity conduct an objective study of the economic impact of royalty payments on performing artists and radio stations.

Stakeholders would offer issues to be evaluated, and at least there will be some quantitative analysis to help mold legislation. Such a study would need to be conducted by a party that is clearly not aligned with either side of the debate. This entity would evaluate the likely impact of a range of royalty rates in a variety of economic circumstances.

During my time for questions, I will ask our witnesses if they will agree to this proposal. Before Congress chooses to act or withhold action on any matter, we have an obligation to ensure all legitimate concerns are fairly reviewed and addressed.

Mr. Chairman, thank you for having this hearing today. And I'll yield back the balance of my time.

Mr. CONYERS. Howard Berman has long been our intellectual property leader on Judiciary, and though he is Chairman of Foreign Affairs, his interest in this subject still continues. We are glad that he is with us this morning.

Mr. BERMAN. Thank you, Mr. Chairman. It was your reference to North Korea, China and Iran that brought me here—no.

First, I would like to particularly thank the Chairman for his commitment and his dedication to getting this bill passed. Fairness to the artists and parity between the platforms are all reasons to support this bill. The equities for repealing the broadcaster exemption are clearly in favor of paying artists and musicians for songs that are played on terrestrial radio. What I'd like to do is raise a couple of questions for my amiable adversary, Mr. Newberry, and Mr. Patrick regarding their justifications for opposing the bill.

Mr. Newberry's argument goes like this. This is testimony from the March 10th—from today's hearing. I quote:

"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 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. Simply put, when audiences hear music they like on their radio, they are likely to purchase that music."

A couple of responses to that argument:

Specifically built into this bill is a way to take into account the value that Mr. Newberry talks about of promotion. Section 114(f)(2)(b) directs in this legislation, Title 17—directs that when the copyright royalty judges establish reasonable rates in terms of royalty payments for public performances of sound recordings, when those performances are played on radio stations, they shall base their decision on economic, competitive and programming information presented to the parties, including subsection (i), whether use of the service may substitute for or may promote the sales of records of that performance.

Now, if you don't like that standard, let us know. But the idea that the bill doesn't take into account promotional value isn't true. And if the promotional value outweighs the value of the music to the station, the determination on rates will reflect that.

Secondly, while it is possible that the station provides such great promotion that it obviates the need to pay the artists, I ask you to consider the comparable situation, where the station in fact will pay, as they do now, handsomely to broadcast sports games. There is clearly promotion there, but there is also payment.

The same with talk radio programs.

Mr. Newberry also argues that in this economy radio can't afford the royalty fees prescribed by this bill. But as is clear in the bill, the royalty fees are assessed only on stations that make over $1.25 million in revenue. That is why the bill allows small broadcasters to pay a small flat annual fee, to ensure the viability of radio. If it's too high for some, let's hear alternatives.

For other stations who reconsider a percentage of revenue royalty rate, that way during hard economic times you could pay less;

during good times, you pay more. But let's not forget that this not a debate about economic impact. We can accommodate that in the structure.

This is about a right of a creator to be able to negotiate and get paid for what they create.

So I'd like to make it clear that I'm hopeful that we can work with the NBA to try and resolve any legitimate concerns it has with the bill. Continually saying "no," as the Chairman mentioned in the beginning, is not a productive way to accommodate real issues.

And I ask my fellow Committee Members, even those who oppose the current iteration of the bill, to call on the NAB to sit with the invested parties, to identify their issues and try to hammer out a mutual resolution. Without that, I believe the Committee may have no choice but to move forward without NAB's valuable input.

Thank you, Mr. Chairman.

Mr. CONYERS. From Virginia, a senior Member of Judiciary, Bob Goodlatte.

Mr. GOODLATTE. Mr. Chairman, thank you. And I also want to thank Ranking Member Smith. We really appreciate your holding this hearing on the Performance Rights Act.

Because the United States has been the pioneer for strong intellectual property protections, it is no surprise that the copyright industries are so successful and are so crucial to our national economy. The U.S. copyright industries have created millions of high-skilled, high-paying U.S. jobs and have contributed billions to our economy.

Today we are examining whether an exemption that has existed for years which allows terrestrial broadcasters to play copyrighted works without paying performance rights royalties is still justified in the Digital Age. Broadcasters argue that recording artists receive great benefits from the airplay their songs get, which result in higher sales for the artists.

While this is likely true, I believe that digital music technologies have come to fruition over the past 5 to 10 years and that consumers do not rely solely on terrestrial broadcast stations for their music anymore. Other media, like satellite radio and on-line broadcasters, also deliver promotional value to the recording artists, and they pay performance rights royalties. This way's in favor of lifting the exemption.

On the other hand, I'm very concerned about maintaining local radio programming. Local radio programming is one of the best and least expensive ways that citizens can access news and emergency information in their communities. At a time when consolidation seems to be the norm, I believe it is important to do what we can to encourage radio stations to continue to provide local news and information, which often is done at cost or at a loss to the radio station.

As such, I'm pleased that H.R. 848 contains provisions to grant relief to small radio operators who fall underneath the revenue threshold in the bill. However, I'm still concerned that the exemption does not strike the right balance and that some radio stations that provide excellent local programming and that may make enough money to just clear the revenue threshold in the bill will

be on the fringe. It would be a shame if this legislation were the last straw that caused stations like these to make the decision to close their shops or sell out.

Last year, during the Subcommittee markup of this legislation, I offered an amendment as an attempt to solve this problem. It is my hope that the Chairman will work with me to come up with language that addresses this local broadcasting concern.

In addition, it seems that one of the same arguments that support a requirement that broadcasters pay a performance royalty, the argument that other technologies now compete with terrestrial radio and also provide promotional value, also weighs in favor of all these various music delivery technologies being subject to the same standard for determining what the royalties should be.

I'm not commenting now on what that standard should be, just that perhaps the time is right for these rules to be uniform. I'm interested to hear what the witnesses today think about these ideas.

And I thank you, Mr. Chairman, for holding this important hearing.

Mr. CONYERS. The former attorney general of Puerto Rico, Pedro Pierluisi.

Mr. PIERLUISI. Thank you, Mr. Chairman. I commend you for holding this hearing on your bill, H.R. 848, which would remove the exemption for paying performance royalties that over-the-radio broadcasters but not other radio platforms have long been granted under Federal law. I know this issue is of vital importance to broadcasters, record labels and artists.

I believe there are good arguments on both sides. And I have not yet made up my mind whether to support H.R. 848 or the competing resolution, H.Con.Res. 49, introduced by Mr. Green, which expresses support for the status quo. I'm hopeful, though, that today's distinguished panel will help crystallize the issues for this Committee.

I would note that I have received letters from several broadcasters in Puerto Rico urging me to cosponsor Mr. Green's resolution. Along with other members of the congressional Hispanic Caucus, I have also received a letter from the Spanish Radio Association, a coalition representing several of Hispanic radio's top players. This association claims that H.R. 848 would deal a financial blow to Hispanic radio from which it can't recover.

Mr. Chairman, I do not believe for a moment that this is your intention. To the contrary, I believe your bill tries in good faith to strike a balance between competing interests. I also know you will not seek to move H.R. 848 until we understand the financial impact that this legislation might have on the broadcast industry. I know this hearing marks one step in an ongoing effort to craft a bill that addresses the legitimate concerns of all parties involved.

In general, I subscribe to the view that artists should be compensated for their hard work. Puerto Rico, like so many of the districts represented on this Committee, has a rich and vibrant musical culture. Besides shortstops, rum and coffee, the island's musical talent may be its most renowned export, from Tito Puente to Luis Fonsi to Ricky Martin, and from Gilberto Santa Rosa to Don Omar.

I tell you, although I expect this point to be vigorously disputed by other Members of this Committee, my extremely biased view is

that Puerto Rico may produce as much good music per capita as any other U.S. Jurisdiction.

So I believe—not Memphis. I'm correct.

So I believe that any bill should treat artists in a fair and appropriate manner while acknowledging the fact that radio clearly provides artists with promotional value.

I thank the Chairman and I look forward to listening to the panelists' testimony.

Mr. CONYERS. The distinguished gentleman from California, Darrell Issa.

Mr. ISSA. Thank you, Mr. Chairman. And thank you for holding the next in this series. And I certainly join with the gentleman from Puerto Rico in saying that not all great music comes from California, nor are all the artists in Memphis indigenous to Memphis.

Having said that, Mr. Chairman, I think we are beginning to go down a road that is in the right direction, which is uncommon in Congress, and that is one where although many of us are on one bill or another and have a stake in them, we are beginning to realize that the balance between performance and the value of the copyright is, in fact, inherently unfair and that we must act, although we are not sure in which direction.

In my case, I'm committed to see that the producers of intellectual property not always receive the exact same compensation for their work on terrestrial radio which currently is zero. But at the same time, I join with the Ranking Member, Mr. Smith, in saying that a study—and I would go one step further, a GAO study, should in fact be commissioned in order to move us in the direction of a neutral third-party, neither the broadcasters who seem to believe that it is always a privilege not to be charged for promoting your song by paying it nor, to be honest, my friends in the content community who cannot really decide which model, but they would like to have a model similar to terrestrial radio or satellite, the two of which are not consistent and neither one of which is necessarily the one that would be chosen if we were to come back again for broadcasters.

So for that reason, Mr. Chairman, I will put the rest of my opening statement in the record. I certainly support what we are going to hear today. Hopefully, Mr. Chairman, what we're going to hear today, in addition to what we've heard in the past, is support for a high-level, independent study to get it right once and for all as to perhaps not just terrestrial, but perhaps also to our friends on the Internet and satellite radio who are currently paying because somehow their promotion value appears to be less.

With that, I yield back.

Mr. CONYERS. A senior Member of the Committee, Zoe Lofgren from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I appreciate this hearing today and wanted to just note that I have remained neutral on this legislation, in part, because I think while there is merit to the arguments made on both sides of the question, the arguments in favor of the artists really overlook the newest platform, which is Web radio. And I think if we are going to have a discussion of parity or fairness under our copyright law—and I think it is absolutely

fair that we do so—we'll err if we do not also discuss the underlying platform inequality that exists with respect to Internet radio.

I would just note that, to me, it makes little sense that while cable and satellite radio providers are paying 6 to 8 percent of their total revenues in royalties under the 801(b) standard, some Internet radio stations are paying 60 to 80 percent of their total revenues under the Copyright Royalty Board's decision.

I don't understand why a terrestrial broadcaster with gross revenues of under $1.25 million has to pay $5,000 under this legislation, whereas an Internet radio broadcaster making the same amount would be forced to pay a sum just shy of $150,000.

In short, it seems that in every possible way the smallest, newest and most innovative entities are the ones most disadvantaged by our current copyright laws. And I would hope that as we attempt to establish parity, as this legislation does, that we would not overlook the Internet providers as well. This is the opportunity to provide parity across all platforms, and I'm hopeful that as we move forward on this, that we can accomplish that as well.

With that, Mr. Chairman, I thank you for recognizing me, and I will put the remainder of my statement in the record.

[The prepared statement of Ms. Lofgren follows:]

PREPARED STATEMENT OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Thank you Chairman.

I have remained neutral on this legislation in part because there is merit to the arguments made on both sides of this question.

The broadcasters contend that an obligation to pay royalties overlooks the promotional benefits of free air play and will decimate local radio.

For their part, the record labels feel that, particularly at a time when sales of physical CDs and vinyl are declining rapidly, the exemption enjoyed by terrestrial broadcasters is unsupportable.

Another argument marshaled by the recording industry is that fairness and parity require this change in our copyright law.

However, I think any discussion of parity or fairness under our copyright law is incomplete until we address the underlying platform inequality that exists with respect to internet radio.

It makes little sense than while cable and satellite radio providers are paying 6 to 8 percent of their total revenues in royalties under the 801(b) standard, some internet radio stations must pay 40 to 80 percent of total revenues under the Copyright Royalty Board's decision.

Similarly, I don't understand why a terrestrial broadcaster with gross revenues of under $1.25 million has to pay $5,000 under this legislation whereas an internet radio broadcaster making the same amount could be forced to pay a sum just shy of $150,000.

In short, it seems that in every possible way, the smallest, newest, and most innovative entities are the ones most disadvantaged by our current copyright laws.

I would hope that any good faith attempt to establish parity in our copyright laws would address this inequity.

Mr. CONYERS. Our country and western expert, Ted Poe of Texas.

Mr. POE. Thank you, Mr. Chairman. I promise not to sing.

I think, of course, in the long term, the best solution is for the parties to get involved and solve the problem rather than having the government swoop in and make decisions that usually—in many cases, I will say—both sides are disappointed with. I do see some concerns that might not have been addressed at this time, and I just want to mention those.

Local radio stations has seen their revenues drop anywhere between 10 and 40 percent because of the current economic crisis. I'm also concerned about the new performance fee spreading well beyond the local radio stations. I understand that new artists trying to break into the music business and listeners, they rely on the radio to get their music out initially, and that may make it difficult for them to ever break into the group of country music singers or Puerto Rican singers or whoever.

But—the one thing that hasn't been mentioned is that this is not really an issue between just the broadcasters and the artists, but you have the big record labels, label companies involved in this, too. If I understand this bill, 50 percent of the performance fee goes to the record labels, and I think we ought to have a discussion on whether that is a good idea or not.

And many of those record companies, they are based all over the world; I don't know that they are based in Texas, but they are based all over the world. And I think that we should have that discussion as well.

Of course, this has been before Congress, I think, three times, and each time Congress has rejected changing the system. So I look for some insight into the comments that I just made about how it will affect the industry overall in this downturn, how it will affect new performers coming in, whether they will be able to have their songs played. And why is 50 percent of the fee going to the big record companies who, I think, are getting quite a share of this new tax or fee?

So, with that, I will submit the rest of it in the record, Mr. Chairman. I yield back. Thank you.

Mr. CONYERS. Our human rights expert on the Committee, Maxine Waters of California.

Ms. WATERS. Thank you very much, Mr. Chairman.

Today's hearing on the Performance Rights Act of 2009, H.R. 848, is an important first step in finally addressing an issue that has remained unsolved for a number of years. Technological advancements that have brought us to a new digital age that has highlighted the fact that our copyright laws must be updated to reflect the reality on the ground and in cyberspace.

Over the years, my congressional district in Los Angeles—in my congressional district, I've spoken with many performers, artists and broadcasters about their concerns regarding the need to find a fair way to compensate everyone for their work. There is no doubt that the Committee must step up to the plate and update the copyright laws to reflect the fact that musical performances are shared today in ways that were never envisioned when the copyright laws were last updated.

But in modernizing the statutes, I'm determined that we do not do so in a way that diminishes the voice of minority broadcasters. Corporate mergers have had a bad enough impact on small- to medium-sized minority broadcasters. I don't want to make that problem worse with a new law, but I believe we can come up with a solution that doesn't hurt small or minority broadcasters, including religious broadcasters.

Mr. Chairman, I commend you and my colleagues, Mr. Berman and Mr. Issa and others, for your efforts to bring this bipartisan

proposal before the Committee today. No bill is a perfect bill and rarely is a bill enacted exactly as it is introduced. But H.R. 848 provides us with a good starting point, and I'm looking forward to working with you and my colleagues to improve this bill in a way that will provide fair payments to performance and impose the least burden on broadcasters.

Mr. Chairman, as I understand it—and I have to take a look at this bill in detail—there is some discussion about promotions and the value of promotions and whether or not there can be some kind of reconciling of the value of promotions and the cost to the performance. So I'm very much interested in that.

I come from a district—part of my district is Inglewood, California, where I have Stevie Wonder, who owns one of our most prominent African American radio stations, and of course, he is one of the most prominent and well-known performers. So he has got a little bit on both sides of this.

And, of course, I work very closely with Ms. Cathy Hughes, who has done so much to give us a voice where we don't have a voice. We don't have—African American legislators don't have access oftentimes to all of the Sunday TV stations and the big radio stations; our voices are mostly heard through these minority broadcasters. So we have to be concerned about them, and of course, the fairness to the performers. People must be paid for their work.

So we've got a challenge to resolve here, and I'm up to the task of working to help resolve that difficult task.

Mr. CONYERS. I know Stevie Wonder.

Howard Coble has long been a leader in the intellectual property issues from North Carolina, and he is still very concerned about this issue.

Mr. COBLE. Mr. Chairman, I thank you and Mr. Smith for having called this hearing.

Mr. Chairman, you conferred the expert title on the distinguished gentleman from Texas. If you will pardon my immodesty, I'm fairly well versed on bluegrass and old time country; so may I share that title, Mr. Chairman?

Not unlike many Members on this panel, I have friends on each side—broadcasters on the one hand, performers on the other. And when you have friends on each side and ultimately cast a vote, we can't in good conscious say, I'm former friends, because one group is going to be feel jilted.

I would like to associate with the expert from Texas, when he said the best of all worlds would be for these folks at the table to come together. If you could hammer out some sort of resolution, that would, I think, benefit all of us favorably.

I spoke to a Member, Mr. Chairman, who sits on this Committee, 10 minutes ago; and I said, Are you with the broadcasters or the performers? He replied, Yes. So I think that says it.

But I look forward to the testimony today, Mr. Chairman, And again I thank you for calling the hearing. I yield back.

Mr. CONYERS. Steve Cohen from Nashville, Tennessee.

Mr. COHEN. It's a big district. Thank you, Mr. Chairman. Thank you, Mr. Chairman.

I have spent time on this Committee with this issue and indeed I understand where the broadcasters come from. For when I was

young, in the 1950's, in Memphis, Tennessee, Dewey Phillips, a disc jockey on WHBQ radio, played Elvis Presley. And if it weren't for Dewey Phillips, the world would not have known Elvis.

So no question about the fact that the broadcasters gave Elvis the opportunity to be heard and to be known; and it was Dewey Phillips' stepping out that did that.

But today it is different. People would have learned about Elvis over the Internet. They would have learned about Elvis in the new technologies that come out where people really learn about new artists. So I think that as we look at what has happened over the years, the argument that the performers benefit as they did from the play on the radio and that that's their compensation has changed, and that technology has come about—this is an anachronism that needs to be corrected; if we were starting with this type of system today, we would not have this type of system and the performers would be paid.

When I was young, I sang, "Don't Be Cruel." Elvis sang, "Don't Be Cruel." Elvis did a lot better than me. The song writer was the same; the performer does make a difference, and it should be recognized and compensated. How you emote a song has a lot to do with how a song is perceived.

The difference in what American artists receive in Europe and European artists is from something to nothing, and that's because of what we've done here. And we've heard our artists being compensated in Europe because of our system. So I think we need to recognize the performer's contribution.

And while this meeting indeed is about and should be about performers' rights, Howard Berman brought up sports and sports is one of my favorite subjects, other than music. And it is interesting, in the discussion today, the Memphis Tigers started their season in Puerto Rico, and now they're on the way to Detroit, the Chairman's hometown. Last year we were on the way to the Ranking Member's hometown, San Antonio.

And, Mr. Chairman, we'll see you in Detroit. Thank you.

Mr. CONYERS. And Marcia Blackburn from Nashville is coming over right away to correct the Chairman.

Mr. COHEN. She also claims she is from Memphis and Knoxville and Kingsport.

Mr. CONYERS. Chairman Emeritus Jim Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I hadn't planned to make an opening statement, but since everybody else is, you know, let me disclaim the fact that country music got turned off in my house when I heard a ditty called, I Want My Woman to Be More Like My Dog; my wife turned off the radio or the TV player and that was the end of that.

When I was Chairman of the Committee, we dealt with a lot of vexatious intellectual property issues. And one thing that came out and rose to the top is, to be successful in any amendment to the intellectual property law, you had to get all of the players at the table and at least all of the players not being opposed to the product of negotiation, which is not the same as all the players being in favor of the product of the negotiation.

Now, it's my understanding that the broadcasters haven't wanted to come to the table. I may be wrong on that, but I think that most

of the Members of the Committee have that impression, and I'm going to aim my cannon right between your eyes, Mr. Newberry.

I hope you and your organization get to the table and get to the table ASAP. If you don't want to get to the table, can you please tell us why during your testimony? And if there is something that has to be done to get you to the table, like the Chair calling for a markup on this bill, then I will be happy to prod you along that way.

So I want to make my message a lot more sharp, I want to make my message a lot more plain. And a lot of my other colleagues have. There is a problem with this law. You can either be a part of fixing the problem or you can be on the outside. And I think this Committee will be very happy to fix it for you.

So I yield back the balance of my time.

Mr. CONYERS. Brad Sherman, California.

Mr. SHERMAN. Thank you, Mr. Chairman. It is—I think everything I needed to know I learned in kindergarten; or I've been trying to understand the lessons of kindergarten, and you learn there what happens to a society when you don't pay the piper.

I think that those who provide us with music are entitled to be paid for it. I look forward to the artists getting a performance right just as they do in most of the developed world, and I think it is particularly hard for anyone who benefits from intellectual property protections to argue against it. I can't imagine the broadcasters saying, Well, we produce all these programs and we don't want them stolen, but we don't want to pay a performance right to the musician.

The intellectual property industry is what keeps Los Angeles afloat and functioning, and those who support intellectual property rights ought to be in favor of intellectual property rights for performers.

And with that, I yield back.

Mr. CONYERS. Our last Member, Dan Lungren of California.

Mr. LUNGREN. Thank you, Mr. Chairman. Even before we get to hear our panel, I'm learning things here. I knew Dewey Phillips was important, but I thought Ed Sullivan had something to do with Elvis Presley—and Steve Allen. I remember him being blacked out from the waist down, which just made him more intriguing as far as I was concerned.

Mr. Chairman, this is an interesting hearing we are having, an interesting subject. The first time around in Congress I represented southern California, so I probably would have leaned toward the recording industry. Now I represent an area of northern California that has a number of small radio stations, so you might think I'd lean toward the radio stations. The problem is I don't think I have enough information, even with the testimony that has been presented here as to what the fair thing to do is.

We are embarking upon a question as to whether or not we are going to make a fairly significant change in a law that dates back to 1909. And I just wonder if we would benefit, as Mr. Issa suggested, from an outside study. Maybe GAO could give us a study of the economic implications.

Maybe I'm old fashioned. I mean, I'm attracted to buying what we used to call records and so forth, buy what I hear on the radio.

That's where I am introduced to it and that's what attracts me to buy something or not buy something frankly. Or occasionally I might see it on television, but mostly it is when I'm in my car listening to the radio. And so I can see that argument very, very strongly, the promotional feature.

On the other hand, we have the testimony of the artists who say it is unfair that we're not being compensated as we would be in other venues and the way the rest of the world is. But, Mr. Chairman, I don't know frankly what the true economic facts are. I don't know what the state of the small stations are, but I hear their pleas. I don't know what the proper cut would be if we were going to make a distinction between large, medium and small.

I do know that, at least in my district, it appears that the radio stations are in some difficulty. They are not where they were 5 year, ago, 10 years ago, 15 years ago, 20 years ago. And if, in fact, what we did inadvertently had the impact of destroying the nature of some of the small, local radio stations, I think that is something we ought to keep in mind as we, at the same time, consider legitimate interests on the part of the recorders and the performers for their intellectual property.

So I would just second what Mr. Issa suggested, which was, perhaps we could have some sort of neutral body like the GAO do a study that might assist us in terms of some of the economic questions here. That would be of great benefit to me in making a determination on this.

And I thank the Chairman for allowing me this time.

Mr. CONYERS. Well, now that the witnesses have listened to all of us, it is time that we listen to you. We welcome Mitch Bainwol, Dr. Liebowitz, Steve Newberry, Lawrence Patrick, Paul Almeida.

And we begin with Billy Corgan, who is not only a poet—and the Smashing Pumpkins have been reunited; they've come off a world tour.

And we are delighted to have you begin your testimony. All witnesses' testimony will be entered fully into the record. And we welcome you here and thank you for your patience.

TESTIMONY OF BILLY CORGAN, VOCALIST AND LEAD GUITARIST, THE SMASHING PUMPKINS

Mr. CORGAN. Thank you. I would like to thank you, Chairman Conyers, and the Committee for this opportunity to appear before you today about the Performance Rights Act. I'm here as a representative of the musicFIRST coalition, to give voice to fellow artists and musicians who join together to assert their right to be compensated for the airing of their musical performances on terrestrial radio.

Because of my experiences in the music business for over 20 years, I have a particular sensitivity when it comes to artists' rights and who controls the distribution and, therefore, the worth of those rights. Like many of my peers, I come from a working-class background, beginning my musical journey playing in dingy bars and college lunchrooms. Being a performer requires countless hours of dedication to your craft. It is not an easy business to undertake, and for every success story there are many that have not had the opportunities that I have had.

I was able to find an audience in no small measure because of the long support of my music by terrestrial radio. I'm a big fan of radio and am very interested in its continued health and well-being. Terrestrial radio has helped me discover many of the artists that became influential to my life and artistic pursuits. I, by no means, see them as the bad guy.

The change to the law we are here to discuss only redresses an outmoded, unfair practice that favors one participant's needs over another. This legislation is simply a form of restoration to artists long overdue.

The rights of any artist are often rife with vague distinctions and contradictions, as the worth of a creative endeavor cannot be calculated by any science. Works of art are judged subjectively, and if deemed good enough, plugged into a vast system that attempts to establish their mettle and eventually capitalize on that value.

The debate over what any piece of art should command in an open market is as old as time itself. As it stands currently, if you've written a song you have the good fortune of being played on terrestrial radio, then you, as the author, are entitled to a fixed form of compensation as established by Congress. This compensation, of course, recognizes the unique contribution the author has made to the creation of the song. Conversely, if you also happen to be a performer on that very same song, by law, terrestrial radio owes you no form of compensation at all.

The decision behind this long-held inequity stems back to 1909 when radio was in its infancy. And since sound recordings had only recently come onto the market, they were not included. The old-fashioned radio business has held on to this exemption for over 80 years, a law made in a bygone era for a set of reasons long past. This landmark exemption, however, stripped performers of their right to a free market evaluation of the value of their recorded works.

From my perspective, this issue is one of fundamental fairness. If the performance of a song has value to a particular terrestrial radio station in its airing, I believe it is only right to compensate those performers who created the work. Simply put, if a station plays a song, both the author and the performer should be paid. These particular performances must have value to the stations or they wouldn't be playing them.

Not every performer on a hit song is a big name, and they might not see the same windfall that a star might. One can't assume they participate in the merchandise or touring income that is linked to commercial radio success. Not everyone who hears a song on terrestrial radio buys a ticket or a T-shirt. Some listeners just listen, thereby rewarding only the station and their advertisers, and not the performers themselves.

All areas in the modern music business are currently feeling the shifting tides as new models emerge and old ones are broken up. Ours is a business that always begins with the brilliance of the artists. Contrary to long-held myths, it does take money to create new music. As the traditional revenue streams have dried up, most notably in the overall decline of records sales, it has placed stress on who continues to benefit from the old models. The future demands new partnerships and a rethinking of long-held practices about how

artists should be compensated for their music. The hallmark of any great entertainment career is sustainability. Recognizing both the significance of the author and performer in the music making process helps to create those future opportunities.

In closing and with all due respect to those that oppose the passage of the Performance Rights Act, to classify this measure as a "tax" is an interesting choice of words, for who has been taxed more than the artists themselves? Artists have paid their dues, so to speak, to establish terrestrial radio as a great and dynamic medium. We must consider that for many artists, the difference between receiving these resources is the difference between a life in music and a life out of music. Few could deny that when a classic performance is captured, forever frozen as a musical snapshot in time, generation after generation returns to these moments, each finding something a little different. Whether we are talking about Motown, Stax, Elvis or Howling Wolf, when the public decides that a specific performance is worthy of their attention, then it seems only fitting that this little bit of magic as documented be recognized in the form of direct compensation for the artists and organizations that helped to create it.

Thank you for your time.

[The prepared statement of Mr. Corgan follows:]

PREPARED STATEMENT OF BILLY CORGAN

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The rights of any artist are often rife with vague distinctions and contradictions, as the worth of a creative endeavor cannot be calculated by any science. Works of art are judged subjectively, and if deemed good enough, plugged into a vast system that attempts to establish their mettle and eventually capitalize on that value. The debate over what any piece of art should command on an open market is as old as time itself.

As it stands currently, if you have written a song and you have the good fortune of being played on terrestrial radio, then you, as the author, are entitled to a fixed form of compensation as established by Congress. This compensation, of course, recognizes the unique contribution that the author has made to the creation of the song. Conversely, if you also happen to be a performer on that very same song, by law, terrestrial radio owes you no form of compensation at all. The decision behind this long-held inequity stems back to 1909 when radio was in its infancy, and since sound recordings had only recently come onto the market, they were not included. The old-fashioned radio business has held onto this exemption for over 80 years—a law made in a bygone era for a set of reasons long past.

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issue is one of fundamental fairness. If the performance of a song has value to a particular terrestrial radio station in its airing, I believe it is only right to compensate those performers who have created this work. Simply put, if a station plays a song, both the author and the performer should be paid. These particular performances must have value to the stations or they wouldn't be playing them.

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I thank you for your time.

Mr. CONYERS. Paul Almeida is the President of the AFL-CIO's Department For Professional Employees. They represent their 4 million professional and technical workers. He is an engineer himself and was, for 7 years, president of the International Federation of Professional and Technical Engineers.

Welcome to the hearing.

TESTIMONY OF PAUL ALMEIDA, PRESIDENT, DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

Mr. ALMEIDA. Thank you, Chairman.

Good morning, Chairman Conyers, Ranking Member Smith and distinguished Members of the Committee. My name is Paul Almeida, and I'm the President of the Department For Professional Employees of the AFL-CIO, a coalition of 24 national unions representing some 4 million white-collar workers. I'm here today to support the hundreds of thousands of recording artists, singers and musicians who seek to secure a performance right so that they may finally be able to receive the fair compensation they deserve for the work they create.

I am especially pleased to be able to deliver a letter to the Committee which has been signed by the presidents of the American Federation of Teachers, the Communication Workers of America, the United Steel Workers, the International Association of Firefighters, the American Federation of State, County and Municipal

Employees and the Service Employees International Union in solidarity with the brothers and sisters in the music industry.

I would ask that the letter be made part of the hearing record.

Mr. CONYERS. We'll accept it into the record.

[The information referred to follows:]

March 10, 2009

The Honorable John Conyers
Chairman
The Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman,

On behalf of our almost 7 million members, we are writing to thank you for your ongoing work to ensure that all performers – musicians and vocalists, whether they are famous, unknown or in-between – are paid when their recorded performances are broadcast on AM/FM radio. ***We stand with our labor brothers and sisters who are members of the American Federation of Musicians (AFM) and the American Federation of Television and Radio Artists (AFTRA) to thank you for re- introducing the Performance Rights Act in this Congress.*** [*] ***We pledge to work with you to ensure swift passage of this critical legislation.***

The major broadcasters malign this legislation as a performance "tax." We call it a paycheck. Performers, like all workers, deserve to be paid for their hard work. From the outside, their world may appear more glamorous than the factories, schools, hospitals and roads where autoworkers, teachers, nurses and truck drivers earn their livings. But the reality for most performers is far from glamorous. Talent and hard work are no guarantees of success. Like other workers, performers struggle to make ends meet. For them, a steady paycheck is the rare exception. They depend on many different income streams – from scale wages for hundreds of recording sessions for different employers, to fees for live performances, to royalties for the use of their work – to patch together a modest middle class life.

As you know, the labor movement was founded on the belief that a fair day's work deserves a fair day's pay, that workers should be treated with respect, and that hard work itself is honorable. These principles are no less valid in the world of music. Long after

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[*] *These bipartisan bills were introduced as H.R. 4789 and S. 2500 in the 110th Congress.*

the brief celebrity of a hit recording has faded, long after a group has become too old or ill to tour, long after sales fade and fads change, recordings continue to make money for the radio business. Radio depends on these recordings to draw listeners and sell billions of dollars of advertising every year. The value of performers' recorded work endures. It is only right and fair that the performers who created that value should receive a fair payment from the businesses who use it to make money.

In fact, this principle is not new even in the music business. Songwriters, who create the underlying music and lyrics, are paid for the radio broadcast of their works. That is exactly as it should be. And, the fact that songwriters have the right to payment in the U.S. means that they also can collect payments for foreign broadcasts of their work. By contrast, performers take a double hit. They are unpaid in the U.S., and on that basis, foreign societies refuse to pay them for foreign radio broadcasts, too. Millions of dollars in foreign royalties are lost to performers – and the U.S. balance of trade – because of this disparity.

In the United States, only AM/FM radio gets this free ride, because radio's competitors in the new digital music world pay performers. And across the world, American radio stands in stark minority – with countries like China, Iran, and North Korea – in denying compensation to performers for the value of their work. Radio in developed nations pays performers, and so should radio in the United States.

When you turn on the radio, and listen to your favorite jazz or blues recordings, please know that we stand behind you in your effort to ensure that the great performers on these recordings, and thousands of their brothers and sisters, are properly compensated for their work.

We look forward to working with you in the 111th Congress to pass this critical legislation.

Sincerely,

Randy Weingarten, President, American Federation of Teachers

Larry Cohen, President, Communications Workers of America

Gerald McEntee, President, American Federation of State, County and Municipal Employees

Harold Schaitberger, President, International Association of Fire Fighters

Leo Gerard, President, United Steelworkers

Anna Burger, Secretary-Treasurer, Service Employee International Union

cc: The U.S. House of Representatives

Mr. ALMEIDA. Thank you.

Like all professionals, singers and musicians spend years developing their musical talents and abilities and invest substantial resources in their careers. While a relatively small number of performers are able to attain, but not necessarily sustain, fame and fortune, the vast majority of recording artists, singers and musicians must work hard to patch together modest earnings from various sources in order to support their families.

The most successful ones are able to build a middle-class career in music. Most performers, even those who appear to the outside world to be successful, have to work day jobs to pay the bills. In what other profession would you be required to give your work away for free? In all my years representing professionals, I have never encountered such a situation.

Labor ardently supports the efforts of our brothers and sisters in the music profession to be fairly compensated for the music they have created and is played on the radio. Commercial radio stations earned over $16 billion in advertising revenue last year, yet they paid nothing to the performers whose music they played. AM/FM radio depends for its success on recordings created by great performers like the Four Tops, The Supremes, Miles Davis, Patsy Cline and so many other great artists and their equally talented session musicians and singers. What does it pay those artists? Not a penny.

As union members, we believe that this is an issue of fairness. We believe in the principle that a fair day's work deserves a fair day's pay.

The current system creates an unfair competitive advantage for AM/FM radio broadcasters over the new-medium radio platforms. All radio platforms, except AM/FM radio, including satellite, Internet and cable radio, pay for the music they play. Under current law, only the songwriters are entitled to compensation. While it is absolutely right that songwriters be paid for the broadcast of their songs, it follows their performers should also be paid for the broadcast of their recordings.

We all know that that the musicians and singers play a crucial role in creating masterpieces we hum throughout the day, whether it is the National Symphony's version of Mozart or the Temptations singing My Girl written by Smokey Robinson and Ronald White. Performers, too, are creators who deserve and need to be paid.

In this worsening economic crisis, we are also leaving $70 to $100 million on the table each year because we do not have a performance right for artists here in the United States. Talented artists are denied the ability to recover what they erode from airplay of their music overseas. Does it really make sense for the U.S. to continue to allow millions of dollars to go no the French cultural fund every year instead of coming home to the U.S., where it can help performers make ends meet and help local economies?

Under the—unless Congress enacts the Performance Rights Act, our artists in the U.S. will continue to be precluded from collecting these royalties from overseas.

It is long past time that our brothers and sisters who belong to the affiliated unions, the American Federation of Musicians and the American Federation of Television and Radio Artists, are paid

for the work that they create. We all benefit greatly from their wonderful music. We listen to it in our cars on our way to and from work, on the job or at home. And like many others, for many years I assumed they were being paid a little bit for each time I heard the grateful dead play Touch of Grey or Jefferson Airplane play White Rabbit.

Now, I know that the broadcasters have prevented this for over 80 years. I know it has been a long-fought battle from Glenn Miller to Frank Sinatra to those like Sam Moore, Martha Reeves, Herbie Hancock and others who are leading the charge now. It is time. It is only fair that the talented artists be fairly compensated for what they create.

Thank you for asking me to be part of the hearing today, and I will be happy to answer any questions.

[The prepared statement of Mr. Almeida follows:]

PREPARED STATEMENT OF PAUL ALMEIDA

Good morning, Chairman Conyers, Ranking Member Smith, and distinguished Members of the Committee. My name is Paul Almeida. I am the President of the Department for Professional Employees (DPE), a coalition of 24 national unions affiliated with the AFL-CIO. I am honored to speak today on behalf of the more than four million professionals represented by our union affiliates, including the American Federation of Television and Radio Artists, the American Federation of Musicians, the Federation of Professional Athletes, the United American Nurses, the American Federation of Government Employees, and all of our other affiliates. I am here today to stand in support of the hundreds of thousands of recording artists, singers, and musicians who seek to secure a performance right so that they may finally be able to receive the fair compensation they deserve for the work they create.

I am especially pleased to be able to deliver a letter today to the Committee which is signed by the Presidents of the Service Employee International Union, the American Federation of Teachers, the United Steelworkers, the International Association of Fire Fighters, the American Federation of State, County and Municipal Employees, and the Communications Workers of America, in solidarity with our brothers and sisters in the music industry. I would ask that this letter be made part of today's hearing record. We are joining this critical campaign as a united labor movement and we deeply appreciate the leadership of Chairman Conyers, Representatives Berman and Issa, and the other Members of this Committee who support this legislation.

Like all professionals, singers and musicians spend years developing their musical talents and abilities and invest substantial resources in their careers. Just like other professionals, they make considerable sacrifices in an effort to succeed in their chosen field. And just like other professionals, recording artists, musicians and background singers deserve to be paid fairly for the work they do. In what other profession would you be required to give your work away for free without your permission? In all of my years representing professionals, I have never encountered such a situation. And while a relatively small number of performers are able to attain (but not necessarily sustain) fame and fortune, the vast majority of recording artists, singers and musicians must work hard to patch together modest earnings from various sources in order to support their families. The most successful ones are able to build middle-class careers in music. Most performers, even those who appear to the outside world to be successful, have to work "day jobs" to pay the bills. Labor ardently supports the efforts of our brothers and sisters in the music profession to be fairly compensated when the music they have created is played on the radio.

The labor community is also concerned about the many, many hardworking singers and musicians who are now growing older and can no longer easily tour. Yet, their jazz hits, country tunes, and R & B melodies continue to be played over and over again on commercial radio stations. While these stations earned over $16 billion in advertising revenues last year, they paid nothing to the performers whose music they played. AM/FM radio depends for its success on the recordings created by great performers like the Four Tops, the Supremes, Miles Davis, Patsy Cline and so many other great artists and their equally talented session musicians and sing-

ers. What does it pay those artists? Not one penny. The radio stations have had a good gig for decades now, but it is time they start paying for the music they play.

As union members, we believe that this is an issue of fairness. We believe in the principle that a fair day's work deserves a fair day's pay. Music broadcasters have fought hard over the years to avoid paying anything for the foundation of their business model—the music that they play 24 hours a day on a myriad of stations. Let's not kid ourselves—no one tunes into the local hard rock or oldies' station to listen to the commercials. We tune in for the music—to be entertained or energized or to reminisce.

These same broadcasters pay their on air "personalities" and shock jocks millions each year to entertain their listening audience. And they pay millions more in licensing fees to broadcast baseball, football and basketball games. Yet, they refuse to pay anything at all to the artists and musicians who bring music to life. This is simply not fair.

And, the current system creates an unfair competitive advantage for AM/FM radio broadcasters over the "new media" radio platforms. All radio platforms except AM/FM radio, including satellite, Internet, and cable radio, pay for the music they play—yet the AM/FM radio broadcasters continue to block artists' efforts to be paid when the same music is played over terrestrial radio. That is just not right!

We believe that both songwriters and performers should be compensated when the music they have jointly created is played on the radio. Unfortunately, under current law, only songwriters are entitled to compensation. While it is absolutely right that songwriters be paid for the broadcast of their songs, it follows that performers also should be paid for the broadcast of their recordings. We all know that the musicians and singers play a crucial role in creating the masterpieces we hum throughout the day—whether it is the National Symphony Orchestra's version of a Mozart classic, or The Temptations singing "My Girl" written by Smokey Robinson and Ronald White. Performers, too, are creators who deserve and need to be paid.

In this worsening economic crisis, we are leaving 70 to 100 million dollars on the table each year because we do not have a performance right for artists here in the United States. Talented artists are denied the ability to recover what they are owed from the airplay of their music overseas. Does it really make sense for the U.S. to continue to allow millions of dollars to go into a French cultural fund every year, instead of coming home to the U.S. where it can help performers make ends meet, and help our local economies? Unless Congress enacts this Performance Rights Act, artists in the U.S. will continue to be precluded from collecting these royalties from overseas. That too is unfair. The United States is the only developed country in the world that does not have a performance right in sound recordings. In our failure to provide a performance right we stand in the company of such countries as China, North Korea, Rwanda, and Iran. In so many other areas, we fight to ensure that the United States is a leader—clearly we have fallen down on the job here.

It is long past time that our brothers and sisters who belong to our affiliated unions, AFM and AFTRA, are paid for the work that they create. We all benefit greatly from their wonderful music—we listen to it in the car to and from work, on the job, and at home while relaxing with family and friends. And like many others, for many years I assumed that they were paid a little bit each time I heard The Grateful Dead play "Touch of Grey" or Jefferson Airplane perform "White Rabbit." Now I know that the broadcasters have prevented that—for over 80 years.

I know this has been a long fought battle—from Glen Miller to Frank Sinatra to those like Sam Moore, Martha Reeves, Herbie Hancock and others who are leading the charge now—It is time. It is only fair that these talented artists be fairly compensated for what they create and the joy they bring into our lives.

Thank you for asking me to be a part of this hearing today. I, and thousands of my union colleagues, are eager to help our brothers and sisters in the music industry earn a decent living from the craft that they have chosen—music.

I would be happy to answer any questions you may have.

Mr. CONYERS. Lawrence Patrick is a veteran in this business. He graduated from Georgetown Law School, Ph.D. From Ohio University. He heads Patrick Communications, owns a number of small market radio stations, has been head of Gilmore Broadcasting, senior vice president of National Association of Broadcasters and chairman of Ion Media Networks.

And we are glad to have you here today. We welcome you to the Committee.

TESTIMONY OF W. LAWRENCE PATRICK, PRESIDENT, PATRICK COMMUNICATIONS

Mr. PATRICK. Thank you very much. Good morning, Chairman Conyers, Ranking Member Smith and Members of the Committee. My name is Larry Patrick and I'm managing partner of Patrick Communications. We are a media brokerage firm based in Elkridge, Maryland.

I am also a radio broadcaster. My company, Legend Communications, owns 14 small-market radio stations in Wyoming.

In my capacity as managing partner of Patrick Communications, I have extensive media brokerage experience. My firm has negotiated or consulted on over 500 radio and 150 television transactions in the past 15 years. I work with both publicly and privately held communication companies ranging from the largest group owners to many hundreds of mom-and-pop stations.

I have been part of the radio industry for 40 years. I can tell you that over the course of my career, I have never seen what the radio industry is currently experiencing. The economic downturn is having a significant and devastating effect on local radio. But as bad as the current local radio landscape is, it will deteriorate even further and much more dramatically if H.R. 848 were to be enacted.

Let me share with all of you where the radio industry is and what I believe a new performance fee will mean to the local radio stations.

In 2008, radio revenues finished the year down 9 percent. 2009 doesn't look much better. A recent Wells Fargo analyst's forecast said there would be a 13 percent drop in revenues for the industry in 2009, and she warned that the forecast may be far too optimistic. She painted a picture of an industry that is now in free fall with no chance of a turnaround until the economy recovers or credit markets improve. I personally know of radio stations that are seeing a 35 to as much as a 50 percent revenue decline all across the country.

Of course, radio, like virtually every other industry, is suffering the effects of the financial meltdown and the paralysis in the credit markets, which makes it difficult, if not impossible, to finance acquisitions. I know dozens of radio station owners—many of them in their 60's and even 70's—who want to sell their stations and retire, cannot find any buyer capable of financing a purchase in today's market. Almost every publicly traded radio company is in default with their lenders today, and many are facing delisting of their stock from the national exchanges.

Right now, I'm advising lenders and investors on nearly a dozen workouts of radio companies involving over 300 radio stations. Salem Communications, based in California, the largest religious radio group; Saga Communications, based in your hometown of Detroit, Mr. Conyers; Radio One, the largest African American radio company; and others including Citadel, Cumulus, Entercom, Beasley, Emmis, Fisher—dozens of others—have all had to lay off employees and reduce companywide compensation from 5 to 10 percent in the last few months.

The radio industry is tightening its belt and moving forward into a world of financial uncertainty that none of us have ever experi-

enced. We are facing an economic downturn that is sharper and steeper than anything I have ever witnessed.

What I've described is the economic realities that the radio industry is facing right now. And having watched the industry for 40 years, I can sit here and tell you that the new fees that will be levied under H.R. 848 will do significant, long-term damage to the local radio stations across the country. Any further station costs will push even more stations into tripping their loan covenants with their banks and more workouts. Station owners will further reduce staffing and services, which will only hurt their local listeners while enriching the big music labels.

The labels suggest that the provision for small market operators of an annual flat fee of $5,000 would not harm the small market operators. Well, I am a small market radio operator also and I know how much this will hurt. And I know hundreds of small market radio owners who barely make $25,000 a year from their stations. To pay this fee, even a $5,000 fee, stations could have to eliminate covering high school sports, give up more local origination and would reduce their staffing even further.

Any additional fees also threaten their ability to provide emergency services that are so critical to the thousands of small towns across this country.

The recording industry has also argued in the past that if a new performance fee were adapted, stations could simply raise their advertising rates to pay for that new fee. Nothing could be further from the truth. If radio broadcasters could actually get more money for their advertising spots, why wouldn't they be doing that already? The truth is that ad rates are dropping sharply; they are not increasing.

At this time, stations are laying off employees, reducing wages by 5 to 10 percent; and a number of radio companies are literally teetering on the verge of bankruptcy.

If this bill is enacted, it will put at risk an industry that employs nearly 106,000 people across America. I am not overstating the situation when I say that such extraordinary fees imposed on local radio stations, in light of the current economic plight of local radio, could be absolutely devastating. The recording industry is living in a fantasy world that is divorced from the critical, depressed financial position in which almost every radio station finds itself today.

I strongly urge the Committee Members to oppose H.R. 848.

Thank you very much, Mr. Chairman. And I look forward to answering any questions that you and the Committee Members may have.

[The prepared statement of Mr. Patrick follows:]

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

United States House of Representatives Committee on the Judiciary

March 10, 2009

Statement of W. Lawrence Patrick
Managing Partner
Patrick Communications LLC

Good morning, Chairman Conyers, Ranking Member Smith and members of the Committee. My name is Larry Patrick, I am here in my capacity as Managing Partner of Patrick Communications LLC, a media brokerage firm based in Elkridge, Maryland. I will also add that I am a radio broadcaster, and my company, Legend Communications, owns 14 stations in Wyoming. I hold both a Ph.D. in communications management from Ohio University as well as a law degree from Georgetown. I have been in and around the radio industry for 40 years, and I believe that the fees associated with the enactment of H.R. 848 will jeopardize the viability of many local radio stations.

In my capacity as Managing Partner of Patrick Communications, I have extensive media brokerage experience. My firm has negotiated or consulted on over 500 radio and 150 television transactions valued in excess of $6.5 billion in the past 15 years. My clients have included over 60 major banks, many Wall Street investment firms, the Internal Revenue Service, the Justice Department as well as scores of both publicly and privately-held communications companies ranging from the largest group owners to mom-and-pop stations.

As I noted, I have been a part of the radio industry for 40 years, and I can tell you that over the course of my career, I have never seen what the radio industry is currently experiencing. The economic downturn is having a significant and devastating effect on local radio. The industry faces sinking revenues, layoffs and tightening budgets. But the current local radio landscape will deteriorate even further and more dramatically if H.R. 848 were to be enacted. Let me share with you where the radio industry is now, and what I believe a new performance fee will mean to local radio stations across America.

Headlines in the trade press speak daily of steep revenue declines of 25 percent or more. I have spent most of the last year dealing almost exclusively with station workouts, loan defaults and bankruptcy filings involving stations large and small. There is no doubt that times are tough in the radio industry. As an industry totally reliant on advertising revenues, radio is feeling the impact of severely reduced advertising budgets that are a direct result of the current economic recession in the country.

In 2008, radio finished the year down 9%. In her latest note to investors, Wells Fargo analyst Marci Ryvicker revised her already negative 2009

prediction of an 8% downward turn, to now forecasting a 13% drop in revenues -- and that's if the radio industry is lucky. She warned that this forecast may be "too optimistic." Ryvicker painted a picture of an industry in freefall, with no chance of a turnaround until the economy recovers or credit markets improve. I personally know of radio stations that are seeing a 35 to as much as a 50 percent revenue decline.

This discouraging forecast follows a broader vision outlined by radio veteran Mark Hubbard. In his essay on the outlook for radio, published online by the Radio Ink Web site, Hubbard believes that "[c]ommercial radio has never been more challenged since its creation in the 1920s."

Of course radio--like virtually every industry--is suffering the effects of the financial meltdown and paralysis in the credit markets, which make it difficult if not impossible to finance acquisitions. I know of dozens of radio station owners, many in their 60s or 70s, who would like to sell their stations and retire but cannot find any buyer capable of financing a purchase in today's world.

Similar to the annual revenues projections, BIA estimates radio station revenues will hit $16.7 billion in 2008, the lowest in more than five years and part of a downward spiral that will fall as low as $15 billion in 2009 and $14.2 billion in 2010. This compares to a high of $21.0 million just a year or two ago.

To put this in perspective and give you an idea of scale, there are approximately 13,000 radio stations in the U.S. that share in that $16.7 billion in revenues. In the recording industry, the $10 billion in U.S. revenues is primarily split between only four large corporations.

Almost every publicly-traded radio company is in default with their lenders and many are facing de-listing of their stock from the exchanges. Right now, I am advising lenders and investors on nearly a dozen workouts of radio companies involving well over 300 radio stations. We are facing an economic downturn sharper and steeper than I have ever witnessed.

In fact, just last Thursday, the New York Stock Exchange said that it would suspend trading on the common stock of Citadel Broadcasting prior to the opening of the market on Friday, March 6. The delisting comes after

Citadel's shares had fallen below the continued listing criteria related to minimum average market capitalization for over a 30-day trading period. The company submitted a business plan to address non-compliance, but after review, NYSE decided to proceed with suspension of trading.

Another headline last week was that Saga Communications became the latest radio company to ask employees to take a pay cut in light of the troubled economic climate. A five percent companywide salary reduction is set to go into effect March 13. Saga President and CEO Ed Christian told employees in a memo that the company is "challenged as we have never been before."

Salem Communications, Radio One, Cumulus, Entercom, Beasley Broadcasting, Emmis, Fisher and dozens of others have similarly reduced company-wide compensation five to 10 percent. The radio industry is tightening its belt and moving forward into a world of financial uncertainty that none of us ever have ever experienced.

What I've described is the economic reality that the radio industry is facing right now. And having watched the radio industry for 40 years, I can sit here

and tell you that the new fees that will be levied under H.R. 848 will do significant damage to local radio stations across the country that are already hurting financially.

The imposition of additional fees on radio for the recording industry, rather than recognizing the enormous and continuing promotional value that radio has delivered to the music industry for decades, will only cripple or destroy many stations. Any further station costs will only push more stations into tripping their loan covenants and more workouts. Station owners will further reduce staffing and services which only hurt the local listeners while enriching the music labels.

The labels suggest that they would not harm the small market operators by imposing only a $5,000 annual fee on each of these operators. I am a small market radio operator also and I know how much this will hurt. I know hundreds of small market radio owners who barely make $25,000 a year from their stations. To pay this fee, even a $5000 fee, they would have to eliminate covering high school sports, local origination and would reduce their staffing further. Any additional fees also threaten their ability to

provide emergency broadcast services that are so critical to the thousands of small towns across the country.

The recording industry has argued in the past that, if the new performance fee was adopted, stations could simply raise their advertising rates to get the money to pay for the new fee. I have to debunk that assumption. If radio broadcasters could get more money for their advertising spots, why wouldn't they be doing that already? But this question is far more difficult to answer in the radio environment we find ourselves in today. Ad rates are dropping sharply, not increasing.

As I've noted above, revenues are down. Layoffs are hitting stations in nearly every market. In this environment, it is difficult to imagine how any performance fee could be paid by broadcasters without eating into their fundamental ability to serve the public, and perhaps to threaten the very existence of many music-intensive stations. The recording industry is living in a fantasy world here that it is divorced from the critical financial position in which almost every station finds itself today.

The structure of the performance fee, as it is proposed in H.R. 848, makes the whole question of affordability even harder to address because it delegates that rate-making decision to the Copyright Royalty Board.

We do know that SoundExchange has consistently argued in other royalty proceedings that the sound recording royalty is far more valuable than the composition royalty. In some proceedings, it has asked for a royalty over six times the amount of the composition royalty. At the House Judiciary Committee hearing held on July 31, 2007, when asked how much the performance fee would be, Marybeth Peters, the Register of Copyrights, suggested that it could a be simple matter of applying the "willing buyer, willing seller" criteria of Section 114 of the Copyright Act to broadcasting. Of course, that standard is the same standard that led to the current Internet radio royalties which have been so controversial.

In the satellite radio context, SoundExchange suggested a royalty of 10 percent of satellite radio's gross revenue for 2007, rising to 23 percent of the satellite radio services' gross revenue for 2012, the last year of the royalty period for those services. For cable radio, SoundExchange proposed a royalty beginning at 15 percent of revenue for 2008 and increasing to 30

percent of cable radio's gross revenue for 2013, the last year of the royalty period for those services.

Moreover, H.R. 848 states that the imposition of the performance fee on sound recordings is not to have any effect on the amount that broadcasters pay to ASCAP, BMI and SESAC. Thus, the money would *by necessity* have to come from other radio station operations.

At this time, stations are laying off employees, reducing wages by 5-10 percent and a number of radio companies are literally teetering on the verge of bankruptcy. If this bill is enacted, it will put at risk an industry that employs nearly 106,000 people across America. I am not understating the situation when I say that such extraordinary fees imposed on local radio stations in light of the current economic plight of local radio could absolutely devastating. I strongly urge you to oppose H.R. 848.

Mr. CONYERS. Dr. Stanley Liebowitz, economist, University of Texas at Dallas, trained at UCLA and Johns Hopkins. We welcome you.

TESTIMONY OF STAN LIEBOWITZ, Ph.D., ASHBEL SMITH PROFESSOR OF MANAGERIAL ECONOMICS, UNIVERSITY OF TEXAS AT DALLAS

Mr. LIEBOWITZ. Thank you.

Thank you, ladies and gentlemen and Members of the Committee, for inviting me to express my views. I am an academic economist, and I have performed research on topics related to today's issue.

My research has tended to focus on the impacts of new technologies, the creation of intellectual products. I have been involved with these topics since the Canadian Government asked me to investigate the impact of photocopying on publishers, which was a long time ago, as most of you know.

I have written two academic papers that examined one of the key topics at issue today—whether or not radio play benefits the owners of sound recordings. The approaches that I used in these two papers are very different from one another. One is an historical examination of old events and the other is an econometric examination using recent data. My historical examination looked at two different episodes. First, I took a look at sound recording sales in the United States after the introduction of radio; second, I examined the introduction of youth-oriented radio in Britain in the 1970's.

In the U.S., what I discovered was that record sales were more mature than most people realized when radio was introduced and that record sales dropped dramatically after radio was introduced. In Britain, the BBC was in charge of all the radio; they had a state monopoly. They did not play rock-and-roll music. Most of you may remember that there were pirate radio stations that Texans, among others, put off the coast of Britain in the 1960's. Those were shut down.

The BBC agreed to start playing more rock-and-roll, and they started to allow private stations in Britain. After that occurred, record sales did not go up.

So, from those two, I found no evidence to support a view that radio playing increases record sales.

My econometric examination compared record sales in 99 U.S. cities, and it looked at how the cities differed in terms of radio listenership. What I found was that the cities that had the largest increase in radio listening had the biggest decreases in record sales. So, again, no evidence that radio increased sales and, in fact, the opposite; the evidence is that radio decreased it.

My papers are attached to my written statement, and people can look at them if they are interested.

Now, you should note that I am looking at the overall sales of sound recordings, not the impact of radio broadcasts on the sales of the individual records that are actually broadcast. This is an important point that I want to spend a few moments on.

I fully agree with the claims made by the radio industry that radio airplay increases the sales of individual records, particularly when they are heavily played by the stations, but that in no way

means that radio broadcasting increases the overall sales of sound recordings. The time that individuals spend listening to the radio is time that they could have spent listening to sound recordings; and they spend much more time listening to the radio than they do listening to sound recordings, according to the U.S. statistical abstract.

Now let me give you a simple example. Imagine you are in your car. On average, people are supposed to spend an hour a day listening to radio in their cars. Let us assume for the moment that radio does not exist, okay? What will happen? Well, you can either listen to the sound of your car's tires on the pavement or you can put in a tape, a CD or an iPod. What is it you are going to do? We all know most people are going to wind up listening to prerecorded music in that circumstance, most of the people who had previously been listening to radio. Since people spend an hour a day in the car, this switch would triple the amount of time that people would spend listening to prerecorded music according to the statistics.

If people were to spend that much more time listening to prerecorded music, it would almost certainly increase the sales of sound recordings. That is the way in which you need to think about what the real impact of radio is on sound recordings, not the fact that radio has an important influence on which sound recordings people actually buy.

Now, it is also sometimes suggested that payola proves that radio is beneficial to record sales, but this is again an incorrect inference. By looking at a small sample of the data, that doesn't give you a complete picture. In the current legal regime, all we can see is a distorted view of the market; that is because the record companies cannot demand payment for the broadcast of the records because they do not own the rights of the broadcast of the records.

By way of analogy, there are many people who publish their own books in this country. If that fact alone were the only fact that you saw when you took a look at book publishing, you might come to the conclusion that publishers do not need to pay authors, because there is a whole set of authors who are perfectly happy not to get paid, but we know that that is an incorrect inference because we look and see the entire publishing industry, because the authors actually have the right to get paid; and in that case, we know that successful authors get paid a very high amount.

Now, I do not view it as my role here to argue for the proposed law or against the proposed law. I cannot say whether the proposal would be superior to just requiring radio stations to be required to acquire the rights to the broadcast sound recordings. But I can say that it seems far more logical, given what I know of the economic factors involved, to have a system where radio stations are required to pay for their usage of sound recordings as opposed to the current system where radio stations can take their primary economic input for free without the permission of the owners of that input.

Thank you.

[The prepared statement of Mr. Liebowitz follows:]

PREPARED STATEMENT OF STAN LIEBOWITZ

Statement before the Committee on the Judiciary Regarding HR 848, "The Performance Rights Act"

Stan Liebowitz Ashbel Smith Professor of Managerial Economics
University of Texas at Dallas

I am an academic economist with an interest in the economic impact of new technologies, copying and the creation of intellectual products. I have been studying the economic effects of unauthorized copying since approximately 1980 when the Canadian government asked me to investigate the impact of photocopying on publishers. I have recently written several papers on the impacts of file-sharing and in that regard have compiled data on record sales which has then allowed me to conduct research on a subject that has played a role in the debate about a performing rights payment for performers/labels—the impact of radio play on the overall sale of sound recordings. I have written two papers on the subject, with one being published in 2004[1] and the other a current working paper.[2]

These research papers were written for academic audiences and I have made presentations of these papers at various academic venues. The 2004 paper was published in a refereed academic journal although the second and more recent paper has not yet been published. These papers were neither commissioned nor paid for by third parties and were supported through my university, as is typically the case for academic work.

My conclusion, in a nutshell, is that there is no evidence to support a view that radio broadcasting has increased the overall sales of sound recordings. I have looked at several

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[1] Liebowitz, Stan J. "The Elusive Symbiosis: The Impact of Radio on the Record Industry" *The Review of Economic Research on Copyright Issues* 2004, Vol. 1, pp.93-118.

[2] Liebowitz, Stan J. "Don't Play it Again Sam: Radio Play, Record Sales, and Property Rights" (January 5, 2007). Available at SSRN: http://ssrn.com/abstract=956527

important historical changes in music broadcasting to see what the impact of those changes was on record sales and found no evidence to support a claim that radio broadcasts increased record sales. I also have performed a statistical examination of record sales and radio play using recent data on American cities and again found no support for the claim that radio play enhances overall record sales.

It is important to emphasize that I am interested in the *overall* sales of sound recordings because I need to distinguish between radio's impact on the sale of individual sound recordings that are frequently broadcast, versus its impact on the entire market for sound recordings.

I fully agree with the claim made by the radio industry that radio airplay can increase the sales of records that are in heavy rotation at stations. Nor do I disagree with artists and record producers who think that radio airplay is important for increasing the sales of their sound recordings.

But it is easy to confuse radio's impact on the sales of individual sound recordings from radio's impact on the entire sound recording market. Radio broadcasts, by way of analogy, appear to increase the size of the individual pieces of the sound recording pie. But that is very different from saying that radio increases the size of the pie, which is the true question of interest. From what I can tell, the radio industry appears to want to keep the confusion level on this point as high as possible.

Individual vs. Overall Impacts: The Fallacy of Composition

The technical term for incorrectly drawing conclusions about a whole entity from looking at the individual components is "the fallacy of composition." One simple example: anyone who stands up at a crowded basketball game gets a better view; but if everyone stands up, no one has a better view and everyone is less comfortable. Another example that is more topical today: Any individual household that decreases its spending and increases its savings has its wealth increase; if every household does this at the same time, however, the economy goes into a tailspin and we are all the poorer for it.

The way this fallacy of thinking would work in the case of radio play of music is quite simple. When a song is frequently played on the radio, audience members become familiar with it and some listeners may decide they like it enough to purchase it for those times when they listen to purchased prerecorded music. Radio play is clearly important for deciding how to allocate the slices of the prerecorded music market pie. Does this mean that radio must have a positive effect on the entire sound recording market, which consists of sound recordings, some of which are broadcast and others of which are not? Not at all.

The time that individuals spend listening to the radio is time that could have been spent listening to prerecording music. According to the US Statistical Abstract (Table 1089) the time people spend listening to the radio (over two hours per day) is four times as great as the time they spend listening to prerecorded music (30 minutes per day). If radio did not exist, many of these individuals would likely be listening to prerecorded music in place of the nonexistent radio, since the two are substitute activities.

To clearly understand this, imagine a world where automobiles could not receive radio signals. Drivers and passengers would then have the option of listening to the sound of the car's tires on the pavement, or alternatively, listening to some prerecorded music on a tape, iPod, or CD. Faced with that choice, most automobile occupants would prefer to listen to prerecorded music. Since the average person spends an hour a day listening to the radio in automobiles, transforming this hour from radio to prerecorded music would lead to a very large increase in the amount of time listening to CDs, perhaps tripling the amount of time that average individuals currently spend listening to prerecorded music. If everyone tripled their time spent listening to prerecorded music, they would almost certainly increase their purchases of prerecorded music so that their current library didn't become stale. That is how radio can damage the sales of prerecorded music. And that is looking only at automobile listening.

Thus, on a purely theoretical level informed by usage statistics, it seems reasonable that radio broadcasting would hurt record sales. Naturally, the next question is whether the empirical evidence supports a view that radio increases record sales or decreases record sales.

There has been very little in the way of empirical examination of this issue. Industry studies seem focused on whether radio influences the sales of individual sound recordings that are broadcast, but this is an irrelevant question for the determination of radio's overall impact on record sales.

Prior to a recent NAB commissioned study, there were only the two academic studies that I have written examining the overall impact of radio on the sound recording industry. These studies used entirely different approaches.

Evidence from the History of Music Broadcasting in the U.S. and the U.K.

The first study, published in 2004, took a look at some natural experiments that could shed light on whether radio increased record sales or not. In principle, experiments could answer this question fairly unambiguously. For example, if radio broadcasters went on strike for 6 months in half of the country, we would have a wonderful natural experiment to test whether record sales increased or decreased in those areas without radio airplay relative to those areas with radio airplay. Unfortunately, we don't have any natural experiments as clean as that, nor will the radio industry shut down if asked by economists hoping to answer this question. Thus we need to search for circumstances that might provide a similar test.

In my 2004 paper I looked at two circumstances where there was a large change in radio broadcasting, to see what the impact was on the sales of sound recordings. Neither of these historical events can be thought to provide results as clean as those that would come from the experiment suggested above, but hopefully we can learn something useful.

The first experiment I looked at was the introduction of radio in the United States during the decade of the 1920s. Sound recording sales were surprisingly robust and large prior to the introduction of radio. In fact, sound recording sales, in inflation adjusted dollars or as a percentage of average disposable income, were at a level in 1922 that was about the same as the level that would later exist in the mid to late 1950s.

What I found was that record sales dropped by almost half during the early and mid 1920s, in spite of a robust economy, which was at the same time that radio broadcasting started to make important inroads in American entertainment activities. Record sales continued to drop during the depression, at the same time that radio kept increasing its

market penetration, with a total decline in sound recording revenue of over 90% by the 1932. Although much of this overall decline is likely due to the depression (and there are other caveats to these results discussed in more detail in the paper) radio usage actually grew during the depression. Nevertheless, there is certainly no evidence from this time period that radio play helped overall sound recording sales.

The second experiment that I looked at was the introduction of rock and roll radio broadcasts in Britain, beginning in the early 1970s. Up through the early 1970s radio broadcasting was controlled by the BBC, a government run monopoly. In the mid 1960s, some enterprising individuals, including some Texan's, anchored boats off the British coast and began broadcasting US style, advertising-based, rock and roll radio, which became known as "pirate radio," with colorful monikers for the stations. In response, the British government passed a law outlawing the practice of doing business with these stations, effectively pulling the plug on the business model of these stations. The government also rethought its radio regulations. After some government commissions provided reports on the problem, the BBC promised to start playing more rock and roll and private stations were allowed to compete with the BBC beginning in the early 1970s.

If radio broadcasting increases the sales of sound recording, everything else equal, we would have expected the sales of sound recordings to increase in Britain as a greater number of stations began to broadcast popular music. To control for changes in music, tastes, and technology, I examined record sales in Britain relative to the US. Because the US had an established and vibrant radio community well before that in Britain, the growth of sound recording sales in Britain should have been greater than that in the US, controlling for factors such as population and income.

When I examined record sales in Britain relative to the US, I found no evidence to support the hypothesis that increased radio broadcasts led to increases in record sales.

My conclusion, from these two experiments, was that the hypothesis that radio broadcasts increase the overall sales of sound recordings was inconsistent with the data.

Evidence from a statistical analysis of record sales and radio play

As an outgrowth of a paper that I had written about file-sharing that has since been published,[3] I decided to investigate econometrically whether there was any evidence that radio broadcasting impacted overall record sales in the US in recent years. In this most recent study ("Don't Play it Again, Sam") I examined changes in record sales in 99 US cities over a 5 year period of time (1998-2003) as other factors, such as radio listening (music and talk), Internet usage, income, education and other demographic variables (from the US Census) changed.

My findings were consistent with my earlier studies. Cities that had relatively large increases in radio listening tended to have decreases in record sales and vice versa. In other words, sound recording sales were negatively related to the intensity of radio broadcasting. The measured coefficients were quite large, although the results were of only borderline statistical significance. The coefficients imply that a one hour decrease in listening to music radio, which would be a drop to about half the current level, would increase record sales by .75 albums per person, an increase of almost 30%. This evidence certainly fails to support a view that radio broadcasting enhanced overall record sales.

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[3] Liebowitz, Stan J. "Testing File-Sharing's Impact on Music Album Sales in Cities" *Management Science*, (4) Vol. 54 April 2008, pp. 852-859.

The NAB's Attempts to Refute My Findings"

About six months after I made my study public, but shortly after the MusicFirst coalition web page linked to my study (I found out about the link from a news reporter) the NAB issued a press release criticizing my "bogus" study.[4] At about the same time they hired a consultant (James Dertouzos) to perform a study examining the impact of radio play on record sales. He also used data on 99 American cities with demographic and Internet data from the US Census, although he used some slightly different years than I used. Whereas I used time spent listening to radio as my measure of radio, he used the number of spins. All in all, the general approach he used was quite similar to mine although there were some differences.

His results, however, were diametrically opposed from mine. Whereas I found a negative impact of radio play, he found a positive impact. The results were so different, and the approaches were so similar, that I believe that the difference in results must be due to a data error as opposed to differences in techniques or the years used. There are many sources of data that needed to be combined and many chances for error to slip into the analysis.

I suggested that we exchange data so that we could figure out if there were errors in one or both of our data sets. This has become the preferred approach in economics, with many academic journals now requiring that researchers be willing to make their data available to any other researcher who might request the data, before the journal will agree

[4] "NAB RESPONSE TO BOGUS AIRPLAY STUDY" July 2007, available at: http://www.nab.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=9729

to publish an article. Nevertheless, in this case, Dr. Dertouzos told me that the NAB was unwilling to provide the data and we have therefore not been able to resolve the differences in our conflicting results. That is the state of the current literature examining the impact of radio on sound recording sales.

Conclusion

Because I do not believe that the evidence supports a view that radio benefits record sales, and because it seems likely that the time people spend listening to radio substitutes for the time they might be spending listening to sound recordings, I believe that radio broadcasting has had a harmful impact on the sound recording industry.

If this harmful impact were just progress, or "creative destruction", meaning that a new technology replaces an old one, like automobiles replacing horses and buggies, I would be all in favor of it. But this is not a productive evolution of markets as much as a usurping of a property right. Radio uses, as its primary ingredient, sound recordings. And radio stations do not need to acquire the rights to those sound recordings prior to broadcast.

If the market were functioning as portrayed in textbooks, radio stations would not be able to use sound recordings as inputs in their business model without acquiring the rights from the owners of sound recordings. Since radio stations generate profits from their use of sound recordings, the rights to broadcast those recordings should be valuable to them. And if radio was harmful to the sales of sound recordings, owners of sound recordings would not be expected to provide those rights without substantial payments.

The fact that record companies have sometimes paid radio stations to broadcast music, a fact that might seem puzzling given all that I have stated, does not diminish the argument above. There are many self published authors. There are some authors who will spend considerable resources trying to artificially boost their sales so they can make a best seller list. But this does not refute the fact that publishers normally pay authors for the rights to publish their commercially viable books. Nor does the fact that many individuals would pay to land a role in a television or movie project, or that sometimes established actors work for very little pay on movies they think will enhance their stature, refute the overall fact that producers generally pay actors to act in their films and television programs.

The payola stories focus on the fact that some record company producers, usually of less well established or perhaps fading acts, will sometimes pay radio stations to have their performers' records played on the radio. At least this is my reading of the few academic studies of the subject. But this ignores the part of the market that we would see if radio stations were required to acquire the rights to the sound recordings. It is like drawing conclusions about the publishing market by focusing only on self published books.

I do not view it as my role here to argue for the proposed law being considered by this committee. I cannot say whether a system based on a performing rights society type of approach would be superior or not to just requiring radio stations to acquire the rights to broadcast the sound recordings. But I can say that it seems far more logical, given what I know of the economic factors involved, to have a system where radio stations are being asked to pay for their usage of sound recordings as opposed to the current system where the radio stations can take their primary economic input for free without the permission of the owners of that input.

ATTACHMENT 1

The Elusive Symbiosis: The Impact of Radio on the Record Industry

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The impact of new technologies on copyright owners has become a topic of increasing interest in the last few years. Although formerly new technologies, such as photocopying, videorecording, and audiotaping have drawn some consideration from analysts, there is apparently nothing like the threat of several hundred lawsuits against otherwise ordinary citizens, as has happened with MP3 downloads, to attract serious attention.[1]

In this paper I examine an older technology—broadcast radio—and its impact on the prerecorded music industry. Radio might, after all, be considered very much like more recent technologies, such as MP3 downloads or videorecording. In the one case we have producers of records or movies concerned that MP3s or VCRs will damage the markets for sound recordings or movies (television). In the other case we have radio broadcasters freely using sound recordings while possibly taking away business from the record industry. Since radio uses sound recordings as a basic ingredient in its broadcasts, and broadcasts might be a substitute for listening to prerecorded music, one can imagine radio threatening the sound-recording marketplace. Except for the technology, there really might be very little difference between these cases.

Of course, this requires that radio broadcast be harmful to the sound recording market. The potential harm to copyright owners from MP3 downloads or videorecorders is easy to envision, even if the existence of *actual* harm is a contentious empirical issue.[2] The potential harm to copyright owners from a

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[1] Although MP3 downloading and its impact on record sales has been the leading copyright story in the news lately, other issues are waiting in the wings. For example, the new generation of digital videorecorders, currently known as "TIVO" allow users to skip commercials while recording. If such recorders becomes common what would happen to the market for advertising based television, and what if anything would be the appropriate regulatory response?

[2] See for example Stan J. Liebowitz "Will MP3 downloads Annihilate the Record Industry? The Evidence so Far" *Advances in the Study of Entrepreneurship, Innovation, and Economic Growth*, V. 15, 2004, pp. 229-260. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=414162 or Martin Peitz and Patrick Waelbroeck (2003), "Piracy of Digital Products: A Critical Review of the Economics Literature." CESifo Working Paper Series No. 1071, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=466063.

technology such as radio is somewhat less obvious, but nonetheless real. The key is the extent to which radio listening is a substitute or complement for the purchase of copyrighted musical works. If radio listening is a substitute for purchase of copyright works, and if radio broadcasters do not have to pay for their use of these works there is an obvious potential market failure that is essentially the same as for direct copying technologies, with the only difference being that listening to a broadcast is the consumer's replacement for a purchased item, instead of a copy (e.g., MP3) of the original being a replacement. It is, however, a distinction without an economic difference.

Society has not seen radio as a threat from which the sound recording industry needed protection. For example, although the 1995 Digital Performance Right Act for Sound Recordings granted copyright owners of the recordings control over digital audio transmissions, they have no such right if the transmission is a non-subscription broadcast transmission, i.e. traditional radio, which continues its exemption from having to pay for the rights to broadcast sound recordings.[3] The logic of this distinction appears to be based on the claim that there exists a "symbiotic" relationship between radio broadcast and the sales of sound recordings.

For example, Edward O. Fritts, president and CEO of the National Association of Broadcasters, when testifying about proposed Internet radio royalties stated:

> The history of copyright protection for sound recordings reflects a dominant, recurring theme: Congress repeatedly took pains to ensure that the grant of copyright *protection did not affect the symbiotic relationship between the radio broadcasters and the record industry*. Congress recognized both that the record industry reaps huge benefits from the public performance of their recordings by

[3] This is true in the US. Other countries (such as Canada) have property rights on radio broadcast of sound recordings in addition to property rights on the broadcast of the musical composition.

> radio stations, and that the granting of a public performance right could alter that relationship to the detriment of both industries.[4] (my italics)

Of course, it is easy to understand why the president of the NAB would want to suggest that radio broadcasters should not have to pay for their broadcast of sound recordings. Imagine, by way of analogy, television broadcasters arguing that they should be allowed to broadcast movies without paying for the rights.

Nevertheless, the Courts appear to also believe this claim.[5] Judge Cudahy, in writing the Appeals Court decision about Internet radio royalties stated:

> While radio stations routinely pay copyright royalties to songwriters and composers (through associations like the American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. ("ASCAP") and Broadcast Music, Inc. ("BMI")) for the privilege of broadcasting recorded performances of popular music, they do not pay the recording industry royalties for that same privilege. Perhaps surprisingly, this state of affairs, until about ten years ago, produced relatively high levels of contentment for all parties. *The recording industry and broadcasters existed in a sort of symbiotic relationship wherein the recording industry recognized that radio airplay was free advertising that lured consumers to retail stores where they would purchase recordings.* And in return, the broadcasters paid no fees, licensing or otherwise, to the recording industry for the performance of those recordings. The recording industry had repeatedly sought, however, additional copyright protection in the form of a performance copyright.[6] (my italics)

Additionally, academics and other commentators appear willing to believe in the symbiotic relationship, as evidenced in this quote from Edward L. Carter:

> In fact, there is credible evidence that AM/FM streaming benefits sound recording copyright holders: "The economics of AM/FM Radio Webcasting work the same way as they do for over-the-air broadcasting, a symbiotic relationship

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[4] From Congressional hearings on June 15, 2000 before the Judiciary Committee. http://www.house.gov/judiciary/frit0615.htm

[5] Similar phrasing can be found in Canadian Copyright Board decisions and also in arguments put forward in Hong Kong. I have not, however, performed a thorough examination of the degree to which this claim is accepted throughout the world.

[6] Bonneville International. V. Peters October 17, 2003, United States Court Of Appeals For The Third Circuit, No. 01-3720; page 5. Available http://www.ca3.uscourts.gov/opinarch/013720p.pdf

> between the record companies and the radio stations who 'promote these songs to 75 percent of Americans who listen to the radio each day.'" Evidence of online broadcasting's beneficial impact for copyright holders is not contradicted by the fact that the broadcasts are digital because streaming, unlike downloading into a format such as MP3, does not involve creation and storage of a permanent digital audio file on a radio listener's computer.[7]

Although there is much talk about symbiosis between radio and sound recordings, I have seen no reference to actual *evidence* supporting this claim although I address this point in more detail in Section IV.

This question of radio's impact on the recording industry does not appear to have received much if any attention in the modern economics literature. The focus of economists, to the extent that they have examined radio at all, has tended to be on the allocation of spectrum, with several notable papers on the subject.

Yet the impact of radio on the recording industry should be of interest for several reasons. These industries are highly influential on the popular culture and seem to have an importance far greater than their share of GDP. More generally, understanding what happened with previous technologies may help our understanding of the present and future technologies, particularly if we discover that some received wisdom is incorrect. Finally, various regulations and rules, and a form of regulatory property rights—what are commonly called "performing rights"—are based on estimates of the market outcomes likely to arise under free negotiations, and these estimates will be skewed if the impact of radio broadcast is misunderstood by the regulators.

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[7] Edward L. Carter, "Promoting Progress or Rewarding Authors? Copyright Law and Free Speech in Bonneville International Corp. v. Peters", Brigham Young University Law Review, 2002, pp. 1155-1179.

I. Some Basic Economics

Americans spend approximately 2.7 hours per day listening to radio but only 40 minutes listening to prerecorded music.[8] Yet the main ingredient of radio broadcasts is prerecorded music, for which radio stations pay very little if anything. If listening to radio were treated like a substitute for listening to prerecorded music (much as blank tapes were treated as substitutes for the purchase of a prerecorded tape by partisans for the RIAA[9]) then simple arithmetic might suggest that five times as many records would be sold if radio didn't exist. Although we shouldn't take the math seriously, the possibility of harm is certainly worth examining.

Radio listening can be thought to have two possible components. One is a pure element of consumption. Listening to music is enjoyable and if a radio station can make musical selections that are in tune with a listener's tastes, the listener can derive considerable satisfaction. The fact that individuals spend, on average, almost three hours per day listening to the radio would seem to imply that there is in fact a rather important consumption element in radio listening. The other possible component of radio listening is most likely something of a by-product to the first. One motive for listening to radio is to learn about new musical compositions to help in the purchase of CDs—a motive based on future shopping plans.

It would seem, based on casual observation, that for most users the first motive dominates the second. It would be difficult to argue that the shopping motive dominates the consumption motive since it seems highly unlikely that individuals would listen to radio for almost three hours per day merely to learn

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[8] 2001 data found in the US Statistical Abstract, Table No. 1102. Media Usage and Consumer Spending: 1996 to 2005. http://www.census.gov/prod/2003pubs/02statab/infocom.pdf

[9] See for example Alan Greenspan's testimony in 1983 on the Home Recording Act. Hearings before the subcommittee on Patents, Copyrights and Trademarks, October 25, 1983.

which CDs to purchase for the purpose of improving their listening experience of forty minutes per day.[10]

These impacts of radio broadcast fit neatly into a model that had been previously been created to analyze the impact of copying on the creators of originals. Liebowitz (1981) identified three effects caused by copying: substitution, exposure, and aftermarket effects.

The substitution effect, as its name implies, occurs when someone forgoes the purchase of the original (record) because they have access to an alternative (the copy or in this case, radio play). The substitution effect maps nicely into the consumption motive of radio listening. If a copy or alternative is a replacement for the purchase of an original, demand for the original falls.[11] This cannot help but harm the seller of originals.

The exposure effect occurs when someone makes a purchase they would not have made except for the fact that they were able to sample the product in another venue (listening to a copy or on the radio). This maps nicely into the shopping motive. Note that the exposure effect doesn't necessarily have a positive impact on sales, and thus doesn't necessarily have an impact different than the substitution effect. Learning more about a product prior to purchase may allow consumers to derive greater utility from any single purchase. At any given price, however, they may purchase fewer units because they become

[10] This ignores the component of radio listening devoted to 'talk' which obviously does not normally have an exposure effect.

[11] As long as the seller of the original does not receive extra payment, or indirect appropriation, of the copy when he sells the original, which is the after-market effect. If, for example, everyone makes one tape of each record they purchase, the seller can just raise the price of the record by the amount of value generated by the copy, which rotates the demand curve counter-clockwise. The aftermarket effect is clearly not relevant in the context of radio. See Liebowitz 1981 for a fuller explanation.

more quickly satiated. Producers, therefore, may discover that their revenues fall when consumers can better sample the products.[12]

The exposure effect and substitution effect, therefore, are relevant to our analysis. These two theoretical factors played an important role in the arguments made during the Napster case. The economic experts for Napster argued that individuals downloaded MP3s to *sample* songs (exposure effect). These experts suggested that Napster users would purchase CDs containing the songs discovered through downloading. The experts representing the recording industry, on the other hand, argued that downloading MP3s was undertaken as a replacement for the purchase of the original (substitution effect). The court found the arguments made by the recording industry experts to be more convincing and although the decision was probably the correct one, the empirical support put forward by the recording industry was, in my opinion, no stronger than that put forward by Napster defense.[13]

By way of comparison, the exposure effect seems likely to be stronger in the case of radio than in the case of MP3 downloads. Downloaders were unlikely to just encounter music that they enjoyed since downloaders are required to look for music using a search engine. Radio stations, in contrast, play music not chosen by and often unknown to the listener. The listener's choice of the radio station or program, however, reveals that the listener enjoys the particular genre of music played by the station, increasing the possibility that the listener will encounter new music that he or she will wish to purchase.

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[12] This is a variant of the "chocolate bar" or "light bulb" example sometimes found in textbooks. Increasing the amount of chocolate in a bar, or increasing the longevity of bulbs, holding the price of a bar or bulb constant, has uncertain impacts on the number of units sold and on the total revenues. The elasticity of demand for the now less expensive underlying product (chocolate or light output) determines whether revenues increase or decrease and whether units sold increase or decrease.

[13] The empirical evidence put forward to support the substitution effect was to compare sales in record stores near universities to record stores not near universities, under the assumption that college students were using Napster much more heavily than ordinary record buyers. In principle this test was fine but the results did not support the claimed results. See Stan J. Liebowitz, *Rethinking the Network Economy*, Amacom, New York, 2002 Chapter 7.

The substitution effect, at first blush, seems likely to be stronger in the case of MP3 downloads than for radio play of music due to the fact that downloads provide the listener with a copy of the song that has virtually identical attributes to the purchased version. There would seem to be little reason to purchase the song under these circumstances, leading to a very strong substitution effect. Listening to the radio does not leave listeners with a useable alternative that can substitute for the purchase of prerecorded music.

However, the activity of downloading files seems less likely to be a substitute for listening to prerecorded music, whereas listening to radio is an activity that can substitute for listening to prerecorded music. The three hours per day spent listening to radio are three hours that cannot be spent listening to prerecorded music. Since listening to prerecorded music generally requires the purchase of the prerecorded music, the more time individuals spend listening to radio the less time spent listening to prerecorded music and the smaller the volume of purchases of prerecorded music.

As is often the case, only empirical evidence can tell us what impact radio broadcast has on the market for sound recordings.

II. The Impact of some analogous Technologies

Before turning our attention to the empirical evidence relating radio broadcasts with on record sales, it is instructive to examine several other instances of new media technologies. In this case I briefly examine the impact of two new technologies on the movie industry since this information will be helpful when examining radio and sound recordings.

A. The Impact of the VCR

It is common in this literature, particularly in the more popular press, to encounter the claim that copyright owners always cry wolf when a new

technology appears to threaten the old, only later to discover that the new technology was nothing short of a bonanza. This claim implies that foolish copyright owners misunderstood the new technology and were fortunate to have been thwarted in their attempts to restrict the new technology.

There clearly have been times when the industry was dead wrong about a technology. But that doesn't mean the industry was always wrong.

One often reads pundits pointing out that VCRs were a boon to the movie industry although the industry fought the VCR. This claim is not exactly correct.

The facts are that shortly after the emergence of the video recorder, leading movie producers did bring a copyright infringement case (the *Betamax* case) against the producers of the device. Movie and television program producers viewed these devices as a threat to the industry. It is also true that the sale of prerecorded movies has become a leading revenue source for movie producers.

But the threat posed by VCRs was not based on substitution of viewing videotapes instead of viewing the theatrical release. Nor was it based on the possibility of a homemade videotape substituting for the purchase of a commercially prerecorded tape. Instead, it was based on the fear that videotapes would allow users to time-shift television programs and do so in a way that allowed them to avoid the commercials.

This was a legitimate concern because broadcast television depends on commercials for its revenues and if increasing numbers of videorecorder users were to have deleted commercials, television broadcasters would have lost the ability to pay for the programs and movies that made up their broadcast schedule.

In reality, the likelihood that consumers would have been able to skip many commercials was very low. Since a single machine could not both record and play-back at the same time, it is unlikely that average television households could have used VCRs for any but a small portion of their viewing. For example, the average television household watches almost 7 hours of television per day. Almost half of this viewing occurs during the prime-time period of 7:00-11:00 p.m. and a majority of television revenues are generated during this prime-time period.[14] If the average household prefers viewing prime-time programs during the prime-time period, it could not engage in a great deal of videotaping of prime-time programs unless it owned more than one VCR. At that time, use of multiple VCRs was not envisioned.

Assume, for example, that a household that normally watches 3 hours of programming on Monday evenings cannot watch television one Monday and has taped 3 hours of prime-time programming from Monday's (M) programs. Assume now that there are 3 hours of prime-time programming which members of the household would like to watch on Tuesday night. They would not be able to simultaneously watch the tapes of Monday's programs and record the programs that they would then miss on Tuesday while they were viewing Monday's programs since a single VCR cannot both record and playback at the same time. In other words, it is impossible to time-shift viewing by one day so as to skip commercials if the viewing of tapes takes place during the same time period the programs are broadcast. In fact, if members of the household enjoy watching 3 hours of prime-time television shows every night, as does the average American household, they would have difficulty fitting the three hours of Monday's taped programs into their future viewing unless they increased their television viewing above what it would have been had they not owned the VCR. This is a serious constraint on the size of any time-shifting behavior.

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[14] In the Central and Mountain time zones the prime-time period runs from 6-10 pm.

In fact, no great time shifting came to pass and the VCR did not damage the television market. Eventually, it opened up an entire new market—the sale and rental of prerecorded tapes—that proved a boon to the movie industry, as I discuss below.

One of the interesting changes in technology is the current hard-disk based TIVO which allows simultaneous playback and recording, as well as automatic deletion of commercials. Because the TIVO removes the constraint of being unable to play back and record at the same time, it poses a far greater threat to advertising revenues than did the VCR. Television broadcasters have legitimate reasons to be concerned, notwithstanding the lessons from the VCR.

Nevertheless, even the TIVO requires some effort on the part of the viewer. If past history is any indicator, there is every reason to believe that many users will refrain from taking the effort to avoid commercials because the effort will seem too great. That may have to be the best hope of the advertising-based broadcast industry as technology continues to erode the intrusion of commercials.[15]

B. The Impact of Television on the Movie Industry

Television took audience away from the movies. But television also made possible the VCR which allowed the movie rental business to get started, and which has been a boon to the industry. It is sometimes claimed that television, rather than destroying movies, as was originally feared, merely brought a new source of revenues to the party, allowing movie/television producers to gain

[15] There are other defensive actions that can be taken by the broadcast industry, the most important among them making it more difficult for the TIVO to detect when a commercial is on when it is recording in 'commercial-skip' mode. At the moment the TIVO relies on information contained in the broadcast itself to identify commercials.

from the new technology just as the VCR allowed movie producers to benefit from a large new market for prerecorded movies.[16]

Unlike music, movies are usually seen only once or twice, not over and over again, so the very concept of an exposure effect is limited. Also, television cannot broadcast movies without contracting with the copyright owner for permission to do so. This prevents television from broadcasting movies until the owners of those movies decide they want them broadcast, which happens to be long after theatrical release.[17]

Since movies do not appear on television until after they have finished their theatrical run, having a movie broadcast on television cannot possibly enhance the theatrical box office for the movie (i.e., no exposure effect for theatrical revenues) although there might be some exposure effect for the sale of DVDs and videotapes from individuals who watched part or all of a movie on television.

Because of this timing, television viewing of a movie cannot be a substitute for the viewing of that movie in the theaters. Although viewing a particular movie on broadcast television cannot be a substitute for viewing that movie in the theaters, the activity of watching television is an activity that can substitute for going to see a movie at a theater. Thus there is a strong potential substitution effect in the *time* spent viewing, particularly given the large amount of time spent watching television (approximately four hours per day for adults) which precludes the viewer from engaging in other activities at the

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[16] Typical is this statement found in an editorial in May 6th 2002 edition of USA Today "Movie theaters thought television would ruin them. Later, they feared the VCR. If Spiderman 's $114-million weekend is any measure, both predictions were off." See http://www.usatoday.com/news/opinion/2002/05/07/edtwof.htm

[17] Movie studios are masters at price discriminating through different markets over time, going from the high valued consumers (theaters) to video/pay cable and finally to broadcast television. According to Vogel (Table 2.6) a viewing-hour in 1999 generated $4.50 in a theater, $.55 in pay cable/home video, and $.06 on broadcast television.

same, time and which provides a similar, although smaller-scale, form of video entertainment.[18]

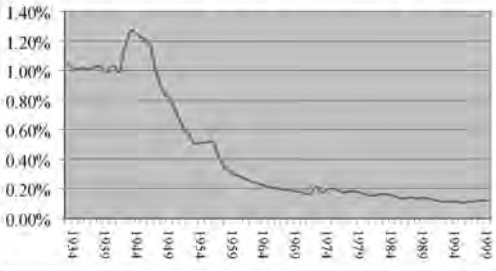
Those who have examined this issue generally understand that television delivered a powerful blow to the movie industry. The movie industry was mature when television became popular in the 1950s and was popular in a way that is hard to imagine today. In the 1930s and 1940s, as revealed in Figure 1, the average American went to the movie theater approximately 30 times per year, compared to the current frequency of approximately five times per year.[19] It is clear that the frequency of movie attendance was far greater prior to television than it is now.

[18] This is likely to become more accurate as the use of large high definition televisions with surround sound become more common.

[19] Source: Screen Source at http://www.anmg.org/~scrnsrc/theater_facts.html. There was one problem with the data provided at this source. Values were given from attendance, average ticket price and box office gross. The first two variables, if multiplied together, should equal the third, and usually did. But there were major inconsistencies in the early 1960s and the 1930s. In some cases, the listed attendance figures seemed less reasonable than an attendance figure derived from ticket prices and total revenues. Nevertheless, in Figure 1 I used the listed admissions values since it makes little difference for our purposes and it provides an additional five years of data.

The penetration of television into American households was remarkably rapid during the 1950s, increasing from 9% in 1950 to 87% in 1960. As one can see from Figure 1, that period of time coincides well with a dramatic drop in the number of times Americans went to the movies per week. It also, unsurprisingly, coincides with a large drop in movie box office revenues as a share of personal consumption expenditure, as seen in Figure 2.

Figure 2: Box Office as Share of Personal Consumption



The timing of the onset of the new, much lower, equilibrium is another datum strongly supporting the thesis that television viewing caused the change in movie attendance. By 1960, households were spending over five hours per day watching television and by 1965 television's penetration was almost complete at 92% of households. The full effect of television, therefore, should have been felt. At the same time, movie attendance and revenue as a share of personal consumption had entered the modern era which has shown remarkable stability for four decades at approximately 5 viewings per year and approximately .15% of personal consumption expenditures.

Movies clearly have lost much of their market to the activity of viewing television. Although the evidence is overwhelming that television had a

devastating impact on the traditional movie industry in terms of theatrical admissions and revenues, there is somewhat more to the story.

Broadcast television provided the audience and the rationale for the early cable television industry. The cable networks that arose over the years had a superior revenue generation model than broadcast television since cable networks had both advertising and subscription fees as potential sources of revenues whereas broadcast television only had advertising. Eventually, cable television networks largely displaced broadcast television as an important market for movies that had finished their theatrical releases.

Similarly, the advent of the VCR, which was itself dependent on the existence of television sets, allowed the movie industry to tap directly into the view-at-home phenomenon by selling prerecorded tapes. According to numbers in Vogel's text that I have repackaged in Table 1, home-video revenues to movie studios were double those of theatrical release in 2000, and pay-cable/networks/syndication revenues from movies were virtually the same as theatrical release revenues.[20]

Table 1: Vogel's Estimates of Film Industry Revenue		
Theatrical Release	$3,100	19.25%
Home Video	$7,800	48.45%
Pay Cable	$1,600	9.94%
Network Television	$300	1.86%
Television Syndication	$800	4.97%
Made for TV	$2,500	15.53%
$ in millions; Estimates for year 2000; Foreign Revenues Excluded; From Table 2.8, p. 62		

[20] Table 2.8 in Entertainment Industry Economics, 5th edition, Cambridge University Press, 2001. Unfortunately, these data in Vogel need to be taken with a grain of salt since there are apparent inconsistencies. His Table 2.5 implies that Pay Cable revenues are almost as large as home video and two and a half times as large as network and syndicated television added together. Also, his Figure 2.9 implies that Pay Cable is between 15% and 20% of total revenue, much higher than in his Table 2.8.

The invention of broadcast television, which was revenue-depleting to movie studios, opened the door for these later revenue-enhancing technologies. What then is the net effect that television has wrought?

The numbers in Table 1 indicate that these additional sources of revenues might have quadrupled movie revenues beyond their simple theatrical levels if you examine only revenues from films made for theatrical exhibition. If you add in movies that were made for television, revenues quintuple.

Yet box office revenue as a share of personal consumption expenditure is currently at about .12%. This is one eighth the level of the 1930s. Since these additional television related revenue sources appear to be less than eight times current theatrical revenues, one would conclude, using this admittedly back-of-the-envelope level of detail, that the net effect of television on movie revenues is still negative. The impact appears even more negative in comparison to overall entertainment's share of personal consumption expenditures, which rose from 5.5% to over 8% over this period. Movies might have been expected to participate in this growth, if not for the introduction of television.[21]

One final point worth noting is that the policy implications are very different for television damaging the movie business than for, say, MP3s damaging the sound recording industry. In the former case consumers switch to a different, preferred product. The damage to the movie industry occurs because consumers no longer consume movies. There is no market failure. In the latter case consumers continue to consume the same music, but the existence of MP3s cuts off the payment stream that consumer would be willing to pay if property rights were more easily enforced. Disconnecting consumption from payment, as MP3s do, clearly causes a market failure since units of music with net social value will no longer be produced.

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[21] Vogel, Page 21.

III. The Impact of Radio on the Pre-Recorded Music Market

This backdrop now brings us to the main topic of the paper: the impact of radio on sound recordings.

At the time of radio's introduction, the idea of transmitting entertainment and news through the airwaves was revolutionary. New institutions and new business models were developed to take advantage of this technological breakthrough, including the idea of using advertising to support the market, which has largely continued to this day.

Radio grew into a major industry, with a profound influence on the culture and social mores. Although it was later to be eclipsed by television, it continues to this day to be one of the major forms of entertainment, with the average American listening to approximately three hours of radio per day.[22]

Radio stations generate positive values to listeners, as evidenced by the willingness of listeners to spend several hours each day listening to radio even though they have to put up with advertising. Advertisers pay for the right to place their advertisements in radio programming, generating the revenues upon which private radio stations depend for their existence.

We have already discussed the two possible impacts that radio might have—substitution and exposure. It is likely that both effects are at work at any one time. The relative strength of each, however, determines the overall impact of radio on record sales.

The prevailing view is that radio play enhances the market for prerecorded music. Much of this view can be traced to the fact that firms in the recording industry carefully cultivate their relationship with radio broadcasters to make sure that radio stations play their recordings. Often, this cultivation crosses

[22] Arbitron claims that 20 hours per week is the average.

over into what is known as "payola", a pejorative term indicating that record companies are paying radio stations, station programmers, or disc-jockeys to pay particular recordings. This is discussed more fully in section IV below.

As we shall see, the recording industry underwent a devastating decline shortly after the advent of radio. Even some commentators who assign the cause of the recording industry's decline to radio's emergence believe that the major impact of radio on record sales changed from substitution to exposure, and that radio now enhances the sales of recordings. For example, according to the BBC website:[23]

> The record industry had spent the first twenty years of the century convincing the public that they needed a source of music in the home but they didn't foresee the possibility that it may be free. Unfortunately, The Radio Corporation of America (RCA) had by the early 1920s started mass-producing commercial radios which, while acoustically inferior, offered a far wider range of news, drama and music. The Record Companies retaliated by drawing up contracts for their major artists, forbidding them to work for this rival medium. This move to limit radio's output was doomed to failure as new vacuum tube amplification rapidly improved reception and sound quality. Record sales plummeted.

Nevertheless, the BBC continues:

> Victor subsequently brought out a machine that could reproduce these [recording] innovations, and the increase in fidelity finally ended the drop in sales....Shortly afterward, players and radios were combined, ending rivalry between media. In fact, the new entertainment conglomerates could now use one (radio) to promote the other (records) and a whole new age of marketing was upon us.

We shall have more to say about this history in the next section.

A. Some Natural Experiments

Determining the empirical relationship between radio listening and the purchase of prerecorded music is not a simple task. If one could design an experiment to test this relationship, one possibility would be to prevent radio

broadcast of music in some randomly chosen localities while continuing it in others and then comparing the sales of records in the areas with and without radio broadcasts of music. Unfortunately setting up such an experiment is not within the capability of this, or probably any, researcher.

Alternatively, if one had sufficiently good data and sufficient understanding of the various exogenous and endogenous relationships, one might design a structural equation system to try to statistically determine the net impact of radio on record sales. Finding sufficiently plentiful and high quality data is a daunting if not impossible task, however, and there are always questions about the validity of any particular structural equation model.

The method I have chosen, therefore, is to examine two natural experiments that allow a before/after comparison of radio's impact on record sales. One natural experiment occurred with the advent of radio in the US, which occurred during the decade of the 1920s and 1930s. The second natural experiment was the belated introduction in the last three decades of the twentieth century of commercial radio into a British market that already had a well established record industry and public broadcasting entity.

Neither of these natural experiments is perfect, but both should be capable of providing useful insights.

B. Radio's Introduction in America

The recording industry was already fairly well established in the US when radio came upon the scene. Radio grew rapidly and became the primary entertainment medium in the country in a fairly short time. The impact of radio on the record industry appears to have been quite dramatic.

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[23] http://www.bbc.co.uk/music/features/vinyl/19201929.shtml

1. A Brief History of the Recording Industry[24]

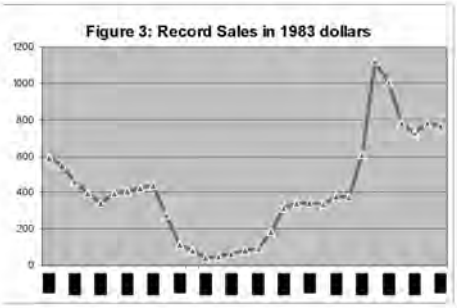
Thomas Edison invented a tinfoil recording process in 1877 which he soon improved by replacing the tinfoil with wax cylinders. To avoid Edison's patents, Emile Berliner developed in the late 1880s a competing recording technology based on discs, which came to be known as the gramophone. A battle between the cylinder and the disc took place over several decades but discs had won the day by 1920. Edison's company introduced its own disc, known as the 'Diamond Disc' with great fanfare and in a precursor to the ubiquitous "is it live or is it Memorex" commercials, embarked on public demonstrations asking the public to guess whether they were hearing live performers or a disc. Supposedly, millions of Americans took this test between 1915 and 1925.

At this time, the recording industry was still engaged in acoustic recording. There were no microphones and no amplifiers. Singers, for example, shouted into a recording horn and the sound energy was converted into a mechanical signal on the disc. In the mid 1920s engineers at Western Electric devised a new method for performers to sing into microphones, which converted the sound into electric currents controlling an electromagnetic record cutter, to produce a recording. These discs were identical in playback format to the old discs and could be played on the older equipment. Many phonographs of the time still reproduced the sound acoustically, without electrical amplifiers.

Statistics provided by the Recording Industry Association of America (RIAA) indicate that sales of records were quite robust in 1921, the first year for which I have data and, ironically, the first year of commercial radio. As shown in Figure 3, sales revenues were almost $600 million in 1921, using 1983 dollars.

[24] Some of the material for this section is based upon David Morton's "Off the Record". Rutgers University Press, 2000 and also from a very nice history that can be found at the BBC's "History of Vinyl" page: http://www.bbc.co.uk/music/features/vinyl/.

To put this value in perspective, sales revenue in 1950 was only 33% higher, in real dollars, and revenue per capita was actually slightly lower in 1950. Thus market for records was fairly mature in 1921, at least in terms of the revenues generated.



As documented in Figure 3, for almost twenty years after 1921 the market went nowhere but downhill.

The earlier quote from the BBC claimed that the sales decline came to an end when radio and the recording industry equalized quality and learned to take advantage of each other's strengths. In fact, although sales did stop their decline from 1926-1929, they remained well below their 1921 levels. Further, the apparent slight increase in the late 1920s occurred during a period of rapid economic growth when a more rapid increase in record sales might have been expected.

The drop in record sales that occurred after 1929 was far more precipitous than the drop during 1921-25. Clearly the depression must have had a large role in this painful decline, beginning as it did right after the stock market crash. The market for records dropped by more than 90% from 1929 to 1933. But although it is easy to blame most of the drop, or even the entire drop, on

the depression, we should look a little more carefully at other clues that might provide some additional insight before we attribute the entire decline to the depression.[25]

A somewhat different view of the vicissitudes of the recording industry can be gleaned from Figure 4 which measures record sales both as a percentage of GDP and in sales per capita. As can be seen, the fall in record industry revenues was far greater than the fall in GDP, since as bad as the depression was, the 26% drop in GDP was, thankfully, nowhere near the 90% decline experienced by the recording industry.

It is conceivable that extremely high income elasticities for sound recordings were responsible for the decline in record sales being so much larger than the decline in income in the early 1930s, but such elasticities are inconsistent with the decline in record industry revenues that occurred in the 1920s, at a time when the economy was experiencing robust growth (48% from

[25] The BBC history blames the decline entirely on the depression. They state: "If market forces affected the recording industry, the Great Crash of 1929 changed it irrevocably as [sic] leisure items such as electrical items becoming luxury goods. Thomas Edison's cylinders and discs ceased production entirely, while smaller independents were swallowed by new conglomerates that could weather the economic storm… For the first time business interests overtook artistic ones. While pandering to mass markets created a certain dumbing-down in the

1921 to 1928). The elasticities that would be implied if the depression were to be given credit for the entire drop in record sales are also inconsistent with the rather pedestrian improvement in recording industry revenue that occurred in the decade after WWII.

By way of comparison, the movie industry, which suffered a serious decline from 1929 to 1932, came back strongly afterward, matching its pre-depression values (at least in attendance) by 1935, as can be seen in Figure 1.[26] We will see below that radio continued to grow rapidly through the depression. Yet the market for records did not show signs of life until 1938 and even then failed to approach the levels seen in the early 1920s. As Figure 4 makes clear, even then record sales failed to keep up with the growth in the economy since it isn't until after the war that sales return to pre-depression values as measured by share of GDP.

Given this evidence, it seems difficult to blame the entire magnitude of the decline in sound recording revenues during the depression on the macro economy alone. The recording industry appears to have had some other factor(s) hindering its performance, both immediately before the depression and continuing through the depression. The most obvious candidate is the competition from the radio industry.

2. *A Very Brief History of Radio*

Radio, of course, did not suddenly arise fully formed. There were many experimental broadcasts and many amateur stations. Yet the first commercial American radio station is generally accepted as being KDKA in Pittsburgh, going on the air continuously in November of 1920. Numerous stations went on

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output, the effects of mass-production did result in a large drop in price of records... One very significant part of the market did, however remain buoyant - the Juke-box."

[26] It took the movie industry an additional two years to essentially catch up to total revenue from 1929.

the air in the next few years, and by 1923 the number of stations was over 500, which remained the approximate equilibrium value for the next fifteen years.[27]

The number of homes with radios grew somewhat more slowly. In 1922 it was claimed that 1 million households were going to own radios before year end. In 1926, at the time of the formation of NBC, it was claimed that 5 million households had radio, out of a total of 26 million, for a penetration rate of 20%.[28] The penetration rate of radio appears to have reached two thirds of all households by 1935.[29] Clearly, the penetration of radio largely occurred from the early 1920s until the late 1930s.[30] National broadcasting networks, with their superior production values, arose in the mid to late 1920s.

Not only did people buy radios, they used them. It is a fairly remarkable testament to the power of this new medium that during the depression households would spend the money required to purchase a radio receiver.

3. Interpretation

From 1921 on, the story of radio was one of constant growth for the next two decades. This is the inverse of the recording industry, which had fairly constant decline over this period. There are good reasons to think that this relationship is more than happenstance.

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[27] Reported in Figure 1 in Thomas Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment" *Columbia Law Review*, Vol 97: 905-944. Hazlett's data are taken from Bureau of the Census.

[28] NBC was created by Radio Corporation of America (RCA), the worlds largest producer of radio sets at the time, based upon a station purchased from AT&T. RCA took out large advertisements in newspapers in September of 1926. In the advertisement it was claimed that at that time 5 million homes had radio, with 21 million yet to have a radio. This would be a penetration rate of 19.2%. A copy of the advertisement can be found here http://earlyradiohistory.us/1926nbc.htm.

[29] According to http://history.acusd.edu/gen/recording/radio2.html.

[30] According to Herman S. Hettinger, the number of radio receivers in the US (in millions) from 1923 until 1932 was: 1.5,3, 4, 5, 6.5, 7.7, 9, 12, 15, 16.68. Table II, page 42 in A *Decade of Radio Advertising*, Arno Press, New York, 1971. From Figure 2 in Hazlett's Columbia Law Review article, a similar, fairly smooth increase in shown.

Listening to radio or sound recordings could both be done at home. The acoustic quality of radio was often better than what was available with early recordings. Sound recordings in the 1920s and 1930s tended to allow only four minutes or so of play on a side before another record would have to be loaded onto the platter, making them fairly inconvenient for listening to music at long stretches. It is not surprising, therefore, that there was a reasonable substitution effect that hurt the market for records.

If there was a strong substitution effect between listening to radio and listening to phonographs then the decline in record sales can easily be explained by the growth in radio. The strong decline in record sales implies that either there was little or no exposure effect, or that the substitution effect was overwhelmingly dominant

The timing of radio's ascendance and the record industry's fall seems more than coincidental. There are some other alternatives that might be suggested, however. The movie industry also was also likely to be substitutes for the consumers' entertainment dollar. Yet there is a stronger case for radio having the major impact. Radio was audio based, as were records, radio was music based, as were records, and radio was listened to in the home, as were records. It is also the case that movie "talkies" began in the mid 1920s and attendance skyrocketed from 1926 to 1929, yet in those particular years record sales were hardly affected as would have been expected if movies were responsible for the decline in records sales that occurred (see Figure 1). Further, the record industry had a dismal performance during the 1930s, yet movies did not grow in that decade—radio did.

Thus the evidence supports a claim that radio was strongly detrimental to record sales during this period.

Others have commented on this possibility as well. According to Morton:

> Record companies welcomed the subsequent transfer of electrical technology from radio and motion pictures to the phonograph industry, but hated the effect these two new forms of entertainment had on the record business. Radio was the biggest threat. On the eve of broadcasting's debut, between 1914 and 1921, record sales had doubled, largely because of sales of popular music. With the inauguration of network radio in the middle 1920s, the market for popular recordings collapsed, resulting in a number of companies leaving the field or changing ownership. Page 26.

The timing of the growth in record sales beginning in 1955 is also interesting although I would hesitate to draw too much from it. Returning to Figure 4, a sustained rise in the fortune of the record industry began at the same time that television began to eclipse radio as the dominant entertainment medium in the country in terms of viewers'/listeners' time. Did the shift away from radio as the premier entertainment medium in the country allow the recording industry to breakout of its longtime doldrums? Perhaps, but some alternative explanations such as the rise of rock and roll, or the rise in the Long Playing record have enough strength as alternatives to preclude a clear affirmative answer.

4. Caveats

Clearly, the imprecision in these data, the fluidity of the content and technology, and the changing market conditions all make it impossible to have a totally clear-cut test of the impact of radio on the recording industry. There are several caveats to make.

a. Quality of Sound

The relative quality of radio and recordings was different in the 1920s than it has been in recent times. Radio, of course, was based on electricity. Radio required electrical amplification and speakers in order to operate. This gave radio an initial advantage over acoustic phonographs in terms of sound quality. Although the sharing of amplifiers and loudspeakers between radio and phonographs was to become common, with the two devices often merged into a

single device, radio at first had sonic advantages. Nevertheless, when recordings increased in quality in the mid 1920s, due to the use of an electrical as opposed to acoustical recording process, there is no evidence of an exposure effect increasing record sales. At best the decline came to a halt for a few years. There is no support for a claim that radio play enhanced record sales.

The relative quality of sound on records versus radio may have been different in 1920s than it was for most of the latter part of the century. Radio, in the second half of the twentieth century, had lower quality than sound recordings. The inconvenience of using records largely disappeared, particularly when the 33 rpm LP record was introduced in 1948 and automatic record changers became more popular. The impact of radio broadcast on record sales in the 1920s and 1930s, therefore, might have changed in later decades.

b. Use of Music

One might argue, with some justification, that radio originally played live music when it played music and that it did not play records. Certainly, many of the popular network radio programs, such as Amos and Andy, did not play records. But there were many radio programs based on music. As long as the music played on radio was also recorded on records, the impact of radio play on record sales should be largely the same as it would be whether or not the specific recordings were played directly on the radio. Further there is some evidence that local radio stations did play records.[31]

Although the role of radio in creating an audience for election returns, horse races and prizefights is the stuff of legend, the mainstay of radio broadcasting was music. Analyses of network radio broadcasts by Hettinger revealed that music made up about two thirds of the content in the period 1927-32. Further breaking down the data, he discovered that popular music

[31] For example, see http://earlyradiohistory.us/1922can.htm.

made up 35%-40% of programs, with semi-classical music at about 15% and variety music at about 5%.[32] Popular music was played more frequently during the prime time hours with the largest audiences climbing from about 25% in 1927-28 to about 54% in 1931-32. Radio programming, even from this early period, was focused on music and particularly popular music, so it is reasonable to expect that the recording industry would be impacted by whatever effects radio might potentially have.

C. The Introduction of Advertising-Based Radio in England

The second experiment occurs at a considerably later period of time, the last third of the 20th century, in England. British radio broadcasting was much different from American radio during the 1950s and 1960s. This is particularly striking given that the two countries had such similar charts of best-selling records. This difference provides the basis for our second natural experiment.

1. A brief history of British Radio

Radio was monopolized for many years in England by the British Broadcasting Corporation (BBC). The BBC was originally (1922) a consortium of six radio manufacturers who were granted a virtual monopoly over the sale of receivers, with the British Post Office overseeing the consortium.[33] These manufacturers wanted to promote the existence of radio stations so that they could sell more receivers, just as RCA did by creating NBC. In return for the monopoly on the sale of receivers, the manufacturers agreed to give ten percent of the revenues from the sale of receivers to the BBC.

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[32] Table XXIII on page 218 in Hettinger. Variety music, according to Hettinger, changed over the period from mainly classical to mainly popular. Variety programs, which also contained much music tended to have about 5% of the programming.

[33] Some of this material is taken from "The Unofficial Guide to the BBC" http://www.vaxxine.com/master-control/BBC/chapters/Bbc_form.html

The BBC became a full-fledged public corporation in 1927, financed by a government tax levied on radio receivers. Being a creature or at least a quasi-creature of the government, the BBC endured certain restrictions on its practices. Initially, due to pressure from the press which was concerned with possible declines in newspaper circulation if radio were to broadcast news, the license provided "that the Company shall not broadcast any news or information in the nature of news except such as they may obtain on payment from one or more...news agencies." For years the BBC would begin its news broadcasts by acknowledging the sources from which they had purchased their information.

There were other restrictions more important for our purposes. There was a 'needle-time restriction', limiting the number of minutes that recorded music was permitted to be played weekly. This was due to agreements with the Musicians' Union—since the BBC employed its own orchestra(s) playing music, allowing the playing of records would have reduced the need for musicians.[34]

As the decades ensued, the BBC lost touch with at least one very important segment of the music listening public—the teenagers of the country. One type of music that it did not program to any great extent was rock and roll. The bottom line is that radio listeners in England had only the BBC to listen to, with its handful of networks, only one of which catered to popular tastes (the Light Programme) and even that station had only a few shows with recordings of popular music. The program that gets the most mention, a show called the "Pick of the Pops," was broadcast only once per week.[35] Since the BBC was the only game in town, listeners were captive to its choice of programming. Unlike

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[34] This comes from a history of the pirate radio stations http://radiolondon.co.uk/kneesflashes/stationprofile/hist.html although another history of UK Radio http://dspace.dial.pipex.com/town/pipexdsl/r/arar93/mds975/Content/ukradio2.html suggests that it was record companies that wanted to limit the amount of time that records could be played on radio. The limit on record play, at least in the post-war era, was 37.5 hours per week.

a producer in a competitive market who must cater to the demands of customers, the BBC was free to program what it felt was appropriate.

Competition is a hardy weed, however. Radio competition, disallowed by law, arose in an unusual form—pirate radio stations, which became quite influential in the mid 1960s.

The demand for rock-and-roll was sufficiently large, and the topography of the country was such, that entrepreneurs were able to turn some converted old boats into floating radio stations parked just outside of Britain's territorial waters, with monikers such as Radio London and Radio Caroline. These were advertising-based, for-profit ventures (one was even set up by a group of Texans).

Although it seems impossible to get accurate numbers on the audiences of these stations, they were sufficiently large that the British government, in 1967, passed the Marine Offenses Bill which made it illegal for any Briton to conduct business or interact with the pirate radio stations. This essentially put the pirates out of business.

To appease discontent caused by the shutdown of the pirate stations, the BBC promised to create its own network to play popular records. The stage was also set for the entrance of commercial radio that began in the early 1970s.[36]

2. The Impact of Private Commercial Radio

Private radio stations in England are supported by advertising, thus having the disadvantage of annoying the listener by having to intersperse commercials within the broadcast. Nevertheless, the increase in stations has been

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[35] There was also the Home Service, which was speech based, the Third Programme, which was highbrow, and the World Service which went to other countries.

[36] There is a very nicely detailed history of these events at http://www.icce.rug.nl/%7Esoundscapes/VOLUME06/Fight_free_radio.html

impressive and so too has been the growth in audience. Commercial stations finally achieved the majority of listening hours in 1995.

The impact of private radio stations came in three waves.[37] A small number of private stations were licensed beginning in 1973. The government was reluctant to increase the number of stations until new legislation in 1980. The early 1980s saw another increase in the number of stations. The mid 1990s saw another burst of activity and increase in the number of stations. At first the private radio stations were heavily regulated. Over time these regulations softened.

Some evidence on the historical size of the commercial radio audience can be gleaned by the share of advertising generated by British radio stations. It grew from .24% in 1973 to 2.49% in 1978 where it largely remained until the early 1990s when it began to steadily grow, achieving a level of 6% in 2000.[38]

The end result of this is that historically, British radio audiences have not had the capacity to listen to popular recorded music on radio to anywhere near the same extent as American audiences. Prior to 1967 there was a very great difference in this ability. This difference began to diminish in the late 1960s and early 1970s and then continued to diminish in the 1980s and 1990s.

If radio play significantly increases record sales, then British record sales should have increased significantly relative to American record sales beginning in 1967 and continuing over the next decade or two, holding everything else equal. By comparing record sales in the two countries over these decades we

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[37] This discussion is based upon Meg Carter's "Independent Radio: The first 30 years" The Radio Authority, 2003.

[38] These figures can be found on page 57 of Carter. British private radio's share of advertising still appears to be less than the share of other countries. Its share is about one third the US and Canadian level and one half that of Australia (data taken from TVBasics, TVB of Canada, 2003), which might not be surprising given the still very large share of BBC radio.

can test whether radio play increases record sales. Unfortunately, reliable UK data on record sales do not begin until 1973.

Figure 5 examines the ratio of UK/US sales per capita of full-length albums, whether vinyl, cassettes, or CDs. There is no evidence of an upward trend caused by greater radio airplay of popular music.

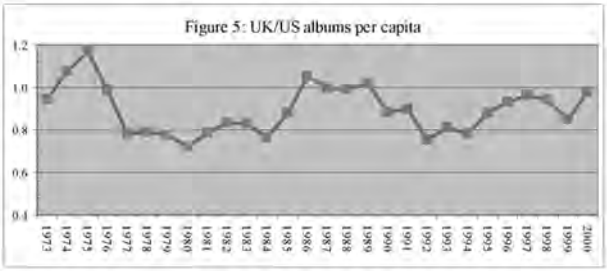
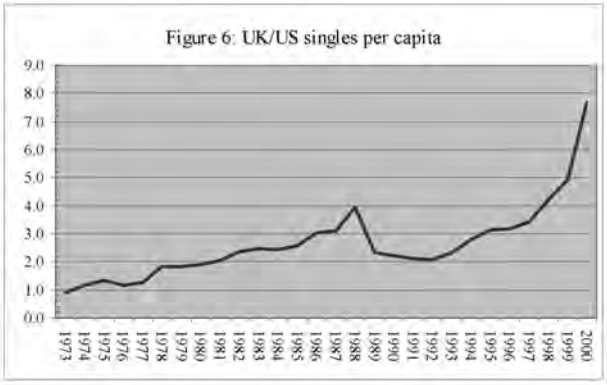
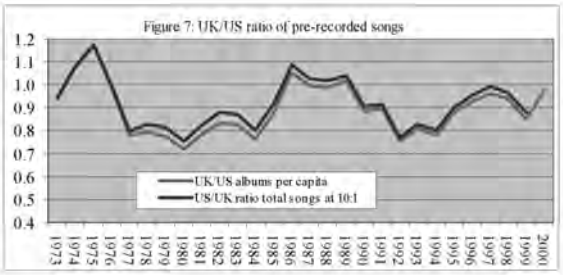


Figure 6 examines the sales of singles, regardless of physical format. Here there might appear to be some evidence for the claim that radio increases record sales since sales of singles increased dramatically in the UK relative to the US. Of course, sales of singles in both countries fell significantly over this period and singles are no longer an important market.



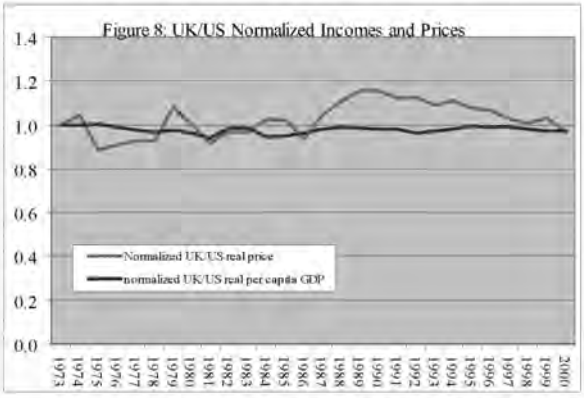
In an attempt to gauge the importance of the increase in UK singles relative to US singles, I assumed that albums contain ten singles and then merged the two series together. Figure 7 presents the results which clearly show that singles have very little impact on the overall market.



These comparisons do not control for other economic variables such as price or income. If by chance the price of records rose in the UK relative to prices in the US, then the quantity sold in the UK would have been expected to fall relative to US quantities. In that case it might still be possible that radio enhanced the market for records in the UK even if the quantity of albums sold

in the UK did not rise relative to the US. Alternatively, if incomes in the UK rose by less than incomes in the US and if record sales are positively related to income, then radio might have had a positive impact on record sales in the UK even though the quantity sold did not rise in the UK relative to the US.

These possibilities are examined, starting with Figure 8. From Figure 8 we can see that changes in both inflation adjusted record prices and GDP per capita were extremely similar between the two countries. Changes in UK inflation adjusted income (GDP per capita) very slightly failed to keep up with changes in US income over this period (2.9% lower over the entire period). Inflation adjusted record prices in the UK increased at a rate very slightly (3.3%) below the US rate although they were above the US rate for much of the period.



With this background it would seem impossible for the impact of price and income to alter the overall conclusion that the introduction of commercial radio had little impact on the quantity of records sold.

Table 2						
	B	Std. Error	t	Sig.	R-squared	Adjusted R-squared
US					0.285	0.222
(Constant)	-2.30E-02	0.021	-1.105	0.28		
Yearly Percent Change in Real Income	2.152	0.722	2.983	0.006		
Yearly Percent Change in Real Price	-0.191	0.273	-0.697	0.492		
UK					0.153	0.082
(Constant)	-9.00E-03	0.024	-0.382	0.706		
Yearly Percent Change in Real Income	1.729	0.868	1.991	0.058		
Yearly Percent Change in Real Price	-0.13	0.307	-0.423	0.676		
Dependent Variable: Yearly percent change in albums per capita						

Table 2 presents the results from regressions with the percentage change in per capita album sales as the dependent variable and the percentage change in real price and percentage change in real per capita GDP as independent variables. The coefficient on income is positive and significant in both countries. The coefficients on price in either country are not statistically significant, although they are at least of the correct sign.

In both countries we have an income elasticity of approximately two but with fairly large standard errors. From Figure 8, we know that the relative income changes in the two countries never deviate by more than 5%. At the end of the period, the income change in the UK was less than 3% below that of the US. Adjusting UK sales, which rose 2% less than in the US, for the higher income growth in the US, would leave the UK with a mere 4% increase in sales over the US during a three decade period during which radio play of popular music increased dramatically. Given the standard errors we certainly cannot support a claim that radio play increased sales of sound recordings.

The final piece of evidence concerns the revenues generated in the two markets. By using revenues as the variable of interest we can allow both prices and quantities to vary in the two countries. In order to avoid difficulties often associated with trying to control for exchange rate movements, I calculate the

share of GDP going to the recording industry in the two countries.[39] The results are reported in Figure 9.

Again, we have a result inconsistent with a claim that radio airplay increases record sales. In fact, over these decades the share of GDP devoted to records in the UK fell relative to the share in the US, and the fall was in the vicinity of 13%. This is slightly more lopsided than the other measurements, but still is not a particularly large difference.

The bottom line from this examination can be stated as follows: The introduction of commercial radio in the UK did not increase the market for prerecorded music, contrary to the claims of symbiosis often made in the literature. Although there is some evidence that radio may have harmed sales slightly, the evidence is weak. The most reasonable conclusion would appear to

[39] Although not reported in the text, the 1973 share of GDP devoted to record sales was remarkably similar in the two countries (.14% in both the UK and the US). One could argue that this similarity of ratios indicates that the UK's lack of commercial radio stations in 1973 neither hurt nor hindered record sales, which is not too far from the conclusion I reach in the paper. Differences between the two countries, however, make it unwise to merely compare the absolute shares. The approach taken in the text, to compare the change in relative shares in the two countries, normalizes each country to its specific characteristics (income, tastes, and so forth). As long as these other characteristics remain constant between the two countries, the approach taken in the text is more robust and instills greater confidence.

be that the introduction of commercial radio had a fairly small negative impact on the record industry in the United Kingdom.

This conclusion is supported by statements made by the UK Monopoly and Mergers Commission:

> The broadcasting of records—for instance, the `Top 40' singles or the airing of new product by popular disc jockeys—has long been an important promotional tool for new record artists and products. We were told, however, that the growing quantity of music broadcast on radio has moved towards becoming a substitute for record sales, with a consequent negative impact on such sales. Consumers who want to hear a particular kind of music are increasingly likely to be able to find a radio station that concentrates on it. This can reduce the incentive to buy records, while the growing facility for high-quality home taping may reduce the necessity for such purchases. We were told that these effects had been reinforced by the removal in 1988 of the restriction on independent radio stations which limited them to nine hours of `needletime' per day. We have been told that this trend is likely to accelerate when high-quality digital broadcasts are introduced.[40]

D. Additional Evidence

Intuition can provide some help in achieving an understanding of the impact of radio broadcast on overall sound-recording sales. Americans spend approximately 3 hours per day listening to radio broadcasts.[41]

According to the US statistical abstract, music listeners spend about 45 minutes per day listening to prerecorded (presumably purchased) music.[42] Note that the time spent listening to radio is three to four times as large as the time spent listening to prerecorded music. Without the availability of radio, some consumers who would otherwise have listened to radio would most likely

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[40] Page 79, "The supply of recorded music; A report on the supply in the UK of prerecorded compact discs, vinyl discs and tapes containing music" Monopolies and Mergers Commission; Presented to Parliament by the Secretary of State for Trade and Industry by Command of Her Majesty, June 1994.

[41] According to Arbitron, Americans spent 20 hours per week in listening to radio in the Fall of 2002, which can be found here: http://warpod.arbitron.com/scripts/ndb/ndbradio2.asp

[42] The number is 263 hours per year found in the US Statistical Abstract, Table No. 1102. Media Usage and Consumer Spending: 1996 to 2005. http://www.census.gov/prod/2003pubs/02statab/infocom.pdf

instead listen to more prerecorded music, since that is the closest substitute. If we make the perfectly reasonable assumption that the more time one spends listening to prerecorded music, the more prerecorded music that one will buy, it is easy to see how radio might harm sound-recording sales.[43]

The most clear-cut possibility of prerecorded music sales being harmed by radio is likely found in the activity of listening to music while driving. According to an Arbitron study of in-car radio use, one third of radio listening occurs in automobiles, which works out to about one hour per day.[44]

If radio were not available, the only way to listen to music in automobiles would be to listen to prerecorded music. Alternatives, such as movies, reading, or television are not available while driving. With the alternative of silence, and no other substitutes available, it seem very likely that if radio were unavailable, the one hour per day currently spent listening to radio in automobiles would convert to time spent listening to prerecorded music.

An increase of one hour per day in listening to prerecorded music would more than double the daily amount of time the average person spent listening to prerecorded music. It is hard to believe that such a doubling would not dramatically increase overall sound-recording sales. And this is just for automobile usage of radio.

Looked at in this light, therefore, it is easy to imagine that radio broadcast might decrease the purchase of sound-recordings.

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[43] The advent of cassettes and CDs allowed prerecorded music to became portable for the first time, presumably increasing the amount of time that individuals spent listening to prerecorded music. Liebowitz (2004) demonstrates that the increase in the penetration rate of portable devices coincides with a large increase in sound-recording sales and suggests that causation runs from new uses to increased listening to increased sales. See Stan J Liebowitz "Will MP3 downloads Annihilate the Record Industry? The Evidence so Far" *Advances in the Study of Entrepreneurship, Innovation, and Economic Growth*, V. 15, 2004, pp. 229-260. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=414162

[44] The study can be found here: http://arbitron.com/downloads/InCarStudy2003.pdf

IV. Payola and the Fallacy of Composition

It is fairly well-known that record labels will often attempt to pay to have their records played by disc-jockeys. In fact, there is a special term that has been coined to describe this behavior—payola—and in the 1950s several American disc-jockeys went through well publicized congressional hearings meant to prevent such activity.[45]

The fact that some record labels were willing to pay those in charge of programming radio stations to promote some records might be taken as evidence that radio play must be beneficial to record sales. Yet that would contradict the evidence on record sales reported in the previous two sections. Is there, in fact, a contradiction?

I think not. Although it seems logical to assume that payola means that radio enhances overall record sales, that conclusion suffers from the fallacy of composition—what may be true for individual observations is not necessarily true for the entire group.

An individual record, particularly if consumers are unfamiliar with the creators, will benefit greatly from airplay. An individual record label will benefit if radio stations tend to focus on broadcasting that label's records. The benefit to that recording or label, however, comes at the expense of other records and other labels since increased play of one record must lead to a decreased play of other records. If radio listening is a substitute for listening to prerecorded music, that substitution will occur regardless of which records are being broadcast, unless listeners feel that the quality of records being played has gone down.

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[45] For an in depth history of payola see Ronald Coase "Payola in Radio and Television Broadcasting," *Journal of Law and Economics*, October 1979, 269-328. Coase does not directly address the impact of radio on record sales although he does seem to implicitly believe there is a positive linkage. His main interest is to understand the causes of the attempt to ban payola.

Since radio broadcast of a record generally increases its share of the market it makes sense for labels to try to get their records broadcast. Payola is rational until the marginal benefit from additional payola no longer covers the cost. Radio stations want to maximize their profits, which requires balancing the audience size, which is maximized by playing records that listeners most prefer, against any revenues that might be generated by 'selling' airplay to record labels a la payola. This keeps the radio stations from deviating too far from what listeners would want to hear.

Recordings of the works of well known artists are less likely to need or benefit from payola since radio stations will want to play those records in order to achieve large audiences.[46] It is not unusual for leading stations to be given 'exclusives' over anticipated new recordings for a day or two, although I do not know what the stations 'pay' for this privilege. These are the recordings for which radio stations would be expected to pay large sums for the rights to broadcast if there were property rights in the broadcast of the recording.

It shouldn't be surprising that producers of recordings using little known artists are interested in paying for airtime. This is no different than in many other markets. There are often new entrants into many types of markets and it is not uncommon for new entrants to provide free samples, giveaways, and other devices to try to achieve market share, and that is how payola should be viewed. The media are willing to pay large sums for interviews with major celebrities, whereas minor celebrities are willing to pay to get someone to interview them. It certainly cannot be viewed as indicating that the overall market price of music for performing rights on radio is negative.

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[46] Coase reports that payola was favored by small record labels and that large labels (and music publishers prior to that) had attempted to outlaw activities such as payola for many decades. Coase viewed the ban on payola as anticompetitive.

Even if a majority of recordings were found to have negative prices for broadcast rights, this would not necessarily indicate that the overall market price, which is weighted by transaction size, would be negative. Only a small percentage of recordings are successful, and yet the successful ones dominate the revenue in the industry and would also likely dominate the overall market for market-based performing rights payments.

V. Conclusions

The belief that radio enhances the market for sound recordings seems firmly embedded in current regulatory, commercial, and legal thinking. Yet there appear to be no formal studies examining the relationship between the two markets.

I have examined two episodes in which the impact of radio should be relatively easy to observe. The evidence from this empirical examination indicates that, contrary to common beliefs, radio broadcast does not enhance the market for sound recordings.

Clearly, there is room for additional work. But the evidence seems strong enough, and the intuition supporting the evidence seems compelling enough, that a complete rethinking of the economic relationship between these industries, and the laws, regulations, and decisions having to do with the interaction of these industries, seems appropriate.

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ATTACHMENT 2

Don't Play it Again Sam: Radio Play, Record Sales, and Property Rights

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Abstract:

This paper undertakes an econometric investigation of the impact of radio play on sales of sound recordings using a sample of American cities. The results indicate that radio play does not have the positive impact on record sales normally attributed to it and instead appears to have an economically important negative impact, implying that overall radio listening is more of a substitute for the purchase of sound recordings than it is a complement. This finding indicates that creating a set of property rights to allow this market to function properly is different than has been suggested by prior research. New technologies affecting radio broadcasts are likely to make this topic increasingly important in the coming years. This research also exposes a fallacy of composition in applying to an entire market a generally accepted positive relationship that holds for individual units.

It is well known that incomplete or missing property rights are likely to lead to wasteful exploitation of resources with their attendant deadweight losses. Coase (1960), of course, taught us that trying to ameliorate such problems through taxes and bounties was not a simple task.

When we think of instances of missing property rights we naturally gravitate toward the well known examples—air and water pollution, wild animals, traffic congestion—found in most economics textbooks. Our concern in this paper is with a case of incomplete property rights associated with a ubiquitous product that the average American uses for approximately three hours per day. That product is broadcast radio.

There are two aspects of the incomplete property rights surrounding the broadcast of recorded music although economists appear to have only been aware of one of them. The missing right recognized by economists is the inability of radio stations to charge owners of sound recordings for the broadcast of those recordings, an activity which is limited by statutes against 'payola'. Sound recording companies cannot legally pay radio stations to play particular sound recordings unless the stations accede to an onerous requirement of announcing the payment each and every time that sound recording is played. This restriction received extensive publicity in the 1950s when Congress held well-publicized hearings on this issue and this where the pejorative term payola, meant to describe payments from record companies to disk jockeys, was born.[1]

The missing property right that has not heretofore been recognized by economists is the inability of sound recording owners to restrict the broadcast of their sound recordings. Simply put, radio stations can broadcast sound recordings at will, with no permission required from the owners of the

[1] A reader interested in the tawdry details of payola can consult either Coase (1979) or Caves (2000). Coase provides detailed documentation about the lengthy history of the practice which existed well before the congressional hearings in the 1950s as well as details from the hearings. Caves covers much of the same information but also provides details of Dick Clark as a peerless payola pioneer that readers of a certain generation may find of interest.

sound recordings.[2] Yet the importance of music to these stations is readily revealed by the fact that radio stations are primarily described by the genre of sound recordings that they broadcast, whether it is Classic Rock, Hot Adult Contemporary, or Cool Jazz. There is virtually no economic analysis of this latter property right.

There have been, over the years, numerous news stories written about payola but only a handful of articles written by economists, among them Coase (1979), Sidak and Kronemyer (1987) and Caves (2000). These economists all lament the lack of property rights in this market, but their view of the missing property right is limited to the inability of record labels to directly pay radio stations, in an unfettered manner, for the possibly valuable promotional component of radio broadcast. These authors seem to have neglected the possibility that payments might also be made from radio stations to record companies for the possibly valuable exclusive right to broadcast certain songs that listeners wish to hear. A well-known analogy exists in the television broadcast market where broadcasters must legally acquire the rights to broadcast television programs owned by others and where broadcasters pay large sums for these rights.[3] The neglect of this possibility by previous economic writers may be due to the widely held belief that radio play is so beneficial to record sales that requiring radio stations to obtain permission to broadcast sound recordings would be irrelevant, in the same manner that a property right for goods that are not scarce would serve no useful role.

[2] Owners of sound recordings in the United States do not have the legal ability to restrict the broadcasts of their sound recordings. In some countries owners of sound recordings have been provided a form of legal 'compensation' where radio stations must pay a fee for the use of sound recordings (with rates usually set by law or supervised by some quasi-judicial organization). Nevertheless, owners of sound recordings are not allowed to opt out of the system and engage in direct negotiations with radio stations, so there is no reason to believe that this system in any way approximates a market outcome. In contrast to the sound recording, radio stations in the US pay a "performance right" for the underlying musical compositions on the sound recordings broadcast by radio stations. The legal distinction is that performance rights payments go to composers and their publishers whereas the recording artist and record company do not receive any payments, although recording artists may be the composers and publishers may be owned by sound recording companies.

[3] The radio stations would need to acquire rights to broadcast particular sound recordings, the same way that television stations need permission to broadcast movies or television programs, and radio stations would be allowed to sell their possibly promotional services of broadcasting records on the radio to record companies.

Before we can write off the possibility that such a property right might in fact have a positive market value to radio stations in some circumstances, however, it would seem prudent to examine the impact of radio play on record sales. If radio play exerted a positive impact on overall record sales, consistent with assumptions, creating such a property right might well be superfluous. If radio play diminishes record sales, however, such a right may well be of value. Such a finding wouldn't rule out the possibility that payments might still go mainly from sound recording owners to radio stations, but it would make it far less likely.

While it seems likely that radio broadcasters can have a profound impact on the success of *individual* sound recordings, it does not appear, as Sidak and Kronemyer have commented, that anyone has empirically examined this proposition.[4] Even if radio broadcast does have the promotional impact on individual recordings normally assumed, it may not hold for the overall impact of radio broadcasts on the sound recording industry as a whole. As discussed below, there is a potentially important fallacy of composition in this market. To my knowledge there has been only a single examination of the impact of radio play on the overall market for sound recordings, Liebowitz (2004), which was a largely historical analysis.

The lack of a property right in the broadcast of sound recordings means we cannot discover the value of the right through direct observation. By way of analogy, we know through direct observation that television broadcasters place higher values on the right to broadcast movies than any possible positive value that movie owners might place on possible promotional impacts of television broadcasts (which, admittedly, seem likely to be negative for movie owners in terms of DVD sales).[5] It is easy to

[4] Sidak and Kronemyer state in their footnote 18: "There appears to be no published study confirming this complementary demand relationship, let alone estimating its empirical magnitude."

[5] Smith and Telang have examine the promotional impact of television broadcast on DVD sales and found it to be positive at the time of the broadcast and shortly afterward although they did not measure the impact on overall future sales. Nor do they examine the impact of television on the entire DVD market (there is ample evidence that the existence of television caused a dramatic decline in overall movie revenues, as found in Liebowitz 2004). Movie

observe that television stations pay positive prices for the rights to broadcast movies, and not vice-versa.[6] If there were a similar market for rights to broadcast music over radio we would know the impact of radio play by direct observation—we could examine whether and how much broadcasters might pay sound recording owners for broadcast rights. But there is no such market to turn to for such observation.

Is there a possibility that at a market based level the majority of the payments could go from radio stations to record companies for the right to broadcast recordings? The results below, where the overall impact of radio play on sound recordings is found to be negative, suggests that such a possibility is real. The currently known payments by sound recording owners to broadcasters might turn out to be similar to slotting fees paid by manufacturers which are common but do not overturn the fact that net monies flow from retailer to manufacturer and not the other way around.[7]

This issue will take on increasing importance in the near future due to a new generation of digital radio receivers—terrestrial, satellite, and Internet based—that are capable of making and storing copies of sound recordings. These receivers alter the typical "streaming" nature of radio, which has historically broadcast songs whose only trace remained in the memory of the listener. The new receivers allow users to automatically record digital songs, providing unlimited playback at the discretion of the user. This technology seems likely to exacerbate any negative impact on record sales from radio play, increasing (or making positive) the market price for the right to broadcast particular sound recordings.

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producers seem to believe that television broadcasts will cannibalize sales and it is hard to imagine that this belief is not correct.

[6] In contrast to record companies, movie owners are able to strictly control whether the station can broadcast the movie, when they can broadcast it, and for what price. Providing geographic exclusivity in these rights to single stations is common. Analyzing the historical reasons for this different set of rights granted to movie owners versus sound recording owners is beyond the scope of this paper, but several possibilities come to mind: 1) there was no copyright on sound recordings until 1971 so there was no right that could be sold and the current situation can be considered a form of grandfathering; 2) the belief that radio was beneficial to sound recording sales implied a zero or negative price; or 3) sound recording firms had less political power vis-à-vis radio broadcasters than did movie owners relative to television broadcasters and thus the sound recording owners were unable to secure for themselves the same set of rights as movie producers.

[7] For more information about slotting fees see Klein and Wright (2007).

There have already been several recent skirmishes between the sound recording and broadcast industries and we can expect more friction as these technologies mature.[8] This would seem, therefore, to be a propitious time to examine the nature of this interaction of radio on sound recordings.

I. A Brief History of Radio and Sound Recording

Radio and sound recordings have largely grown up together, with both industries reaching commercial viability early in the 20th century, although sound recordings came first. Thomas Edison is credited with creating the first sound recording in 1877 with a tinfoil recording process. Tinfoil was soon replaced with wax cylinders, leading to a long-forgotten standards battle between cylinders and disks (the disk system, known as the gramophone was developed by Emile Berliner). Just as VHS came later but nevertheless won its battle with Beta, disks came later but eventually won the day.

The first commercial American radio stations went on the air in late 1920. Numerous stations were borne in the next few years and by 1923 the number of stations was over 500, which remained the approximate number for the next fifteen years (Hazlett 1997).[9] In 1926 the penetration rate of radio was approximately 20%.[10] In those days both radio and sound recordings were more the provenance of the middle and upper classes than the lower class and the overall penetration rate of radio most likely severely underestimates the penetration rate of radio in sound recording households.

The market for sound recordings was surprisingly mature by the time of radio's entrance. For example, a magazine devoted to the sound recording industry (Talking Machine World) was established in 1905 and by 1920 monthly issues were averaging 200 pages.[11] Sound recording sales in 1921 were

[8] I include satellite radio as a species of radio broadcast in this paragraph. An example of this friction can be found in the Washington Post, "Music Labels Sue XM Over Recording Device" Annys Shin, May 17, 2006; Page D01 at http://www.washingtonpost.com/wp-dyn/content/article/2006/05/16/AR2006051601826.html

[9] Reported in Figure 1 in Thomas Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment" *Columbia Law Review*, Vol. 97: 905-944. Hazlett's data are taken from Bureau of the Census.

[10] See Liebowitz (2004).

[11] See http://www.garlic.com/~tgracyk/tmw.htm.

more than $1.1 billion, measured in 2004 dollars, and the population was only slightly more than one third of the current population.[12] To put this value in perspective, constant dollar sales revenue per capita was actually slightly higher in 1920 than in 1950. An overview of the current music market that also touches on several of the issues raised in this paper can be found in Connolly and Krueger (2006).

Liebowitz (2004) examined the historical relationship between record sales and radio play for two periods: the introduction of radio in the US in the 1920s and the introduction of commercial radio in Britain in the latter decades of the 20th century. In the first instance record sales fell dramatically after the introduction of radio, and in the second case there was no evidence of a positive relationship between increased radio play of popular music and record sales. The current paper is an attempt to more directly and more precisely measure the current relationship between radio play and sound recordings.

II. The Possible Relationships between Radio and Sound Recordings

It is often claimed that radio has a beneficial impact on sound recording sales. While it is incontrovertible that radio can direct demand to particular songs that receive heavy airplay, the impact on individual songs is quite distinct from the impact on the entire industry, although this distinction has not been generally recognized.

The particular details of the overall impact of radio depend on two competing factors. On the one hand, radio allows users to experience new songs that they may not have previously heard. If this were the primary use of radio by listeners then radio could increase overall record sales. On the other hand, the time spent listening to radio is also capable of being a substitute for the time spent listening to prerecorded music. To the extent that broadcast radio is such a substitute, radio would be expected

[12] This number comes from correspondence with the Recording Industry Association of America (RIAA) as reported in Liebowitz (2004).

to harm overall record sales. Radio is capable of delivering both impacts and the relative strength of each would determine the overall impact.

A. What can we learn from statistics on music listening?

The bare statistics on time spent listening to various technological sources of music are informative in and of themselves. The average American spent five times as much time listening to radio per day than listening to traditional sound recordings in 2003, according to the US Statistical abstract.[13] These time-usage values seem incompatible with a hypothesis that radio is used primarily as a means to learn about new music for later purchase, since it would appear infeasible that consumers spend so much more time searching for new music then they spend in the ultimate act of music consumption. These statistics imply that radio is being used largely for its own consumption value.

Certainly, this line of thinking doesn't prove that time spent listening to radio is too long to be pure search, but it illustrates the great likelihood that much and probably most radio listening is a form of consuming music, and if so, radio is likely to be a substitute for the listening to and the purchasing of sound recordings. Understanding the nature of that substitution depends on understanding the nature of music consumption.

B. Music Consumption

Listening to music is a favorite activity for many individuals. The particular forms of consumption are varied, however, and include attending live performances, listening to CDs (or other sound recording mediums), or listening to radio and television broadcasts. Our focus is on the two major sources of music consumption—broadcast radio and sound recordings. These two music sources

[13] Radio (including satellite) is listed at 2.75 hours per day and sound recordings at .5 hours per day. See Table 1116 "Media Usage and Consumer Spending for 2003." The ratio was closer to 3:1 in 1999, before file-sharing began. Available at http://www.census.gov/compendia/statab/tables/06s1116.xls.

satisfy the music listening craving in different ways and each has certain advantages relative to the other.

Sound recordings provide the highest audio quality and also allow particular songs and performances to be ideally matched to an individual's tastes. Broadcast radio, besides suffering from lower audio quality and less perfectly matched music, also suffers from numerous minutes of advertising. Nevertheless, radio has some advantages over sound recordings—disk jockey patter (which many consumers apparently enjoy); broad playlists which allow the consumer to sit back and let someone else decide what to play (which is presumably more useful than a pure randomizer switch since otherwise radio would just use such a switch); and a much lower price since radio is free whereas the legal consumption of sound recordings requires that they be purchased.

These different characteristics provide different strengths for these two sources in catering to the music listening desires of consumers. We can think of two extremes in a continuum of music listening experiences. On the one hand, an individual might wish to listen to a specific recorded performance or set of performances, which we can refer to as "specific" music consumption. Alternatively, an individual might wish to listen to a random selection of performances from a large library of performances (most likely from a particular genre) which we can refer to as generic or nonspecific music consumption. The two types of listening, which are themselves somewhat substitutable, imply different behavior toward radio and sound recordings.

If specific music consumption is desired the individual will need to access the specific sound recordings of interest, either from his personal collection, those of acquaintances, or more general libraries. Once these sound recordings are in the individual's possession, he can easily and quickly listen to the songs in which he is most interested. Radio, by way of comparison, is not an efficient technology for accessing specific songs. Since a song is considered to be in heavy rotation if it is played twice a day,

an individual would need to spend an inordinate amount of time listening to radio before even one desired song was played, to say nothing of a larger collection of songs (note that this is somewhat less true for satellite radio which sometimes has a station devoted to songs from but a single artist, e.g., the Elvis Presley or Bruce Springsteen stations on Sirius Satellite Radio).

Non-specific music consumption is another matter entirely. Radio is particularly good at catering to this desire, with its playlists and large libraries. Individuals can use their personal libraries to also provide a form of non-specific listening, perhaps by telling their CD or MP3 player to randomize the play of songs, or else choosing the music to listen to in a somewhat haphazard manner. Because sound recordings are not free, the music libraries of individuals are usually quite limited in comparison to that of radio stations. The disadvantages of radio are its lower audio quality and the fact that its collection of music is not as closely tailored to the tastes of individual listeners as their own libraries are likely to be. Nevertheless, the relative usage statistics reported above indicate that the disadvantages of radio are overwhelmed by its advantages for a great majority of individuals.

Note that radio and sound recording are substitutes for non-specific music consumption whereas specific music consumption should be dominated by the use of sound recordings. More importantly, radio broadcasts are clearly a substitute for sound recordings in the case of non-specific music consumption but may well be a complement for sound recordings in the specific music consumption category. This latter result is due to the fact that radio can provide information and therefore influence which specific sound recordings are purchased.

This dichotomy between the impact of radio in specific versus non-specific uses of radio broadcasts leads to the potential fallacy of composition. By focusing on the ability of radio to rearrange the position of songs in an individuals ranking of 'favorites' the analyst would only measure the positive impact of radio on sales of specific songs without capturing the true market impact.

Because radio and sound recordings compete for non-specific music uses, radio usage will have negative impacts on the sales of sound recordings for non-specific music uses, which appears to be by far the larger of the two uses. In the much smaller category of specific music use, radio will clearly influence the selection of sound recordings and may even increase the number of sound recordings sold. By focusing on the latter interaction of these music sources to the exclusion of the former interaction, previous discussion have ignored the potentially negative impact of radio on sound recording sales. We turn now to an empirical investigation of the overall relationship.

III. Data

In order to perform our analysis we need to merge three data sets together: Arbitron data on radio, Nielsen SoundScan data on record sales, and US Census data for market demographics.

The Arbitron radio data are based upon diaries filled out by respondents, similar to Nielsen television diaries. The data are produced several times a year and currently are found in digital form. We were provided access to their data for 1998 and 2003. Arbitron classifies stations by type and also aggregates groups of stations into approximately 275 (269 and 278 in 1998 and 2003 respectively) Metropolitan Survey Areas (known as Metro Areas) based on the areas in which they broadcast. Some rural residents are left out of the surveys. Arbitron data include information on the average time spent listening to radio in its Metro Areas as well as data on the share and genre of each radio station in an area, allowing a calculation to be performed separating the audiences for music radio and talk radio.[14]

Nielsen SoundScan sells data on record sales (full length albums) by geographic area, genre, and by year. Sales data come mainly from bar code scanners at retail outlets. Online sales are included in these numbers, with customer locations mapped to shipping addresses for physical units or credit card

[14] In 1998 the radio genres which we classified as 'talk' were: News, Religion, Sports and Talk. In 2003 the genres had multiplied and changed, and we classified as talk: All News, All Sports, Educational, News Talk Information, Spanish News/Talk, Sports, Talk/Personality, and Religious. Note that Gospel, although religious, is classified as music.

locations for digital downloads. As a factual matter, digital downloads played virtually no role in the analysis since they were a trivial component of the market even as late as 2003. Nielsen aggregates sales by Designated Market Areas (DMAs) of which there are 210 in the US and everyone in the United States is included in a DMA. We purchased data for the largest 100 largest DMAs which includes approximately 83% of the total population. As we will see below, smaller DMAs provide less reliable data.

The US Census, as part of it Current Population Survey (CPS) undertaken for the Bureau of Labor Statistics, conducts irregular surveys on Internet and Computer use. We use these Census surveys since we wish to control for the important impact of file-sharing on record sales. There was a survey in December of 1998 and another in October of 2003 and these are the two used in the analysis.[15] The surveys provide information on demographic variables such as average household income, age distribution by area, minority share of population, breakdown by gender, internet use, type of internet connection, as well as a host of other variables not used in the analysis. The geographic areas used in the Census are known as Metropolitan Statistical Areas (MSAs) and there are 241 of these areas in our data. As is the case with Arbitron Metro Areas, these MSAs do not include rural residents.[16] Census data are based on responses from individuals to survey questions. The size of the census survey sample (approximately 130,000 nationally) in small MSAs is sometimes insufficient to provide accurate estimates for various demographic data. We try to take account of this problem in the analysis. Arbitron Metro Areas normally correspond to Census MSAs although they are not identical to them.[17]

[15] The control for file-sharing requires that the start date occur prior to file-sharing (1999) and that only one other year be used. For details see Liebowitz (2006).

[16] The Census Data also include PMSAs (primary metropolitan statistical areas) and CMSAs (consolidated metropolitan statistical areas) which are entire or parts of more heavily populated MSAs.

[17] Arbitron states: "Arbitron Metros generally correspond to the Metropolitan Statistical Areas (MSAs, PMSAs, CMSAs) defined by the U.S. Government's Office of Management and Budget. They are subject to exceptions dictated by historical industry usage and other marketing considerations as determined by Arbitron." See page 8.2 of Arbitron Radio Market Report Reference Guide, 2002.

Combining these data sets is not a trivial task. Since Nielsen DMAs are the largest areas and represent larger populations than Census MSAs or Arbitron Metro Areas (even when they all have the same name) we aggregated the MSAs and Metro Areas to match the Nielsen DMAs. This often required adding several MSAs (or Metro Areas) together to approximate the DMA. Arbitron provides a guide to link its Metro areas to the Nielsen DMAs, although the resulting matches are sometimes far from perfect. Matching the Census MSAs to the Nielsen DMAs was based upon examining Nielsen DMA maps (which show the counties belonging to a DMA) and determining which DMA an MSA belonged to based on the county containing the MSA.

The 'matched' Metro Areas and Census MSAs sometimes contained only a small portion of the DMA population, particularly for the DMAs with smaller populations and more rural characteristics. This is because rural households in DMAs are often excluded from Metro Areas and MSAs. For that reason we constructed a variable, "Coverage", which measures the portion of the DMA population replicated by the aggregated MSAs or Metro Areas.[18] When Coverage falls to a low level it is possible that the Census or Arbitron variables, based as they are on MSAs which make up only a small percentage of the DMA population, will not properly reflect the actual population characteristics in the DMA. In the analysis that follows the sample will sometimes be restricted to observations where the Coverage is greater than 60% or 75%, in order to eliminate the influence of potentially misleading measurements.

Although the data from Nielsen SoundScan cover 100 DMAs, one DMA could not be matched with any census MSAs and was dropped from the analysis. Further, missing data for radio listenership

[18] Coverage ratios were calculated for each DMA for both Arbitron and Census data and the lowest ratio for either Arbitron or Census data is used for each DMA. One difficulty in constructing these ratios was that Nielsen populations were based on individuals over the age of 2 whereas Arbitron populations were based on individuals over the age of 12. This required that we used Arbitron listed DMA populations when calculating the Arbitron coverage ratios.

removed another three or four DMAs, depending on year and whether radio was measured as total radio audience or music radio audience.

Table 1: 2003 Values							
Variable	Obs	Mean	Std. Dev.	Min	Max	pop weighted	Rural
College Degree	99	0.204	0.051	0.087	0.345	0.216	0.139
Coverage	99	0.683	0.206	0.203	0.977	0.828	
DMA Population (00,000)	99	23.505	27.275	6.308	194.212	54.835	
Household Income (000)	99	47.966	8.986	20.380	75.895	50.540	38.255
Males	99	0.480	0.023	0.400	0.520	0.482	0.484
Minority	95	0.220	0.138	0.024	0.665	0.269	0.293
Number Radio Stations	95	22.017	4.991	12.287	38.109	25.304	
Old (55+)	99	0.227	0.054	0.130	0.410	0.215	0.250
Share Internet	99	0.613	0.071	0.440	0.740	0.621	0.545
Radio Usage (hrs/day)	96	2.711	0.161	2.371	3.233	2.769	
Music Radio Usage	96	2.298	0.190	1.861	2.976	2.293	
Talk Radio Usage	95	0.417	0.138	0.190	0.750	0.476	
Record Sales per capita	99	2.321	0.440	1.499	3.879	2.445	1.837
Calculated Weights	99	651.593	545.538	17.108	2664.062		
Young (12-29)	99	0.303	0.044	0.200	0.410	0.306	0.288
98-2003							
Change in Variable	Obs	Mean	Std. Dev.	Min	Max		
College Degree	99	0.018	0.040	-0.114	0.208		
DMA Population (00000)	99	1.643	2.361	-0.559	13.845		
Household Income (000)	99	8.523	7.087	-6.660	26.901		
Males	99	0.001	0.035	-0.137	0.143		
Minority	93	0.019	0.054	-0.115	0.186		
Number Radio Stations	96	2.172	7.311	-11.404	65.000		
Old (55+)	99	0.011	0.047	-0.120	0.191		
Radio Usage	95	-0.294	0.104	-0.600	-0.050		
Music Radio Usage	95	-0.323	0.123	-0.623	-0.036		
Talk Radio Usage	95	0.029	0.092	-0.227	0.351		
Record Sales per capita	99	-0.577	0.695	-3.484	1.049		
Share Internet	99	0.310	0.058	0.120	0.466		
Young (12-29)	99	0.001	0.045	-0.110	0.140		

Table 1 presents summary statistics for 2003 and for the change from 1998 to 2003, allowing the reader to infer the 1998 statistics if desired. A person in the average DMA spent 2.3 hours per day listening to music radio and 2.71 hours a day listening to all radio. Sales of full length sound recording albums averaged 2.32 per person per year across DMAs, somewhat less than the average weighted by

population. The combined coverage ratio in the average DMA was 68.3% and the DMA with the lowest values was about 20%, which would be a cause for concern if these observations were accorded much weight in the analyses. The national (weighted) coverage ratio was a more reassuring 82.8%, however. Small cities tend to have lower coverage ratios (the correlation between DMA size and coverage is .44).

As mentioned, the population of the top 100 DMAs represents about 83% of the national population. The MSA (Metro Area) population matched to the DMAs covers about 87% (79%) of the DMA population, so that in total our sample covers about 72% (66%) of the US population. How does the population left out of MSAs compare to the included population? Being more rural, the left out population would be expected to be poorer, have lower Internet usage, and lower education. This expectation is confirmed in the rightmost column of Table 1 where we see that left out individuals have lower Internet use, a smaller share of college degrees, lower incomes, and lower per capita record sales than the included population.

IV. Estimation

Our goal is to determine the impact of radio play on record sales. Our null hypothesis will be that radio increases record sales since that conclusion seems to have been accepted by almost everyone. All of our variables are measured as the per capita value in a city. The dependent variable will be record sales per capita. The key independent variable will be the average time spent listening to music radio. Demographic variables that are likely to influence record sales include income, Internet use, possession of college degree, relative size of age groups (over 55 and 12 through 29), and minority population (black and Hispanic).

We have data for 1998 and 2003. Having data for more than one year allows panel methods to be used and this will be our preferred methodology. The appendix present results from the single-year cross section regressions which provide similar results.

A. Radio Play and Record Sales

Table 2 presents results from running regressions using first differences. By taking first differences we control for underlying differences in the populations and circumstances of cities that do not change over this period and for which we do not have controls, in a manner identical to a fixed effects model.

The table includes regression results over the full 1998-2003 interval where all the variables are in first differences, except for the measurement of Internet usage which will be explained shortly. The dependent variable is the change in albums sold per capita. The various specifications in Table 2 differ from one another as we stratify the observations by coverage ratio and population in order to remove from the analysis observations likely to be less precisely measured.

The first column includes the full sample although these results are most vulnerable to poor measurements and are included more for the sake of completeness than for any information revealed. The second column weights each observation by a combination of population and coverage, so that larger cities are more heavily weighted and cities with greater coverage are more heavily weighted, with the weighting constructed to give approximately equal impact to population and coverage.[19] The purpose of this weighting was to reduce the impact of observations with likely mismeasurement due to low coverage or possible imprecision in the Census numbers due to the sample size being too small to provide reliable statistics. The weighting here is quite severe, with the variation from the highest to lowest weight on the order of over one hundred to one (as can be seen in Table 1). The next two

[19] The weighting was constructed taking the product of the squared coverage and the square root of the population.

columns eliminate observations (giving them a zero weight) when the coverage is less than either 60% or 75%. These cutoffs were chosen as fairly natural indicators of good if not great coverage and more demanding cutoffs would have lowered the number of observations further than deemed prudent, although we will explore the impact of choosing different cutoffs later in the paper. Columns 5 and 6 add in a cutoff for population as well as coverage.

Table 2: First Differences Regression on Change in Album Sales

Change in	Full Sample	Pop & Cov Wgt	Coverage >.6	Coverage >.75	Cov >.6; pop>.6M	Cov >.75; pop>.6M
Daily Per Capita Music Radio (Hours)	-0.0745	-0.7903	-0.7507	-1.1817	-0.6049	-0.7767
	(0.462)	**(0.076)**	(0.169)	(0.126)	**(0.067)**	**(0.056)**
Average Household Income (000s)	0.0087	0.0227	0.0299	0.0368	0.0148	0.0220
	(0.362)	**(0.025)**	**(0.047)**	**(0.086)**	(0.118)	**(0.034)**
2003 Internet Access	-1.5582	-2.7630	-3.4950	-4.5426	-2.7686	-2.5656
	(0.185)	**(0.012)**	**(0.043)**	**(0.062)**	**(0.003)**	**(0.014)**
BA Degree or above	3.1199	4.0142	6.2029	9.0215	-3.2295	0.3713
	(0.162)	(0.172)	**(0.081)**	**(0.080)**	(0.188)	(0.863)
Share 12-29	5.3332	5.2812	9.0277	8.2210	0.6868	0.8054
	(0.077)	**(0.094)**	**(0.022)**	(0.108)	(0.792)	(0.676)
Share Males	-0.8486	-2.4070	-4.6742	-4.9393	1.1555	-0.4517
	(0.721)	(0.329)	(0.159)	(0.196)	(0.452)	(0.774)
Share 55+	1.3197	1.1857	4.9417	1.0563	-0.5910	-1.2845
	(0.568)	(0.581)	(0.144)	(0.784)	(0.775)	(0.413)
Share Minority	-1.0790	-0.2796	0.4427	-0.9315	0.6420	-0.4186
	(0.475)	(0.844)	(0.806)	(0.700)	(0.675)	(0.744)
DMA Population (%)	-0.3810	-0.3324	-0.4518	0.0504	-0.8576	-0.4557
	(0.684)	(0.668)	(0.663)	(0.973)	(0.154)	(0.428)
Constant	0.2827	0.6820	0.9922	1.4393	1.0931	0.7715
	(0.719)	(0.308)	(0.342)	(0.326)	**(0.050)**	(0.145)
Observations	90	90	61	41	53	36
R-squared	0.14	0.20	0.33	0.37	0.25	0.36

Robust p values in parentheses; p value for music radio is for one tail test; bold is sig at 10% level; bold underlined at 5%, bold double underline 1%

Our primary interest is in the coefficients on music radio use. The coefficients are always negative and (excluding the full sample) imply that radio play causes a substantial decrease in the sales of CDs. The coefficients are generally at or near the border of statistical significance if we include 10% as a cutoff. The average coefficient (excluding the full sample) is -.82 but we will round this value down to -.75 in the illustrations below because when the impact of outliers is reduced the average coefficient

falls to -.68.[20] This economic significance of these coefficients tells us that a one-hour increase in usage of music radio, which is somewhat less than one half of the average value, would lead to a decline of .75 sound recordings. Although the confidence intervals around these coefficients are wider than we might like, the implied impact of radio indicates an important economic impact of radio play on record sales since the yearly per capita purchases of sound recordings is about 2.7 over the five year interval. If this coefficient could be applied to the entire range of radio usage, and we will have more to say about this below, the decline in record sales would be very large relative to actual sales. These results are certainly strongly contrary to the normal expectation of a strongly positive impact of radio play on record sales.

Income is always positive, as expected, and usually significant. An increase in household income of $10,000 would lift sound recording sales by approximately .25 units. DMA population has no clear impact on sales.

The Internet variable requires some additional explanation. In the period from 1998 until 2003 file-sharing arose from nothing to become a very popular activity. Liebowitz (2006a) demonstrates that a correct specification for a regression measuring the impact of file-sharing, if file-sharing was zero in the beginning period, would be to use the *level* of Internet use in the later period in an otherwise first differenced regressions. As was the case in that paper, the Internet variable in Table 2 indicates a very strong negative impact of file sharing on record sales, which is consistent with most other studies of the subject (see for example, Liebowitz 2006, Rob and Waldfogel 2006, and Zentner 2006). The impact of file-sharing is less than this coefficient, however, because Internet usage itself can be something of a

[20] I used the built in RREG Stata routine to determine whether weakening the impact of influential observations would change the results. Although the coefficients were slightly lower, the average p values were slightly stronger (.08 versus .10). The RREG routine first eliminates observations with levels of Cook's D that are above 1 and then it iteratively lowers the weightings of observations with large absolute residuals, until a convergence threshold is reached.

substitute for listening to sound recordings as described in Liebowitz (2006a), which controls for this factor and concludes that file-sharing still has a large negative impact on record sales.

The share of the population with college degrees appears to have a positive impact on record sales until small cities are removed. It is also the case that when outliers are made less influential this variable loses its strength. The minority and age group variables do not have much consistency. The coefficient on share of individuals aged 12-29 appears to have a positive impact on record sales, but as was the case with the college variable, the result goes away when small cities are removed or when robustness checks (for outliers) are performed.

Table 3: Concise Regressors on Change in Album Sales

First Differences	Pop & Cov Wgt	cov>.6	cov>.75	cov >.6 pop>.6M	cov >.75 pop>.6 M	Avg
Daily Per Capita Music	-0.8091	-1.2560	-1.5237	-0.6347	-0.6931	-0.9833
Radio (Hours)	**(0.065)**	**(0.069)**	(0.101)	**(0.033)**	**(0.019)**	**(0.057)**
Average Household	0.0177	0.0194	0.0347	0.0084	0.0201	0.0200
Income (000s)	**(0.033)**	**(0.079)**	**(0.044)**	(0.320)	**(0.009)**	**(0.097)**
2003 Internet Access	-2.1177	-2.9273	-4.2516	-2.4070	-2.2478	-2.7903
	(0.026)	**(0.053)**	**(0.073)**	**(0.005)**	**(0.018)**	**(0.035)**
Observations	95	61	41	53	36	
R-squared	0.076	0.074	0.137	0.147	0.284	
Robust Regressions						
Daily Per Capita Music		-0.7562	-0.7493	-0.7066	-0.6614	-0.7184
Radio (Hours)		**(0.019)**	**(0.035)**	**(0.028)**	**(0.055)**	**(0.034)**
Average Household		0.0128	0.0146	0.0142	0.0187	0.0150
Income (000s)		**(0.065)**	**(0.079)**	**(0.047)**	**(0.024)**	**(0.054)**
2003 Internet Access		-1.9139	-1.7411	-2.1668	-2.0606	-1.9706
		(0.009)	**(0.043)**	**(0.003)**	**(0.015)**	**(0.018)**
Observations		61	41	53	36	
R-squared		0.163	0.169	0.205	0.232	

Robust p values in parentheses; p value for music radio is for one tail test; bold is sig at 10% level; bold underlined at 5%, bold double underline 1%; Constant term not shown.

Due to the relatively small number of observations it is important to try to maximize the efficiency of the estimates. To this end the regressions were rerun using only the variables that appear to actually have consistent and significant impacts—music radio use, Internet use, and income. The

results are found in Table 3. The top half of that table provides the first differenced OLS regression coefficients. The general results are similar but generally stronger than in Table 2. The coefficient on music radio is somewhat larger, averaging -.98 with an average p value slightly below .06. The bottom half of the table provides the results from the robust regressions using Stata's RREG routine to weaken the impact of influential observations.[21] With these regressions the music radio coefficient is about the same as in Table 2 but the confidence interval is narrower.[22]

B. The Nature of the Substitution

We have found that, contrary to received wisdom, increases in time spent listening to music radio do not increase the purchase of sound recordings but instead appear to decrease the sale of sound recordings by an economically large amount. There are two possible explanations for a negative impact. One explanation might be that the time spent listening to radio is time that is taken away from other general entertainment activities and that listening to sound recordings is just one of these activities. The other explanation, which is the one that has been put forward in this paper, is that listening to *music* radio is a substitute for non-specific music listening that might otherwise have used sound recordings.

Fortunately, it is fairly easy to test between these two possibilities. Not only do we have a measure of time spent listening to music radio but we also have a measurement of the time spent listening to talk radio. If the former hypothesis were true, talk radio would have the same impact on record sales as does music radio since time would be the key element of substitution and an hour of talk radio takes as much time as an hour of music radio. If the latter hypothesis were true music radio would have a more powerfully negative impact on sound recording sales than would talk radio.

[21] Stata's RREG routine doesn't allow weighted regressions so the first column is blank.
[22] Although the robust regressions were not shown for Table 2, the average coefficient was .684 and the average p value was .079

Table 4 presents the partial (income and Internet coefficients are not shown) results of concise regressions which include both talk and music radio in regressions otherwise identical to Table 3. The coefficients on talk radio, although generally positive, have large confidence intervals. Certainly, talk radio does not appear to have the same impact or sign as music radio.

Table 4: Concise Regression with two types of Radio Station						
	Pop & Cov Wgt	cov>.6	cov>.75	cov >.6 pop>.6M	cov >.75 pop>.6 M	Avg
Daily Per Capita Music Radio (Hours)	-0.6238	-1.1435	-0.4070	-0.8487	-0.6004	-0.7247
	(0.126)	**(0.082)**	(0.364)	**(0.017)**	(0.113)	(0.140)
Daily Per Capita Talk Radio (Hours)	0.3996	0.2398	1.9753	-0.5094	0.1904	0.4591
	(0.598)	(0.842)	(0.212)	(0.319)	(0.735)	(0.541)
Observations	95	61	41	53	36	
R-squared	0.08	0.08	0.17	0.16	0.29	
Test for Equality of coefficients (p-val)	(0.182)	(0.266)	(0.120)	(0.437)	**(0.036)**	
Coefficients for Income and File-sharing Proxy not shown; Robust p values in parentheses; p value for music radio is for one tail test; bold is sig at 10% level; bold underlined at 5%, bold double underline 1%						

Because the confidence interval around talk radio is so wide we can only reject equivalence of the two coefficients for one regression specification; the other specifications have p-values ranging from .12 to .44 when the equivalence of the coefficients are tested. Nevertheless, the impact of talk radio certainly appears to be different than music radio and in a manner consistent with expectations. Our conclusion, therefore, is that music radio is a direct substitute for sound recordings independent of the time taken listening to radio. This is really not much of a surprise.

V. Further Checks

A. Outliers and Cutoffs

One possible issue is the impact of outliers. In all instances, beyond those mentioned in the text, the robust regression technique built into Stata were examined and the results were in close agreement

with those presented in the text. The DfBetas for the radio coefficient were also examined and there is no evidence that the results presented are due to a small number of influential observations.

It is also possible that the cutoff points chosen may have inadvertently impacted the results relative to other possible cutoff values. Examining other cutoff values (based on the concise regression specification), as shown in Table 5, reveals that the cutoff values chosen did not lead to unusual results. [Note that as some cutoff values change the number of included observations may not change.] An examination of p-values, found in the bottom half of Table 5, also reveals that the chosen cutoff points in the main text do not provide unusual results.

Table 5: Music Radio Coefficients (and p-values) for Different Cutoff Values								
Pop \ Cov	0.5	0.550	0.6	0.650	0.7	0.750	0.8	Average
none	-0.9572	-1.1719	-1.2560	-1.4040	-1.4725	-1.5237	-2.0500	-1.4050
400,000	-0.9289	-1.0739	-1.1722	-1.4040	-1.4725	-1.5237	-2.0500	-1.3750
500,000	-0.9517	-1.0974	-1.2012	-1.4414	-1.5140	-1.6070	-2.1453	-1.4226
600,000	-0.4671	-0.5597	-0.6347	-0.8320	-0.7323	-0.6931	-0.6219	-0.6487
700,000	-0.4632	-0.5597	-0.6347	-0.8320	-0.7323	-0.6931	-0.6219	-0.6481
800,000	-0.3684	-0.4496	-0.5162	-0.6963	-0.6993	-0.6296	-0.5314	-0.5558
Average	-0.6894	-0.8187	-0.9025	-1.1016	-1.1038	-1.1117	-1.3368	-1.00921
p values								
Pop \ Cov	0.5	0.550	0.6	0.650	0.7	0.750	0.8	Average
none	**(0.0945)**	**(0.0805)**	**(0.0690)**	**(0.0555)**	(0.1005)	(0.1005)	**(0.0615)**	**(0.0803)**
400,000	(0.1140)	(0.1020)	**(0.0860)**	**(0.0555)**	(0.1005)	(0.1005)	**(0.0615)**	**(0.0886)**
500,000	(0.1120)	(0.1020)	**(0.0855)**	**(0.0550)**	**(0.1000)**	**(0.0955)**	**(0.0590)**	**(0.0870)**
600,000	**(0.0700)**	**(0.0530)**	**(0.0325)**	**(0.0050)**	**(0.0265)**	**(0.0185)**	(0.0635)	**(0.0384)**
700,000	**(0.0735)**	**(0.0530)**	**(0.0325)**	**(0.0050)**	**(0.0265)**	**(0.0185)**	(0.0635)	**(0.0389)**
800,000	(0.1210)	**(0.0965)**	**(0.0645)**	**(0.0125)**	**(0.0260)**	**(0.0240)**	**(0.0915)**	**(0.0623)**
Average	**(0.0975)**	**(0.0812)**	(0.0617)	**(0.0314)**	**(0.0633)**	**(0.0596)**	**(0.0668)**	**(0.0659)**

B. Simultaneity

Finally, another potential problem with the estimation is the possibility of simultaneity. We have examined the role of radio broadcasts on the sales of sound recordings. The argument might be made that the sales of sound recordings have an impact on radio listening just as radio has an impact on sound recording sales. After all, they are substitutes for each other when individuals want to listen to

non-specific music. Could the amount of time individuals spend listening to radio depend on the number of sound recordings that they purchase?

Although a linkage is clearly possible, there are reasons to doubt the importance of sound recording purchases on time spent listening to radio. First, the number of sound recordings available is the stock of owned recordings which is likely to be much larger than the flow of purchases, so the current flow might be at most only weakly related to the number of purchases unless the stock of older CDs depreciates rapidly over time. Second, for specific music consumption, sound recordings are the much preferred solution and radio will not be much of a substitute. Sound recording purchases intended mainly for specific listening (which might be the main use of sound recording purchases) should not, therefore, impact time spent listening to radio.

It is also useful to consider factors that might change the number of sound recordings purchased and the impact on radio listening. One very important factor during this period is file-sharing, and to this we should add instances of non-Internet based sharing, such as ripping borrowed CDs. Although we have a variable for internet based file-sharing, it might not pick up all of the impact of borrowed or pirated music. If it did not, individuals would decrease their purchase of sound recordings and at the same time likely decrease their listening to radio since they can now have a very large free library of music to which they can listen. In this case, a reduction in record sales would be associated with a decrease in radio listening, not an increase.

Nevertheless, we can perform a test to determine whether there is evidence of simultaneity or not. The test is a form of Hausman specification test in which we regress radio music listening on a set of exogenous variables, calculate the residuals, and then include those residuals in the regression on record sales. In this case the exogenous variables include all the demographic variables used in the above regressions plus, for the regression on radio music listening, changes in both the number of radio

stations and time spent listening to talk radio, each of which should be independent of the possible music-radio/sound-recording tradeoff. Table 6 reports the coefficients on the variable consisting of the first stage residuals for our various combinations of cutoff, which are insignificant with all cutoff values.

Table 6: Coefficients of Residuals in Hausman Test

	Pop & Cov Wgt	cov>.6	cov>.75	cov >.6 pop>.6M	cov >.75 pop>.6 M
coefficient	0.2619	0.1648	1.0382	-0.7221	0.2765
p value	(0.812)	(0.928)	(0.654)	(0.539)	(0.784)

The conclusion that would be drawn from this is that there is no simultaneity problem to worry about. Nevertheless, this test cannot be considered conclusive so we proceed to use instrumental variables in order to more fully expunge the possibility of simultaneity. We should keep in mind that because we have a fairly small sample size, instrumental variables, which provide biased and inefficient estimates, may not provide better estimates than OLS.

Equation (1) represents the equation that we have been estimating with OLS up to this point. Equation (2) represents a structural equation explaining music radio usage. The two new variables in this equation are the number of radio stations (Stations) and the amount of time that individuals spend listening to talk radio (RadioTalk).

(1) $\text{Albums} = a_0 + a_1\,\text{RadM} + a_2\text{Inc} + a_3\text{BA} + a_4\text{Yng} + a_5\text{Male} + a_6\text{Old} + a_7\text{Int} + a_8\text{Minority} + a_9\text{Pop}$

(2) $\text{RadM} = b_0 + b_1\text{Albums} + b_2\text{Stations} + b_3\text{RadioTalk}$

Listening to talk radio fulfills a very different taste than does listening to sound recordings and should not be a substitute for listening to sound recordings, at least no more than any other activity that takes up time. Further, we have already seen that the time spent listening to talk radio does not impact

the number of albums sold. If talk radio is independent of album sales, it should be uncorrelated with the error term in the regression on Albums.

Our other instrument is the average number of stations in a DMA, which is a construct based on the average number of stations found in Arbitron metro areas weighted by the populations of the metro areas in a DMA and as such doesn't relate directly to any particular set of physical stations since a single station can appear in more than one metro area.[23] We expect this count of stations to be independent of record sales except through its impact on the radio music-use variable. The number of stations is determined in part by regulations since radio stations need government permission to broadcast. The number of stations is likely to impact the variety of programming and might allow listeners to find programming closer to their tastes, impacting the time spent listening to music radio, but there does not appear to be any other mechanism by which the number of stations would impact the sales of albums.

Our procedure will be to instrument for RadM in equation (1) with the fitted values of RadM from equation (3) that includes all the other exogenous variables that are found in equation (1) and the two instruments where X1…X8 is a vector representing variables 2-9 in equation (1).

$$(3)\ \mathrm{RadM} = c_0 + \left|c_1 \ldots\ldots c_8\right| \begin{vmatrix} X1 \\ \cdot \\ \cdot \\ X8 \end{vmatrix} + c_9\mathrm{Stations} + c_{10}\mathrm{RadioTalk}$$

The results of the second stage regression coefficients for radio music are found in Table 7. As a byproduct of using instrumental variables, the standard errors on radio music are larger than is the case for OLS which can explain why the coefficient is more variable than when using OLS and in one

[23] Not all stations in a metro area were counted. If a station was listed as having an audience rating (percentage of audience) of zero, it was excluded from the analysis. This is similar to Arbitron's listings which include stations only if they have a measurable presence, although they do not base it on ratings points but instead on audience size.

instance is even positive. Nevertheless, the average coefficient is about the same as before (-.826) which further supports the view that there is no evidence that the OLS estimates are impacted by simultaneity.

Table 7: Second stage IV estimates of change in sound recording sales					
	Pop & Cov Wgt	Coverage >.60	Coverage >.75	Cov >.6; pop>.6M	Cov >.75; pop>.6M
radio music change in hours*	-0.9375	-0.9658	-2.2727	0.4015	-0.6441
p values (one tail)	(0.177)	(0.256)	**(0.021)**	(0.301)	**(0.100)**
Sargan [non heteroskedastic-robust] Instrument validity; P-value	0.4303	0.4193	0.4112	0.7297	0.659
Hansen J Statistic on instrument validity [hetero robust Sargan]; P-val	0.2178	0.1278	0.1044	0.5537	0.4436
Heteroskedastic robust [quasi-Hausman] exogeneity test; Chi-sq p value for RadM	0.931	0.7223	0.5618	0.2698	0.9549
Anderson Canon Corr Underidentication LR test; p value	0.0000	0.0000	0.0001	0.0008	0.0004
Partial First Stage Results; Music Radio is dependent variable					
station count change	0.0025	0.0025	0.0023	0.0022	0.0024
	0.000	**0.000**	**(0.001)**	**(0.004)**	**(0.002)**
radtalkchg	-0.6657	-0.5962	-0.6768	-0.5600	-0.6778
	0.000	**0.000**	**0.000**	**0.000**	**0.000**
Observations	90	61	41	53	36
R-squared	0.537	0.486	0.642	0.476	0.626
Robust p values in parentheses; *=instrumented variable; bold is sig at 10% level; bold underlined at 5%, bold double underline 1%					

The Sargan test for instrumental validity implies that our instruments are likely to be valid and not related to the error term. The Hansen J Statistic, which differs from Sargan in that it is robust in the face of heteroskedasticity, provides a less sanguine answer to the same question although it too suggests, but more weakly, that the instruments are valid. A test similar to the simultaneity test reported in Table 6 but robust to heteroskedasticity leads to the same conclusion as before—there is no evidence that music radio is endogenous and thus no need for instrumental variables to begin with. Finally, the Anderson canonical correlation likelihood ratio test tells us that the instruments identify the equation. The bottom of Table 7 provides some coefficients and other results from the first stage regressions

where it is easy to see that the two variables used as instruments are highly correlated with changes in music radio usage.

We conclude that simultaneity is not a problem for the OLS results.

C. Errors in Variables

Although we have taken steps in our estimation to eliminate or weaken any impact of measurement error, one might argue that such errors cannot have been completely eliminated. It is well known that under classical errors-in-variables circumstances (which assumes the measurement error term is not correlated with the true values of the variables) coefficients on all the rhs variables will be biased and inconsistent if any of the variables is mismeasured.

Of course, our interest is centered on the coefficient for music radio listening. If there were only one explanatory variable in the regression the nature of the bias due to the mismeasurement is much easier to determine since it would simply become the typical error-in-variables attenuation bias, where the coefficients are biased toward zero. For this reason the regressions were rerun leaving out the other rhs variables except music radio listening time. Table 8 shows that the results from these regressions are very similar to those obtained from the complete regression. Under standard EIV assumption we can conclude that measurement errors are likely to lower our estimates of the impact of music radio.

Table 8: Regression with Radio Music Use as Sole Independent Variable

	Pop & Cov Wgt	Coverage >.6	Coverage >.75	Cov >.6; pop>.6M	Cov >.75; pop>.6M	Average
Music Radio Sole	-0.7505	-1.0323	-1.1118	-0.3877	-0.4976	-0.7560
Variable	(0.113)	(0.143)	(0.200)	(0.157)	**(0.073)**	-0.1369
Observations	95	61	41	53	36	
R-squared	0.024	0.024	0.031	0.013	0.043	
In Full	-0.7903	-0.7507	-1.1817	-0.6049	-0.7767	-0.8209
Regression from	**(0.076)**	(0.169)	(0.126)	**(0.067)**	**(0.056)**	-0.0985

Robust p values in parentheses; p value for music radio is for one tail test; bold is sig at 10% level; bold underlined at 5%, bold double underline 1%

If the true coefficient were larger than the measured coefficient would not alter our analysis since it would merely strengthens the conclusions already drawn.

A solution often proposed for errors-in-variables is to use instrumental variables. Although we have performed such as examination above, there are difficulties with using it as a salve for the errors-in-variables problem beyond the difficulties mentioned for issues of simultaneity. Among those difficulties is the fact that most potential instruments (including the ones chosen) will suffer from the same errors-in-variable problems as the variables used in the OLS results unless instruments could be found that were based on DMA level data as opposed to constructed from the MSA level data, which we have not been able to do.

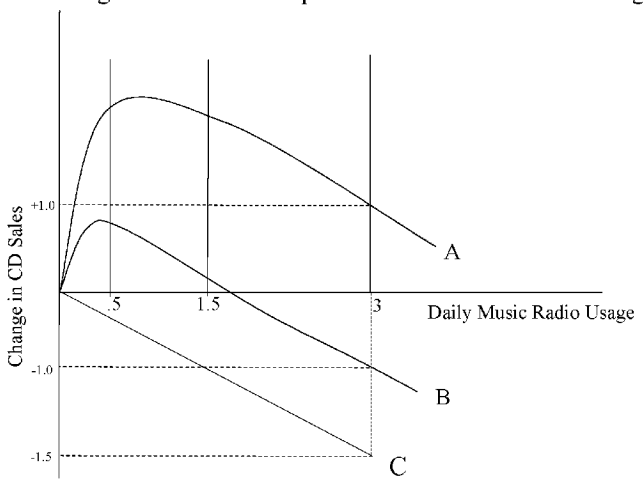
VI. Gauging the Overall Impact of Radio

We have found that radio use lowers sales of sound recordings. Because we have only a limited range of observations to work with the regression results that we have found could be compatible with other scenarios that might allow for overall positive impact of radio play on record sales. For example, radio at first might have a positive informational aspect on sales, which then turns negative when greater radio use becomes a substitute for listening to CDs. In this case the overall impact of radio could be positive or negative in spite of our negative findings. Assume, for the sake of example, that radio has a positive impact for approximately the first .5 hours of daily use and a negative impact thereafter. This is illustrated in Figure 1 for three possible cases, A, B, and C.

Correctly estimating the impact of music radio when all observations are between 1.5 and 3 will lead to a conclusion that music radio lowers record sales, which is correct within the bounds of the data. Attempting to extrapolate the impact of a factor, such as radio use, to levels that are outside the bounds of the sample can easily provide misleading results if the relationship looks like A or B, however. The negative relationship found in measured portion of A could obscure an overall positive

impact that radio play might have on sound recordings since the large positive impact from the first half hour of music radio would be obscured.

Figure 1: Out of Sample Estimates can be Misleading



The bounds of music radio use in our 2003 sample (see Table 1) run from a low of 1.9 hours to a high of 3 hours, with an average of 2.3 hours. The 1998 values are just slightly higher. The range of changes in music radio use is .6 hours from 1998 to 2003. Within these ranges of observations the measured impact of radio play on the sales of sound recordings is negative. The average album consumption stood at 2.3 units per capita in 2003. If we were to assume that the relationship between music radio and CD purchases were linear throughout its range, as illustrated in case C, an increase in radio use from 0 to 2.3 hours per day could be expected to reduce album sales by more than one and a half albums, given a coefficients of -.75. This would be a very large negative impact of overall radio use. Yet the relationship represented by curve B would imply a loss of only 1 unit and the relationship

represented by A would imply a gain of 1 unit, and either of these other two curves could also be consistent with the data at hand.

Is there any evidence for or against such a nonlinearity that might overturn the results found in generalizing these regression results? First, we ran quadratic specification of the amount of radio music use to see whether there was any evidence of nonlinearity within our data. There was not. We also split the data in half based upon music radio usage and ran separate regressions for each half. The cities with smaller music radio usage had a larger negative impact than the cities with greater music radio usage, contrary to what we would expect from the type of nonlinearity suggested by lines A or B. Still, the limitations on our data keep us from being able to say much more.

The historical approach used in Liebowitz (2004), however, can be used to throw some light on this possible nonlinearity. That paper examined the sales of sound recordings immediately before, during, and after the introduction of radio into the American market. If there was an initial positive promotional element in radio, and if it were large enough to overpower the later negative impacts, that positive impact should have clearly shown up in historical data which included the very first hours of music radio listening. As already mentioned, the sound recording market was already quite mature at that time, with per capita sales the equivalent of those in 1950. Yet, as that paper reported, there was no evidence of any but a negative impact of radio on sound records since sales fell significantly during the first few years of radio's growth in spite of a healthy and growing economy. The fact that record sales fell during the birth of radio would seem to imply that the net effect is negative, even at an initial stage.

That conclusion is echoed in Morton (2003):

> Record companies welcomed the subsequent transfer of electrical technology from radio and motion pictures to the phonograph industry, but hated the effect these two new forms of entertainment had on the record business. Radio was the biggest threat. On the eve of broadcasting's debut, between 1914 and 1921, record sales had doubled, largely because of sales of popular music. With the inauguration of network radio in the middle 1920s, the market for popular

> recordings collapsed, resulting in a number of companies leaving the field or changing ownership. (Page 26).

To be sure, this issue cannot be completely settled since one can argue the radio/sound-recording relationship in the early 1920s might have been very different than the current relationship. Nevertheless, the lack of any evidence in favor of the possibility of a net positive impact, when compared to the more substantial evidence of the negative impact of music radio, provides a prudent analyst with at least a tentative conclusion that radio has a net negative impact on sound recording sales. Further research is warranted.

VII. Discussion

Can this result be reconciled with the well-documented existence of payments to radio stations for the promotion of records? The existence of payola seems to have been taken as evidence that radio stations generate sufficient positive impact on record sales that the typical market clearing price for the right to broadcast sound recordings would be negative price for the rights to a sound recording. Does it provide evidence on whether a property right controlling the broadcasts of recordings would have economic value?

I think not. The overall negative impact of radio play found in the above regressions would be beyond the feasible control of record companies due to the current lack of broadcast property rights in sound recordings. Any record company that attempted to, let's say, pay radio stations to play fewer hours of sound recordings would only receive a portion of the benefits which would accrue to all sound recording companies. Nor would it make sense for a record company to pay radio stations to reduce the hours of broadcast of just that record company's songs since this would tend to decrease its market share and not have any salutary impact on overall record sales since those radio signals would still be

broadcast for the same amount of time, allowing the same level of substitution of radio for sound recordings by consumers. Further, antitrust laws would prevent the entire industry from collectively trying to make such payments. Even if they could do so, entry problems would likely doom such an agreement since any station (talk radio, say) could then threaten to play more sound recordings (by changing formats) in order to generate payments not to.

It is also the case that payola is consistent with the possibility of an overall negative impact of radio play for the simple reason that payola doesn't impact the total quantity of radio broadcasts of sound recordings. Payola only impacts which particular songs are broadcast. There does not appear to be any evidence, for example, that record companies tried or can alter the share of music relative to talk on radio stations, or that they tried to convert talk radio stations into music radio stations.

Both Caves and Coase note that numerous attempts were made by record companies and before them, music publishers, to stop paying radio station personnel or well-known performers to play particular records or songs, beginning, according to Coase, with an episode in 1890. Some of these attempts, including the congressional hearings in the late 1950s, appear to be instances where established record companies were trying to reduce the airplay of a group of smaller upstart record companies who were heavy users of payola and who happened to specialize in that evil music otherwise known as rock-and-roll. Caves suggests that modern attempts to limit payola have largely been attempts by major record companies to restrict competition from smaller independents. There may well be truth to these claims of redistributional impacts from attempts to control payola. Nevertheless, if payola type activities benefited record companies in an overall sense the industry should not have wanted to eliminate the practice altogether.

The results of this paper are entirely consistent with a modified version of the conclusions of the economists who have argued for a market solution. Their focus on only part of the property rights

problem have led them to conclude that payola should not be illegal, that it is payment for a useful service, and that the market should determine what the payments should be.

For example, Coase concludes (p 318):

> ..if the playing of a record by a radio station increases the sales of that record, it is both natural and desirable that there should be a charge for this. If this is not done by the station and payola is not allowed, it is inevitable that more resources will be employed in the production and distribution of records, without any gain to consumers, with the result that the real income of the community will tend to decline. In addition, the prohibition of payola may result in worse record programs, will tend to lessen competition, and will involve additional expenditures for regulation.

Caves states (p 292):

> The evidence supports a simple interpretation of the economics of payola in broadcasting. Promotional benefits to the label cannot be captured directly by the broadcaster, who lives by advertising revenue that generally will not reflect this benefit. Payola compensates for valuable promotion, and leaves us wondering why it is stigmatized as bribery rather than recognized as payment for services rendered.

We agree completely with this call for a fully functioning market. A complete market, however, would not merely allow payola to be legal. A fully functioning market would allow a complete set of property rights over the sound recording being broadcast, including the ability of record companies to restrict radio play and to provide geographically exclusive territories for the broadcast of songs.

VIII. Conclusions

The impact of music radio broadcast on the sales of sound recordings has received scant attention by researchers. The analysis above provides evidence that radio play is negatively related to the overall level of record sales and that the size of the negative impact is large. This implies that radio play is largely a displacement for the sales of sound recordings, a result that seems at odds with most conventional thinking.

The negative impact of radio on record sales only exists for music broadcasts and not for talk radio, which is consistent with a view that listening to music on the radio is a close substitute for listening to music on sound recordings. The measured negative impact of music radio on record sales is in the vicinity of 20% within the range of our observations. Extrapolating these results outside the bounds of our sample provides for a considerably larger impact, although such extrapolation is fraught with difficulties. Those difficulties are ameliorated somewhat by appealing to other evidence and other tests.

This finding is likely to become increasingly important in the near future as the transmission of music becomes increasingly digitized and the putative property rights (or lack of property rights) of the copyright owners come under greater scrutiny and political pressure. These results also provide some suggestions for public policy that is likely to become increasingly important in the next few years. As new broadcasting techniques (e.g., digital transmissions that allow high quality copies to be made automatically) make using the radio a closer substitute for the purchase of sound recordings, the above results should provide useful information in a discussion of whether the owners of sound recordings should be given the ability to exclude such usage.

On a methodological note, the apparent divergence between the impact of radio play on the sales of individual records versus its impact on sales for the entire industry indicates an important danger in trying to estimate the impact on an entire market by examining the impact on individual units, such as records. This potential fallacy of composition should be kept in mind whenever there are reasons to believe that the behavior of the whole may be different than the behavior of the individual parts (besides radio broadcasting, the example of file-sharing's impact on individual recordings vis-à-vis the entire recording industry come to mind). In these instances, the technology's impact on market shares can occur quite independent of the impact on overall market sales and it is important not to conflate share changes with overall market changes.

These problems highlight the difficulty of using any form of analysis to help regulators try to imitate markets. With a full property rights system in place, record companies could control how frequently their records were played and extract payments from radio broadcasters, or they might make payments to broadcasters as the case might be. A complete market solution would have a set of rights like the one between the television and movie industries. Record companies would be able to enter into whatever contracts they wished, including restricting the playing of songs to particular stations in particular localities. With this additional proviso, the market solution suggested by Coase, Caves, and Sidak and Kronemyer can be readily supported. In that case, the true value of the various rights could be determined where they are best determined—by direct observation in the market.

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Mr. CONYERS. Mr. Steve Newberry has been here before. He is the president and CEO of Commonwealth Broadcasting, vice chairman of NAB's board of directors, and he has been in this business quite a while.

We welcome you to the Committee.

TESTIMONY OF STEVEN NEWBERRY, COMMONWEALTH BROADCASTING CORPORATION, ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

Mr. NEWBERRY. Thank you, Mr. Chairman, Ranking Member Smith and Members of the Committee.

My name is Steve Newberry. I am president and CEO of Commonwealth Broadcasting Corporation. We operate 23 stations in the State of Kentucky, but today I am testifying on behalf of the over 6,800 local radio members of the National Association of Broadcasters.

Now, I am sure it comes as no surprise to any of you that I am here to express my opposition to H.R. 848, but I can tell you that since the last time I had the privilege to testify before this Committee, this sharp economic downturn has intensified my concerns about this bill and the impact that it will have on local radio stations across America.

At its heart, this bill attempts to create a conflict between artists and radio stations where no conflict exists. In reality, local radio stations have been supporting the music industry for decades, which is why it boggles my mind that a bill that is supposed to be about benefiting artists takes 50 percent of the performance fee and puts it into the pockets of the big record labels, predominantly the big four record labels, most of which are not even American companies. The record labels actually walk away with more money under this bill than do the featured artists.

Let me be clear about that: The record labels walk away with more money in this bill than do the featured artists. The real problem, which this bill does not address, is between the artist and the mega record labels. Artists often find themselves in such difficult financial straits because of unfair, one-sided contracts they sign with their record labels. Toni Braxton, for example, received less than 35 cents per album of the $188 million in CDs that she sold.

If these artists had had fair contracts with the labels that included fair royalty clauses, they would have benefited from the promotional value that radio airplay has brought to them and that they have enjoyed. Free radio airplay is the best friend of artists and of record labels.

Herbie Hancock said it best just 2 weeks ago during his visit to Capitol Hill: "Just as radio promotes music, music promotes radio."

I could not agree more. That is why the system has worked so well, to the benefit of all parties for the last 80 years. But let me put this in the most stark of terms.

Under H.R. 848, your local radio stations will be forced to cut services or employees. They may be forced to move from a music format to a talk format or may be facing bankruptcy, but the damage resulting from H.R. 848 will run far beyond local radio stations. Who else will be hurt?

Composers: This bill creates a financial disincentive to play music. If there is less music played on the radio, composer royalties will decrease.

New artists: This bill makes a steep mountain even steeper for emerging young artists. H.R. 848 forces a radio station to turn playing music into a return-on-investment proposition. Why take a risk on a new, untested artist when you can play the known and recognized performer? Now, every time you play a song, it becomes a decision that potentially affects your bottom line.

Music diversity: This bill will decrease the diversity of music on the radio. I can tell you that many niche stations that offer Latino and hip hop are already on shaky ground. For many, even what is called a "small" $5,000 fee will take them from barely getting by to unprofitable.

Minority ownership: NAB has long worked with Congress to support minority tax certificates, to help women and minorities realize the dream of station ownership. What help will the minority tax certificate be if you can afford to buy the radio station, but you cannot afford to run it?

Finally, radio listeners will be hurt: Stations that listen to and serve their local communities may, indeed, disappear. In many of these cases, the radio stations in peril, possibly going off the air, are serving very rural communities where they may be the only stations serving their local town.

What I am saying is that H.R. 848 has significant unintended consequences that I do not believe this Committee has fully investigated. The funding for this new performance fee has to come from somewhere.

So what are my options? Do I reduce the community affairs programming, including essential news and weather service in times of emergency, because I cannot reduce my electric bill? Am I forced to lay off staff or cut the employee benefits at my station because I cannot reduce my FCC regulatory fees? Do I move to a nonmusic format which will have the effect of playing less music, which will ultimately harm the performers? That is the reason the National Religious Broadcasters, the National Association of Black Owned Broadcasters, the National Association of Farm Broadcasters, and the Spanish Broadcasters Association all oppose the imposition of any new performance fees.

The answers are not simple, and the consequences of this debate will hit both industries in unanticipated ways. I strongly encourage and urge the Committee to carefully consider these very real consequences of H.R. 848.

Thank you, Mr. Chairman. I look forward to answering your questions today.

[The prepared statement of Mr. Newberry follows:]

PREPARED STATEMENT OF STEVEN NEWBERRY

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

United States House of Representatives
Committee on the Judiciary

March 10, 2009

Statement of Steven Newberry
Commonwealth Broadcasting Corporation

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

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[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

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[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.

ATTACHMENT

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

A National Association of Broadcasters White Paper
By Jane Mago, Benjamin Ivins and Suzanne Head

March 2009

EXECUTIVE SUMMARY

The American recording and broadcasting industries are the most successful in the world, due in no small part to the mutually beneficial relationship that exists between the two industries. For decades, record labels and performers have sought radio airplay of their music, regarding such promotion as the "holy grail" of the recording industry, and local radio broadcasters have sold advertising time when they play and promote that music for free. This reciprocal "free airplay for free promotion" relationship has served both industries well for decades, as evidenced by the fact that the U.S. is the most significant exporter of music and the largest territory for recorded music sales.

One of the reasons that American over-the-air radio has been such an effective promotional tool for music is because it is unburdened by a performance royalty on over-the-air radio broadcasts. Critics may complain that record labels and performers of sound recordings do not receive a cash royalty fee as they might in other countries, but numerous differences between the U.S. broadcasting system and those of other countries have led to the existing system of reciprocal compensation rather than a royalty fee.

For example, other countries provide less protection for sound recordings than U.S. copyright law. In many countries that have implemented a performance fee, broadcasters that pay the highest fees to record companies are, or have been, government-owned or subsidized. Government subsidized broadcasting in many countries is used to control content by promoting cultural, political and other agendas.

Additionally, sound recording performance rights in other countries apply to all businesses that use recordings, not just to radio stations.

Further, layering a new payment requirement onto the compensation system that already exists would do nothing to advance the economic policy behind copyright law, which is not to reward the labor of authors, but rather to promote the progress of science and useful arts for the good of the public. There is no reason to believe that the grant of a new performance right would provide incentives to record labels or artists to produce more – or better – sound recordings.

Although the recording industry has seen declines in sales and revenues over the past several years, this loss in revenue has been experienced worldwide, including in countries that have implemented a performance fee. Further, since none of the causes for those declines can be attributed to radio broadcasters, funds should not be siphoned from broadcasters to the recording industry via a new copyright royalty scheme.

The law and the current system of reciprocal compensation, as they stand today, work. Imposing a new performance tax on local radio broadcasters and upsetting the careful balance that has evolved over the years and been repeatedly recognized by Congress would be a dramatic shift that would be unnecessary and unfair to broadcasters. Nothing in the way other countries subsidize their recording industries justifies such a change here in the U.S.

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

The United States proudly claims the strongest, most prolific recording industry in the world. From its talent development mechanisms to its production, manufacturing, and distribution systems to its incomparable promotion strategies that create international recording stars, the U.S. music system has been the envy of the world since the inception of recorded music. At the center of its promotion strategies are local radio stations, which have been the primary marketing vehicle for music for decades. So much so, in fact, that radio airplay is considered the "holy grail" of the recording industry.[1] From Sinatra to Elvis to Madonna to Beyoncé, local radio broadcasters have been essential in creating hit after hit for artists and their record labels.

Many unique strengths of the American commercial broadcasting system contribute to its role as the heart and soul of music promotion in the U.S., including the fact that it is unburdened by a performance royalty on over-the-air radio broadcasts. This has allowed the market to develop a mutually beneficial compensatory mechanism – essentially, free radio airplay for free music promotion. Critics may complain that record labels and performers of sound recordings do not receive a cash royalty fee as they might in other countries, but numerous differences between the U.S. broadcasting

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

system and those of other countries have led to the existing system of reciprocal compensation. To compare just one feature of American and foreign copyright laws, without taking into account how that feature figures into the countries' respective legal schemes, business structures and cultural development, would be misleading.[2] Simply put, the notion that "other countries do it" does not justify imposing a new performance fee – what may be called a "tariff" or a "levy" in other countries and what U.S. broadcasters refer to as a "performance tax" – on sound recordings in this country.

A sound recording performance fee is merely one facet of other countries' business and legal structures that are significantly different from those of the U.S. For example, other countries provide less protection for sound recordings than U.S. copyright law. In many countries that have implemented a performance fee, broadcasters that pay the highest fees to record companies are, or have been, government-owned or subsidized. Government subsidized broadcasting in many countries is used to promote cultural, political and other agendas. Additionally, sound recording performance rights in other countries apply to all businesses that use recordings, not just to radio stations.

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[2] Attempting to draw analogies or comparisons between different sets of national approaches to performance fees often results in difficulties. For example, the U.K. Copyright Tribunal concluded that the structure and functions of the sound broadcasting industry in other European countries were so different that no useful comparison could be made. Moreover, the Tribunal held that even if there were similarities in the conditions, it would be difficult to see how royalty rates could be adapted where such different legal regimes applied. *Association of Independent Radio Companies Ltd. and Another (AIRC) v. PPL*, CT 9/91 [1993].

While it is certainly true that the recording industry has seen declines in sales and revenues over the past several years, this loss in revenue has been experienced worldwide, including in countries that have implemented a performance fee. Further, none of the causes for those declines can be ascribed to radio broadcasters. Accordingly, broadcasters should not be looked to for a "bailout" of the recording industry through the imposition of a new copyright royalty scheme.

Further, layering a new payment requirement onto the compensation system that already exists would do nothing to advance the economic policy behind copyright law. As the Supreme Court noted, "The primary objective of copyright is not to reward the labor of authors, but "[t]o promote the Progress of Science and useful Arts.""[3] "The "immediate effect" of the copyright law is that authors receive a "fair return for [their] creative labor"; however, the "ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.""[4] There is no evidence that the grant of a new performance right would provide incentives to record labels or artists to produce more, or better, sound recordings.

The existing U.S. system of "free airplay for free promotion" has served both the broadcasting and recording industries well for decades. As a result, the U.S. is the most

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[3] *Feist Publication, Inc. v. Rural Telephone Service Co.,* 499 U.S. 340, 349-50 (1991) (citations omitted).

[4] *Twentieth Century Music Corp. v. Aiken,* 422 U.S. 151, 156 (1975).

significant exporter of music and the largest territory for recorded music sales.[5] Operating without a sound recording performance fee on the over-the-air broadcasting, 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.[6]

The law and the current system of reciprocal compensation, as they stand today, work. Imposing a new performance tax on local radio broadcasters and upsetting the careful balance that has evolved over the years and been repeatedly recognized by Congress would be a shift of seismic proportions. There is nothing in the way other countries subsidize their recording industries that can justify such a shift here in the U.S.

A. Other Countries Provide Less Protection For Sound Recordings Than the U.S.

Under U.S. law, copyright owners of sound recordings enjoy the status of "authors." In contrast, most foreign legal systems deny protection to sound recordings as works of copyright "authorship," but instead afford producers and performers a measure of protection under so-called "neighboring rights" schemes.[7] While that protection may be

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[5] Warner Music Group Annual Report 2007 at 16.

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

[7] Stephen M. Stewart, *International Copyright and Neighboring Rights*, 190 (1989). Most countries distinguish between, and provide different schemes of protection for, works of "high authorship" such as novels and sculptures and the rights provided to performers, producers of sound recordings, and broadcasters whose activities are described by some as less "highly creative exercises." The rights afforded to these groups are referred to as "neighboring rights." *Nimmer on Copyright*, § 8 E.01[A].

more generous in some respects than sound recording copyright in the United States (such as 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 for a significantly shorter period than under U.S. law. Under U.S. copyright law, a sound recording is generally protected for 95 years. Canada, and many other countries in Europe and Asia, however, provide only 50 years of protection.[8] Indeed, Article 17 of the WIPO Performance and Phonograms Treaty of 1996 (WPPT) specifies only a 50-year term of protection. In the U.K., the British Government recently considered but then declined to extend the term of protection past its current 50 years, despite fierce lobbying by the recording industry. In other words, in countries that provide protection for sound recordings for only 50 years, the recordings of artists such as Elvis Presley, Buddy Holly and many other stars of the 1950s and 1960s either are, or soon will be, no longer protected. By contrast, in the United States, copyright in these sound recordings will protect these works for an additional 45 years.

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[8] The term of neighboring rights protection in Member States of the European Union, which was harmonized by Council Directive 93/98/EEC of 29 October 1993 (as amended by Counsel directive 2001/29/EC of 22 May 2001), required all E.U. Member States to adopt provisions in their domestic legislation which provide for 50-year terms for neighboring rights in sound recordings. *See* Canadian Copyright Act § 23(1); Copyright Law of Japan, Article 101; New Zealand Copyright Act of 1994, Sec. 23(1)(a); International Intellectual Property Alliance of 2008 Special 301 Report (www.iipa.com) ("IIPA 2008 Report").

Perhaps more importantly, many countries that have adopted performance fees for sound recordings provide few or no anti-circumvention measures for copyright protection or copyright management information – protection the U.S. provides.[9] As a result, although many countries that have adopted performance rights for sound recordings have done little or nothing to protect sound recordings against illegal copying and other forms of piracy. The toll this piracy takes on the record industry no doubt far exceeds whatever is earned in performance royalties.[10]

B. Other Countries' Broadcasting Systems Are or Were Government Subsidized

In sharp contrast to the U.S. commercial radio broadcasting industry, which was built by private commercial entrepreneurs who did not receive any subsidy from the government or the listening public, broadcast systems in many other countries were built and owned, or heavily subsidized, by the government and by tax dollars.

In the U.K., for example, performance fees were adopted when the BBC was the sole broadcaster on the air and the only entity paying the performance fee.[11] When non-

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[9] Countries that have neglected to implement anti-circumvention measures include Argentina, Canada, Chile, Egypt, India, Israel, Indonesia, Malaysia, Mexico, New Zealand, Philippines, Poland, Romania, South Korea, Sweden, Switzerland and Thailand. IIPA 2008 Report.

[10] For example, tens of billions of illegal files were swapped in 2007. The recording industry estimates that the ratio of unlicensed tracks downloaded to legal tracks sold is about 20 to 1. International Federation of the Phonographic Industry. IFPI Digital Music Report 2008.

[11] The BBC operates under a Royal Charter and license obtained from the Home Secretary which includes clauses relating to finances and programming. The BBC cannot express its own editorial opinion. Its U.K. radio service is financed, in large part, by a television license fee which all owners of television sets in the U.K. must pay. *See* www.bbc.co.uk/worldservice.

government, commercial radio stations were launched in the U.K. in the 1960s, the Independent Broadcasting Authority first negotiated those stations performing licenses. This would be comparable to the Federal Communications Commission negotiating music licenses on behalf of U.S. radio stations.

Germany and France have a similar broadcasting history. At the time Germany adopted a sound recording performance fee in 1965, radio stations were government-owned and operated. It was not until the late 1980s that the German radio industry was privatized.[12] When France introduced its performance fee in 1985, the French radio industry was still working through changes that would allow for some private ownership of radio stations.[13]

Even more dramatically, until the end of the 1980s, the *entire continent* of Africa had only two radio stations that were not state-owned.[14]

Significantly, when parts of the broadcasting systems in those countries were ultimately privatized, performance fees for recordings had already been institutionalized. Thus unable to negotiate a market-based reciprocal "airplay for promotion" arrangement like

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[12] Stephen M. Stewart, *International Copyright and Neighboring Rights* (1989); Putze, Jens, *Special Report on Germany (1): Can the press stay on top as TV gears up for growth? – Television and radio are going private in Germany, posing a very serious threat to the dominant print media*, Haymarket Publishing Services Ltd. Campaign, March 11, 1988.

[13] *Id.*

[14] *Washington Post*, October 7, 2007 at A.29.

in the U.S., private broadcasters entering the business were forced to accept the existing payment regimes as part of the cost of doing business.

A comparison of governmental funding for radio (*e.g.*, public broadcasting) also demonstrates the vast differences in political and cultural philosophies between the U.S. and other countries. The 2005 report of the Digital Future Initiative Panel noted the following wide disparity between the annual funding per capita provided for public broadcasting in the U.S. versus other countries around the world:[15]

- United States $1.70
- United Kingdom $83.00
- Germany $85.00
- Canada $28.00
- Japan $49.00
- Australia $28.00

In Canada, the federally-funded public broadcaster Canadian Broadcasting Corporation (CBC) – which includes radio, television, specialty (cable) services, a pay audio service, an international service, an interest in Sirius Canada and Internet programming – received federal government funding in 2006 that exceeded $1 billion.[16]

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[15] "Digital Future Initiative: Challenges and Opportunities for Public Service Media in the Digital Age," http://www.freepress.net/docs/dfi_report.pdf.

[16] This consists of an annual appropriation of $946 million plus an additional $60 million in non-recurring funding of which $348 million was for radio at http://www.cbc.radio_canada.ca/annualrpeports/2005-2006/pdf/financials-e.pdf.

The Australian government recently announced an allocation of an "additional" AU$2.4 million to distribute CDs to community radio stations in order to provide exposure and airplay for the musical works of local artists.[17]

The fact that some governments choose to subsidize their own national recording industries by granting performance fees and paying royalties from government-owned or subsidized stations clearly indicates how inappropriate such a system would be for the U.S.

Moreover, the absence of a performance fee in the U.S. has not hurt the recording industry. The U.S. recording industry – which operates under a regime with no performance fee – is larger than that of the U.K., France, Germany, Canada, Australia, Italy, Spain and Mexico *combined*, all of which have performance fee regimes.[18]

C. Foreign Governments Exercise Control Over Broadcasting Content

Governments in foreign countries often adopt policies to promote national culture through a variety of means, including imposing performance royalties on recordings and exercising control over broadcasting content. In contrast, the U.S. does not utilize its broadcasting system to advocate cultural or national agendas. The U.S. radio system is

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[17] The Australian Media, May 17, 2008, at http://www.theaustralian.news.com.au. An additional AU$1.5 million previously had been provided by the government for this project. *See* http://www.amrap.org.

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

primarily structured as privately-held and commercial in nature and enjoys all of the First Amendment rights of freedom of the press. Of course, FCC-licensed stations have obligations to serve their local communities, but U.S. national policy has consistently exercised little control over the content of broadcasts. Rather, content is marketplace-driven, not quota-driven: what gets played is based upon what American listeners want to hear. The diversity on the airwaves comes from the high quantity of stations and market-driven differences in programming and program formats, not from government-mandated playlists, as in other countries.

- For example, the stated purpose of the Canadian broadcast system is to provide "a public service essential to the maintenance and enhancement of national identity and cultural sovereignty,"[19] and that it should "serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada."[20] Canadian private radio stations are obligated to ensure that 35 percent of all popular music aired each week is Canadian.[21] French-language private radio stations in Canada are also required to ensure that a certain percentage of the music played is in French.[22]

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

[20] *Id.* at § 3(1)(d)(i).

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

[22] https://www.cab-acr.ca/english/keyissues/primer.shtm; *see also* http://www.media-awareness.ca/english/issues/cultural_policies/canadian_content_rules.cfm.

- In Mexico, both government-owned and private radio stations are financed by advertising (both public and private) but must provide 12 percent of broadcasting time for government use. Additionally, all "cultural" stations in Mexico are operated by government agencies or by educational institutions.[23]

- The 1992 Poland Broadcasting Act as amended in 2000 and 2004 requires broadcasters to dedicate at least 50 percent of their air time to European productions and 10 percent to independent productions. Moreover, at least 33 percent of broadcasts each quarter must be produced in Poland.[24]

- Radio broadcast quotas in France specify that 40 percent of songs on nearly all private and public radio stations must be Francophone.[25]

D. Without a Performance Fee, the U.S. Is More Creative and Culturally Prolific Than Countries That Have Imposed One

The U.S. is the most prolific producer of sound recordings in the world, and there is no evidence that the absence of a performance fee for record labels and artists has had any adverse effect on creativity, innovation or has in any other way decreased the incentives to create music and the performance of recorded music.

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[23] Library of Congress Country Studies, Mexico at http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+mx0095).

[24] IIPA 2008 Report (Poland at p. 322).

[25] 2008 National Trade Estimate Report on Foreign Trade Barriers at 225 (www.ustr.gov).

The recording industry in the U.S. – with no performance fee – is twice the size of that of next-largest Japan, and larger than most major European countries combined.[26] There is no reason to believe that more recorded music, or better recorded music, would be created if Congress were to impose performance fees on recordings aired and promoted on radio stations.

A 2003 New Zealand Cabinet Paper made this precise observation. It noted a lack of evidence to support the claim that the absence of an expanded regime of performance fees had led to any reduction of New Zealand's cultural and intellectual diversity. Rather, "the creation of a successful performance is more dependent on other factors like the performers' motivation, the reputation and appeal of the performer and the director, and the power of the story being told."[27]

The recording industry has experienced worldwide revenue declines in recent years, and not just in countries without performance fees. Most countries have experienced a decline in recorded music sales, with 2006 being the seventh consecutive year in which the recording industry has experienced declining revenues.[28] The causes of such declines may be attributed to a variety of causes, such as online music piracy, online file sharing, expenditures on other forms of entertainment or the quality of newly recorded

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

[27] Office of the Associate Minister of Commerce, Cabinet Economic Development Committee, Performers Rights Review, paras. 41-45 (NZ).

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

music.[29] But there is no evidence or data suggesting that radio broadcasters (who already pay hundreds of millions of dollars in copyright royalties to music composers and publishers) are to blame for these revenue declines, or that the revenue declines would not have occurred had U.S. broadcasters paid record labels and performers for promoting their music on the air. Accordingly, there is no justification for imposing a performance fee on local radio broadcasters to "make up" for these revenue declines.

Further, while radio stations do not pay a cash performance fee to the recording industry, the promotional value derived from radio airplay, on air interviews with artists and promotions of concerts and merchandise provides reciprocal compensation to record labels and recording artists. In fact, a recent study shows that the promotional benefit provided to the recording industry from free radio airplay ranges from $1.5 to $2.4 billion annually, which does not include the promotional benefit provided to concert ticket and merchandising sales.[30]

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[29] The use of online file sharing and consumer expenditure on other entertainment have been some of the causes. *New York Times*, January 4, 2008. The quality of newly recorded music may also be a cause. The best-selling album in 2007 was a collection of Christmas songs. *Id. See* All Access Music Groups, www.allaccess.com, October 8, 2007 (retailers bemoaning fact that "rock schedule is beyond a disaster").

[30] Radio Airplay and the Record Industry: An Economic Analysis, Dr. James N. Dertouzos, June 2008, available at www.nab.org.

E. Foreign Performance Fee Revenues From Radio Are Disproportionately Allocated to Record Labels and Highly-Successful Artists

The distribution of revenues generated from radio by performance fees in many foreign countries end up mostly in the hands of the record labels and a small minority of highly-successful artists.[31]

In most European countries, including the Czech Republic, Croatia, France, Germany and the Netherlands, between 77 percent and 89.5 percent of the total fees are distributed to only 20 percent of the top earning performers. In those countries, 80 percent of performers receive no more than 10 to 23 percent of the total remuneration and at least 20 percent of performers do not receive any noteworthy remuneration.[32]

Moreover, record companies often benefit far more than the performers they represent. For example, in France, record producers receive an average of 13,545 Euros a year in royalties for music broadcast on radio, while artists receive an average of 329 Euros.[33]

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[31] *See, e.g.,* Gowers Review of Intellectual Property, December 2006 (Gowers Review) at 51 (arguing that a proposed extension of U.K. copyright term would not benefit all artists, but only the few highlight successful artists whose work is still commercially available after 50 years, and proposing that "perhaps a more sensible starting point [for increasing compensation to artists] would be to review the contractual arrangements for the percentages artists receive [from CD sales].") AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement, June 2007, II.1.5.a.

[32] AEPO-ARTIS, Performers' Rights in European Legislation: Situation and Elements for Improvement, June 2007, II.1.5.a.

[33] *See* Danish Ministry of Culture, International Tariff Analysis on License Fee to Administration Companies for Transmission of Music, Capacent, April 2006, at 3-31. (Data reflect average yearly payments as of September 2005).

F. The Performance Royalty in Other Countries Is Imposed Broadly and Not Targeted at Just the Radio Industry

Unlike the performance royalty legislation that has been introduced in the U.S. Congress,[34] countries that have imposed a performance royalty have not limited its application to only radio stations but rather have applied it broadly to require payments from any business establishments and public places where recorded music is aired – from restaurants to hotels to taxi cabs.[35] This results in hundreds of millions of dollars in costs to these businesses, but it is consumers who inevitably bear the burden in the end, by paying higher prices for products and services available from those who are burdened with this additional cost of doing business.[36] No explanation has been provided as to why the proposed U.S. performance fee should apply only to broadcasters. In fact, during a 2007 House of Representatives hearing on the subject, the U.S. Register of Copyrights Marybeth Peters argued that the fee should be broadened to include all commercial transmissions. When asked if royalties should be

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[34] Performance Rights Act of 2007, S. 2500; H.R. 4789.

[35] Article 12 of The Rome Convention states that: "if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both." Although countries have the ability to limit the applicability of this provision to broadcasting only under Article 16 of the Rome Convention, practically speaking, we are not aware of any countries that have instituted such limitations.

[36] *See, e.g.,* Gowers Review at 56. Albeit in the context of a contemplated extension of copyright, Gowers argues that such extension would "increase costs for all businesses that play music" including hairdressers and retirement centers, for example. "The impact of extension would therefore be felt throughout the economy." The same holds true for the proposed imposition of a performance fee in the United States.

paid in cases where music is played in restaurants, bars, retail shops, shopping centers, and sporting events, and her answer was "ultimately, yes."[37]

The logical and fair conclusion to be drawn from the proposal that a performance tax should be imposed for publicly playing sound recordings is that *if* such a proposal were to be adopted, everyone who engages in this activity should pay. Indeed, those who perform sound recordings and provide little or no promotional value, such as retail establishments, restaurants, bars, and entertainment venues, should pay more. There is nothing in schemes by which other countries subsidize their recording industries that would justify such a massive redistribution of wealth in favor of the recording industry.

G. Congress Has Correctly Considered and Rejected Being Influenced by Foreign Performance Royalty Legislation

The general rule, still in effect today, is that the vast majority of public performances of sound recordings are not subject to a performance fee. In 1995, Congress passed the Digital Performance Right in Sound Recordings Act of 1995 (DPRSA) which created an exception to this general rule and provided a limited performance royalty in digital audio transmissions, but specifically did not include over-the-air broadcasts.

In the deliberations over DPRSA, those advocating a much broader performance royalty argued then, as they do now, that the fee should apply to broadcasters because of the existence of the royalty in other countries. Indeed, those pressing for a broader fee were

[37] Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary, "Ensuring Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century," 110th Congress, July 31, 2007, p. 115.

seeking to have it included as a mandatory provision of an international treaty being negotiated at the World Intellectual Property Organization (WIPO).

Congress was aware of those efforts, but was unpersuaded that the existence of a performance fee applied to broadcasters in many other countries provided adequate justification for its application in the U.S.

> The Committee is well aware of ongoing discussions and attempts to greater international harmonization of copyright and neighboring rights at the World Intellectual Property Organization (WIPO), in discussions within the G-7, and other forums. This legislation reflects a careful balancing of interests, reflecting the statutory and regulatory requirements imposed on U.S. broadcasters, recording interests, composers, and publishers, and the recognition of the potential impact of new technologies on the recording industry. The purpose and scope of this new right are clearly laid out in the bill and this report. 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 subscription and interactive services – but not by broadcasting and related transmissions.[38]

Accordingly, Congress has long been aware of the fact that other countries impose a fee for the public performance of sound recordings. Indeed, Congress has specifically considered these foreign regimes and, after a "careful balancing of interests reflecting the statutory and regulatory requirements imposed on U.S. broadcasters recording interests composers and publishers . . ."[39] has decided the U.S. is just fine the way it is.

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[38] S. Rep. No. 104-274, 104th Cong. 1st Session at 17.

[39] *Id.* (emphasis supplied)

H. Conclusion

This paper illustrates some of the key differences between the business, legal and cultural structures surrounding the recording industry in the United States and those of many foreign jurisdictions. The U.S. radio industry differs from those in other countries, most of which rely on heavy subsidies from their governments and where content is heavily influenced by the government. The U.S. model is unique and it works.

The fact that the laws of some foreign jurisdictions provides for a performance fee in sound recordings does not justify imposition of such a tax in the U.S., where the proliferation and dissemination of music far exceeds other countries.

The existing U.S. model of "free airplay for free promotion" has served the recording and broadcast industries well for decades. The vast majority of listeners identify FM radio as the place they first heard music they purchased. With an audience of 235 million listeners a week, there is no better way to expose and promote sound recordings. A new performance tax would take this mutually beneficial system and transform it into an unfair, one-sided scheme that financially benefits only the recording industry – to the detriment of local radio stations and their listeners. There is nothing in the way that other countries subsidize their recording industries that can justify such a result.

Mr. CONYERS. The chairman of the RIAA, Mitch Bainwol, has replaced Hilary Rosen—now, a number of years ago—and he serves on the board of several boards including leadership music in Nashville, is a graduate of Rice University, and of Georgetown University as well.

TESTIMONY OF MITCH BAINWOL, CHAIRMAN AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA (RIAA)

Mr. BAINWOL. My name is Mitch Bainwol. I am the CEO of the RIAA. Today, I am here as a member of the MusicFIRST coalition, which represents labels big and small, managers, musicians, and producers, all together, in supporting the performance right.

This issue unites the creative community, property rights advocates and labor. I am pleased to be sitting here today with the incomparable Billy Corgan—my 10-year-old son is a huge fan, Billy—and Paul Almeida from the AFL-CIO. I am delighted to submit for the record a letter from the Property Rights Alliance in support of this bill.

[The information referred to follows:]

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February 5, 2009

To: All Members, U.S. House of Representatives
RE: Performance Right for Sound Recording

Legislation being considered in the House and Senate seeks to amend the "Digital Performance Royalty in Sound Recording Act of 1995," which required digital radio, such as satellite radio, cable radio channels, and Internet web casts to compensate songwriters and recording artists for the use of their music. Currently, broadcasters are by law exempt from paying royalties to owners of sound recording copyrights. Proposed amendments in the House and Senate to the 1995 Act would eliminate the exemption for broadcast radio, thus requiring them to pay royalties to the owner of the sound recording. As with digital broadcasters, AM/FM broadcasters would acquire a license and make one payment annually under a government set rate for all the music they play.

The debate currently being waged is whether radio broadcasters should be allowed to use copyrighted intellectual property without compensation because of the perceived promotional benefit to the owner of the creative work. The fact that broadcast radio is the only exemption to granting compensation for performance rights makes the promotional value argument invalid. Where radio may once have been the only medium for a recording artist to promote their work, in today's digital world there are countless mediums from satellite radio to internet radio to MySpace that allow consumers to enjoy the creative works of recording artists. Al l of these mediums pay for the use of music despite offering a potentially greater promotional value. In fact, much of the music played over the airwaves only reaches that medium after they have found success in these new arenas.

In the realm of property rights, the exemption for radio broadcasters from paying royalties to the owners of sound recordings represents nothing more than a taking under the semblance of offering free promotion for recording artists. A similar taking occurred in the *Kelo v. the City of New London* Supreme Court decision. In that case, the Court ruled that the government may use the power of eminent domain to expropriate property for private to private transfer under the ambiguous title of "economic development." The public outcry in response to the decision demonstrates opposition by a majority of Americans to takings that abuse protected private property regardless of economic benefit.

Property owners in America are not just proprietors of the land and homes where they live, or creators who have a vested interest in their intellectual property. Whether they are ranchers or writers, Americans work in a society where individual freedom, economic expansion and job creation depend on securing property rights. Economic growth only occurs when property, in all forms, is respected AND protected.

Sincerely,

Kelsey Zahourek
Executive Director

Mr. BAINWOL. I would like to focus your attention on five key points. The first point: The issue is not as complicated as the broadcasters suggest. On the contrary, this year, radio will spin almost a billion songs in the United States, making billions of dollars in advertising from our music. The payment to artists and labels for those recordings will not amount to even a penny, not a penny. As George Carlin famously said, "What a ratio."

I am not aware of any business elsewhere in the American economy where the primary input is not compensated. The broadcasters brandish diversionary rhetoric. We have heard it today; they call this a tax. You know better than I that a tax is what government collects, not a payment between private parties for private property.

No, what is going on here is entirely different. It is a taking. When broadcasters use our music to build their business for investors, but performers and musicians don't get paid when our music is played and we cannot tell radio not to use our music, that's a taking.

The second point: The U.S. in the case of terrestrial radio is unique. We're the only Nation in the OECD that does not provide the creator compensation for radio play; and ironically, the most economically secure platform that broadcasts music, over-the-air radio, dominated by big corporations, is the only platform in the United States that does not pay.

Satellite does. Internet companies do. Cable does. Terrestrial radio is an anomaly. The competitive landscape, thus, is biased in favor of the old establishment players against new start-ups and innovative technologies.

Third point: While this has always been a taking, the so-called logic behind the taking has totally collapsed. You hear broadcasters talk about promotions and the symbiotic relationship that exists between our industries.

Here are the facts: More than half of what big radio plays on the air are oldies. I love oldies, and I know you guys do, too. Older artists do not tour, and they should not have to.

The promotional value for playing oldies is hollow. We are no longer in a world in which listeners turn on the radio, hear a song and run down to Tower Records to buy that song. We are increasingly moving to a world where consumers get their music through the performance of it—through standard radio, through niche programming or on-demand access. We are not saying there is no promotional value. There is, but it has diminished.

Sales have fallen from almost $15 billion to $9 billion since 1999, including digital, and hits are not what they once were. In 2000, the Top 10 song albums in the country sold 60 million units. Last year, the Top 10 song albums sold about 19 million units.

Grammy-award-winning artist Herbie Hancock said it best, and you are right, "While there is no question that radio promotes music, it is also clear that music promotes radio." The fact is that whatever value promotion represents should be made a factor for determining the appropriate rate. That's what this bill does.

Fourth point: This bill focuses on big corporate radio, and we are anxious to roll up our sleeves to work with smaller stations, like those of Mr. Newberry's, to find responsible ways to address their

concerns. As it is, almost 80 percent of the stations in the country are accommodated. Stations under $1.25 million in revenue enjoy a flat fee amounting to about $400 a month. Public stations pay less than $100 a month. Talk radio will not pay for music; neither will religious services.

We are prepared to work with the smaller stations to build phase-in ramps, given the economic downturn. We just can't find anyone to sit down with. Despite the call last year from Members from this Committee for us to sit down and negotiate, Mr. Rehr, who runs the NAB, said he would rather slit his throat than talk. I have got to tell you that it makes it hard to negotiate with that kind of player.

But to be clear, the issue in the end is not about small station owners; it is about whether big, consolidated radio can continue to flex its muscle to perpetuate this taking. As for Administrations of both parties, the Bush administration and the Clinton administration before it, Administrations of both parties stipulated there is no legal or policy rationale for the sweetheart deal that broadcasters enjoy.

The fifth and final point: This issue is not merely about transferring revenue from one company to another, far from it. Half of the payments will go directly to the performers, by statute—radio stations, to Sound Exchange, to the artists, period. Many of the recipients are artists and musicians who are struggling.

Additionally, due to international reciprocity, the law will return millions of dollars each and every year, dollars that are locked up now overseas. Broadcasters receive a government handout, corporate welfare in the form of free broadcast spectrum and a rigged economic advantage over every other radio platform.

It is no mystery why they are fighting so hard to maintain the special exemption. What business would not love to avoid paying for their key input? Imagine Morton's not paying for beef or car manufacturers alleging economic hardship to suggest they should get free steel. Preposterous.

Once again, we thank you for your attention to this matter. We look forward to working with you to get this right.

[The prepared statement of Mr. Bainwol follows:]

PREPARED STATEMENT OF MITCH BAINWOL

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

MARCH 10, 2009

Chairman Conyers, Ranking Member Smith, and Members of the Committee, I appreciate the opportunity to be with you this morning. My name is Mitch Bainwol and I am Chairman and CEO of the RIAA[1]. But today I am here as a member of the MusicFIRST coalition, which represents American labels big and small, artists, managers, musicians, and producers who are all united in supporting the Performance Rights Act to finally end the special subsidy over-the-air radio has been receiving.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

Mr. CONYERS. The Committee is pleased to welcome Marsha Blackburn of Tennessee to our Committee hearings. We think she is from Nashville, but some think that there are other parts of Tennessee she might be from.

Mrs. BLACKBURN. Thank you, Mr. Chairman. I appreciate the opportunity to step in. I have a little bit of Memphis and a little bit of Nashville. I go all the way to the Kentucky border.

Mr. WATT. Mr. Chairman, I ask unanimous consent to allow the gentlelady to make an opening statement.

Mr. CONYERS. Without objection.

Mr. SMITH. Mr. Chairman, I am afraid I have to object.

Mr. CONYERS. All right.

Mr. SMITH. If the Chairman would yield or maybe the gentleman from North Carolina, I will be happy to explain why to my good friend and colleague.

Mr. WATT. Are you reserving the right to object or are you objecting?

Mr. SMITH. I am objecting.

Mr. WATT. Well, if you are objecting, then that is the end of the conversation.

Mr. SMITH. Well, in that case, I will reserve the right to object.

Mr. WATT. All right. In that case, I will listen to you. If you have already objected, I do not know why we are having the discussion, but go ahead.

Mr. CONYERS. Why are you so controversial, Mrs. Blackburn?

Mrs. BLACKBURN. I will just say thank you, Mr. Chairman. I appreciate the opportunity to sit in. I did not want to make a statement, but I appreciate the opportunity to clarify all of the good people that I do represent in my little bit country/little bit rock-and-roll district.

Mr. SMITH. Mr. Chairman, I would like to explain, just so that our colleagues and so, perhaps, those in the audience understand why I objected.

It has been a longstanding policy on this Committee—that I thought the gentleman from North Carolina was aware of, and that I know the Chairman is aware of—that we do not have Members who are not Members of the Judiciary Committee make opening statements.

If we were to set that precedent, as much as I might like to do so today, we might be inundated with dozens of Members who would appear at every hearing and who would have reason to make opening statements.

Mr. WATT. Will the gentleman yield?

Mr. SMITH. Just a minute.

So, at least in this Congress and in the last Congress, the Chairman and I have had an agreement that we would not have opening statements by other Members.

I will be happy to yield.

Mr. WATT. I thought I was being bipartisan in making this motion, and I thought I was the appropriate person to make it, since I was one of only two people who did not make an opening statement myself. But if the gentleman does not want his colleague to make an opening statement, that is fine with me.

Mr. SMITH. I yield back, Mr. Chairman.

Mr. CONYERS. I would like to ask any of the distinguished witnesses if they have any opening remarks that they would like to exchange about anything that they have heard from the other witnesses before we begin.

Oh, yes, Mr. Almeida.

Mr. ALMEIDA. I understand the difficult times the small radio stations are in and the burden it would be on them. However, even more so are the musicians and the background singers who are further, if you want to call it, "down the food chain."

So they should be further penalized? I think it is a major injustice to those workers who do their work.

I think that we have this common misconception of performers. We kind of hold them on a plateau in what we take for our personal enjoyment. I think we often do not connect that they are working people, trying to put bread on the table. So I think we take advantage of that often by the position that we put them in in society.

Mr. PATRICK. Mr. Chairman, we understand where they are—the musicians, the background singers, all of those types of people. I want to make sure the Committee understands. We are not just talking about the small market stations.

I was just recently in your home State 2 weekends ago, trying to help a family who owns an AM/FM radio station up in central Michigan. At the end of last year, the total money that they had made off that station was $33,000, and there is no doubt, at $5,000 a clip, they lost a third of their income almost. This is a husband and wife who work 50 to 60 hours a week.

When I go through Intercom and Citadel and all of the big companies, and Radio One, that have been delisted from the exchanges, this is not just a small market radio problem; this is a radio problem. While $16 billion sounds like a lot, there are 13,000 radio stations, and the reality is, we have been down $5 billion in the last 2 or 3 years.

So it is everywhere in radio, and we are hurting, and we are going to the same stations, working hard, and doing all of the things that we have to do to try to survive, and it is very tough.

I will tell you that I am helping a couple of African American companies right now, and I am helping a Spanish company in Texas right now. If this bill were to pass, that Spanish radio operator, who is already losing money on an operational basis, would pay about a $1.8 million to $2 million more. They are already in trouble; that will absolutely push them into bankruptcy.

Mr. CONYERS. Yes, Mr. Bainwol.

Mr. BAINWOL. If I could, I think it is important to separate the conversation between the question of a right and the question of a rate, and that really is the core question here.

We are not going to be in a down economy forever. Parenthetically, nobody has a monopoly on pain. We were both $15 billion industries about 10 years ago. They have gone up and we have gone down, but that is not the point.

The question here really is, should there be a right? Is it acceptable for a taking to occur in this country with this one platform when it does not exist as a taking in any other industrialized nation in the world or in any other platform in the U.S.?

There ought to be some compensation. There ought to be a right. Then the question is: Okay, if you say there is a right, then what should the rate be? We hear a lot of scare chat about how damaging this would be.

Again, we are not going to be in a down economy forever. The question is, maybe this is done as a percentage of revenue. Right now, the composition side is about 3 percent. The typical ratio between the composition side and the sound recording side is that there is some plus-up. Whatever that might be, would the broadcasters at the table be comfortable with 6 percent or 7 percent?

We are not talking about something that would be, you know, as draconian as the suggestions that you all have made to fight this back. We are talking about something modest and that represents a very modest payment for the cost of goods, in your case, sold. You know, Ford and General Motors, they pay 90 percent in cost of goods sold. Your cost of goods sold for music is 3 percent right now.

Mr. CONYERS. Howard Berman.

Mr. NEWBERRY. Mr. Chairman, may I ask for an opportunity to respond to that?

Mr. CONYERS. Of course you can.

Mr. NEWBERRY. There are two things that I would like to address. The first one is the word "taking." These are not robber barons who show up in the middle of the night with a gun and take the music. We have one station in Salt Lake City that received 3,800 phone calls from record labels asking that their songs be played in a 6-month period.

I have with me a trade magazine that is filled with ads of record labels, saying, "Thank you for playing our songs. Thank you for making this happen for us." So this is not a transaction where the record labels and the artists are saying, "Please do not take our music. Please do not play it."

The second thing I want to do is draw a delineation. Radio does not equal music. Music is part of the radio industry, but we have talk stations; we have sports stations; we have many, many stations that contribute to that $15 billion industry. So for us to say that we are talking about an industry as a whole, when we are talking about a segment of the industry, I think it is a little bit contradictory.

I want to make sure. I will be glad to answer questions from the Committee, but I wanted to make sure and draw the line there.

Mr. BAINWOL. The music is about 80 percent of radio revenue, isn't it?

Mr. CONYERS. Howard Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

I hear that you actually pay the sports teams for the right to broadcast the sports radio, and I hear that you pay the talk radio hosts for the talk radio show, but—that was rhetorical, not to be answered.

There are a couple of points that I would like to make, and then I would like to ask Mr. Newberry a question.

Again, we have the issue of the right, which this bill seeks, to remove the exception for, and accord in this country that right which is recognized almost everywhere else in the world. Then we have the structure.

My guess is, when radio stations have lost $5 billion, the payment for the musical compositions that go to the songwriters and composers goes down by a proportional number because there is a percentage of revenues. The system can adapt to the good times and to the bad times.

When we talk about a GAO study in terms of the impact, I am fine with that, but that should not be the condition precedent to moving a bill ahead which establishes the right. We can get the GAO study; we can get into discussions about appropriate rates.

And that leads me to my question, if I can just find it.

Here it is: Again, Mr. Newberry, I would love to go to your testimony. You said for a small market operator of an AM station or a small FM station that may be dealing with less than $100,000 a year, with a profit margin of 10 percent or less—and a profit margin, in most of these cases, defines what the owner takes home. This is not after they have been paid; it is their take-home pay. So $5,000 is a significant amount.

If you take a small broadcast operation that has an AM/FM combination in a small community like Princeton, Kentucky, or somewhere in rural North Carolina—Mr. Coble was asking the question—now you have $10,000 of obligations to pay. I think the amount is something that would be an economic burden on those who find it most difficult to find probability in our industry.

That was an exchange from last year's hearings, and I have been giving that exchange a lot of thought.

What if we graduated the fee for the smaller stations? What if we said that, for those who make $100,000, instead of $5,000, they pay $500? Less than $100,000 could pay $250. There are so many different ways to deal with the accommodations for people within the small broadcaster situation.

Would you support a provision which took care of that situation which you laid out in response to Mr. Coble's question?

Mr. NEWBERRY. I will make the same delineation Mr. Bainwol did. We are discussing the right, then we are discussing the rate. I think your question addresses the rate.

Let me say two things very quickly.

Mr. BERMAN. Does that concede the right?

Mr. NEWBERRY. No, sir. It addresses it; it does not concede it. There are two issues that I would make from that very quickly.

The broadcasters understand the concept of intellectual property. We get that. For it to be said that we have provided no value, that we have provided no remuneration, that we have provided no equity for the performances that we have had, it gets to the rate issue.

I think that we have to understand that our industry has been built—we talk about the streaming; we talk about the satellite radio. Certainly, satellite radio and cable and several of the Web casters are fee based. It is an entirely different business model. So, when we do start talking about potential rates, whether it be for a small market or the largest market, I will tell you that the amount of promotional value that is provided by the larger stations is proportional; and I have grave concerns with the argument of principle before you get into the rate.

Now, going back to the suggestion of the GAO study, we have a saying in Kentucky, "Measure twice, cut once." I think that we are desperately lacking in information on this, and I think for you to move legislation before you have an opportunity to fully study it—it could cause irreparable damage to our industry. And we would certainly be comfortable with that independent, third-party study.

Mr. BERMAN. How about two things at the same time, where we start the GAO study, and you start negotiating rather than slitting throats?

Mr. NEWBERRY. Yes, sir.

Mr. BERMAN. Okay.

Mr. CONYERS. Did he agree?

Mr. NEWBERRY. No, sir. If I might say, I took that as another rhetorical statement.

Mr. CONYERS. Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. WATT. Mr. Chairman, I think the record should show that he at least did not slit his throat.

Mr. SMITH. Thank you, Mr. Chairman.

I did propose in my opening statement something that Mr. Newberry has just anticipated and that maybe Mr. Berman has just followed up on. That is the idea of the independent, third-party study that would be conducted to evaluate the economic impact of royalty payments on both the artists and the radio stations themselves.

Let me say, while I consider the idea as being specific in talking about a GAO study, most GAO studies that I am aware of take more than a year to complete. If that were the case, I do not know that that would be that helpful to us in this Congress, so that is why I specifically kept that question open as to the outside entity.

Mr. Newberry, I am glad you agree with that.

Mr. Bainwol, what do you think of the idea of an outside entity's conducting that kind of study, that might well be the first step to the next step, which is wider negotiations?

Specifically, I think it would be helpful myself, obviously. What do you think?

Mr. BAINWOL. Our preference would be to dual-track this, per suggestion by Mr. Berman. I think studying the issue has got great value.

We are in favor of an informed process. I will note that in 1976, when we punted on this back then, we did a study as well.

That said, if the study is done in the context of moving a right to make sure that the right is appropriately framed and structured, then we are absolutely for it. We think the concept of a quick shot clock is a good addition.

Mr. SMITH. Great. I am glad to hear that. I think it represents real progress.

I might also add that I would expect all parties to have input as to what that study evaluated, so you all would be able to contribute the issues of the subject matter to be studied. So I would hope that that would be achievable in the next few months.

Perhaps, if I can suggest it, why don't you all work with the Chairman and me to try to accomplish that in the next couple of weeks as far as designating the outside entity and coming up with

issues that we would like that outside entity to study? Is that agreeable to you all?

Mr. BAINWOL. Yes, sir.

Mr. SMITH. Great.

I do not mean to put you on the spot, but I do at the same time. This is a question for both Mr. Newberry and Mr. Bainwol.

Would you all support an amendment to this bill that would designate that all royalty payments go to the recording artists? Mr. Newberry? Mr. Bainwol?

Mr. BAINWOL. The simple answer is no. Under Federal law now, in the context of the digital performance rights that we do enjoy, there is a 50-50 split. And there is a reason for the 50-50 split; it is 50 percent to the copyright holder—which is typically, but not always, a label—and 50 percent to the performer and the musician.

We believe—we, my association and American philosophy—when it comes to the economy, that it is a good thing to do to invest. In order to make an investment, you have to have a return. Our return in today's world is primarily from sales.

Our return in the evolving economy will be based on income related to performance and income related to access. So to take out the income related to performance would simply dry up the ability of investors to support emerging new artists.

We spend probably anywhere between $1 billion and $4 billion a year supporting artists, breaking acts—a couple hundred new acts a year—and that is predicated on the ability to earn a return, so taking that return out, I think, would be penny wise and pound foolish.

Mr. SMITH. Thank you, Mr. Bainwol.

Mr. Newberry, I realize this question is a little bit theoretical since you do not support the concept necessarily of the royalty payments, but what do you think of the idea?

Mr. NEWBERRY. First, I would like to echo what Mr. Bainwol said. An investment without a return is not much of an investment, and that is what the entire broadcast industry is struggling with now. That is evident by what is happening to us.

Moody's came out with a report yesterday that, of the sectors of the economy that are most damaged by the downturn of the economy, radio and television are two of the top five in the country. So we are struggling very much with the same economic investment and return concerns that cause them to want the money, that cause us to say, "Wait a second. Why are you taking the money?"

I think the bill, with all due respect, Mr. Chairman, is not the appropriate time, and I do not agree with the legislation, obviously. But certainly I am very proud of the broadcasters I do business with. I would not support an amendment to the bill because I am not thrilled with the bill, but certainly taking the record companies out seems to be much more on target with what the Members want.

Mr. SMITH. Thank you, Mr. Newberry.

Mr. Chairman, let me end on a positive note.

Thank you both for agreeing to the outside study and for getting that initiated in the next couple of weeks.

Mr. CONYERS. Subcommittee Chairman Bobby Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

This is complicated. Let me just get some understanding here.

Mr. Bainwol, do radio stations pay somebody for the use of their intellectual property when they play a song?

Mr. BAINWOL. The radio stations pay, through SESAC, ASCAP and BMI, the songwriter, but they do not pay for the sound recording.

Mr. SCOTT. And they do not pay for the recording. They pay the writers?

Mr. BAINWOL. They pay the writers, correct.

Mr. SCOTT. How did that come about?

Mr. BAINWOL. This goes back 100 years.

Mr. SCOTT. To congressional action?

Mr. BAINWOL. The writer has a copyright. When we got our copyright in 1972, an exemption was put into place that we would not have a performance right.

Mr. SCOTT. Does the owner of the intellectual property have a choice on whether the radio can play their property or not?

Mr. BAINWOL. No, we do not. That is why we phrase it as a "taking." They build their businesses on the backs of our sound recordings, and we cannot say "no."

Mr. SCOTT. Now, does the performer have an opportunity to negotiate anywhere to get rights for what is played on the radio?

Mr. BAINWOL. No.

Mr. SCOTT. Terrestrial radio is unique. How do the performers get rights in the other platforms?

Mr. BAINWOL. By congressional passage in the mid-1990's.

Mr. SCOTT. Do any other countries have performance rights?

Mr. BAINWOL. Virtually all industrialized nations in the world do.

Mr. SCOTT. So, if you are a British performer on a British radio, you get performance rights/royalties?

Mr. BAINWOL. Correct.

Mr. SCOTT. Do United States performers get any royalties from the foreign radio stations?

Mr. BAINWOL. No. There is a lack of reciprocity because we do not have the right.

Mr. SCOTT. If they could get performance rights or royalties, would any performers negotiate and sell their revenue stream for the future? This is, pay me twice as much now, and the publisher could have the royalties?

Mr. BAINWOL. You know, I am not an attorney, but I presume that that is a basket of rights that they could sell.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. CONYERS. Howard Coble, North Carolina.

Mr. COBLE. Thank you, Mr. Chairman.

It is good to have you all with us, I say to the panelists.

Mr. Newberry, as you know, section 3 of H.R. 848 provides special treatment for small, noncommercial, education, and religious stations. I am interested in knowing what stations in my district would be covered by that. Could you have someone from NAB provide that for me?

Mr. NEWBERRY. Certainly.

Mr. COBLE. I would appreciate that.

Mr. NEWBERRY. Let me qualify that, sir. As much as people are willing to share their personal and private information, but we will make every effort to do that for you.

Mr. COBLE. I understand that.

That said, Mr. Newberry, there inevitably will be some stations that will not be covered.

How will H.R. 848 financially impact those stations?

Mr. NEWBERRY. You are asking about the stations that are above the 1.25 threshold?

Mr. COBLE. Yes.

Mr. NEWBERRY. I think one of the real issues that people may not understand about the broadcasting business is that we are a fixed-cost business. Our business does not have input. We are not a hardware store. If we do not sell a hammer today, it remains on the shelf tomorrow like at a hardware store.

We sell time. It costs basically the same amount for us to produce an hour of programming whether we have sold commercials in that or whether we have not sold commercials in that. As a result of that, it is critical that broadcasters try to maintain their cost. If you do not maintain that cost, you can lose money very quickly, very rapidly.

So one would think that a station that was billing more than $1.25 million might have adequate funds, but when you factor in the royalty rates that you are paying to the composers at this point in time, when you factor in the cost of talent and the employees that you have, the rising cost of health care, the lease that you have to pay, all those fixed costs, I cannot answer that question directly.

Mr. COBLE. Okay. I thank you, sir.

Mr. Almeida, in your testimony, you mentioned that millions of dollars go into a French culture fund every year instead of coming to the United States because of the lack of reciprocity in the law.

What assurances are there, if the Congress amends the law as proposed here, that the French would, in fact, be compelled to direct those funds to you as performers?

Mr. ALMEIDA. I am not sure, exactly. Right now, there is reciprocity, and we assume that they would send the funds according to how it works in the other platforms.

Mr. COBLE. Well, that would be my conclusion, too, but I do not know that it is cast in iron.

Nonetheless, thank you for that.

Mr. Corgan, I am concerned, as are my colleagues, about the decline in the music industry's revenues. A, what is your belief as to what has caused that? B, how will H.R. 848 help the industry as a whole?

Mr. CORGAN. To answer the first part of your question, it is a very complex answer.

The main reason that most people point to is the rise of the Internet culture and what is commonly known as "free downloading" or people transferring files. The record business kind of dug in their heels and tried to slow the whole thing down, and it actually kind of ended up working in reverse and creating a whole culture of, especially young people, who do not see music as something that they buy.

Then, of course, you have got all of these different platforms now where people can listen to music, so you do not have that same sort of causal effect of "I am going to go to the store and buy it because I want to listen to it." They have access to it. They can have it on their computer.

It is complicated, and you could talk to 50 people and get 50 different answers on that.

Mr. COBLE. I thank you, sir.

Mr. Patrick, let me alter my track here. A, do radio stations currently broadcast over the Internet? B, do they pay a performance royalty for those broadcasts?

Mr. PATRICK. Some do stream, and they do, in fact, pay for some streaming. It is a different situation than over the air.

I also think that the Committee needs to understand—I mean, there are 235 million people a week who listen to over-the-air radio. When we start talking about satellite Internet as if they are all equal, we are talking about toy soldiers versus big armies. There are very few people. I mean, you can look at Sirius XM; their total audience in the morning on any one of their channels does not equal one station in New York City or in Los Angeles.

So the answer is, these are not equal platforms, and because some came into the world with the idea that they would have to pay, we do.

I can just tell you, sir, that I have run radio stations in Miami and Dallas and in lots of other middle-sized markets. Not a day goes by that the record companies and the promoters are not begging stations to play. I think Mr. Newberry has an example from Salt Lake City, but the reality is, radio play still drives record sales, concerts, tickets, merchandise, and all sorts of other things.

There is a Tuzo study that was produced, I think, last year that indicates that 61 percent of all people who hear about new music hear about it on radio. Radio is still viable, and it's huge. That is why we think there is a value proposition there.

The reality is, yes, we do pay for streaming. Mr. Newberry was on the Committee that just negotiated that. Perhaps he can answer it in more detail.

Mr. COBLE. Well, Mr. Chairman, I see that intimidating red light.

Mr. Newberry, do you want to weigh in on it?

Mr. NEWBERRY. The broadcasters and the recording industry have entered into an agreement as a result of the laws that were passed by Congress. Certainly, we understand that the value of promotion that is provided by our Web stream is nowhere near what it is on the over-the-air, and there was a compensation made there and reached by both parties.

Mr. COBLE. I thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Mr. Corgan, did you want to add to that comment?

Mr. CORGAN. I cannot speak for every artist, but I can speak for a lot of artists. The inability for the artists to have any leverage in this situation makes it very difficult in the changing markets to create our business models to make great music. At the end of the day, while everybody over here is talking about the turf wars between who gets what in the pie, if you do not have great music, you are not going to be able to have great radio.

I think—my personal opinion is the reason that musical accomplishment has diminished over the last 15 years partially is due to the changing in the revenue streams, but you also have sort of a narrowing of the business models, and the artists are not able to invest in their careers in the same way, so this puts stresses on these things.

No one is arguing that radio does not promote. Radio is a great tool for promotion, and nobody in the music business wants to see terrestrial radio go down. We are talking about the ability to negotiate and to find the right water level for everybody involved.

In my particular case, I am a songwriter, I am a performer, and I am also a copyright owner, so in this particular instance, I have no leverage. I cannot go to anybody and say anything; it had been taken away long before I entered the music business.

Mr. CONYERS. Professor Liebowitz.

Mr. LIEBOWITZ. Yes, I just wanted to make this point again that everyone is talking about promotion.

The nature of radio promotion is deciding which song gets the biggest piece of the pie. The question as to whether or not radio is beneficial to record sales overall is whether radio is making the pie bigger or not. The evidence on that is that it is not, even though it is clear that it determines which individual songs get the biggest piece of the pie.

But if people are listening to radio as opposed to listening to prerecorded music, radio could very well be making the total pie smaller even when it is increasing the size of the pie for individual songs. I will give you a simple example with movies and television.

Movie companies still advertise the movies on TV, and the big stars go around when the premieres come out, and they go on all of the late-night talk shows, and they do it virtually for free. If you were to look at that, you would say, Wow, television really helps promote movies, and it does, but if you take a look at the history of television and movies, television killed the movie industry. Back before TV came along, people went to see the movies 30 times a year, every other week. Now they see it 5 times, and it is exactly in the 1950's, when television started, that movies dropped like crazy.

So, yes, television helps decide which movies get biggest, and that is why they are willing to advertise them and send their stars, but it had a terrible negative effect overall on the total size of the market.

Mr. CONYERS. The distinguished gentleman from North Carolina, Mel Watt.

Mr. WATT. Thank you, Mr. Chairman.

I have been trying to figure out one of the economic factors here. Maybe I am missing something because one of the arguments I have heard consistently is, if we ran a performance right—and I think a couple of you may have made this point—it is going to make stations not play music, but go more to talk formats.

The last thing I want to do—because I hate talk radio, and I actually do not listen to it, so it is fine with me. When you have talk radio, it seems to me you have got somebody on the station, talking, who has to be paid. Even if I assume that that person who is doing the talking is getting paid the minimum wage over a month's

period, that would be more than you would pay for the small station, the $5,000-a-year thing.

So somebody explain to me why I am missing something. Maybe I am missing something here, and you all are anxious to explain it, so maybe there is an explanation.

Mr. Patrick, and then Mr. Newberry.

Mr. PATRICK. Well, I think if you look at talk radio, you will understand that much of talk radio is satellite delivered.

Mr. WATT. But you are paying somebody.

Mr. PATRICK. We are not necessarily paying those people. I mean, I can get talk radio right now for no money a month for a particular talent.

Mr. WATT. Why don't you just go to that format instead?

Mr. NEWBERRY. We have in many cases.

Mr. PATRICK. We have in many cases.

Mr. WATT. So what is the big deal? I do not understand how that militates against the performance right. I mean, I think you have got the option to do whatever you want to on your stations. You can talk and not pay somebody if you can find somebody who will work for free, although there are minimum wage standards in this country.

I just do not understand what that has to do with the notion that you can just take somebody's commercial property and use it. I do not understand that.

Mr. Newberry, maybe you can shed some light on this.

Mr. NEWBERRY. Sure.

For instance, at many of our stations, we carry ESPN programming. So we have sports talk that is on 24 hours a day, 7 days a week. It is provided at no cost to us.

Mr. WATT. But does somebody pay Rush Limbaugh?

Mr. NEWBERRY. I do not carry Rush Limbaugh on any of my stations.

Mr. WATT. But somebody is carrying him as an option, and they have decided that there is some value there.

Mr. NEWBERRY. They are getting an exclusive right for that product in that market.

Mr. WATT. I am not against your negotiating.

Let me back up and approach this a different way. What if we just recognized on this Committee the right, and left it to individuals to enforce that right without a framework? I mean, you know, you all are into how much you get paid, how much is this fee format. If you then use my music and I am the artist, then I have got the right to come and find you and make you account for it.

Does anybody think that is a terrible idea? I mean, that is the way our legal system is set up, isn't it?

Mr. PATRICK. This is not just the artists who are coming. This goes back to Mr. Smith's question. This is not just the artists who are coming and asking. This is the record label saying, We want half of the money.

Mr. WATT. Don't they own something, too? Don't they own something? If you played the music, then wouldn't they have the right to come and enforce that just like the performer over here did?

Mr. CORGAN. I am not the biggest fan of the record labels. I have had my battles with them through the years. I, as an artist, nego-

tiated in good faith with the labels over my rights. So, from my end and from the label's end, it is just a rights issue.

If you go to a free market free-for-all, it probably would not work because it would be very hard to get everybody to agree, so I think that is why everyone is looking for some sort of framework by which to negotiate.

Mr. WATT. People would not agree. I am not trying to make litigation, but if you all think that we ought not to be setting up a structure here to work this out, as we have in other entertainment settings, then the option is that we recognize the right and let the market and the individuals work it out.

Mr. CORGAN. So to answer a question you did not ask, they would not play the music if it were not worth something. It would just go to something else that would give their stations more value.

They are playing the music, whether it is Motown or my group, because it adds value to the station. No one is arguing that they do not add value. Everybody just wants to work together, but if you do not establish the right, what can you do? There is no conversation.

Mr. WATT. Mr. Newberry, you do not think there is a right. Everybody else has a right except the person who performed it?

Mr. NEWBERRY. I think we have a system that is not perfect, but I think we have a system that, if tinkered with, can become much more imperfect. I think we——

Mr. WATT. Are you going in the room to talk to people now?

Mr. NEWBERRY. May I finish my statement? Then I will answer your question.

Mr. WATT. Okay.

Mr. NEWBERRY. I think we have a system where, if we go to where it is a business transaction, as proposed, the most recognized artists are going to get more play and the least recognized artists are going to get less play. I mean, we can find examples, and we can talk about big record companies, but Madonna bought a $38 million condo in New York; and that is more than the market cap of many of our largest companies right now.

Mr. WATT. Mr. Newberry, this is not about Madonna. This is about whether individual artists have any rights. Madonna's right is more valuable because she has——

Mr. NEWBERRY. She is played a lot on the radio.

Mr. WATT [continuing]. She has made a lot of money, that's right. That is not a reason not to recognize a right that Joe Blow or Joe the Plumber has if he makes a record.

I mean, you can still decide whether to play that music or not to play it; I am not trying to take that right away from you. But it just seems to me that for you all to say there is no ownership right here that ought not be enforced in some kind of way—under some framework or individually case by case by case—I do not understand that.

Mr. NEWBERRY. I understand your point, sir.

Mr. WATT. Okay. I yield back.

Mr. CONYERS. Our first attorney general, Dan Lungren.

Mr. LUNGREN. Mr. Chairman, I just say for my friend from North Carolina, I think if you want to hear Joe the Plumber, it will probably be on talk radio rather than singing radio.

Mr. WATT. No, if they want to play him on music radio, it is fine with me. I mean, I don't listen—I won't listen——

Mr. LUNGREN. You won't listen in either event I'll bet.

Mr. WATT. That's right, that's right.

Mr. LUNGREN. If I can go back to why we are all here, as I read the Constitution, we are here because it says in Article 1 Section 8 that Congress has the power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respected writings and discoveries. In other words, it was to promote ingenuity, creativity and so forth.

So I was very interested, Mr. Corgan, your comment that musical—I believe these are your words—musical accomplishment has diminished over the past few years, which would suggest that there is less creativity in the American musical industry today than there was before. Can you elaborate on that?

Mr. CORGAN. Well, it starts with the erosion of the revenue base. And like in any business, people get more conservative, and so you see a conservatism creep into the mainstream musical formats, and——

Mr. LUNGREN. I guess my question is, what is the quantifiable proof to that, that there is less musical accomplishment or it has diminished over the past few years?

Mr. CORGAN. It is a generally held opinion that I am voicing, and people would agree with me. But we, as a musical culture, and I'm talking about all genres of music, feel that music has been sort of hijacked by kind of corporate interests. And you see less of that leading-edge artist that you used to see. And as someone—I work with Mr. Azoff who was here recently said, we're not creating new stars. And I think that is the best quantifiable thing I can say. You're not seeing as many new stars per generation. If you think back to, say, the '60's and you look at the amount of stars that came out of that generation and the stars that are coming out of this generation, it is very different. And I don't mean different in style. I mean different in just sheer numbers.

Mr. LUNGREN. Would that also mean that there are less new bands, less new performers?

Mr. CORGAN. No, there are actually more. There's more artists than ever.

Mr. LUNGREN. But there's fewer stars?

Mr. CORGAN. Exactly. So if you want to try to make a math proposition out of it, there must be something going on that is creating less stars because they must be out there. I mean, just sheer numbers, you would say more people playing more music would equal more stars.

Mr. LUNGREN. Okay. Let me ask you the question that has been raised by a couple of comments here, which is if, in fact, this proposal were to go into effect unamended, the suggestion by the operators is that since it is a business decision to run a radio station, that the bottom line is very important. So that would, if in fact they would continue to play music, mean that they would be most likely to play those performers who are already established stars as opposed to taking a chance on the cutting-edge, as you suggest, which is a manifestation of the fact that there has been a diminishment of creativity. How do you respond to that?

Mr. CORGAN. I would argue the flip side that you need the capital revenue to invest in the artists' careers. In my case, my band didn't really hit the top of the charts until really our third album. And now it is commonly understood you have one album when you are entering as a new artist. A lot of artists that are now established as big names—Bruce Springsteen is a classic example—he didn't become the Bruce Springsteen that we know on the first record. It took until the fourth or fifth record. Artists' careers aren't given the time to develop because the labels aren't willing to make the capital investment over the long term.

Mr. LUNGREN. So your argument would be that the capital investment has been diminished; therefore, on that side of the equation, there would be fewer opportunities for emerging artists to become stars. On the other hand, what we've heard from the radio stations is that they would not take the chance on those. And I guess that would go to the question——

Mr. CORGAN. I don't——

Mr. LUNGREN. Mr. Liebowitz, that somehow, as I understand what you are saying, actual exposure on the radio stations doesn't really increase the universe of artists that are getting played. If you accept that argument, then it seems to me to be somewhat of a self-defeating proposition, is what—I'm just trying to figure out——

Mr. CORGAN. I would say it is like a sports franchise. Stars drive the business. The NFL is a huge business now because stars drive the business. They finally realized that seeing behind guys' helmets made for bigger revenues at the gates and more merchandise and stuff like that. Stars still drive the business.

Mr. LUNGREN. So your definition of a star is someone who makes a lot of money?

Mr. CORGAN. My generation of a star is somebody who changes the musical culture and, through the change of musical culture, enacts an interest in the field. You know, like somebody mentioned Madonna. Well, when Madonna came in, suddenly there was a whole interest in people like Madonna. So, you know, it has a kind of a sweeping effect behind the star.

Mr. LUNGREN. If you had more stars but fewer emerging—if you had more stars but fewer people actually going out there and trying out, that would still, by your definition, be an increase in creativity?

Mr. CORGAN. Again, sir, I would argue that the revenue base is necessary for the capital investment. It is like any business. If you don't have the capital investment, people get really conservative in their choice-making.

Mr. LUNGREN. But if the capital investment is based in part on what the radio stations do, and the radio stations are telling you, in terms of their capital investment, they are more likely to continue to play already-established stars——

Mr. CORGAN. I don't buy that, sir.

Mr. LUNGREN. You don't buy that.

Mr. CORGAN. I think that is a fake argument, in all due respect.

Mr. NEWBERRY. This is one of the things that frustrates me as a broadcaster because for years, the recording industry—I have played Mr. Corgan's songs on your stations, big fan of his group.

The radio and the recording industry should partner together to find ways to solve the business and the model moving forward instead of taking guns and knives to one another.

Mr. LUNGREN. Well, that's the negotiations we're talking about——

Mr. NEWBERRY. We are, as an industry—we as an industry are more than willing to find ways to promote the music, to find ways to take what we have, which is promotional value, and help the recording industry monetize that, for both the benefit of the performers and the labels.

But instead, what we find in this legislation is it is being turned back on us and saying, wait, we are going to bite the hand that has fed us these years, because our business model is disrupted as a result of the Internet.

Mr. BAINWOL. For us to have an expectation—may I? May I, Mr. Chairman?

Mr. CONYERS. Yes.

Mr. BAINWOL. For us to be characterized that we're taking knives when all we want is to have a right and to be paid for our product is kind of a distortion. We——

Mr. NEWBERRY. I would say both industries are doing it to each other.

Mr. BAINWOL. Well, the reality here is we need to work on this together. We do have a symbiotic relationship, but that shouldn't be one way. And we can figure out moving into the future, if we sit down and talk and you recognize that there ought to be a right.

The world has changed dramatically. It is no longer a single platform world. And that is where this whole question of creativity really comes into question. I mean, you're as likely to break an act on YouTube now as you are on Clear Channel. And that is the reality.

They are spending half of their air play on oldies. So they are not really breaking acts with that, and we're not getting paid for that because there is no promotional value in effect. So this is a very complicated question, but we can't get to the bottom of it until we sit down, and they recognize that we ought to have a right.

Mr. NEWBERRY. I would say that I think YouTube is very effective for babies crying and people falling down and some pratfalls, but I don't know any artist that has become a superstar because they were broken on YouTube.

Mr. CONYERS. The Chair recognizes the Constitutional Committee Chairman, Jerry Nadler of New York.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Newberry, I missed the beginning of the hearing. I was at an economic hearing. So if I repeat any question or concept, forgive me.

As we have discussed, one of your primary—I have difficulty, I must say, with the idea that someone shouldn't get paid because someone else decides that the exposure is enough. One of your primary arguments is just that; it is that artists receive a tremendous benefit from their recordings being played, the promotional value should be enough to obviate the need for royalty payments. That is essentially the argument, correct?

Mr. NEWBERRY. It is an argument based on history, yes, sir.

Mr. NADLER. All right. How much value is enough to take the place of royalty payments? How does one decide how much professional or other value is enough to obviate the need for royalty payments? How would you judge that?

Mr. NEWBERRY. I think that is the purpose of a suggested study that has been offered earlier that we had a discussion on, that there is not enough information at this point in time to identify a lot of this. I would argue that our promotional value is more than the value of the air play. I'm sure the recording industry would argue the other side. But we certainly would support a study to learn more information on that.

Mr. NADLER. Should such a principle be extended to other industries?

Mr. NEWBERRY. Sir?

Mr. NADLER. Would the same principle be valid in any other industry in your opinion?

Mr. NEWBERRY. I think it is risky to make a blanket statement because the metrics and the way that each business operates is different.

Mr. NADLER. Can you think of any other industry where this might be a valid principle?

Mr. NEWBERRY. I'm sure I could. I haven't given any time to think of it in that context.

Mr. NADLER. You cite a study by Dr. James Dertouzos in your written testimony that regular air play increases music sales.

Mr. NEWBERRY. Yes, sir.

Mr. NADLER. According to another of our witnesses, Professor Liebowitz, Dr. Dertouzos was hired by the NAB, a fact not included in your prepared statement; is that correct?

Mr. NEWBERRY. Yes, sir, he was.

Mr. NADLER. Now, Professor Liebowitz conducted an economic study and concluded that not only did radio not increase music sales but caused them to drop. The NAB called the study—you called the study bogus. But according to Professor Liebowitz, the methodologies employed by him and Dr. Dertouzos, who came out with the conclusions you liked, were similar methodologies. How would you differentiate their methodologies? And if you can't, why would you consider one bogus and one valid?

Mr. NEWBERRY. Well, Professor Liebowitz' testimony that he had earlier today is basically making the argument that there are 24 hours in a day.

Mr. NADLER. Do you doubt that argument?

Mr. NEWBERRY. No, sir, I don't deny that. It is a very valid argument. But he also makes—goes back and says, if radio were to not be there. And he talks about, what would happen—that is the reality of where we were. If TV were not there, if movie theaters were not there, if schools were not there, our children would have a lot more time for physical education. That does not necessarily mean it is a valid argument of why you should do away with schools. So we have——

Mr. NADLER. I'm sorry. You lost me. You went too fast.

Mr. NEWBERRY. There is X amount of time in a given day for someone to listen to recorded material or for them to listen to the radio or for them to go out and buy. That is the point of his study.

You can make that same argument by saying there are only X number of hours in the day for a child. If we have them going to school, they can't exercise as much. That doesn't mean that school is a bad thing. And I'm saying—I stand by my point. There is a limited amount of time. There is a limited amount of inventory. I think that the study does not take into account the value of the promotional ad—promotional incentives radio play brings to the recording industry. And for him to say that radio has dropped the amount of record sales based on what occurred in 1930, I don't disagree with that. But I think it is out of connection with what is occurring in today's society.

Mr. NADLER. Would you comment, Professor Liebowitz, please?

Mr. LIEBOWITZ. Yeah, thank you. I suspect—and I don't blame Mr. Newberry—that he hasn't read my paper or Professor Dertouzos' because it is very hard to understand what is in those papers if you're not an economist.

In fact, we used a similar methodology. We looked at 100 different cities. I have two papers. This is the econometrics paper. I looked at 100 different cities and looked from 1998 to 2003 to see how record sales changed and radio listening changed. He took the period 2004 to 2006, took the same 100 cities, did a very similar thing with some slightly different variables in terms of how he measured radio usage basically. We got completely opposite results from one another, even when he said he was trying to emulate as closely as possible exactly how I did mine.

Now, when you have differences that are that great, it is very unlikely that the slight years that we used that were different would be the cause. My guess is that one of us has made a mistake, that there is a problem with the data. Because you don't get results so black and white unless there is an error usually. So I suggested to him that we exchange the data to see if we could figure out who has made the mistake. He said he would be happy to do that, but the NAB wouldn't allow him to do that.

Mr. NEWBERRY. I will be glad to do that——

Mr. LIEBOWITZ. That's where we are with that.

Mr. NADLER. Mr. Newberry, Professor Liebowitz is saying in effect that the NAB wouldn't allow Professor—Dr. Dertouzos to share the data; is that correct?

Mr. NEWBERRY. The data belongs to the Arbitron Company. Our license did not allow us to distribute that. It is available if anyone—if the professor would like to get it, it is readily available from the Arbitron Company.

Mr. NADLER. Professor?

Mr. LIEBOWITZ. Yeah, that is conceivable. See, I have data from the Arbitron Company as well. I don't have a time restriction. They say they do. I don't deny—doubt that. But you don't recreate someone's study from scratch if you just want to find out where the error is. What you do is you take what they have, and actually, a methodology that is relatively recent that the profession has come up with to try to be able to check the work of different scholars in leading journals now. You have to provide the data and you have to say how you created the data and you have to give all the formulas that you used in the statistical package to show how you got your results because otherwise there would be so much work for

someone to recreate someone—effort that nobody would ever bother doing it. So to say, oh, yeah, I could go and get all the data from scratch for the years he did and redo it——

Mr. NADLER. What I don't understand is, if you can get the data from Arbitron and if Mr. Newberry—the NAB's objection is that the data is from Arbitron, I don't understand why there is a problem with allowing—first of all, I'm missing something. You can get the same data from Arbitron that he won't give you?

Mr. LIEBOWITZ. I'm not sure it is exactly the same. I had it for different years that he does.

Mr. NADLER. If Arbitron doesn't mind their data being given out, though, Mr. Newberry, why can't you give or the NAB allow Dr. Dertouzos to show his data and so everybody can compare it? That is a normal scientific method.

Mr. NEWBERRY. We bought the data for a specific use, and that's what our license of the data was. I don't know what Arbitron——

Mr. NADLER. Would you ask them?

Mr. NEWBERRY. I can certainly inquire on that, certainly.

Mr. NADLER. Because presumably if they are willing to give their data—we have got a conflict here that ought to be easily—normally if you can't reproduce results or if you get different results in any scientific experiment, you go back to the data, and the data is openly available and the peer-reviewed literature looks at it and so forth. It ought to be the same here.

Mr. PATRICK. Arbitron is a company based up in Columbia, Maryland. They are a research company. They would rather sell the same data to two different people. They are not giving NAB the right to allow anybody else to see it, other than the Dr. Dertouzos, who has been doing performance rights analysis for almost 20, almost 30 years now.

Mr. WEINER. Will they give me the data?

Mr. PATRICK. If you want to buy it.

Mr. NADLER. Let me just suggest——

Mr. LIEBOWITZ. He doesn't have acces to it anymore.

Mr. NADLER. Let me just suggest, because my time is up, I would just suggest that if the NAB wants anybody or Congress to rely on this—I mean, if you want to cite Dr. Dertouzos' study, you have to do whatever you have to do with Arbitron to make that data available so that people can look at its validity.

Thank you. I yield back.

Mr. CONYERS. The gentleman from Virginia, Bob Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Let me ask a question of all the panelists and perhaps, starting with Mr. Bainwol and just move to the—proponents of the Performance Rights Act point to the arguments that other technologies, such as Webcasters and satellite radio and others, compete with terrestrial broadcasters and provide promotional value and thus that the exemption for terrestrial broadcasters does not make sense to them. Don't these same arguments also weigh in favor of all music-delivery technologies being subject to the same standard for determining the appropriate royalty to pay the recording artist? And if so, what should the standard be?

Mr. BAINWOL. We think the concept of parity on rate standard makes sense and feel like that is the direction we are moving in, yes, sir.

Mr. GOODLATTE. Any guidance on what that standard ought to be?

Mr. BAINWOL. It ought to mimic as close as possible the free market.

Mr. GOODLATTE. Mr. Newberry?

Mr. NEWBERRY. Congressman, I hate to ask you to repeat that, but I want to make sure that I understand the question completely.

Mr. GOODLATTE. Sure. I noted that there are other forms of music being delivered, through satellite and the Internet and so on, that do pay broadcast—they pay royalties, and so the question is, going beyond the issue that you're here today about, which is, should you be paying something at all; if you do, do you think it should be standard across all the different technologies?

Mr. NEWBERRY. That's a big assumption, so I will say, assuming that if we were to have to, which I would not agree with, but I think that the business model of each of those enterprises is entirely different. Webcasters don't have any of the public service obligations that a broadcaster does. Satellite radio is a subscription service. Cable is a subscription service. So I think for you to say that an equal rate creates an equal platform is an incorrect statement.

Mr. GOODLATTE. Okay.

Professor Liebowitz.

Mr. LIEBOWITZ. In a general way, when I heard the term market, there would be a way to answer actually some of the general questions here about whether the promotional value is sufficiently high that the payment would be zero or not. And that would be better than a study, because studies are very hard to come to good definitive conclusions about that.

Provide the right so that radio can't broadcast the music without the permission of the copyright owner and see what the price is. If the broadcaster is correct, the price would be zero. If the broadcasters aren't correct, the price would be positive and the performers will get the money that they feel they deserve. And that is a way that one would like the market to work.

The reason it started might not being able to work properly in these circumstances is because there are 10,000 radio stations and there are hundreds and hundreds of thousands of songs and keeping track of what is going on at all the stations might be too difficult for that to occur.

Mr. GOODLATTE. I have to cut you off because I have got——

Mr. PATRICK. I would agree with Mr. Newberry.

Congressman, these are very different platforms. These are—I think you were out of the room for a moment. But these are very different sized businesses. And they were built on different assumptions, some subscription, some advertiser supported, and some that deliver huge promotional impact; others don't. And I don't think that the rate is necessarily the same in all cases.

Mr. GOODLATTE. True, but that is the same amongst radio stations as well, is it not? The size is different. The local contribution that they make is——

Mr. PATRICK. There is no doubt. There is no doubt that the different sized companies and different stations and different markets deliver different value to the artists.

Mr. GOODLATTE. Mr. Almeida.

Mr. ALMEIDA. I think there are two points. One is, why do the other platforms have a performance right that go to the artist? And I think that is the inequity. And I think, from our vantage point, we've been willing to sit down and negotiate over this, and what the right position is as far as that is concerned. We have been more than willing to sit down and negotiate over that. And many of your colleagues have said that is what the parties should be doing.

Mr. GOODLATTE. Mr. Corgan.

Mr. CORGAN. From my end, artistic end and somewhat label representative, free market determines value, you know. And if you can create a system that encourages hard work, which is what the free market system is supposed to do, then innovation, better programming, better stars, everybody should profit from the idea of everybody pursuing a bigger piece of the pie. It is doing the opposite. It is creating almost, like, a negative return.

Mr. GOODLATTE. Let me—Mr. Chairman, if I might, the legislation currently establishes a threshold that protects many small broadcasters from much of the uncertainty concerning the level of royalties they will be required to pay. However, I'm still not convinced that the bill strikes the right balance, and I'm particularly worried about local broadcasters who may own multiple stations and who have decided to provide robust local news and information, one of the points that has just been made, sometimes at a loss to the owner's bottom-line for that station. My concern is that these broadcasters could be forced to eliminate that robust local coverage of news in order to make ends meet with the new obligation to pay royalty fees. And I'm asking if you would agree to work with those of us who have this concern, to find a solution to this concern before the full Committee markup on this legislation?

Mr. CONYERS. I think it would be very important to do that.

Mr. GOODLATTE. Thank you, Mr. Chairman.

And with that I yield back.

Mr. CONYERS. All right.

The gentlelady from Texas, Sheila Jackson Lee.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I think this is a vitally important hearing, and I thank all of the panelists for their participation here today.

And I would like to follow up with a line of questioning that some of my colleagues who preceded me engaged in. But first I'd like to suggest that a companion body of law, patent law, that provides copyrights, I think has already laid the precedent for establishing that songs and performance, performance artists have in fact a property right. Otherwise, we would not be asking them to rush to copyright or to insist that the particular talent or the particular property be registered to be protected.

So, gentlemen, I think that we have a separate body of law, a separate process that establishes the fact that there is a property right. But saying that, I believe that we should be attempting to follow that great philosopher out in California, Brother Rodney, who said, can we all get along?

And I do think there is a common ground. And I want to compliment the Chairman because we went through this last year, Mr. Chairman.

And when we wrote this legislation, we provided—my colleague just mentioned it, Section 3, special treatment for small, noncommercial educational and religious stations because we were concerned about the group that you were speaking of, Mr. Patrick, and that we wanted to be open minded.

Let me ask, Professor—let me ask Professor Liebowitz, on the economic analysis, can we find a balance to respect the property right of performing artists but answer the questions of our good friend, Steve Newberry?

Mr. LIEBOWITZ. Well, it is always going to be the case if you have to pay for something that you didn't have to pay for before, that you're going to be worse off because you have less money than you did before.

The question is twofold. One is, should you have been paying, or is it something you should be paying regardless? And I think they have been using the property without any requirement that they get the permission of the owner, and that is very unusual.

Can you——

Ms. JACKSON LEE. You accept the premise that it is property? Go ahead.

Mr. LIEBOWITZ. Yes. When I first came across this particular market, I was astounded because I had known about the movie market, and I knew television broadcasters always had to pay to get a movie, except for that Christmas movie which apparently had the copyright expire on it. But then when I found out from radio that they didn't have to get anyone's permission, I thought that was very odd.

The payment, if it is one that is run by either the government or some sort of organization and not the market, you can certainly manage it or massage it so that certain types of broadcasters pay much less. So I have dealt with, in Canada, where I've worked with performing rights for the composers, and I know that up there, they have multiple tiers of what the payment would be for the radio broadcasters, and the various smaller broadcasters pay almost nothing. And if you're in a different classification, if you're a nonprofit broadcaster, you pay almost nothing. And then, when you get above a certain level, then you start paying the full rate.

Ms. JACKSON LEE. If I could refer you to Section 3, we attempted to craft that language. And I know that all of us, as we proceed to markup, will look at that to refine it even more. Let me thank you.

Let me go to Billy Corgan and thank you for your testimony. How do you answer the question—you own a property right. You've been hearing from the broadcasters that this is going to undermine their economic scheme. What is your response to that? What balance do you think this bill or the idea presents itself in terms of compensating the performing artists because you have a property right and balancing their needs?

Mr. CORGAN. I don't think anybody on the artistic side of the music business wants to see terrestrial radio go out of business. I can't think of anybody who would want that. I think the pro-

motional value, the significance in the culture, the local cultures, is all recognized. I don't think that is at the base of the argument. It is simply a rights issue, and then when you have—establish the rights issue, then everybody should be able to negotiate in good faith in the value of the things.

As I said before, if these—what is interesting is that it is particular performances. There is only one version of "My Girl" that people want to hear. They don't want to hear necessarily someone else's version. They want to hear that version. So——

Ms. JACKSON LEE. I think that is a good point that you're making, That there is refinement in the type of versions that belong to that particular artist.

Mr. CORGAN. So you're recognizing an accomplishment. And that accomplishment continues to have value. So if you're talking about a 40-year-old song that continues to be played, it has value.

Ms. JACKSON LEE. And so would you be accepting of a stair step—if we had to look at stair step payments based upon how long or what level, you would be open to that?

Mr. CORGAN. Yes, ma'am. Absolutely. But you just have to establish the right to be able to figure out the formulas. Nobody wants to see anybody go out of business. That would be the last thing anybody would want.

Ms. JACKSON LEE. Mr. Newberry, very quickly, do you pay for Rush Limbaugh programming?

Mr. NEWBERRY. No, ma'am.

Ms. JACKSON LEE. So is his programming free?

Mr. NEWBERRY. I don't carry Rush Limbaugh.

Ms. JACKSON LEE. No, that is not the question I'm asking. When he is played on radio stations, do the we have—do the owners pay for it?

Mr. NEWBERRY. It will vary. In some cases, it will be on a barter basis. In other cases, it will be a compensated basis. They are buying the exclusive rights to that program in their market.

Ms. JACKSON LEE. And someone considers that—whatever our disparate tastes may be, some of us may turn that programming off. It is still the property right that goes to Mr. Limbaugh; is that correct? He is assessed as a property right?

Mr. NEWBERRY. It is a product. It is a negotiation, and stations do make compensation.

Ms. JACKSON LEE. With that in mind, inasmuch as I said, there will be stations that won't have to pay for him, knowing their audience would be happy that they did not. But with respect to the music, then it equates to the similar context, can you find a compromise for us? And how do we act to protect the property right of a performing musical artist and also work with your constituents in which you have been eloquent in protecting their rights? Can you see the need, an opportunity for balance?

Mr. NEWBERRY. For me to immediately say no to you sounds as if I'm digging in and trying to be obstinate. And, Congressman, I do not mean that at all.

But I will go back to the fundamental issue that we have had an institution that has existed for years. And I certainly recognize that there are artists whose music we are playing decades after they were original hits. But many of those artists are still having

the opportunity to monetize from that. And if they are not able to do that, I would tell you that I think that is a flaw in the original recording contract that they have with their record label. So it is an imperfect system. But changing it as proposed in this particular piece of legislation I think could really upend the system that much more.

Ms. JACKSON LEE. Mr. Chairman, let me—Mr.—if you'd just finish on my last question, Mr. Bainwol. We appreciate you being here. And I'm not trying to cast dispersions, but the record industry has been mentioned quite frequently. I think both of us would be dishonest not to admit the treatment that African-American artists got in the old days, barely a nickel on profit. We can call their names, call the rolls. How do you respond to the fact that this is generated from the miscontracting that the record industry engaged in?

Mr. BAINWOL. I understand the long history here and your particular assertion about the way African-American artists were treated in the past.

I was a very good friend of Isaac Hayes, and I heard stories. And without pinning the blame on any one institution, I understand that what you are suggesting is something that we need to recognize.

What we are talking about now, though, is a bill about moving forward, and the artist community, the label community, big labels, small labels, small businesses all over this Nation are seeking just compensation for the property that we generate. And we are joined at the hip together as a creative community. Again, the labels, the artists and the musicians, and this is with an equity moving forward where there will be direct payment to the artists and to the performers.

Ms. JACKSON LEE. And that's what I want to end on. You will be not—you will allow a pure direct payment to the artist and the performer?

Mr. BAINWOL. That is stipulated in the statute, yes, ma'am.

Ms. JACKSON LEE. Do you mean the bill we have before us?

Mr. BAINWOL. Yes.

Ms. JACKSON LEE. I just want to make that clear for the record. And there will be no intervening or intervention on behalf of the company.

Mr. BAINWOL. The revenues would flow from the radio stations to Sound Exchange, direct to the performer.

Ms. JACKSON LEE. Let me thank the Chairman, and I'm happy to yield back.

Mr. CONYERS. Former judge, Ted Poe.

Mr. POE. Thank you, Mr. Chairman.

I appreciate all of you being here, especially appreciate the passion with which you try to educate us on this Committee.

Clay Walker and Tracy Byrd are both from my district, very good friends of mine. And I like them because they sing songs I understand.

But I'm also concerned about small town radio stations. I have several of those, not near as many as there used to be. And I know that they're operating on a shoestring. And when they quit operating, they go out of business or they get bought.

And I'm also concerned about the big conglomerates that are buying up all of the radio stations in the country, and we don't have the local flavor. We have somebody from New York City down there in Baytown, Texas, talking on the radio.

Be that as it may, I would hope there would be a study on this to see what the bottom line is. And also I would also hope that this could be worked out among the people involved rather than getting Congress involved in this. I really think that could happen. It reminds me of a divorce case I once saw or heard. After hearing the passionate pleas from both sides, I denied the divorce and told them they deserve each other and figure out how to stay together.

And without being harsh, I think maybe that is something that ought to happen in this situation.

I would like to know how much—I write a song, how much do I get paid to be on a radio station? How does that work mechanically? And how much do I get each time my song is played that I wrote?

Mr. NEWBERRY. Congressman, I can't tell you specifically what—I can tell you how we compensate. I can't tell you specifically how that is delineated to the individual composer.

We pay one of three rights organizations, the ASCAP, BMI and SESAC organizations are the three that we are involved with. For many years, it was a percentage of revenue. In the current license term, it is a flat fee. So that is adding further stress on the broadcast industry——

Mr. POE. What is the fee?

Mr. NEWBERRY. It will vary by market size.

Mr. POE. Give me some idea. Give me something I can understand.

Mr. NEWBERRY. Four or 5 percent generally is an approximation of what the income of the station is, but it is not based on revenue right now. I don't have the fee at the top of my head. I can certainly provide it.

Mr. POE. So 4 or 5 percent goes to the writers of the songs you play on the radio station? Approximately.

Mr. NEWBERRY. Yes, sir.

Mr. POE. Is that right, Mr. Patrick.

Mr. PATRICK. It goes to the music licensing organizations who then split it, but how each——

Mr. POE. You'll have to turn the microphone on.

Mr. PATRICK. I'm sorry. Billy may be able to explain more. Each song writer has some leverage in negotiating with how much they are going to get. It is also based on number of spins or the number of plays, and it is not just radio, BMI, SESAC—ASCAP, BMI and ASCAP are the big ones. They are pulling money from the people that have stereos in their businesses, from jukeboxes, to live performance from any number of things. And at end of the day, they ask—on the radio side, they ask us to tell them basically what songs we played in a sample week, and they go across the country and use different weeks. And at the end of the year, it is a compilation of saying it is—you know, Billy's, you know, group played X number of millions of times and that represents .9 percent of the total. And he gets—you know, they scrape off a little bit for admin-

istration, and he gets the rest of it. Now, the other issue obviously——

Mr. POE. Let me interrupt you. I want to go on to another subject since my time is limited.

Thank you, Mr. Patrick.

It seems to me that there is value in the radio station playing music. But there is also value to the performer for the music being played on the radio station. So there is value each way. And if we are talking about compensation, why aren't we talking about compensation for both? It seems like this legislation automatically devalues the value of playing it on the radio to the performer.

Would you like to comment on that, Mr. Patrick?

Mr. PATRICK. Okay——

Mr. POE. I get to pick who I want to answer the question.

Mr. CORGAN. I understand.

Mr. PATRICK. There is no doubt there is value to the artist and value to the record company when we play a song, and it is why there are—I think, in Salt Lake City, one of the stations said they have got 3,800 calls in 1 month asking—from a record company asking them to play a particular song or to play a particular artist. It happens all the time. It is why they want radio stations, why they take full page ads out in the trade press constantly, begging the radio stations to basically play music.

Mr. POE. Do they have an agent or someone that contacts the radio station, saying, hey, play Bubba's music this Friday or whatever?

Mr. PATRICK. There are independent producers that in fact—independent promotion people that in fact call the radio stations all the time. I've run radio stations where I have had to say, you can only call on Tuesday or only on Thursday because we're overwhelmed with how many calls are coming in.

Mr. POE. Mr. Newberry, let me ask you this question regarding value. Have you ever—has the industry ever put a price on the value to the performer when the song is played on radio stations?

Mr. NEWBERRY. Not that I'm aware of. And just one thing just for clarity, Mr. Patrick. We heard 3,800 in 1 month. I have since learned it is in 6 months. So I want to make sure that he is aware of that. It is a 6-month period. It is still a lot of calls.

No, sir, I'm not aware of any placement of value. You could probably do an extrapolation, but it would be—it would be an unscientific method certainly for a broadcaster from Kentucky. I'm sure there are people qualified to do that, but I'm not aware of one.

Mr. POE. Maybe the GAO study will solve that for us.

Mr. NEWBERRY. That might be a good point.

Mr. POE. Let me ask you another question, Mr. Newberry.

If what you say and Mr. Patrick say occurs and it hurts radio stations and they have to go to syndicated talk shows or whatever, would that—I mean, would that—what would happen, otherwise go out of business, you would go to a talk format where it may or may not appeal to the public?

Mr. NEWBERRY. I think what would happen is, and we talked about this when I had the opportunity to appear here earlier this year or last year, I don't think it is a case that every radio station that is playing music would disappear. But the number of stations

playing music would dramatically decrease as alternative programming was introduced.

Most of that programming is not going to originate nature from a local community. It is going to be brought in by satellite because of the economic question Mr. Watt raised earlier. So you're going to have local programming that is disappearing. You're going to have the amount of diversity of music that disappears, and you're going to have the most familiar artists that are getting played because of the business reality of the transaction, again, the unintended consequences that I spoke to in my opening testimony.

Mr. POE. Last comment, question. If we're talking about the free market. This industry is not a free market. It is regulated by Congress. And so this bill regulates the free market even more. In a true free market, there would be no—there would be a contract between the broadcasters, the radio labels, the performers, with the broadcasters. There would be a contract, and they would figure out who pays who rather than Congress saying, you pay this person every time, or in this legislation, we are flipping the legislation where we pay the opposite person. What do you think about a free market industry?

Mr. Patrick, I'll ask you, and that will be my last question.

Mr. PATRICK. We always like free market industries, and to some extent, what you are describing is some of what we have with BMI and ASCAP. We have regular, every couple of years, negotiating on behalf of the industry with them as to what the rates are going to be. And in essence, we take into account what the value that they bring and the value they bring to us.

Mr. POE. My time has expired.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. The distinguished lady from California, Maxine Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

Let me just say that this has been a very beneficial discussion here today. And I think that all of us have learned an awful lot about what is happening in this industry. Let me just cite a few of my thoughts.

Mr. Liebowitz, I don't think that, despite the fact that we respect your work, I don't think anybody here is going to believe that there is no promotional value that the performers enjoy that causes the purchase of records. Most of us believe that, when these radio stations play this music, that there are people that still go out and buy records, despite the other platforms that are being discussed here today. But to indicate that there is really no real promotional value is just hard for us to—most of us to digest.

Let me also say, to Mr. Newberry, I think you have made an excellent case here today, but none of us, I think, believe that performance artists don't deserve to be paid. We believe that they deserve to be paid. So what we have here is basically an impasse.

And Members of Congress at some point will make some decisions. Whatever the decisions are, somebody is going to benefit. I think there is a possibility that both sides could benefit, but the best way that both sides can benefit is that if both sides get together and work it out and then bring the solution to us. That would be the best of all worlds.

Let me just say to Mr. Mitch Bainwol, why—why—why should the record companies get 50 percent of the performance fees?

Mr. BAINWOL. The record companies are the investors who put money into new artists and existing artists to help make their careers go.

Ms. WATERS. Don't they charge them for that? Isn't that what some of the young artists don't understand, that all of the production, all of the clothing, all of the what have you is being charged to them and they've got to pay it? Isn't that what happens?

Mr. BAINWOL. First of all, we are talking about—when we use the phrase labels, we're really talking about copyright holders. They can be major labels. They can be small mom-and-pop individual labels. And there are thousands of those around the country. Or they can be artists who have their own—artist-owned labels. So, in this case, what we are saying is the copyright holder gets 50 percent for making the investment that sets a career in motion.

Ms. WATERS. All of those that you just described, 50 percent across the board?

Mr. BAINWOL. Fifty percent of the performance royalty, correct.

Ms. WATERS. And my question is, whether you describe that as small, individual copyright holders or the big conglomerate, they should all be treated the same, with 50 percent?

Mr. BAINWOL. The objective, both behind the language and the Constitution and behind any kind of exercise that is venture capital, is to produce more of the product. And in order to produce product, you have to be able to get a return. And in today's marketplace, where sales have diminished so much, the future of the market is in fact in performance and in access. So it is important for the folks who invest capital, whether they are big or they're small or they are the artists themselves, to develop a return on that investment so you can have more creativity.

Ms. WATERS. Am I to understand that, say, the big copyright holders who invest and who promote and who charge the artists for every aspect of the promotion and whatever they do, they are not getting a return on investment?

Mr. BAINWOL. I can tell you that sales have gone from $15 billion in 1999 to about $6 billion physical last year. When you throw in digital, it is about $9 billion. So the investment in creativity is not realizing the same return. The marketplace is fundamentally different today than it was——

Ms. WATERS. So they're not deducting this from the artists' earnings at all?

Mr. BAINWOL. No. No, ma'am.

You make an investment in an artist, and there is an advance and you pay royalties on sales. Okay? When sales diminish, there are fewer royalties to pay, and there is also less of an investment basis to invest in the next Bruce Springsteen, the next Billy Corgan.

Ms. WATERS. Well——

Mr. LIEBOWITZ. Can I respond to the question that you had about whether or not there is promotion?

Ms. WATERS. Yes.

Mr. LIEBOWITZ. I don't want you to misunderstand. I'm not saying radio doesn't promote music. It does. What I am saying is——

Ms. WATERS. You are saying that it doesn't cause the purchase of records.

Mr. LIEBOWITZ. Oh, no. What I said is the net effect overall of radio is that it causes people to spend more time listening to radio than they otherwise would and therefore less time listening to music, and therefore, the net effect is to actually hurt the sales of sound recordings. But that is because there are two effects. There is a promotional effect, which is positive, which is being used these days to determine which songs are getting the biggest sales. But then there is also the substitution effect because when you're listening to radio, you're not listening to prerecorded music. And they conflict with one another, and the question is which one is stronger——

Ms. WATERS. We are really interested in the bottom line here. There's some information that shows us that the companies, the industry solicit still radios to play their artists' recordings; is that correct?

Mr. LIEBOWITZ. That's correct.

Ms. WATERS. And they do that simply because they like to hear it or it has a bottom line for them?

Mr. LIEBOWITZ. They want to have increased sales of particular artists that they have.

Ms. WATERS. Do you think that they would continue to do that if, in fact, they did not see that the bottom line was being affected by the——

Mr. LIEBOWITZ. They can't control whether or not radio is playing records. They can't reduce the amount of time radio is on there substituting for music, substituting for prerecorded music. Because they have no control, because they don't have a property right, all they can do is say, music is going to do what it is going to do, the radio is going to substitute the way it is going to substitute and we can't control that, we want to at least have our songs, the ones that have the biggest market.

Ms. WATERS. I'm old enough to have lived through payola.

Mr. LIEBOWITZ. Yes.

Ms. WATERS. What was Payola all about?

Mr. LIEBOWITZ. Payola was all about the fact that radio stations are willing to—record companies are willing to pay radio stations——

Ms. WATERS. Why were they willing to pay them?

Mr. LIEBOWITZ. Because it helps the sales of individual songs.

But there is nothing they can do to stop the substitution effect. So they can control the size of the piece of the pie, but the record companies have no control over the size of the pie because they can't keep radio from being the size it is.

Ms. WATERS. Well, still, the bottom line is that there is value in promotions. What that value is, I don't know. I am not saying that artists should not be paid because of the promotions. I'm saying that it just should be recognized as value.

And having said that, let me just say to Mr. Corgan that your testimony here today was perhaps the best that I have heard in helping us to understand from so many vantage points that you have been able to share with us today. And so, again, I would like to see this worked out so that the artists are paid and the broad-

casters are—the problems of broadcasters are recognized in some fashion.

My bottom line on the broadcasting is this, I do not want to see small broadcasters, minority broadcasters, out of business. I think it is good for our communities. It is good for this democracy, and we must have that kind of interplay, otherwise we are at the mercy of the conglomerates who don't give a darn about some the issues that we care about. So I'm hopeful that you guys can work it out and not just leave it to us to try and figure it out.

And I yield back the balance of my time.

Mr. SHERMAN. [presiding.] Thank you.

Mr. Gohmert.

Oh, you're next? Oh.

Mr. KING. Thank you, Mr. Chair. Am I recognized?

Mr. SHERMAN. Yes, you're recognized.

Mr. KING. Thank you. I have been patiently sitting here, and I'm sure Mr. Gohmert understands—we've had our conservations, and we are both very interested in this, and we have I think shown as much interest as anyone in the Judiciary Committee today by at least the length of our presence and our attention.

I picked up a lot here. It is curious to me that we have been at this for several hours now, and the room is still full. That tells me not just that this is an important issue to this country, but there is an important broad constituency that supports each of your arguments that are before this Committee today.

I tend to revert to the Constitution and try to determine the foundation that we are acting upon here in this Judiciary Committee especially. And I know that Mr. Lungren focused on the Constitution as well.

I think there is a bit of an irony here. Article I, Section 8, the subject of our discussion here, to promote—it reads as, quote, to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, closed quote.

It is interesting to me that that is in our Constitution, Article I Section 8, just slightly above to define and punish piracies. There is a certain irony there, and it happens to be right above the power to declare war. So we know the Founders put high value on property rights, on intellectual property.

They put a couple caveats in there that we haven't discussed to much length here. One of them is the term—and I would have to look at it here—the useful—the useful arts. And that tells me that, then, that Congress has the authority to determine what is useful in the process of making a determination on what is going to be done with property rights. That is part of our subject here today, even though it has not been any part significantly that I've heard of the testimony. And I don't intend to go there. I just make that point.

And another component of this is for limited times. And that is something that didn't come clear to me.

But I wanted to follow up on the gentlelady from California's statement, and starting on my left. And that is that I expected to hear the testimony of an artist today, Mr. Corgan. And I heard the testimony of a businessman, I think, who has significant clarity in

this. So I want to ask you in this way: If you write the lyrics of a song, you can copyright those lyrics and receive compensation?

Mr. CORGAN. Yes, sir.

Mr. KING. And if you write the musical, the instrumental for a song, you can copyright the instrumental and receive compensation?

Mr. CORGAN. As an author? Or in the performance——

Mr. KING. As an author.

Mr. CORGAN. Yes, sir.

Mr. KING. And then if you write the lyrics and your base player writes the instrumental, which would be actually probably the opposite of what is likely to happen, I think, then you can join together and negotiate with a record label those copyrights to the lyrics and the instrumental that comprises a song that you have not yet performed?

Mr. CORGAN. Normally, those are internal agreements with the group or between the writers. They are not necessarily happening through the label.

Mr. KING. Fair enough. And I think you ought to have that right of contract to negotiate with whomever you're doing business with and package that up because it is more marketable as a package.

Then when you perform that song that you and your base player have written, both the lyrics and the music, and have copyrighted, well, then you receive a payment on that if you perform in concert?

Mr. CORGAN. Yes, sir.

Mr. KING. And the label markets and you get royalties off the sales of anything that might be downloaded and paid for and anything that might be a CD or a DVD?

Mr. CORGAN. That's the concept.

Mr. KING. Yes, and I did mention——

Mr. CORGAN. That is another tangent, but, yeah, that is the concept.

Mr. KING. I want to let you know, I have let the Chinese know about this.

Mr. CORGAN. Thank you. I appreciate that.

Mr. KING. And I think that it is a cost of business for them to continue to talk this thing to death. Sometime I'll take up another subject there.

So that takes us down this other way, this other thought, the other side of the right to property. Now, Mr. Patrick said that his record labels calling him on Tuesdays and Thursdays; that is the days that are allowed. And I understand that. Do they ever—and again, I turn to Mr. Patrick. Do they then ever offer to pay you to play their songs?

Mr. PATRICK. Yes. But it is illegal for us to take it unless we disclose that to the FCC. And 99 percent of all stations say they will not allow an employee to ever do that. But that is Payola.

Mr. KING. But what about the company? If you own a radio station that is grossing $1.249 million and you decide that part of your revenue stream could be to negotiate with the record label created by Mr. Corgan, who might offer to pay you to play that, today is anybody doing that?

Mr. PATRICK. Nobody—to my knowledge, nobody is doing that, sir. I think they are all scared of the Payola rules.

Mr. KING. But isn't that—aren't you talking about disc jockeys on Payola rules? And isn't it a different equation when it comes to a radio station management transaction?

Mr. PATRICK. It doesn't matter. It is the station or the individual that does it.

And could there be a world in which there was free market where Billy comes to a company and says, I've got a new release and I actually would like to buy my way on to make sure it gets enough spins, theoretically, it could.

Mr. KING. I'd just like unanimous consent to complete this line of questioning. I know my red light is up, and I'll make it brief, Mr. Chairman.

Mr. SHERMAN. Sure.

Mr. KING. Thank you. Then I just make this observation, and that is that there is value to playing songs to the emerging artist who has not yet emerged on the stage. At some point—I mean, say, if I write a song and I play it as—then there would be value in me being able to pay the radio station to play that, so that we could get to the point where it got to the other side of the equation where I could collect payment on the other side. Wouldn't it be appropriate to allow for—if we are going to pay the artists copyright or the artists who perform this and require that that be paid over the radio stations that play it, who are promoting it, shouldn't we allow stations then to collect from those that want to promote before they become a marketable commodity?

And I would ask Mr. Newberry.

Mr. NEWBERRY. What is good for the goose is good for the gander, but I don't think that is the appropriate model for anything that is based on artistic creativity and merit of the music as opposed to music that goes to the highest bidder.

I think that our industry has always operated—there are always bad apples within any sector, and we've had issues, as Congresswoman Waters mentioned earlier with Payola. I'm absolutely against anything that even hints of that. And going to the highest bidder wins in terms of who gets played I think is a very slippery slope for our industry, for the recording industry, for the artist.

Mr. SHERMAN. Thank you.

And I think just the one answer.

Mr. KING. That will be the last word. Thank you.

Mr. SHERMAN. Without objection, I'd like to enter into the record some letters the Committee has received from musicians supporting the bill, including Paul McCartney, Gloria Estefan, Brian Wilson, Ricky Martin, Celine Dion and John Legend.

Without objection, those will be part of the record.

[The information referred to follows:]

1 Soho Square · London W1D 3BQ

28 April 2008

To Whom It May Concern

I am surprised to learn that the US is out of step with the rest of the world in failing to pay artists and performers when a recording is played on the radio in the USA.

I would like to urge whoever is concerned to protect the future of music by ensuring that we pay the performers what they should be getting when a song is played on US radio.

I will therefore be signing the petition to make sure everyone knows my feelings on the subject.

Regards,

Paul McCartney

ARTISTS AND PERFORMERS WORLDWIDE ASK FOR A FAIR DEAL FROM US RADIO

Making a living from music requires talent, creativity and hard work. Artists and musicians the world over depend on the simple idea that when a radio station broadcasts our music, we are rewarded by a royalty payment. Today in the United States, the world's biggest commercial radio sector, worth 20 billion dollars, pays absolutely nothing for the performance of the music which draws its audience and drives its business. While corporate radio profits from the music we create, performers in the US and everywhere else are getting no reward for our work.

This is grossly unfair and leaves the US almost totally out of sync with the rest of the world.

From the aspiring career musician to the well-known star, performers today are being denied the payments in the US that we receive in virtually every other country in the world. No other free-market nation in Europe or North America fails to pay broadcast royalties to artists and performers. It is indeed ironic that the US government, which proudly fights to protect the rights of artists and musicians in foreign countries, is today failing artists and musicians in its own back yard.

We ask legislators in the US to deliver a fair deal for artists when their music is played on the radio. We do not seek any subsidies or special favours; all we ask for is for fair payment from the people that exploit our work to generate their own successful businesses.

Paul McCartney

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estefan enterprises inc.

I'm sorry I can't be with you in person today to testify in support of the Performance Rights Act. It is such an important piece of legislation and means so much to all performers and musicians.

Radio has supported my career from day one for which I am very grateful. I make no hesitation in acknowledging radio's value. But I also make no hesitation in asking the broadcast companies to respect the value performers bring to them, and to compensate us just as they do the creators of the other content they broadcast. Satellite radio, internet radio and cable radio all bring value to the performer, but they also compensate performers and invest in the future of music. Over the air radio should do the same. That's why I, and hundreds of other music creators, are speaking out in support of the Performance Rights Act.

I am grateful that the Performance Rights Act is sponsored by Members of both parties, in both Houses of Congress. The broad based support it is receiving is inspiring to those in the creative community who want to dedicate their lives to this profession. During this long fight for performance rights, I have asked so many people whether they think radio stations should compensate performers to use their music as they do the composers. And, invariably, the response is, "They don't pay?" I encourage you to do your own random survey; I know you will find the same result. And really, it's not so hard to understand why. How can it be that a business is able to take someone else's work without compensating the creator? After all, when you get to he bottom of it, it's the MUSIC that creates listenership for a radio station .. and it's the listenership that brings ratings to the station . .and it's the ratings that create advertising dollars. Broadcast companies are earning significant income based on our original works and performers and musicians are not in turn earning their rightful share.

When artists and musicians record a song, they give it life. It is a piece of us – a reflection of our heart and soul. When others use it, they need to respect the creator. We should be the ones who get to decide whether to give it away or whether we want to be paid. We appreciate that broadcasters believe they are promoting us, and we them. But the creator must be the one who is able to determine and negotiate the value of their music.

Really it's as simple as this: when you make something, and when people want to use it, they have to compensate you for it. This is a concept as old as…well, at least as old as broadcasting. Artists and musicians deserve no less respect than the makers of any other product. Our country sadly stands alone in the developed world with respect to the fact that performers do not get compensated when their music is used by radio stations.

For so many performers, this is about making a living. Of course, I have been blessed with the opportunity to make music and to have made a wonderful living from it. But there are so many thousands of other artists out there who have not yet achieved the level of success whereby they can earn a living for what they love to do . They have dreams and, yes, they are struggling. So many of these creators around the country can't stay in this tough business unless their work is respected and they're paid when their music is broadcasted. We simply can't afford to maintain radio's unique exemption at their expense. If they cannot afford to make music, there won't be new music for radio stations to broadcast.
It's time for all of us in the music business, performers and broadcasters, to be in business together so that we can finally create a true symbiotic relationship. Your support for the Performance Rights Act will do just that. On behalf of all of us in the music community.

Thank you.
Gloria Estefan

420 jefferson avenue miami beach, florida 33139
(305) 695-7000 Fax: (305) 534-5220

Senator Patrick Leahy
Chairman Senate Judiciary Committee
Dirksen 226
Washington DC 20510

Representative John Conyers
Chairman House Judiciary Committee
2138 Rayburn
Washington, DC 20515

Dear Chairman Leahy and Chairman Conyers:

I'm very sorry I'm not able to be in Washington today to help you with your kick off of the campaign for a fair performance right in radio. But scheduling conflicts kept me in Los Angeles.

Nevertheless, I wanted to write you to tell you how much I support this effort and thank you for what you've done to help music performers from all walks of life.

To me it's only fair that musical performers receive some form of compensation when their performances are played on radio. It's pretty simple: our hard work should be rewarded.

All the hard working performers who play with me in my band today and those I played with in the past would benefit from this proposal. So when I say this bill is only fair, I'm speaking for hundreds of performers whose names you may not know, who helped made my music what it is, and who would gain a vital source of revenue from the bills you have introduced.

I'm a proud founding artist of the MusicFIRST coalition. I wish I could be there today. But I'm there in spirit.

Brian Wilson

Brian Wilson

March 6, 2009

The Honorable John Conyers
Chairman, House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Conyers and Chairman Leahy:

I am writing to express my appreciation for your recent introduction of the Performance Rights Act, which would end the unfair exemption that U.S. radio broadcasters have enjoyed for decades from the requirement to pay artists for the music that they play.

I am proud to be a part of America's vibrant creative community, but it disheartens me to know that the United States is the only industrialized, democratized nation in the world that does not recognize a musician's right to be compensated when his music is played on the radio. Instead, radio broadcasters in this country are free to use an artist's intellectual property for their own commercial benefit, without paying a penny to the performer who creates the very content that makes their business run. This system is fundamentally unfair, and a change in the law is long overdue.

Your legislation will correct this longstanding inequity and ensure that musicians are fairly compensated for the work that they create. I am grateful for your leadership on intellectual property issues, and I hope that Congress will enact this important bill into law this year.

Sincerely,

Ricky Martin

PO Box 13345 • Santurce Sta., San Juan, Puerto Rico 00908-3345

Feeling

February 28, 2009

The Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable John Conyers, Jr.
Chairman, House Judiciary Committee
U.S. House of Representatives
2426 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Leahy and Chairman Conyers:

First of all, thank you for your extraordinary leadership and for everything you do to nurture, support, protect and advocate for music in the United States.

Most people are unaware that performing artists and musicians receive no royalties when over-the-air radio stations play their music. This amazing inequity is due to an exemption that broadcasters receive, unlike any other provider of music and unlike anywhere else in the industrialized world. The result is that tens of thousands of talented performers are not being paid for their artistic works when the songs they bring to life are used commercially.

As you know, the music industry has been hit hard over the last few years. The decline in record sales makes it that much more difficult for artists and musicians when they can't look to income from broadcast performance royalties, as artists and musicians outside the United States can. Radio stations use music to gain an audience in order to sell advertising. It is simply not right that they don't pay artists for the privilege of exploiting their creations.

Thank you so much.

Sincerely,

Celine Dion

Les Productions Feeling inc. - Feeling Productions Inc.
2540, Daniel-Johnson, # 755, Laval, Québec, Canada H7T 2S3 Tél.: (450) 978-9555 - Fax.: (450) 978-1055

March 10, 2009

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Conyers:

Thank you for holding a hearing today in the Judiciary Committee of the U.S. House of Representatives on the "Performance Rights Act." While I cannot be there in person, I am certainly there in spirit along with thousands of other performers and musicians – present, past and future – who believe creators deserve the right to be compensated for their work when it is used by radio broadcasters for their own gain. The right to negotiate for the value of what you do is an American principle that should not be lost on performers and musicians. I am so grateful that this Committee is considering legislation that will entitle artists the respect and dignity they deserve for the many contributions they give to radio and to our culture. This cause is about no less.

It truly is incredible that broadcast radio has gone so long without paying performers for use of their music. More than 20 years ago, Frank Sinatra sent a letter like this one, asking that Congress enact a performance right to protect the countless number of performers and musicians who contribute their passion and hard work to our country. Somehow, for more than half a century, broadcast radio has been allowed to use our music to build a multi-billion dollar industry without a single penny going to the performer or musician.

Broadcasters enjoy this unique status over all other radio platforms – including satellite, Internet, and cable – who all properly pay performers and musicians, and respect their work product. This unfair economic advantage for the most profitable platform makes no sense. Certainly, all radio platforms provide benefits to performers, but all except broadcast radio values the music and compensates for its use. The U.S. remains the only developed nation to deny performers a right to compensation for radio play, which results in hundreds of millions of dollars over the years owed to U.S. performers and musicians left overseas, since countries will not pay us if we do not in turn compensate their artists here.

Broadcasters are our partners. But we need for them to treat us as such, and for the law to finally reflect the true value our music provides them. After all, without music, there are no music stations.

Please help us to finally end this unjustified loophole and to properly reward the thousands of creators who have built radio's business and brightened our lives. We hope you will enact the "Performance Rights Act" into law this year.

Sincerely,

John Legend

Mr. SHERMAN. I will now recognize myself for 5 minutes.

Mr. Corgan, first, thank you for your excellent testimony, and also thank you for the effect you have had on American culture because now when people see a bald guy, they think rock star.

Mr. CORGAN. But, sir, you're not completely bald. You're not there yet.

Mr. SHERMAN. I'm not completely a rock star?

Mr. CORGAN. No, sir. No, you're not.

But we need new stars. We need new stars.

Mr. SHERMAN. Bainwol, we'll talk.

There has been some discussion as to whether the bill reflects a fair compromise between the artists and the label. It is my understanding that the artists and the labels are both behind this bill and this division; is that correct?

Mr. CORGAN. Yeah. That is the basic idea.

Mr. SHERMAN. So the attempt by those that don't want to pay anything to create a fight as between the labels and the artists or to attack the bill for being unfairly artist or unfairly label, is that—you come here as a united front?

Mr. CORGAN. Yes, sir. But can I make one comment? In the mechanical rights issue with songwriters, which was, you know, was enacted by Congress, labels have been really wishy-washy on paying the full mechanical rate. And they have used that as a negotiating tool, so if you're going to do this, if you are actually going to say it is the right thing to divide this pie 50/50, make it 50/50, don't let the labels then exert pressure on the artists to whittle down their share, which they've done in the mechanical rights issue. That is something that is very irritating to me as an artist.

Mr. BAINWOL. If I can clarify——

Mr. SHERMAN. Mr. Almedia, do you also agree that the bill has the right division between the artists and the labels?

Mr. ALMEIDA. Yes, we have come together and——

Mr. SHERMAN. Mr. Bainwol, do you agree with the bill as it is drafted and you are going to pay the full 50 percent, or are you going to be negotiating the artist down?

Mr. BAINWOL. Yes, yes, and no.

Mr. SHERMAN. So no to negotiating the artist down.

Let me move on in the questioning.

Mr. Newberry, you point out that the stations do public service. You didn't mention that you get tens of billions of dollars worth of free spectrum. And while almost all the businesses in this country perform important public service when they can, very few of them get that kind of valuable right. So the two go hand in hand.

I'd like you to imagine a big rock band entourage that goes crashing into a restaurant, eats well, and then refuses to pay. And when they refuse to pay, when they steal the food, they say, well, our business model was created on the assumption that we'd always steal food. Or times are tough; we've got to steal the food now. Or this band performs a lot of good public service, so we should be able to steal the food. Or our band is so popular, we are providing promotion to this restaurant, it is going to be the hot restaurant because we were seen here. Or our band is a small local business, so we should be able to steal food. Or we need to do a study to determine whether or not we should steal the, food and

until such time as that study is completed and agreed to by everyone as being an accurate study, we should steal the food.

In this society, do we usually allow theft on the theory that the thief is struggling or the thief is public-spirited or that somehow the victim unwillingly and without their consent benefits from the theft?

Mr. NEWBERRY. Would you like for me to answer that?

Mr. SHERMAN. Quickly.

Mr. NEWBERRY. If the restaurant went to the band 3,800 times in the course of 6 months and said, please come eat our food; we would like for you——

Mr. SHERMAN. Sir, I think that Mr. Liebowitz has well illustrated the fact that, obviously, each individual band, record label, and record has it in their interest to be played more, but in total, the industry suffers. And we've seen—I mean, I think he has illustrated that rather well.

But to say that because you get 3,800 flyers saying, come eat at the restaurant, that you get to go for free, seems a bit absurd. But I do want to shift to Mr. Liebowitz.

Mr. NEWBERRY. Well, I would also like to go on record that the assertion that it is stealing and thievery is somewhat a mischaracterization. It is an industry that has worked jointly with the radio and recording industry over the years to promote——

Mr. SHERMAN. Sir, if one of your members produces a station—produces the Limbaugh show, which I know you don't air—and I put it on my station and I run it for free, but not with the barter, I just put only my own commercials in, and I say, wait a minute, I'm helping Limbaugh become popular in my area, and he wanted to be on my show, and I'm helping his book sales, therefore I don't have to pay or provide any barter for the show, I think you would be here asking the government to enforce the rights of the station involved.

But Mr. Liebowitz, two rival studies, one is yours and one is the other's side.

They won't share the data with you. Have you shared your data with them? And have they found any holes in it?

Mr. LIEBOWITZ. Well, I offered to exchange data, and they basically said——

Mr. SHERMAN. When you say "exchange," is your willingness to share your data contingent on them providing their data?

Mr. LIEBOWITZ. Well, I wasn't sure exactly what my answer would be if they said, "Well, we will take your data, but we are not going to give you ours."

Mr. SHERMAN. I am asking the question, so tell us the answer.

Mr. LIEBOWITZ. So it never actually came up.

Mr. SHERMAN. Okay. Now it is coming up.

Mr. LIEBOWITZ. I am not sure what my answer would be.

Mr. SHERMAN. What would your answer be, Mr. Liebowitz?

Mr. LIEBOWITZ. I am a little reluctant to, sort of, let them make the final decision as to who is right and who is wrong. But if there was a third party, I certainly would be willing to——

Mr. SHERMAN. Maybe you would want to give the Committee your data. That would be the solution to this.

Mr. LIEBOWITZ. Excuse me?

Mr. SHERMAN. What?

Mr. LIEBOWITZ. I am sorry, I missed what you said. I didn't catch it.

Mr. SHERMAN. Maybe you would want to furnish to this Committee for this hearing the data——

Mr. LIEBOWITZ. Sure, I can do that.

Mr. SHERMAN [continuing]. So that everyone could then see whether either of these studies could withstand scrutiny. If your data is furnished and withstands scrutiny and their data remains hidden for reasons that have been previously talked about, then we will know which study we can rely on.

My time has expired. I believe we have Mr. Gohmert.

Mr. GOHMERT. Does that mean I am recognized?

Mr. SHERMAN. Yes, it does, for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

Of course, Rush Limbaugh has been mentioned a few times, and I guess his radio show and Al Franken's show are not exactly analogous since, you know, like, Rush's show goes on for 3 hours—and that is right—Mr. Franken's doesn't go on at all anymore. But with a 3-minute song compared to a 3-hour program, I am not sure how analogous those are.

You may have heard Howard Coble say earlier that he asked one of our Members of the Committee if that Member supported the performers or the radio stations, and the response was "yes." Well, that was me.

And I have been struggling with this a great deal. On the one hand, I represent east Texas. Most of our radio stations are very rural, and a lot of them are combined, so they might end up getting hammered for a couple of fees if this goes into effect. And they say their profit margin is so thin, especially these days with advertisers pulling out, it might just be what undoes them or sends them completely to talk radio.

And I know, in deference to my friend Ms. Waters from California, I mean, I am living proof. I have bought two albums in the last couple of months. I am one of the old guys who—I may hear it on the radio and then go to the Web site to hear a little part—"Ooh, I like that"—and then I actually go physically buy the CD. But both of them I have heard on the radio and go, "Ooh, I like that," and so I go buy it. So I know there is value in hearing things on the radio. I know there is. I hear that. And whether we can whitewash that and say that it is all a wash and that it doesn't really matter or that maybe it is costing, I don't know. But I would like to get to the bottom of it.

I was shocked when I found out that performers didn't get any cut of the royalties that were paid, because that just seemed inherently unfair. It seemed fair that the writers got that. But then I come back to—and I have been trying to do research. And, as somebody who has written songs for my wedding, for my kids and stuff, I know it is a lot of work, and especially if you are going to make it as good a product as something that people will actually buy.

But, Mr. Corgan, I go back to the record companies again. And I heard the comment that, you know, 50 percent may go to the record companies for setting a career in motion and its investment in creativity, but, as I understand it now, the artists have to go on-

line and create their own career and get enough hits to their own Web sites and their own music, and so they have set their own career in motion. Finally, somebody says, "Okay, I will help you. I will make 3,800 calls to radio stations and try to get them to play your music," or something, "try to set you in motion."

But I am wondering, I know what we have heard from people coming to our offices is that performers have really been cut in their income. But it sounds more like the record companies are suffering the biggest cut. And I am curious. I don't know who your label is, but what kind of cut does a record company normally get from a group as well established as Smashing Pumpkins?

Mr. CORGAN. Well, in our case, we are now an independent entity. We have actually decided to go without labels. So something like this——

Mr. GOHMERT. Wait. You are saying that they no longer have all this help to give you as a performer?

Mr. CORGAN. Well, we have posthumous work—oh, I didn't understand. Sorry.

Mr. GOHMERT. I am sorry. I shouldn't be sarcastic. I am sorry.

Mr. CORGAN. We are without a label now. We are completely independent. Although we——

Mr. GOHMERT. Has that devastated your sales now that you don't have a label?

Mr. CORGAN. Well, it is a new model that we are trying to arrange. And, you know, again——

Mr. GOHMERT. The fact is more performers are going with this model; isn't that correct?

Mr. CORGAN. Well, because of what I was saying to the other Congressman before, because you have less capital available to the labels and then you have less investment, what is happening now is they are putting the onus on the artists to develop their own careers and then they just cherry-pick.

Mr. GOHMERT. Right. So, as an independent now, if you put your songs on iTunes—and I haven't looked. I assume you have songs available on iTunes, right?

Mr. CORGAN. Yes, sir.

Mr. GOHMERT. What cut of that do you get?

Mr. CORGAN. Well, we actually renegotiated our contract, our old contract, if you are talking about, like, say, my old music. So we have a 50-50 cut with our old record company. But that is very novel. We had to negotiate that.

Mr. GOHMERT. As I understand it, you may be lucky to get 30, 40 percent.

Mr. CORGAN. Most artists are probably in the 20 percentile range.

Mr. GOHMERT. And then if you sign with a record label, I have been told that perhaps the record label can negotiate 60 or 70 percent for them and 30 percent for iTunes, but then the artist still gets a small cut of that, after deductions for expenses.

Mr. CORGAN. Yes, sir. But, again, in a free-market situation, the artist has the right to say no. They decide, "Well, do I want to enter into this system of opportunity?" And I think what is being argued here is, there isn't that same system of opportunity. You

know, you get the straight "no," and then there is nothing to negotiate.

Mr. GOHMERT. Okay. Well, I see my time has expired, and I am obviously not going to get 10 minutes, like my other friend from Texas. So my time has expired.

But let me just say I really appreciate everybody's input. You know, I was a judge, and we would get evidence from all sides. And I am still struggling with this issue, you know, what is fair. And so I really appreciate you all making the effort to be here and to participate. Thank you very much.

Mr. SHERMAN. I thank the gentleman from Texas and recognize the gentleman from New York.

Mr. WEINER. Thank you, Mr. Chairman.

You know, I think in this, if we divide the issue between the right and the rate, I think that the equities of the right are almost agreed to. I mean, I didn't hear too many people on this panel who didn't believe that the performers have a right to something. So I think that issue is done. So then it becomes a conversation of rate, and I think that it is much better resolved, frankly, with guidance from Congress but, frankly, letting you all work out some of these things.

I think, for example, a smart record company would probably negotiate a lower rate for an unknown artist, you know, one that they want to try to promote. I think that you might even have artists who say, "Listen, I will take a discount because I am one of the 46,000 calls to get on the air."

But if I could drill a little bit into this thing that we have glossed over, Mr. Newberry, do you believe that if you have a radio station that features Glenn Beck, do you believe you should have to pay for his programming? I mean, he, too, is benefiting from the promotion. He, too, is benefiting with his books and the marketing that he is getting for his things that are non-radio-related. As a matter of philosophy, do you believe that you should have to pay for his programming?

Mr. NEWBERRY. I don't believe I should have to pay for his programming. I believe I have the right to decide whether that is an investment or not.

Mr. WEINER. Yeah, but do you believe that he should have a right that, if you play it, he should be compensated? Do you believe that right that exists on his part?

Mr. NEWBERRY. I think that is dependent on how each model is established. So I can't say whether he has a right to do it, but if that is how he wants to set up his business, that is his problem.

Mr. WEINER. No, I am asking a different question. I am not asking about his motivation. I am asking about from your perspective. You have described that you believe—and forgive me for summarizing your position—that, since you provide such a value to performers by promoting their product, that they should not have a right to be compensated for that. Do you have the same belief about people who engage in another performance art, say, the spoken word?

Mr. NEWBERRY. I am saying that we have provided compensation to the recording artist through the promotion. I am not saying they

don't have a right to compensation. I am saying we are providing compensation.

Mr. WEINER. Do you believe the same thing exists for someone—I mean, I don't if you really don't understand my question or you are just dancing around it. But do you believe that the same circumstance exists with people like Glenn Beck, who, frankly, I believe, when I hear him on the radio, he should have to pay me, but that is a different story.

Mr. NEWBERRY. I would concur.

Mr. WEINER. But I am just asking whether you have the same—you seem to have a philosophical position that, since you provide a promotion right to the performers, that that should be in lieu of any payment you give. Do you have the same philosophical sense about the spoken word? This has come up a couple of times here. I just want to hear what your position is.

Mr. NEWBERRY. Okay, let me address it then in something—I don't carry Glenn Beck, so let me address it because Chairman Berman earlier mentioned sports. We carry sports teams that we do not provide any compensation for the broadcast. Do they have a right to that compensation? No. They come to us and say, "Listen, we have a struggling team. We have a team that would benefit from the exposure. We have a university that would benefit from the promotional value of having their games on your radio station." And they don't pay us. We make a decision, is that a programming decision, and is that something that is beneficial to our listeners.

Mr. WEINER. And so do they.

Mr. NEWBERRY. Right.

Mr. WEINER. They make that decision. But in the relationship you have with performance artists, you want to be able to decide that it is a no-compensation thing for the performers. That is the difference there.

I agree with you, Mr. Newberry. I think, as a result of this legislation, which there now seems to be emerging consensus that performers have this right, as a result of this legislation, you could well find yourself having people come to you and say, "You know what? I don't want a dime to be on your radio, so you don't have to compensate me at all, because it would be so good for me if I am going to catch up with—my artist is going to catch up with the Smashing Pumpkins that, you know what? You don't have to pay me a dime. I am going to negotiate that with you."

But the question is different that I am asking you. The New York Mets have a right to negotiate that. The Glenn Becks of the world have a right to negotiate that. The performers, in your view, just to make sure I understand, should not have that same right. Is that just a fair explanation of your position?

Mr. NEWBERRY. The system that we have under the current circumstance is not perfect. I am opposed to changing it under the proposed legislation because I think it causes unintended consequences. So, to say should that right be introduced now after 80 years of a balanced relationship, yes, sir, I disagree with your position.

Mr. WEINER. Mr. Newberry, I understand that that is the question you would like to answer. I am asking you a philosophical question, you and me, that we are not talking about 80 years of

this. And I would stipulate, to what the gentleman says, that these are tough economic times, I would stipulate to Mr. Liebowitz—I mean, God bless you, but I think it is the least newsworthy research ever, that it helps some people but basically it doesn't help other people. Like, that was interesting, but it doesn't really get to this point, which is: On a philosophical level, do you believe, today, that there is inequity there?

I mean, I think there is no doubt that all legislation involves a balance of equities and a balance of the politics. And, yes, clearly, you have a good hand you are holding, being someone who represents broadcasters from around the country. But on the equities of it, it seems that there is no really good argument except you don't want to change something for 80 years.

Mr. NEWBERRY. Would you like me to answer that?

Mr. WEINER. I would, except the gentleman two seats to your right has been gesturing that he wants to.

Mr. PATRICK. One other thing is, when you are talking about Glenn Beck or anybody else, you are talking about exclusivity, and that may be what you are paying for. You may not like him, I may not like him, but you are getting that, and 10 other stations or 50 other stations in your market don't get that. Or sports rights—only one person gets the Mets in New York, not all of the other stations.

Mr. WEINER. But, Mr. Patrick, you are right about those details, but you are missing the premise. The premise is the equity of the Mets or Glenn Beck being able to negotiate for themselves what that value terms and condition is of the performance that they are having.

You are right, there are plenty different combinations of permutations, which is why, at the end of the day when we are about to pass this, you are going to get into a room and say, "Please don't. We have worked out a deal." That is what is going to wind up happening.

Mr. SHERMAN. I think the gentleman's time has expired.

Mr. WEINER. Thank you, sir.

Mr. SHERMAN. The Chair will now recognize the gentleman from New York.

Mr. MAFFEI. Thank you, Mr. Chairman.

I do want to clarify some of the stuff that came up in Ms. Jackson Lee, the gentlewoman from Texas's testimony. And I think she was talking to Mr. Corgan, so I want to address a similar question to Mr. Bainwol.

I understand this legislation has accommodations for small commercial and noncommercial broadcasters, which would allow them to pay a lower rate than what would likely be set by the Copyright Royalty Board for large commercial stations. This is really good for districts like mine. I have a mixed district. It has a small city, it has rural areas, and we do have very small stations in my district. And even the accommodations provided in the bill might be too burdensome for them.

For instance, if a small rural station makes only about $50,000 in revenue, that might be difficult for them to afford even $5,000. And, similarly, if you look at a tiny, noncommercial station, for instance a small college radio station, that makes no money at all, $1,000 might be a little unworkable to them.

So would you be willing to consider some sort of a sliding scale that would allow even really the smallest stations—the student-run stations, the rural stations—to pay a rate that is commensurate with their actual income and ability to pay?

Mr. BAINWOL. The short answer is yes. We have been literally begging to get into a room to negotiate for a year, and we haven't found a partner with whom to negotiate.

But this is not about the small stations. We are prepared to be perfectly rational and reasonable about how this gets crafted and make any adjustments. This is about whether or not big corporate radio that is consolidated is going to make payment for the property they use to build their businesses.

Mr. MAFFEI. Okay. Mr. Newberry and Mr. Patrick, is there anything here that you could live with? Is that true?

Mr. PATRICK. I think you have hit on one thing that we had talked about earlier. The non-com stations, the little religious stations, the minority stations, and the very rural stations like Steve owns and I own——

Mr. MAFFEI. Don't forget the college stations. I used to work for one.

Mr. PATRICK. Yes—$5,000 is way too high. And I appreciate the fact that they would like to carve out a sliding scale, and what that is, who knows? That presupposes there is a right. And so far, broadcasters are not quite there yet, if they are ever going to get there.

But on the rate issue, I think you are correct. There has to be much more flexibility on that concept.

Mr. MAFFEI. Do you want to add something, Mr. Newberry?

Mr. NEWBERRY. I think it goes back—and I am not sure, Congressman, if you were here when we had the earlier discussions, but it is perplexing, as a broadcaster, the sliding scale. Is $5 better than $5,000? Sure, that is common sense, and I am not going to sit here and argue that. But there is basically a principle argument here, that if the effort is to protect the performers, if the effort is to improve the status of persons like Mr. Corgan.

There was a panel discussion that occurred just this past Friday out in Nashville. And if I could take 30 seconds to read this, because this summarizes it. It is between Blake Shelton, who is a country music performer; Heidi Newfield, who is a country music performer; and Mike Dugan, who is the president and CEO of Capitol Records in Nashville.

Mr. Shelton, talking about the performance rights debate: "I think it is a terrible idea for now. I think it is a terrible time to be even going there." Heidi Newfield: "I agree." Blake Shelton: "But, I mean, I am really rich," to which the room laughs. Mike Dugan: "There is no question that the timing of this is horrible. This would have been a much healthier conversation a couple of years ago."

Then Ms. Newfield says: "I think it also needs to start—stems from the building of a record contract. I think the artists and management and their record companies need to sit down and get real about when it comes to the bottom line of what we are actually making. There is a huge misconception of what we are making. I am $100,000 in debt, but that is the cost of doing business. It was

worth that to start over again. We need to talk about this more with our people." This is an artist saying this.

Then the president of the record label says: "There is no question that we get so much promotional value from radio. And I will tell you that, if it wasn't for radio, we would not be here." Radio also gets value from music.

Mr. MAFFEI. Okay. No, actually, I appreciate those comments. I think my problem with that is that it just doesn't seem that only the radio station should decide the promotional value of radio. It seems that that should be something that——

Mr. NEWBERRY. Well, that is from the president of a record label.

Mr. MAFFEI. Maybe so, but I might disagree with it, and other Members of this Committee might disagree with it——

Mr. NEWBERRY. I understand.

Mr. MAFFEI [continuing]. Even though he is the president of a record label. So a lot of us, I think, would just like to see both sides get together and try to decide a little bit more what the promotional value is, rather than just one side of it.

What my question is trying to get at is: Obviously, the promotional value is much less if you run a tiny college station or a station that doesn't bring in more than $25,000 or $30,000 a year, so trying to get to a sliding scale would seem fair on both sides of that.

My time has expired, but I do want to make the point, though, that what we are looking for here is some sort of a way to find something that both sides can live with. And, you know, clearly, as has been said before, folks deserve to be compensated for their work. On the other hand, there might be a promotional value here. I just don't know if only one side of the debate should decide what that promotional value is.

Thank you, Mr. Chairman.

Mr. SHERMAN. I thank the gentleman from New York.

And there, for a while, I thought the joy would end, but the music goes on. The gentleman from Texas is recognized, should he wish to be.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. I rushed back. I am sure you think I have the most exciting question to pose, but not really. I think everything has been said in one form or another.

But the concern and the difficulty we all have, especially on this Committee, with so many lawyers, is that we recognize a right, but it may be a right without rights or an unprotectable right. And that is a very foreign concept to us. That is why we are having such difficulty here.

Then the question comes in the marketplace: How does that unprotectable right or the right without rights for so many years become protectable? And there is some sort of compensation for that particular right or for the acknowledgment of it.

And I apologize. I had to run up here.

The only way that you can justify the continuation—because you lose on the fairness argument, but you would have to say that the promotional value is the compensation, that the promotional value is the subsidy. Conceptually, you have to meet that first argument. And it is going to be very difficult, because I have, obviously, a dif-

ference of opinion as to whether that is true or not. And that jury is still out, are we going to have an independent study, and so on? At the end of this whole process, who knows? But I am not really certain where we are today, despite the testimony of Professor Liebowitz.

The fallback position, to continue the status quo, is to say it will be the demise of radio station using the public airwaves. And I find great value in—whether it is television or whether it is radio, it is the only direct link that government has when it comes to communication out there, because of the use of the public airwaves. To diminish it in any capacity diminishes the ability for us to represent the best interests of our constituents. And I really look at it that way. I have made this argument before on Energy and Commerce when it comes to telecommunications, the Internet and so on, cable, satellite and such, as opposed to over-the-air broadcasters. So the real question is, where are we today?

There is one aspect—and I am not sure, Mr. Chairman, whether it was covered in my absence—there is one school of thought of, why this now? I recognize that I think the performers and artists should be compensated. It really is a foreign concept to me that they are not and have not been, but I am willing to listen to that argument that has been advanced in the past and that was advanced here today.

There is another argument—and I am not sure if this is true or not, maybe the professor and Mr. Patrick and others can enlighten me on it—and that is that maybe there is greater emphasis on it today because there is no single platform, Mr. Bainwol, as you had pointed out. And because of that, it is a whole new dynamic out there. So if you download, if you share, if you are part of all the tremendous piracy that goes on out there, where does the performer then realize just compensation? And that now, because it is not just one platform and because of technology, they have to make up that revenue stream elsewhere and maybe look to the radio stations.

Can I have any comments regarding that particular thought that is out there and is being expressed? And I think I will start with Mr. Newberry.

Mr. NEWBERRY. I concur. I think that the record labels and the performers have been dealing with a very unfortunate circumstance of business that has occurred since the Internet and since downloading. I am sure that there are thousands of people who would like to say, "Man, we really wish we could go back and change the way we handled the digital transition and the way we handled the whole issue of downloads." The model did not work.

Our industry is absolutely against piracy. We want to do everything that we can to protect the integrity of those works. But it is a feeling of, "Look, the model has collapsed around, so we are going to turn and go back toward the one source of consistent revenue where we know where it is, instead of finding ways to adapt to an expanding platform."

Mr. GONZALEZ. Well, Mr. Bainwol—and, of course, I sense that you are going to disagree with Mr. Newberry—but what about the argument simply that, if you can' control it in another delivery system—I don't know what we want to call everything that is out

there—that you have to go to that which maybe is more accessible? At this point, it would be compensation from the radio stations.

Mr. BAINWOL. This issue is not about piracy. This issue is about a fundamental change in the nature of consumption of music. And in the old days—and I think our friends, the broadcasters, are nostalgically clinging to an American-pie past. We are not in the old days where you turn on the radio and you buy a piece of plastic. Today's model is entirely different. It is multiple platforms broadcasting music, with consumers, instead of buying music, accessing music and listening to performances, whether it is on YouTube, whether it is on Pandora, whether it is on cable TV, whether it is on their iPod. It is all about access and listening to performance.

If we care about creativity and we care about creating an investment basis for the next generation of art, then we have to find a way to make sure that we connect to the emerging model. That means performance. In that context, having the single biggest platform enjoy a benefit relative to Pandora, relative to Real Networks, relative to any of the other DiMA companies, makes absolutely no sense to the integrity of the marketplace or to fairness for creators.

Mr. GONZALEZ. Well, do you think we would be here today had it not been for these new platforms?

Mr. BAINWOL. I think the new platforms dramatize why this is so outrageous as a matter of equity.

And the other point here that I think is critical is the argument that this is symbiotic gets totally blown away with the question that Mr. Weiner was going through, where we don't get to participate in this question of balance. They get to take our property, use it, and we can't say no. They call it symbiotic; I call that a taking.

Mr. GONZALEZ. My time is up, Mr. Chairman.

Mr. SHERMAN. I thank the gentleman from Texas.

At the request of the Committee counsel, I have one clarifying question.

Mr. Newberry and Mr. Bainwol, are you folks willing to sit down and negotiate, yes or no?

Mr. BAINWOL. I would like to have lunch first, but yes.

Mr. NEWBERRY. No, sir. We remain opposed to this legislation. To negotiate on that we think is counter to the interests of our industry and service to the public.

Mr. SHERMAN. Don't slit your throat, but don't do it here. Thank you.

[Whereupon, at 1:34 p.m., the Committee was adjourned.]

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