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MARKUP OF H.R. 4789,
THE "PERFORMANCE RIGHTS ACT"
Thursday, June 26, 2008
House of Representatives,
Subcommittee on Courts, the
Internet, and Intellectual Property,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:39 a.m.,
in Room 2237, Rayburn House Office Building, Hon. Howard L.
Berman [chairman of the subcommittee] presiding.

Present: Representatives Berman, Conyers, Wexler,
Watt, Jackson Lee, Cohen, Johnson, Sherman, Weiner, Schiff,
Lofgren, Sutton, Coble, Feeney, Smith, Sensenbrenner,
Gallegly, Goodlatte, Chabot, Keller, Issa, and Pence.

Staff Present: Shanna Winters, Counsel; Rosalind

Jackson, Professional Staff Member; David Whitney, Minority Counsel; and Blaine Merritt, Minority Counsel.

Mr. Berman. The committee will come to order.

I would like to welcome everyone.

And, without objection, the Chair is authorized to declare a recess.

Pursuant to notice, I call up the bill, H.R. 4789, the "Performance Rights Act," for the purposes of mark up.

The Clerk will report the bill.

The Clerk. "H.R. 4789, a bill to provide parity in radio performance rights under title 17, United States Code, and for other purposes."

[The information follows:]

***** INSERT 1-1 *****

Mr. Berman. Without objection, the bill will be considered as read and open for amendment at any point.

If there is no objection, I would like to waive opening statements at this point, call up the manager's amendment, and then we could have the opening statements on the manager's amendment.

Seeing no one complaining, the Clerk will report the manager's amendment.

The Clerk. "Amendment to H.R. 4789, offered by Mr. Berman of California and Ms. Jackson Lee of Texas. Section 5(a) is amended to read as follows: (a) Preservation of Royalties on Underlying Works --"

[The information follows:]

***** INSERT 1-2 *****

Mr. Berman. Without objection, the amendment will be considered as read.

And I recognize myself in support of the amendment.

We have discussed the provisions and rationale of the underlying bill a number of times previously, as recently as several weeks ago at our hearing, so let me talk briefly about the manager's amendment.

My position has always been that we not adversely affect the creators of a musical composition. While the bill accomplishes this goal, the songwriters have requested additional language to serve as belt and suspenders. And I would like to, without objection, add their letter to the record at this point of this markup.

[The information follows:]

***** COMMITTEE INSERT *****

Mr. Berman. We have included the amendments they have requested which relate to establishing this right. But I do want to point out that some of the language appears to be redundant and, also, that the term "music user" serves as a placeholder for now.

In addition to ensuring that performers are fully able to benefit from this legislation, we have included two additional amendments.

The first is a codification of an agreement from 1994 among the major record companies, AFTRA, and the American Federation of Musicians. It will require payment by the labels to the unions equal to 1 percent of royalties from uses outside this statutory license -- for example, interactive transmissions -- for distribution to non-featured performers.

The second provides for direct payment to SoundExchange of 50 percent of any monies due pursuant to an agreement between the label and broadcaster for over-the-air performances that fall outside the statutory license. This language requires the broadcaster to pay 50 percent directly to SoundExchange rather than have that portion pass through the labels and potentially be recouped.

Perhaps most importantly, though, I want to reflect on what is not addressed in the manager's amendment but are

issues that I think we should be considering during the process and between subcommittee and full committee.

The first is that the point has been made in the past, and I think there is something to it, that the small broadcaster who has revenues of \$1 million, still under the \$1.2 million cap, but \$1 million, paired with the broadcaster who generates only \$80,000 or \$100,000 in annual revenue, under the bill as it is presently written both have to pay \$5,000.

I think we ought to contemplate the notion of some kind of bifurcation or sliding scale so that the one who is making a much smaller amount of revenue perhaps pays something less than that \$5,000. And that is one issue I would like to leave to work on and do a reasonable kind of substitute between now and full committee, assuming we get out of here today.

The second is the issue of, we call it a cliff, or it is a vertical climb, when a broadcaster who is producing \$1.24 million in revenue is paying \$5,000 a year, and then the broadcaster who is making \$1.26 million a year, in effect \$2,000 a year more, is paying the full royalty rates. Perhaps there should be some transition up to the full rate for the people in between.

Third, this is an issue that Mr. Goodlatte and others have raised. In the wake of all the consolidation in

broadcasting, are there policies that we should be considering to incentivize those that are maintaining the local aspect of broadcasting, not only in the music they play but in the news and the media? This is an issue I would like to pay attention to, but I think we have to do that very carefully.

And there is an issue raised that I think is legitimate: Why should the owners and creators of sound recordings be the -- if we, as a Federal Government, want to incentivize maintaining that kind of local broadcasting, should they be subsidizing it? But this is an issue I hope to work on between now and full committee.

And then the final issue is the issue raised by our colleague, Zoe Lofgren. She would like to see some additional issues addressed in the context of 114 reform, greater platform parity and other kinds of issues here. I think this is our large conversation. Without belaboring all of the lengthy discussions that have already gone on, I believe there will be more, and I would like to focus on that issue between now and the full committee.

Finally, one challenge in crafting the bill and the manager's amendment has been that the broadcasters have refused to acknowledge there may be a sum above zero that they would be willing to pay. I am hoping between subcommittee and full committee that that position will

change. And I would love to have discussions and for the committee to have discussions with them about finding a compromise.

So I ask my colleagues to support the manager's amendment.

And I would also be grateful if they would refrain from offering any additional amendments at this point.

Mr. Goodlatte. Would the chairman yield?

Mr. Berman. Sure.

Mr. Goodlatte. I thank the chairman for yielding.

I do have an amendment which I will offer later, but I wanted to ask you about another point that you raised that I think is a valid one.

You noted that there is a potential disparity in the smaller stations, and you want to address that disparity. However, that disparity exists above that amount as well. So that when you have, as you noted, a station that is making slightly above \$1.25 million receiving a rate that is to be determined -- and there is a process for that in the bill but not a determination -- why is it that we are setting rates for the smaller stations and not for the somewhat less small stations and intermediate-size stations, setting those rates there as well?

I mean, it seems to me that we are leaving a whole lot of uncertainty in this process if you are giving a very

definite rate for smaller stations, which I think is helpful to the process, but you are leaving the rest of it totally undetermined.

Mr. Berman. Just to reclaim my time, the whole point of this is to create a -- it is impossible for radio stations, really -- and that has been the whole logic behind the rate court in terms of rates for musical compositions, copyright royalty tribunals, and other rate-settings mechanisms for satellite radio and Internet webcasters, creating a mechanism. And what we were doing, really, was trying to acknowledge that, establishing the principle, you have to pay for the property that belongs to someone else that you are using, but for the small guys, to try and provide them a notion that in no event will they have to pay more than X, but not to move away from the general rate setting.

I do take the point that there are people just above the \$1.25 million, perhaps, where I don't think you want to start setting rates for everything or else you -- we are not the body to be able to do that, but to create some transitional mechanism. So for whatever rate is set, either the rate-setting tribunal will note the need for a transition from partial to full-rate payments for those people who are just above that line.

But I just don't think we are the body to be

fundamentally setting these rates. The notion of having to sit through the hearings just scares me to death, as well as bores me to death. How do you value promotion? How do you -- you know. And I think there is a place for this.

Mr. Goodlatte. If the chairman might yield just briefly.

Mr. Berman. My time is -- boy, is it expired.

Mr. Goodlatte. I just want to share that I share your concerns about those things, but I also believe that we are moving into a very unknown area here with businesses that are long-established under a different practice. And if we don't take those things into account, we may be creating some serious difficulties for a lot of radio stations that have legitimately existed under a previous environment.

Mr. Berman. All right. Well, just -- I think I have to recognize the others, but just one last sentence.

I think the people who make the rate perhaps should be mandated to take that into account. I just don't think we should be the rate-setting body.

At this point, I would like to recognize our ranking member, Mr. Coble, for an opening statement.

Mr. Coble. Thank you, Mr. Chairman. I move to strike the last word.

Mr. Chairman, as you know, earlier this month, I declared my decision to support the Performance Rights Act

when it is presented for markup in the subcommittee, as is the case today. I continue to support the bill, as well as the decision to move forward on this legislation.

That said, I consider the bill to be a work in progress that will require a great deal more coordination and compromise before we have a consensus product for consideration before the full committee.

I am specifically concerned, Mr. Chairman, and have previously shared my view that some of the language in the manager's amendment may be imprecise, unnecessary, or may even lead to unintended consequences. I appreciate your willingness, however, Mr. Chairman, to consider substantially revising or deleting problem language as we move forward.

I do not intend to offer any amendments today, and I intend to vote for the manager's amendment. And furthermore, Mr. Chairman, to facilitate the process, I intend to vote against other amendments that might be offered even if I might agree with some of the substantive concerns of the authors, in the hopes of working to address these specific concerns prior to full committee action.

Going forward, I plan to work with Chairman Berman in the hopes that we can both be enthusiastic in support of the bill and the decision on the appropriate time to advance to the next step in this process.

Not unlike other members of the subcommittee, I do have unresolved questions that I hope we will be able to address about the timing and implementation of the changes proposed in the bill. As I have previously stated, the idea of continuing this exemption in perpetuity just does not strike me as the right thing to do. But neither should we repeal a policy that has profited, to be fair, both broadcasters and recording artists without ensuring that we have fully considered all legitimate points of view and taken them into proper account prior to implementing our new approach.

Mr. Chairman, you are to be commended for leading the subcommittee to this point. I hope that all interested stakeholders in this issue who have been invited to sit at the table as the subcommittee assesses the changes that are needed will take full advantage of this opportunity. And the sooner good-faith negotiations begin, the better.

And I thank you, Mr. Chairman, and yield back my time.

Mr. Sensenbrenner. May I? Will the gentleman yield?

Mr. Coble. Yes.

Mr. Sensenbrenner. First of all, let me associate myself with the gentleman's remarks. I intend to support the manager's amendment, support moving the bill to full committee, and oppose all other amendments, but not making an assessment as to the merits of the other amendments.

But I do want to issue a word of caution. No

intellectual property revision has been enacted into law for at least the last 50 years that at least is not opposed by all stakeholders. Now, not being opposed is not the same as being supported by all stakeholders. And I would hope, as we are going through this thicket -- and that is what it is -- that this committee will not make the same mistake that it made with the patent reform bill, where we did not have all interested stakeholders onboard, it was jammed through the committee and jammed through the House of Representatives, and ended up dying a rather ignominious death in the United States Senate.

There is a further concern that I have, and that is that if we do not have the patience to at least get everybody not opposed to this bill, we will end up having the Senate write the final version. And I have never been very impressed with their work product on intellectual property or probably anything else.

So I would hope that this would be a message to the stakeholders that the time has come to sit down and start negotiating in good faith, because the train is starting to leave the station, and people being onboard that train will end up getting a better deal in the end.

I thank the gentleman for yielding, and I yield back.

Mr. Coble. I reclaim and yield back.

Mr. Berman. The time of the gentleman is expired.

The chairman of the committee is recognized for an opening statement on the Berman-Jackson Lee manager's amendment.

Chairman Conyers. Thank you, Chairman Berman.

What a wonderful morning this is. The bipartisanship is on full display. Standing room only. The offices on K Street and Pennsylvania Avenue and Georgetown emptied out all to be here.

[Laughter.]

Former members of the Judiciary staff are present. This is wonderful.

Mr. Berman. Only in America.

Chairman Conyers. Only on the Judiciary Committee do you get this kind of bipartisanship flowing. Only because the current system is not fair and must be changed. That is what we are here to work out.

And I appreciate all of the previous comments. The Chairman Emeritus has given us some experienced words of caution. The distinguished gentleman from North Carolina has weighed in. I wait with anticipation the ranking member of the full Committee on Judiciary's comments.

The whole idea is to get some justice for recording artists, musicians and performers. Historic event? Yes. So I want to move it forward.

I ask unanimous consent that my remarks be included in

the record.

But I just wanted to -- I am not dropping names now, but there are some real people behind this. And I don't want you to raise your hand; this is not an exam or anything. But who remembers Ruth Brown and Billy Eckstine and Sarah Vaughan and Ella Fitzgerald? And, coming into the present, Mary Wilson with the Supremes? Bebe Winans? Martha Reeves, now a councilwoman in Detroit? All of those folks, present and gone on to their reward, have been lobbying this committee for years on this subject.

And so I am happy that we are here to discuss this with our broadcaster friends, with RIAA, with the American Federation of Musicians. There is a certain guy out there in a seersucker suit in the first row, watching over these proceedings. And this is very important.

And I hope that we can work with the other body. The Senate is becoming more cooperative of late. I am very pleased with the results, especially with our corresponding committee of the Senate Judiciary.

So I congratulate all the members for being here and recognizing the importance of the subject matter of a little justice for the people.

I remember the old days, they used to tell a performer, "You are lucky we are playing your record. We are giving you great advertising." And as they were spinning, these

guys died frequently in impoverished circumstances. And so this is a great moment for all of our performers to this great American music that is now celebrated around the world.

[The information follows:]

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Mr. Berman. I thank the gentleman.

And I would like to recognize the ranking member of the committee, my cosponsor of the manager's amendment.

Because there is another markup, I would be very grateful if members would use -- we could vote on the manager's amendment and members could use the motion to strike the last word as the basis for making any opening stage or comments they have on this, and take whatever amendments are offered in regular order, but hold off from doing opening statements beyond the two individuals I have mentioned.

The ranking member of the full committee, Mr. Smith, is recognized for 5 minutes.

Mr. Smith. Thank you, Mr. Chairman.

The issue with H.R. 4789, the Performance Rights Act, is the extent to which sound recordings should be protected by copyright law. Unlike musical works, which have been subject to a full right of public performance for more than a century, sound recordings have only enjoyed legal protection under the Copyright Act since 1971.

Amending the law to require full statutory performance right for sound recordings is a change that has been sought by performing artists in the record industry for many years. Arguably, the most significant limitations on the

performance right for sound recordings are the provisions in the Copyright Act that exempt terrestrial radio stations from the obligation to pay royalties. This practice has been national policy since the beginning of the radio age.

Constituents in my own congressional district have an interest in all aspects of our current policy. I represent Clear Channel Communications, the largest and most successful operator of terrestrial radio stations, as well as a number of smaller radio station operators. And I also represent thousands of copyright owners, including hundreds of performing artists who are among the most talented and accomplished in the world.

On one hand, it seems obvious that performing artists, particularly those who have an active recording contract, do benefit from having their songs heard repeatedly on the radio, for example. On the other hand, copyright owners are generally entitled to exercise their exclusive rights to license the use and distribution, including public performance, of their works.

The reality is that copyright law does make distinctions among classes of owners and types of technologies with respect to both the entitlement to receive and the obligation to pay royalties. Whether or not these distinctions are sensible and justified as sound copyright policy is likely to be the focus of the Judiciary Committee

for some time to come.

The decisions we make in Congress impact the lives of real individuals and industries, and the effects, even when unintended, are often harmful and lasting. Before Congress chooses to act or withhold action, we have an obligation to ensure that all legitimate concerns are fairly addressed.

Mr. Chairman, I appreciate the steps you and other sponsors of this bill have taken to mitigate foreseeable harmful impacts on both copyright owners and users. My own view is that we need to discuss these issues further and not be hasty in seeking to enact this particular piece of legislation.

Thank you, Mr. Chairman. I will yield back.

Mr. Berman. I thank the gentleman.

Again, I meant to say I would recognize the gentlelady, the cosponsor of the manager's amendment, from Texas, and my cosponsor of the bill, Mr. Issa from California. But he has a thick skin, and he is used to my unintended slights.

Mr. Issa. Never offended, Mr. Chairman.

Mr. Berman. The gentlelady from Texas is recognized.

Ms. Jackson Lee. I thank the chairman very much, and I ask to strike the last word.

Mr. Berman. The gentlelady is recognized for 5 minutes.

Ms. Jackson Lee. Thank you very much.

I would like to quote a very famous philosopher lodged in your great State, Mr. Chairman, and that is, "Can we all get along?" We might remember that quote, and it might be helpful to us this morning.

And I really want to thank you for reaching out on H.R. 4789, the Performance Rights Act. And I support the bill. I believe that we can get along, we can find balance. And I believe that I have been redundant in that refrain. And so I want to continue to work with all of the parties who are in this room.

And for those of you who have heard the litany of names being called out by our chairman of the full committee, for those of you who are familiar with the gospel genre, you would recognize what Walter and Edwin Hawkins did to "Oh, Happy Day," maybe some of the songs of Yolanda Adams, "Just As I Am," and Sandy Patti. And so we know that we can get along, between those who play the music and those who sing the music.

There are benefits and drawbacks of extending the scope of public performance rights to terrestrial broadcast performances. However, I know that these benefits and drawbacks can be balanced.

We recognize that, under current law, owners of underlying musical works, i.e., the lyrics and musical notations, who in most cases include the songwriter or the

music publisher, are entitled to receive royalties from statutory licenses for the public performance of their works in terrestrial radio broadcasts. However, the copyright owners of sound recordings and the artists featured in the sound recordings do not have a comparable right to royalties for the public performance of their work in terrestrial radio broadcasts. That is simply what we are trying to do.

This is in contrast to certain digital broadcasts of songs, including cable, satellite or webcasts, where the songwriters, performing artists and copyright holders of sound recordings are typically entitled to public performance royalties.

So specifically, H.R. 4789 requires terrestrial radio stations to pay performance royalties to the owner of the copyright and the performer of the music whenever the artist's music is played over the radio.

I will ask unanimous consent that my entire statement be included, but let me speak specifically to the question of the manager's amendment.

I worked closely with Chairman Berman to develop and strengthen the protection for songwriters and owners of musical works. Importantly, the amendment clarifies that license fees payable for the public performance of sound recordings may not be cited, taken into account, or otherwise used to set or adjust the license fees to be paid

for the public performance rights of musical works.

We will look at this long and hard as we move toward full committee. The manager's amendment requires all public performances of a sound recording to be subject to a license granted by the owner of the copyrighted musical work or a performing society that represents the musical work copyright owner.

Lastly, I worked with Chairman Berman to ensure that broadcasters are required to pay performers 50 percent of the new public performance royalties. There are ways of making sure that this is a balanced aspect.

I will not offer amendments at this committee, but I am looking at and interested in the cap on the stations that are paying the \$5,000 flat fee, and wondering whether or not there are small stations that are not included in this particular cap. And we want to address that question.

I also want to make sure an amendment to do more to ensure royalties are paid to performers. And, Mr. Chairman, I would like to submit into the record an article, "Record Labels Must Pay Shortchanged Performers," May 5, 2004, where it indicated that, among the artists that could not be found or due money, were Mr. Bowie, \$10,698; Dolly Parton, \$7,568; Willie Nelson, Tom Jones, Public Enemy.

I ask unanimous consent that this be submitted into the record.

Mr. Berman. Without objection, it will be included in the record.

[The information follows:]

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Ms. Jackson Lee. And then I would be interested in an amendment moving toward platform parity. My final amendment may be more of a statement. I believe that Congress, in the interest of fairness and consistency, should look to creating a notion of platform parity with respect to a number of other disciplines. Terrestrial, cable, satellite and Internet all play music, and the performance royalties paid across each platform should be harmonized and should, therefore, be the same. I am raising a discussion that I hope we will take toward the full committee.

But in conclusion, let me suggest to my colleagues something that the chairman has indicated and that we have been working on this question or hearing about this question for a very long time. And I would like to indicate that Mary Wilson called, and many of you know her association on her own talent, but her affiliation with the original Supremes and the wonderful music and excitement and joy all of their music brought to America. There are still a few of us kicking around the Motown sound, and particularly the Supremes.

And I only say that to say that we should pass this legislation and manager's amendment based upon the joy that we have received when we hear these songs being sung. And if anyone is unjoyful, then they obviously will take issue

with this legislation, and maybe some will run out of the room. But I think if this bill is tested by a joy measure and exercise that one gets from dancing, then, Mr. Chairman, I think we will be moving in the right track and we all will get along.

I ask my colleagues to support the manager's amendment, and I yield back.

[The information follows:]

***** COMMITTEE INSERT *****

Mr. Berman. The time of the gentlelady has expired.

The gentleman from California, Mr. Issa.

Mr. Issa. Thank you, Mr. Chairman.

And I, too, could offer a great many names, but I will limit myself to Harry Chapin, Jim Croce, Janis Joplin and Buddy Holly, just so I balance off the music for today with the full committee chairman's.

And, by the way, a show of hands, how many people would have raised for those?

If I do John B. Sebastian, do I get a couple? There we go. Yes.

Okay. Look, there are so many names of so many people who, for so long, the answer to what you get paid for your performance is zero, that it has made so little sense for so long, that it is time.

The Chairman Emeritus did a great job of talking about how, if we set rates, and nothing has ever happened, and don't trust the Senate. And all of that is true. I am here to say that.

But the time has come for us to realize that, as we go into the final digital push for terrestrial radio, we have to make a decision: Do we continue to have what is effectively a Government-sanctioned anti-trust advantage?

And the full committee chairman has left, but the fact

is, we hold hearings on people who want to merge two small, you know, 5-million-subscriber, paying-full-royalties companies, XM and Sirius, because it might actually be anti-competitive. But, of course, it isn't anti-competitive to the performers who are receiving significant royalties for their works as they are played on hundreds of channels. And yet, we turn around and say, but it is anti-competitive for that. Well, one can put the shoe on the other foot. And I have friends at the broadcasters, and I hope I continue to in the future have them. I don't know that I do today, but in the future.

The fact is, if you come in and say, that is monopolistic, to bring two companies together -- and I recused myself from that debate, and I am glad I did -- but now that that is sort of behind us, let's be honest. Something is very anti-competitive about that form of broadcasting paying significant royalties while, in fact, another form, clearly competing, says, our free competes against their pay; and our no pay of performance competes against their pay for performance. That is what we are trying to resolve here today.

I won't be offering an amendment to simply strike the prohibition on receiving royalties. And that is essentially what we could do. We could simply take the performers out and say, let the courts decide. We could tell the

performers that they ought to get to the Supreme Court and say that this is an anti-trust activity, and they might. But both of these would take a long time and produce litigation. I share with the chairman the desire to find a non-litigation solution.

Later today, I will offer en bloc and withdraw -- or maybe I will just talk about it now. Which would you prefer, Chairman?

Mr. Berman. I think now is better.

Mr. Issa. Now is better.

Okay, then I have six amendments at the desk, which will be distributed to the K Street crowd and not, in fact, offered to the committee today --

[Laughter.]

-- that start off by saying that, for the next 10 years, we are going to have a 7.5 percent royalty to all the broadcasters for it, then a 6.5 percent, then a 5.5 percent, then a 4.5 percent, then a 3.5 percent -- do I sound like I am getting desperate? -- 3.5 percent, then a 2.5 percent. And we get to the bottom of the stack, 1.5 percent, and then a 0.5 percent.

We could also offer amendments that said, if you tell us the title, the album and the artist, we will give you a better rate. So we could have a split decision.

Now, I would love to offer those amendments, and I hope

to be able to do one of them at the full committee with bipartisan support, including the chairman. But because there has been no response from the other side, other than "free is the right price," we find ourselves unable to pick any of these.

Now, I am not saying that there should be negotiation on every bill, but this is clearly an opportunity to say, do you want us to pick the number? Do you want the Copyright Board to pick the number? Or do you want to find and come forward with a soft landing that says, "Look, we are in a tough time, this is a transition time; we would like to work together on something which fits our business model"?

So I won't be offering these or any other amendments today. But it is very clear that instead of my saying, I would like to offer amendments, to who? Nobody agrees. I can't blame the performers for saying that they like 7.5 and they wouldn't like the 0.5, but the fact is, I can't negotiate with just one side, and neither can the chairman.

So, as we go through today's markup, it is going to be quick and it is going to be substantially what you see here before you on the manager's amendment. When we get to full committee, it is my fervent hope that, in fact, we will have at least had a dialogue leading to a business model that works for terrestrial broadcasters as they go into a digital age.

Mr. Chairman, I truly appreciate the opportunity to make an opening statement and to talk about what I will not do here today.

I will only close with one thing.

Mr. Berman. Since the gentleman is so accommodating in only doing a virtual offering of six amendments, I give him unanimous consent for an additional 2 minutes.

Mr. Issa. I will use less than that.

For every terrestrial broadcaster out there, and for Rush Limbaugh, I would suggest the following: If it is fair to say that you are promoting in order to get no rate, then every station should start taking the best of Rush Limbaugh, putting it out there for an hour or 2 a day, paying nothing. Because, in fact, once it has been performed once, why wouldn't it be driving people to buy the "best of" album from Rush? You know, he actually offers that. You can get --

Mr. Berman. Will the gentleman yield?

Mr. Issa. Yes, Mr. Chairman.

Mr. Berman. That would truly be an appeal to a niche market, wouldn't it?

[Laughter.]

Mr. Issa. But the idea, in closing, that, in fact, what is produced by radio stations somehow should be their property while, in fact, what is produced by others becomes

the property for no pay by radio stations is part of the very thing that the broadcasters have to argue against, that what they produce they control, whether it is a baseball game they did or, in fact, Rush Limbaugh or some other niche performer. And that is the craziness that we are faced with.

So please understand, we don't want to make a decision. We want a decision made that both sides will be equally unhappy with.

And, with that, Mr. Chairman, I yield back the additional time you gave me and support the bill.

Mr. Berman. The gentleman's time has expired.

Without objection, other members' statements will be included in the record.

The question is on the amendment.

Those in favor, say, "Aye."

Mr. Keller. Mr. Chairman? Mr. Chairman? Is this our only chance to speak?

Mr. Berman. No. No, no, no. We just want to pass the manager's amendment, and then --

Mr. Keller. Okay.

Mr. Berman. Great.

Those in favor, say, "Aye."

Opposed, "No."

The ayes have it. The amendment is agreed to.

And does any other member have an amendment?

Ms. Lofgren. I will just move to strike the last word.

Mr. Berman. The gentlelady is recognized for 5 minutes.

Ms. Lofgren. Thank you, Mr. Chairman.

As I mentioned when we had our hearing, I have a concern that parity and genuine fairness will not be achieved until we resolve the imperiled state of Internet radio in the wake of the Copyright Royalty Board's decision. And at our hearing, I mentioned that if we are looking for equality, we should include Internet radio. They are the most endangered, and some Internet radio providers are facing extinction because of the Copyright Royalty Board's decision.

I gave serious consideration to offering an amendment today to address this issue, but I have had the opportunity, Mr. Chairman, to talk with you. I very much appreciate your reaching out to me and your commitment to work to bring a resolution to the dispute over royalty rates for Internet radio. Your personal involvement in resolving that is important to me. And I prefer that approach because, in rate setting, as in most matters, a negotiated solution is preferable usually to a legislative solution.

So I am not going to offer any amendments at this time. I reserve the right to offer amendments at the full

committee, if these efforts to resolve the Internet radio situation are not successful.

I would offer any support I can to you, Mr. Chairman, in the efforts that you are engaging on. I have heard from all of the parties, indicating that they are serious, that they intend a good-faith effort. And I take those reassurances seriously. And so I am hopeful that, by the time we get to the full committee, that piece of this puzzle will be resolved. And I hope that it is so.

And I thank you for your efforts and your reassurances, and, at this point, would yield back.

Mr. Berman. The time of the gentlelady has expired. The gentleman from Florida, Mr. Feeney.

Mr. Feeney. Thank you, Mr. Chairman.

Mr. Chairman, I had a couple meritorious amendments, but some of the most respected and senior members of this committee indicated that, no matter how meritorious an amendment was, that today they would be opposing it.

Mr. Berman. On the merits.

[Laughter.]

Mr. Feeney. That is right. And given that fact, I appreciate what the chairman and the committee are trying to do, and will be happy to postpone my offering these amendments until the full committee.

I will say at the outset that I am persuaded that there

is a property right that singers have that has not been recognized. I think that early on in the days of radio, that there was enormous benefits, and we had, of course, artists and singers paying to get their music on the radio, and so those benefits the free market recognized. In some cases, it was illegal, but payments were made in any event. And I do think that this committee has an obligation to recognize individual property rights wherever they occur. And so I applaud the committee for what it is doing.

Having said that, without going into any of the great details, it has really taken decades, four or five decades, for the situation to evolve where technology and other opportunities have perhaps diminished the original benefit that singers got from having their work played on the radio. And I do think it is unfair for people with business plans, people that do a lot of local news, people that do a lot of sacrifices for their communities, to have their business plan thrown out the window and essentially have a confiscatory burden placed on them to set a lack of historical acknowledgment of the intellectual property, to set that straight.

And so one of the things that I think is very important is that we phase in over time any of the payment schedules that either we agree on or that we have a third-party arbitration panel establish. I think it would be very

important for people that have business plans to have an opportunity to accommodate a new piece of obligation that they would have that has not been historically recognized but, in my view, ought to be.

And secondly, I also think there is still a great benefit to those new, aspiring singers who haven't been on the radio or haven't had their new work on the radio. I am more concerned about the folks whose music is still being played from 10, 20, 30, 40 years ago who have received nothing in return after they finished doing their tour or after they finished their original record sales.

So I do believe that, for example, the first 120 days of a singer's work might be exempted from any payment schedule, so that we would give an opportunity for new artists to get on the radio. There would be an incentive for the radio broadcasters to play new works, but, ultimately, if that work does become popular and a success, there should be some reimbursement.

So those are two key concerns that I have. I look forward to working with the chairman and the leadership of this committee. And I probably would oppose the bill if we took a roll-call vote in its current form. But I hope to get this bill into a position where I can enthusiastically embrace it, because I think the fundamental issue is is there a property right, and I believe that there is.

With that, I yield back the balance of my time.

Mr. Issa. Does the gentleman yield?

Mr. Feeney. I would be happy to yield.

Mr. Issa. I think that the gentleman's comments are, in fact, meritorious in the spirit of all parties coming to the table and saying we need these in our business model. And I would hope that the gentleman, between now and the full committee markup, would work together to reach out to those people that need to say, this is what we need. I think all of your suggestions are excellent.

I yield back. Thank you.

Mr. Feeney. Reclaiming my time, I agree with the gentleman. I think that the experts in the field can do a much better job of managing the details of how to put together a piece of legislation than this committee can. But if it can't be done, then, you know, I think the sentiment on this committee is very strongly that we will do it if they don't.

With that, I yield back the balance of my time.

Mr. Berman. The time of the gentleman has expired.

Mr. Watt, you are recognized. For what purpose?

Mr. Watt. I move to strike the last word.

Mr. Berman. The gentleman is recognized for 5 minutes.

Mr. Watt. Thank you, Mr. Chairman. And thank you for all the effort that you have put into this issue.

As you are aware, I am a strong supporter of the performance right and of artists being compensated for the work that they perform.

As I looked at the original bill, there were two concerns that continue to be raised that I thought deserved additional attention.

One of those concerns I believe you have addressed in the manager's amendment. And that is the concern that some people were raising that the artist still may not get the full benefit of the performance right because they could contract it away to the recording company or the record label or to others; and that we ought, perhaps, if we could, do something to protect against that possibility.

I think you have addressed that or at least moved substantially in the direction of addressing that issue in the manager's amendment. And between now and the full committee markup, we can look more aggressively at what you have done on that in the manager's amendment to make sure that it does effectively address the concern that was being raised.

The second issue --

Mr. Berman. Will the gentleman yield just on that point?

Mr. Watt. Yes, I will be happy to yield to the chairman.

Mr. Berman. We definitely deal with the direct licensing situation on the manager's amendment.

As to the items covered under the statutory license, there are these side agreements. And I guess the question you are having is to what extent should those be sort of codified, regarding -- to reach the goal that we share about the real enforceable right of the recording artists and musicians and the others to get what this bill is laying out.

Mr. Watt. My concern is that if this is absolutely about rewarding the artist, we want to make sure, to the extent that we can legally do that, make sure that that objective is accomplished and that artists still don't end up, as some have, in the later stages of their lives without any means of income.

I realize that there are limitations, or may be limitations, on the extent to which we have the ability to protect against contracting away some of those things. But we need to continue to look at that, and I am committed to doing that between now and the full committee.

The second issue is one that I actually thought Mr. Goodlatte was going to address, and I kind of took a step back because I thought he was working on the issue. And that is the concern that has been raised by smaller broadcasters about the economic impact of this bill on their

survival.

And I thought Mr. Goodlatte was going to address it. The amendment that he may or may not offer today doesn't really address that issue in a way that I think it needs to be addressed. I am not sure exactly how to address it.

The concern I raise is that we have put a figure on page 2 of the original bill of \$1,250,000 of gross revenues and a royalty fee of \$5,000 per year, which are fixed in the statute. And I am not sure that those are the magic figures to protect small broadcasters. And I am not sure that the \$5,000-a-year figure maybe shouldn't be a maximum figure, as opposed to a fixed fee, because there are a lot of smaller broadcasters down at the bottom of the food chain that even a \$5,000 annual fee -- and the way the bill is written now, the original bill, it actually set a royalty fee of \$5,000. It wasn't up to \$5,000, with somebody else reviewing or setting a formula that might fluctuate for small broadcasters.

Mr. Berman. I ask unanimous consent that the gentleman have an additional minute. And when he is done, I would ask him to yield on that issue.

Mr. Watt. I just think that is an issue that we need to look at between now and full committee. And I will be happy to yield to the Chair.

Mr. Berman. The only two of the three benchmarks you

cited are arbitrary from this bill. The \$5,000 is an arbitrary figure; the \$1,000 is an arbitrary figure. The \$1.25 million is the line set to distinguish between webcasters and small webcasters, so that was an arbitrary decision at some other time that we have just incorporated.

[Laughter.]

Mr. Watt. Well, I know that there quite often is a level of arbitrariness in the things that we do. But we are trying to get some figures on what the actual experiences are out there from the broadcasters. And if they are listening, I hope they will help us by giving us those figures. Because the objective here is not to drive people out of business or make it impossible for them to survive. The objective is not to drive the performers out of business and not to make it impossible for them to survive. We want everybody to be able to survive in this new environment.

And we will be looking at those two issues aggressively between now and the full committee.

And I appreciate the gentleman. I am with him this morning, and I will probably be with him all the way through the process.

RPTS CASWELL

DCMN SMITH

Mr. Berman. I thank the gentleman. The time of the gentleman has expired.

Mr. Goodlatte. Mr. Chairman.

Mr. Berman. The gentleman from Virginia.

Mr. Berman. Thank you, Mr. Chairman. I do have an amendment at the desk.

Mr. Berman. The gentleman is recognized for 5 minutes --

Mr. Goodlatte. I would ask the clerk.

Mr. Berman. The clerk should distribute the amendment.

The Clerk. Amendment to H.R. 4789, offered by Mr. Goodlatte of California.

[The information follows:]

***** INSERT 2-1 *****

Mr. Goodlatte. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Mr. Berman. Without objection, the amendment is considered as read.

The gentleman is recognized for 5 minutes.

Mr. Goodlatte. Thank you, Mr. Chairman.

I am proceeding a little differently than everybody I have listened to ahead of time, because unlike my good friend from California, I do believe the amendment should be distributed to the members of the Intellectual Property Subcommittee. I am sure the folks in the audience will have an opportunity to see it as well, but I want the members to consider it.

Mr. Chairman, I support the principle underlying your bill, and accordingly, I will support reporting the legislation out of the committee.

I support the manager's amendment and voted for it. I support the concerns raised by a multitude of folks that there is much more work to be done. I guess my disappointment lies in the fact that this is, indeed, the Intellectual Property Subcommittee, and it would have been my hope that we would have addressed a number of these very substantive concerns in the committee before advancing legislation.

I, in fact, made a commitment to some of the people that I represent in my congressional district that I would attempt to do so. So I have, accordingly, offered the amendment.

However, sharing the concern of the gentleman from Florida, Mr. Feeney, that members of the panel have indicated that they would vote against amendments offered other than the manager's amendment, regardless of the merit, I will not ask for a vote on the amendment, and will subsequently ask that it be withdrawn.

But I hope that we might have some further discussion on my concern, which relates very much to the matter raised by the gentleman from North Carolina and goes beyond it.

I also share the concern raised by the gentlewoman from California with regard to Internet radio and hope that we can find a vehicle to address that. That concern goes directly to the ultimate way that this is resolved, and that is through a rate-setting board that, in that case, has created more problems so far than it has resolved.

Therefore, it is my hope that we will take a much more careful look at what we do in this process before we turn it over to negotiations, to rate-setting boards, to others, because I think there is a lot at stake here.

The difference between this and Internet radio is that this is a long, long, long established medium for utilizing

the works of creative artists who, I definitely agree, should be rewarded for their work, particularly now that the environment has changed, now that we have Internet radio, satellite radio and others who are paying royalties.

This industry, I think, is going to have to address that as well, and I hope that negotiations are successful in doing so.

But there are many implications here for not just the smallest of radio stations, but what I would call medium-sized radio stations, particularly in smaller- to medium-sized markets, that are very much clustered around a group of stations, one of which is often a news and local information station, which is operated by the owner of that station at or below cost and supported by the music stations that surround it.

This value of having local ownership of radio stations, when we have seen tremendous consolidation in this industry, with out-of-town ownership of radio stations, the loss of that local news and information operated by local owners concerns me and has caused me, therefore, to offer this amendment, which would essentially cut the -- whatever the rate is set, would cut it in half for stations up to \$5 million in gross revenues.

I think that is something that needs to be very, very carefully considered by this committee, because I think that

we are going to see, in communities like those that I represent, and in thousands of other communities around the country, a consolidation of radio stations, a loss of local ownership of radio stations and an impact on local communities that I don't think -- those who are supportive, as I am, of seeing that royalties are paid to performing artists and the owners of the music that is utilized -- will have that impact.

So, therefore, I offer this amendment.

Mr. Berman. The time of the gentleman has expired.

You are withdrawing your amendment?

Mr. Goodlatte. If there is no comment, I will withdraw the amendment unless, Mr. Chairman, has something to say.

Mr. Berman. Well, I think you raise legitimate points. Obviously, I am concerned about -- I will recognize myself just in opposition to the amendment.

What I am worried about are individual carve-outs, and I think we want to -- some of the issues you raise, I think we are going to try to find a coherent way, because ultimately the result of individual carve-outs is, we will have one very major, well-known company paying the fee and somebody will want to eliminate them for the bill, and no one will be left. So it goes down a slippery road that way.

I would rather sort of figure out what the policy in some of these areas that you have raised should be, and then

deal with it in that context rather than some combination of numbers of stations and where they are located. Because some of those values regarding, say, local broadcasting, apply to an owner of stations that might be in ten communities rather than one, or five communities rather than one. Maybe the logic should apply there as well.

Mr. Goodlatte. Well, if the gentleman would yield, I actually agree with that sentiment.

I do not view it as a carve-out, however, because this would apply uniformly to any community, anywhere in the country, that meets this criteria. I believe there would be a great many that would meet this criteria. And it also does not eliminate the responsibility for making payments; it simply moves in the direction that I think the overall bill should move in, which is in a graduated scale. You have recognized that for stations below \$1.25 million.

Quite frankly, using that figure, coming from where the Internet radio benchmark was set is really very different for people who own buildings and towers and so on which these radio stations have traditionally operated in communities, and that \$1.25 million figure may be very arbitrary in this particular environment.

So whether this amendment hits it exactly right or whether there are additional factors that ought to be put into this, I think is very valid, and I would like to work

with the chairman and other members of the committee to accomplish that goal.

But I do think the principle that you put into the bill below \$1.25 million and acknowledged more work needed to be done between a very tiny station and a station at \$1.24 million, carries above that figure and ought to be addressed in this legislation as well.

Mr. Watt. Would the chairman yield?

Mr. Berman. I would be happy to.

Mr. Watt. I just wanted to weigh in briefly on this, because I am not sure. I have been thinking about this a lot.

I am not sure this committee is ever going to be able to set this, and I recognize the \$1.25 million figure was arbitrarily set somewhere else. That might have to remain a fixed figure, just to make it equal across different -- but I do think there probably needs to be more flexibility in the language up to that in the \$5,000 fee, and we have got to figure out somebody other than us who can set that in some fair manner.

Because if we get into trying to set that in the bill, I mean, how do you arrive at -- I mean, it is just not -- there ought to be some, I think, some general principles that guide somebody other than us in setting, for small stations, that fee. The \$5,000 probably should be the

maximum.

But that is kind of where I am thinking about, and I am testing this out in a public forum so people can start to react to it, since we are going to be working on it.

I agree with the Chair that if we start doing it the way Mr. Goodlatte has done it, that there will be all kinds of different categories that you wouldn't call a carve-out, but in effect, create a kind of carve-out.

Mr. Berman. Then we would be appropriators.

Mr. Watt. Yes.

Mr. Berman. But -- okay, if I owned a radio station that on December 29 or December 30 got the check that put me from 2.49 to 2.51 from the advertiser, I think I would send the check back, because -- so, I take this notion of transitions, when you have to have figures, and I also accept very much the notion that ultimately a group of experts focused on this should be making the decision.

My time has expired.

Any other speakers on this amendment?

Mr. Keller. Mr. Chairman, I move to strike the last word.

Mr. Berman. Would the gentleman insist on a vote on his amendment?

Mr. Goodlatte. If he is wanting to speak on this amendment.

Mr. Keller. No, I want to speak on the underlying bill.

Ms. Jackson Lee. Mr. Chairman, I just want to put on the record that I think data collecting is going to be very important in however we determine. And if we do an outside body, astute analysis of the appropriate outside body is going to be enormously important.

So I raise the fact that the FCC may not be the appropriate body and may need to be a new creature of our statutory legislation.

With that, Mr. Chairman, I yield back.

Mr. Berman. Without unanimous consent, the amendment is withdrawn.

The gentleman from Tennessee.

Mr. Cohen. Thank you, Mr. Chairman. I didn't really seek recognition.

Mr. Berman. In that case, withdrawn -- the gentleman is recognized.

Mr. Cohen. I was going to associate myself with your remarks and those of the chairman and add to the litany of performers, everybody from Memphis that has been overlooked, Stax, Soulsville, and Sun.

"Gee Whiz," Carla Thomas, should have been mentioned; and as "we do the funky chicken," we need to remember Rufus Thomas.

Mr. Berman. Does the gentleman from Florida seek recognition?

Mr. Keller. Yes, I move to strike the last word.

Mr. Berman. The gentleman is recognized for 5 minutes.

Mr. Keller. Mr. Chairman, I am very concerned about intellectual rights, whether they are rights belonging to songwriters, singers, companies, record labels, whoever.

Those who follow this issue closely know there is one and only one antipiracy bill moving through this Congress and will become law in a matter of months, and that is legislation that I authored to crack down on the illegal downloading of music on college campuses, which is in the Higher Education Act, currently in conference, because I put it there.

Some of the people that are champions of your bill, Mr. Berman, are among my favorite people on a personal level to deal with in the past 8 years in Washington, D.C. Let me just raise some concerns that I have, and I am going to start general and then be very specific.

If I had a German Shepherd guard dog, I would hope that this dog would bite the leg of the robber, not bite the hand of the one who feeds it.

In this case, I believe the robbers are the pirates who are illegally stealing songs and music. I believe the local radio stations had nothing whatsoever to do with this

piracy, and they are the ones, in fact, feeding the record sales and the concert ticket sales by their free air play and their free promotions.

Now there is a challenge about going after these pirates. The pirates are 100 percent liable, but they often have little assets. Often it is a 19-year-old kid in college or some criminal in China that is hard to track down. On the other hand, these large radio stations have very deep pockets; they are easy to track down, but they have no liability whatsoever for the main problem that these record labels are facing, and that is piracy.

So I have looked at every single document from both sides, gathered a lot more from independent sources. I have listened to every witness. I have just asked myself some basic questions.

First, is it true that record sales are increased by the free air play of songs on local radio stations?

Second, is it true that concert sales go up as a result of free concert promotions provided by the free air play?

Third, is it true when more people go to concerts, does that result in higher merchandising sales?

Fourth, is it true that the record labels and the artist both benefit from higher record sales, higher concert sales and higher merchandising sales?

Fifth, are these benefits so great that the record

labels would pay the local radio stations, if they could, to get their songs on the air?

In the interest of straight talk, the answer to each one of those questions is yes, yes, yes, yes, yes, and yes.

Now, when I hear the other side today in our hearing, they tried to minimize that: Oh, payola was something that happened in the 1950s, and there is really not as much benefit these days.

Nancy Sinatra had a number one hit, and I said, do you think you benefited by that number one hit by the free air play on the radio? Well, I don't know. I don't know.

Well, here is some straight talk. Payola is the practice by which record labels and promoters offer money and other gifts in exchange for broadcast air time for particular songs. I am not hitting the record companies. It is wrong for broadcasters to accept, and it is wrong for them to offer it.

In September 2006 a payola scandal was so large in New York that it resulted in settlement fines of \$4.25 million and settlement agreements by four record companies and a major radio broadcaster with the New York attorney general's office and required them to stop paying and stop receiving payola.

One radio station, according to the public records, had a program director who received \$93,000 from the record

labels in just 1 year for adding songs to the play list. That is page 12 of the complaint, New York vs. Intercom. Here is the e-mail exchange that I got from these public records.

The program director from WKSC wrote, "Do you need help on Jessica Simpson this week? It is \$1250. If you don't need help, I certainly don't need to play it."

Record company promoter, "\$1250, that's fine with me. Can I put it on the board?" Page 11, public records, New York State v. Intercom.

ABC News reported on February 8, 2006 -- in a story called "Pay to Play: Music Industry's Dirty Little Secret," ABC reporter Brian Ross said "Music industry officials told Primetime, ABC News, that, 'Millions of dollars in payments, gifts and trips are exchanged each year to get more stations to add songs to their weekly play lists.' In fact, this resulted in a major settlement only 10 months later on December 27, 2006."

So don't tell me that there is no benefit to these artists when they have their songs played on the radio if it is so valuable that they are willing to break the law to pay to get them on the air.

My challenge with this legislation is, it completely ignores this benefit and seeks to minimize it. That is what I think is unfair, and that is why they are not coming to

the table as of right now.

Those are my concerns.

I have some thoughts about amendments, but my time has expired. Out of respect to you and our ranking member, I won't offer them today, but they are something I will bring up, or think about bringing up, at the full committee level.

Mr. Chairman, I yield back the balance of my time.

Mr. Berman. The time of the gentleman has expired.

The gentleman from California, for what purpose do you seek recognition?

Mr. Schiff. Mr. Chairman, I move to strike the last word.

Mr. Berman. The gentleman from California is recognized for 5 minutes.

Mr. Schiff. Thank you, Mr. Chairman. I will try to take less than that amount of time.

I think by the amount of air time that we have all consumed on this already, you would think that all the members already had public performance broadcast rights.

Mr. Berman. Depends on listenership.

Mr. Schiff. I didn't say we would get rich from it, but I wanted to speak briefly in support of the bill and also the manager's amendment.

I think the fact that we don't compensate performers and the owners of the copyright for sound recordings for

industrial broadcast is an anachronism. It is inconsistent with how we treat digital transmissions. It is inconsistent with how the rest of the world treats terrestrial broadcast.

The fact that it is an anachronism hasn't made it any easier to get rid of. Given the opposition that has been manifest already, it will continue to be a challenge. But I think, both in the interest of equity and the interest of harmonizing our laws with those around the world, it makes a great deal of sense.

There have been a number of concerns raised about different provisions in the bill, and I want to compliment you, Mr. Chairman, for addressing many of them in the manager's amendment, in particular, the language that clarifies that license fees payable for public performance of sound recordings can't be cited or taken into account or otherwise used to set or adjust the license fees to be paid for public performance rights earned by others. I think it is enormously important to songwriters, and I would appreciate the work that you put into that provision.

I know there are other efforts that will be made in the full committee. I look forward to working with you on those issues and amendments.

But I want to thank you, Mr. Chairman, for raising this difficult issue and moving it forward. I support it completely and urge my colleagues to do the same.

Mr. Chairman, I yield back the balance of my time.

Mr. Berman. The time of the gentleman has expired.

The gentleman from Indiana, Mr. Pence.

Mr. Pence. I have got to move that.

Mr. Berman. Ordinarily, I think we all understand.

Mr. Pence. Ordinarily, I will like to be associated with his name and his accounts.

I move to strike the last word.

Mr. Berman. The gentleman from Indiana is recognized for 5 minutes.

Mr. Pence. But not today.

I rise -- I want to say that I don't have any intention of standing in the way at the subcommittee level, and I am very grateful for the hard and bipartisan work that has been done on this legislation.

I would like to add to the record some concerns that I have.

Mr. Schiff spoke, I thought eloquently, about an anachronism. I don't really take issue with that; to understand that we have a lack of harmony with the laws around the globe relative to royalties for performers and sound recordings is something that I recognize. But I do want to strongly associate myself with Mr. Keller's concerns about the balance of this legislation that I don't believe yet has been reached in a way that reflects the best

interests of both ends of this argument.

Let me say, with respect to the gentlelady from Texas who said that if we had joy, we would support this bill. Well, this conservative never takes joy in passing government mandates or expanding the scope in the reach of government.

That is where I come to this with some hesitation today. I understand both sides of the entertainment economy are hurting. On the performance side, I have worked with many on this committee on both sides of the aisle to combat piracy. I think it is the principal villain that actually brings us to this room.

I recognize that listening habits are changing. CD sales are down. Consumers of music have all kinds of new options. On the broadcast side, quite frankly, local radio has new competitors for listeners, a multitude of choices that local terrestrial broadcasters never faced before.

The word is, the Federal Communications Commission is preparing to introduce a whole new range of red tape and regulation, forcing diversity, greater emphasis on local issues. Yesterday, the Speaker of the House announced her support for returning the Fairness Doctrine to the laws of the land, an anachronistic regime that governed content of broadcast radio for four decades in this country.

So I understand there are pressures on both sides. My

concern, Mr. Chairman, is that I don't believe the Performance Rights Act has equitably yet balanced the interests of both sides.

I would like to suggest an alternative business model. It derives from comments that I made in our committee hearing not long ago and may well take the form of an amendment that I seek support for in the full committee. It has to do with my principle that you shouldn't muzzle the ox when he is treading out the grain. You know, it may well be that the ox ought to have to pay for what he gets to pull in the wagon. We may reach that point now for terrestrial radio, but I would suggest to you that in this download digital age, the ox ought to be able to have a little bit of taste of the proceeds that results from the promotion that occurs from having one's records played on the radio.

It seems to me that there would be a way that, if we are to in effect require terrestrial radio stations to pay performance rights -- Mr. Issa and I have talked about this privately -- that in this digital download age we ought to think about allowing those radio stations to participate in the revenue stream that is demonstrably, directly connected to the airtime on that radio station.

It does seem to me -- I mean my kids don't buy records in stores anymore; my three teenagers just download what they are interested in. Well, I know that iTunes knows

where they live and probably, with very little trouble, could indicate where they heard that song on the radio.

It seems to me that there is a model here where we could mitigate the financial impact of these new performance fees on radio stations, not just by creating the arbitrary cutoff that the gentleman from North Carolina referred to, which I appreciate -- I appreciate the arbitrary restrictions for larger broadcasters and smaller broadcasters, that protection. But the true mitigation here would be to compensate the performer, but then allow the radio station to realize on some small portion of the revenues that are directly attributable to the promotional value that is associated in that area of demographic influence and that radio station.

So it seems to me that as we move to harmonize our laws with each other in this country, recognizing the disparity between digital performance rights and satellite versus terrestrial -- and harmonizing with the rest of the world -- that we might, as Americans always do, think about even a better business model, a better mousetrap than the rest of the world, that says that we ought to consider a model where everybody wins; that the promotional value that comes from airing on a radio station -- a country radio station in Indiana could be that radio station -- and paying the performance fees on the front end could have a shot at

sharing in that area of demographic influence with the revenues that proceed from that promotion.

So I don't have an amendment for you today, Mr. Chairman, but we are thinking through that, thinking through a better business model here, and we will be prepared to come to the committee with some additional thoughts and perhaps proposals in that regard in full committee.

Mr. Berman. I thank the gentleman. The time of the gentleman has expired.

The gentleman from Georgia, Mr. Johnson.

Mr. Johnson. Mr. Chairman, I move to strike the last word.

Mr. Berman. The gentleman from Georgia is recognized for 5 minutes.

Mr. Johnson. Thank you, Mr. Chairman, we have had a wonderful time today, laughing and reminiscing, but let us not forget about the poor broadcasters who are going to really suffer as a result of passage of this measure.

There are going to be some adjustments and some pains that our poor broadcasters, despite consolidation of that industry, will experience. I think that we should really keep in mind how much they will suffer.

But now I am also concerned about, there is a 79-year-old lady out in Seattle; she is a jazz performer. I

think her name might have been Ruth Brown, but I read about her this week. This lady has recorded, she is like a two-, three-time Grammy nominee, and 79 years old, living in the family homestead home that she has lived in, I think, since 1945. She got caught up in one of those predatory loans and, as a result, her house payment went from \$1,000 to \$5,000; and she certainly has no income to pay it.

I just suspect that she would never have been in the posture of having to take a predatory loan to get by if she were being paid for the recordings that she has performed on and are still being played for the enjoyment of the listening audience.

These poor broadcasters are charging advertisers for the ability to promote these songs that these performers play on, and nobody is asking them to share the advertising revenue with the poor performers.

So, you know, I am -- so much tragedy here. We have got these performers who, like this 79 year-old woman, who is \$40,000 behind on the mortgage now and threatened with foreclosure. And at this age, when she should be basking in glory, instead, she is being highlighted on the front page of the newspaper as being a victim of foreclosure fraud.

That is embarrassing. You don't want to go out like that, but we have got so many artists and performers who have not been paid. They can't tour anymore, they are not

making any records, so there are not a lot of record sales. But their music is still being played, and they are not getting paid for it. If they were, they would be in a much better position.

So that is why I support this legislation. It is the human interest. It is only fair to the performers who give us such joy that we give them a little joy as they move towards the twilight years.

I am happy to support the manager's amendment, and I would urge you all to do so as well, notwithstanding the fact that there is so many broadcasters out here that are going to be suffering.

Thank you. I yield back.

Mr. Berman. If there are no further people seeking recognition, I would like to close the debate, and then I would like to wait for the last person to make the reporting quorum to come in. And he has.

The question is on the amendment, on the legislation, on reporting the bill, as amended, favorably to the full committee.

Those in favor, say aye.

Opposed, no.

The ayes have it. The bill, as amended, is reported favorably to the full committee.

Without objection, the bill will be reported as a

single amendment in the nature of a substitute incorporating amendments adopted. Staff is authorized to make technical and conforming changes.

I thank the members for their patience.

There being no further business of the subcommittee, the meeting is adjourned.

[Whereupon, at 11:10 a.m., the subcommittee was adjourned.]