Testimony of

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STATEMENT OF DEL R. BRYANT
PRESIDENT AND CHIEF EXECUTIVE OFFICER
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BEFORE THE
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
ON "MUSIC LICENSING REFORM"

July 12, 2005

Chairman Hatch, Senator Leahy, and Members of the Subcommittee, thank you for the opportunity to testify concerning the important subject of "Music Licensing Reform".

My name is Del R. Bryant. I am President and Chief Executive Officer of BMI, one of the world's leading performing right organizations ("PROs"). America's copyright laws have provided a firm foundation to support a vibrant creative community of songwriters and composers whose works fuel a robust and growing entertainment industry. BMI is proud to represent the public performing rights of over 300,000 songwriters, composers and music publishers, more than any other performing right licensing organization. BMI oversees a repertoire of more than 6.5 million musical works. BMI's repertoire includes outstanding creators in every style of musical composition: from pop songwriters to film and television composers; from country music to gospel; from classical composers to commercial jingle writers; from library music to musical theatre composers; from jazz to hip hop; from metal to meringue; classical to soul; rock to reggae; and all categories in between. BMI also represents the performing rights in the musical works of thousands of foreign composers and songwriters when those works are publicly performed in the United States.

Since BMI's doors opened in 1940, our core competency is licensing the public performing rights of these musical creators and copyright owners. To be successful in this mission, BMI developed an understanding of and appreciation for the business models and programming needs of the hundreds of thousands of businesses across our nation that bring our creators' music to the public. We are a trusted bridge between the musical creator and copyright owner on the one hand and the businesses using music on the other. We maintain a sensitivity to the creative process, identifying and supporting musical creation in all its varieties. At the same time, we reach out to our licensees by listening to their needs, and where possible, offering licensing solutions that permit them to focus on their businesses. Our operations are efficient, fair and transparent, and our royalty distributions are accurate and timely. Competition among the American PROs (BMI,

ASCAP and SESAC) provides benefits to creators and music users alike. . . a win-win success story for the American enterprise system.

Specifically, BMI's role is to license one of the six exclusive copyright rights, the right to perform publicly musical works. Public performances of musical works occur on radio, television, cable, satellite and the Internet as well as at concerts, sports venues, restaurants, hotels, retail stores and universities, to name a few of the many categories of BMI licensees. BMI licenses its music literally wherever music is communicated to the public. As you know, BMI operates on a non-profit making basis, distributing all income (less overhead and reasonable reserves) to our affiliated songwriters and publishers. The PRO model has proven over the decades to be highly beneficial to the songwriting community as well as to the businesses that require timely and efficient clearance of music copyrights. In her recent testimony before the House Intellectual Property Subcommittee, Register of Copyrights Marybeth Peters highlighted the success of the PRO model. Many groups with whom we negotiate, including DiMA, have acknowledged that BMI does a good job in establishing a fair market value for music.

The emergence of a viable business in the digital distribution of music in recent years has focused the attention of the industry and members of Congress on issues having to do with licensing of the mechanical right when music is digitally delivered. Some digital music services have complained that the current compulsory license for mechanical rights codified in Section 115 of the Copyright Act is cumbersome and requires reform. While the issue of mechanical licenses has not historically impacted BMI, the digital transmission of music often involves both the mechanical right and the public performing right. Consequently, BMI has attempted to meet our licensees' needs to provide licensing solutions where both rights are required. Over its entire history, BMI has actively represented the public performing right interests of our affiliated songwriters, composers and music publishers in the marketplace as well as in Washington, DC, to protect the performing right which is vital to songwriters' and publishers' livelihoods. We have fought against legislative and regulatory efforts that would unfairly eliminate or truncate the public performing right as it applies to digital transmissions.
In an attempt to resolve the claimed problem that digital music services are unable to secure the necessary mechanical rights and performing rights, I would like to point out that BMI believes that the proposal made by NMPA-HFA, BMI and ASCAP for a "Unilicense" continues to be a preferable solution to the problems at hand.

The "Unilicense" proposal does not involve a repeal of the Section 115 compulsory license, which for decades has set the backdrop for licensing of mechanical rights in physical CDs (and LPs and cassettes). Also, it does not create an upheaval in existing music industry licensing institutions with unsettling marketplace repercussions. Rather, it entails an antitrust exemption that would permit the existing PROs and HFA, to offer a one stop shop to obtain a license for the reproduction/distribution and performing rights to subscription interactive digital music services. A key component of the proposal is that Congress would establish a fixed license rate as a percent of subscription music services' gross revenues (with minimum fees as appropriate). This rate would provide reasonable compensation to the songwriters and music publishers for the use of their musical works. In this regard, it is noteworthy that the record industry, which has no regulation of its licensing of interactive digital music services, have negotiated substantial rates from these same users for the copyright rights in sound recordings.

There have been complaints by some internet music services' about "double-dipping" by copyright owners of musical works under the current copyright law. These complaints are unfounded. At bottom, they are simply complaints about the separate administration of the public performing and mechanical rights in the U.S. As you know, BMI and ASCAP for decades have licensed public performing rights only, while music publishers have customarily licensed reproduction and distribution rights either directly to record labels or else through the Harry Fox Agency. In Europe, by contrast, both performing rights and mechanical (i.e. reproduction/ distribution) rights may be jointly administered. Despite the separate structure of the licensing organizations in the U.S., many businesses have successfully licensed both performance and reproduction rights over the past decades. BMI has long licensed subscription digital music services like Music Choice and DMX, and has licensed video on demand and other cable and satellite television services. Why should performance royalties not be available to songwriters for Rhapsody and other services, when the obvious intent of the subscriber who is enjoying conditional downloads is to listen to performances of the music?

While DiMA and the Local Radio Internet Coalition ("LRIC") have praised the collective blanket licensing model for licensing Internet music services, in their very next breath they will argue that the performing right should not apply to subscription downloading services. What these services seek is not only ease of licensing the copyright rights they need, but also a bargain basement license fee, all at the expense of the songwriters whose works provide the very foundation of their businesses. As mentioned above, in 2001, BMI and ASCAP publicly stated that they would not seek license fees for pure, unconditional downloads. This should satisfy the needs of "e-tailers" who are selling music digitally with no restrictions. Under these types of new subscription digital music services, however, the consumer's ability to listen to her subscription music (however delivered) stops the minute her subscription expires. The fact is that many of the new online music services also offer a wide variety of limited or conditional downloading services for a monthly subscription fee. It is these services that the PROs seek to license, and that are the focus of the "unilicense" proposal.

In Europe, where societies jointly administer the public performing right and mechanical rights, both the performing rights and mechanical rights are being paid for. The Joint NMPA-HFA/ ASCAP/BMI unilicense proposal would accomplish something similar by providing for the necessary exemption from antitrust laws to create a joint licensing "super agency" for this purpose. The unilicense proposal achieves the goal of one stop shopping without the need for government oversight. It permits a private business issue to be resolved by the private businesses. It achieves this goal with a minimum amount of legislation and regulation. The royalty rate would be set by Congress. There would be no need for the parties to submit to expensive adjudication by Copyright Royalty Judges. The allocation of the royalties collected would be an internal business decision not requiring government intervention or oversight.

I believe that the "Unilicense" proposal directly targets the two types of digital audio transmissions currently being offered by digital music services, namely conditional downloads and interactive streams, for which DiMA and others have claimed that they are unable to obtain the necessary performing right and mechanical licenses. That is why we proposed a targeted solution that is narrowly tailored to fit the problem. Although we question whether or not the digital music services have adequately demonstrated that they cannot obtain the necessary

licenses for these services in the market, BMI has nevertheless joined ASCAP and NMPA-HFA to offer a compromise "Unilicense" solution that has a suitably narrow scope and would involve as little disruption to the music industry as possible.

The plain fact is that many of the innovative and exciting new services represented by DiMA offer combinations of streaming and downloading capabilities to their subscribers As the industry's discussions proceed, our primary objective will be to safeguard the full value of our affiliated songwriters' and publishers' copyrights and create an efficient and fair licensing system for digital music services. We echo the sentiments of the Register of Copyrights Marybeth Peters when she testified at a recent hearing held by the House Judiciary Committee's Subcommittee on Courts, the Internet and Intellectual Property that the development of competitive licensed digital music services can help ease the piracy epidemic that is currently sweeping the country (and the world) through unauthorized peer to peer file sharing.
In her testimony, Ms. Peters, proposed legislation entitled "The 21st Century Music Licensing Reform Act," which would repeal the current mechanical compulsory license provision of the Copyright Act (Section 115), in favor of an entirely new structure. Her proposal would redefine the current PROs as "music rights organizations" (or "MROs"). According to the proposal, an "MRO would be authorized, and required with respect to digital audio transmissions, to license the reproduction and distribution rights of any non-dramatic musical work for which it was authorized to license the public performance right."

As we understand it, the Copyright Office's proposal would require MROs to offer a blanket license to audio digital music services that combines both the public performing right and the mechanical rights needed for making the various kinds of digital audio transmissions of music to consumers. Her proposal would facilitate this by automatically amending every public performing right grant to a PRO to include mechanical rights. The licensing contemplated by her proposal addresses all digital audio transmissions,
Although her proposal provides for an unlimited number of MROs, Ms. Peters testified that she anticipates few MROs will actually be created, and that MROs will function similarly to how the three PROs operate in the U.S. today. However, there is concern that many MROs will come into existence since the Copyright Office definition of MRO appears to enable any copyright owner or aggregator to become an MRO. We do not believe that creating a world of dozens (or hundreds) of MROs would be an improvement over the current landscape. In fact, if this were to happen, the proposed cure would actually become no cure at all. The digital music services would be put in a position of having to deal with many more licensing entities than they do today. The result would be a very cumbersome licensing process that would serve to benefit pirates who would continue to operate without any authorization while the legitimate digital services would be hampered in their attempts to secure appropriate licensing.

I testified at a recent "PRO oversight hearing" before the House Intellectual Property Subcommittee that the PRO business model of blanket licensing and marketplace negotiations works for licensees and creators alike and should not require legislative intervention. While the Copyright Office proposal to essentially adopt the PRO model for mechanical rights licensing in digital audio transmissions is a strong endorsement of the way we do business, the proposal represents a far-reaching change in the way music publishing rights are licensed in the United States that transcends the immediate issues at hand. At this time, while we appreciate Ms. Peters'

attempt to offer a comprehensive overhaul of the mechanical licensing system, BMI believes that there are significant areas of concern and therefore supports the unilicense proposal.
As Ms. Peters' testimony reflects, we are not a part of the problem. We are willing to be part of the solution, however. Whether the solution be our "unilicense" proposal or another, we believe Congress should not lose sight of more modest attempts to address the digital music services' problems.

BMI has been recognized as a global leader in digital initiatives for more than a decade. We were the first music company with a website, the first to license music for performance on the web, and the first to post data on our entire catalog, now more than 6.5 million musical works, on the Internet. We recognized the potential for licensing digital transmissions before Internet streaming was a reality. In calendar year 2004 alone, BMI processed 2.4 billion performances of music from more than 3,500 different digital licensees, and as those numbers grow exponentially, we have the robust infrastructure to track their growing volume, too. We provided the core technology for FastTrack, an international alliance of copyright organizations who share a network of performance and mechanical rights data on more than 20 million copyrights.

We look forward to continued conversations with you and your staff and other members of the Subcommittee, and will under the Chairman's leadership continue to work closely with all sectors of the music industry in order to develop music licensing solutions. Mr. Chairman and Mr. Ranking Minority Member, we are grateful to you for the effectiveness of the Copyright Act, which permits BMI to function, and songwriters, composers and publishers to be compensated. Thank you for your many years of strong leadership on these issues which affect the livelihoods of the hundreds of thousands of individuals we represent.

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