

Testimony of
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President and CEO
Comcord Records
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Concord Music Group
Before the Subcommittee on Intellectual Property
Senate Committee on the Judiciary
Music Licensing Issues
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Mr. Chairman, Ranking Minority Member Leahy and other distinguished members of the Subcommittee, good afternoon and thank you for inviting me to participate in this hearing. As the President of the Concord Music Group, an independent record label and music publisher, I recognize and appreciate the leadership this Committee has provided in the past on many issues affecting my business. I am not a lawyer, so I am not going to dwell on the technical details of mechanical licensing. However, I am grateful for the opportunity to share some practical thoughts with you today on how the existing inefficient system of licensing musical compositions is contributing to the contraction of the music industry by preventing companies of all sizes from offering consumers the exciting and competitive products that are necessary if we are to thrive, and maybe even survive, as an industry.

Background

By way of introduction, the Concord Music Group is committed to offering inspiring, innovative and high quality recordings of great artistic merit. Originally formed as an offshoot of the Concord Jazz Festival, Concord Records has been considered a leader in the jazz and traditional pop fields for over 30 years. Last year, Concord acquired and merged with Fantasy, Inc., home to one of the world's most prestigious catalogs of jazz, blues, R&B and rock music, to

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create the Concord Music Group. Today, the Concord Music Group is one of the largest independent record companies in the world and keeper of an extraordinary rich, and, in many cases, historically significant, catalog of recordings from some of the most admired and enduring names in music. Concord is also the holder of a prominent catalog of music publishing rights, including many of the best known songs written by John Fogerty while he was a member of Creedence Clearwater Revival. Over the years, such legendary artists as Tony Bennett, Rosemary Clooney, Count Basie, John Coltrane, Creedence Clearwater Revival, Miles Davis, Duke Ellington, Bill Evans, Ella Fitzgerald, Vince Guaraldi, Isaac Hayes, Thelonious Monk, Tito Puente, Mel Torme, Little Richard, and Otis Redding have recorded for Concord or Fantasy labels. The record company's current recordings and releases include such world-class artists as Peter Cincotti, Chick Corea, Michael Feinstein, Carole King, LaToya London, Marian McPartland, Barry Manilow, Sergio Mendes, Ozomatli, Eddie Palmieri, Sonny Rollins and many

more. In all, our catalog contains over 10,000 recordings, ranging from the 1940s through today. You may be familiar with one of our recent releases, "Genius Loves Company," the final recording by the legendary Ray Charles. This historic CD was completed last year just prior to Ray's death and, in addition to being a multi-platinum seller, received eight Grammy awards, including Album and Record of the Year.

The Concord Music Group currently employs approximately 100 people based in Los Angeles and Berkeley, California. In addition, we provide significant income and revenue to hundreds of others in the production and marketing of our recordings. We currently have nearly 3,500 albums in print and will issue over one hundred new releases this year.

Concord has a broad perspective on the issues being addressed this afternoon. In addition to being a record company, it is important to note that Concord owns significant music

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publishing assets. Accordingly, we see these issues both as an owner and as a user of musical compositions.

The Current System for Licensing Musical Compositions is Not Serving Anyone As It Should
This is a challenging time in the music business. Piracy, other demands on consumers' time and money, radio consolidation, and reduced and less varied inventories at retail have made it much more difficult to market both new and existing recordings, let alone build an audience for a new artist. This has all led to declining sales. But this is also a revolutionary time in the music business. New technologies give us opportunities to offer consumers new and innovative ways to enjoy music. Particularly in the case of genres like jazz, the Internet is a very encouraging means of extending our distribution. In addition, new formats like Super Audio CD ("SACD") and CD/DVD DualDisc offer great promise for giving consumers the exciting products and extra value they want, and that we hope will let us compete successfully for their limited time and money.

Unfortunately, while our business always requires us to balance the concerns of art and commerce, we have particularly struggled with the music licensing issues raised by new technologies and their effects on our investment decisions. Our experience with SACD is illustrative. An SACD is a form of multilayer disc that lets us include music in both a standard stereo format as well as a "surround-sound" format so that the consumer can enjoy an enhanced listening experience with the proper playback equipment but can still listen to it on a standard CD player. It is very exciting to be able to offer some of our jazz masterpieces in the higher fidelity formats possible on an SACD. But introduction of any new kind of offering requires investment and risk. We've invested in releasing some 30 titles in SACD, and are considering

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the investment in more. But it is expensive to remix an album for this new format, and an uphill battle to sell it into limited retail markets. Nonetheless, we believe that the format could expand the overall industry if it were to gain traction and are, therefore, willing to invest toward that end. After launching our SACD lines, we were informed that many music publishers think that, simply as a result of the music being technically encoded two times on the disc, they are entitled to get paid twice as much for an SACD release of a song as for a regular CD release, even though they sell at generally the same price point. Our counsel tells me that we shouldn't have to pay twice - and as a business proposition I know that to be true. It just doesn't make business sense, however, to invest in promoting a speculative new format while at the same time having to spend time and money arguing with our colleagues in the music publishing community. We'd certainly like to clarify this issue, but there doesn't seem to be any practical

way to resolve the dispute.

Another example, of lost business opportunity pertains to adding video content to our musical offerings. On many occasions our marketing and production personnel have asked to provide bonus video material with one of our recordings (for which the consumer is not charged any more), only to be rejected because the licensing process would be administratively prohibitive and the publishing costs would likely be duplicative.

In addition, while the problems in the current system for licensing musical compositions critically impair our ability to pursue new forms of products, those problems are not limited to new technologies or applications. Every day we grapple with musical composition licensing issues. Even in the "easy" case of licensing musical compositions at the statutory rate for a front-line release in the traditional CD format, the process is too slow, too inefficient and too paperwork-intensive. Tackling the licensing for anything out of the ordinary is really daunting.

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You see, every song has at least one publisher and a high percentage have multiple publishers. Given that a CD typically has between ten and twenty tracks, it is common that we must deal with dozens of copyright owners to clear a single album's release. And while many licensing transactions are straightforward, there are tens of thousands of music publishers and countless individuals, such as heirs of writers of older repertoire, who lack either the wherewithal or desire to respond to license requests on a timely basis. Too often we have been burned by committing months of scarce staff time to a clearance effort, only to find late in the process that a project just won't be viable. This frequently and regretfully causes us to conclude at the outset that we can't pursue potential projects because securing all the necessary licenses at an acceptable price is just too difficult and uncertain to warrant investment in the clearance effort. As a relatively small business, we simply need to allocate our staff to completing projects that we know can be licensed on a quick and cost efficient basis.

As a result of examples such as these, consumers are getting less value and are, therefore, buying less. This means that artists are getting less exposure, and writers, publishers and record companies are all making less money than if we could deliver greater value and generate excitement with the consumer. I would like to experiment with many new products and see our music in all types of services. However, on top of the significant investment, risk and downward market forces, it's just not practical for businesses like ours to contend with the licensing issues necessary to make that happen.

It is very important to remember that Concord is a music publisher as well. As such, I certainly want to see writers and publishers receive their fair share of music industry revenues. In fact, given that music publishing rights are typically afforded much higher valuation multiples than recordings, the owner of both types of copyrights has a clear interest in seeing a bigger

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piece of the pie go to the publishing rights. However, as someone who is in the trenches trying to enhance the value of all our rights by producing new music, developing artists and giving consumers what they want, I can tell you that the inefficient process for licensing musical compositions is a substantial impediment to expanding the music industry revenues in which writers and publishers share. It is my steadfast belief that the entire industry, including publishers and songwriters, will see greater income if we had a simpler, more transparent licensing system with lower transaction costs, a percentage rate royalty, and less opportunity for disputes. Writers, publishers and record companies have spent too much time and effort fighting over the division of a shrinking pie. And that will continue so long as that the system for

licensing musical compositions prevents companies like Concord from pursuing good projects to meet consumer demand, because consumers will acquire their music from illegal peer-to-peer services or spend their money on other entertainment products. It's time to work together to increase the size of the pie for all of us. If we want to reverse the last few years' trend of shrinking revenues, we need a licensing system fit for the 21st century.

Suggestions for Reform

I'd like to conclude with a few specific suggestions for reform of the current system for licensing musical compositions.

First, we should have a more efficient system for administration of mechanical licensing. The Section 115 license is the only compulsory license that it is not a blanket license. For example, an Internet webcaster can perform all commercial sound recordings by filing a single notice of intention and paying a single Section 114 royalty to the "designated agent." There is no reason we should not have a similar system for Section 115.

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Second, we should have a system with more royalty rate flexibility. The current per-unit, cent-rate royalty often does not reflect the economic realities of new technologies and business models and the resulting changes in the traditional business models. If consumers are prepared to pay a premium price for a DVD-Audio product, a download to a cell phone or a ringtone, songwriters and publishers should get their fair share. Conversely, when it is necessary to provide consumers extra value to win business back from the pirates, or a subscription service presents a different consumer value proposition than the sale of traditional products, the mechanical royalty should reflect that. A percentage royalty - like that which has long been in place in Europe and many other countries - is the only approach that makes sense for the 21st century.

Third, we should have a system with more certain application, and less room for disputes, when licensees are considering investment in new technologies. That could be achieved in part through changes in license terms. For example, a license with fewer intricate requirements and a percentage royalty would not lend itself to disputes the way the current one does. Another part of the solution should be procedural. A small business could never afford litigation over any of these issues, but an expedited proceeding in the Copyright Office might provide a practical way of putting to rest questions like whether we have to pay twice to release an SACD.

Finally, we should consider whether there is anything that should be done to facilitate licensing for uses not currently covered by Section 115. I think there probably are uses like lyrics or limited audiovisual material on DualDiscs where the transaction costs of work-by-work clearance are so high relative to the royalties that the market would bear that we would all benefit from some means to reduce the substantial impediments to these uses.

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I truly believe that making these changes would make a huge difference in enhancing the availability of music through legitimate product and service offerings and grow music industry revenues to the benefit of everyone.

Thank you for your time; I would welcome your questions.