Testimony of

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STATEMENT OF RICK CARNES, PRESIDENT
THE SONGWRITERS' GUILD OF AMERICA
ON MUSIC LICENSING REFORM

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Chairman Hatch, Senator Leahy, and Members of the Subcommittee, thank you for allowing The Songwriters Guild of America the opportunity to testify today on proposals for reform of the music licensing system.

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

I am sure the members of this Subcommittee are familiar with the current economic plight of the American songwriter. Over the last decade, more than half of America's professional songwriters have been forced to abandon their careers due to income declines stemming from, among other things, the de-regulation of radio, corporate mergers throughout the music industry, and rampant Internet piracy. The average annual royalty income earned by American songwriters is today well below the national poverty level.

Let me give you the painful facts. When I was a young songwriter, like every aspiring music creator I dreamed of having one of my songs on a million selling album. That, I imagined, would be the very pinnacle of success, assuring my financial security. A closer look at the real numbers illustrates just how naïve I was to place my faith in the current system.

Under the present compulsory licensing provisions, a songwriter is to receive 8.5 cents per song on any CD ("phonorecord") manufactured and distributed, or legally downloaded, in the United States. So, if one of my songs appears on a million selling album, I am theoretically due $85,000 by statute. However, I split that money half and half with my music publisher by contract. That leaves me $42,500. Then I must spilt that in half again with the recording artist who co-wrote the

song with me, leaving me with $21,250. Practically every artist now co-writes every song on his or her album with the primary songwriter, because the record labels have included a controlled composition clause in every new artist's contract that makes it financially ruinous for the artist to record more than one or two tracks that he or she did not co-write. The reason the record companies do this is so they can pay the artist, and his or her co-writer, 75% of the statutory mechanical royalty rate. Because of the controlled composition clause, and with transaction costs deducted, my royalty income is reduced by thousands more dollars.

Thus, after all is said and done, I end up making less than $16,000 for having a song on a million selling CD. Of course, given that the retail charge to consumers for a CD may be as high as $18, a million sales will generate up to $18 million for someone....

Let me put that figure in even starker perspective. Perhaps some of you remember the famous film "The Glenn Miller Story," in which actor James Stewart --playing the great trombonist and American war hero-- explained to his skeptical father that being a songwriter wasn't such a bad way to make a living in 1936. "Pop," he said excitedly, "I get 2 cents for every record sold!" Well, that amounted to $20,000 per million units distributed in the middle of the Great Depression. And that amount, sadly, is in practice more than I get today.

As Register of Copyrights Marybeth Peters recently put it, the current system of compensating authors under Section 115 is "antiquated". No songwriter could possibly argue with such a conclusion other than to insist it was an understatement.

How did American songwriters reach this economic nadir? The most obvious reason is the astonishing fact that the U.S. statutory mechanical royalty rate was not raised from the 2 cent level for 69 years from 1909 to 1978. And for the last 27 years, modest increases to 8.5 cents have not addressed that longstanding, bedrock inequity. The reason I am making less than $16,000 on a million sales is that I am getting 1936 wages in 2005! That truly is "antiquated" compensation. More and more songwriters simply can no longer afford to continue to expend the time and energy required to practice their craft, while attempting to support their families. And as we suffer personally, American musical culture --long a source of enormous national pride, international prestige, and positive trade balance-- is endangered along with us.

Sometime between the enactment of the compulsory license in the early Twentieth Century and the evolution of today's modern music industry, the authors who are granted "exclusive" rights to their respective writings under the Constitution and the United States Copyright Act have lost virtually every ability --due to marketplace inequities-- to effectively influence how their works are licensed and how much they are paid for such licensed uses. As Congress considers reforms to Section 115, songwriters hope that changes will give power back to the creators, starting with a mechanism to raise the mechanical royalty rate to a more reasonable level.

It is not only mechanical royalty rates, however, that need to be changed (although that would certainly represent a good start). Register Peters was also correct when she stated in House testimony last month, "At its inception, the [Section 115] compulsory license facilitated the availability of music to the listening public. However, the evolution of technology and business practices has eroded the effectiveness of this provision." Critically, Register Peters emphasized,

"...in determining public policy and legislative change, it is the author--and not the middlemen--whose interests should be protected." SGA agrees wholeheartedly.

Songwriters support the digital music revolution. The success of legitimate online services is vital to any chance we have of improving our dire economic situation. We recognize how valuable it may be to streamline the music licensing system in ways that favor getting more music to the market quickly in new creative new formats that consumers desire, like music subscription services. But these services require entirely new licensing solutions because they implicate both mechanical and performance rights.

Thus we were pleased to join recently with our colleagues in the Nashville Songwriters' Association (NSAI) and with our friends in the music publishing industry in taking a substantial leap of faith by allowing subscription-style Internet music services to operate while the parties tried to determine a fair split of the total music revenues generated. With royalty rates and payments for the licenses issued by songwriters and music publishers being held in abeyance, record companies proceeded to negotiate licenses for the sound recordings unilaterally with the subscription services, taking for themselves up to 50% of the services' revenues. With the service providers apparently wanting to pay at most 50% of their revenues to license the music and the record companies already taking 50% that leaves nothing on the table for the creators of the music.

In response to this situation, the songwriter and music publisher community (including SGA, NSAI, The National Music Publishers Association, and the performing rights societies) have put forth a "Uni-license" proposal that we believe best achieves licensing reform while simultaneously providing greater essential marketplace protections for songwriters. Our proposal seeks a reasonable rate of 16 2/3 % of gross Internet subscription service revenues, with a minimum flat dollar fee per as a floor. The songwriters will, in the end, receive roughly half of this percentage-based income, with the publishers sharing in the other half. There can be no public policy justification for giving the creators of the songs--on whose labors the entire music industry depends-- anything less than this figure while the record company and service provider 'middlemen' take the giant share of the money.

Throughout the Section 115 reform process, the stated goals have included protecting creators, simplifying the licensing process, and achieving "one-stop licensing" for digital subscription services. Our Uni-license proposal would meet these goals, and can also be instituted quickly and with minimal overhead costs. The super agency contemplated by our proposal would allow Internet subscription services to obtain a blanket license for all performing and mechanical rights in exchange for payment of a reasonable percentage of the companies' gross revenues to the agency. The designated mechanical and performance rights agents would then distribute the royalties to the appropriate writers and publishers. Perhaps most importantly, our proposal will get legitimate, on-line subscription services into the marketplace quickly, helping to curtail piracy.

I would mention two points of special concern to songwriters in our proposal to reform the licensing process. The first relates to transparency and songwriter participation. One of the most critical issues for songwriters and recording artists is transparency in the payment process. Songwriters must receive unlimited access to any payment data. To assure this and to guarantee

fairness in the process generally, songwriters want a major role in the governing structure of any super agency. The second point relates to transaction costs. The costs of 'sorting out' these blanket distributions should not be shifted onto the creators since we are not the direct beneficiaries of the new 'efficiency' in the licensing process. In fact, distribution costs under a blanket license will be significantly higher for creators than the old mechanical license where a sale could be directly tied to a songwriter.

The songwriter community recognizes that a key goal of Section 115 reform should be to counteract music piracy. The more legitimate music is offered online, the more illegal file sharers will have a viable alternative to piracy. The simplified licensing system described above is intended to facilitate use of music by legitimate on-line services, and thus represents a key means to combat piracy. The songwriter community also recognizes that the inability to secure a compulsory license for a sound recording may be an impediment to offering all music on-line. Songwriters and music publishers have questioned the equity of a compulsory license for musical compositions without establishing a compulsory license for the sound recording as well. Songwriters recognize and respect the arguments made by recording artists and record labels wanting to maintain and control rights to their sound recordings online. They have legitimate reasons for concluding that a compulsory license for sound recordings is a bad idea. However, songwriters believe a delicate balance must be sought to compensate for the marketplace inequities created by this system. We believe the Uni-license proposal of a 16 2/3% royalty rate for the musical composition would help to restore such a balance.

As alluded to above, another area of drastically needed reform concerns the longstanding record company practice of applying so-called "controlled composition" rate reductions and caps to mechanically licensed musical works. When Congress finally completed reform of American copyright law and enacted the 1976 Copyright Act, which nominally raised the mechanical royalty rate in 1978 and provided a mechanism for future increases, record companies immediately used their market leverage to coerce recording artists into including mechanical royalty reductions and other royalty caps in their recording contracts. The result has been devastating to the songwriter community, as the gains that Congress sought to bestow on us after seven decades of frozen rates were immediately and severely diminished by contract. This inequitable dealing now threatens to infect Internet transactions as well, with certain recording companies seeking to apply controlled rates to on-line sales of recordings. The songwriter community respectfully asks this Committee to examine controlled composition practices, and to assist us in eliminating these clauses once and for all.

During these past few months of freewheeling negotiations among parties in the music industry, there have even been discussions about eliminating the compulsory mechanical license altogether. While we are not philosophically opposed to this idea, pragmatically we feel that keeping the current compulsory license on physical product and adding the new Uni-license for subscription services would be an easier solution for all to administer and create less risk for songwriters. But if the percentage rate for subscription services is going to be set at a level too low for songwriters to make a living; if we can get no relief in an equitable royalty setting procedure; if we are to be perpetually beset with "antiquated" compensation that favors only the 'middlemen'; then we might favor lifting the compulsory and taking our chances in the marketplace. Better a few songwriters survive than none at all. But when lambs and wolves are

pitted against one another in "free and open competition," the lambs rarely fare as well as we might hope.

SGA has always believed that at the end of the day what matters most is the music. Songwriters don't write songs just to make money; we make money just so we can keep writing songs. But the story of American songwriters is all too often a "rags to rags" tale. Stephen Foster, America's first professional songwriter, died in poverty with 38 cents in his pocket at the age of 37. He left behind a legacy of songs that moved the entire nation, and that enriched a horde of 'middlemen', but which never earned enough to sustain him or his family. It is my sincerest hope that any reform of the music licensing process will begin and end with a focus on what will help American songwriters and artists survive a very difficult present, and thrive in a much better future.

On behalf of our songwriter-members and all those who create the greatest music in the world, SGA wishes to thank the Subcommittee for the opportunity to share our views on these vital issues.

Thank you.