Testimony of

Steven W. Newberry

November 13, 2007

Statement of Steven Newberry
Commonwealth Broadcasting Corporation

On behalf of the National Association of Broadcasters

Hearing before the Senate Judiciary Committee
On Exploring the Scope of Public Performance Rights

November 13, 2007

Introduction

Experiencing losses due to illegal file sharing and its misdirected efforts to salvage its failing legacy business model, the recording industry recently has attempted to convince Congress to use the Copyright Act to make up for these losses by imposing a new obligation on local broadcasters, in the form of an additional fee for playing recorded music on free, over-the-air radio. The imposition of what broadcasters consider a "performance tax" would be inequitable and unfair to radio broadcasters, who, throughout the decades, have been substantial contributors to the United States' complex and carefully balanced music licensing system, a system which has evolved over many decades and has enabled the U.S. to produce the strongest music, recording, and broadcasting industries in the world. For more than 80 years, Congress, for a number of very good reasons, has rejected repeated calls by the recording industry to impose a tax on the public performance of sound recordings that would upset this balance. There is no reason to change this carefully considered and mutually beneficial policy at this time.

As we noted in NAB's July 2007 testimony before the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property, the recording industry's pursuit of a performance tax at this time appears to result in part from illegal peer-to-peer sharing of sound recordings, and in part from the loss of revenues from the sale of recorded music and an inability of record companies to timely adapt to rapid developments in digital technology and consumer demands. Broadcasters are not responsible for either one of these phenomena, and, particularly in the current highly competitive environment, it makes little sense to siphon revenues from broadcasters in order to prop up the recording industry's failing business model.

In an effort to make this proposed wealth transfer from the broadcast industry to the recording industry more acceptable to both lawmakers and the public, the recording industry has attempted to characterize it as a means by which to "equalize" the rights of performers with those of songwriters. However, since songwriters and artists do not earn royalties in the same way, the copyrights in their works do not need to be symmetrical in order for the copyright owners to each receive fair compensation. In fact, in order to truly determine whether artists (who usually relinquish all copyright ownership in their works to the record labels) are not being properly compensated for their works, it may be more appropriate to examine the flow of royalties within the record industry itself and how the currently collected royalty payments are actually allocated among the parties. Indeed, those countries that have previously implemented a sound recording right have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists. Creating new intellectual property rights will do little to remunerate artists if the artists lack sufficient bargaining power in their relationships with the record labels.

Royalty distribution to music and sound recording copyright owners has traditionally been unsymmetrical. Music producers and songwriters generally receive the bulk of their royalties via the public performance of their musical

compositions, while record labels and recording artists generally receive the bulk of their royalties via the sale of physical copies (e.g., CDs, digital downloads), concert tickets, and merchandise.

For decades, local radio broadcasters have substantially compensated the music and recording industries, including making annual payments of hundreds of millions of dollars in fees to music composers and publishers through ASCAP, BMI, and SESAC and providing record labels and artists with free promotion of their recordings and concerts. Local radio stations have been the driving force behind record sales in this country for generations. Music producers and publishers receive some royalty payments from producers of sound recordings who record their works, but those sums are small relative to the receipts by the record companies and artists who receive the vast majority of their revenues from the sale of sound recordings. While receiving no copyright fees from broadcasters for the over-the-air use of recordings, they enjoy tremendous promotional value from radio airplay, a fact which Congress has consistently recognized over the decades.

Under the Constitution, Copyright is designed: "To promote the progress of science and useful arts." There is absolutely no evidence that absent a performance tax there has been a dearth in the production of sound recordings in this country. To the contrary, while many countries have such a tax and the United States does not, we are the most prolific producers of sound recordings in the world.

In short, I urge the Committee to see this proposal for what it is, a wealth transfer that will hurt American businesses, small and large, and ultimately, American consumers. The current system has produced the best broadcasting, music and sound recording industries in the world. It is not broken and is not in need of fixing.

Evolution of the Sound Recording Performance Right

U.S. copyright law confers a bundle of enumerated rights upon the owners of various works of creative expression. These are set forth in Section 106 of the Copyright Act and are, in turn, subject to a series of limitations and exemptions, which are set forth in Sections 107 through 121 of the Act. Among the enumerated rights is a right of public performance which empowers the copyright owners - subject to any applicable limitations, exemptions, or compulsory licenses - to grant or deny another permission to perform a work in a public forum or medium.

While composers have long enjoyed a right of public performance in their musical compositions - for which over-the-air radio broadcasters in 2007 will pay annual royalties exceeding $450 million to the performing rights organizations (e.g., ASCAP, BMI and SESAC) - prior to 1995, U.S. copyright law did not recognize any right of public performance in sound recordings embodying such musical compositions. As explained below, even that right was very limited.

Congress has considered and rejected proposals from the recording industry for a broad performance right in sound recordings since the 1920s. For five decades, it consistently rebuffed such efforts, in part due to the recognition that such a right would disrupt the mutually beneficial relationship between broadcasters and the record labels.

Congress first afforded limited copyright protection to sound recordings in 1971, in the form of protection against unauthorized reproductions of such works. The purpose of such protection was to address the potential threat such reproductions posed to the industry's core business: the sale of sound recordings. And, while the record industry argued at that time for a public performance right in sound recordings, Congress declined to impose one. Had Congress believed that record companies and performers were at risk of not being motivated to make enough recordings to serve the interests of the public, Congress could have granted additional monopoly rights for sound recordings. However, Congress wisely realized that the recording industry was already adequately motivated to serve the public interest and thus did not grant those additional rights.

During the comprehensive revision of the Copyright Act in 1976, Congress carefully considered, and rejected, a sound recording performance right. As certain senators on the Judiciary Committee recognized:

For years, record companies have gratuitously provided records to stations in hope of securing exposure by repeated play over the air. The financial success of recording companies and artists who contract with these companies is directly related to the volume of record sales, which in turn, depends in great measure on the promotion efforts of broadcasters.

Congress continued to decline to provide any sound recording performance right for another twenty years. During that time, the record industry thrived, due in large measure to the promotional value of radio performances of their records. Indeed, copyright protection of any sort for sound recordings is of relatively recent vintage. It has been marked throughout by careful efforts by Congress to ensure that any extensions of copyright protection in favor of the record industry did not "upset[] the long-standing business relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." As to performance rights in sound recordings in particular, Congress has explicitly recognized that the record industry reaps huge promotional benefits from the exposure given its recordings by radio stations.

It was not until the Digital Performance Rights in Sound Recordings Act of 1995 (the "DPRA") that even a limited performance right in sound recordings was granted. As explained in the Senate Report accompanying the DPRA, "The underlying rationale for creation of this limited right is grounded in the way the market for prerecorded music has developed, and the potential impact on that market posed by subscriptions and interactive services - but not by broadcasting and related transmission."

Consistent with Congress's intent, the DPRA expressly exempted non-subscription, non-interactive transmission, including "non-subscription broadcast transmission[s]" - transmissions made by FCC licensed radio broadcasters, from any sound recording performance right liability. Congress again made clear that its purpose was to preserve the historical, mutually beneficial relationship between record companies and radio stations:

The Committee, in reviewing the record before it and the goals of this legislation, recognizes that the sale of many sound recordings and careers of many performers have benefited considerably from airplay and other promotional activities provided by both noncommercial and advertiser-supported, free over-the-air broadcasting. The Committee also recognizes that the radio industry has grown and prospered with the availability and use of prerecorded music. This legislation should do nothing to change or jeopardize the mutually beneficial economic relationship between the recording and traditional broadcasting industries.

The Senate Report confirmed that "[i]t is the Committee's intent to provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings."

In explaining its refusal to impose new burdens on FCC-licensed terrestrial radio broadcasters, Congress identified numerous features of radio programming that place such programming beyond the concerns that animated the creation of the limited public performance right in sound recordings. Specifically, over-the-air radio programs (1) are available without subscription; (2) do not rely upon interactive delivery; (3) provide a mix of entertainment and non-entertainment programming and other public interest activities to local communities; (4) promote, rather than replace, record sales; and (5) do not constitute "multichannel offerings of various music formats."

It should also be noted that even though the Copyright Office has argued for a performance tax, Congress has strongly and consistently refused to adopt these recommendations.

The Free Benefits Radio Provides to Recording Industry

As Congress has repeatedly recognized, the radio industry provides tremendous practical and other benefits both to performing artists and to the recording companies. In NAB's July 2007 testimony before the House Judiciary Subcommittee, we previously cited numerous examples of acknowledgements and confirmations of these benefits, which are abundant in all segments of the industry. To further illustrate the ubiquity of these sentiments, below are some comments from this past Wednesday's Country Music Association 41st Awards:

? "Country radio, thank you so much for being our mouthpiece. You know what we do means nothing if it never gets played, and no one gets to hear it."
-- Rascal Flatts, Vocal Group of the Year
? "Thank you...radio for playing this song like crazy."
-- Carrie Underwood, Female Vocalist of the Year, Single of the Year
? "Thank you country radio. Thank you everybody we opened for. We love you."
-- Sugarland, Vocal Duo of the Year

? "I wanna thank... my band, my crew, my mom who is with me tonight... I wanna thank the fans and country radio and everybody."
-- Kenny Chesney, Entertainer of the Year
? "I can't even believe that this is real... I want to thank country radio. I'll never forget the chance you took on me."
-- Taylor Swift, Horizon Award (for best new artist)
The Recording Industry's Flagging Revenues Provide No Basis For Adopting a Performance Tax

The recording industry represents a classical oligopoly, where a small number of firms dominate the revenues of a particular industry. There are four major companies in the recording industry: Universal Music Group, Sony/BMG, Warner Music Group and EMI. The Warner group is the only U.S.-based company; the other three major players are foreign-owned.

While the U.S. recording industry was estimated at $11.5 billion in 2006, the recording industry suffered declining revenues in 2006 for the seventh consecutive year. All countries have experienced a decline in physical music sales due to, among other factors, the growth of the Internet, peer-to-peer file sharing and piracy. While all of these factors have hurt the recording industry, there are no facts that even suggest that radio broadcasters are to blame for the economic problems in the recording industry, nor that a performance tax will in any way address the factors that have contributed to declining record sales.

International Federation of the Phonographic Industry ("IFPI") Chairman and CEO John Kennedy claims the current economic data "reflect an industry in transition." Despite the decline in physical sales of recordings, many sectors of the music industry aside from the major record labels have experienced strong growth. According to the IFPI, digital shipments (the legal sale of online music, such as through iTunes and other legal download services) grew by 85% in 2006 to $2.1 billion. Live performances were up 16% from 2005 to 2006 to an estimated $17 billion. Merchandising and sponsorship grew by 30% in 2006. Yet another growing segment is portable digital players, estimated at another $10 billion in revenue for 2006. There is little hard data as to how much revenue is acquired on music globally through mobile phone and Internet Service Providers, but IFPI and other sources estimate these revenues to be several billion dollars.
What this data suggests is that, in addition to piracy, a major reason for the recording industry's revenue decline is its failure to adjust to the public's changing patterns and habits in how they choose to acquire sound recordings. Any such shortcoming also was not of broadcasters' making; nor should our industry be looked to as a panacea, through a tax or fee, to provide a new funding source to make up for lost revenues of the record companies.

Indeed, the imposition of such a tax could create the perverse result of less music being played on radio or a weakened radio industry. For example, to save money or avoid the new fees, stations could cut back on the amount of pre-recorded music they play or change formats to all-talk, providing less exposure to music. This could not only adversely impact the recording industry, but the music composers and publishers as well.

Sixty-eight percent of commercial radio stations in this country are located in Arbitron markets ranked 101 or smaller. Many radio stations, especially in these small and medium sized markets, are also struggling financially. It is these stations on which a new performance tax would have a particularly adverse impact. Were such additional fees imposed, in the face of competition from other media, many of these stations would have to spend more time in search of off-setting revenues that could affect the time available for public service announcements for charities and other worthy causes, coverage of local news and public affairs and other valuable programming.

Comparison with Other Countries' Intellectual Property Laws Does Not Justify the Imposition of a U.S. Performance Tax

While proponents of a U.S. performance tax for sound recordings often point to the laws of foreign countries to justify a performance tax, such argument ignores key differences in the American industry structure. To compare one feature of American law with one feature of analogous foreign law without taking into account how each feature figures into the entire legal scheme of the respective country produces exceedingly misleading results. For example, many foreign legal systems deny protection to sound recordings as works of "authorship," while affording producers and performers a measure of protection under so-called "neighboring rights" schemes. While that protection may be more generous in some respects than sound recording copyright in the United States, entailing the right to collect

royalties in connection with public performances, it is distinctly less generous in others. For example, in many neighboring rights jurisdictions the number of years sound recordings are protected is much shorter than under U.S. law. For example, although U.K. copyright owners have a right of remuneration for the performance of their sound recordings, protection in the U.K. extends only 50 years after the date of the release of a recording, as compared to 95 years in the U.S. This was no oversight or anomaly on the part of the British Government, which recently considered and declined to extend the term past its current 50 years, despite fierce lobbying from the British music industry.

In many countries, the royalty rate paid to music composers and publishers is significantly higher than that paid for sound recordings, yet the Copyright Royalty Board decisions in the U.S. have provided rates for performing digital audio transmissions several times higher than rates paid to the composers. In its reliance on the example of foreign law, the American recording industry is, in effect, inviting policy-makers to compare non-comparables.

The U.S. has the best radio system in the world, which, among other things, has helped spawn the most lucrative recording industry in the world. The U.S. commercial radio broadcasting industry was, for the most part, built by private commercial entrepreneurs who did not and do not receive any subsidy from the government or its listeners. Many, in fact most, broadcast systems in other countries were built and owned, or heavily subsidized, by the government or by taxes. The fact that under those systems the governments also chose to subsidize their own recording industries by granting performance rights and paying royalties from government owned or subsidized stations does not mean this is an appropriate system for this country. In this regard, it is significant to note that the U.S. recording industry that operates under a regime with no performance tax, is larger than that of the UK, France, Germany, Canada, Australia, Italy, Spain and Mexico combined, all of which have performance tax regimes.

Any Undercompensation of Performing Artists May Be the Result of Their Contractual Relationships with the Record Companies

Advocates for a performance tax often raise the specter of overworked and underpaid performers as the supposed beneficiaries of such a tax. The history of the treatment of performers by recording companies makes any assumptions that performers meaningfully would share in any largess created by a performance tax highly dubious at best. That history is replete with examples of record company exploitation of performers. Following are just some examples:

"The recording industry is a dirty business - always has been, probably always will be. I don't think you could find a recording artist who has made more than two albums that would say anything good about his or her record company. . . . Most artists don't see a penny of profit until their third or fourth album because of the way the business is structured. The record company gets all of its investment back before the artist gets a penny, you know. It is not a shared risk at all." (Don Henley, The Eagles, July 4, 2002, http://www.pbs.org/newshour/bb/entertainment/july-dec02/musicrevolt_7-4.html.)

"What is piracy? Piracy is the act of stealing an artist's work without any intention of paying for it. I'm not talking about Napster-type software. I'm talking about major label recording contracts. . . . A bidding-war band gets a huge deal with a 20% royalty rate and a million dollar advance . . . . Their record is a big hit and sells a million copies . . . . This band releases two singles and makes two videos . . . . [The record company's] profit is $6.6 million; the band may as well be working at 7-Eleven . . . . Worst of all, after all this the band owns none of its work . . . . The system's set up so almost nobody gets paid . . . . There are hundreds of stories about artists in their 60s and 70s who are broke because they never made a dime from their hit records." (Courtney Love, Hole, 2000, http://archive.salon.com/tech/feature/2000/06/14/love/.)

"Young people . . . need to be educated about how the record companies have exploited artists and abused their rights for so long and about the fact that online distribution is turning into a new medium which might enable artists to put an end to this exploitation." (Prince, 2000.)

Often the distribution system for performance rights in sound recordings is very skewed to the record companies as opposed to performers, and often the performers allocation is heavily skewed to the top 20% of the performers. A performance tax will take money out of the pockets of radio stations and other business, and put it in the hands of

record companies and a few top-grossing performers.
Even those countries with sound recording performance rights, which proponents of a performance tax often point to as models, have begun to question whether copyright legislation is the best instrument by which to improve the economic status of artists. Imposing a new performance tax would not alleviate any economic concerns if the artists themselves continue to lack bargaining power in their relationships with the record labels.
Performance Rights for Sound Recordings As Applied to Streaming Need To Be Fixed

Like any industry must in this time of rapid technological advancement, radio is endeavoring to adapt to the changes in the marketplace. Broadcasters are eager to embrace new technologies and new plans to remain relevant in our local communities for decades to come. We are embracing the future by investing significant financial and human resources in new technologies, including Internet streaming, so that we can continue to compete in a digital marketplace and improve our service to local communities and listeners.

As I discussed previously, Congress created a limited public performance right in sound recording with the goal of fostering the growth of Internet streaming while preserving the longstanding, mutually beneficial relationship between the radio and recording industries. Broadcasters are struggling to create viable business models for Internet streaming. Coupling the powers of the Internet with the longstanding strengths and benefits of local free over-the-air radio provides exciting possibilities for broadcasters and our listeners. Unfortunately, the current legislative scheme imposes conditions and limitations that are incompatible with traditional and emerging broadcast practices, and the recent decision of the Copyright Royalty Board (CRB) has resulted in oppressive and unjustified sound recording royalty fees that have made a viable business model for simulcast steaming almost impossible for many broadcasters. The 200% increase in the sound recording performance fees over the 2006-2010 license period established by the CRB is unreasonable and debilitating to growing a profitable business. There are numerous serious flaws in the CRB's decision, but let me mention just two of them. First, the CRB gave no credit to radio broadcasters for the tremendous promotional value we provide to the recording companies and artists. This is a major factor in record sales and revenues from concerts. Second, the CRB based the rates it established on rates paid to the recording industry by interactive webcasting services that provide the ability to purchase recordings online. We believe there are fundamental differences between such services and the free, advertiser-supported services broadcasters provide.

The sound recording performance fee for Internet streaming - and the standard by which it is set - must be reformed. NAB supports H.R. 2060 and S. 1353, which would vacate the CRB decision, establish an interim royalty rate structure, and change the current "willing buyer, willing seller" standard that has been a recipe for abuse and needlessly inflated royalty rates to levels that are suffocating radio streaming services. The "willing buyer, willing seller" standard has given rise to a presumption in favor of agreements negotiated by the major recording companies, acting under the antitrust exemption in the Copyright Act. The predictable result has been unreasonably high sound recording fees.

In addition, the conditions imposed on broadcasters that stream should be modified. The statutory performance license imposed nine conditions on broadcasters that stream, at least three of which are wholly incompatible with broadcasters' over-the-air business model. For example, one condition prohibits the playing of any three tracks from the same album within a three-hour period. Another condition prohibits DJs from "pre-announcing" songs, and a third requires the transmitting entity to use a player that displays in textual data the name of the sound recording, the featured artist, and the name of the source phonorecord as it is being performed. These conditions are designed to prevent copying of sound recordings from distribution mechanisms far different than radio. Radio stations should not be forced to choose between either radically altering their over-the-air programming practice or risking uncertain and costly copyright infringement litigation.

We urge the Committee to address these gaping inequities as soon as possible, and certainly not to permit the record companies to expand the existing unfair and unworkable system any further.

Conclusion
The relationship between the radio industry and the recording industry in the U.S. is one of mutual collaboration, with a long history of positive economic benefits for both. Without the airplay provided by thousands of radio stations across the U.S., the recording industry would suffer immense economic harm. Radio stations in the U.S. have been

the primary promotional vehicle for music for decades; it is still the primary place where listeners are exposed to music and where the desire on the part of the consumer to acquire the music begins.

Efforts to encourage Congress to establish a new performance fee comes at a volatile time for both the radio and recording industries. Both industries are fighting intense competition for consumers through the Internet and other new technologies, and both industries are experiencing changes to their traditional business models.

The recording industry's pursuit of a new performance tax at this time appears directly linked to the loss of revenues from the sale of music. This should not be a basis for the imposition of such a levy and radio should not be responsible for the loss of revenue from physical sales in the recording industry. A performance tax would harm the beneficial relationship that exists between the recording industry and the radio industry. Together, these two industries have grown and prospered. Congress would better serve all parties, including the public, by encouraging our industries to work together to solve challenges rather than to legislate a system that would merely siphon revenues from one to the other.