

Testimony of

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STATEMENT OF EDGAR BRONFMAN, JR.
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BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ON
PARITY, PLATFORMS AND PROTECTION: THE FUTURE OF THE MUSIC INDUSTRY IN THE DIGITAL RADIO
REVOLUTION

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Chairman Specter, Senator Leahy, and Members of the Committee, thank you for inviting me to testify today. My name is Edgar Bronfman, Jr., and I am Chairman and CEO of Warner Music Group.

I come here today not just as the CEO of the only major American music company, but as a representative of the intellectual property, or "IP", industry. IP, in its many forms and permutations is the backbone of the U.S. economy--today and in the future. To support, expand and enhance our economy, the United States government seeks to protect American IP around the world. Intellectual property should receive the same respect here, within our own national borders, as we would have it receive internationally.

The digital revolution has had--and will have--a profound effect on our society and specifically on most forms of intellectual property and no other form of IP has been more profoundly affected than music.

When a group of investors and I purchased Warner Music Group from Time Warner two years ago, many people in the investment community thought we were crazy. Piracy, both physical and digital was growing rapidly, resulting in billions of dollars and thousands of jobs lost and artist rosters cut. This meant less opportunity to invest in new music and new talent. It was a crisis for which there was no clear solution.

Since then, while piracy remains a debilitating plague on our industry and other IP industries, Warner Music has been meticulously rebuilt on the premise that as a result of the digital revolution, there will be more music available, in more ways and to more people, than ever before. And it will be delivered to consumers in ways that we never before imagined possible--and with that will come great economic benefit to our nation--but only if there is parity among platforms in this new, emerging, digital world. It requires a balance that allows both content companies and new digital services to thrive. Neither can, nor should be sacrificed for the sake of the other.

No one is a stronger believer in the promise of digital music than Warner Music. We seek to lead the industry's transformation into the digital era. And digital is, by far, the fastest-growing part of our business.

We also know that we can't do this alone. We are pleased to work with the many services and manufacturers who help to bring new digital offerings to listeners. Through a myriad of digital distribution services, consumers today dictate how they experience music. Consumers decide whether they prefer to purchase a whole album, a single song ... or a monthly subscription. They can have music delivered to them in their homes or directly to a portable device--or both simultaneously--at any time of day.

There are substantial benefits for everyone in this digital music ecosystem--artists, music companies and distribution companies. But it is both nascent and fragile. Most of the companies, technologies and models that help make up this ecosystem are relatively new--or at least relatively new to the music business.

And so, the growth of these digital services and the extension of these extraordinary benefits to consumers must rely on a key principle: "parity." With parity across all the platforms on which digital music is delivered will come a level playing field among multiple technologies and players as will all the attendant consumer and artist benefits of true competition. Without parity, one technology--or certain companies--are unfairly favored... competition evaporates... and the entire digital music ecosystem is in peril--and with it, the potential economic benefits of a once again healthy and growing music industry.

Music is licensed along a continuum, with royalty payments varying depending on how much control the user has over the music. At one extreme is the purely passive listening experience provided by traditional radio. At the other extreme is interactivity or permanent ownership of the music, which is provided by so-called "distribution services" like iTunes, Rhapsody and Yahoo! Unlike the passive listening experience, distribution services offer consumers varying degrees of control to determine what music they hear and how and when they hear it.

Cable, satellite and Internet music services are regulated by the government--and by this Committee--through a compulsory license. I am generally not a fan of compulsory licenses and feel they are only appropriate when there is some reason why ordinary market mechanisms cannot work. By their very nature, they place IP companies at a great disadvantage because they aren't negotiated on arm's-length terms and because the IP company can't say "no." In addition, compulsory licenses can be subject to misuse when the licensees who are the beneficiaries exceed their scope. Lastly, unlike contractual arrangements negotiated in the marketplace, with compulsory licenses, if you later discover some flaw or if the passage of time makes them outmoded, they are far more difficult to fix because they are statutory.

There is no better example of this than the treatment of satellite services under Section 114 of the Copyright Act. These services are obtaining their content through compulsory licenses that were designed for listening-only, or purely passive services traditionally referred to as "radio."

It's important to note that, even though throughout this hearing you'll hear the term "radio" to describe such satellite services, they offer a lot more than what we commonly think of as "radio." These services provide scores of channels of narrowly themed programming, so they can cater to the very particular tastes of any individual listener, and by virtue of the rapid advancements in technology, they are quickly being transformed into much more than the traditional, passive, listening-only experiences from which their original compulsory license was derived.

Many of these services have already morphed from listening services into download services. Satellite services are now offering new devices, which can essentially transform a satellite service like XM and Sirius into a distribution service like iTunes. Many of the satellite devices about to be released are not only similar to iPods--but iPods linked to a free iTunes supply feature.

Let's be very clear about this: we're not concerned about the simple recording of blocks of music for time-shifting purposes by listeners of traditional radio. Everyone agrees that that should be permitted. Instead, we are concerned about technologies which these services are embracing today which allow their broadcast programs to be automatically captured and then disaggregated, song-by-song, into a massive library of music, neatly filed in a digital jukebox and organized by artist, song title, genre and any other type of classification imaginable. And with the inevitable march of technology, we can only imagine what other services might be offered in the future.

What's that old saying? "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Well, when I see a device that permits consumers to identify the specific tracks they want from a satellite broadcast, record them and library them for future use, I call that device an iPod and I call the satellite service making that device available a download service. What is clear to everyone is that these services no longer resemble and will increasingly stray from our collective understanding of what constitutes a traditional radio service.

I recognize that some satellite services have agreements with distribution services like Napster. We view that as a positive development, but as long as they simultaneously offer the ability to take the same content for free, it's just disingenuous.

A solution to this problem, within the confines of continued compulsory licenses, is The PERFORM Act, introduced by Senators Feinstein and Graham. It is a critical step towards ensuring that IP continues to be respected in the digital world. It does so by making sure that the same rules apply to all of the satellite, cable and Internet services, which avail themselves of a compulsory license under Section 114. It helps protect the IP community from under-market rates by applying to satellite services the same "fair market value" standard that currently applies to Internet music services. It also protects the value of IP by applying the same effective content protection requirements to satellite, cable and Internet music services equally.

Today, Section 114 embodies an imbalance that gives satellite services an unintended advantage over Internet services. The PERFORM Act attempts to create parity--to rectify that imbalance--for all of the satellite, cable and Internet services subject to the statute. In addition, it provides that if a Section 114 service is for all practical purposes acting like a distribution service, outside the scope of the compulsory license, then for those additional services or functionalities, it must enter into arm's-length negotiations with the IP community.

If Section 114 is left as is, this lack of parity will, in effect, continue to serve as an unfair subsidy for the satellite services much of whose foundation rests upon the many decades of work produced by the music industry. And yet under the current system, artists and labels are essentially subsidizing both the satellite services' acquisition of non-musical content and the cost of the subscription itself. How valuable, I would ask, might these services be without music? And whatever the answer, I would advocate that the answer should be found through the exercise of the free market.

To devalue music content, to suggest that the creators and owners of content should be forced to share their property in a manner that ignores the free market, and that disadvantages other services is as outrageous as it is wrong. It also means, in the end, the digital music ecosystem will fail and the promise of a resurgent marketplace for musical content will disappear. And where will these so-called new services be then? Because what new service can prosper without the content it carries?

What we have today is a fragile ecosystem that is out of balance and a business model that is unfair. It's unfair to the legitimate music distribution services that are struggling to gain traction in a nascent business. And it is unfair to the music companies and artists, whom it robs of proper compensation for the use of their work.

We prefer the free market to compulsory licensing, but if we are all going to have to live with these licenses there must be parity in practice and application.

The PERFORM Act, is a critical step towards creating parity among satellite, cable and Internet music services. It provides content protection requirements for content distributed on all of these platforms and it creates parity for the rate-setting rules among disparate platforms thus leveling the playing field and enabling these services to compete fairly with each other.

At the same time it levels the playing field between satellite and distribution services, the bill specifically protects consumers' expectations when it comes to being able to record music off of these services as consumers have traditionally done from time to time while listening to the radio. We want consumers to be able to enjoy music in many different ways and continue to enjoy the kind of personal home recording that listeners have experienced for decades.

The PERFORM Act accomplishes this by ensuring equal opportunity for satellite, cable and Internet platforms and services, establishing rules that respect and value the music that makes such a difference in our lives.

Mr. Chairman, no one appreciates the promise of the digital era more than we do. We believe that the integrity of the digital marketplace represents the very future of music. We want all of these services to survive and prosper and to continue to expand the ways in which consumers can access and enjoy music. In doing so, the benefits for

consumers, artists, labels, device manufacturers and services are immense. But to achieve this promise... to achieve these benefits... there must be parity. The PERFORM Act provides parity.

We come here today not to ask for a subsidy for our industry. We do not seek a "floor" on the value of our content. But we do ask for the equitable and reasonable concept of parity among platforms. Parity in the way a fair price is derived. Parity in the ways content is protected. Plain and simple: parity.

Without it, our licensing regime is riddled with flaws resulting in unintended adverse consequences that jeopardize the great promise of the digital revolution. I urge you to support this legislation and move it to enactment in order that all of these parties here today, and all others who seek to legitimately bring content to consumers, can make beautiful music together.

Thank you.