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Satellite Digital Audio Radio Services and Copyright Law Issues

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Summary

Satellite radio services such as XM and SIRIUS provide high-quality digital audio programming to millions of subscribers who pay a monthly fee to enjoy listening to a wider variety of entertainment and news than traditional terrestrial (AM and FM) radio stations offer, including many genres of music, sports broadcasts, and talk radio. However, partly because of the digital nature of satellite radio broadcasts, when satellite radio providers transmit copyrighted content to their customers, several legal issues potentially arise that may not be present in terrestrial radio broadcasts. Copyrights in music are held by composers and recording artists or their record labels. The rights of these parties under the Copyright Act to control and financially benefit from third-party use of their creative works may affect the music licensing fees paid by satellite radio companies, and may limit the manner in which consumers listen to and enjoy music broadcast by satellite.

This report explains the music copyright issues involved in satellite radio services, summarizes the concerns raised by some music copyright holders over particular broadcast recording features offered by satellite radio companies, and examines legislation introduced in the 109th Congress that seek to reform the current licensing scheme for digital audio transmissions and online music deliveries, including S. 2644 (PERFORM Act of 2006) and H.R. 5553 (Section 115 Reform Act of 2006).

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Satellite Digital Audio Radio Services and Copyright Law Issues

Introduction

When satellite radio providers broadcast copyrighted content to their customers, several copyright issues potentially arise. The rights of music copyright holders under the Copyright Act to control and financially benefit from uses of their creative works may affect the music licensing fees paid by satellite radio companies, and may limit the manner in which consumers listen to and enjoy music broadcast by satellite. This report explains the music copyright issues involved in satellite radio services, summarizes the concerns raised by some music copyright holders over particular recording features offered by satellite radio companies, and examines legislation introduced in the 109th Congress that seek to reform digital music licensing, including S. 2644 (PERFORM Act of 2006) and H.R. 5553 (Section 115 Reform Act of 2006).

Background

Description of Satellite Radio. The satellite radio industry comprises two companies, Washington, DC-based XM Satellite Radio, Inc., and New York, NY-based SIRIUS. These companies broadcast to consumers audio content from dedicated satellites orbiting over the United States, in the form of "channels" that offer a wide variety of digital-quality music, sports, traffic, weather, and talk radio programming. Combined, these two companies provide satellite radio service to more than 11 million subscribers in the United States.[1] To listen to these broadcasts, a customer pays a monthly subscription fee[2] to the company and uses a satellite radio receiver — a special audio device manufactured by electronics companies such as JVC, Pioneer, and Samsung. Satellite radio receivers are available in different configurations for various listening environments (e.g., car, home stereo, and portable hand-held device).

The Interested Parties Involved in Satellite Music Broadcasts. Several parties are interested in the offering of satellite digital[3] audio radio:

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[1] *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (2006) (statement of Gary Parsons, Chairman of XM Satellite Radio), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5268].

[2] The current monthly fee charged by both SIRIUS and XM is $12.95.

[3] Copyright issues regarding *analog* music services, such as traditional AM and FM radio station broadcasters, are beyond the scope of this report. The Copyright Act creates particular rights and licenses for music conveyed to the public by digital means, which are

(continued...)

- Musical content creators (individuals who compose music by writing musical notation and the lyrics of a song — e.g., songwriters).[4]

- Sound recording owners (a performance of a song or other piece of music that is recorded onto a material object, including digital music formats such as MP3 — e.g., record companies that produce, manufacture, and distribute the sound recording).[5]

- Satellite radio providers (entities that deliver music to the public by means of satellite broadcast — e.g., XM and SIRIUS).

- Consumers who enjoy listening to satellite radio.

Customers pay monthly fees to satellite radio companies for the ability to receive broadcasts; these companies, in turn, compensate music content creators and sound recording owners for the right to digitally deliver music to their subscribers. Satellite radio operators are obliged to pay licensing fees to copyright holders because of several provisions of the Copyright Act.

Copyright Holder's Rights in Digital Music. Section 106 of the Copyright Act provides copyright holders with several discrete, exclusive rights to, among other things,[6] control:[7]

- the reproduction of a work, meaning copying the work;

- the distribution of a work, meaning transferring ownership of a copy of a work to the public by sale, rental, lease, or lending; and

- the public performance of a work, meaning performing, transmitting or otherwise communicating the work to the public.[8]

Each of these rights corresponding to the particular use of a copyrighted work is distinct and divisible; meaning, for example, that a copyright holder could authorize a third party to distribute a work while denying that same party the right to perform it publicly. Therefore, a third party interested in doing something with a

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[3] (...continued)
largely inapplicable for works made available to the public via analog technologies.

[4] For example, Cole Porter wrote the song "I've Got You Under My Skin."

[5] For example, Frank Sinatra recorded a rendition of him singing Cole Porter's "I've Got You Under My Skin." This sound recording is owned by Reprise Records.

[6] 17 U.S.C. § 106 also provides the copyright holder with the right to display or prepare derivative works based upon the work; these rights are beyond the scope of this report.

[7] The holder of a copyright in a work has the right to do, or to authorize others to do, any of these actions with respect to the work.

[8] 17 U.S.C. §§ 101, 106. Section 101 of the Copyright Act provides a more detailed definition of "publicly," which is not necessarily relevant to the delivery of digital audio to the public.

copyrighted work must first obtain the permission of the copyright holder to do anything that implicates any one of the holder's exclusive rights (e.g., reproduce, distribute, or perform). The unauthorized use of a copyrighted work constitutes an infringement of the particular right at issue, unless the action is permitted by a statutory exception, such as "fair use" for limited purposes such as criticism, teaching, comment, scholarship, or research.[9]

Music Licensing and Satellite Radio Services. As noted above, the Copyright Act distinguishes between two different holders of copyrights in musical content — for simplification and convenience, this report refers to these two parties as the "songwriter" (musical work composer or the music publisher) and the "record label" (owner of the material object in which the sounds of a musical work are recorded). Music copyright holders usually grant permission to a third party through a voluntarily negotiated, private licensing agreement, whereby the third party agrees to pay royalties to the copyright holder in exchange for the right to use the work under the conditions set forth in the contract. However, copyright law also provides several types of "compulsory" licenses for certain uses of music, in which the third party need *not* seek authorization of the copyrighted holder, but rather pays a statutorily prescribed royalty rate for the privilege of using the work in particular, limited ways that are specified by the Copyright Act.

The compulsory licenses created by the Copyright Act are found in 17 U.S.C. §§ 112, 114, and 115. Section 112 involves "ephemeral" recordings of digital audio transmissions; for example, entities that "webcast" (transmission of audio through the Internet) a sound recording may pay a compulsory license fee under § 112 to make a temporary reproduction or copy of the recording, generally stored in the hard drives of computer servers, to facilitate the performance. Section 114 provides a compulsory license to certain eligible music providers for the public performance of digitally transmitted sound recordings. Section 115 allows a user to pay a "mechanical license" to the songwriter for the right to reproduce and distribute the musical composition, in a manner that may be heard with the aid of a mechanical device, for songs that have been initially distributed publicly under the authority of the copyright holder. The Digital Performance Right in Sound Recordings Act of 1995[10] amended § 115 to include "digital phonorecord deliveries," or DPDs, thus ensuring compensation to songwriters for the digital transmission (e.g., digital downloads) of their musical compositions. The § 115 mechanical license does not, however, authorize reproduction of the sound recording that is embodied in the digital music file; permission to duplicate the sound recording must be obtained through voluntary negotiation and agreement with the record label.

The chart below provides a summary and comparison of the royalties that are paid by a digital music service, and the copyright holders to whom they are owed, for music delivered to the public through digital means — either by digital "downloads" of music files (implicating the reproduction and distribution rights) or by broadcast (implicating the performance right). As the chart illustrates, both copyright holders (the songwriter and record label) are entitled to compensation for any reproduction,

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[9] 17 U.S.C. § 107.

[10] P.L. 104-39 (1995).

distribution, or performance of their works, although the rates may vary between the type of use and the type of music copyright holder. Generally, the royalty rates increase in direct proportion with the amount of control the listener may exercise over the music received:

Royalty Rates and Digital Music Services		
	Reproducing or Distributing a Work	**Publicly Performing a Work Through Digital[11] Transmission**
Songwriter: the author of a musical work, or the holder of a copyright in a musical composition (the music publisher).	As provided by § 115 of the Copyright Act, a "mechanical license": 9.1 cents for songs 5 minutes or less, or 1.75 cents per minute or fraction thereof for songs over 5 minutes.[12]	Royalty rate set by voluntarily negotiated private agreement between the third party and the copyright owner.[13]
Record label: the holder of a copyright in a sound recording of a musical composition.	Royalty rate set by voluntarily negotiated private agreement between the third party and the copyright owner.	As provided by § 114 (d)(2) of the Copyright Act, a compulsory license for public performance of sound recordings: 0.0762 cents per performance.[14]

[11] While there is no general public performance right in sound recordings, copyright law provides a limited right to sound recording copyright holders for the performance of a sound recording by means of a digital audio transmission. 17 U.S.C. §106(6). However, terrestrial radio stations (AM and FM stations) that broadcast through analog means, do not need to compensate recording artists or record labels, only the composer of the music.

[12] This is the statutory rate effective from January 1, 2006, to December 31, 2007. U.S. Copyright Office, Copyright Royalty Rates, Section 115, the Mechanical License, *available on July 12, 2006, at* [http://www.copyright.gov/carp/m200a.html]. However, the Harry Fox Agency, a wholly owned subsidiary of the National Music Publisher's Association, typically negotiates and issues these licenses on behalf of songwriters, and the mechanical license is seldom used for the permission to make or distribute copyrighted musical compositions; such rate rarely exceeds that set by the U.S. Copyright Office. *See* [http://www.harryfox.com/public/FAQ.jsp].

[13] ASCAP, BMI, and SESAC are "performing rights societies" that represent their members (composers, songwriters, lyricists, and music publishers) in the licensing of public performances of their works. *See, e.g.*, [http://www.ascap.com/about].

[14] Digital Performance Right in Sound Recordings and Ephemeral Recordings, 69 Fed. Reg. 5693 (Feb. 6, 2004), *available on July 12, 2006 at* [http://www.copyright.gov/fedreg/2004/69fr5693.html]. This is the current rate set by the Copyright Royalty Board of the Library of Congress, which determines the rates and terms of statutory royalty payments. Pursuant to 17 U.S.C. § 804(b)(3)(B), the Copyright Royalty Board commenced proceedings in January 2006 to determine a new rate to be paid by satellite digital audio radio services, for the period beginning on January 1, 2007, and ending on December 31, 2012. Adjustment of Rates and Terms for Preexisting Subscription and Satellite Digital Audio Radio Services, 71 Fed. Reg. 1455 (Jan. 9, 2006), *available on July 12, 2006 at* [http://www.loc.gov/crb/

Copyright Infringement Claims Against Satellite Radio Services

New Recording Functionality Offered by Satellite Radio. When satellite radio services broadcast copyrighted content to their subscribers, they pay *performance* royalties to the songwriter and record label as specified on the previous page. However, in early 2006, XM Satellite Radio and SIRIUS introduced portable hand-held devices that allow their subscribers to program in advance the digital recording of up to 50 hours of broadcast music for later playback.[15] The Recording Industry Association of America (RIAA), which represents record companies that comprise approximately 90% of all sound recordings produced and sold in the United States, alleges that these recording devices hold the potential to infringe their copyright holders' rights to control the reproduction and distribution of music. Summarizing the nature of the complaint, the chairman of a major record label testified before Congress as follows:

> [B]y virtue of the rapid advancements in technology, [satellite radio services] 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.[16]

SIRIUS has reached agreements with the four major record labels (EMI Music Group, Warner Music Group, Vivendi Universal's Universal Music Group, and Sony-BMG) to pay a fee to the labels for each sale of its S50 recording device in exchange for the right to market the device.[17] However, XM Satellite Radio has, to date, been unsuccessful in negotiating a similar agreement with the record labels. In defense to charges of copyright infringement, XM has asserted the following:

> [The recording devices] simply enable listeners to save songs off the radio for playback later — the 21st century equivalent of a cassette recorder, in the same way that TiVo allows them to save TV shows for later viewing. XM subscribers cannot choose the tracks that XM plays. And unlike download services, XM

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[14] (...continued)
fedreg/2006/71fr1455.html].

[15] *See, e.g.*, the Pioneer Inno, described at [http://www.xmradio.com/pioneerinno/index.jsp], the Samsung Helix, described at [http://www.xmradio.com/samsunghelix/index.jsp], and the SIRIUS S50, described at [http://www.sirius.com/gs/s50/index_product.html].

[16] *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (2006) (statement of Edgar Bronfman, Chairman and CEO of Warner Music Group), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5267].

[17] Peter Kafka, *Sirius, EMI Agree On Player Deal*, Forbes.com (Apr. 13, 2006), *available on July 12, 2006 at* [http://www.forbes.com/2006/04/13/sirius-emi-music_cx_pk_0413sirius.html].

> subscribers never own the programming that they record from XM — it cannot be burned to a CD, transferred to other radios or uploaded to the internet. In addition, XM subscribers can only listen to recorded XM content as long as they keep an active XM subscription.[18]

Litigation Against XM. In a federal lawsuit filed against XM Satellite Radio on May 16, 2006,[19] the major record labels argue that XM has only paid for the right to perform (broadcast) music under a § 114 compulsory license, but that it has not voluntarily negotiated or paid for the right to reproduce and distribute a copy of such music to subscribers. Section 114 of the Copyright Act provides that the limited compulsory license available for the public performance of a sound recording does not "annul, limit, impair, or otherwise affect" the reproduction and distribution rights of a holder of copyright in sound recordings.[20] Under the plaintiffs' characterization, the defendant XM Satellite Radio, by offering the recording devices, is effectively functioning as a digital download "service" rather than solely as a satellite radio broadcaster, and thus XM should have to pay higher royalties fees for the right to distribute music, such as those paid by an online music stores like Apple Computer's iTunes service.[21]

XM company officials respond to this allegation by presenting its recording device as a lawful, digital audio recording device that is fully compliant with the Audio Home Recording Act (AHRA).[22] Congress enacted the AHRA[23] in 1992 to provide for a royalty payment system and a serial copyright management system for consumer electronic devices that allow digital copying of sound recordings in exchange for a prohibition on copyright infringement lawsuits against the manufacturers of such devices and consumers who use them for noncommercial purposes. In addition, or in the alternative, XM officials claim that the devices allow for legitimate "time-shifting" of radio broadcasts similar to that offered by a VCR,[24] a "fair use" approved by the U.S. Supreme Court in the 1984 case, *Sony Corp. of America v. Universal City Studios, Inc.*[25]

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[18] Eric Logan, *An Open Letter From XM Satellite Radio to Artists, Musicians and Songwriters, available on July 12, 2006 at* [http://www.xmradio.com/lineup/openletter.jsp?refsrc=hp_ex].

[19] Atlantic Recording Corp., et al., v. XM Satellite Radio, Inc., No. 1:06-cv-03733 (S.D.N.Y. filed May 16, 2006).

[20] 17 U.S.C. § 114(d)(4)(C).

[21] Charles Duhigg, *Labels Sue XM Over Its Device,* L.A. TIMES, May 17, 2006, at C3.

[22] *See* Logan, *supra* note 18.

[23] P.L. 102-563 (1992), codified at 17 U.S.C. § 1001 et seq.

[24] *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong., 2nd Sess. (2006) (statement of Gary Parsons, Chairman of XM Satellite Radio), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5268].

[25] 464 U.S. 417 (1984). While "time-shifting" for non-commercial, private use was deemed a fair use, the Court defined such practice to mean the recording of a program for viewing

(continued...)

As of the writing of this report, the outcome of this litigation is not yet known, and thus the validity of the legal theories offered by the parties to the dispute remains open to question.

Legislation Introduced in the 109th Congress

In recognition of the technological advances in music delivery methods to the public, the potential blurring of distinctions between reproduction, distribution, and performance rights when music is transmitted digitally,[26] and the perception that music licensing laws are antiquated,[27] several bills have been introduced in the 109th Congress that seek to reform the Copyright Act with respect to the use of copyrighted music in a digital context. Among other things, the purpose of these bills, according to their sponsors, is to ensure that music copyright holders are fairly compensated and their works protected against unauthorized further reproduction, redistribution, or retransmission, and to streamline the process through which digital music services obtain permission from music publishers and record labels to use their songs and recordings. Critics, however, raise concerns that the proposed licensing reform legislation may hinder technological innovation and the ability of consumers to enjoy music in ways that are most convenient to them.[28] Some digital music providers, particularly the satellite radio companies, also observe that the bills are being

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[25] (...continued)
once at a later time, and thereafter erasing it. *Id*. at 423. In contrast, however, the Court arguably did not appear to sanction "library-building," in which a user records a program in order to keep it for repeated viewing.

[26] *See Music Licensing: Hearing Before the Senate Comm. On the Judiciary*, 109th Cong., 1st Sess. (2005) (statement of Marybeth Peters, The Register of Copyrights), available on July 12, 2006, at [http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4446] ("For various reasons that made sense at one time, the domestic music licensing structure for nondramatic musical works has evolved as a two-track system, one for licensing public performance rights and the other for licensing the reproduction and distribution rights. This worked reasonably well when the two sets of rights rarely intersected. But the reality of digital transmissions is that in many situations today it is difficult to determine which rights are implicated and therefore whom a licensee must pay in order to secure the necessary rights.").

[27] *See id*. ("There is no debate that section 115 needs to be reformed to ensure that the United States' vibrant music industry can continue to flourish in the digital age.... [T]he operative question is not whether to reform section 115, but how to do so.... It is now time to modernize section 115 holistically not only to address immediate needs, but also to establish a functional licensing structure for the future.").

[28] *See, e.g.*, Consumer Electronics Association, *CEA Urges Congress to Reject the PERFORM Act*, May 12, 2006, *available on July 12, 2006, at* [http://www.ce.org/shared_files/pr_attachments/20060512_perform.doc] ("Americans have been making noncommercial recordings off the radio for decades. This bill would turn back the clock on home recording. Indeed, if this bill applied to video content, your TiVO would be outlawed.").

introduced at an inopportune time: when some digital music providers and music copyright holders are renegotiating the terms and rates of music licensing contracts.[29]

S. 2644, the PERFORM Act of 2006. Senators Feinstein, Graham and Frist introduced S. 2644, the Platform Equality and Remedies for Rights Holders in Music Act of 2006 (PERFORM Act) on April 25, 2006. The PERFORM Act is primarily concerned with the digital public performance right of sound recording copyright holders; thus, satellite radio companies would be directly affected by this bill. If enacted, S. 2644 would:

- Create an additional eligibility precondition[30] for the use of a § 114 compulsory licenses (for public performance of a digitally transmitted sound recording), which mandates that the transmitting entity "takes no affirmative steps to authorize, enable, cause or induce the making" of a phonorecord,[31] by or for the listener.[32]

- Require content protection — a transmitting entity that avails itself of a § 114 compulsory license must use "technology that is reasonably available, technologically feasible, and economically reasonable" to disallow the reproduction of the music transmitted to the listener,[33] *except* for "reasonable recordings."[34]

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[29] *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary,* 109th Cong., 2nd Sess. (2006) (statement of Gary Parsons, Chairman of XM Satellite Radio), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5268] ("The proposed Perform Act would give the recording industry unwarranted control over the business of satellite radio, and would unfairly change the rules governing our upcoming royalty rate arbitration just as that arbitration is about to begin.").

[30] Section 114 currently contains several preconditions that a transmitting entity must satisfy before qualifying for the use of a compulsory license, the specific details of which are beyond the scope of this report.

[31] The Copyright Act defines the term "phonorecord" to mean a material object in which fixations of sound are embodied, and from which the sounds may be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine. 17 U.S.C. § 101. A sound recording and a musical work may be embodied in a physical phonorecord.

[32] S. 2644, § 2(c) (bill as introduced). Thus, if a digital music provider took actions that violate this condition, such as by allowing its users to create "music libraries," it would not be eligible for a compulsory license to perform the sound recording, and must instead voluntarily negotiate licensing agreements with sound recording copyright holders (the record labels) to gain the right, not only to digitally transmit the work, but also to reproduce and distribute it as well.

[33] Although the focus of this report is concerned with satellite radio broadcasts, it is worth noting that this provision of the PERFORM Act would likely require webcasters (Internet radio broadcasters) to stream music to the public using a digital rights management (DRM)-enabled digital music file format, such as Microsoft's Windows Media Audio (WMA) or Real's RealAudio (RA) format. MP3-encoded audio is *not* DRM-compliant, and thus webcasters may need to switch their Internet radio streams to a non-MP3 format. *See* Fred

(continued...)

- Define "reasonable recording" to mean the making of a phonorecord for private, noncommercial use, where the recording device and the entity transmitting the music employ technological measures that (1) allow automated recording or playback based on specific programs, time periods, or channels, as selected by the user; (2) prevent automated recording or playback based on specific sound recordings, albums, or artists; (3) prevent the user from separating the recording into component segments and manipulating the sequence of playback of those components; and (4) prevent the redistribution, retransmission, or other exporting of the phonorecord from the recording device through a digital output or by burning it onto removable media such as a blank CD or memory card.[35]

- Establish "rate parity" between businesses that use the § 114 compulsory license — digital music providers that transmit audio through Internet, cable, and satellite technologies.[36] Currently, the royalty rate for a § 114 license varies depending on the medium or technology being used to transmit the music.[37] In an attempt to

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[33] (...continued)
von Lohmann, *The Season of Bad Laws, Part 3: Banning MP3 Streaming*, Apr. 26, 2006, *available on July 12, 2006, at* [http://www.eff.org/deeplinks/archives/004587.php].

[34] S. 2644, § 2(c) (bill as introduced).

[35] S. 2644, § 2(d) (bill as introduced). The recording devices introduced by XM and SIRIUS currently appear to abide by (1) and (4), but may not satisfy the conditions specified in (2) and (3).

[36] S. 2644, § 2(a), (b) (bill as introduced). Recall that traditional terrestrial radio stations (AM and FM) pay nothing in performance royalties to sound recording copyright holders, as the Copyright Act does not provide a general performance right in sound recordings, only a right in sound recordings performed through digital audio transmissions.

[37] According to an executive of an Internet radio company, satellite radio services pay sound recording royalties of approximately 5-7% of their revenue, whereas subscription webcasters typically pay 10.9% of their revenue. *Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary,* 109th Cong., 2nd Sess. (2006) (statement of N. Mark Lam, Chairman and CEO of Live365, Inc.), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5270]. However, a representative of the satellite radio industry testified before Congress that such rate disparity is justified because it takes into account the costs that are incurred by satellite radio providers in operating their services:

> Of all the entities that pay performance royalties, satellite radio is the only industry that creates and pays for its entire delivery infrastructure. Webcasters like Yahoo! did not have to create the Internet, and did not have to license spectrum from the FCC. By contrast, we acquired an FCC broadcast license at a cost of $90 million. We have spent close to a billion dollars to purchase our own dedicated transmission satellites and launch them into orbit, and we must repeat that investment to replace them on an ongoing basis after a relatively few years. We created and designed the XM transmission and receiving technology. In total, we have invested more than 3 billion dollars to create the satellite radio

(continued...)

> create such "rate parity," S. 2644 would first change the standard that is used by the Copyright Royalty Board in determining the royalty rate, from one that reflects the "fees that would have been negotiated in the marketplace between a willing buyer and a willing seller" to a standard that uses "the fair market value" of the right to transmit digital audio.[38] Second, the bill adds a new consideration that the Copyright Royalty Judges must base their rate setting decision upon,[39] to include "the degree to which reasonable recording affects the potential market for sound recordings, and the additional fees that are required to be paid by services for compensation."

A companion bill, H.R. 5361, was introduced on May 11, 2006, by Representative Howard Berman and referred to the House Committee on the Judiciary. H.R. 5361 is substantially similar to S. 2644 in many respects. One difference is that the provision of H.R. 5361 that amends § 114(f)[40] qualifies the term "transmissions" with "eligible,"[41] and then provides a definition of "eligible transmission," as it is to be used in § 114(f)(1) as redesignated by the bill, to mean the following: subscription transmissions by preexisting subscription services, subscription transmissions by preexisting satellite digital audio radio services,

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[37] (...continued)
business, and expect to invest billions more on an ongoing basis.

Parity, Platforms, and Protection: The Future of the Music Industry in the Digital Radio Revolution: Hearing Before the Senate Comm. on the Judiciary, 109th Cong., 2nd Sess. (2006) (statement of Gary Parsons, Chairman of XM Satellite Radio), *available on July 12, 2006 at* [http://judiciary.senate.gov/testimony.cfm?id=1853&wit_id=5268].

[38] However, S. 2644 fails to provide a definition of what constitutes "fair market value." One of the sponsors of the bill acknowledges this omission and suggests that a definition might be included in future versions of the bill if one could be developed based on "what the courts have held, what the copyright office has used, what a real competitive market would entail, as well as other factors that may not have been considered." 152 CONG. REC. S3510 (daily ed. Apr. 25, 2006) (statement of Sen. Feinstein).

[39] Under the current provision, 17 U.S.C. § 114(f)(2)(B), the Copyright Royalty Judges, in setting the reasonable rates and terms of a § 114 compulsory license, are required to base such decision on the following two factors: (1) whether use of the digital music service may substitute for or may promote the sales of sound recordings or otherwise may interfere with or may enhance the sound recording copyright owner's other streams of revenue from its sound recordings and (2) the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk.

[40] 17 U.S.C. § 114(f) describes the procedures that the Copyright Royalty Judges must follow in determining reasonable rates and terms of royalty payments for digital transmissions of sound recordings.

[41] H.R. 5361, § 2(b)(3) (bill as introduced). Thus, as amended by this provision of H.R. 5361, § 114(f)(1)(A) would read: "Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for eligible transmissions during the 5-year period beginning on January 1 of the second year following the year in which the proceedings are to be commenced...."

eligible nonsubscription transmissions, and transmissions by new subscription services. Throughout the comparable section of S. 2644 that amends § 114(f), S. 2644 does not qualify "transmissions" with the term "eligible." Therefore, S. 2644 offers no definition for "eligible transmission" because such term is not used under the Senate version of the bill. Without such qualification, it would appear that S. 2644 potentially would apply to a broader range of transmissions, whereas H. 5361 narrows the type of sound recording transmissions subject to the § 114(d)(2) compulsory license to only those that fall within one of the four eligible categories.

In addition, concerning the additional eligibility precondition for a § 114(d)(2) compulsory license that both versions of the PERFORM Act create (that the transmitting entity take no affirmative steps to authorize, enable, cause, or induce the making of a copy or phonorecord by or for the transmission recipient), H.R. 5361 adds at the end of 17 U.S.C. § 114(d)(2) the following:

> the mere offering of a transmission and accompanying metadata does not in itself enable the making of a copy or phonorecord.

S. 2644, by comparison, adds at the end of § 114(d)(2), the following language (additions noted through italics):

> the mere offering of a transmission and accompanying metadata does not in itself *authorize*, enable, *cause, or induce* the making of a phonorecord.

Under the House version of the bill, it is not as clear as the Senate bill whether the "mere offering" of a transmission (and accompanying metadata, such as text showing song title and artist information) constitutes authorizing, causing, or inducing the making of a phonorecord.

H.R. 5553, the Section 115 Reform Act of 2006 (SIRA). Introduced by Representatives Lamar Smith and Howard Berman on June 8, 2006, H.R. 5553, the Section 115 Reform Act of 2006 (SIRA), if enacted, would amend the mechanical license provision of § 115 by creating a new statutory license specifically for digital delivery of musical works. Unlike the PERFORM Act, SIRA crafts a novel, separate "blanket licensing" regime for digital music deliveries and applies to holders of copyright in musical works. SIRA would streamline the process by which digital music providers (such as Apple's iTunes) obtain permission from music publishers and songwriters to reproduce and distribute their musical works. SIRA's applicability to satellite radio companies, however, depends on whether the actions and activities engaged in by those entities come within the scope of the definition of

a "digital phonorecord delivery" (DPD)[42] or a "hybrid offering."[43] A brief summary of the major provisions of SIRA appears below.

Licenses Created.

- A "blanket" compulsory license shall be available for all DPDs and "hybrid offerings" for the following functions: (1) the making and distribution of general and incidental DPDs in the form of full downloads,[44] limited downloads,[45] interactive streams,[46] and any other form constituting a DPD or hybrid offering and (2) all reproductions and distribution rights necessary to engage in these activities, including cached, network, and RAM buffer reproductions.

- A royalty-free license shall be made available for the making of server and incidental reproductions to facilitate the noninteractive streaming of music; however, this royalty-free license is *not* available for digital music services that take affirmative steps to authorize, enable, cause, or induce the making of reproductions of musical works by or for the end users that are accessible by those end users for future listening.

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[42] The Copyright Act currently defines a DPD as: "each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible." 17 U.S.C. § 115(d).

[43] H.R. 5553 defines a "hybrid offering" to mean a reproduction or distribution of a phonorecord where a digital transmission of data is required to render the sound recording embodied on the phonorecord audible to the listener.

[44] H.R. 5553 defines a "full download" to mean a DPD of a sound recording of a musical work that is not limited in availability for listening by the end user either to a period of time or a number of times the sound recording can be played.

[45] H.R. 5553 defines a "limited download" to mean a DPD of a sound recording of a musical work that is only available for listening for (1) a definite period of time (including a period of time defined by ongoing subscription payments made by an end user) or (2) a specified number of times.

[46] H.R. 5553 defines an "interactive stream" to mean (1) a stream of a sound recording of a musical work that does not qualify for a statutory license under § 114(d)(2) with respect to the sound recording embodied therein and (2) a stream of a particular sound recording of a musical work that an end user has selected, and is transmitted to such end user, to listen to at or substantially at the time of making such selection or at some future time, whether or not as a part of a program specially created for the end user.

Eligibility.

Only digital music providers are eligible for this blanket license.

Designated Agents.

- The Register of Copyrights is to designate, by August 1, 2007, a mechanical licensing and collection agency representing music publishers that represent the greatest share of the music publishing market; such agency shall establish and operate a General Designated Agent (GDA). The GDA is empowered to do the following: grant and administer all licenses for musical works licensed under this regime; collect and distribute the royalties; engage on the behalf of music publishers and songwriters in industry negotiations, rate setting proceedings, litigation, and legislative efforts.

- The Register of Copyrights is to certify additional designated agents (ADAs) to represent copyright owners for purposes of these licenses, who represent music publishers representing at least a 15% share of the music publishing market. The ADAs represent any musical work copyright owner who voluntarily elects to have them represent them.

- Each designated agent is responsible for distributing royalties collected from these blanket licenses to any copyright owner whom the agent represents.

- Each copyright owner may be represented by only one designated agent during any calendar year; by default, it is the GDA, or by an ADA on the election of the owner.

- The GDA and ADAs are to maintain and make available free of charge to digital music providers a searchable electronic database from which the providers can determine which musical works are available for licensing through that designated agent.

- The designated agents may, upon written notice, conduct a "royalty compliance examination" of any licensee.

Duties Imposed on Digital Music Provider.

- A digital music provider that receives a blanket license, for the making and distribution of limited downloads or the making or distribution of interactive streams, may report to the designated agent that the provider had engaged in such activity during the period from January 1, 2001, to January 1, 2008, and pay the designated agent *retroactive* royalties applicable to that activity. A provider that reports this activity and makes such payments shall not

be subject to an action for copyright infringement for these activities.[47]

- An entity that avails itself of this blanket license shall, on a quarterly basis, report (in electronic format) its usage of musical works under the license and make royalty payments accordingly to the applicable designated agent.

- If a digital music provider fails to provide the quarterly report or fails to make all quarterly royalty payments, the designated agent may issue a warning in writing to the licensee stating that if the default is not remedied within 30 days of notice, the license will automatically terminate at the expiration of that 30-day period. If such license is terminated, the digital music provider will be subject to copyright infringement liability under 17 U.S.C. § 115(c)(6), which could include an injunction and an award of actual or statutory damages.

Miscellanea.

- By no later than December 1, 2007, the Copyright Royalty Judges are responsible for determining the reasonable rates and terms for the blanket license applicable to the DPDs and hybrid offerings. All designated agents are entitled to participate in these rate setting proceedings.

- Copyright owners and digital music providers may enter into voluntary license agreements to cover any of these digital music delivery activities, which shall apply in lieu of the blanket license created by SIRA.

- The blanket license regime created by SIRA does not limit or affect any right of public performance of a musical work.

[47] However, it is unclear whether a digital music provider could be held liable for alleged infringing activity that occurred prior to 2003. The statute of limitations provision of the Copyright Act, 17 U.S.C. § 507, prohibits civil copyright infringement actions unless they are commenced within three years after the claim accrued.