DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
COURTS AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

H.R. 1506

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

JUNE 21 AND 28, 1995

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DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

WEDNESDAY, JUNE 21, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, F. James Sensenbrenner, Jr., Howard Coble, Bob Goodlatte, George W. Gekas, Charles T. Canady, Martin R. Hoke, Patricia Schroeder, John Conyers, Jr., Howard L. Berman, Xavier Becerra, and Rick Boucher.

Also present: Thomas E. Mooney, chief counsel; Mitch Glazier, assistant counsel; Sheila Wood, secretary; Betty Wheeler, minority counsel; and Julian Epstein, minority staff director.

OPENING STATEMENT OF CHAIRMAN MOORHEAD

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order. This morning, the subcommittee will begin the first day of hearings on H.R. 1506, the Digital Performance Right in Sound Recordings Act of 1995.

The subcommittee began last Congress to try and construct legislation to take care of what all parties agree is a likely problem for U.S. record companies and the people who sing and play music. The problem concerns home subscription services for the digital transmission of music offered by cable. This type of service permits the home subscriber, for a monthly fee, to select music. The subscription service can purchase a single record and play it for hundreds of subscribers, and by so doing displace record sales.

Two bills were introduced in the 103d Congress that would have granted an exclusive public performance right for sound recordings in performances that occur via digital transmissions. Although the proposed right was limited, interested parties, including representatives of broadcasters and of the recording industry, proposed further amendment to these bills and they died at the end of the session. Prior to that, the parties did come to a compromise on May 11, 1994, but we could not come to an agreement on the exemption of radio broadcasters. Radio broadcasters are exempted under H.R. 1506.

The May 11, 1994, compromise agreement was endorsed by the Recording Industry Association of America, ASCAP, BMI, the

American Federation of Musicians, the American Federation of Television and Recording Artists, and the National Music Publishers' Association.

On January 13, 1995, Senators Hatch and Feinstein introduced S. 227, a new version of this legislation. That bill pretty much disregarded the compromise of May 11, 1994, and took the side of the record industry. Hearings were held on S. 227 on March 9, 1995. Except for the Recording Industry Association of America, which strongly supports S. 227, the other industry representatives and the Register of Copyright expressed serious reservations about certain provisions of S. 227.

On April 7, 1995, I introduced a bill similar to S. 227. Cosponsors of H.R. 1506 are Chairman Hyde and Representatives Conyers, Gekas, and Bono. H.R. 1506 differs from S. 227 in a number of respects. The main difference is that where the songwriters, music publishers and record companies differ, H.R. 1506 uses the May 11, 1994, compromise language as a way to settle their differences.

This legislation is important, but I am afraid it is not going anywhere unless the parties settle their differences. I know the parties are meeting to try to settle these differences, and I would encourage them to continue to do so. I hope these hearings will assist in that effort.

[The bill, H.R. 1506, follows:]

104TH CONGRESS
1ST SESSION

H. R. 1506

To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 7, 1995

Mr. MOORHEAD (for himself, Mr. HYDE, Mr. CONYERS, and Mr. GEKAS) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 17, United States Code, to provide an exclusive right to perform sound recordings publicly by means of digital transmissions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Digital Performance Right in Sound Recordings Act of 1995".

SEC. 2. EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS.

Section 106 of title 17, United States Code, is amended—

(1) in paragraph (4) by striking "and" after the semicolon;

(2) in paragraph (5) by striking the period and inserting "; and"; and

(3) by adding at the end the following:

"(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital transmission.".

SEC. 3. SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS.

Section 114 of title 17, United States Code, is amended—

(1) in subsection (a) by striking "and (3)" and inserting ", (3), and (6)";

(2) in the first sentence of subsection (b) by striking "phonorecords, or of copies of motion pictures and other audiovisual works," and inserting "phonorecords or copies"; and

(3) by striking subsection (d) and inserting the following:

"(d) LIMITATIONS ON EXCLUSIVE RIGHT.—Notwithstanding the provisions of section 106(6)—

"(1) EXEMPT TRANSMISSIONS.—The performance of a sound recording publicly by means of a digital transmission, other than as part of an inter-

active service, is not an infringement of section 106(6) if the performance is part of—

"(A) a nonsubscription transmission, such as a nonsubscription broadcast transmission;

"(B) any of the following transmissions, whether it is a subscription transmission or a nonsubscription transmission:

"(i) a prior or simultaneous transmission incidental to a nonsubscription transmission, such as a feed received by and then retransmitted by the nonsubscription transmitter, if such incidental transmission does not include any subscription transmission directly for reception by members of the public;

"(ii) a retransmission of a nonsubscription broadcast transmission if, in the case of a retransmission of a radio station's broadcast transmission, the transmission is not willfully or repeatedly retransmitted beyond a radius of 150 miles from the site of the radio broadcast transmitter;

"(iii) a transmission to or within a business establishment, that is confined to

the premises of that business establishment, the premises of other business establishments under common ownership or control, and the vicinity immediately surrounding such establishment and establishments; or

"(iv) a retransmission that is otherwise an infringement of section 106(6), if such transmission is simultaneous with the primary transmission and is authorized by the primary transmitter, and the primary transmitter has been licensed to publicly perform the sound recording.

"(2) SUBSCRIPTION TRANSMISSIONS.—In the case of a subscription transmission other than a transmission exempt under paragraph (1), the performance of a sound recording publicly by means of a digital transmission shall be subject to statutory licensing in accordance with subsection (f), if—

"(A) at least—

"(i) 3 months have expired since the first public performance by means of a digital transmission of the sound recording under the authority of the copyright owner

in a subscription transmission in the United States, or

"(ii) 4 months have expired since the first distribution for ultimate sale to consumers in the United States of a phonorecord embodying the sound recording under the authority of the copyright owner, whichever period is shorter;

"(B) the transmission is not made for the purpose of enabling the recipient of the transmission to reproduce the sound recording;

"(C) the transmission does not exceed the sound recording performance complement; and

"(D) except as provided in section 1002(e), the transmission of the sound recording is accompanied by the information encoded in that sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

"(3) RIGHTS NOT OTHERWISE LIMITED.—

"(A) Except as expressly provided in this section, this section does not limit or impair the exclusive right to perform a sound recording publicly by means of a digital transmission under section 106(6).

"(B) Nothing in this section annuls or limits in any way—

"(i) the exclusive right to publicly perform a musical work, including by means of a digital transmission, under section 106(4);

"(ii) the exclusive rights to reproduce and distribute a sound recording or the musical work embodied therein under paragraphs (1) and (3) of section 106, including by means of a digital phonorecord delivery as defined in section 115; or

"(iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist either before or after the enactment of the Digital Performance in Sound Recordings Act of 1995.

"(e) AUTHORITY FOR NEGOTIATIONS.—Any copyright owners of sound recordings and any entities perform-

ing sound recordings affected by this section may negotiate and agree upon the terms and rates of royalty payments for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

"(f) LICENSES FOR SUBSCRIPTION TRANSMISSIONS.—

"(1) VOLUNTARY NEGOTIATION PROCEEDINGS.—Not later than 30 days after the date of the enactment of the Digital Performance in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiation proceedings for the purpose of determining reasonable terms and rates of royalty payments for the activities specified in subsection (d)(2) during the period beginning on January 1, 1996, and ending on December 31, 2000. Such terms and rates shall distinguish among the different types of digital transmission services then in operation. Any copyright owners of sound recordings or any entities performing sound recordings affected by this section may submit to the Librarian of Congress licenses covering such activities with respect to such sound record-

ings. The parties to each such negotiation proceeding shall bear the entire costs thereof.

"(2) COPYRIGHT ARBITRATION ROYALTY PANEL PROCEEDING.—In the absence of license agreements negotiated under paragraph (1), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (3), shall be binding on all copyright owners of sound recordings and entities performing sound recordings. In establishing such rates and terms the copyright arbitration royalty panel may consider the rates for comparable types of digital transmission services and comparable circumstances under voluntary license agreements negotiated under paragraph (1). The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the arbitration panel shall direct. The Librarian of Congress shall also establish requirements by which copyright owners may receive reasonable notice of the use of their sound recordings under this section, and under which records of such use shall be kept by entities performing sound recordings.

"(3) PRIORITY OF VOLUNTARY LICENSE AGREEMENTS.—License agreements voluntarily negotiated at any time between one or more copyright owners of sound recordings and one or more entities performing sound recordings with respect to activities specified in subsection (d)(2) shall be given effect in lieu of any determination by the Librarian of Congress under chapter 8 with respect to the same matter.

"(4) PERIODIC APPLICATION OF PROCEDURES.—The procedures set forth in paragraphs (1) and (2) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe—

"(A) within the 6-month period beginning on the date on which a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital transmission service on which sound recordings are performed is or is about to become operational, and

"(B) between June 30 and December 31 of the year 2000 and every fifth year thereafter.

"(5) NOTICE AND ROYALTIES REQUIREMENTS FOR SUBSCRIPTION TRANSMISSIONS.—Any person who wishes to perform a sound recording publicly by means of a subscription transmission under this subsection may do so without infringing the exclusive right of the copyright owner of the sound recording by complying with such notice requirements as the Register of Copyrights shall prescribe by regulation and by paying royalty fees in accordance with this subsection, or, if such royalty fees have not been set, by agreeing to pay such royalty fees as shall be determined in accordance with this subsection, and any royalty payments in arrears shall be made on or before the twentieth day of the month after the month in which the royalty fees are set.

"(g) PROCEEDS FROM LICENSING OF SUBSCRIPTION TRANSMISSIONS.—

"(1) PAYMENTS TO RECORDING ARTISTS.—Except in the case of a subscription transmission licensed in accordance with subsection (f)—

"(A) a featured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright

owner of the sound recording in accordance with the terms of the artist's contract; and

"(B) a nonfeatured recording artist who performs on a sound recording that has been licensed for a subscription transmission shall be entitled to receive payments from the copyright owner of the sound recording in accordance with the terms of the nonfeatured recording artist's applicable contract or other applicable agreement.

"(2) ALLOCATION OF RECEIPTS TO RECORDING ARTISTS.—The copyright owner of the exclusive right under section 106(6) to publicly perform a sound recording by means of a digital transmission shall allocate to recording artists in the following manner its receipts from the licensing of subscription transmission performances of the sound recording in accordance with subsection (f):

"(A) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Musicians (or any successor entity) to be distributed to nonfeatured musicians (whether or not members of the

American Federation of Musicians) who have performed on sound recordings.

"(B) 2½ percent of the receipts shall be deposited in an escrow account managed by an independent administrator jointly appointed by copyright owners of sound recordings and the American Federation of Television and Radio Artists (or any successor entity) to be distributed to nonfeatured vocalists (whether or not members of the American Federation of Television and Radio Artists) who have performed on sound recordings.

"(C) 45 percent of the receipts shall be allocated, on a per sound recording basis, to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists' performance in the sound recordings).

"(h) LICENSING TO AFFILIATES.—Where the copyright owner of a sound recording owns a controlling interest in, or otherwise has the power directly or indirectly to exercise a controlling influence over the management or policies of, an entity engaging in digital transmissions covered by section 106(6) and licenses to such entity the right to publicly perform a sound recording by means of

a digital transmission, the copyright owner shall make the licensed sound recording available under section 106(6) on similar terms and conditions to all other similarly-situated entities offering similar types of digital transmission services, except that the copyright owner may—

"(1) impose reasonable requirements for credit worthiness; and

"(2) establish different prices, terms, and conditions to take into account the types of services offered, the duration of the license, the geographic region, the numbers of subscribers served, and any other relevant factors.

"(i) NO EFFECT ON ROYALTIES FOR UNDERLYING WORKS.—License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. Royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).

"(j) DEFINITIONS.—As used in this section, the following terms have the following meanings:

"(1) A 'broadcast transmission' is a transmission made by a broadcast station licensed as such by the Federal Communications Commission.

"(2) An 'interactive service' is one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient. The ability of individuals to request that particular sound recordings be performed for reception by the public at large does not make a service interactive. If an entity offers both interactive and non-interactive services (either concurrently or at different times), the non-interactive component shall not be treated as part of an interactive service.

"(3) A 'nonsubscription transmission' is any transmission that is not a subscription transmission.

"(4) The 'sound recording performance complement' is—

"(A) in the case of an interactive service, the capability of a member of the public to receive transmissions, during a 1-week period, of no more than the complement number; or

"(B) in the case of a transmission other than in the course of an interactive service, the

transmission consecutively of no more than the complement number.

"(5) The 'complement number' is—

"(A) 2 selections of sound recordings embodied in any one phonorecord distributed in the United States for ultimate sale to consumers; or

"(B) 3 selections of sound recordings of performances—

"(i) by the same featured recording artist, or

"(ii) embodied in any set of phonorecords or compilation of sound recordings marketed together as a unit for ultimate sale to consumers.

"(6) A 'subscription transmission' is a transmission that is controlled and limited to particular recipients, and for which consideration is required to be paid or otherwise given by or on behalf of the recipient to receive the transmission or a package of transmissions that includes the transmission.".

SEC. 4. SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS.

Section 115 of title 17, United State Code, is amended—

(1) by striking "clause" each place it appears and inserting "paragraph";

(2) in subsection (a)(1) by inserting before the period at the end of the second sentence ", including by means of a digital phonorecord delivery";

(3) in the second sentence of subsection (c)(2), by inserting "and except as provided in paragraph (3)," after "For this purpose,";

(4) in subsection (c) by redesignating paragraphs (3), (4), and (5) as paragraphs (5), (6), and (7), respectively, and by inserting after paragraph (2) the following:

"(3)(A) A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work under subsection (a)(1) to distribute or authorize distribution of the sound recording embodied in such phonorecord by means of a digital transmission which constitutes a digital phonorecord delivery. Such transmission may also constitute a public performance of a nondramatic

musical work under section 106(4) and of a sound recording under section 106(6).

"(B)(i) For every digital phonorecord delivery by or under the authority of the compulsory licensee which is identifiable, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (2) and chapter 8 of this title.

"(ii) For every digital phonorecord delivery by or under the authority of the compulsory licensee which is not identifiable but which can be reasonably expected to result from a digital transmission of a sound recording, the royalty payable by the compulsory licensee shall be the royalty prescribed under paragraph (4).

"(iii) The Librarian of Congress shall prescribe regulations describing the types of digital transmissions of a sound recording which are described in clauses (i) and (ii). Such regulations—

"(I) shall take into account any efforts by transmitters to avoid or evade the reasonable use of available techniques to identify deliveries to transmission recipients of phonorecords of sound recordings, and

"(II) may consider the nature of the digital transmission service, its marketing practices,

technical characteristics, or other indicia to determine whether it is described in clause (ii).

"(C) Independent of any right of public performance under section 106(4), the copyright owner of a nondramatic musical work embodied in a sound recording has the right to receive royalty payments at the rates prescribed under this subsection when the digital transmission of that sound recording constitutes a digital phonorecord delivery. Unless authorized by the copyright owner of the nondramatic musical work or by any person who has obtained a compulsory license under this section, such a digital transmission, by whomever made, shall be actionable by the copyright owner in the nondramatic musical work as an act of infringement, except that no such cause of action may be brought against a copyright owner of a sound recording unless it authorized the digital phonorecord delivery. Any such cause of action shall be in addition to remedies available to the copyright owner of the musical work under section 106(4) and the copyright owner of the sound recording with respect to digital phonorecord deliveries under section 106(6).

"(D) Nothing in section 1008 shall be construed to prevent the exercise of the rights and rem-

edies allowed by this paragraph, paragraph (7), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer, or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

"(E) Nothing in this section annuls or limits in any way—

"(i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under sections 106(4) and 106(6),

"(ii) except for the compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under sections 106(1) and 106(3), including by means of a digital phonorecord delivery, or

"(iii) any other rights under any other provision of section 106, or remedies available

under this title, as such rights or remedies exist either before or after the enactment of the Digital Performance in Sound Recordings Act of 1995.

"(4) LICENSES FOR CERTAIN DIGITAL PHONORECORD DELIVERIES.—

"(A) Notwithstanding any provision of the antitrust laws, for the purposes of this paragraph any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may negotiate and agree upon the terms and rates of royalty payments for any digital phonorecord deliveries described in paragraph (3)(B)(ii) and the proportionate division of fees paid among copyright owners, and may designate common agents to negotiate, agree to, pay, or receive such royalty payments.

"(B) Not later than 30 days after the date of the enactment of the Digital Performance Right in Sound Recordings Act of 1995, the Librarian of Congress shall cause notice to be published in the Federal Register of the initiation of voluntary negotiations for the purpose of determining reasonable terms and rates of

royalty payments for the digital phonorecord deliveries described in clause (3)(B)(ii) during the period beginning on January 1, 1996, and ending on December 31, 1999. Such terms and rates shall distinguish among the different types of digital phonorecord delivery services then in operation. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a)(1) may submit to the Librarian of Congress licenses covering activities with respect to such works. The parties to each such negotiation proceeding shall bear the entire costs thereof.

"(C) In the absence of license agreements negotiated under subparagraph (B), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to subparagraph (D), shall be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a)(1). In establishing such rates and terms the copyright arbitration roy-

alty panel may consider the rates for comparable types of digital phonorecord delivery services and comparable circumstances under voluntary license agreements negotiated under subparagraph (B). The parties to the proceeding shall bear the entire cost thereof in such manner and proportion as the arbitration panel shall direct. The Librarian of Congress shall also establish requirements by which copyright owners shall receive reasonable notice of the use of their works under this subsection, and under which records of such use shall be kept and made available by persons entitled to obtain a compulsory license under subsection (a)(1) and authorized to make digital phonorecord deliveries.

"(D) License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a)(1) shall be given effect in lieu of any determination by the Librarian of Congress under chapter 8 that would otherwise apply.

"(E) The procedures set forth in subparagraphs (B) and (C) shall be repeated and concluded, in accordance with regulations that the Librarian of Congress shall prescribe—

"(i) within the 6-month period beginning on the date on which a petition is filed by any copyright owners of nondramatic musical works or any person entitled to obtain a compulsory license under subsection (a)(1) affected by this section indicating that a new type of digital phonorecord delivery service is or is about to become operational, and

"(ii) between June 30 and December 31 of the year 1999 and each fifth year thereafter.";

(5) by inserting after the first sentence in section (c)(6) (as so redesignated) the following: "In the case of digital phonorecord deliveries described in paragraph (3)(B)(ii) for which royalty fees have not been set, the compulsory licensee shall pay, effective as of the initial delivery, such royalty fees as shall later be determined in accordance with subsection (c)(4), and any royalty payments in arrears shall be made on or before the twentieth day of the

month after the month in which the royalty fees are set."; and

(6) by adding after subsection (c) the following:

"(d) DEFINITION.—As used in this section, the term 'digital phonorecord delivery' means each individual delivery of a phonorecord by digital transmission of a sound recording which—

"(1) results in an identifiable reproduction by or for any transmission recipient of such sound recording, or

"(2) can be reasonably expected to result in a reproduction by or for any transmission recipient of such sound recording even though such delivery is not identifiable,

regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein. None of the exempt transmissions described in section 114(d)(1) shall be considered a digital phonorecord delivery.".

SEC. 5. CONFORMING AMENDMENTS.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended by inserting after the definition of "device", "machine", or "process" the following:

"A 'digital transmission' is a transmission in a digital format. A retransmission in a nondigital for-

mat of a digital transmission is not itself a digital transmission."

(b) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS.—Section 111(c)(1) of title 17, United States Code, is amended in the first sentence by striking "The" and inserting "Except in the case of a performance of a sound recording in the course of a digital transmission, the".

(c) LIMITATIONS ON EXCLUSIVE RIGHTS: SECONDARY TRANSMISSIONS OF SUPERSTATIONS AND NETWORK STATIONS FOR PRIVATE HOME VIEWING.—Section 119(a)(1) of title 17, United States Code, is amended by striking "Subject to" and inserting "Except in the case of a performance of a sound recording in the course of a digital transmission, and subject to".

(d) COPYRIGHT ARBITRATION ROYALTY PANELS.—

(1) Section 801(b)(1) of title 17, United States Code, is amended in the first and second sentences by striking "115" and inserting "114, 115,".

(2) Section 802(c) of title 17, United States Code, is amended in the third sentence by striking "section 111, 116, or 119," and inserting "section 111, 114, 116, or 119, any person entitled to a compulsory license under section 114(d), any person entitled to a compulsory license under section 115,".

(3) Section 802(g) of title 17, United States Code, is amended in the third sentence by striking "115, 116, 118, 119, or 1003" and inserting "114, 115, 116, 118, 119, and 1003".

(4) Section 802(h)(2) of title 17, United States Code, is amended by inserting "114," after "111,".

SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, shall take effect January 1, 1996, except that the provisions of sections 114(e) and 114(f) of title 17, United States Code, as added by section 3 of this Act, shall take effect on the date of the enactment of this Act.

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Mr. MOORHEAD. I would like to yield at this time to the ranking minority member of our subcommittee, the gentlewoman from Colorado, Mrs. Schroeder.

Mrs. SCHROEDER. Thank you, Mr. Chairman, and I must say I am very, very distressed this morning I can't be here because our Constitution Subcommittee has got a markup going at the same time, so it is a little frustrating to try to figure out where you can be. But as you know, you can't miss a markup, and it is impossible for Members to fully participate in both things. You can only be one place at a time, I guess, even with all of this information highway.

I think everybody knows that I support a digital performance right in sound recording. I think adding this right to our copyright law is terribly important, not only to keep pace with the technology but also to strengthen our position internationally; and I think our international position has got to be one of our preeminent focuses because if we don't protect intellectual property at home, we are in real trouble when we try to enforce it offshore, and we know how critical that is to America's trade balance.

So while we try to harmonize our copyright laws with those of other countries—and total harmonization is probably not possible—I still believe we need to achieve it to the greatest extent possible; and I am concerned that the movement toward compulsory licenses poses problems for the GII and for harmonization, but we are interested in exploring them.

With respect to the differences between the different parties on the issues, I understand the negotiations are underway, and I look forward to hearing about the status of those negotiations and learning about the position of the parties on these.

I guess I am forced to look at the record when this is over, because in 10 minutes we have the next hearing start; and that is a markup, and you miss that, you miss a vote. So I sincerely apologize and will stay as long as I possibly can and get back if the markup ends.

Thank you, Mr. Chairman.

Mr. MOORHEAD. We also have an opening statement from the ranking minority member of the full committee, John Conyers.

Mr. CONYERS. I am glad to see all of our friends here today from the various different organizations that have a deep concern about the matter. I am hopeful that we can work out an agreement that will lead us to a conclusion on this matter. This is the second Congress that we have been working on this matter. We have a few different players involved, but I think that, keeping hope alive, we will be able to move this thing along in a very good and timely fashion.

I am in the same position; we are in the process of negotiating with the chairman a way that these subcommittees don't all crash at the same time. We have got to make more time for the work of the subcommittees. Otherwise, it becomes minimalized, and a lot of responsibilities and issues get passed along. Thank you very much.

Mr. MOORHEAD. Thank you. I understand that the negotiations have been going very well. The only major issue that we haven't come to some kind of agreement on is the mechanical royalties. I would urge you to keep working on that area and to come to a con-

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clusion as rapidly as possible, because we would like to mark up this bill as soon as possible and get it on its way.

Our first witness will be Mr. Jason Berman, who is the president and CEO of the Recording Industry Association of America. I have had the pleasure of working with Jay on many occasions. Mr. Berman holds a doctorate in political science from the University of Pittsburgh. Prior to his position at the RIAA, Mr. Berman served as vice president of public affairs for Warner Communications, Inc. He also served as president of his own public relations firm.

He is a member of the board of directors of the International Federation of Phonographic Industries and is actively involved with the International Intellectual Property Alliance and the World Intellectual Property Association. He also serves as a member of the U.S. Trade Representative's Service Policy Advisory Committee.

Welcome, Mr. Berman.

Mr. JASON BERMAN. Thank you, Mr. Chairman.

Mr. MOORHEAD. I am going to introduce all of you, then you will be the first witness.

Our second witness will be Mr. Wayland Holyfield, who is a songwriter and a member of the board of directors of the American Society of Composers, Authors and Publishers, or ASCAP. Mr. Holyfield is a graduate of the University of Arkansas and has served on ASCAP's board since 1980. Mr. Holyfield has written over 40 "top ten" hits and 13 No. 1 country songs. Some of you might recognize the country hits "Could I Have This Dance?" and "You're the Best Break This Old Heart Ever Had."

Mr. Holyfield has served as an officer and a member of the board of directors of the Nashville Songwriters Association for 10 years, as well as a board member of the Nashville Music Association and the Country Music Foundation Advisory Committee.

Welcome, Mr. Holyfield.

Mr. HOLYFIELD. Thank you.

Mr. MOORHEAD. Our third witness is Mr. Edward Murphy. Mr. Murphy is the president and CEO of the National Music Publishers' Association. Prior to assuming his duties at NMPA, Mr. Murphy served as president of G. Schirmer, Inc., a large American music publishing house. Mr. Murphy serves on the advisory board of the International Intellectual Property Alliance and is a member of the International Copyright Panel of the U.S. Advisory Committee on International Intellectual Property. He founded the International Copyright Coalition and is secretary of the National Music Council.

Welcome, Mr. Murphy.

Our last witness on the first panel is Mr. Marvin Berenson, who is the senior vice president and general counsel of Broadcast Music, Inc., or BMI. Mr. Berenson holds a bachelor's degree from Michigan State University and a law degree from Boston University. He is the past treasurer and currently serves as a member of the Copyright Society of the USA and as a board member of the American Copyright Council. He is also a member of the executive committee of the International Literary and Artistic Association and of the American Intellectual Property Law Association.

Welcome, Mr. Berenson.

We have written statements from our four witnesses, and I ask unanimous consent that they be made a part of the record; and I ask that all of you summarize your statements in 10 minutes or less.

I ask that the subcommittee hold their questions of all four witnesses until they have completed their oral presentation.

We will begin with testimony from Mr. Berman.

STATEMENT OF JASON S. BERMAN, CHAIRMAN AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. JASON BERMAN. Good morning. Thank you, Mr. Chairman, members of the committee. I am Jay Berman, chairman and CEO of the Recording Industry Association of America. Our member companies create, manufacture, and distribute approximately 90 percent of all the legitimate sound recordings sold in the United States and over 60 percent of the sound recordings sold worldwide.

Mr. Chairman, members of the subcommittee, I applaud you for holding this hearing to highlight the need to provide a public performance right for sound recordings and for fostering the continuing consideration of this vitally important copyright issue. I appear before you today to strongly urge you to move quickly to pass a bill that will protect American recording artists, musicians, performers, and record companies in the new digital transmission age.

U.S. copyright law contains one glaring inequity and inadequacy, an inadequacy that has historically prejudiced the interests of record companies and performers both at home and abroad and now, in light of emerging digital transmission technologies, may well threaten their very existence—the lack of a performance right in sound recordings.

H.R. 1506 begins to close this loophole, and I commend you for continuing the effort to enact a performance rights bill.

I will briefly outline in my statement this morning why a performance right for sound recordings is an imperative, identify our concerns with H.R. 1506 as introduced, and in the spirit of compromise, which marked your opening statement, report on the very successful negotiations that have taken place over the course of the last 2 weeks and through last evening between RIAA, ASCAP, and BMI, leaving only one remaining substantive issue that divides us and the music publishers—namely, the provisions dealing with the payment of mechanical royalties—an issue, I might add, that doesn't belong in this bill since it is a performance bill, not a distribution bill.

Under existing law, record companies and performers, unlike songwriters, composers, music publishers, and every other copyright owner of every other copyrighted work capable of public performance, have no right to authorize or be compensated for the public performance of the sound recording. While songwriters and music publishers get paid for such uses of their works, as they should, in addition to mechanical payments for every record made, no payment is made to the record company or the performer for their role in creating and bringing to life the sound recording that is actually performed. And let me restate that, it is the sound recording that is being performed.

A principal tenet of copyright law is based on the premise that creators should be able to control and be compensated for the commercial use of their work. Unfortunately, unless legislation is passed to grant a performance right for sound recordings, companies that do not create recordings will continue to profit at our expense. It is simply unfair to permit this situation to continue, and I realize that you recognize that, Mr. Chairman, and I would urge the committee to move forward.

As you know, following the introduction of H.R. 1506, I wrote a letter identifying the three substantive problems raised by the bill. At the request of you, other members of this subcommittee, as well as the sponsors of the Senate bill, S. 227, Chairman Hatch and Senator Feinstein, we have begun working with all parties in an attempt to resolve our differences. I am happy to report that we have been able to resolve two of the three substantive areas in a way consistent with the principles of this bill and good public policy.

First, the issue of how interactive music services will be licensed has been dealt with in a way that avoids the "gatekeeper" concerns expressed by ASCAP and BMI, while preserving the exclusive right that record companies require for these unique types of transmissions.

Second, we have reached an agreement with ASCAP and BMI under which we are able to support a limited exemption for commercial background music services. The only remaining substantive issue concerns the provisions in the bill supported by the National Music Publishers' Association that deal with the complex question of digital phonorecord deliveries, a provision which would provide an expansion of music publishers' reproduction and distribution rights well beyond reason and a question that in many ways is unrelated to the fundamental issue at hand, a public performance right.

Let me briefly outline in my remaining time the problems we see with the question of mechanical royalty payments. Under current law, record companies must pay music publishers a mechanical royalty every time a recording is made and distributed. We have constantly indicated our willingness to continue to do so when a record is sold, not only in a record store, but by electronic transmission as well. However, the music publishers are demanding mechanical payments well beyond electronic sales and seek to secure payment every time a copy is made, even if it is clearly not a sale, even if the copy may be transitory, and even in those instances where we really don't know if a copy was made at all.

The expansion of these rights, as the price to pay for a limited public performance right for sound recordings, cannot be justified by public policy. H.R. 1506 would require payments for any copying whatsoever in the course of or as the result of a digital transmission. The bill even requires payments for nonidentifiable copying, a provision I am happy to refer to as the "UFO provision."

How can music publishers demand that record companies pay mechanical royalties for copies they don't even know have been made? The answer offered by NMPA is government regulation. NMPA has suggested that the Government try to figure out who is making these nonidentifiable copies in their homes and how

much the publishers should be paid. This will be a first, the first time the Government will have been able to identify a UFO.

The fact is, H.R. 1506 substitutes government regulation for the marketplace. It would have the Government, rather than the marketplace, determine the value of musical works and, in so doing, it would prejudice, perhaps fatally, the development of new types of music delivery services.

These provisions are complex and controversial. They have no place in a bill that is intended to deal only with performance right for sound recordings and corrects a longstanding inequity. To the extent that they raise issues of how the reproduction and distribution rights should apply in a new digital transmission environment, they raise issues affecting all copyright owners, including record companies, not just music publishers.

These issues, as a matter of public policy, should be fully addressed in the context of the NII legislation Congress will take up later this year. We want them addressed as much, if not more so, than the music publishers because our fundamental right is at stake. We urge the committee to remove the mechanical royalty provisions from H.R. 1506 so that they may be considered later when NII legislation that deals with all of these issues about the impact of electronic delivery on all copyright owners comes before this committee.

Thank you, Mr. Chairman, for the opportunity to present my views.

Mr. MOORHEAD. Thank you.

[The prepared statement of Mr. Jason Berman follows:]

PREPARED STATEMENT OF JASON S. BERMAN, CHAIRMAN AND CEO, RECORDING INDUSTRY ASSOCIATION OF AMERICA

Mr. Chairman and members of the Committee, my name is Jason S. Berman, and I am Chairman and Chief Executive Officer of the Recording Industry Association of America. RIAA is the trade organization representing the interests of American record companies. Our members create, manufacture and/or distribute approximately 90 percent of the prerecorded music sold in the United States and 60 percent of all sound recordings created worldwide.

I am pleased to have the opportunity to appear before you today to address an issue of paramount importance to the recording industry and its performers -- the manner in which our industry will be able to operate in the new technological environment of digital audio subscription and interactive transmissions, whether via broadcast, cable, telephone, satellite, or other means. I commend you, Mr. Chairman, for holding this hearing so that debate on this important matter can begin.

Our nation's copyright law is intended to provide authors and publishers the incentive to create and disseminate new works of authorship for the public benefit. A U.S. copyright is, in actuality, a "bundle of rights" generally providing copyright owners with the exclusive rights of reproduction, adaptation, distribution, public performance, and public display. Unlike the owners of all other works protected under U.S. copyright law, however, copyright owners of sound recordings are not currently afforded the right to control the public performance of their works. Because of this historical anomaly, recording companies, those they employ, and their

performing artists and musicians have no right to authorize, and receive no compensation for, such performances.

The right of public performance is recognized for every other copyrighted work capable of being performed, including motion pictures, books, computer software and musical compositions. Sound recording copyright owners are thus in the ironic position of being able to control the public performance of their works as embodied in music videos, but not the performance of the very same recorded music, without the visual images, over radio, digital cable audio services, or any other audio transmissions services.

On the international front, it is now more important than ever for Congress to press forward with such legislation. Over the course of the past 10 years, the United States has been at the forefront of efforts to improve protection for intellectual property rights internationally. It is time to close this glaring gap in our own copyright law -- the absence of a performance right in sound recordings -- by granting this protection.

I. U.S. Law Unfairly and Unreasonably Prejudices Record Companies and Performers

U.S. copyright law contains one glaring omission -- the right of the copyright owner of a sound recording to authorize the public performance of his or her work. The sound recording is the only category of copyrighted work that does not enjoy this right. As a result, unlike the

songwriter and music publisher who properly get paid every time a recorded song is played on the radio, the record company and performer receive absolutely nothing.

The creative contributions of those who are responsible for putting sound recordings into the hands of the public are no less valuable to transmission entities and no less worthy of recognition than are the efforts of those who create works that are protected by a performance right. For example, a recording artist's interpretation of a song is no less a contribution to, or an integral part of, the recorded product that is the composer's score and lyrics. Consider the song "I Will Always Love You," which was actually written by Dolly Parton. However, this song became one of the greatest hits of all time when performed by Whitney Houston on "The Bodyguard" soundtrack. An artist's rendition is a distinct and unique product because of the creative contributions of the principal vocalist and the supporting artists and musicians who breathe life into the musical composition. Clearly, the performance of a song is a creative act that itself makes a significant difference.

It is difficult to justify why the bundle of rights enjoyed by the copyright owner of a sound recording should not include a right enjoyed by all other copyright owners -- the right to license public performances. This disparate treatment has always harmed record companies and performers. It is particularly harmful to older performers whose recordings are still popularly broadcast but whose records no long sell.

Current advances in digital technologies threaten to take this existing gap and turn it into a chasm. We urge this Committee to act quickly to establish the right necessary to protect record companies and performers in this new digital world.

II. Developments in Digital Technology Threaten Creative Incentive and Investment

Digital transmission systems have advanced to the stage where acts of broadcasting could become more like acts of distribution and less like our traditional notion of broadcasting. Digital transmission offers the opportunity to replace our traditional forms of distributing information. Everything capable of being reduced to zeros and ones, whether literary text, audio or audio-visual signals, or other information, can be delivered to the home digitally without the transfer of a physical product.

The ability to transmit "CD-quality" digital audio signals challenges our assumptions about the means of delivering recorded musical entertainment as we approach the 21st century. Traditionally, the recording industry has looked upon the sale of prerecorded music on disc or tape as the primary form of delivering sound recordings to the public. The copyright law currently limits us to deriving our income solely from this form of distribution. As we will see, this limited scope of rights is outdated in the new digital environment and will not provide sufficient incentive to invest the vast sums of money required for new recordings.

The new digital audio transmission services take us far beyond traditional terrestrial analog radio broadcasting. With their ability to offer CD-quality music to the home, it does not

take a great deal of imagination to foresee what choices consumers will make. Indeed, one need only listen to what these services say about what they plan to offer, and in some cases, are already offering.

For example, the programming of digital audio cable services, such as Digital Music Express (DMX) and Digital Cable Radio (DCR), involve multichannel offerings with a number of features that are designed to make performances of sound recordings in consumers' homes a viable substitute for album purchases. As one DCR brochure puts it, there will be "no need to spend a fortune on a CD library." How true that statement is! A DCR subscriber, paying less per month than the cost of one compact disc, can receive more than forty continuous, uninterrupted, CD-quality channels of prerecorded music. This seemingly "good deal" is only possible because the transmitter has no obligation to pay the record company or the performer for their product, nor is it required to spend the money necessary to make the recording possible in the first place.

Moreover, one proposed digital audio broadcast service, Satellite CD Radio, itself has announced its intent to charge subscribers directly for listening to our members' product and to offer program guides, album hours, etc. Digital audio cable services also have the unfettered right under current law to do the same.

Patterned after the evolution of cable television services, they all can also further close the gap between transmissions and record store purchases by offering pay-per-listen services which, like current cable pay-per-view services, will enable listeners to obtain a direct, time-

certain transmission of an album of their choice with a pricing structure likely to be cheaper than that of record stores. And just beyond that is the advent of on-line electronic delivery services, what some have called "audio on demand" or the "celestial jukebox," which will enable consumers to select music to listen to at their convenience without ever buying the compact disc or ever having to make an actual copy.

Some may say that these services simply enhance consumer access to music and increase the choices available. The emergence of niche marketing of diverse entertainment may be made possible on an unprecedented scale. The term "narrowcasting" could take on a whole new meaning in terms of music delivery systems.

Suppose, however, that rather than leading to increased investment in the production of recorded music these new services operated outside the control of the company producing the recordings and resulted in little or no financial return to the record company, the artist, and others who are involved in the creation of a recording. In this case, digital delivery would siphon off and eventually eliminate the major source of revenue for investing in future recordings. Over time, this will lend to a vast reduction in the production of recorded music.

III. The International Implications of the Absence of a Performance Right in Sound Recordings

The unfairness of this discriminatory treatment is all the more glaring since the United States, the world's leader in the creation of sound recordings, is one of only a very few developed nations that fail to recognize a performance right in sound recordings. Approximately 60 nations, including at least nine European Community member states, grant public performance rights in sound recordings. The failure of U.S. law is depriving our performers, musicians and recording companies of foreign revenues because many nations will not pay sound recording royalties to nationals of countries that do not have reciprocal performance rights. American recording companies, artists and musicians have thus either been excluded in part from royalty pools that distribute performance royalties in excess of $120 million in 1991, or are at risk of losing any current entitlement to these monies. And the size of these pools will grow exponentially over the coming years as the number of countries that recognize a performance right in sound recordings increases. Unless U.S. law is changed, American recording companies, musicians and artists will continue to be carved out of royalty pools.

The absence of a performance right in sound recordings also prejudices the position of the U.S. government in international trade and copyright discussions. Promoting high levels of intellectual property protection within both multilateral and bilateral fora is a major trade policy goal of the United States. However, our trading partners naturally question our commitment of such standards when we fail to accord sound recordings the basic protection of a performance right. Just as the United States' reluctance to accede to the Berne Convention once placed U.S.

trade negotiators in the awkward position of asking for more copyright protection in the international arena than were afforded at home, the absence of a performance right in sound recordings now similarly frustrates and embarrasses U.S. negotiators.

The lack of a performance right in a sound recording under U.S. law, and the consequent inability of the United States to credibly or forcefully argue that sound recordings are "copyright works" like books and motion pictures, have also been used effectively by our trading partners who wish to maintain a low level of protection for sound recordings. This low level of protection can take several forms -- including a short term of protection, no retroactivity, application of reciprocity rather than national treatment, and broad limitations on exclusive rights (e.g., exemption for "personal use"). Whatever the inadequacy, there is a common thread -- the ability to reproduce, distribute or perform U.S. sound recordings without payment.

The current situation completely undercuts U.S. credibility by forcing the U.S. to take positions on international obligations with respect to sound recordings to protect our industry throughout the world that differ from our own law. Our position is often incoherent and the confusion is unnecessary. The American recording industry is too important to our nation's balance of trade to allow this situation to continue. The negative international consequences resulting from the status quo are but another reason why sound recording copyright owners should now be granted the long-overdue right of public performance.

IV. The U.S. Needs to Move Quickly in Establishing a Performance Right in a Sound Recording

The present existence and announced future plans of digital transmission systems require us to establish a proper legal framework for assuring that our copyright law does not become antiquated and overtaken by technology. A central concept of copyright protection is that copyright owners, as creators or beneficial owners, should be able to authorize the commercial uses of their works -- the theory being that the public benefits most when the copyright owner is granted the necessary incentive to invest in the creation of artistic works. Therefore, Congress should act **now**, before consumers and businesses avail themselves of free and unfettered access to copyrighted sound recordings.

V. RIAA's Specific Concerns with H.R. 1506

We commend you, Mr. Chairman, for beginning the process of serious debate on this issue. However, we believe that H.R. 1506 contains three serious and substantive flaws that, unless amended, will stifle the development of the very services this legislation is intended to foster, as well as harm consumers, recording artists and the record companies that produce this music.

A. **Interactive Transmission Services Should not be Subject to Statutory Licensing.**

H.R. 1506 subjects virtually all transmissions to a compulsory, or statutory license. While artists and record companies have been willing to agree to subject most of the relevant digital transmissions to statutory licensing, the line must be drawn at **interactive**

transmissions. These transmissions must be subject to an exclusive right -- a right that every other copyright owner enjoys for their works. This is essential if we are to achieve this protection in other countries, according to our trade negotiators.

Unlike pre-programmed cable audio services like Digital Music Express or Digital Cable Radio, interactive transmission services enable a recipient to obtain access to the sound recording of their choice whenever they want it. When a consumer can hear any record they want whenever they choose, it is in essence a distribution, the equivalent to selling the record in a store. Record companies must be able to negotiate the terms of those distributions in the marketplace, as we do now. To subject these transmissions to a compulsory license is to invite the government to set prices for records in a Tower Records store.

Of all the new forms of digital transmission services, it is interactive services that are most likely to be seen by consumers as a substitute for traditional record sales, and therefore pose the greatest threat to existing revenue sources for recording artists and companies. If the provisions mandating statutory licensing were applicable to interactive services, record companies would not be able to assure the economics on continued music product. After all, 85% of all records put in the marketplace fail to make back their cost of production. In this business, hits subsidize the development of new artists and less commercially viable genres of music, such as jazz and classical. This is a fragile balance that should be maintained in a free marketplace -- not by a government-regulated price regime. That is why it is vitally important that exclusive rights be preserved in regard to interactive transmission services.

B. There Should be No Exemption for Digital Music Services Transmitting to Businesses.

H.R. 1506 exempts from liability digital music services that transmit our sound recordings to businesses -- we urge the committee to carefully re-evaluate this position. A principle tenet of copyright law is to permit the creator of a work to control its commercial exploitation - or simply, that others should not be permitted to unjustly benefit from the creative work of another. Why should companies that transmit sound recordings for a fee to businesses be exempt from liability under the new sound recording performance right? These transmitters should be required to compensate the creators for the use of our works -- as they currently pay the songwriter for the use of the musical composition.

It seems contrary to sound public policy for Congress to impose liability for digital transmissions to consumers, yet exempt from liability the same digital transmissions to businesses. If anything, the case is easily as strong for imposing liability on transmissions to businesses, because both the transmitter and the business recipient are acting for commercial gain. I urge the Committee to follow the approach taken in S. 227, that properly imposes liability for digital transmissions for which subscribers are charged a fee, regardless of whether those subscribers are consumers or businesses.

The commercial music services have said that since their business does not affect record sales, they should be exempt. In fact, it is the use of the music, and their profit from it, that is the central tenet in performance liability under the principles of copyright law. Their

argument that businesses should be free from liability is like saying businesses should not have to pay for telephone service because the telephone companies make more money from consumer sales. There is simply no policy justification for this exemption.

C. **When record companies don't make a record sale, they should not have to pay publishers and writers as though they did.**

There has never been any question that publishers and writers should be paid mechanical royalties when records are sold by means of a digital transmission instead of in a record store. H.R. 1506 grants music publishers an expanded distribution right far in excess of existing law and premised on the burden of government regulation. Moreover, those provisions are inappropriate to the scope of this bill. We will outline our concerns in greater detail in a subsequent submission to the Committee.

I want to indicate that the numerous other groups supporting efforts to pass a sound recording performance right agree that H.R.1506, while a good start, must be amended to address the concerns outlined above. These groups include Artists for a Performance Right Now, with over 250 artist members including Amy Grant, Kathie Lee Gifford, Mary Chapin Carpenter, Billy Joel, Bonnie Raitt, Don Henley, as well as the approximately 300,000 members of the American Federation of Musicians and the American Federation of Television and Radio Artists who are principally background vocalists and musicians.

In closing, Mr. Chairman, we acknowledge that the issues posed are difficult and complex. And we understand the temptation to look for a formulation that avoids the need to examine and decide the very real issues that divide the parties.

Unfortunately, we see no alternative to dealing with these few remaining issues directly. As we said at the outset, if we felt that we could responsibly support the text of H.R. 1506, we would do so in an instant, and put this long-standing item on our legislative agenda behind us. But we have already probably compromised more than we should have; the future is too important to be compromised away.

We look forward to working with you as you guide H.R. 1506 through the legislative process.

Mr. MOORHEAD. Mr. Holyfield.

STATEMENT OF WAYLAND D. HOLYFIELD, SONGWRITER AND MEMBER OF THE BOARD OF DIRECTORS, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. HOLYFIELD. Mr. Chairman and members of the subcommittee, my name is Wayland Holyfield. I am a songwriter from Nashville, TN. I am also a member of the board of directors of ASCAP and appear on behalf of ASCAP's more than 65,000 songwriter and music publisher members to state our strong support for your legislation.

Let me begin, Mr. Chairman, by conveying the warmest regards of ASCAP's president and chairman, Marilyn Bergman. As you know, Marilyn would have liked to have been here to testify herself in support of your legislation, but today we have an ASCAP annual membership meeting in Nashville, and Marilyn must be there to preside. I will see her a little bit later in the day.

You know, as a songwriter, I try to say what I have to say in about 3 to 4 minutes, and I am going to attempt to do that this morning. Unfortunately, it may not rhyme very well, but maybe we can get the point across without that.

I want to express on behalf of all ASCAP members our deepest appreciation to you for your introduction of this much-needed legislation. As you know, the advent of the digital age has brought about a need for a performing right in sound recordings. New methods of digital transmission require such a right to help preserve the health of the music industry. The danger of new digital transmission technologies to the traditional method of record sales argues for a performing right in sound recordings as is contained in your bill. Its direct beneficiaries, of course, will be the record companies and performing artists.

I should add that we are especially concerned about the economic well-being of the performing artists, many of whom are ASCAP members. We are, therefore, thankful that your bill would protect those rights.

The fact that this new right is needed does not mean that it should be granted without qualification. To the contrary, the music industry works in a complex and sometimes very confusing web of interrelationships, and there is one overriding concern that we have, that the new right being granted should not in any way diminish or affect the existing rights of songwriters and music publishers. After all, a song can exist without a recording, but a recording cannot exist without a song.

When legislation to grant this new right was introduced by others in the last Congress, we just couldn't support it for it would have really harmed our rights. We had two major concerns. First, we needed appropriate safeguards to ensure that the use of music in interactive digital transmissions did not come entirely under the control of the record companies—sort of allow them to be the gatekeepers that we have heard about; and, second, we needed the appropriate safeguards to ensure that the rights and royalties of songwriters and music publishers, that they receive under the existing law, would not be harmed or diminished in any way as a result of the granting of this new right.

Mr. Chairman, your bill contains these safeguards, and we applaud that. More importantly, because of its introduction, your legislation became the catalyst for the further talks that Mr. Berman has referred to and that you have heard about this morning. The interested parties have gotten together and it looks like we have some very good news.

I am delighted to report that it seems that we have come to an understanding on the performance right aspects of this legislation. Without going into the details here, this understanding protects us against both the gatekeeper threat and the danger to our existing performing rights and the royalties that they generate.

So far, so good, but we are not over the finish line yet. The interested parties must now turn their attention to assuring that the mechanical rights which form an important stream of income for songwriters and music publishers will not be threatened by this new technology and this new right.

Now, while ASCAP is a performing rights society, it does not deal directly with mechanical rights as such; I will assure you that our 65,000 members are keenly interested in making sure that this mechanical right issue is properly addressed, and I am sure Mr. Murphy will have a few things to say about that in detail later.

Let me sum up, Mr. Chairman, by saying two things: First, the parties could not have come to this table were it not for your vision in crafting and introducing H.R. 1506. Second, the agreement on the performance right, which it seems we have reached, embodies the basic principles of protecting all parties and preventing any one group from controlling these new uses of music.

So, Mr. Chairman, I again want to say on behalf of all of the songwriters, artists and publishers who make up ASCAP, thank you for being our champion protecting these rights; and we look forward to the enactment of this much-needed legislation.

[The prepared statement of Mr. Holyfield follows:]

PREPARED STATEMENT OF WAYLAND D. HOLYFIELD, SONGWRITER AND MEMBER OF THE BOARD OF DIRECTORS, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. Chairman and Members of the Subcommittee, good morning. My name is Wayland Holyfield. I am a songwriter. I am also a member of the Board of Directors of ASCAP, and appear on behalf of ASCAP's more that 65,000 songwriter and music publisher members to state our strong support for H.R. 1506.

At the outset, Mr. Chairman, let me convey the warmest regards of ASCAP's President and Chairman, Marilyn Bergman. As you know, Marilyn would have like to have been here herself, testifying in support of your legislation. Unfortunately, today is the day of ASCAP's annual membership meeting in Nashville, and Marilyn's presence there is required.

Mr. Chairman, I want to express, on behalf of all of ASCAP's members, our deepest appreciation to you for your introduction of this much-needed legislation. As you know, the advent of the digital age raises the necessity for a performing right in sound recordings. New methods of digital transmission require such a right to preserve the health of the music industry. The danger of new digital transmission

technologies to the traditional method of record sales argues for a performing right in sound recordings, as is contained in your bill. Its direct beneficiaries, of course, will be the record companies and performing artists. I should add that we are especially concerned about the economic well-being of the performing artists, for, overwhelmingly, they are at the economic mercy of others. We are therefore thankful that your bill would protect their rights, and urge the strongest possible safeguards to ensure that the performing artists get their just rewards.

The fact that this new right is needed does not mean that it should be granted without qualification. To the contrary, the music industry works in a complex web of interrelationships, and there is one overriding concern that we have -- the new right being granted should not in any way diminish or affect the existing rights of songwriters and music publishers. After all, a song can exist without a recording, but a recording cannot exist without a song.

When legislation to grant this new right was introduced by others in the last Congress, we could not support it, for it would have harmed our rights. At your urging and the urging of many of your colleagues, we sat down with representatives of all the other affected parties in the music industry, and reached agreement on draft legislation which we could all live with and which would grant the new right we all support -- this was the "May 11 Agreement" we have all heard

so much about. The May 11 Agreement was supported by the entire music industry.

Unfortunately, your predecessor as Chairman did not agree with it, and refused to introduce it. Other parties then backed off of the Agreement, a most unfortunate occurrence, for if they had kept faith with it, we believe this legislation would now be the law of the land.

The May 11 Agreement addressed two of the major concerns we had with the granting of this new right. First, it had appropriate safeguards to ensure that the use of music in interactive digital transmissions did not come entirely under the control of the record companies, and so allow them to be "gatekeepers" over that use of music. Second, it had appropriate safeguards to ensure that the rights and royalties songwriters and music publishers receive under existing law would not be harmed or diminished in any way as a result of the granting of this new right.

Mr. Chairman, your bill does exactly what the May 11 Agreement would have done. It grants record companies and performing artists the new right they need in the digital age. It also protects our existing rights against erosion, and prevents any one element of the music industry from completely controlling the area of use which we all envision will become so important in the future -- interactive digital transmissions.

H.R. 1506 achieves these goals in many ways. First, it is forward-looking. It grants the new right of public performance in sound recordings for digital subscription transmissions, the types of performances for which performing artists and record companies need protection. Second, it ensures that the performing artists will get a share of the proceeds -- a point which we have emphasized from the first, and which was so sorely lacking in last year's bill. Indeed, we believe that if we had not insisted on the point, the legislation would never have had any protection for performing artists. We would urge the strongest possible safeguards to ensure that the performing artists actually do get their hands on the royalties this new right will generate.

H.R. 1506 protects us by granting to record companies a right which is equal to, but not greater than, our right of public performance. Because, as a practical matter, songwriters must license their performing rights through collective licensing organizations like ASCAP, and because those collective licenses must, as a matter of law, be nonexclusive, it is vital that the record companies not have an unlimited exclusive right of public performance. If they did, they would be in a superior position, able to control completely the use of music in these new areas. Your bill grants them a right to be paid, but not a completely exclusive right -- they would therefore be on a par with us in this regard. At the same time, H.R. 1506 includes adequate

safeguards protecting the record companies against the loss of record sales in the digital world. And your bill also assures that the mechanical rights which form an important stream of income for songwriters and music publishers will not be threatened by this new technology. We applaud your wisdom in crafting H.R. 1506 to protect all elements of the music industry, and to prevent the possibility of a takeover of the music business in the interactive world by one element of the industry.

H.R. 1506 also insures that existing user industries, such as broadcasters and music service operators, which use music and which have, over the years, developed well-established economic relationships with us, will not be required to pay new, additional amounts for the use of music. And it ensures that our rights will not be diminished in any respect as a result of the new rights being granted.

As you know, Mr. Chairman, H.R. 1506 differs from the Senate bill on the same subject, S. 227 -- a bill whose purpose we wholeheartedly support, but whose details do not protect us as your bill does. In recent weeks, we have been once again discussing with the record companies and the other interested parties some form of agreement which will reconcile our differences and allow us to move forward as a unified industry, as we did for too brief a time last year after the May 11 Agreement. We have made some progress in reaching that goal, and we hope we realize it fully soon. If we do so, Mr.

Chairman, it is fair to say two things: First, the parties could not have come to the table were it not for your wisdom in crafting and introducing H.R. 1506. Second, any agreement we may reach will embody the basic principles of protecting all parties and preventing any one group from controlling these new uses of music -- principles that you have espoused in H.R. 1506.

Mr. Chairman, I again want to repeat, in the strongest terms, our support for H.R. 1506. We will do everything we can to help you enact this much-needed legislation.

Mr. MOORHEAD. Mr. Murphy.

STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CEO, NATIONAL MUSIC PUBLISHERS' ASSOCIATION

Mr. MURPHY. Good morning, Mr. Chairman and members of the subcommittee. I am Edward P. Murphy, president and chief executive officer of the National Music Publishers' Association, Inc., a trade association representing more than 600 businesses that own and administer copyright and musical works. I am pleased to testify before you today to express NMPA's strong support for H.R. 1506, the Digital Performance Right in Sound Recordings Act of 1995.

I have submitted a detailed statement for the written record. In my remarks this morning, I would like to explain why section 4 of the bill, amendments to the compulsory mechanical license in section 115 of the Copyright Act are so important to songwriters and to their music publisher partners.

Chairman Moorhead, your bill recognizes an important consensus on issues raised by the digital transmission of sound recordings reached last year between representatives of publishers and writers and the recording industry. H.R. 1506 preserves the balance achieved through the consensus approach and prepares our industry to enter the digital age. We believe the bill will prevent the most powerful forces in our industry from overwhelming the rights of the very creators whose works are the foundation upon which the music and recording industries' house is built.

Mr. Chairman, dozens of songwriters, many of whom are with me this morning, have traveled to Washington this week to convey their support for the forward-looking and fair approach taken in your bill. They have come from California, from Tennessee, from New York, from every corner of this Nation.

I also have with me and will leave with you members of the subcommittee, copies of letters from hundreds of writers who also appreciate your efforts and support your bill. They include John Denver, Clay Walker, Jr., Doug Stone, Waylon Jennings, the Osmonds, Kathy Mattea; they also include several writers, Brooks and Dunn, Hank Williams, Jr., for example, who, it has been claimed, support the Senate performance rights bill, S. 227, but who actually favor H.R. 1506. We have 60 pounds of letters being delivered to the Hill today. I am sorry for the numbers, I don't know exactly, but I believe there are 60 pounds of letters, and more are coming from the songwriters.

Understand, this is not an issue that is being crafted as a publisher issue. As you know, publishers are in partnership with songwriters. This is a songwriter-publisher issue. I say this now because some have suggested that the provisions of the bill that I will talk about in a moment only concern publishers. Nothing could be further from the truth.

The writers with me today and their publishers earn a living through performance royalties and royalties on record sales, which we in the music business call "mechanicals," or "mechanical royalties." Both the consensus achieved last year and your bill recognize the digital transmission of sound recordings will impact both in-

come streams. Without the safeguards in your bill, these writers fear their livelihoods would be ripped from them.

One-third to one-half percent of songwriter income comes from mechanical income. H.R. 1506 protects our mechanical rights by establishing a workable system for assuring that mechanical royalties will not be lost to us. New digital transmission services will allow consumers to buy music on line. H.R. 1506 will make sure that we receive our mechanical royalties when the digital recording is purchased electronically rather than at a store.

It also gives record companies and music copyright owners a process to follow in order to determine appropriate rates of mechanical, royalty payments for services that have aspects of a record sale, but for which a particular download cannot be technologically monitored. This protection is essential to the future well-being of the American songwriting and music publishing community.

Our friends in the recording industry will be in a position to assess the nature of a particular transmission and to set license fees accordingly. If a service is a pure download, they can charge a fee, let's say, of $8 to treat it like a record sale. If the service is a broadcast-type format, they will license it as a public performance for a few pennies per transmission. If the transmission has aspects of both public performance and distribution, they will be able to negotiate for a license fee that compensates for both, say $4.

H.R. 1506 would make sure that the publishers and writers receive mechanical royalties in the first instance on the same terms as they now do for the sale of a record or a CD. In the second, like the record companies, we would get our public performance payment. In the third, however, H.R. 1506 does no more than require that we sit down with the record companies and negotiate a reasonable compensation for our own rights of reproduction and distribution, much as they did in their negotiations with the transmitters. If negotiations fail, the dispute would be resolved by a copyright arbitration royalty panel (CARP), the mechanism Congress established 2 years ago to handle royalty rate and distribution matters, the cost of a cut would be borne by the parties and not by the taxpayers.

The record industry has called distribution subject to a negotiated rate procedure "UFO's." They claim that they have no way of knowing precisely what mechanical payments would be due. The very same factors that would be relevant in negotiation between record companies and a digital transmission service would be relevant in the record companies' discussions over the mechanical fees. If they can figure out an appropriate license fee for their product, the same must be true for our music. There are no UFO's under this bill, but I can guarantee members of the subcommittee that without the full mechanical royalty protection that H.R. 1506 affords, there would be a black hole in cyberspace to swallow up our mechanical income.

Writers and publishers are not seeking new rights. We are not seeking to disadvantage record companies. We simply need to clarify—we simply need to clarify, and I underline that—to clarify how the rights we now have will apply in the digital world. We are will-

ing to talk to the record companies in an effort to explore their concerns and in fact we will be meeting with them later today.

In the meantime, in an industry with its share of Goliaths, songwriters and music publishers are resigned to our role as the Davids. We are willing to make our own fight to protect our livelihoods, but we need the protection of this bill to level the playing field.

Again, on behalf of NMPA, the writers with me today, their organizations, The Songwriters Guild of America's President George Davis Weiss, the National Academy of Songwriters and the Nashville Songwriters Association International, please accept our sincere thanks for the opportunity to appear before you today.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Murphy follows:]

PREPARED STATEMENT OF EDWARD P. MURPHY, PRESIDENT AND CEO, NATIONAL MUSIC PUBLISHERS' ASSOCIATION

Good morning, Mr. Chairman and members of the Subcommittee. I am Edward P. Murphy, president and chief executive officer of the National Music Publishers' Association, Inc. ("NMPA").[1] I consider it a privilege to appear before you to express NMPA's support for H.R. 1506, the "Digital Performance Right in Sound Recordings Act of 1995," and to thank you, Mr. Chairman, for the leadership you have shown on this important issue.

NMPA is a trade association representing more than 500 American music publishers, businesses that nurture the process of creating music by providing financial and artistic support for writers, by promoting those writers and their songs, and by generating royalty income through the issuance of copyright licenses. The association's mandate is to protect and advance the interests of music publishers and their songwriter partners in matters relating to the domestic and global protection of music copyrights.

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[1] NMPA maintains its offices at 711 Third Avenue, 8th Floor, New York, New York, 10017; (phone) 212/922-3260; (fax) 212/953-2471.

NMPA's licensing subsidiary, The Harry Fox Agency, Inc. ("HFA"), represents more than 14,000 music publishers and licenses a large percentage of the uses of music in the United States on records, tapes and CDs. HFA also licenses music on a worldwide basis on behalf of its publisher principals for use in films, commercials, television programs, and all other types of audio-visual media.

The music business is grounded in copyright. Our rights, as defined under the law, are what enables everyone in our industry to earn a living by their talents. In the United States and throughout the world, music publishers and writers earn income from two principal sources: (1) public performances; and (2) the reproduction and distribution of recorded music in tapes, CDs and other formats. Because the subscription digital transmission services which are the subject of H.R. 1506 have implications for both streams of income, the opportunity to address the Subcommittee today is particularly important to us. My colleagues from the performing rights societies will explain our industry's views as they relate to the public performance aspects of the bill. This morning, I will limit my remarks to reproduction and distribution issues, but wish to express NMPA's support for the position of the societies.

NMPA also supports the creation of a public performance right in sound recordings, provided the existing rights of music creators and copyright owners are not jeopardized. In NMPA's view, H.R. 1506 would give sound recording copyright owners a needed measure of control over the use of their works in

subscription-based digital transmission services, as well as a significant new source of revenue. At the same time, we are satisfied that the bill contains adequate measures to safeguard existing rights and existing streams of revenue that are vital to writers and music publishers, including the rights of reproduction and distribution and income derived from their exercise.

Both H.R. 1506 and the Senate performing rights bill, S. 227, derive from a consensus approach negotiated between music publishers and writers, represented by NMPA, ASCAP,[2] and BMI,[3] on the one hand, and the RIAA[4] on the other, in May 1994. While H.R. 1506 is faithful to the "May 11 compromise," S. 227 omits certain provisions that we believe are crucial to preserving existing rights of writers and publishers.

NMPA applauds the efforts of Chairman Moorhead and this Subcommittee to bring into focus the implications of digital transmission services not only for record companies and performers, but also for music creators and copyright owners. More particularly, we view H.R. 1506's inclusion of amendments to section 115 of the Copyright Act, the compulsory "mechanical" license, as an important step toward ensuring that legal rights and remedies that apply to the delivery of recorded music via the "real" record store of today will be maintained for the "virtual" record store of tomorrow.

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[2] American Society of Composers, Authors and Publishers.

[3] Broadcast Music, Inc.

[4] Recording Industry Association of America.

By way of background, section 115 of the Copyright Act currently establishes the framework for a legal and business relationship between music copyright owners and record companies that covers the "making and distribution" of phonorecords. "Phonorecord" is the Copyright Act's short-hand for material objects in which sounds, including sound recordings embodying musical works, are fixed. Audio cassettes, compact discs, the mini-disc and the vinyl LP are all examples of phonorecords.

H.R. 1506 and the May 11 compromise reflect the understanding -- shared by music copyright interests and record company representatives alike -- that some digital transmission services will provide record companies with a new technological means of distributing phonorecords, and that writers and music publishers should receive mechanical royalties based on such digital distribution. In keeping with this understanding, H.R. 1506 confirms the applicability of mechanical rights and the availability of the section 115 compulsory mechanical license where phonorecords of sound recordings are distributed by means of a "digital phonorecord delivery." NMPA views this aspect of the bill as essential to promote consumers' access to the benefits of new technologies while ensuring that writers and music publishers will receive compensation for the new ways of "selling" music that digital technologies will make possible.

In last year's discussions with the recording industry, we envisioned and provided for two general ways in which digital phonorecord delivery could be accomplished, and H.R. 1506 covers both. First, we agreed that the section 115

compulsory license would be available, and that mechanical royalties under the license would be paid, when a transmission resulted in an identifiable digital phonorecord delivery. The term "identifiable" was carefully chosen to encourage the inclusion of copyright management information in pre-recorded music and transmissions of it, and to promote the use of reasonable technological means and measures for determining that a copy has, in fact, been made. For each identifiable digital phonorecord delivery, H.R. 1506 provides that the section 115 license terms and royalty rate would be the same as that provided for traditional phonorecord sales.

Second, we agreed that mechanical rights would be triggered and mechanical royalties paid in cases where a digital phonorecord delivery, although not identifiable, can be reasonably expected to result from a digital transmission. In our talks last year, we discussed at length how the licensing practices of a record company, as well as the marketing practices of a digital transmission service, its technical characteristics and other ascertainable service characteristics could -- and, the recording industry agreed, would -- serve as a basis for determining an appropriate license rate for such deliveries, either through negotiation or, if necessary, arbitration.

NMPA, RIAA and other parties to the May 11 compromise intended that the two types of digital phonorecord delivery, taken together, should cover the universe of digital transmission services whose delivery of phonorecords to the

home subscriber effectively substitutes for the retail sale of cassettes and CDs. H.R. 1506 preserves this goal.

In contrast, S. 227, the bill now supported by the recording industry, defines digital phonorecord delivery much more narrowly. As a consequence, songwriters and publishers fear the Senate bill's omissions would leave a "black hole" in the digital service universe.

S. 227 limits the application of the section 115 compulsory license to "each individual digital transmission of a sound recording which results in a specifically identified reproduction by or for any transmission recipient of a phonorecord of that sound recording. . . ." As I mentioned earlier, parties to the May 11 compromise agreed that "each individual digital transmission of a sound recording which results in the identifiable delivery to any transmission recipient of a phonorecord . . ." should be covered. S. 227 further omits, in their entirety, the provisions dealing with digital phonorecord deliveries that are not identifiable, but which can reasonably be expected to result from a transmission.

The differences between the mechanical rights provisions of H.R. 1506 and S. 227 are significant. By limiting the application of the section 115 mechanical license to digital phonorecord deliveries that are "specifically identified," S. 227 stands to discourage the use of copyright management information and technological measures for monitoring and identifying when a reproduction has been made and a mechanical royalty payment is due. In practice, the limitation could provide unintended economic incentives for record

companies and subscription services to structure their agreements and related operations to avoid the obligation to pay mechanical royalties. H.R. 1506 avoids this result by extending the royalty payment obligation to digital phonorecord deliveries that are technologically identifiable.

S. 227 widens the mechanical royalty payment loophole further by failing to make provision for digital phonorecord deliveries that can reasonably be expected to result from a transmission. Related provisions in H.R. 1506 address the impact of digital transmission services that actively promote their use as a means of digital phonorecord delivery through marketing practices or by offering to subscribers equipment or devices that facilitate copying. For example, a service might offer a day-by-day play list that details what songs will be transmitted, the exact time of the transmission, and its precise duration. Even though individual digital phonorecord deliveries may not be identifiable in such cases, the parties to the May 11 compromise recognized a record company's ability to negotiate with the service provider for a level of compensation, beyond compensation for the public performance of its works, that would take into account the impact of the service on the record company's exclusive rights of reproduction and distribution.

To illustrate how these provisions would operate, let's assume three different digital transmission services. In one, the consumer accesses a current CD by punching up an identifying code and downloading the title. The charge is $10.00. In a second, a service advertises that a new release will be transmitted

at a specific date and time, and indicates the precise duration of the transmission; the consumer can confirm in advance that the transmission is desired, and is charged $5.00 for the transaction. In a third, a consumer subscribes to a service that transmits music to him 24-hours a day, every day, for a flat monthly fee.

H.R. 1506 would treat the first example -- the consumer-initiated download -- as a record sale, and music publishers and writers would receive mechanical royalties on the same terms as apply to the sale of records and CDs through traditional retail outlets. (The result would be the same under S. 227, but only if the transmitter employed technology to identify the download; otherwise, no mechanical royalty payment would be due.) Under either bill, the third example probably would not involve the delivery of a phonorecord, and in that case, no mechanical royalty would attach.

The second case -- the $5.00 transmission -- is treated drastically differently under the two bills. S. 227 would provide no basis for payment of mechanical royalties, even though the pricing agreed upon by the record company and the transmitter clearly reflects that, while some subscribers will use the special transmission to "preview" the work, a good many others will "buy" their copy at that price. Where a record company is in a position to price a transaction to include an element of compensation for the reproduction and distribution of their sound recordings, H.R. 1506 would require that the record company and music copyright owner attempt to negotiate an appropriate mechanical license payment for the reproduction and distribution of the music

in that sound recording and would allow for arbitration if such negotiations failed.

In closing, I'd like to assure members of the Subcommittee that writers and publishers are not advocating any measure that would disadvantage the performing artists and musicians who give life to music. H.R. 1506 and S. 227 provide for the same division of performance royalty fees between record companies and performing artists. Moreover, for the many performers who write their own songs, H.R. 1506 would not only provide a new source of public performance income, but would also protect the public performance and mechanical income they currently earn as songwriters.

Nor are we seeking to impose any new or unfair burden on the transmitters of music. In fact, the section 115 provisions of H.R. 1506 would minimize the burden on transmitters by placing record companies in a position to license their own performance and digital distribution rights directly and to cover the reproduction and digital distribution rights of music publishers and writers by complying with the terms of the compulsory mechanical license.

We are not even trying to create new or expanded rights for ourselves. We are simply seeking to hold our own as technology rapidly advances.

On behalf of the Board of Directors and members of the National Music Publishers' Association, I again thank you for the opportunity to testify today. NMPA looks forward to working with the Subcommittee as this important legislation advances.

Mr. MOORHEAD. I want to apologize to the panel. We have a quorum call, followed by a 5-minute vote going on. That is why you see shifting up here. I think George Gekas will probably get back before I do. He will vote and come back, but we will start up as fast as we can. If you don't mind waiting there 10 minutes or so, we will hurry back.

Mr. JASON BERMAN. We have waited a long time, Mr. Chairman. We will be here.

[Recess.]

Mr. MOORHEAD. The subcommittee will come to order.

Mr. Berenson.

STATEMENT OF MARVIN L. BERENSON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, BROADCAST MUSIC, INC.

Mr. BERENSON. Chairman Moorhead, members of the subcommittee, I thank you for the opportunity to speak briefly this morning. BMI, Broadcast Music, wishes to extend its gratitude to the chairman for the leadership role that you and other members of the committee have taken with respect to the creation of a digital performance right of sound recording. BMI supports the creation of such a right as long as it does not adversely affect the public performing right and the musical creations of the more than 160,000 songwriters, composers and music publishers whose works BMI represents.

Since the concept of this legislation was introduced, BMI has worked diligently with other interests in the music industry to outline provisions which would encompass the continued protection of songwriters and copyright holders while establishing a new right for artists and record companies. Under your leadership and the leadership of Senator Hatch, negotiations between the various interests in the music industry have continued and are currently underway on an almost daily basis. These negotiations have been intense and frank, and as of last evening, I am happy to say an agreement was reached between the RIAA, representing the record companies, and BMI and ASCAP, representing the creators and authors of musical compositions.

Additionally, the NMPA has been a party to these negotiations and is likewise attempting to narrow the differences between the interests of music publishers and the interests of record companies. We feel that the NMPA and the RIAA must—and I say must—resolve their differences so that this legislation can go forward with the unified backing of the entire industry.

Many of BMI's songwriters and composers had concerns regarding the creation of a performing right derived from the digital transmission of sound recordings. Any changes to the copyright law, they said, must not place or permit artificial restraints on the number of public performances that works are capable of generating in a free and open marketplace; also, that no single entity should be granted a unilateral role as gatekeeper, determining when and by whom their works may or may not be used. There should be, said our songwriters, healthy and open competition among service providers in the interactive digital arena which would encourage the performance of their musical works to the broadest possible range of consumers. Sound recordings, we be-

lieve, should be digitally encrypted with writer and title information, as well as other information which would allow the tracking of the performance of these sound recordings.

In sum, the creation of this new performing right should not in any way diminish the public performing right for songwriters and music publishers as it exists today. The agreement reached last night between the RIAA, BMI, and ASCAP achieves these goals. Language will be presented to the committee which will reflect the agreement reached last evening.

What is left to achieve is an agreement between the NMPA and the RIAA with regard to the mechanical right. We believe that this can be achieved. When an agreement is achieved, the music industry will be able to offer united support for the creation of a digital performance right in sound recordings.

H.R. 1506, your proposed legislation, Mr. Chairman, served as a guidepost in our negotiations and helped us achieve a resolution between the performing rights organizations and the RIAA.

Again, Mr. Chairman, thank you for your insight and thoughtfulness.

Mr. MOORHEAD. Thank you very much.

[The prepared statement of Mr. Berenson follows:]

PREPARED STATEMENT OF MARVIN L. BERENSON, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, BROADCAST MUSIC, INC.

Chairman Moorhead, Members of the Committee, I thank you for the opportunity to speak briefly this morning. BMI (Broadcast Music, Inc.) wishes to extend its gratitude to the Chairman for the leadership role that you and other Members of the Committee have taken with respect to the creation of a digital performance right in sound recording. BMI supports the creation of such a right as long as it does not adversely affect the public performing right in the musical creations of the more than 160,000 songwriters, composers and music publishers whose works BMI represents.

Since the concept of this legislation was introduced more than a year ago, BMI has worked diligently with other interests in the music industry to outline provisions which would encompass the continued protection of songwriters and copyright holders while establishing a new right for artists and record companies. Under your leadership, and the leadership of Senator Hatch, negotiations between the various interests in the music industry have continued and are currently underway on a day-to-day basis. These negotiations have been intense and frank, and I believe that substantial progress has been made between the RIAA (Recording Industry Association of America), representing the record companies, and BMI and ASCAP (American Society of Composers, Authors and Publishers), representing the creators and authors of musical compositions. Additionally, the NMPA (National Music Publishers Academy) has been a party to these negotiations and is likewise attempting to narrow the

differences between the interests of music publishers and the interests of record companies. We feel that the NMPA and the RIAA must resolve their differences so that this legislation can go forward with the unified backing of the entire industry.

Many of BMI's songwriters and composers have concerns regarding the creation of a new performing right derived from the digital transmission of a sound recording. Any changes to the copyright law, they say, must not place or permit artificial restraints on the number of public performances their works are capable of generating in a free and open marketplace; no single entity should be granted a unilateral role as a gatekeeper determining when and by whom their works may and may not be used. There should be, say our songwriters, healthy and open competition among service providers in the interactive digital arena which would encourage the performance of their musical works to the broadest possible range of consumers. Sound recordings, we believe, should be digitally encrypted with writer and title information, as well as other information which would allow the tracking of the performance of these sound recordings. In sum, the creation of this new performing right should not in any way diminish the public performing right as it exists today.

The performing rights organizations and the RIAA have been discussing ways in which all of these issues could be resolved so as to protect the interests of our affiliated songwriters, composers and publishers as well as the interests of record companies and artists. We believe this can be achieved, and the music industry will be able to offer united support for the creation of a digital performance right in sound recordings.

Your proposed legislation, Mr. Chairman, has been serving as a guidepost in these negotiations. H.R. 1506 embodies principles which strike a balance among the interests of all

the parties. Its provisions will permit the industry to go forward into the digital age with the assurance that all creative forces and copyright owners will be fairly compensated, and that the public will have the opportunity to enjoy the broadest spectrum of entertainment opportunities. The thoughtful drafting of H.R. 1506 will serve America's creators and the American public well in the digital era.

Mr. MOORHEAD. I understand that Mr. Holyfield is going to have to leave very shortly.

Mr. HOLYFIELD. If possible. We have that membership meeting in Nashville and Mechanicsburg, and I need to leave because of transportation complications, if it is all right with you.

Mr. MOORHEAD. I want to thank all of the members of the panel for the work they have done in trying to work out a compromise so far, and I understand that most of your issues have been pretty much worked out.

Mr. HOLYFIELD. We feel very good about where we are on this point.

Mr. MOORHEAD. Do you have a position on mechanical royalties?

Mr. HOLYFIELD. Well, I do. I am a songwriter, almost half of my royalties or most of my income comes from mechanicals, and although I sit here in the ASCAP chair, I would be very frightened, as the new technology comes about, that we are not protected in a fair and reputable way.

I am a little afraid of some of what I hear about the possibilities as we advance with the record label situation. I feel like, from what I am hearing, that we can work this out, but I would certainly have to say at this point that we need to have that addressed; I think all songwriters would feel very uncomfortable as it is right now.

Mr. MOORHEAD. Do you feel the same, Mr. Berenson?

Mr. BERENSON. Yes, I think that the RIAA and the NMPA have to sit down and work it out. I really believe it can be done.

Mr. MOORHEAD. The reason I am asking you two this question is because, really, what is left is between Mr. Murphy and Mr. Berman—and I know you have to leave, and we will—you may go when you have to go.

Mr. HOLYFIELD. Thank you, Mr. Chairman.

Mr. Berenson will certainly, and I think Mr. Murphy will share our views on where we are, and maybe they can answer any of those type questions.

Mr. MOORHEAD. I think I ought to give, because you are leaving before I ask questions of the other members of the panel, I ought to give Mr. Berman an opportunity to ask you any questions that he desires to.

Mr. BERMAN OF CALIFORNIA. Well, thank you, Mr. Chairman. I just have one question.

I would take it, I understand the importance of settling this issue and how this issue affects income to the creative artist, the songwriters; and it is not just a publisher issue in that sense. The other side of the coin though is, it is fair to say that no bill passing is just as bad or worse from a songwriter point of view.

Mr. HOLYFIELD. You mean, this bill not passing at all?

Mr. BERMAN OF CALIFORNIA. Right.

Mr. HOLYFIELD. You have got to understand this bill is not for the songwriters; we do not gain from this bill; it is more a matter of addressing a modern technological emergence to protect the artist and the royalties.

Mr. BERMAN OF CALIFORNIA. Let me just follow that up. I mean, if there is no protection for sound recordings in the digital world, why are the people who make sound recordings going to make them in that format? Why aren't you losing a lot of potential ex-

ploitation of your artistry if there is no stream of effective compensation to the people who would record your works?

Mr. HOLYFIELD. Are you referring to the performers or just the writers?

Mr. BERMAN of California. I am talking here about the songwriters and composers. In the end, your revenues are far more from—my guess—from both the performance of sound recordings and the distribution of sound recordings than perhaps from any other——

Mr. HOLYFIELD. Right, about 50–50, the performance and the mechanicals; I think both should be addressed in this new age. I think that is what we are trying to do. I don't want us to leave anything out.

We said maybe we could come back to the mechanical later, but I think we ought to address it now, personally. I feel it is such an important, critical issue because we are talking about statutory rates that have been set by Congress in the past. We have guidelines that could be used. You know I can't speak for the two gentlemen here, but I feel like we are awfully close. I am for us having some sort of a resolution to this mechanical issue.

Mr. BERMAN of California. Well, Mr. Chairman, I have questions both for Mr. Berman and Mr. Murphy on this issue, but I will wait. I understand your desire to get the witness who has to leave off early.

Mr. MOORHEAD. Mr. Becerra, one of our witnesses has to leave; it is Mr. Holyfield. Do you have a question for him before he leaves?

Mr. BECERRA. Mr. Chairman, since I was not here for any of the previous questions, if Mr. Berman would like——

Mr. MOORHEAD. We have just started the questions. Rather than asking questions of the whole panel, I am letting the witness who has to leave be addressed first.

Mr. BECERRA. That is fine. I thank Mr. Holyfield for being here.

Mr. HOLYFIELD. Thank you very much.

Mr. MOORHEAD. Thank you.

Mr. Murphy, Mr. Berman suggests that the inclusion of provisions on mechanical royalty payments are inappropriate to the scope of this bill. Could you tell us why you believe these provisions are appropriate?

Mr. MURPHY. I think there are several reasons why it is appropriate, but I would like to just maybe recall that—in fact, Jay Berman, may recall that RIAA's written statement acknowledges that many of the digital transmission services will be more like distributions; and if they are like a distribution, there needs to be a clarification, I think, of the type of right, that right being a mechanical right.

You know, we are entering into a new age, and we are trying to set the standards, as you all know, for the next century. I think it is important that we try to clarify what those rights are. And in the digital transmission world, there is a mechanical right. We believe there is because, of course, there is a "catcher" device, there is a receiver. A digital signal is received and caught, and that means a reproduction has been made and a mechanical payment is due. So I think it is clear from our perspective that we need a

clarification of our rights. If you rely upon the judicial system—if you want to go out into the courts and bring actions against each of those individuals—it will be burdensome and expensive for songwriters and publishers to bring those actions, over a long period of time. It takes many, many years to clarify rights via the courts. What I think you have the opportunity to do here is to clarify it, as you have, and make provisions in your bill that will certainly clarify the law and avoid costly—many, many years of long litigation and high costs that all the people would be forced into.

Mr. MOORHEAD. Well, I believe it is Mr. Berman's position that we should say nothing about this. What happens if we say nothing?

Mr. MURPHY. I think if we say nothing about it, we are forced to go back to the judicial system and bring actions where we believe each of those cases may appear.

We have such a case, you know, pending now, and it is already 2 years in negotiation, and we are into several hundred thousand dollars of expense, and it is still not resolved.

The action has been brought by one of our publishers, and NMPA funded it. We can't fund all of these things, and individuals will have to bring it up on their own; and it is very, very expensive, very long and costly to bring these things before the court.

Mr. MOORHEAD. Mr. Berman, there is a provision in the Senate bill which would authorize and encourage the creation of new organizations to enforce the performance rights granted recording companies. Do you anticipate that these new collecting and enforcement organizations would be analogous to performing rights societies and other collective rights organizations?

Mr. JASON BERMAN. I believe they might be, Mr. Chairman, yes.

Mr. MOORHEAD. Mr. Murphy, do you have an idea about that?

Mr. MURPHY. I am not sure. Whatever the performers choose to put together, obviously, is their option. I think we have always supported performers receiving appropriate performance royalties—of course, your bill supports it fully.

I would just like to add, as always, H.R. 1506 contains payments for performers. We are happy with that. We have no qualm with that.

Mr. MOORHEAD. Mr. Berenson.

Mr. BERENSON. Speaking on behalf of BMI and, I think, of ASCAP in this respect, we certainly believe in the collective administration of our rights and it would be up to those entities whether they would want to use that. Certainly we find it is an economical way of collecting your license fees.

Mr. MOORHEAD. Mr. Berman, as rights become less easily defined in a digital environment, would these new collection organizations be potential competitors with existing collective rights organizations?

Mr. JASON BERMAN. I don't believe so, Mr. Chairman, because they would represent the interests of those people who have not been at the table to date, namely the recording artists and the record companies, in the collection of money derived from public performance.

Let me say something about a question that was asked earlier and was answered by Mr. Murphy that relates specifically to the issue of mechanical royalties and what the new digital trans-

missions implicate. On behalf of his members, Ed said that somewhere between one-third and one-half of their income is derived from mechanical royalties, meaning that somehow the reproduction or distribution right was in fact the issue.

Mr. Chairman, of the four people sitting at this table, three of them have every single right they need moving into this digital transmission environment. They have both a public performance right and a distribution right, and they collect today on both of those rights. The only guy here who doesn't have both of those rights is me. I am trying to level the playing field, to get a public performance right.

Now, if one-third to one-half of the income of NMPA members is derived from mechanical royalties by virtue of the implication of the distribution right, 100 percent, the sole source of income for record companies is through the implication of the distribution right. So if there is concern about how digital transmissions affect the current state of rights under the copyright law, I would say that concerns us twice as much as it concerns the music publishers.

The distinction is not about rights, it is about rates, and we believe that Ed has today—and God bless him, he is entitled to it—every right he needs to enforce whatever he wants to enforce; and in fact he is about to do it, he is doing it.

Mr. MOORHEAD. Well, I want you to know that I consider it very, very important, when you get together at 3 today, that you both understand that you probably both have to give a little blood, that compromises are not reached by any side getting adamant where they stand and refusing to give a little.

This is a very important issue; it is one that many people in the industry, all the industries that are affected by you, want to see go through. The bill will be greatly speeded on its way and greatly enhanced if you two can get this problem, this last problem basically worked out.

Mr. JASON BERMAN. We are going to take this seat out, and at 3 we will be next to each other.

Mr. MOORHEAD. And you will have a love fest?

Mr. JASON BERMAN. Mr. Chairman, nothing would please me more, having waited decades to get a public performance right, than to find a way to make it easy for everybody to support that right.

Mr. MURPHY. Mr. Chairman, we fully support, as you know, the creation of a digital performance right for record companies; and we do know that they are at the table looking for this additional right, and we fully support that. And Jay understands that, and I know he does. I won't make him repeat it again and again; we understand they don't have that right. But we are not here seeking any new rights, we are not seeking any more money, we are not seeking anything but to hold what rights we currently have; and I think that is an important distinction we want to make.

Yes, the recording industry has a great deal at stake on the distribution rights of sound recordings, but they do have alternate ways of receiving income through the subscription services. That is the concern we have, to make sure that when they have a subscription payment that we also have a payment for the songwriters and publishers. That is the issue.

It is a question of rights and a question of rates. If the rights are clarified, the rates follow.

Mr. JASON BERMAN. We have the rights, and if I sell the record, he will get the mechanical.

Mr. MOORHEAD. I am not trying to tell you what to agree to, but it is very, very important that you let this whole thing—a lot of people are watching and anxious.

Mr. JASON BERMAN. Your admonition has been taken to heart, Mr. Chairman.

Mr. MOORHEAD. You both are so competent at what you do, it is awful hard for one of you to beat the other because you are both very, very capable of representing your point of view. But just kind of get together and get this thing settled, so we get the bill through.

Mr. Berman.

Mr. BERMAN of California. Thank you, Mr. Chairman. See if we can really damage these upcoming negotiations by hardening the line.

Mr. Berman talks about the mechanical royalty issue as—there are electronic sales, which I guess he would say if something is an electronic sale, it is a distribution for which mechanical royalties are owed and for which your rights are well recognized in existing law. Then there is something—there are copies made, but not for sale——

Mr. MURPHY. Yes, I would like to—and Jay could add to this, but I think we are talking about copies. In our opinion, when a copy is made, a copy is made, and I think we are introducing a new concept; and the new concept here is, in an electronic world, in cyberspace, in the way the EtherNet up there is loaded, you know, you are not going to be able to continually jam the airwaves with signals, that consumers are going to look to download information in bursts.

Mr. BERMAN of California. You are talking about a downloading by a private party who doesn't intend to resell it?

Mr. MURPHY. No, this is a company, a subscription company which would permit a download in a burst of an album or a song; and a number of songs can be downloaded in a burst and received at home on a receiver. And now, how long it stays in that receiver—and Jay could add to that; he thinks—and if I am incorrect, I am sure he will correct me—that this should be a different payment structure depending upon how long a copy is kept on the capturing device.

In other words, you receive that signal; and we believe, if it is received at home and on a subscription service and it is copied and a copy is made——

Mr. BERMAN of California. What if it is received, listened to, but not copied?

Mr. MURPHY. There is no mechanical payment whatsoever, none whatsoever. The point only being, when it is a catcher, when there is a catcher, when there is a mitt, when it is recorded, then a mechanical fee is applicable. That is a recording fee to us; that is a recording. That is what it says under the copyright law—that has been the basis of our entire business relationship all these many years.

And now what is being suggested is that because of technology and because of the burst of information there should be a different payment structure because a copy may not be on there for a long time. They may erase it; they may keep it on for 10 seconds or 50 seconds or for a minute or, I don't know, for 5 years, but that is as I understand the RIAA's question.

We are saying, if it is recorded and if there is a recording fee, are——

Mr. BERMAN of California. I am real simple. I don't understand all of this. I don't understand bursts.

Mr. MURPHY. Compressed signals.

Mr. BERMAN of California. I can understand copying something.

Mr. MURPHY. They are signals which are compressed. It is a copy of music, a product that has been compressed, digitized and downloaded.

Mr. BERMAN of California. OK. And now it is copied?

Mr. MURPHY. Yes, sir.

Mr. BERMAN of California. How do you know and how does he know? How does the subscription service know whether it is copied?

Mr. MURPHY. Under certain technologies, the only way you will be able to hear the music is, it will have to be copied or "stored" to play it back, so you know that it has been copied. Unless it comes in a different format, and those other formats you will know by the type of signal and the way it is being transmitted. You can distinguish between a broadcast and a download that has been copied, definitely.

Mr. BERMAN of California. Well, in the next panel, I think—remember, last year we went with Bill Hughes and we watched the subscription service, and that was a digital format, and——

Mr. MURPHY. We are talking about compressed signals. This is a compressed signal; this is a different thing.

Jay can add to it, I am sure.

Mr. BERMAN of California. I am sorry, I don't understand.

Mr. JASON BERMAN. I think you have proved my point, Congressman Berman, this is in fact a very, very difficult issue.

Mr. MURPHY. It is difficult, but I think—the point I want to make, just one point, if it is copied and we do know when it is copied, then a use under the mechanical right is taking place.

Mr. BERMAN of California. All right. So now, OK, we have electronic sales?

Mr. MURPHY. Yes, sir.

Mr. BERMAN of California. We have copies made, and your position is, when you know a copy has been made, that is a distribution, that is like selling a record or selling a CD and a mechanical is owed then.

Do you disagree with that, Mr. Berman, when you know a copy has been made?

Mr. JASON BERMAN. If I know a copy has been made. What if I have not been able to license it as if it were a sale?

I will give you exactly the example Mr. Murphy gave: 25 cents, $5, $8. First, I wouldn't license it for $8 if it was a sale; I would probably license it for more. In fact, in that environment, where I knew the recording was being sold and the copy was being made

and it was a permanent copy or whatever, he is entitled to a full mechanical. I am selling a record, I am just selling it via a different means.

Let's say I license it for a quarter because it is a performance. I don't believe I should pay him anything. They get performance income. That is what performance rights are all about.

Let's say in this new world that we don't know about and we are not smart enough to figure out at the moment, though they have all the rights they need, I license it for $5 because I don't really know what is going on, and the guy who runs the service doesn't want to pay more. We don't know if the copy is incidental to the performance or the copy may self-destruct once the guy orders a new performance or whatever, so I am charging $5 instead of $10. Why should I pay him a full mechanical? I haven't sold the record. I have said to him, I will pay you a percentage based on what I am getting; I am not trying to avoid the payment of mechanicals.

Mr. MURPHY. Would you like me to respond?

Go back to that question. We are not sure if a performance has taken place or if a recording has taken place. Just for clarification, you can have many call-ups and you can have many requests for one quarter, same as a jukebox. If you go to a jukebox, you put in a quarter today and you can play, this is a recording—this is like a jukebox, the same thing. We are saying, yes, a payment should be made; how much should be made is to be discussed. We haven't gotten that far.

The other—Mr. Berman said that he would be willing to pay a percentage, and the offer of a percentage, a percentage of what? And I think that is what we need to discuss.

All payments today in our field have been based, as you know, on a per-song basis, not a percentage; and to go into a percentage, is an entirely different area. A percentage of profits? I don't think that would be something that we could ever entertain. We all know the difficulties in finding out who makes what in the entertainment business when you deal in a percentage of profits. So I think that is totally unacceptable.

But as a way of looking at how much money would be made on a per-song basis, obviously, yes, we would be happy to look at it.

Mr. BERMAN of California. What are you saying?

Mr. MURPHY. Per song. We always have been paid on a per-song basis and not as a percentage.

Is the percentage a percentage of what they get paid? Maybe Jay could clarify it. What percentage is he offering—of record company profits, of retail sales, of wholesale? A percentage of what? It is not clear to me. I really don't know.

Mr. BERMAN of California. Well, I just—electronic sales, copy made, but no sale. I guess sale of a copy, is that what you meant when you said——

Mr. MURPHY. You made a copy, there was a copy, the word "copy" keeps coming up.

Mr. BERMAN of California. Mr. Berman talked about a classification of copies when there was no sale.

Mr. MURPHY. But there was a copy made.

Mr. BERMAN of California. A copy made, but no sale. Then he talked about transitory copies, so this is the self-destructing copy.

Mr. MURPHY. I never heard of that. I don't know what a self-destructing copy is. It is something brandnew to me.

All we are talking about is virtual reality in this world today, virtual music, and you don't even have to buy a copy. You can understand how the songwriters and publishers are frightened to death. If what Jay is talking about becomes a reality, you know, there will be many people who may choose never to buy a record and simply have it on a subscription service and call it up when they want it—that could happen—and now their company could get paid, the subscription company could get paid. And they are entitled to a payment, obviously, as a subscription service.

But how would the songwriter get paid? He wouldn't.

Mr. JASON BERMAN. He would charge for his performance a higher fee that we would charge.

Mr. MURPHY. Now we are mixing performances, performers, we are mixing it up, we are doing a dance here, because now we are saying the performance fee—doing a tap dance.

Mr. BERMAN of California. Mr. Chairman——

Mr. MURPHY. We have performance fees included in this bill, but performance fees are not a way to compensate for mechanical use. They never have been and shouldn't be, because you are dealing with pennies versus many, many pennies; and that is why the songwriters get very upset when they hear that, Jay, because you can't pay the performance fee, which amounts to a very small amount of money as compared to what is lost mechanical income. A lost record sale is substantial money.

Mr. JASON BERMAN. Well, Ed, it would be a substantial loss to us, in fact, twice the loss it would be to you if we lost a sale.

Mr. BERMAN of California. Mr. Chairman, the wisdom of your suggestion, that they negotiate it without us in the room, makes a great deal of sense to me. I have one last question and I am curious, how did you work out the exclusive rights gatekeeper issue?

Mr. JASON BERMAN. Oh, Mr. Berman, if I told you that, I would be giving away a deep, dark secret. Some day it will appear in a draft. Actually, through an incredible set of circumstances in which the parties to the negotiation felt they really wanted to reach a compromise and move this along.

Basically, the compromise was that in the small area where the recording company would have an exclusive right, namely in interactive services, the ability to license exclusively would be subject to certain restraints to meet the concerns expressed by the collecting societies that we not be the "gatekeeper;" and those parameters are established whereby we could enter into an exclusive license for a period of 1 year, but an interval would then have to elapse of 13 months in which we could not enter into a similar deal. We have retained our exclusive right to do so, which is critically important in an interactive environment. And we have, I think, given the collecting societies a comfort zone that this is not going to be abused, that there will be a multitude of outlets from which moneys would be derived. It was a Solomon-like compromise.

Mr. BERMAN of California. No one—no subscription service, no whatever, whoever is buying this—can have the exclusive right to that sound recording for more than 1 year?

Mr. JASON BERMAN. That is correct.

Mr. BERENSON. Yes, what Jay said is absolutely right. It was Solomon-like; no one got what they wanted, but the performing rights organizations feel they have protected the interests of the songwriters here to make sure there is no gatekeeper concern, a multiplicity of services come into play here, that we know that there will be a certain—a minimum number of outlets that will be available so the musical composition would be performed. This was of great concern to the performing rights organizations, and it took until late last night to resolve it; and we are both happy with it.

Mr. JASON BERMAN. We are looking forward to another late night.

Mr. BERMAN of California. Thank you.

Mr. MOORHEAD. We are hoping you have a real late one.

The gentleman from Los Angeles, Mr. Becerra.

Mr. BECERRA. Thank you, Mr. Chairman. It seems like this is still evolving, so it sounds like the answers move as the questions are asked.

Let me see if I could get Mr. Berman to give me a little bit more elaboration on his point about giving percentage payment of royalties in this new and developing field of electronic transmissions. Can you explain a little bit more of what you meant?

Mr. JASON BERMAN. I can explain it to the extent that I myself am unsure what this world might well be, but I will go back to the three very distinct categories that I can see in a digital transmission environment.

A sound recording is actually sold through electronic delivery. We would—let's say we would even charge more than we would in a record store for the convenience of having it actually in your home instantaneously, as opposed to going out and buying it and storing it and whatever. So we would charge a certain fee for that, which would be at the high end of the spectrum; it would be the equivalent of our selling that recording in a retail outlet. They would be entitled to the full mechanical payment, even though it is electronic distribution.

Let's say I license this use for 25 cents because it is simply a performance, the performance right is implicated, not the mechanical right, and all of these guys have both of those rights. Let's say, because I am not sure what is happening at the end of that process, I enter into—and I only have the ability to make these kinds of deals in interactive services because that is the only exclusive right I have; otherwise, I am subject to a compulsory license—let's say I make a deal for $6. I don't know if it is a performance or if it is a distribution or it is this new hybrid that is possible.

I have said that he is entitled to a mechanical payment, that the mechanical payment should be a percentage of what our license fee is. I am prepared to pay a mechanical of some sort in that instance; I am not prepared to pay a full mechanical, because I have not received what would be the equivalent of a sale, which implicates his mechanical right. His mechanical right is implicated by virtue of my being able to have implicated my own reproduction and distribution right; and in this case, I don't see that happening.

Mr. BECERRA. Let me stop you there. It sounds like what you are saying, then, is that you are willing to try to pass along the rel-

ative or the percentage take that you have got, pass that along as a percentage to those who claim the right to that particular——

Mr. JASON BERMAN. I don't want to negotiate with myself, but I am saying I am prepared to enter into a negotiation that would establish their right to get paid in this intermediate environment.

Mr. BECERRA. Now, Mr. Murphy, comment on what you have heard Mr. Berman say and give me the flaws or the good parts of this.

Mr. MURPHY. I think over the records sold, there is no debate; if the record is delivered to the home, Jay says they pay full mechanical. I think that is self-evident. The full performance only, that may be a full performance only, meaning the one-time 25 cent example.

So we are now talking about the third one, the third category, the $6 one, as Jay just outlined. Is it a percentage of receipts or a percentage of profit, Jay, which is it?

Mr. JASON BERMAN. I am not going to sit here and negotiate.

Mr. MURPHY. I am asking you.

Mr. JASON BERMAN. You will find out at 3 if you are prepared to entertain us.

Mr. MURPHY. No, it is an important issue, because we have never dealt with percentages. But we are not saying we are not open. We are open to listen and discuss anything and everything; that is the way deals are obviously made.

The future of this business will be different, and we have to look at it differently. That is why it is such a very important question, but if the principle is that there is a payment made, we are very happy to look at it.

Payments should be made. The question then is not one of rights, it is rates, as long as the right has been established; but we would like the bill to contain a clarification of rights, then I am sure we can come to an agreement on the rates.

Mr. JASON BERMAN. It is an issue of rates and not of rights.

Mr. BECERRA. Tell us what you can. I don't want to destroy the ability for the two of you to sit down in private and come up with some solution on the rates, but tell me what you can, both of you, if you can, what you see to be the criteria for determining what the rates should be, or the distribution of the different rates.

Mr. MURPHY. I think there are many ways of adjusting rates. Rates can be done percentagewise. Rates can be done—in our industry, as you know, there is a mechanical royalty rate established statutorily, 6.60 cents, but today many, many people use and are given licenses well below that. That is a ceiling, not a floor. There are many opportunities for the bargaining process to take place, and they do. I think the average rate in America today would be much, much lower, probably in the vicinity of 4 cents rather than 6. There are club rates and all types of discounted rates. There is no difference in what we are talking about here.

If they are looking for a discounted rate because of a different technology, I think that can be understood; it could still be done on a set rate, discounted.

Mr. BECERRA. Mr. Berman, any thoughts?

Mr. JASON BERMAN. Oh, I am filled with thoughts, Congressman Becerra. I have said this before, so it comes—it should come as no mystery; I am prepared to enter into this negotiation.

Mr. BECERRA. But are you able to share any particular thoughts now about what your vision is?

Mr. JASON BERMAN. My vision is that if I am getting something less than what I would have sold the record for, I am not prepared to pay a full mechanical.

Mr. MURPHY. Fine.

Mr. JASON BERMAN. I am not prepared to pay any kind of mechanical where I know that I can't identify that the right was implicated.

In this new world, whatever it may be, I am fully prepared to incur the liability of paying some form of mechanical royalty based on what I am able to derive from my licensing fee; and I am happy to enter into a discussion about whether that is a percentage, a mixed percentage or anything else.

I am not trying to avoid paying mechanical royalties. I am trying to figure out what kind of mechanical royalties I should be paying; and I think, unfortunately, what is happening is that the technology is such that it is creating an environment in which maybe the old rules and the old rules of the road may not be entirely appropriate.

Mr. BECERRA. Mr. Murphy.

Mr. MURPHY. I would like to respond.

I think the technology has helped us more than it has hurt. I think the technology has been enabling us to track and find out what is being used. I think—just to buttress what Jay said, I think where he is coming from, I think is negotiable; we can discuss it, and we should, except for one point.

He said, where it is not trackable, he didn't know what had transpired. I maintain that with the technology today and play list information you do know, and in all forms of cable transmission and all forms of computer transmissions, people do know what is downloaded, they can identify it, it is trackable, it can be found out.

In addition to that, play lists are available. That can be made mandatory, to supply you a play list to know what is being broadcast. To say that people don't know something, maybe they don't choose to want you to know, but there are physical things that are available. There is technology that can help us, as well, so the untrackables, those UFO's, may be launched by the subscription services themselves.

Mr. BECERRA. Can I ask, it seems you identified two issues now that I suspect need to be negotiated in this private meeting you are going to have. Are there any other things that we perhaps are not aware of?

As I understand, there has been agreement on just about everything.

Mr. JASON BERMAN. I don't want to be presumptuous, but as far as I know—and we went through this last evening—every single issue, not just the issues that divide the interests represented at this table, but I believe all the other issues from interested parties have been resolved. Don't ask us to put that back into a bill now.

It is just a lot of paper rolling around; but, yes, I believe this is the outstanding issue.

Mr. BECERRA. And within that outstanding issue, it seems to me, there seem to be two issues.

Mr. JASON BERMAN. There are two parts, yes.

Mr. MURPHY. That is correct.

Mr. BECERRA. Mr. Chairman, I suspect if I were to ask more questions, that it probably would be in that meeting.

Mr. MURPHY. You are quite welcome to be there.

Mr. BECERRA. I don't know if I want to be there.

Mr. MURPHY. We would like you there.

Mr. BECERRA. Thank you very much.

Mr. MOORHEAD. Thank you. It has been a good panel. I hope you don't let any of the rhetoric stand in the way of your agreement. Get in there and try to work it out. We are anxious to get the rest of the bill through, along with your agreement.

Mr. JASON BERMAN. Thank you very much.

Mr. MURPHY. Thank you, Mr. Chairman.

Mr. BERENSON. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our first witness on the second panel will be Mr. Edward Fritts, who is the president of the National Association of Broadcasters. Mr. Fritts is an alumnus of the University of Mississippi. He is the former president/owner of a group of four AM radio stations and four FM radio stations in Mississippi, Arkansas, and Louisiana. Mr. Fritts is a director of the Advertising Council and the Museum of Television and Radio.

Welcome, Mr. Fritts.

Mr. FRITTS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Our second witness will be Mr. Jerold H. Rubinstein. Mr. Rubinstein is the chairman and CEO of International Cablecasting Technologies, Inc., which owns a digital music subscription service called Digital Music Express. International Cablecasting Technologies is a music network which uses current technology to form new presentations of music.

Mr. Rubinstein holds a B.S. in business management from a good school, UCLA, and a law degree from Loyola Law School. He is also a C.P.A. He is a former CEO and chairman of two record companies and a former RIAA board member. Mr. Rubinstein also serves as a director on the boards of Spatializer Labs, Inc., an audio technology company, and Grafix Zone, Inc., a multimedia CD–ROM development company.

Welcome, Mr. Rubinstein.

We have written statements from our two witnesses and we ask unanimous consent that they be made a part of the record, and I ask that you all summarize your statements in 10 minutes or less.

Again, I ask that the subcommittee hold their questions of both witnesses until they have completed their oral presentation.

Mr. MOORHEAD. We will begin with the testimony from Mr. Fritts.

STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman. I will be very brief, inasmuch as we have already filed our formal statement for the record,

but let me begin by commending you and your staff and your subcommittee for the excellent work that you have done on this legislation.

We are particularly pleased that in H.R. 1506 you have recognized the longstanding relationship between broadcasters and the recording industry, and indeed it has been a mutually beneficial relationship for decades now. In exchange for use of their products, the recording industry has received untold, invaluable promotion which has helped sell literally billions of records, CD's, cassettes, and also sold millions of concert tickets. In fact, as one record company official said, "Without air play, we would all be in the door-to-door aluminum siding business."

In survey after survey, the No. 1 reason which people have given for purchasing a particular record or tape recording is because "I heard it on the air." This symbiotic relationship has also benefited the American listening audience, which has had an opportunity to hear everything from rock to jazz to country to classical, and all for free.

Now, the legislation you have introduced correctly understands that in the creation of any new performance rights there is no need to upset the win-win situation for both broadcasters and the recording industry. Your decision to exempt over-the-air broadcasters from having to participate in a performance rights scheme, either as analog broadcasters now or as digital broadcasters in the future, is essential to maintaining the accessibility of music to the audience and the continued vitality of both the record industry and the broadcast industry.

Now, we are all aware that recently, digital services have emerged. They charge a fee to subscribers for providing recorded music via cable or satellite. When the phone companies begin providing additional choices, no doubt these subscription services will grow. We take no position on whether or to what extent these services should be subject to a new performance right. We do, however, take issue with the suggestion that these services are essentially no different than broadcasters and should be exempt from the performance right.

Let me just remind you and the committee of a few points. Only over-the-air broadcasters are licensed to serve their local communities and will continue to provide their services free to all. Only broadcasters provide news, sports, weather, public service information, and have public interest obligations to the local community. Broadcasters have a long history of a balanced relationship with the music and the recording interests, which these services apparently do not. Whatever level of promotional value is provided by these new services will not and cannot compare with that which is provided by the broadcaster; and even if these new services do not currently play entire albums or consecutive cuts, that doesn't mean they couldn't. Their economics, of course, work differently than the advertiser-supported, free, over-the-air broadcaster.

Mr. Chairman, free, over-the-air broadcasters are, in fact, vastly different than these new, emerging digital subscription services. The exemption of radio and television in your bill is appropriate, and we applaud your understanding of the marketplace in making that distinction.

Finally, let me address the claim that we need performance rights as applied to U.S. broadcasters, so the record companies can collect performance royalties being held in other countries. That is simply not the case. Many foreign countries use performance rights paid by government-owned or controlled broadcasting as a way to provide government subsidies to their domestic recording industry.

Now, I hardly think that we need or want a system like that in our country. Moreover, our experience with the digital tape legislation and with the GATT Treaty should teach us that other countries can always find ways to avoid paying such royalties if they choose to. Simply stated, significant amounts of money would not flow to the American record companies whose works are played in other countries.

So we would urge the Congress to make it very clear that while you are aware of the international discussions about performance rights that might go beyond H.R. 1506, this legislation is as far as Congress is prepared to go.

So, in closing, let me again thank you, Mr. Chairman, for your leadership on this issue. You have done an outstanding job of bringing all the sides together. We look forward to having the issue resolved in a way that meets the needs of all parties concerned.

Thank you.

[The prepared statement of Mr. Fritts follows:]

PREPARED STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. Chairman, I am Eddie Fritts, President and CEO of the National Association of Broadcasters (NAB), which represents the interests of those who own and operate America's radio and television stations, including most major networks. I appreciate the opportunity to testify regarding H.R. 1506, the Digital Performance Right In Sound Recording Act of 1995.

Mr. Chairman, let me say, at the outset, that we are pleased that H.R.1506 completely exempts broadcasters. You have demonstrated outstanding leadership in putting together a legislative package that, while addressing some of the concerns expressed by those in the recording industry, also recognizes the symbiotic relationship that exists between recording industry and the American broadcast community. Clearly, H.R. 1506 is an excellent bill that we believe maintains the continuity and mutually beneficial relationship between our industries that has existed for more than sixty years.

In the digital world, many broadcasters will continue to operate as they do today. Unlike other digital audio service providers, digital broadcasting service will be provided free to all Americans. We are pleased that your bill recognizes broadcasters' unique role in a digital world, and look forward to a prompt resolution of this legislation.

Mr. Chairman, a number of observers have questioned the need and justification for exempting broadcaster public performances from the scope of the bill. Still others have argued that the digital subscription audio services they provide, or might provide, are

essentially no different than traditional broadcasting and, hence, their services should also be exempt from the new performance right. Mr. Chairman, I would like to devote the bulk of my testimony to addressing these issues.

Why Broadcasters Should Be Exempt From Performance Rights in Sound Recordings

A. Broadcasters Provide Extraordinary Benefits to a Thriving Recording Industry

Mr. Chairman, American broadcasters have long played a central role in bringing music to the American people. We have done so within the framework that provides huge benefits to the recording industry as well as to broadcasters and to the public.

The extraordinary benefits the current system provides the record industry are unquestionable. Exposure of musical recordings to the buying public through free broadcasting is a critical part of the promotion of records, tapes, CDs, music videos and concert tickets, not to mention "spin off" goods and services marketed under the names of star performers. Absent such free exposure, sound recording and music video sales, concert ticket sales, and the sale of endorsed goods and services would plummet. This is confirmed by many sources in the recording industry. Earlier this year, in accepting their Grammy award, the phenomenally successful group "Boyz II Men" thanked the Lord and

radio stations as being essential elements in their new found prosperity. Similar recording industry acknowledgments to the radio industry abounded at the recent Country Radio Seminar in Nashville, Tennessee. For example, Jack Purcell, a Warner Records executive stated that "without radio support, there's no chance of a record becoming a commercial success."

These recent acknowledgments and recognition of the essential role broadcasters play in the success of the recording industry are hardly new. Other examples include:

1. Pam Tillis, country music star, commenting on the importance of "radio tours" where artists tour the country making personal appearances at radio stations: "They are unbelievably important;" "invaluable;" "I only regret I couldn't do it more and do it longer;" "You guys are so important to us." Also commenting on the importance of radio tours, BNA recording artist, Lisa Stewart added "...I'm really glad I had the opportunity to do that (go on radio tours). Because I feel that it has really, really helped me..."[1]

2. Jack Lameier, Vice President/Promotion, Epic Records (a 30 year veteran of the recording industry) commenting on the importance of radio airplay-- "We are in this business to sell product. You sell product by airing it, liking it and going out and buying it. Our exposure of this product is controlled by the people in this room (at the Country Music Seminar, Nashville) and in this industry. Without the airplay nobody knows what it sounds like. If they don't know what it sounds like why would they want to buy it? Certainly not because they've read about it or they might have enjoyed the video. I really don't know what video does for it. It is the repetition that's the reason for the chart numbers (a ranking of records receiving airplay), the heavier the rotation, the more exposure the more likely someone is to buy the product."[2]

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[1] "Meet and Greet and More: Enhancing Artist-Label-Radio Relationships", Country Music Seminar, Nashville, TN, March 3-7, 1993.

[2] "Hot Seat: Real Answers to the Questions You Always Wanted to Ask", Country Music Seminar, Nashville, TN, March 3-7, 1993.

3. The value broadcasters provide the recording industry was conceded in a lawsuit filed in 1991 by Motown Records against MCA alleging MCA's failure adequately to promote Motown's records, in which Motown states that: "sales of new records to the public are generated largely by air play on various radio stations throughout the United States" and that "pop radio air play is a critical factor in the success of a record label."[3]

4. The 1991 Country Music Awards included six awards to disc jockeys and radio stations for their contribution to the success of country music, and radio was acknowledged by the winner of the "entertainer of the year" award.

5. The recording industry spends missions of dollars promoting their product to broadcasters, including distribution of free copies of their recordings, in an attempt to encourage air play. The critical importance of this effort sometimes has led to abuses, which in turn engendered the payola laws of the 1960's.

6. Bob Sherwood, the President of Phonogram/Mercury Records: "I, like every other head of a record company, need and want radio to play our records. Without airplay, we'd all be in the door-to-door aluminum siding sales business."[4]

7. Stan Corman, a former Warner Records Executive: "What would happen to our business if radio dies? If it weren't for radio, half of us in the record business would have to give up our Mercedes leases ... we at Warner won't even put an album out unless it will get airplay."[5]

8. Bobby Colomby, drummer in the rock group "Blood, Sweat & Tears" (in answer to the question, How important is radio to you?): "Well, that is it ... what you're doing is ... you're advertising."[6]

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[3] Motown Record Company v. MCA, Inc., Superior Court of the State of California, filed May 14, 1991 (Complaint, ¶¶ 20-21).

[4] *Billboard*, December 22, 1979, p.20.

[5] *Daily Variety*, March 4, 1975.

[6] Radio Program "The Politics of Pop" - June 5, 1975.

9. One record manufacturer's survey found that over 80 percent of rock albums are purchased because people have heard cuts off the album over the radio. A 1984 Office of Technology Assessment study verified this finding.[7]

10. The attached advertisement for a country music album (Appendix A) says it all: "Country radio **heard it.** Country radio **liked it.** Country radio **played it.** Country music fans **heard it.** Country music fans **LOVED IT!** And on May 6, 1991 Country music fans can **BUY IT.**"

Under these circumstances, it simply makes no sense to require broadcasters to pay record companies and performers for the right to "perform" sound recordings.

Indeed, broadcasters already pay approximately $300 million annually to composers and publishers for the rights to publicly perform the music incorporated into the sound recording. These royalties frequently go to performing artists who are also composers and to record companies who also often have music publisher subsidiaries.[8] Accordingly, payments to many artists and record companies required by a performance right in their sound recordings often would result in a double payment for the same public performance.

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[7] Office of Technology Assessment, Copyright & Home Copying: Technology Challenges the Law, OTA-CIT-422 (October 1984) (hereinafter "OTA Study") at Table 8-11. Of those polled in a more recent Vallie/Gallop survey, 50% said their most recent purchase of a CD was based on hearing it on the radio.

[8] Thorn-EMI and Warner/Chappell alone own the rights to over one million songs.

There is clearly no economic need or justification for transferring wealth from broadcasters to the recording industry by establishing a performance right in sound recordings that would apply to broadcasters. Between 1985 and 1989, the recording industry experienced a 47 percent increase in the total dollar value of shipments, and between 1989 and 1990, another 15 percent increase.[9] The dollar value of shipments, described by some as relatively flat in 1990 and 1991, continued its upward trend in 1992 with a 15.2 percent gain over 1991, reaching $9.024 billion. 1993 saw an 11.8% dollar value increase in unit shipments and an 11.3% increase over 1992, with sales reaching $10.5 billion.[10] In 1994, the recording industry continued its sustained double digit growth, with increases over 1993 of 17.5% in units shipped and 20.1% in dollar value. Dollar value from 1993 to 1994 jumped from $10.05 billion to $12.07 billion.[11] RIAA's president noted that his industry's market "has nearly tripled in the last decade" and that "there's still no limit to possible heights conventional music CD can climb."[12]

It is significant to note, Mr. Chairman, that the record industry's $12 billion plus in revenues from U.S. sales, went primarily to just six huge conglomerates, that together

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[9] OTA Study at 92; *Billboard*, march 24, 1990 at 1, 73; *Billboard* Oct. 30, 1990 at 1, 87.

[10] *TV Digest*, February 28, 1994 at 18. (Source RIAA)

[11] *TV Digest*, February 20, 1995 at 16. (Source RIAA). While radio stations have recently experienced a resurgence in revenue growth, they are much more prone to the vicissitudes of economic conditions. In 1993, some 300 radio stations were off the air. Over half of all radio stations lost money in 1990, as did almost 60 percent in 1991. FCC Report "AM and FM Stations Silent For Six Months or More" (as of January 1, 1993, 88 FM stations silent as of 1/1/93); FCC Memorandum "AM Stations Silent" (as of March 4, 1993, 220 AM stations); 1991 NAB/BFM Radio Financial Report at pp. 27, 32, 43 & 65; 1992 NAB/BFM Radio Financial Report at pp. 27, 31, 42 & 64.

[12] Id.

control well over 90% of the market,[13] which translates to average revenues for each company of roughly $1.8 billion. Five of the six are foreign owned.[14] As one American record industry executive bemoaned, "You can't make any deal without first checking with somebody in London or Tokyo or Holland or Frankfurt."[15]

Were a performance right in sound recordings created that applied to broadcasters, many stations would have to reallocate resources devoted to news and public affairs programming to pay for additional license fees. It cannot be assumed that radio stations could simply pass on the additional expense to advertisers, as has been stated by a digital cable audio witness at hearings in the Senate earlier this year.[16] The local advertising market is highly competitive, and is made more so by the increase in local spot advertising sales by cable operators, for whom it is a low-cost supplementary revenue stream, at or below radio spot prices.

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[13] See Testimony of Jason S. Berman, Hearings on S.227, March 9, 1995 at 4. New York Times, March 19, 1990, p.2-17; *Billboard*, December 8, 1990; Los Angeles Times, November 4, 1990; The London Times, March 6, 1992.

[14] It was recently announced that one of these five companies, Matsushita, sold its interest in MCA to Seagram, a Canadian company, whose CEO and a major shareholder is an American citizen.

[15] *Id.*

[16] See Testimony of Jerold H. Rubinstein, Hearings on S. 227, March 9, 1995 at 5. It is simply wrong in asserting that broadcasters would be better able to pass on the costs of a performance right than would subscription services. DMX could simply raise its subscription fee which the subscriber would have to pay based on the assumption that cable will not offer competing audio services.

B. Any Need to Provide Enhanced Compensation To Performing Artists Does Not Justify Imposing a New Performance Right with Respect to Broadcasters

Mr. Chairman, some have argued, that a new performance right would benefit artists and performers whose work is embodied in the sound recordings to which they contribute. But if past experience is any guide, there is no assurance that a new sound recording performance royalty would flow to artists and performers. Record companies have established contracting practices that maximize the benefits to them as opposed to the artists. A 1992 Billboard article written by an attorney in the wake of Art Buchwald's litigation victory over Paramount described them as follows:

> Contractually mandated royalty accounting methods and recoupment practices used in the recording industry raise questions similar to those in Buchwald. While superstars like Madonna or Michael Jackson have the bargaining power to negotiate favorable economic terms, aspiring acts and even ascending stars lack the clout to negotiate many standardized royalty and accounting terms.
>
> The royalty rate for newcomers (including the producer's royalty) is typically 10%-20% of retail sales, as opposed to a range approaching twice these rates for established talent. Royalty calculations based on domestic-unit sales are also often significantly less for new artists. Advances made by record companies to performers for recording costs usually must be fully recouped before the performers see any distribution of royalties. If an artist's first recording does not recoup its production costs, the losses are usually carried over and deducted from royalties earned on the next recording. No other business, including the film industry, requires the cost of creating to be fully recouped by the creator.
>
> The royalty calculations in standard record industry contracts, as in the film industry, contain numerous clauses guaranteed to assure profits or minimize financial exposure to the company

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before payment to the artist. For example, through so-called "packaging deduction" clauses, record companies generally reduce the base price, on which the artist's royalty is calculated, by 25% for the cost of producing CDs and up to 20% for producing cassettes. Recording contracts also frequently require a lower royalty to performers on CDs (35%-85% of normal rates) to reflect increased manufacturing costs incurred when CDs were first introduced as a new technology. In light of Buchwald, serious consideration must be given to whether these clauses can be economically justified as being based on actual costs.

So called "free goods," promotional recordings, and reserves also raise contractual questions. Record companies pay royalties on less than 100% of their sales to reflect discounts given to distributors; therefore performers' royalties are often paid on only 85%-90% of records sold. Additional promotional copies for recordings may be deducted before royalties are calculated. Royalty reserves as high as 25%-35% of sales are withheld from the artist for as long as two years, interest free, against possible record returns from distributors. Standard contracts require artist/writers to be paid writers' royalties on no more than 10 songs per-unit released, although CDs often contain more than 10 songs, or provide for a mechanical royalty at less than the statutory rate established by Congress. Finally, contracts generally do not obligate the company to promote recordings and provide that the performers themselves are financially responsible for touring costs, which are essential to record promotion.[17]

Given the extraordinary wealth generated by the recording industry, if there is any current imbalance in the compensation for studio musicians and lesser known artists, the answer is a redistribution of the wealth within that industry, not the imposition of a new royalty payment structure designed to have broadcasters compensate performers. There would be no assurance that such royalties would not simply make the rich richer, leaving the struggling artist's lot unchanged. If record company megadeals, such as the 1991

[17] Buchwald Case Has Stern Message For Labels, Billboard, April 18, 1992, at p.8; See "What's not to love?", *Forbes*, September 30, 1991 at p.108.

deals reportedly netting Michael Jackson a $65 million guarantee for six albums plus a share of profits, his own record label and other compensation, and his sister Janet Jackson's $40 million for 3 albums plus a 22 percent royalty on retail sales,[18] are not trickling down to backup musicians and others contributing to those albums, the remedy should lie within the industry.

You may have also heard to the effect that the lack of a performance right in sound recordings is particularly unfair and harmful to older performers whose recordings are still popularly broadcast but whose records no longer sell. Mr. Chairman, I have two responses to this point.

First, the unjust contractual and accounting practices by record companies with respect to many of these "old performers", particularly many of the rhythm and blues acts of the 1940s, '50s and '60s, is a matter of public record. While I commend a number of companies that are finally making amends for these past injustices, my initial reaction regarding concern for harm suffered by these performers is that charity should begin at home.

My second point on this issue, is that, in fact, recordings of many of the older performers that continue to be broadcast are still being sold. Re-releases of many of these classics on CDs, minidisks, and digital compact cassettes are producing millions in

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[18] Keeping Up With the Jacksons, Los Angeles Times, June 16, 1991 at Calendar, p.8.

revenues. Walk into any record store and you can find whole collections of "golden oldies." Watch late night television and you are bound to see ads for classic collections that can be ordered from direct mail subsidiaries of the record companies. These direct mail and record clubs were responsible for $1.5 billion in sales in 1994.[19] Time Life Music, a subsidiary of Time Warner, ships 5 million units annually of such compilations as "Sounds of the '70s," "Rock 'n Roll Era" and "Twenty Five Years of Essential Rock."[20]

In response to the suggestion that broadcasters should compensate performers for publicizing their works, I would refer you to Appendix B containing examples of the appreciation performers expressed to radio for their success at a recent country music seminar. Perhaps the most notable of these was Sawyer Brown who said "Thanks, Radio for Making Country Music the Success It Is Today and For Making Sawyer Brown A Part Of It." For this we should pay a royalty?

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19 *TV Digest*, February 20, 1995 at 16.

20 *Washington Post Business*, January 25, 1993 at 9.

C. International Copyright Considerations Provide No Justification To Create A U.S. Performance Right In Sound Recordings Applicable To Broadcasters and It Is Unlikely That A Broadcaster Exemption From Such A Right Will Adversely Affect U.S. Recording Interests.

Mr. Chairman, perhaps no other area of this discussion today needs more clarification than the impact this legislation will have on domestic recording interests.

Those who seek a performance right for sound recordings in this country offer as a justification that, in the absence of such a right, U.S. recording companies and artists are losing, and would continue to lose, hundreds of millions of dollars in foreign royalties from countries that use the lack of a U.S. performance right as an excuse not to pay U.S. recording interests for public performances of their works. With all due respect, Mr. Chairman, this argument provides no basis to apply a performance right for sound recordings to broadcasters, nor does it provide a basis to challenge the broadcaster exemption in H.R. 1506.

First, performance rights for sound recordings are most often found in countries where broadcasting organizations are owned by governments. When such government owned broadcasters pay into a fund for public performance, it is in effect a transfer from the accounts for one government entity to that of another. These payments are often intended as a subsidy to encourage domestic, not foreign, cultural activity. We do not

believe that our members should be asked to subsidize U.S. cultural industries. Even if such subsidies were determined to be appropriate, it would be fundamentally unfair to require broadcasters to bear the costs. In short, we believe that importing public performance rights applied to broadcasters from abroad into the United States, rights which are essentially alien to ways we have conducted our business for over 60 years, would be enormously disruptive and harmful.

Second, many countries already make these moneys available to U.S. recording interests. Among these are several of the major European countries. With respect to those "countries" that do not provide royalties for the performance of "American" works, closer scrutiny is required. You must remember, Mr. Chairman, that more than 80 percent of the international trade in recorded music is controlled by the six major record companies,[21] five of which are foreign owned. It is my understanding that performance right in sound recording royalties in most countries are negotiated, collected, and distributed by associations called "copyright societies" consisting of these companies or their subsidiaries. If this is true, and if Time Warner's or Sony's French subsidiary choose not to share performance royalties with their American sister companies, the solution would not seem to require a change in U.S. copyright law.

Third, I believe that foreign countries operating under reciprocity may well be unprepared to distribute these moneys to U.S. interests under <u>any</u> circumstances, and the

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[21] *Washington Post*, November 12, 1994, at C1.

mere enactment of a public performance right will not change their policies. During hearings last Congress before this subcommittee, it seemed clear to members and witnesses that large transfers of money to U.S. recording interests was not something other countries would agree to.

Let me give you an example. In 1992 the Congress enacted the DART (Digital Audio Recording Tape) bill. That bill assesses a small royalty on every blank recording tape sold in the U.S. Part of the logic for its enactment was that American copyright holders would not be permitted to collect from foreign copyright schemes unless we enacted a system in the United States. Well, we did. Our system is, however, limited to digital format, because the Congress determined that is the area where the advent of new technologies posed a threat. Despite these legislated changes, a number of senior European officials have stated that U.S. interests may nonetheless be denied benefits under certain European levy systems, because our system is not "the same" as theirs in that it does not cover both digital and analog formats.

We raise these examples to illustrate the point that many other countries realize that full recognition and distribution of funds to U.S. recording interests in the same manner that their own nationals are treated would result in a considerable negative trade balance and, accordingly, will always find loopholes to avoid this result. So-called "cultural integrity" provisions are but one example. Simply stated, if foreign countries do

not want to provide benefits to U.S. interests, it does not matter what we do. They will find a way to deny us the money.

Fourth, many countries recognizing performance rights in sound recordings are also much less generous than this country in protecting sound recordings in other respects. For example, while U.S. law generally protects sound recordings for anywhere from 70 to 100 years,[22] France generally protects them for only 50 years, and Germany for only 25 years. Moreover, U.S. law prohibits unauthorized rental of sound recordings and the laws of many other countries do not. The point here is that you cannot simply and fairly extract a public performance right in sound recordings from the intellectual property rights scheme of another country, and insert it in U.S. copyright law without considering the context in which such right fits into the entire intellectual property scheme of both countries.

Some advocates of public performance rights argue that we need to enact these rights in the United States to successfully negotiate new international law in the areas of copyright and neighboring rights. As I understand it, these matters are now under consideration in the World Intellectual Property Organization, and its ongoing work on a protocol to the Berne Convention and the possible drafting of a new treaty on rights of performers and sound recording producers. These new international laws will, the

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[22] 17 U.S.C §302(c).

advocates of public performance rights argue, substantially advance the interests of U.S. authors, producers and performers. But we are not convinced.

The WIPO deliberations, and the issues now pending, would not advance in any way the interests of U.S. broadcasters. Our industry operates primarily domestically. While some NAB members have international operations, the vast majority of our members operate and serve in local communities. We cannot see how any of the issues pending in these international forums would in any way advance our members' interests. Moreover, certain of the changes being considered, such as a requirement to enact a public performance right applied to broadcasters, would cause U.S. broadcasters great economic harm.

We raise these points, Mr. Chairman, to illustrate that enacting a public performance right in sound recordings applied to broadcasters would not necessarily enhance the ability of the United States to negotiate successfully new international law or treaties in these areas. Moreover, adoption of such a right will provide no assurance that the intended result of greater recognition in other countries of performing rights in U.S. sound recordings will be achieved. Finally, the notion that the entire well established U.S. allocation system among music composers, publishers, record companies, recording artists, performers and broadcasters should be reconfigured to accommodate foreign copyright and neighboring rights laws would be the classic example of the tail wagging the dog.

To ask U.S. broadcasters to pay new royalties to the recording industry so that it can go abroad to obtain still more royalties would be unfair and inequitable. Overall, U.S. interests are more likely to be harmed than helped. If, as the Register of Copyrights and the Commissioner of Patents and Trademarks suggest, performance rights in sound recordings applied to broadcasters is the price that must be paid for so-called international copyright "harmonization," that price, for American broadcasting interests, is too high.

In this regard, Mr. Chairman, we urge you in considering this legislation to make it unequivocally clear that Congress is fully aware of the ongoing discussions and attempts at greater international harmonization of copyright and neighboring rights at WIPO and elsewhere, but that this legislation is as far as Congress is prepared to go in creating performance rights in sound recordings. Such clarification is necessitated by the public pronouncements of certain public officials that they intend to continue to press for international treaties and agreements that would compel broadcasters to pay royalties for the public performance of sound recordings regardless of what Congress has to say on the subject.

D. A Broadcaster Exemption Poses No Threat To Retail Sales of Sound Recordings

Some have expressed concern that the advent of digital broadcasting (DAB), with its enhanced sound quality, will result in massive individual copying of prerecorded music. There is, of course, no evidence that this phenomenon will occur. Similar unfounded fears were expressed with the advent of FM stereo, cassette recorders and other technical advancements. Moreover, the implementation of DAB for broadcasters is years away at best. Finally the Audio Home Recording Act of 1992 imposes royalties on the sale of digital recording equipment to be paid to record companies and artists, and is designed to redress digital copying concerns.

Free, Over-the-Air, Commercially Supported Broadcasting is Significantly Different From Subscription Digital Audio Services

Mr. Chairman, I would like now to turn to the complaints raised by Digital Music Express, the National Cable Television Association, and perhaps, others representing subscription digital audio services, that they are indistinguishable from broadcasters, and should enjoy the same exemption from the new performance right in sound recordings as are broadcasters with whom they compete.

Let me first say, Mr. Chairman, that NAB takes no position on the relative merits relating to the basic question of whether the exemption section of H.R. 1506 should be

modified to include other non-broadcast businesses and, if so what they might be. If other non-broadcast businesses can establish legitimate policy reasons for an exemption covering their particular activities, they should be considered, notwithstanding the fact that some of these parties have, by and large, remained silent during the past three years during which this issue has been debated.

What you should not do, Mr. Chairman, is accept the somewhat disingenuous claims of some of these parties that they are entitled to a broadcaster-type exemption because they are, in all material respects, indistinguishable from broadcasters. They clearly are not, and here are some of the key distinctions:

1. The primary distinction between these services and those offered by broadcasters is that broadcasters offer their services free to all members of the public, while most digital audio services are available only to those willing or able to pay for them. Most of these services charge for, and profit directly from, the sale of the public performance of the sound recording. That function, and only that function, is the reason these subscription services exist. They do not provide news, sports, weather, and public affairs programming. They do not provide public service announcements. They do not provide DJ patter which, while some listeners find annoying, others find entertaining, or a panacea for boredom or loneliness. And they do not provide what DMX refers to as "annoying commercial announcements," which serve as a vital link in the commerce

and economy of the markets in which broadcast stations are licensed to serve.

2. None of the present or potential digital audio subscription services has or will have any statutory obligation to serve the needs and interests of the communities to which they are licensed. Significantly, these obligations are tied to the renewal of the broadcasters' license. Therefore, if a broadcaster fails to fulfill these requirements, his or her license is subject to revocation. None of the subscription services faces this possibility. Attached as Appendix C is a list of some of the public service and other statutory requirements unique to broadcasters.

3. Another key distinction between broadcasting and DMX or other cable and satellite-delivered subscription digital audio services was suggested by Senator Orrin Hatch (R-UT) when he introduced similar legislation, S.227, in the Senate earlier this year.

> [L]ong-established business practices within the music and broadcasting industries represent a highly complex system of interlocking relationships which function effectively for the most part and should not be lightly upset.[23]

Indeed, Mr. Chairman, the highly complex economic and contractual relationships between and among record producers and performers, music

[23] Cong. Record, January 13, 1995 at S 94 8.

composers and publishers, and broadcasters date back some sixty years. In this regard, broadcasters were publicly performing sound recordings for decades before they enjoyed any copyright protection, which was first granted in 1972. DMX, by contrast, which did not commence operation until 1991, can hardly make the claim that a performance right would fundamentally, and unexpectedly, alter the way it has done business for decades.

4. DMX, and others, take great pains to suggest that, like radio, their services promote the sales of sound recordings, and that they could not, and would not, pose a threat to such sales. NAB has no quarrel with the notion that, thus far, such services appear to have stimulated record sales. It is, however, incorrect to suggest that subscription digital audio services pose no greater potential threats to sound recording sales. In another venue, DMX's Jerry Rubinstein stated:

> We offer a lazy man's approach to listening to great music. You might have a fabulous C.D. collection, but it's not easy picking out an evening's worth of music. We do it for you.[24]

Mr. Rubinstein comes perilously close to suggesting that his service does, or could, supplant the need to obtain an expensive "fabulous C.D. collection", by subscribing to his C.D. quality commercial free pre-

[24] "Cable Radio Searches for Subscribers," New York Times, January 25, 1993, p. D8.

recorded music service. Advertiser supported radio poses no such threat. Moreover, while DMX apparently does not currently play entire uninterrupted albums or pre-announce that it is doing so, as a subscription service it certainly could provide such a format. If commercial radio engaged in such practices, the public would listen to the uninterrupted album, switch off at the commercial breaks, and the station would soon be out of business.

5. While it may be true, as DMX suggests, that some subscription digital music services promote the sales of sound recordings, the level and significance of the publicity and exposure for sound recordings provided by such services can hardly be compared to that of broadcasting. I don't recall, for example, seeing any survey indicating that, like radio, fifty to eighty percent of record sales result from subscribers' hearing the recording on DMX. Nor do I remember any record company executive saying something like "Without play on DMX, we'd all be in the door-to-door aluminum siding sales business"; or a recording artist saying "Thanks DMX for making country music the success it is today and for making Sawyer Brown A Part of It."

Again, let me reiterate, Mr. Chairman, the NAB takes no position on the merits of whether exemptions from the new performance right should be extended to DMX or any

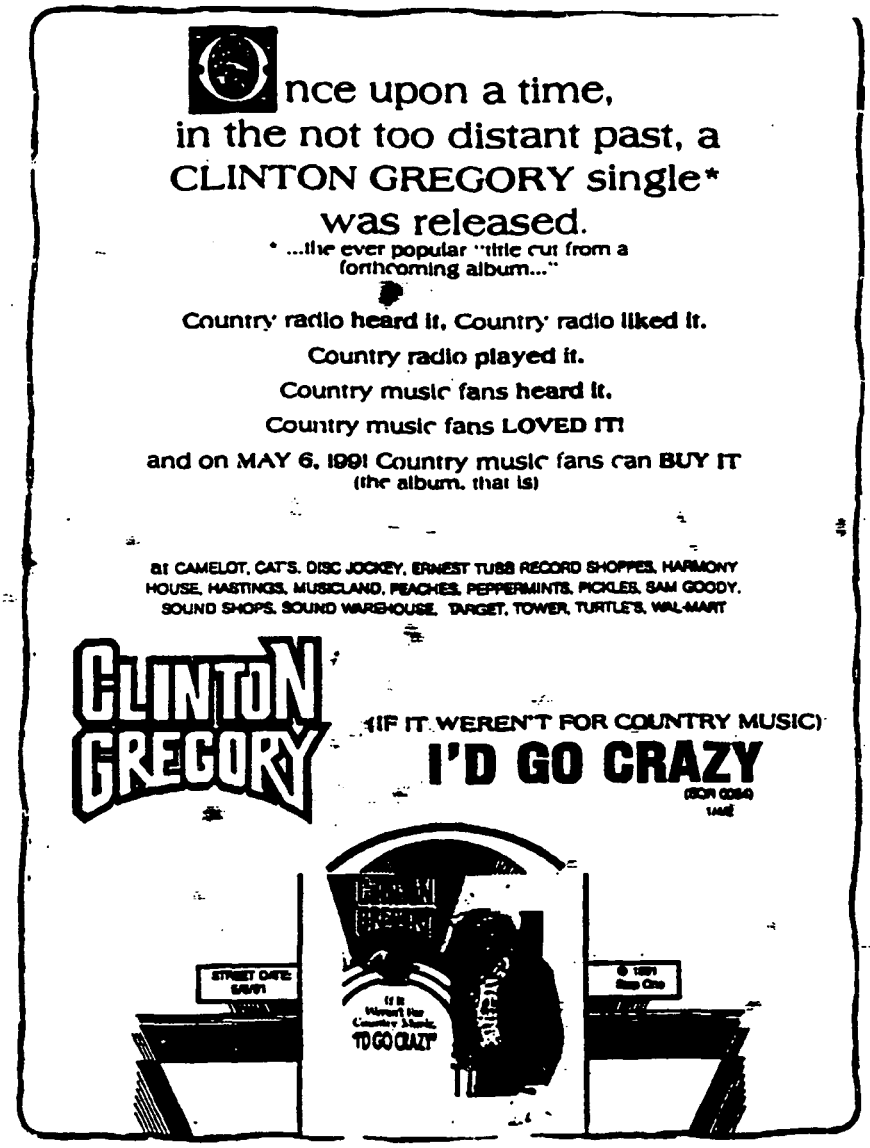
other non-broadcast business. What we do object to is these services' assertion that they are entitled to an exemption because they are no different than broadcasters.

Mr. Chairman, the issue of whether this country should adopt a performance right in sound recordings and, if so, what the scope of such a right should be, has been the subject of countless hours of debates and hearings and thousands of pages of reports, commentaries, testimony, etc. It has been debated before numerous sessions of Congress. It has been debated before the Copyright Office. It has been debated before the American Bar Association. It has been debated before the Administration's NII Working Group on Intellectual Property and its NII Advisory Council. And, it continues to be the subject of debate and discussion at the World Intellectual Property Organization.

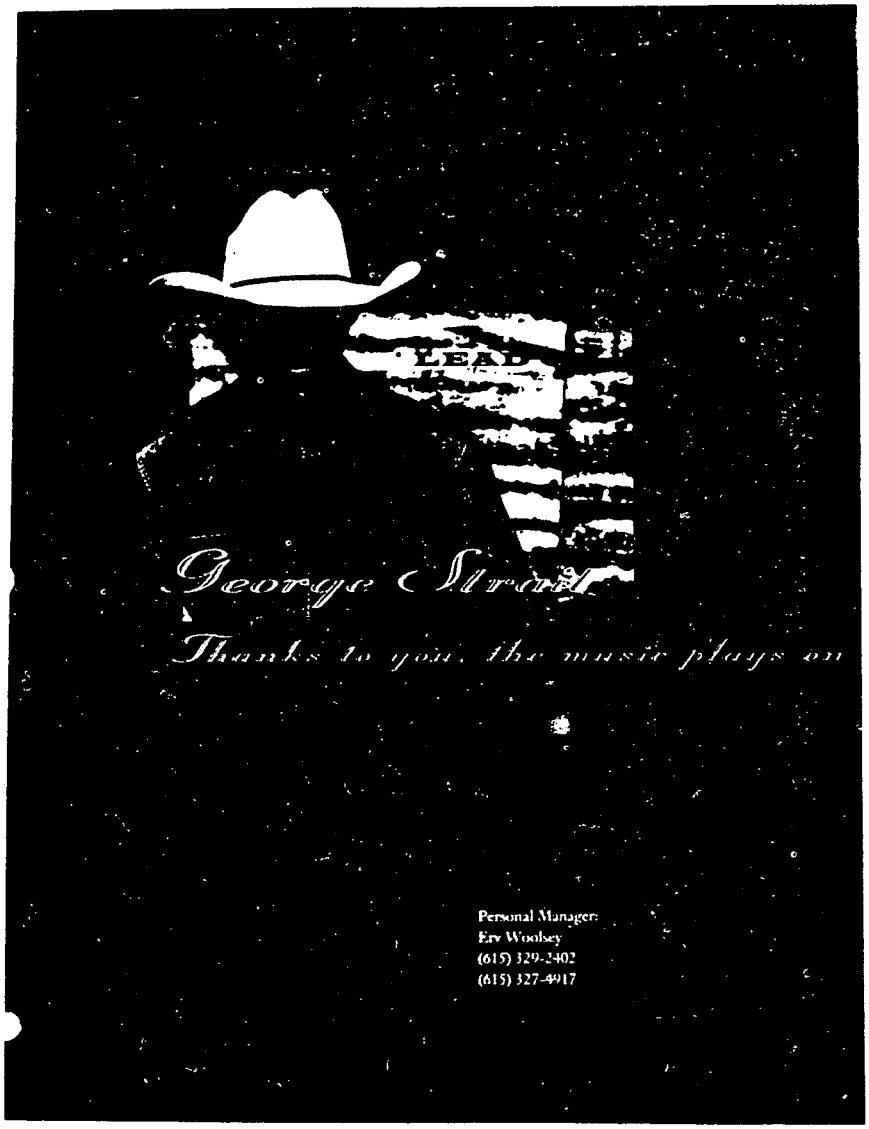
Mr. Chairman, the time has come to resolve this issue once and for all. We hope that H.R. 1506 with its broadcaster exemption achieves that goal.

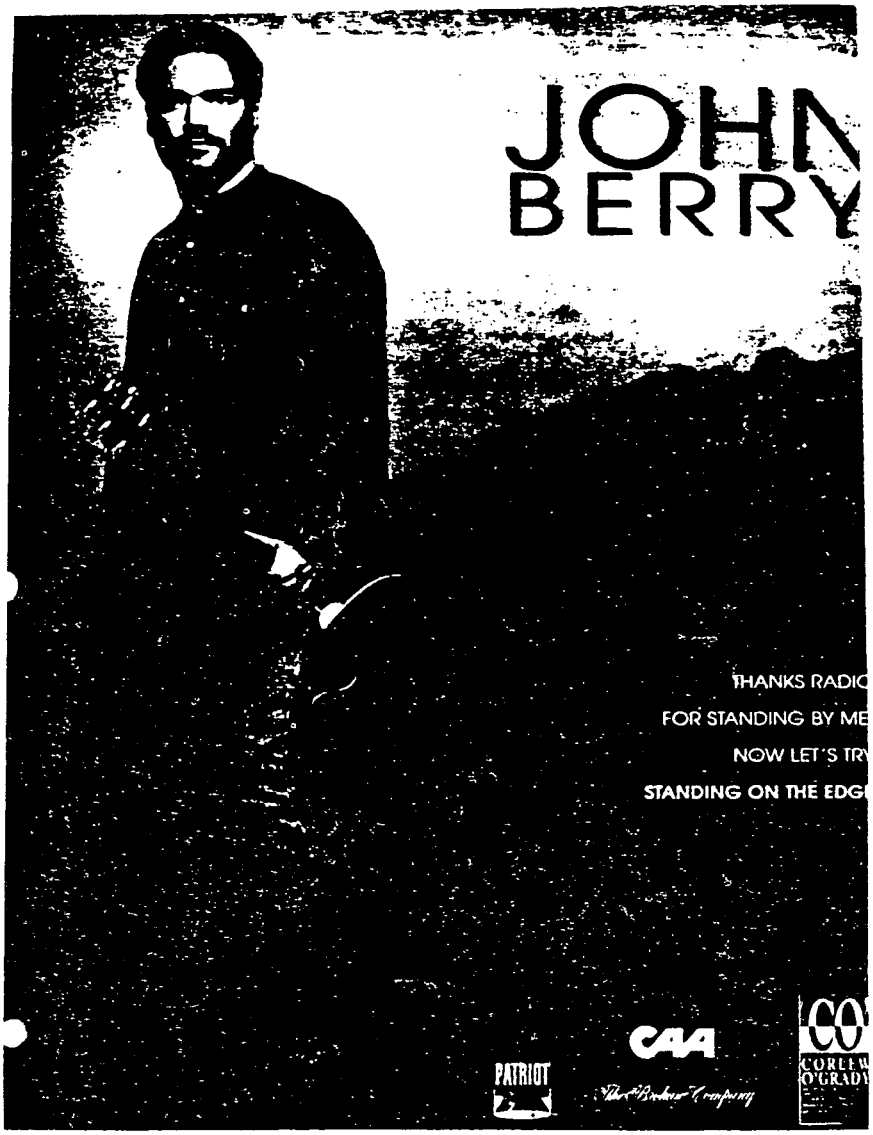
Again, we thank you, Mr. Chairman, your staff and others for the extraordinary amount of time and diligent effort you have put into crafting this legislation. Your leadership and balanced view of this issue is the reason that H.R. 1506 has a good chance of being enacted in this Congress.

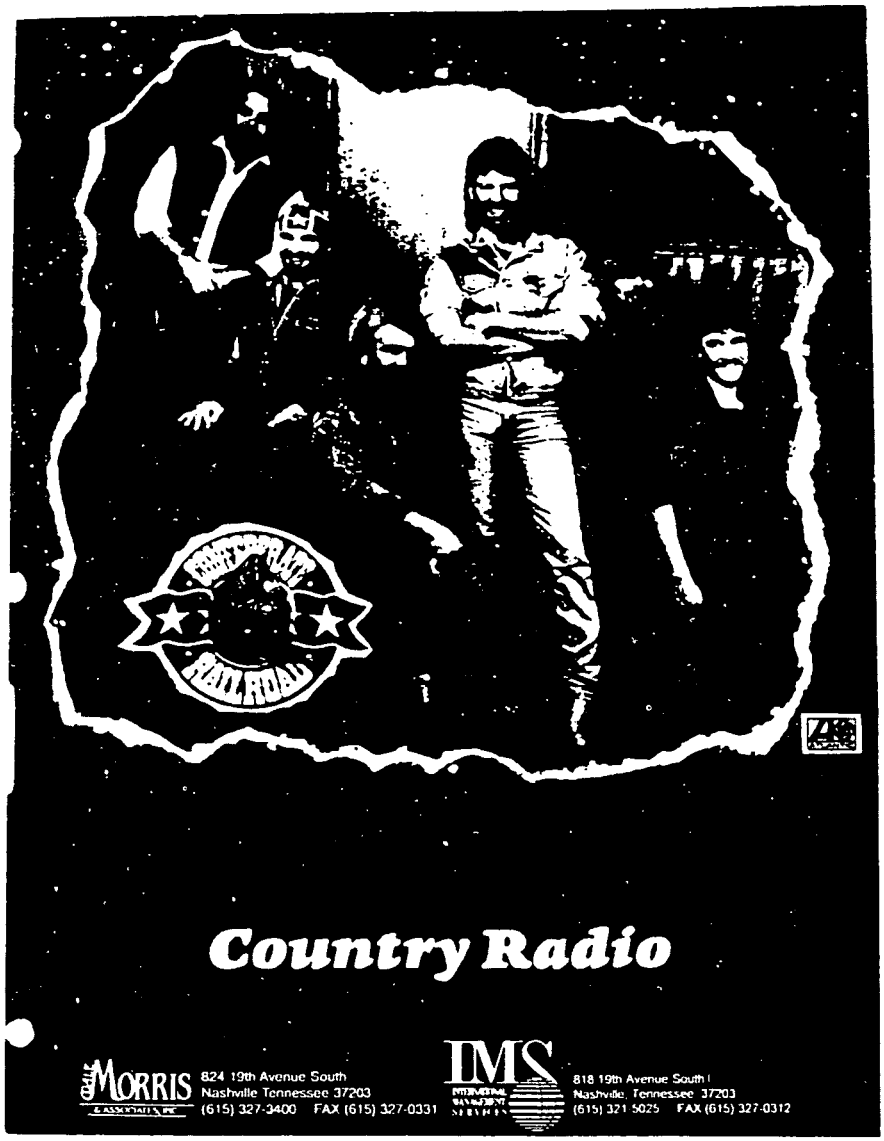
APPENDIX A

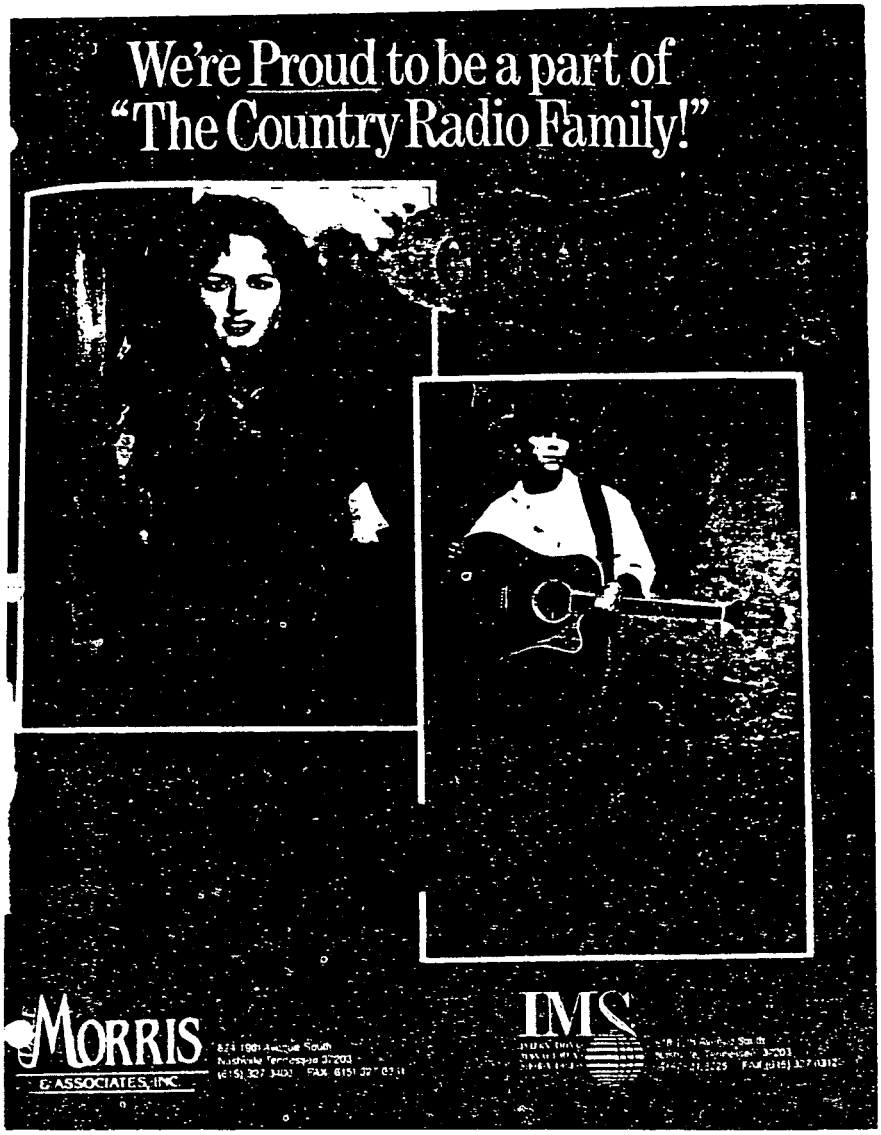


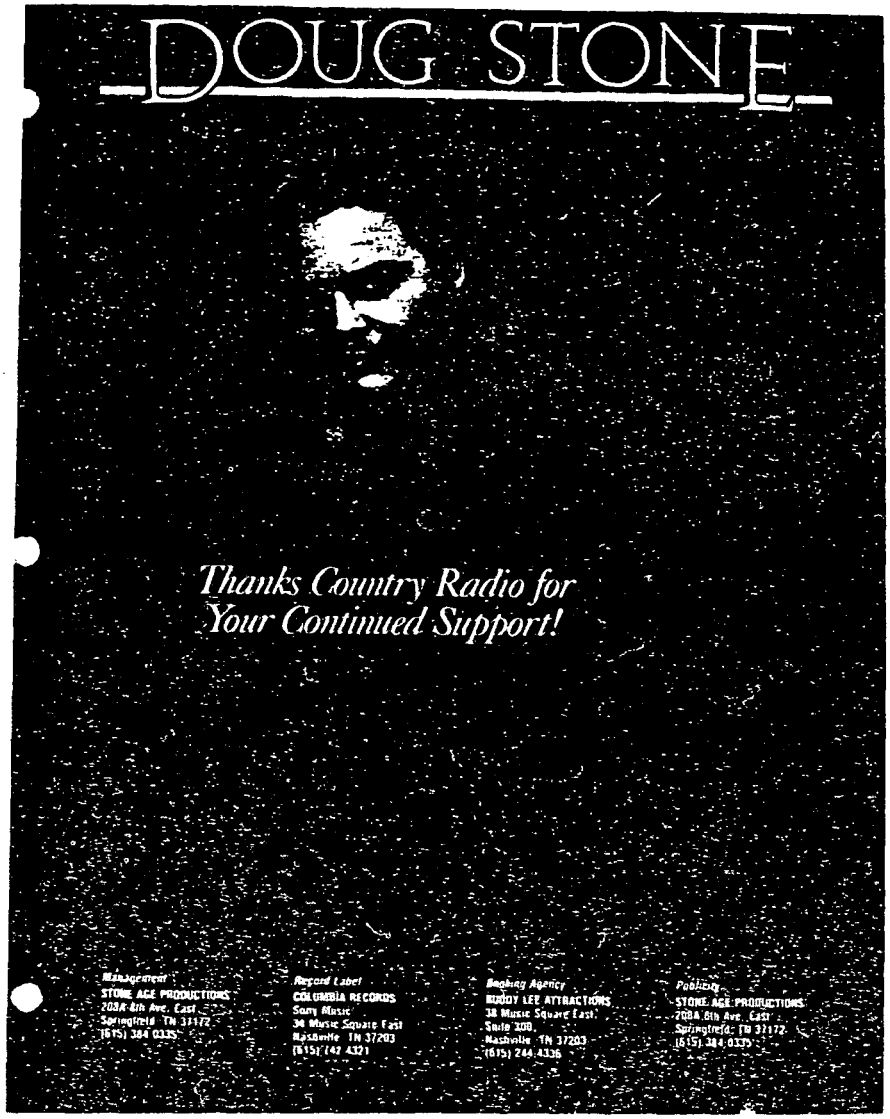
APPENDIX B











APPENDIX C

In the Public Interest:

A Survey of Broadcasters' Public Service Activities

by

Brenda K. Helregel
Research & Planning Department

Executive Summary

Public affairs activities are an integral part of broadcast stations' community involvement. Through public affairs activities, stations invest both programming and non-programming time and effort to educate and involve their communities. A nationwide survey of randomly selected television and radio stations was conducted by the NAB Research and Planning Department in early 1991. The purpose of the study was to gather information regarding stations' public affairs activities. Below are the major findings from this study.

- Over ninety percent of the radio (93.9%) and television (91.8%) stations surveyed report they aired public service announcements before election day to encourage people to vote. Additionally, half of the radio (46.4%) and television (50.6%) stations offered to sponsor candidate forums, including debates among political candidates running for office during the 1990 elections.

- Stations report that many of the campaigns they are currently running are concerned with Medical and Community Oriented Fund-raising drives, as well as campaigns related to Health matters.

- Radio and television stations report locally producing and airing public service announcements in the past month on a multitude of topics ranging from Substance Abuse to Minority and Women's Issues. In addition, stations report airing locally produced public affairs programs in the past month on topics from AIDS to Local Community Oriented Information and Fund-raising Drives.

- Besides programming, broadcasters also report investing non-programming time and efforts to educate and involve their communities. Community outreach activities reported for the past month cover topics from Hunger/Poverty/Homelessness to Education and the Environment.

- When asked to name the three biggest campaigns in the *past year*, campaigns concerning Charitable Fund-raising, Substance Abuse and Health issues were mentioned most often. Among the most often mentioned campaigns that stations are *planning* are campaigns concerning Charitable Fund-raising and Health issues.

- Over four-fifths of the radio and television stations report that they have been involved in campaigns related to the U.S. troops stationed in the Middle East.

- Half of the stations report that they have been involved in campaigns to aid the victims of a disaster.

- Station investments in non-programming or off-air public affairs efforts to serve their communities are evident in that well over half of the stations report that their next campaign would include both programming and community outreach aspects. In addition, four-fifths of the stations report tying promotional activities to community public service campaigns and involving other local businesses in their campaigns.

- Three-fourths of the stations report that in 1990 they helped charities, charitable causes and needy individuals by fund-raising. Of the radio stations, the average amount collected was $37,075, while the television stations averaged $286,352.

- The average radio station donated $128,319 and the average television station donated $262,501 worth of free air time in 1990 to public service announcements alone. For 1990 alone a total of $1.5 billion worth of air time for just public service announcements was donated by radio and television broadcasters nationwide.

- Stations run public service announcements throughout the day with the highest concentration running between 6 am and 12 noon.

SUMMARY OF BROADCASTERS' PUBLIC INTEREST OBLIGATIONS

The Communications Act establishes broadcasters' general obligation to operate consist with the "public convenience, interest, and necessity." Traditionally, the FCC has granted broadcasters wide discretion in meeting these obligations, in keeping with their First Amendment rights. The Act and FCC regulations, however, do set out some specific obligations that help to define elements of broadcasters' public interest responsibilities. While many unnecessary or outmoded regulations were eliminated by the FCC, beginning in the 1970s, the core public interest obligations remain largely unchanged. Below is a summary of the most important of these obligations.

1. PROGRAMMING

A. General obligation to provide issue-responsive programming

* Quarterly issues/programs lists -- licensees must prepare quarterly lists of community issues station addressed during last 3 months; and programming that gave "significant treatment" of those issues. Must be kept in station's public file. Broadcasters "run" on this list at renewal time.

B. Children's television

* Obligation to provide educational and informational programming; restrictions on amounts of advertising.

C. Obscenity/Indecency

* Communications Act and Criminal Code prohibit "obscene, indecent or profane" broadcasts.

D. Lotteries

* Criminal Code restricts broadcasts of certain lottery information

E. Station IDs

* Licensees must broadcast stations identification announcements at beginning and close of broadcast day, plus hourly.

F. Sponsorship Identification

* Licensees must identify sponsors of broadcast.

G. **Payola/Plugola**

* Licensees and employees may not accept direct or indirect consideration for broadcasting songs or other material without disclosing sponsorship.

2. **POLITICAL**

A. **Reasonable Access**

* Licensees must provide "reasonable access" to federal candidates for political messages.

B. **Equal Opportunity**

* Licensees must provide all legally-qualified candidates with equal opportunities for their political messages.

C. **Lowest Unit Charges**

* Licensees must provide all legally-qualified candidates with lowest unit charges during campaign "window;" must provide "comparable rates" at all other times.

D. **Political editorial, personal attack rules**

* Stations that editorialize in favor of or in opposition to candidates must provide other candidates with notice and reasonable opportunity to respond; similar rules apply to identifiable person or persons "attacked" during discussion of controversial issues of public importance.

3. **OWNERSHIP**

A. **National limits**

* No person may have licenses for more than 20 AM stations, 20 FM stations , and 12 TV stations. (25% nationwide reach limit for TV; slightly higher numerical and reach caps for minority ownership interests.)

B. **Foreign ownership prohibited**

* Licenses may not be granted to aliens; alien corporate ownership limited to 20-25%.

C. **One-to-a-market**

* General prohibition on ownership of two TV station in same markets.

D. **Cross-ownership**

* Ownership of broadcast stations and newspaper in same market, or TV Station and cable system in same market is prohibited.

E. **Anti-trafficking**

* One year restriction transfers of licenses obtained in comparative proceeding or through minority ownership policies.

4. ENGINEERING

A. **Minimum hours of operation**

* All broadcast licensees must operate a minimum number of hours per week.

B. **EBS**

* Emergency Broadcasting System regulations vary for participating and non-participation stations. TV stations must provide captioning of EBS messages for the deaf.

C. **Transmitter/Tower**

* Stations must operate within specified power and frequency parameters, and keep logs. The FCC also regulates tower lighting and painting.

D. **RF Radiation Safety**

* New station, modification and renewal applicants must certify compliance with FCC RF rules protecting public and station employees form excessive exposure.

E. **FAA**

* Stations must meet FCC/FAA requirements for non-interference/obstruction to air navigation.

5. MANAGEMENT

A. EEO

* Broadcast licensees are covered by FCC EEO policies, as well as general provisions of civil rights laws. Under FCC policies, all licensees must have EEO policy that prohibits discrimination and must take positive steps to recruit, hire, and promote women and minorities. FCC reviews licensees' EEO record on periodic basis; all stations' records reviewed at renewal.

B. Renewal

* Stations undergo renewal proceedings every 5 years for TV, every 7 years for radio. Renewal applications must include certification regarding compliance with rules.

C. Ascertainment

* Licensees must identify community needs and problems by any reasonable means in order to prepare and maintain issues/programs lists.

D. Network affiliation

* FCC imposes restrictions on TV network affiliation agreement -- agreements may not extend more than 2 years, may not bar licensee from affiliating with 2 or more networks, my not prohibit licensee from rejecting network programming. TV licensees must file copies of network affiliation agreement with FCC.

E. Public File

* Licensees must maintain files available for public inspection. Files to include any applications filed with FCC, ownership material, affection agreements, citizens agreements, EEO reports, political information, issues/programs lists, and letters from public.

Mr. MOORHEAD. Mr. Rubinstein.

STATEMENT OF JEROLD H. RUBINSTEIN, CHAIRMAN AND CEO, INTERNATIONAL CABLECASTING TECHNOLOGIES, INC.

Mr. RUBINSTEIN. Thank you, Mr. Chairman. I am the founder and CEO of DMX, Inc., formerly known as International Cablecasting. DMX, or Digital Music Express, programs, markets, and distributes a digital music subscription service. We program more than 30 channels of commercial-free music in a wide variety of music formats via cable and satellite to more than 350,000 home subscribers and approximately 25,000 commercial businesses in the United States.

In my career, I have been chairman and CEO of two record companies and a member of the board of the RIAA. I therefore designed DMX to promote, not displace, record sales.

Some things that we voluntarily do not do are that we don't play albums in their entirety, we don't play two songs in a row by the same artist or from the same album, and we don't publish a program guide or preannounce records. Broadcast radio stations, by the way, do all or some of these things.

Some things that we do, our remote control displays the name of the song, the artist, the composers, the album title, the record company, and the catalog number on every selection aired. Soon our subscribers can simply call our 800 number, read off the information from their remote control, and buy the CD by mail. Our studies confirm that DMX listeners have increased their purchase of CD's and tapes since subscribing to the DMX service.

For 20 years, I have supported a performance right for sound recordings. Unfortunately, the way H.R. 1506 is drafted presently, I cannot support it. However, with some of the negotiations that have recently taken place, I would not oppose what the bill may end up looking like through negotiation. However, when it leaves the broadcasters untouched and overregulates subscription competitors, I have a problem with that.

The exclusive window provision and the complement provision seems to have been worked out with the RIAA.

The bill raises certain antitrust concerns and fails to ensure that independent subscription services such as ours are treated comparably to services in which record companies have invested. I am not going to address those issues that it seems we have already worked out.

But just let me say that it is essential that the remaining provisions of H.R. 1506 should not further disadvantage subscription services, so that we could compete as broadcasters and FM services go digital and have the opportunity to broadcast the same quality signal that we currently are broadcasting.

The statutory license payment ought to allow us to engage in typical programming practices. It should set a level playing field between the recording industry and ourselves. It should allow for the regulation of the broadcasters so they cannot play an album from beginning to end and they cannot preannounce that which they are going to play, and they must announce that which they have played, and therefore remain the music industry-friendly service that it always has been in the past.

The bottom line is that the subscription services will pay statutory license fees and will abide by the complement issue. As a matter of fundamental fairness, it would seem that similar programming restrictions, at least, should be applied to the broadcasting industry. Broadcasters can continue to play multiple cuts and whole albums under H.R. 1506, while subscription services could not. They could also play it in the digital environment.

We want to be sure that the complement does not impose liability for unintentional acts such as playing cuts from multiple albums, which also may appear on a compilation or box set.

The mechanical royalties should not apply to subscription programmers such as DMX. However, we believe that the publishers and composers are entitled to a mechanical royalty for a distribution such as in an interactive service. We do not believe that H.R. 1506 is the place to address that problem. That is a downloading interactive problem; DMX is not such a service.

Subscription music must be good for the recording industry. Three of the six major recording companies—Time Warner, Sony and EMI—have invested in our main subscription competitor, Digital Cable Radio's Music Choice.

We appreciate, Mr. Chairman, that the "licensing to affiliates" provision attempts to ensure that independent competitors are licensed on terms comparable to those of services in which record companies have invested, but H.R. 1506 still would allow monopoly pricing and price discrimination that in a nonregulated environment would be considered anticompetitive. Our competitors don't need this sort of antitrust exemption, and we might not survive it.

Another antitrust concern is that H.R. 1506 permits record companies and subscription services to collectively negotiate license agreements. This can be beneficial, but it lends itself to price-fixing and collusion if it is the exclusive licensing mechanism. The authority for the negotiation provisions should be made voluntary and nonexclusive.

Like you, Mr. Chairman, I support the principle of performance rights for sound recordings. My concern is that under H.R. 1506, that principle would not be applied fairly. I would be pleased to work with your staff and other interested parties as we have done in the past to bring to this legislation the sort of balance and equity that was originally envisioned.

Thank you again for inviting me to appear today, Mr. Chairman. I would be pleased to answer any questions.

Mr. MOORHEAD. Thank you very much.

[The prepared statement of Mr. Rubinstein follows:]

PREPARED STATEMENT OF JEROLD H. RUBINSTEIN, CHAIRMAN AND CEO, INTERNATIONAL CABLECASTING TECHNOLOGIES, INC.

Chairman Moorhead and Members of the Subcommittee:

My name is Jerry Rubinstein. I am the founder, Chairman and Chief Executive Officer of International Cablecasting Technologies, Inc., or "ICT." On behalf of ICT, thank you very much, Mr. Chairman, for inviting me to testify today.

ICT programs, markets and distributes a digital music subscription service known as Digital Music Express or DMX. DMX provides 30 channels of continuous, commercial-free music to home subscribers and commercial businesses, via cable systems and satellite transmission.

I come from the record business. In the 1970's through the early 1980's, I was Chairman and C.E.O. of ABC Dunhill Records and United Artists Records. As a former director of the Recording Industry Association of America, I share the concern that the record industry remain vibrant and profitable. For 20 years, I have joined the record industry in calling for the recognition in U.S. copyright law of a performance right for sound recordings.

DMX uses innovative technologies to assure that we are a resource that promotes rather than displaces record sales. The remote control that DMX provides to the consumer,

at the touch of a button, gives the consumer all the information they need to walk into a record store and purchase the recording. We do not play albums in their entirety. We don't even play two songs in a row by the same artist. Soon, we will be offering subscribers an 800 telephone number that they can call to purchase by mail order the records heard on DMX.

We compete primarily with broadcast radio and other subscription music systems. Currently, two major commercial home music subscription services compete in the United States. My company, DMX, is independently owned by ICT. The other, Digital Cable Radio's "Music Choice," is primarily owned by three of the world's six major record companies: Time Warner, which controls the Warner, Reprise, Elektra and Atlantic labels; Sony Corporation, which owns the Sony Music, Columbia and Epic labels; and EMI, which owns the EMI, Capitol, Liberty and Angel labels.

I therefore am concerned, as I will explain below, that the narrow performance right in H.R. 1506 unfairly targets only DMX. H.R. 1506 exempts analog broadcasters, exempts digital broadcasters, and legitimizes discriminatory licensing practices by record companies that are vertically integrated into subscription services, such as Music Choice. Only one company is left to bear the burdens of H.R. 1506 -- DMX. Those burdens are compounded by draconian program regulations, and possible punitive mechanical license obligations.

DMX Programming

DMX serves up a diverse menu of specialized program formats, including channels devoted to orchestral and chamber music, country, folk, religious and inspirational music, top 40, classic rock, jazz, blues and alternative music. We have obtained all broadcast licenses for performance of copyrighted musical works, and pay license fees to ASCAP, BMI and SESAC.

DMX began programming in September 1991, to an average of 23,000 monthly subscribers. By the end of last year, DMX had approximately 300,000 subscribers nationwide. Through partnerships with cable and satellite operators, DMX now is capable of reaching some 17.5 million cable households across the United States. DMX also provides background music to more than 20,000 businesses in the United States. We are expanding our network internationally into Europe, Canada, Latin and South America and Africa.

SUMMARY

DMX Supports Performance Rights, But Opposes H.R. 1506 Because it Unfairly Targets DMX

It comes as no surprise to anyone who knows me and my history in the music business that I am a strong believer that sound recording companies and music performers need and deserve performance rights, and that commercial entities that perform sound recordings should compensate producers and performers. I have called on Capitol Hill and in the press for the enactment of a performance right as a fundamental principle of copyright law.

But a performance right applied only where it seems convenient or pragmatic to do so, is not principled at all. It becomes a pretense of fairness and an excuse for discriminatory treatment. That is why, with deep disappointment, I must strongly oppose H.R. 1506.

The intent of H.R. 1506 is to level the playing field of copyright law for producers and performers in sound recordings. The limited scope of H.R. 1506 instead distorts the marketplace for music programming. By entirely exempting broadcasters, and giving licensing advantages to vertically integrated record companies, H.R. 1506 tilts the playing field against DMX in the following ways:

- **H.R. 1506 imposes a performance license and payment obligation only on digital subscription services, while it broadly exempts all broadcasters, whether analog FM or tomorrow's CD-quality digital broadcasts.** This commercial advantage for the broadcast industry cannot be justified under copyright principles or market realities. Whether over radio airwaves, cable or satellite, a public performance is a commercial use that should be subject to a performance right.

- **The statutory license should, but does not, cover typical programming practices.** H.R. 1506 gives another perk to the broadcasters by exempting them from the "sound recording performance complement" and the three-to-four month "exclusive window." These provisions will prevent subscription services from providing normal programming that radio broadcasters do free of any performance royalty, unless we pay the record companies a second premium. The exclusive window and sound recording performance complement are unduly restrictive and unworkable in practice.

- In addition to the performance royalty, **H.R. 1506 unfairly may foist upon subscription program services the obligation to pay compulsory mechanical royalties ordinarily applicable only to record companies.** The definition of "digital phonorecord delivery" blurs the fundamental differences between interactive services and subscription services. Interactive services, like record companies, sell records. Subscription services, like radio stations, program selections of music for listening. It would be illogical, unjustifiable and prejudicial to apply the section 115 compulsory mechanical license to DMX.

- **The "Licensing to Affiliates" provision inadequately safeguards against anticompetitive licensing practices by record companies that are vertically integrated with digital music subscription services.** The threshold of ownership under Section 3(h) is too high to assure equal treatment for all competitors, and the language of clauses (h)(1)

and (2) opens loopholes wide enough to justify almost any form of monopolistic behavior or unlawful discrimination, and would hamper any attempts to remedy such behavior through the courts.

I wish to elaborate on these basic philosophical and policy points, and to comment on a few specific concerns with respect to the drafting of H.R. 1506.

1. THE BROADCASTER EXEMPTION FROM LICENSING OBLIGATIONS IS UNJUSTIFIED UNDER COPYRIGHT LAW AND THE REALITIES OF THE COMPETITIVE MARKETPLACE.

Broadcast or Subscription, It's All A Performance

As a matter of copyright law, there is no reason to limit a performance right to subscription services. Performance rights should be applied to all commercial users of sound recordings, including over-the-air broadcasting. Every day, tens of thousands of copyrighted sound recordings from compact disks are played over radio stations with high quality reproduction. Not a penny of performance royalties is paid to producers and performers by those broadcast stations now, nor would it be paid under H.R. 1506.

Digital subscription music services and radio both compete for the listener's ear. Audiences tune in to enjoy a particular type of programming, be it on FM radio or DMX. By contrast, a consumer who wants to listen to a specific piece of music at a particular time will listen to a purchased compact disk, tape or vinyl record. We are no more in competition with record companies than is any radio station in America. Indeed, as I later explain, DMX implements promotional innovations that make DMX a more direct and effective promotional medium than broadcast radio.

The biggest differences between radio and DMX are, first, that radio derives its income from sponsors or taxpayer-funded subsidies, while commercial-free DMX derives its income from reasonably-priced monthly subscriptions. Broadcasters are better able than

subscription services to pass on the costs of a performance right. Broadcasters can marginally increase the price of their commercial announcements to their sponsors. DMX cannot easily pass on the cost of a performance royalty directly to the consumer.

Second, DMX plays a much wider variety of music than could be supported in the average radio market. DMX exposes the consumer to many artists that receive little or no airplay from the "more hits, more often" crowd on the FM dial. We are a new service and so we may not yet have gold or platinum records hanging on our wall; but that day surely is coming and very soon. Subscribers tell us that as a result of the diverse programming on DMX, they have purchased more albums by artists they would never have known but for DMX. So if the broadcasters are correct that airplay promotes sales, surely DMX is a better friend to the record industry than is FM broadcasting.

Of course, many radio stations provide programming other than music, such as talk, news, weather and traffic, but that is why they obtained their spectrum for free in the first instance. It does not justify an exemption from a performance right; the amount played only affects the amount paid. There is no reason to exempt broadcasters while roping in DMX.

Subscription or Broadcast, Digital is Digital

The distinction made in H.R. 1506 between digital and analog technology also finds no support in the legal principles that justify performance rights. It has no basis in fact. "Digital" does not, in and of itself, mean "better." A low bit-rate digital signal sounds worse than FM radio. Nevertheless, in today's technology, digital cable music subscription services are one step ahead of FM analog broadcast in terms of sound quality and interference-free reception.

Scant years from now, however, the public airwaves will be teeming with digital audio broadcast stations delivering CD-quality sound to millions of home consumers and

commercial businesses, absolutely free of charge. The sound quality and reception of digital radio hardly will be distinguishable from DMX. Digital broadcast stations will compete for the same listeners as digital cable services.

But under H.R. 1506, digital subscription services must pay a performance right license fee; our digital broadcast competitors get off scot-free. If we find it unpalatable to cover digital broadcasting now, before it becomes a reality, it will become virtually impossible to do so once FM radio goes digital. If H.R. 1506, as the recording industry asserts, must look to the future, then we should not now exclude digital audio broadcasting.

Digital Subscription Channels Promote, Not Displace, Sales

Subscription-based radio services do not displace music sales any more than do broadcast radio stations. In fact, as I suggested earlier, DMX technology is better designed than radio to promote, not displace, record sales. Digital subscription radio, and DMX in particular, adds technological innovations that mean more sales for the recording industry:

-- How many times do you listen to the radio, get interested in the music or the performance, but never hear an announcer identify the piece or the performer? DMX gives its customers the answer at their fingertips. The DMX DJ Remote control has a visual display window that, at the touch of a button, identifies the name of the song, the artist, the composer, the album name and identification number, and the record company that published the sound recording.

Under H.R. 1506, it would become mandatory to include such information in the transmission signal. DMX voluntarily has done so from its inception. However, I would urge that the types of required information be few in number, directly related only to the purposes of this legislation, clearly defined and permanently set. Without such specificity, the bill would impose an uncertain obligation to continually invest in new technology or

equipment whenever the recording or music industries added some new code for unrelated purposes.

-- DMX is bringing a new service to its subscribers -- an 800 telephone number that the subscriber can call to purchase any compact disk heard on the DMX channels and receive it by mail order.

If subscription programming threatened the record industry, one would not expect three of the world's six major record companies to have so heavily invested in the Music Choice subscription service; but one also would expect that DMX and Music Choice already would have depressed record sales. This is hardly the case. Since I launched DMX in 1991, record industry revenues from compact disk sales are up by nearly 50 percent.

Despite the furor and rhetoric over the dangers of subscription services, one may search high and low for a single shred of empirical evidence that digital cable and satellite-based services displace sales. I guarantee you will not find it. DMX studies show what the U.S. Congress Office of Technology Assessment confirmed in 1989: those who are the most interested in new audio technologies are the heaviest purchasers of recorded music. Our research shows that DMX listeners generally increase their purchase of recorded music because of exposure to new artists on DMX channels. The DMX listener is the record industry's best customer.

Throughout this century, new technologies initially feared as dangerously competitive have proven instead to be synergistic. Records didn't kill the concert hall, they whetted consumer appetites to see live performances. Radio exposed the public to new artists and promoted both record sales and concert tours. Tape decks and personal recorders spurred the purchase of millions of prerecorded cassettes for playback. The VCR and MTV created the multimillion dollar worldwide market for sales of music video.

If listening to DMX may displace record sales, so would listening to the radio. Arguably, broadcast radio would displace sales more than DMX. All broadcasters pre-announce records. Many publish a daily or monthly program guide. DMX does none of these. Consumers don't know what is going to be played next on DMX. As I have noted, DMX does not play entire albums. FM radio stations do, and often. For example, this month the recording industry released two long-awaited rock recordings, both expected to be smash hits in the record stores. One, is the Pink Floyd double CD live recording, "PULSE"; the other is the new album by Soul Asylum. Reportedly, a local Washington, D.C. FM radio station played both of those albums in their entirety -- indeed, they played the entire Pink Floyd album even before it became available for purchase in record stores.

DMX is not asking for the right to play entire albums. I personally think it can be harmful to the recording industry, and I do not support it. But given the magnitude of radio listening versus listening to DMX, it makes no sense to say that subscription services cannot engage in normal programming formats and practices, or must pay a premium price for that basic need, while broadcasters remain untouched. I can't imagine what the broadcasters have done so right to deserve these multimillion dollar perks, or what DMX has done so wrong to be forced to foot the bill. And it would be ironic if this bill encouraged broadcasters to play whole albums or multiple cuts so as to maintain a competitive edge over subscription services.

Finally, the justification for performance rights does not lie in the rare possibility of home off-the-air recording. It resides in the principle of payment for commercial usage. Congress recently addressed and resolved this separate home recording issue in the 1992 Audio Home Recording Act. Once again, there is no principle that justifies exempting broadcasters while imposing performance rights on DMX.

A Broadcaster Exemption Will Not Promote International Reciprocity

One justification offered for H.R. 1506 is that it will help our trade negotiators to unlock pools of performance royalties held hostage in foreign countries, which royalties rightfully should be paid to American record companies. Mr. Chairman, through my experiences in the record industry and DMX's foreign operations, I am well familiar with the attitudes expressed abroad toward the lack of a sound recording performance right in this country. Unfortunately, the limited scope of H.R. 1506 will do nothing to change those attitudes, and instead may reinforce them.

Of the more than 60 countries that currently give performance rights to sound recordings, none has a law comparably narrow in scope to H.R. 1506. Those countries all broadly apply their performance right. No other country differentiates between analog and digital, and subscription and nonsubscription services. It is hard to imagine that countries that have intentionally withheld from United States interests more than $120 million in annual royalties, in spite of the obligations of the Berne Convention, the Rome Convention and the GATT, would suddenly open their coffers in light of a performance right that applies only to digital subscription music services.

I have heard the argument that while H.R. 1506 does not solve the international problem, it couldn't hurt and could possibly help -- like a bowl of chicken soup. Mr. Chairman, the narrow performance right of H.R. 1506 is a mighty thin broth. Chicken soup remedies will not cure international inequities. We should not use H.R. 1506 as an excuse not to take the strong medicine we really need. If we are unwilling to do what is right, we should not enact an unfair bill just for the sake of doing something.

Political Reality And Fundamental Fairness

In the months since the introduction of the Senate companion performance rights bill, S. 227, I have heard across Capitol Hill that it is politically impossible to impose a performance right on the broadcasters. Sure, it would be fair and proper to enact a broader performance right, they say, but for political reasons it simply cannot be done. This is the kind of talk that leaves citizens like me scratching our heads.

If political realities dictate that H.R. 1506 must exempt broadcasters, please recognize that this exemption creates severe distortions in the marketplace that could render subscription services noncompetitive with broadcast radio. I therefore implore the Committee to make every effort in H.R. 1506 to ameliorate those distortions. I will address the remainder of my statement to the specific provisions of the bill that should be amended to balance the obligations and exemptions of H.R. 1506 with fundamental fairness to DMX.

2. THE EXCLUSIVE WINDOW AND SOUND RECORDING PERFORMANCE COMPLEMENT OVER-REGULATE SUBSCRIPTION SERVICES.

The most basic element of fairness needed in H.R. 1506 is to ensure that the statutory license covers typical programming practices. A statutory license is meaningless unless it allows subscription services to compete with broadcasters who are exempt from the license obligation. A subscription service should be able to program typical music formats, such as top 40, adult contemporary, country, rock or jazz, based on the statutory license alone without the need to negotiate separate and more expensive deals with each and every record company. Unfortunately, this is not the case under the current draft of H.R. 1506. The "exclusive window" provision combined with the "sound recording performance complement" make programming under the statutory license completely non-competitive with broadcast radio, and unattractive and unacceptable to the listener.

Something for Nothing for Broadcasters; Nothing for the Statutory License Fee

It seems odd, at a time when Congress is debating dismantling the Federal Communications Commission and loosening restrictions on transmission services, that Congress should consider such severe over-regulation of subscription service programming. As I noted previously in my testimony, DMX voluntarily adopted a programming code from its inception, so I have no conceptual problem accepting reasonable complement restrictions. The restrictions in H.R. 1506, however, are plainly unfair and unworkable.

Let me give you but one example of how H.R. 1506 over-regulates DMX. Top 40, modern rock, and adult contemporary formats program current hit songs interspersed with older hits. Michael Jackson's new single, "Scream," has been played on the radio for about two weeks. It entered the charts at number five -- supposedly the first time this has happened since the Beatles. Jackson's new double disk set, "HIStory," hit the record store shelves yesterday. Radio stations are all over these Michael Jackson records like a sequined suit.

H.R. 1506, however, prevents subscription services from playing any part of the record at all. The statutory license would be subject to an "exclusive window." That means DMX or any other subscription service cannot play a new record until three months after the record gets airplay, or four months after it is placed on sale. So, unless DMX paid a premium price over and above the statutory license fee, DMX could not play these radio hits until late September. Within three-to-four months, today's number one will have fallen off the charts. In other words, subscription services will have to pay the statutory license fee, and get nothing in return. Broadcasters pay nothing, and get programming regulations that restrain their competition. This is absurd. It's enough to make me "Scream."

A reasonable complement gives all the protection the recording and music industries really need. The window is broken. Shut the "exclusive window." The solution is clear: the window should be eliminated for subscription music services.

The "Sound Recording Performance Complement" Is Vague And Needs Clarification

The sound recording performance complement defined in H.R. 1506 is reasonable in number. If songs are not transmitted consecutively from the same album, then the performance does not substitute either for album purchase or listening. Similarly, if three songs from the same featured artist or boxed set cannot be consecutively transmitted, then the performance does not substitute for a "greatest hits" package; but it allows for the programming of consecutive cuts -- the "two-for Tuesdays" or artist blocks common throughout the radio broadcast industry.

Candidly, DMX engages in neither of these practices, and so the numbers set forth in the complement are acceptable to me. However, I certainly can conceive of a reasonable programmer playing two or three cuts in a row in appropriate circumstances, or to celebrate the birthday or the passing of a great songwriter or performing artist. This complement number in H.R. 1506 will protect such reasonable programming practices while also adequately protecting the economic interests of the recording industry and performers. Nevertheless, the complement proposal requires clarification in a few key respects.

Liability Should Not be Imposed for Unknowing Violations.

Recordings made decades ago are seeing a resurgence in popularity as older Americans and baby boomers replace scratched vinyl records with compact disks. Hundreds of collections and "greatest hits" anthologies on single disks or boxed sets are displayed in record stores, or advertised on late night television by companies as big as Time-Life and companies that consist of little more than a post office box and an 800

number. Last Friday's "Weekend" section of The Washington Post advertised two such collections:

-- "Only Rock and Roll" -- "All the best of the 50's through the 80's." 160 "Classic Pop Hits" from Chuck Berry to Fleetwood Mac, sold either as set or as 8 individual CDs of 20 songs each; and,

-- "Those Wonderful Years" -- "The definitive collection of pop hits from the 20's through the 50's." 140 classics by Duke Ellington, Bing Crosby, Rosemary Clooney and other "timeless artists," sold either as a set or as 10 individual CDs of 14 songs each.

There is no possible way that a programmer such as DMX can keep track of the hundreds of such collections or to take a license with every tiny record label and late night "greatest hits" packager in America. It would be prohibitively expensive even to try. Unfortunately, the current draft of H.R. 1506 would require DMX to do just that.

The complement applies if the two or three selections are "embodied in" a phonorecord or set of phonorecords. Under this standard, DMX could play songs from albums by the original artists, but DMX still would violate the complement because these same songs might be "embodied in" some anthology or collection. This is unfair. However, it is easily remedied simply by changing the words "embodied in" to the word "from." By requiring that the songs actually be played from a particular recording, the bill makes certain that liability is imposed only for knowing and intentional violations of the complement.

The Complement Needs Clarification

In return for paying the performance royalty, DMX surely should be able to understand what is included in the statutory license. Unfortunately, H.R. 1506 leaves too

many unanswered questions as to what the complement means in practice. We raise several questions and suggest several clarifications below:

a. The Complement should apply on a per channel basis. If the complement applies across all 30 channels of DMX service, DMX would have to get a separate license for each of hundreds of cross-over artists, just in case the programming on any of our channels happens to coincide.

b. "Selection" needs definition. Is a "selection" an entire symphony, or just one movement? Is it a complete opera, or is it measured by act, by scene or by aria? Is a medley of showtunes one selection or many? Several factors such as whether the "selection" is the whole or part of a greater work, how it appears on the recording, how it ordinarily would be performed live, would be relevant in a judicial balancing test.

c. "Featured recording artist" needs to be defined. Does the complement permit DMX to play consecutively a John Lennon record, a Paul McCartney and Wings tune, a George Harrison cut and then a Beatles song as long as Ringo sings lead? Is DMX liable if we consecutively play Mozart, Beethoven, Schubert and Stravinsky performed by the same orchestra? What if the orchestras were the same but had different soloists? What if there are four different orchestras, but all conducted by Leonard Bernstein?

"Featured artist" should mean a performing group or ensemble, or an individual performer identified as the principal artist performing on the sound recording. There should be only one "featured artist" per phonorecord; and a vocalist or soloist performing along with a group or ensemble should not be a "featured artist" unless that person is identified on the recording as the primary performer.

d. The Complement should apply at the time the program schedule is set, not at the time of transmission. DMX sets its programming in advance. Suppose I programmed

my channel on June 15 for transmission today. On June 15, Michael Jackson's "HIStory" album (one disk of which is a "greatest hits" package) did not exist, so if on that day I played three consecutive cuts from three different Michael Jackson albums, I did not exceed the complement. But if the complement is measured on the date of transmission, then I played one cut too many. Only by setting the complement as of the date of programming can DMX avoid liability for unintentional acts, and be liable only for knowing violations.

Mr. Chairman, it is critically important that unintentional acts do not result in liability, and that this is made clear before the legislation is passed. DMX is in its early stages of development. We have yet to turn an operating profit. I am sickened by the prospect of betting my company's future on the outcome of a court case for copyright infringement or some arbitration proceeding. Again, it bears reminder that broadcasters are exempt from all of these obligations. To achieve at least a relative degree of equity, H.R. 1506 must state with certainty that liability is imposed only for willful violations in clearly defined circumstances.

A Healthy Dose of Programming Reality

I understand the concerns that underlie the performance complement -- I twice ran record companies myself. But before we try to slay every bogeyman hiding in some record company executive's anxiety closet, we should take a close hard look at the programming practices of subscription music services today.

People tune in a subscription channel like DMX to be exposed to a genre of music. We program a varied selection of artists and composers to increase listenership and to maintain audience interest. No one likes all composers or performers in a particular genre. Even people who love particular artists often can't stand some of the songs on their albums. That's why some tunes are hit singles and others end up on the flip side.

DMX programming policy of no entire albums, no consecutive selections, reflects these realities. It respects the interests of the record industry, and makes sense for a subscription programming service. But no subscription service can afford either to live with unduly restrictive programming micromanagement, or to pay premium prices for normal programming practices -- particularly when our broadcast competitors are exempt from both obligations. I urge you, Mr. Chairman, and the Committee, as a matter of fundamental fairness to ensure that the statutory license fee guarantees that subscription services can engage in normal competition with broadcasters and with each other. Please -- eliminate the exclusive window and clarify the complement.

3. THE COMPULSORY MECHANICAL ROYALTY SHOULD NOT APPLY TO SUBSCRIPTION PROGRAMMING SERVICES SUCH AS DMX.

Subscription services, like radio, program music selections for the purpose of listening. Recording from DMX does not substitute for purchasing a recording. If consumers want to listen to a particular record at a chosen time, they have to play it from their own collection, since they cannot do so via DMX. Consumers do not select the music to be played on DMX. They have no idea what is going to be played on DMX or when, since DMX does not publish a program guide, pre-announce record or album titles, or play "requests." DMX listeners thus have no real ability to tape from DMX and logically have little incentive to do so. Why tape when the styles of music you want to hear are available whenever you tune in?

Interactive services are clearly a different animal. The consumer uses an interactive service to purchase a song or album. The consumer selects the recording interactively, rather than in a record shop. The purchased recording is delivered electronically to the

home, and the consumer "downloads" or records the delivered works on home equipment, such as an analog or digital recorder.

Thus, interactive services implicate the rights to make and distribute phonorecords, under section 106(1) and (3). By contrast, subscription programming services, like radio, are public performances only.

Unfortunately, the definition of "digital phonorecord delivery" in section (d) of the proposed amendment to Section 115 indiscriminately conflates these two distinct types of services. That section would loosely apply to any performance that "can be reasonably expected to result in a reproduction by or for any transmission recipient of such sound recording ... regardless of whether the digital transmission is also a public performance of the sound recording... ." This overly broad language could impose upon subscription services a compulsory mechanical royalty in addition to a performance royalty.

It is unfair and prejudicial for DMX to pay an additional mechanical royalty like the record companies do for the right to make a compact disk or tape, when all we do is play recorded music in the same manner as radio stations. Broadcasters don't pay mechanical royalties. Given the similarities between broadcast and subscription services, and the clear distinctions between subscription programming and interactive delivery, there is no reason to impose the mechanical royalty on DMX.

Copyright holders entitled to assert the mechanical right came to Congress but a few years ago on this issue. Congress then gave them the right to payment for digital home recording via the Audio Home Recording Act of 1992. That legislation embodied an historic compromise among the music industry, recording industry, consumer electronics manufacturers and consumer groups, and was a delicate balance of those competing

interests. There is no reason so soon to revisit this issue. The performance rights bill should not be exploited as an "end run" around the Audio Home Recording Act.

H.R. 1506 should make clear that "digital phonorecord delivery" applies only to interactive services, and not to subscription programming entities such as DMX.

4. H.R. 1506 GIVES AN UNFAIR ADVANTAGE TO VERTICALLY INTEGRATED SUBSCRIPTION SERVICES.

H.R. 1506 does not adequately safeguard against the potential for anticompetitive licensing practices by vertically integrated record and subscription services. Having exempted broadcasters entirely, care must be taken to avoid such a possibility. Otherwise, any provision that legitimizes disparate licensing practices by integrated record companies would mean that H.R. 1506 applies to only one company -- DMX.

The vertical integration of three of the world's largest record companies into one of the two digital subscription services raises serious issues for competition in this market. It is essential that any performance rights law must protect competing music services against discriminatory license practices. H.R. 1506 does not provide that needed protection.

Vertical integration could result in a record company charging its affiliate a monopolistic price, secure in the knowledge that 50 percent of the royalties simply are being paid from one pocket to the other. Or it could result in better financial terms for the affiliated entity, such as a lower performance royalty, more flexible programming terms, or advance exclusive access to new hit recordings. Any of these would be anticompetitive.

Section 3(h) of H.R. 1506 attempts to remedy this problem, but I am deeply concerned that it simply does not go far enough.

- Section 3(h) only applies where the recording companies own a "controlling interest," or can exercise a "controlling influence." What does that mean in terms of Digital

Cable Radio, which is approximately 50 percent owned by three record companies? Is each company's shares enough to be a "controlling interest"? Does any one company hold a "controlling interest," or wield a "controlling influence"? Does this provision adequately prevent these companies from offering better terms to their affiliates out of self-interest, not out of a controlling interest?

H.R. 1506 should adopt a lower threshold, such as the 5 percent ownership figure adopted in the Cable Act regulations, at 47 C.F.R. § 76.1000(b).

- The body of section (h) promises licensure by the copyright owner on "similar terms and conditions to all other similarly-situated entities offering similar types of digital transmission services, ..." This seems fair in theory, but in practice, the possibility of arbitrary and discriminatory licensing remains. The antitrust laws are designed to preclude both unduly favorable licensing practices and monopolistic pricing. H.R. 1506 does not adequately address either of these practices.

- The vagueness of subsections (1) and (2) of section (h) further expose competitors to discrimination. They list five specific factors and one kitchen sink factor that a record company could use as an excuse for disparate treatment. The enactment of these factors may unintentionally impede efforts in a court of law, by a competitor or the government, to remedy any anticompetitive conduct.

To remedy these flaws, we suggest that the provision require that the record company shall offer to other entities the same terms and conditions offered to its affiliated entity. If the affiliated entity's license sets different rates based on factors such as numbers of subscribers, methods of delivery, number of plays, etc., then those rates would apply to the unaffiliated entity as well. However, if the license to the affiliated entity makes no such distinctions, then the record company should not be able to artificially discriminate against

the unrelated entity by citing current differences between the entities. Subscription programming is a fledgling business that is growing in market penetration, number of channels and types of services. H.R. 1506 should not permit a record company to discriminate against an unaffiliated service based on distinctions that soon could evaporate or be rendered meaningless.

5. THE "AUTHORITY FOR NEGOTIATIONS" PROVISION SHOULD BE CLARIFIED.

H.R. 1506 would amend Section 114 of the Copyright Act to add a new paragraph (e), governing authority for copyright owners to collectively negotiate with subscription services. We agree that in concept this could lead to certain administrative conveniences for both sides. However, the provision also lends itself to possible refusals to deal or other collusive behavior. Therefore, we suggest that the provision make clear that this should be a non-exclusive mechanism for negotiations, and that any licensee has the unfettered right to negotiate directly with a record company if it prefers to do so. This can easily be attained by inserting the words "on a voluntary and non-exclusive basis" toward the end of the last sentence, between the words "may designate" and "common agents."

6. ANY BUSINESS SUBSCRIPTION EXEMPTION ALSO SHOULD APPLY TO DMX.

H.R. 1506 exempts subscription music services delivered to commercial establishments from the new performance right. As a provider of commercial services, DMX appreciates and supports that exemption as drafted. Should that provision be amended in any manner, DMX respectfully requests that its services to business establishments be treated the same as those of other entities.

CONCLUSION

What I hope my comments have shown, Mr. Chairman, is that the legal principles and equities that favor performance rights are not satisfied by the current draft of H.R. 1506. A truly fair bill would impose the performance right also upon broadcasters. If that fundamental equity must be sacrificed to political compromise, this bill should be carefully crafted to avoid compounding the marketplace distortions inherent in the broadcaster exemption.

The amendments and clarifications I request will go a long way toward restoring balance and fairness to those subscription services who disproportionately bear the brunt of this bill. With such changes, I would be able to support H.R. 1506. But as drafted, I strongly oppose it. A narrow bill skewed to the competitive benefit of broadcasters and vertically integrated music services is not "simple justice" -- it is simply unjust.

Thank you again for inviting me to testify today. I would be pleased to answer any questions.

Mr. MOORHEAD. Mr. Rubinstein, right now, Digital Music Express only plays previews of songs, provides information to encourage sales by telephone or in a store. Isn't it obvious that in the near future digital music companies, including DMX, the market share can reap terrific profits, will displace record sales?

Mr. RUBINSTEIN. Not under the complement provision of this bill nor under our self-imposed programming restriction. We do not preannounce what we are going to play nor do we play a whole album or an artist series or an artist special, so to displace sales. People don't know what they are getting and people then, therefore, would be recording streams of music.

We expose much more music and many more formats of music than does radio or any other place, so therefore our listeners are being introduced to music that they wouldn't get other places and find themselves buying CD's because they have gotten a taste of something they like, as opposed to downloading a stream of music that is not cohesive as an album is.

Mr. MOORHEAD. No performance royalty is granted to record companies from digital transmissions which could eventually replace shopping in the mall for a record. No incentive will exist to create music which can then be digitally transmitted.

Isn't it in everyone's interest that we provide royalties for those people that are creating these?

Mr. RUBINSTEIN. Absolutely. As I say, I have supported for years the performance right. I believe it is necessary and I believe there should be regulation of how digital services, as well as analog services, do their programming to protect the integrity of the recordings.

Mr. MOORHEAD. Mr. Fritts, broadcasters have to pay a performance right to composers, lyricists, and publishers. Why should record companies and performers, who are also necessary to the success of your industry, be left out?

Mr. FRITTS. Well, I think that if you look at the symbiotic relationship that has existed between the record industry and broadcasters through the years, it is clear that we currently pay well in excess of $300 million a year to ASCAP, BMI, and SESAC. There is no value added being brought to the table currently in what this bill proposes for broadcasters. I think the clear distinction between what we do and what Mr. Rubinstein's company does is that we offer our services for free, and a variety of music, interspersed with news and information, with patter and other types of things that people like to listen to, as opposed to charging a subscription for a definitive music service.

Mr. MOORHEAD. Do writers and publishers who don't want the record companies and performers to possess a superior right for digital transmissions possess a superior right in this case?

Mr. FRITTS. I don't really know, quite frankly.

Mr. MOORHEAD. Are they getting an advantage? That is what we are asking.

Mr. FRITTS. If you would repeat that, maybe I can digest it a little better.

Mr. MOORHEAD. It seems that writers and publishers who don't want the record companies' performers to possess a superior right

for digital transmission may possess a superior right in this case. How would you respond to that?

Mr. FRITTS. I guess after listening to the last panel, it seems like that most of the parties are coming to some type of an agreement on a mutually negotiated settlement, and I guess that is best for them to determine.

Mr. MOORHEAD. I would agree. I think that we are making progress. George Gekas is here, and I thank you very much, George.

Mr. GEKAS. Yes, I would like to pose a couple of questions, if I may. I thank the Chair.

In complex issues like this that have hit us over the years, I have always been praying for agreement among the parties that have been at friction with one another; and in telecom and motion pictures and broadcasters and all those things which are so complex, we have always breathed a sigh of relief when, because of introduction of a bill or because of some pressure, shall we say, from the Congress, the parties involved do sit down, negotiate, and then come to an accord on new language or a new bill or some initiative on the part of the Congress.

I thought we had arrived at something like this here; and many of the witnesses on the first panel, and I think Mr. Fritts has tangentially agreed that this bill does begin that process or end that process.

Now Mr. Rubinstein voices disapproval of the current language. What I would like to ask is if Mr. Rubinstein is saying that H.R. 1506 should clearly acknowledge that subscription services are not engaged in digital phonorecord delivery under section 4(d), that would help you accept this bill; is that correct?

Mr. RUBINSTEIN. That is correct.

Mr. GEKAS. Now I ask Mr. Fritts, if that would be accepted, does that remove you from the agreement?

Mr. FRITTS. Well, I am not sure about 4(d) and the various sections. I will say to you, however, that we have negotiated for well over 3 years now with the Recording Industry Association, and our agreement is virtually in place, most of which is embodied in this legislation as we go forward. Whatever you want to do or whatever the committee wants to do, in its wisdom, with respect to Mr. Rubinstein and his company and other companies like that is fine with us. It is up to the——

Mr. GEKAS. It wouldn't militate against the agreement reached by the other parties?

Mr. FRITTS. So far as I know, it would not.

Mr. GEKAS. How about Mr. Rubinstein's assertion that 1506 should require nondiscriminatory licensing of subscription services at the same standard rates, terms, and conditions that record companies offer to their affiliated subscription services, whatever that means? Does that give you heartburn, Mr. Fritts, on the agreement reached?

Mr. FRITTS. No, it doesn't. I think what he is saying is, he has some competitors who are owned by the music companies who provide a very similar-type service that he offers, and those are his competitors, and they sort of have feet in both camps, if you will.

I think it is important to note, Congressman Gekas, that I sat here and I heard the other panel; I thought, with great interest, they are talking about the rates, they are talking about the division of money, they are talking about who gets what. We are the people who are paying the money in large measure up until now, and then I think what they are looking at is future income streams from subscription-type services being delivered digitally. Broadcasters will not be offering subscription-type services digitally. We will be offering the same radio signal except with an enhanced quality.

Mr. GEKAS. So Mr. Rubinstein's argument is not with you?

Mr. FRITTS. I don't see it with me.

Mr. GEKAS. Do you agree, Mr. Rubinstein?

Mr. RUBINSTEIN. I totally agree.

Mr. GEKAS. I want to finally act on a bill here that does reach 99 percent consensus because none of us, I believe, can by ourselves sort out all these various equities and perceived inequities, so I think we have to work a little bit more strongly on what Mr. Rubinstein finds as lacking in this bill and then see if we can address that at some future session.

I thank the Chair. I have no further questions or comments.

Mr. MOORHEAD. Well, thank you very much. I would like to thank the witnesses for their testimony today. The subcommittee very much appreciates their cooperation.

This concludes our first day of hearings on this bill. We will reconvene 1 week from today, June 28, 1995, for a second day of hearings on H.R. 1506. Thank you for coming today.

Mr. FRITTS. Thank you, Mr. Chairman.

Mr. RUBINSTEIN. Thank you, Mr. Chairman.

Mr. MOORHEAD. The subcommittee is adjourned.

[Whereupon, at 12:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, June 28, 1995.]

DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

WEDNESDAY, JUNE 28, 1995

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS AND
INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2237, Rayburn House Office Building, Hon. Carlos J. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives Carlos J. Moorhead, Howard Coble, Martin R. Hoke, Patricia Schroeder, and John Conyers, Jr.

Also present: Thomas E. Mooney, chief counsel; Mitch Glazier, assistant counsel; Sheila Wood, secretary; and Betty Wheeler, minority counsel.

Mr. MOORHEAD. The Subcommittee on Courts and Intellectual Property will come to order.

This morning the subcommittee will continue its hearings on H.R. 1506, the Digital Performance Right in Sound Recordings Act of 1995. The subcommittee began last Congress to try and construct legislation to take care of what all parties agree is a likely problem for U.S. record companies and the people who sing and play music. The problem concerns home subscription services for digital transmission of music offered by different companies. This type of service permits the home subscriber, for a monthly fee, to select music. The company providing the subscription service can purchase a single record and play it for hundreds of subscribers and, by so doing, displace the record sales.

Last week we learned that after many weeks of meetings between the parties, two of the three major issues had been worked out, but there still remained one important issue concerning mechanical royalties. I am very pleased to announce that, after much encouragement from the subcommittee and others, the last remaining issue has been worked out. The parties are to be congratulated. As soon as the language of the compromise agreement is made available to me, I'll send it to each of the subcommittee members for their review. I'll also send it to the Register of Copyrights and the Commissioner of Patents and Trademarks for their review and comment.

I'd like to yield at this time to our ranking minority member, if she were here, but she is tied up on the floor with legislation that is taking place there and she probably won't be here for another 20 minutes or so.

Our first witness on the first panel will be the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Mr. Bruce Lehman. Mr. Lehman is no stranger to this subcommittee. He served as counsel to the subcommittee for 9 years and as chief counsel for a number of those years.

Mr. Lehman has been a key player on intellectual property issues between the United States and Asia and the European Union and has also headed numerous delegations to consider intellectual property issues at the World Intellectual Property Organization. He is here representing the administration, and we welcome Commissioner Lehman.

Our second witness will be the U.S. Register of Copyrights, Ms. Marybeth Peters. From 1983 to 1994, Ms. Peters held the position of Policy Planning Advisor to the Register. She has also served as Acting General Counsel in the Copyright Office and as Chief of both the Examining and Information and Reference Divisions. Ms. Peters holds an undergraduate degree from Rhode Island College and a law degree from George Washington University. She has served as a consultant on copyright law to the World Intellectual Property Organization and authored "The General Guide to the Copyright Act of 1976."

Welcome, Ms. Peters.

We have written statements from our two witnesses, and I ask unanimous consent that they be made a part of the record. And I ask that each of you summarize your statement in 10 minutes or less. I ask that the subcommittee hold their questions of both witnesses until they have completed their oral presentations.

We'll begin with the testimony of Mr. Lehman.

STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE

Mr. LEHMAN. Thank you. Thank you very much, Mr. Chairman.

With your permission, I'll submit my statement, which I think you have for the record.

First of all, I want to express my personal thanks and the thanks of the administration for your subcommittee's consideration of this issue today. It's really an important issue, and I think it's very encouraging that you're displaying the leadership that you have across the board in intellectual property issues, as the chairman of this subcommittee. Our Nation's creators need an active Congress to deal with the new technologies that are going to be affecting their lives, and to modify and change the laws where required to deal with unfolding circumstances internationally. And so we really appreciate your leadership on this, and it's been a great pleasure to work with you on all of these matters.

I think the best thing that I can do to help the committee this morning, and explain the administration's testimony in the same remarks, is to try to put this issue into a larger context. The net context is that I think we're all committed—certainly, we in the Clinton administration are very committed—to several basic principles. One of them is that creators ought to be able to get paid for what they do and they ought to have the freedom to sell the fruits

of their own labor in the marketplace, both in the United States and in the world. That's really just a fundamental principle of fairness in our country.

The problems that we have had, however, is when you are dealing in the area of intellectual property, these creations are very ephemeral. They don't have a lot of tangibility. And so you really only have the rights that are granted to you in the law.

Historically, in our copyright law, going back to the very beginning in 1798, when we granted copyright rights to people, we granted exclusive rights in the making of copies of a work. Then, later on in the late 19th century we added some other rights, including the rights to control the public performance or display of copyrighted creations, which have enabled America to create and build one of the biggest and most thriving creative communities in the whole world. In addition, this creative community has generally operated in a free market model; there's been very little government regulation. These creative products have been bought and sold in a free market, and it's been very successful.

Over the years, though, there have been a few anomalies in this general principle, and one of the most significant, which has been a source of difficulty to the Congress and has reappeared in Congress after Congress after Congress, is the fact that under section 106(4) of the copyright law—which is the provision that grants the exclusive right in public performance of your work—there's one major category of copyright owners that's left out—the producers of sound recordings. Now, historically, that didn't create a lot of difficulties for people who owned sound recordings because, as a practical matter, the business of making and selling sound recordings and the money generated in that business was centered very largely around the selling of records in record stores. Certainly, these records were performed on the radio, in discotheques, and in other places. And while the people who composed the music in those records, or the lyrics that were on the records, enjoyed a public performance right and the associated right to receive money when the music was played in a discotheque or on the radio, the people that actually produced the record and the performers in the record had no such right. However, they still were able to make a good living and to prosper because they sold physical copies of their records.

Now the point that the administration is most concerned about—and that as a matter of policy, needs correction—is that performers and producers should have exclusive performance rights, even though they're able to make money off the sale of physical copies of records. However, one of the things that we are very concerned about in the administration, as we look forward to the emerging national and global information infrastructure, is that records are going to be delivered to consumers in a much different way in the future. The traditional manner of selling records in the record store isn't going to be the way people get paid in the future electronic marketplace. What you're going to have is basically the use of records in this new information superhighway, and they're going to be delivered to people in different kinds of ways—the present interactive services and subscription services are good examples of that. These services will start to displace the sales of records in the record store.

The main problem is that the right which record owners have, which is the right to control the making and distributing copies as contained in sections 106 (1) and (3) of the copyright law enables them to get paid when their record is sold in the record store. But if the main source of revenue for a record company shifts to interactive services and subscription services, then the transaction may be a public performance and not the making and distribution of a copy. If that happens, then we're going to have a lot of really serious problems, and we're going to see this industry very, very crippled unless we grant this public performance right. Therefore, even though the administration has always believed it fair and just to grant a performance right in sound recordings, now it is more than just simply a philosophical matter; we're getting to the point where it may be a question of survival of this industry, and the well-being of all of the people who work in it.

Finally, I'd like to just say that this, as with so many things we do in intellectual property law today, cannot be looked at as purely an American phenomenon. We market and sell the works of people in your home district in southern California all over the globe. yet one of the difficulties that we historically have faced in this area is that other countries have long recognized the performance right in sound recordings and significant revenues are generated from the exploitation of that right. However, those revenues oftentimes have been denied to American copyright owners because of the fact that we don't have a reciprocal performance right in our law.

So one of the things that the administration is very concerned about is that we're presently trying to develop a new treaty through the World Intellectual Property Organization, called The New Instrument which will solve this problem, and which will, for the first time, provide national treatment to Americans all over the world. To the extent that our law is anomalous or different from what most of the rest of the world has, it makes it much more difficult for us to draft such a treaty and to try to get the other countries to give us our fair share when our products are sold in their markets. I think that has to be a concern here as well.

Let me say in closing, Mr. Chairman, that we really appreciate your efforts on this, and we also appreciate the efforts of the various industries and parties to work with one another. It very well may be that their efforts will solve some of the short-term problems, but I think we have a longer-term problem. I suspect until we get a more comprehensive public performance right of the type that the administration envisions for songwriters and lyricists and dramatists and others, that we're probably going to continue to be coming back to this hearing room for years to come until we finally solve that longer-term problem.

I think we're making incremental progress very largely because of your leadership, but I think we're going to need to stick to it, and our prepared testimony outlines what the long-term picture is for the public performance right.

[The prepared statement of Mr. Lehman follows:]

PREPARED STATEMENT OF BRUCE A. LEHMAN, ASSISTANT SECRETARY OF COMMERCE AND COMMISSIONER OF PATENTS AND TRADEMARKS, PATENT AND TRADEMARK OFFICE, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and Members of the Committee:

I am pleased to appear before you today to testify on a bill that, in certain limited instances, will provide copyright owners of sound recordings an exclusive right to perform their sound recordings publicly by means of digital transmissions.

Of the copyrighted works capable of being performed, sound recordings are the only works which are not granted public performance rights. This deficiency in our system is not justifiable as a matter of policy, and we believe that the time has come to bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of all other works. Therefore, we applaud the efforts of the Chairman and Members to correct this inadequacy and I come before you on behalf of the Administration to support those provisions of H.R. 1506 that establish an exclusive right in the public performance of sound recordings by means of digital transmission.

While we support the provisions of the bill that establish the exclusive right, we are concerned with the numerous provisions that limit this right through carve-outs and exemptions for certain transmissions, and through the imposition of statutory or compulsory licenses on the remaining transmissions. The carve-outs and exemptions in the bill severely limit the scope of the public performance right. Among the transmissions and performances not covered by this bill are:

- all analog transmissions, such as those of traditional radio broadcasters;
- all public performances not involving transmissions, such as DJs playing records in nightclubs;
- all nonsubscription digital transmissions;
- various retransmissions of nonsubscription digital transmissions; and
- transmissions to or within a business establishment, that is confined to the premises of that business establishment, and the premises of other business establishments under common ownership or control.

The Administration believes that a full public performance right is warranted for sound recordings. Further, we are convinced that there is no justification for exemptions from the performance right based on distinctions in the location of the performance -- such as in business establishments -- or the type of transmission -- such as digital versus analog or subscription versus nonsubscription. There is no reason to afford a lower level of protection to one class of creative artists over others. However, while the Administration continues to support a full public performance right, if a distinction must be made based on the type of transmission, we believe that the public performance right should at least cover all digital transmissions.

In addition to the exemptions, the bill also contains a number of statutory license provisions that apply to all remaining public performances under the bill. The Administration finds such compulsory licenses problematic for a number of reasons. First, the Administration believes that many of the justifications put forth in support of such licensing schemes are unfounded. Specifically, concerns voiced by some over potentially abusive practices by the holders of exclusive performance rights do not warrant the imposition of compulsory licensing. Rather, the Administration believes that mechanisms other than compulsory licensing -- such as antitrust laws -- are better suited for combating such practices. In addition, we cannot justify adding new compulsory licenses to our law while the United States continues in its efforts to rid the rest of the world of unjustified compulsory licensing systems, which force U.S. copyright owners to accept statutory license fees rather than fees set in the marketplace for the use of their works abroad.

Policy Justification for a Full Performance Right

I stated that the denial of a public performance right in sound recordings is not justifiable as a matter of policy. However, others want to maintain the historically discriminatory treatment of performers and producers of sound recordings. I would like to analyze these arguments, and present the Administration's position on why a full performance right is warranted.

Some argue that copyright owners of sound recordings should not be granted a public performance right because they already derive indirect benefit from the public performance of their works. Specifically, it is argued that the public performance of a work is "free advertising," that provides the copyright owner of the sound recording with the indirect benefit of increased sales of reproductions of that work.

Therefore, the copyright owner gets benefits indirectly through increased sales of reproductions, they should be denied an exclusive public performance right and its associated royalty payments.

This argument is flawed in two respects. First, with the advent of high quality copying devices that can be used to copy sound recordings from digital broadcasts, those broadcasts may, in fact, replace sales of sound recordings. Thus, H.R. 1506 would only partially compensate copyright owners of sound recordings for such lost sales. Second, simply because the public performance of a sound recording may induce someone to purchase a copy does not justify the denial of the public performance right. Consider owners of copyrights in all other works, who enjoy the full panoply of exclusive rights, and who are not restricted from exercising all of their rights merely because the exercise of one right increases the value of the exercise of another right. For instance:

- The copyright owner of the musical composition embodied in a sound recording is paid both when recordings of the composition are sold and when the composition is publicly performed -- even though the public performance might increase the number of records sold and thus benefit the copyright owner's reproduction and distribution rights.
- Serial excerpts from a novel that are published in a magazine might increase sales of the book, but the magazine nonetheless must obtain permission from the author of the book to publish the excerpts.
- The copyright owner of that novel may also increase his book sales when a motion picture based on the novel is released. However, no one suggests that the motion picture company shouldn't have to pay the copyright owner of the novel for the right to turn it into a movie, just because the movie might indirectly benefit the copyright owner.

The copyright owners of sound recordings should be able to decide for themselves, as do all other copyright owners, if "free advertising" is sufficient compensation for the use of their works. If the arguments regarding the benefit copyright owners derive from the public performance of their sound recordings are correct, the users should be able to negotiate a reasonable license fee -- perhaps no fee at all in some circumstances.

Some opponents of this public performance right argue that there is a finite limit to the "public performance royalties" that can be paid by those who publicly perform copyrighted works. As a sound recording embodies two distinct copyrighted works -- the musical composition and the sound recording -- this argument posits that the performance royalties currently enjoyed by the copyright owners of musical compositions will be reduced if their licensees must additionally pay royalties to the copyright owners of sound recordings. Although the Administration does not accept this static "royalty pie" argument as justification for denying public performance rights to sound recordings, it does highlight a marketplace issue we believe should be addressed. That is, that the Administration believes section 115 of the Copyright Act would no longer serve its intended purpose if a full performance right were granted.

Section 115 of the Copyright Act requires the copyright owner of a musical composition to allow record companies to make and distribute records utilizing that composition, and, in the absence of a negotiated fee, fixes the amount of money the record company will pay the copyright owner for that privilege. By establishing a full performance right, composers, music publishers, and record companies can and should engage in price competition and free negotiation in the marketplace. The

Administration believes that eliminating the compulsory mechanical license, and granting a full public performance right in sound recordings, taken together, will go a long way toward regularizing the treatment of sound recordings and musical compositions under the copyright laws.

These two arguments against granting a public performance right mask the domestic and international consequences of our lack of a public performance right. By granting a full performance right in sound recordings, the United States will treat the creators of these culturally and economically important copyrighted works the same as all other works capable of being performed. Such a performance right will provide increased incentive for creators of sound recordings to produce and disseminate more works, thereby expanding consumer choice and adding to the U.S. economy.

A full performance right not only puts copyright owners of sound recordings on equal footing with other copyright owners domestically, it also removes a serious international barrier to foreign royalties. Presently, public performance rights are granted in many foreign markets, however, some of these countries condition the availability of these royalties on reciprocity. Due to the lack of reciprocity in the United States, U.S. performers and their record companies are denied their fair share of foreign royalty pools for the public performance of U.S. sound recordings in some countries. While the granting of a public performance right does not guarantee access to these foreign royalties, it removes a tremendous stumbling block in our efforts to negotiate in this area.

The Administration's Position on Statutory Licensing

I stated that some of the justifications for the statutory licenses in H.R. 1506 are unfounded. In particular, I noted the concern expressed by some that by granting an exclusive performance right in sound recordings, performers or their recording companies may unreasonably limit the availability of licenses to perform their sound recordings. The Administration does not share this concern. It is difficult to imagine why performers or their recording companies would seek to limit the performances of their sound recordings. Indeed, if the performer is to derive the indirect benefit of increased sales of reproductions, it is clearly in the performer's interest to have their works performed for the buying public to hear. Generally speaking, it is unlikely that a performer would refuse a license when performance royalties as well as increased public exposure to the performance is in his or her interest, and the marketplace will determine the fair value for licensing the right. However, if abusive practices are encountered, there is sufficient protection through the antitrust laws to alleviate such isolated occurrences.

Specific Provisions of Concern

The proposed sections 114(e) and 114(h), however, have raised some concerns from an antitrust perspective. The Administration believes that, as written, these provisions could weaken the ability of antitrust law to address potentially anticompetitive behavior by performance rights holders. Therefore, the Administration suggests that section 114(e) be deleted to remove the authority of copyright owners and entities performing sound recordings to designate common agents to negotiate, agree to, pay or receive royalty payments. Further, we suggest that section 114(h) be strengthened to prevent rights holders from licensing to their

affiliated programmers in a way that would artificially boost licensing rates to the industry as a whole.

While the Administration supports the provisions of H.R. 1506 establishing a public performance right, we are troubled by the numerous carve-outs, exemptions, and statutory licenses contained in the bill. Specifically, the bill fails to provide full exclusivity for "interactive transmissions" (i.e., those in which a subscriber or other end user specifies when a particular sound recording should be transmitted) by subjecting such transmissions to statutory licensing under the proposed amendment to section 114(d)(2) of the Copyright Act. This is particularly troublesome because interactive digital transmissions are the most likely to result in the making of reproductions by a subscriber -- i.e., "downloading" a copy. Therefore, by subjecting such transmissions to statutory licenses, the price of a sound recording will be established by operation of law versus the present operation of the marketplace.

In addition, the Administration finds unnecessary the statutory licensing requirements for subscription transmissions found in the proposed amendment to section 114(f) of the Copyright Act, as well as the statutorily defined remuneration percentages of the proposed amendment to section 114(g). We recognize the concern expressed by some that owners of the exclusive performance right in sound recordings could have the potential to exercise their right to the detriment of owners of the rights in the musical composition -- particularly in vertically integrated business arrangements. Absent evidence of anticompetitive practices, however, the Administration believes that the licensing of this right should be left to the marketplace and sees no reason to create a new compulsory license. At

present, we are not convinced this further limitation on an already very limited public performance right is necessary.

Other points of concern in H.R. 1506 include the provisions establishing a new section 115(3)(B)(ii) & (iii). These provisions categorize digital phonorecord deliveries as either identifiable and non-identifiable, and subsequently establish a licensing procedure under section 115(c)(4) based on these categories. The Administration believes that such a complex compulsory licensing scheme is unnecessary, and potentially unworkable based on the use of identifiable and non-identifiable categories. Also of concern is the breadth of the exemption of section 114(d)(1)((B)(iii) with respect to business establishments "under common ownership or control." Unlike an exemption for a single business, this provision appears to exempt, for example, entire shopping malls, office buildings, and other commonly controlled enterprises.

Conclusion

The Administration continues to support a full public performance right, however, we recognize that a full performance right may be unattainable at this time. While the limited scope of the right granted in H.R. 1506 is all that may be possible at present, we are troubled by the bill's exemptions, and the imposition of compulsory licenses on much of the remainder of the public performance right.

I would be pleased to answer any questions Members of the Committee may have.

Mr. MOORHEAD. Thank you.
Ms. Peters.

STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS, ACCOMPANIED BY MARILYN KRETSINGER, ACTING GENERAL COUNSEL, COPYRIGHT OFFICE

Ms. PETERS. As you know, I don't have a voice, and so Marilyn Kretsinger will give the statement.

Ms. KRETSINGER. Thank you.

I am Marilyn Kretsinger, the Acting General Counsel of the Copyright Office. Thank you, Mr. Chairman and members of the subcommittee, for the opportunity to appear before you today to testify on the important issue of public performance rights for sound recordings. I will be reading the Register's oral remarks that she prepared, and we did submit a longer written statement that I hope will be part of the record.

I would like to echo the words of the Commissioner, Mr. Chairman, and congratulate you on the leadership role that you have taken in getting this very important right for American rightsholders back on track. You and the members of your subcommittee have been very diligent in seeing that the various parties continue to work to forge consensus, and it now seems possible that the United States will at least have a public performance right for digital transmissions to subscription services.

Sound recordings are the only category of work capable of being performed that are denied the public performance right under existing U.S. copyright law. They should be afforded the same level of protection as all other work. Recognition of this right is long overdue. As you know, the Copyright Office, through most of the 20th century, has supported the principle behind this right. Advances in technology and the advent of the international superhighway make it even more critical for performers and producers of sound recordings to be given a public performance right. As we noted in our 1991 report for Congress, Copyright Implications of Digital Audio Transmission Services "* * * as technology permits more copying and performing of American music, a performance right [is] even more essential to compensate American recording artists and record producers fairly." Moreover, with digital technology, the distinctions between different types of work may be obliterated. Thus, with the growth of the Internet, the emergence of online systems and bulletin boards, as well as the growth of digital audio services on cable, there is an urgency to enact this legislation. Simple justice cries out for the creation of this right which is entirely consonant with the basic principles of copyright law.

I am pleased that the parties have been able to work out the issue of the period of exclusivity and the conditions of such exclusivity as well as refine the conditions for the statutory license. I'm also pleased that the unresolved issue concerning the digital delivery of phonorecords and the application of section 115 to digital transmissions has been resolved. The result is a fairer and more balanced bill.

At this point we desperately need a public performance right for digital transmissions and sound recordings. I wish the bill were broader and that all digital transmissions of public performances were covered. However, what we have at stake right now, especially in the NII and GII context, is the very viability of the music and recording industry. The bill as modified to reflect the consensus agreements will give the music and recording industries the protection they need.

I am, however, unsure about the international implications of this legislation. Hopefully, it will be enough to keep the international discussions on track. I fear, however, that it may not be enough to forge the basis of an international agreement and result in royalties from foreign countries where the test is material reciprocity and not national treatment.

The Copyright Office strongly supports finally closing the gap in our law in sound recording public performance rights and recognizes that a pragmatic solution is the only viable option. Therefore, I applaud you and your committee for your efforts to finally enact the public performance right for sound recording.

I would be happy to answer any questions. Obviously, Ms. Peters is not going to be able to answer them today, but I will try to answer any questions that you might have. If you have questions, as you noted in your statement, that are on this fast-changing consensus agreement, we would appreciate making our comments after we see it in writing.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS, REGISTER OF COPYRIGHTS AND ASSOCIATE LIBRARIAN FOR COPYRIGHT SERVICES, LIBRARY OF CONGRESS

Chairman Moorhead joined by Chairman Hyde and Representatives Conyers and Gekas introduced H.R. 1506 on April 7, 1995; legislation to provide a sound recording public performance right has also been introduced in the Senate. The Copyright Office has supported the principle behind H.R. 1506 for many years.

As Congressman Moorhead aptly noted when H.R. 2576 was introduced in the 103rd Congress:

> this legislation is an important step in ensuring that U.S. Copyright law keeps pace with advancing technologies and places the United States in a leadership position as this issue is considered in the international arena. The rapid development of digital delivery services and the international trade considerations for this matter have changed the parameters of the debate and demand a speedy resolution.

My statement begins with a discussion of efforts to adopt a performance right prior to H.R. 1506 and a brief analysis of salient features of H.R. 1506, indicating where the Office has questions or comments. It also contains a summary of the history behind this bill and the reasons the United States should recognize performance rights in sound recordings. Originally my statement contained a more detailed analysis of this bill. The parties, however, have continued to meet and a consensus which in some respects is significantly different from the language before us is in sight.

I. THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT

A. ACTIVITY DURING THE 103RD CONGRESS

1. Legislation Introduced in the House and Senate.

Representatives Hughes and Berman introduced H.R. 2576 on July 1, 1993; this bill provided for "an exclusive right to perform sound recordings publicly by means of digital transmissions." On August 6, 1993, Senators Hatch and Feinstein introduced S. 1421. This bill, like H.R. 2576 broadened the scope of exclusive rights in sound recordings [1] by amending 17 U.S.C. §106 (exclusive rights in copyrighted works) to include sound recordings performed publicly by means of a digital transmission, including radio and television broadcasts, cable television, and satellite transmissions.

The Senate bill addressed some concerns [2] raised by existing rights holders by adding a section that stated licensing fees payable for the public performance of sound recordings under section 106 "shall not be taken into account in any administrative, judicial or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works." [3] In her floor statement, Senator Feinstein noted that this provision was added to let governmental and judicial agencies know that the legislation was not intended to reduce existing royalties and that in the course of hearings there would be a determination whether "additional statutory protection for current

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[1] A sound recording typically embodies two copyrightable works, the musical work and a sound recording. Music copyright owners presently enjoy an exclusive public performance right, although this right must be exercised in a nonexclusive basis; music performances are licensed pursuant to consent decrees. Moreover, rates for licensing musical performances are subject to judicial review.

[2] These concerns related to what is sometimes referred to as the "pie" theory: users might seek to reduce music performance fees to songwriters and publishers because a new category of rightholders would be entitled to claim royalties from sound recording performance.

[3] S. 1421 at SEC. 3.

rights holders" would be required. [4] Congressman Moorhead recognized in his remarks that H.R. 2576 would "undergo some change as it works its way through the legislative process" and I encourage the affected parties to work with the subcommittee and each other to reach a solution."[5] Pursuant to that advice, the parties held many negotiations.

2. Consensus Agreement.

Although there was a great deal of debate on the two bills, neither the Senate nor the House held hearings. [6] However, in an effort to forge some consensus between interested parties, Chairman Hughes hosted "roundtable" discussions and the parties continued to meet on their own to resolve their differences. Last spring music industry organizations representing songwriters, performers, unions, performing rights societies, music publishers, and record companies announced they had reached an agreement on legislation that would create a digital public performance right in sound recordings. The May 11, 1994, agreement known as the Consensus Agreement was endorsed by the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), the American Federation of Musicians (AFM), the American Federation of Television and Recording Artists (AFTRA), the National Music Publishers Association (NMPA), and the Recording Industry Association of America (RIAA). Conspicuously missing, but not surprisingly so, was the endorsement of the National Association of Broadcasters (NAB).

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[4] 139 Cong. Rec. S10900 (daily ed. Aug. 6, 1993) (statement of Sen. Feinstein).

[5] Statement of Congressman Moorhead, E1731.

[6] Oversight hearings had been held in the House earlier concerning these rights, Performers and Performance Rights in Sound Recordings: Oversight Hearings before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, 103rd Congress, 1st Sess. (1993).

The Consensus Agreement did not provide as broad a public performance right for sound recordings as S. 1421 and H.R. 2576. Instead, it focused generally on creating a compensation system for performance of sound recordings that are distributed by commercial subscription audio services. An exemption was included for services such as Muzak. The May 11 Consensus Agreement also included a so-called window of exclusivity. This window consisted of an exclusive right to authorize digital performance by subscription services three months from the first public performance or four months from the first sale of a recording, whichever came first. This provision was aimed at giving sound recording owners lead time to authorize or prohibit subscription transmission on new recordings.[7] The May 11 agreement provided a statutory license for digital subscription transmissions complying with the sound recording performance complement provision. This complement restricted subscription transmission to two consecutive selections from the same phonorecord, and three consecutive selections by the same featured artist or from the same set of works marketed together as a unit.

The Consensus Agreement also addressed and revised the application of the mechanical reproduction compulsory license of §115 of the Copyright Act, and gave the Librarian of Congress substantial responsibility in that area. Mechanical reproduction rights of writers and publishers would apply when phonorecords were delivered to consumers by way of digital transmissions. The mechanical royalty rates would vary depending on whether or not it was possible to identify the particular work being copied. The two categories of works were "trackable," i.e., identifiable deliveries, for which information would be available as to which works were being copied, and "nontrackable" deliveries, those deliveries for which copying can reasonably be expected but identification of the works copied would be impossible or difficult. The Consensus Agreement rates for identifiable deliveries would be the mechanical compulsory license rate. The rates for nontrackable deliveries, where the making of phonorecords was

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[7] The significance of this provision is seen when the digital transmission represents a lost sale because interested consumers record a digital transmission rather than purchase it.

facilitated without making an effort to determine which works were being copied, were to be set by voluntary negotiations. If negotiations were unsuccessful, rates would be subject to the binding determination of copyright arbitration royalty panels, convened by the Librarian of Congress.

3. Amendment Based on the May 11, 1994, Consensus Agreement.

Following that agreement, Chairman Hughes circulated several draft substitute amendments to H.R. 2576 and scheduled a markup on a draft substitute bill on June 28, 1994. [8] That draft legislation proposed a digital public performance right in sound recordings that exempted over-the-air broadcasters engaging in digital transmissions. Digital delivery was defined as occurring if "the person entitled to the compulsory license has authorized a digital transmission of a sound recording that results in the identifiable making by the transmission recipient of a phonorecord of that sound recording." [9] The performance right would apply to broadcasters who offered subscription services. The draft provided either a statutory license or a voluntary agreement. Royalty rates for statutory licenses would either be negotiated between copyright owners of sound recordings and entities transmitting sound recordings, or would be defined through arbitration. The statutory licensing fees would be paid to copyright owners, as well as featured recording artists, and nonfeatured musicians and vocalists, according to percentages prescribed in the bill.

The Librarian of Congress was charged with responsibilities similar to those presently existing under the Copyright Royalty Tribunal Reform Act. If negotiating parties could not reach agreement on licensing rates and terms, the Librarian would convene a Copyright Arbitration Royalty Panel (CARP) to determine rates and terms. Results would be binding on all parties that had not entered into a voluntary licensing agreement. CARP proceedings would occur every five years, or whenever a

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[8] All references are to the draft amendment circulated on June 28, 1994.

[9] Sec. 4(2)(B), draft amendment, June 28, 1994.

copyright owner of a sound recording filed a petition identifying a new type of digital transmission service. Fees paid to copyright owners of musical works for public performances of their works were not to be adversely affected.

Sometime after the circulation of this proposed House substitute amendment, some of the parties began to back away from the legislation being circulated. Moreover, Chairman Hughes was not interested in a bill that totally excluded broadcasters. Others were concerned about the issuance of the Green Paper [10] which called for a performance right for sound recordings but raised again the question of whether all digital transmissions were public performances.

4. S. 227 in the 104th Congress

Senators Hatch and Feinstein introduced S. 227 on January 13, 1995. Although S. 227 creates a public performance right for digital transmissions of sound recordings, it is much more limited in scope than their earlier bill, S. 1421. Only subscription services come under this bill; broadcasters are completely exempt. The bill subjects certain transmissions to a statutory license, the rates and terms of which will be decided by either voluntary agreements or compulsory arbitration before a CARP.

While S.227 reflects some of the points reached in the May 11 Consensus Agreement, it is not identical. Nor does the bill contain everything that was in the draft amendment circulated by Chairman Hughes; it does not contain an exclusivity window, and its compulsory license restrictions create a broader exclusive right.

As introduced S. 227 creates a compulsory license for a "subscription transmission," but does not apply to interactive services or where the subscription transmission exceeds the "performance

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[10] Department of Commerce, Patent and Trademark Office, Working Group on Intellectual Property Rights of the White House Information Infrastructure Task Force. Preliminary Draft of the Report of the Working Group on Intellectual Property and the National Information Infrastructure (1994).

complement." Under this bill, the "performance complement" is the transmission of no more than two selections each day of sound recordings embodied in any one phonorecord distributed in the United States or three selections each day featuring the same recording artist or embodied in a set or compilation sold as one unit. It also contains savings clause language that states that S. 227 does not eliminate or limit any music copyright owner's existing rights or remedies. Finally, S. 227 calls for licensing of independent subscription services on equal terms with those owned, controlled or managed by sound recording rightsholders.

5. Ongoing Negotiations

The parties have now reached a new consensus, and are continuing to refine their agreement. They have agreed on several points, including a provision that would grant a record producer a one year exclusive right to license its works for use on interactive services. If the record producer is a small company, holding the copyright to 1,000 or fewer sound recordings, the exclusive license could last for two years. These grants could not be renewed for a period of thirteen months after the expiration of the original license. In order to forestall concerns that a large record company might become a "gatekeeper" over the use of the music, the new compromise sets minimum standards for the licensing of sound recordings which should promote widespread dissemination of the recordings. In addition, the interactive services can only receive an exclusive license if the music being transmitted is licensed for use by the various performing rights societies. Finally, to address the concerns of subscription services, the compromise sets a new sound recording performance complement that also allows for accidental transmission in excess of the complement number. The Consensus Agreement will be reflected in the markup of S. 227 scheduled for June 29.

B. ANALYSIS OF H.R. 1506, THE DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS ACT OF 1995

Chairman Moorhead, joined by Chairman Hyde and Representatives Conyers and Gekas, [11] introduced H.R. 1506, the Digital Performance Right in Sound Recordings Act of 1995, on April 7, 1995. Like S. 227, introduced by Senator Hatch on January 13, 1995, this bill creates a new public performance right in digital transmissions of sound recordings. The Moorhead bill, however, is not simply a companion to the Hatch bill; instead, it basically introduces the terms of the "consensus," the result of an earlier agreement the parties struck, that is referred to as the May 11 Consensus Agreement.

H.R. 1506, in essence, gives the Consensus Agreement its "day in Congress." As noted by Chairman Moorhead, H.R. 1506 differs from S. 227 in a number of respects. Where parties differ, H.R. 1506 uses the consensus language in order to provide a mechanism for resolution.

H.R. 1506 has narrowed the debate to a few unresolved issues. First is the matter of the scope of the performance right. The Senate bill resulted in a near-exclusive public performance right for a non-broadcast, subscription digital transmission of a sound recording by employing very restrictive requirements for the statutory license. It would be difficult for noninteractive subscription services to qualify for a statutory license. Interactive subscription services would be subject to an exclusive right. The House bill broadens the statutory license.

Copyright owners of nondramatic music recorded on phonorecords favor H.R. 1506's broadening of the statutory license limitations because they fear sound recording rightsholders will become "gatekeepers" over the performance of the underlying music. Music copyright owners assert that sound recording rightsholders may use their exclusive right to limit the performance of their music.

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[11] Since its introduction, Representative Bono has become a cosponsor of H.R. 1506.

The second issue is also between sound recording copyright owners and music copyright owners; it concerns mechanical royalties on phonorecords reproduced from digital transmissions. S. 227 would only authorize royalties for specifically identified reproductions, while H.R. 1506 provides a compulsory license to avoid discouraging the transmitter from providing copyright management information and technological measures for identifying when reproductions are made.

As the Subcommittee on Courts and Intellectual Property continues to seek an acceptable consensus among interested parties and effectuate good copyright policy, the Copyright Office offers the following brief summary and comment on the provisions of H.R. 1506.

SECTION 2 – EXCLUSIVE RIGHTS IN COPYRIGHTED WORKS

1. Summary and Overview

As do other sound recording performance rights bills — H.R. 2576, S. 1421, the consensus bill, and S. 227 — H.R. 1506 establishes a public performance right for sound recordings by adding a new paragraph 6 to §106 (exclusive rights in copyrighted works). This new section grants owners of sound recordings the right to perform their works publicly by means of a digital transmission.

2. Comment

At first glance, the performance right appears to be a broad one covering at least all digital transmissions to the public. However H.R. 1506, like earlier bills, establishes extensive limitations on the enjoyment of this right in later sections.

SECTION 3 – SCOPE OF EXCLUSIVE RIGHTS IN SOUND RECORDINGS

1. Summary

Section 3 adds a reference to §106(6), to §114 (exclusive rights in sound recordings), clarifies the extent of the reproduction rights, and deletes the reference after "copies" to "motion pictures and other audiovisual works" in subsection (b). This section also deletes the current subsection (d), of section 114 and replaces it with new subsections (d), (e), (f), (g), (h), (i), and (j).

The new subsection (d) contains three paragraphs. The first paragraph delineates exempt transmissions, those that create no liability despite the proposed changes in 17 U.S.C. §106; the second paragraph sets out limitations on subscription transmissions, and the third paragraph refers to rights that are not otherwise limited.

Subsection 114(d)(1) exempts from copyright liability certain digital transmissions that are not part of an interactive service. An interactive service is defined later in the bill as "one that enables a member of the public to receive, on request, a transmission of a particular sound recording chosen by or on behalf of the recipient." Subsection 114(d)(1)(A) exempts public performance of a sound recording by a nonsubscription transmission (such as a digital radio or television broadcast). Subsection (d)(1)(B) sets out further limitations or exemptions. Thus, H.R. 1506 like S. 227 creates certain classes of exempted activities.

Section 114(d)(2) creates a new statutory license for subscription services . In order to qualify for this statutory license, the digital performance must meet certain criteria. First, unless authorized by the copyright owner, three months must have expired since the first public performance by means of a digital transmission in the United States or four months from the first sale to the public in the United States of the digital recording, whichever comes first. Second, the purpose of the transmission must not be to enable the recipient to reproduce the sound recording. Third, the transmission must not exceed the

specified sound recording performance complement. Fourth, except as provided in § 1002(e), the transmission must be accompanied by any encoded information identifying the sound recording or underlying work.

Section 114(d)(3) asserts that this legislation does not limit or impair any existing rights. This is an attempt to preserve the status quo for existing rightholders. The concerns are the exclusive right to perform a musical work under §106(4), the exclusive right to reproduce and distribute a sound recording of the musical work embodied therein under §§106(1), and the exclusive right to distribute under 106(3), which includes by means of a digital phonorecord delivery as defined in the revised §115.

2. Comment

By restoring the exclusivity window and the requirement of consecutive performance found in the consensus bill, H.R. 1506 broadens the number of digital transmissions that could be subject to the statutory license. The music public performing right is (and must be) exercised non–exclusively. The writers and publishers of nondramatic musical works argue that giving an exclusive sound recording performance right places the sound recording rightsholder in a position to become the gatekeeper of all performances, not only of a sound recording but also of the underlying music recorded on the phonorecord. They assert that this creates an unfair advantage for the sound recording rightsholders. On the other hand, sound recording rightsholders assert their basic need for an exclusive right for sound recording performances.

Since exclusivity questions were a key feature of the May 11 Consensus Agreement, the introduction of the two approaches to statutory licensing found in H.R. 1506 and S. 227 puts resolution of the matter squarely before Congress. The question before Congress is whether the scope of the statutory license should incorporate interactive services, a broad performance complement, and a three

to four-month window of exclusivity or whether the performance rights should be made more exclusive by eliminating these features.

3. Subsection (f) Licenses for Subscription Transmissions.

a. **Summary.** This subsection creates a statutory license for nonexempt digital subscription transmissions. It first sets up in (f)(1) the possibility of voluntary negotiation by requiring the Librarian of Congress no later than 30 days after enactment of the bill to publish a notice in the *Federal Register* initiating voluntary negotiation proceedings among parties to establish terms and rates of royalty payments for activities subject to the new statutory license for the period from January 1, 1996, until December 31, 2000.

If the parties have not reached a negotiated agreement by then, (f)(2) takes over and the procedures come under a copyright arbitration royalty panel (CARP). The Librarian must convene a CARP to determine and publish rates and terms. This proceeding will be under Chapter 8 and will be binding on any party not subject to a voluntary agreement.

Subsection (f)(2) directs the Librarian to establish requirements by which copyright owners receive reasonable notice of the use of their sound recordings that are subject to statutory licensing. This subsection also directs the Librarian to establish requirements under which entities performing sound recordings must keep records of their performances. Subsection (f)(3) directs that a voluntary license agreement shall take precedence over the determination of a CARP on the same matter.

Convocation of a CARP to set terms and rates is not a one-time occurrence. In subsection (f)(4), the bill directs the Librarian to adopt regulations which require convening a CARP:

> (A) within a six-month period beginning on the date on which a petition is filed by any copyright owners of sound recordings or any entities performing sound recordings affected by this section indicating that a new type of digital transmission

service on which sound recordings are performed is or is about to become operational, and

(B) between June 30 and December 31, 2000, and at five-year intervals thereafter.

Finally, (f)(5) states that a person may perform a sound recording by means of a subscription transmission that comes under this subsection without infringing the exclusive right of copyright owner of the sound recording if that person complies with the notice requirement set by the Register and pays the appropriate royalties.

b. Comment. Suggestions for governing standards would be helpful. We presume that the usage record requirements of this section could be fulfilled by a subscription transmitter from its normal business records rather than requiring additional, more detailed records. We envision a system where listings, cue sheets or "logs," of transmitted performances, would be made available to copyright owners to enable them to compile performance information similar to that gathered on behalf of composers and authors under section 118. However, clarification on this point would be helpful.

4. Subsection (g) Proceeds from Licensing of Subscription Transmissions.

a. Summary. Paragraph 1 of subsection (g) directs payments to performers from all sound recording performance licenses. A rightsholder must allocate fees for nonstatutory licenses according to the terms of its contracts with performers.

Paragraph (2) of subsection (g) sets out a formula for statutory royalties to be divided equally between sound recording owners and recording artists. Nonfeatured musicians and vocalists each receive 2 1/2 percent of receipts. In both cases, funds are deposited in escrow accounts managed by a jointly

chosen independent administrator. In addition, featured artists receive 45% of receipts, allocated on a per sound recording basis.

The bill does not envision royalty distribution by a CARP; royalties are paid directly to the copyright owners of the performed sound recordings, who must then set aside a portion for artists featured on the recordings. The responsibilities of the Librarian of Congress are confined to adopting notice requirements, establishing a voluntary negotiation period, convening CARPs every five years to set "terms and rates," and convening CARPs to address new types of digital transmission services.

b. Comment. Like the consensus bill, H.R. 1506 goes a step further than the Senate bill in delineating performers' rights to all sound recording performance royalties, whether statutory or nonstatutory. Under existing law and in the absence of the work made for hire doctrine, record companies owners and performers are joint authors of the sound recording. Recognition of the contribution of recording artists is important, and we are highly supportive of this addition.

Based on our experience with Chapter 10 which has a similar provision, we are concerned about nonfeatured musicians and vocalists who are not members of the musicians' or vocalists' unions. How will they be identified and paid by the independent administrators? Do they file claims with the independent administrator? If not, then what alternative method of obtaining royalties do they have?

All parties are agreed on subsection (g)(2) and the allocation appears fair. Although no changes need to be made in the language of the bill, an explanation in the legislative history of how non-union members may claim royalties in the nonfeatured administration fund would be helpful.

5. Subsection (h) Licensing to Affiliates.

a. **Summary.** This subsection addresses the issue of vertical integration among companies involved in both the music and the subscription service business. It is designed to assure that products are available to similar types of subscription services at fair prices and terms.

Once a copyright owner licenses the right to publicly perform a sound recording through digital technology to an entity which it controls or manages, either directly or indirectly, the copyright owner must offer the licensed sound recording to other similarly situated entities that also want to transmit the sound recording digitally to the public. The license offered to the competitive entities, however, may differ in price, duration and terms to insure credit worthiness and to accommodate differences in geographic region, numbers of subscribers or other relevant factors.

b. **Comment.** Although we are pleased to see a nondiscrimination provision in H.R. 1506, we have some questions about its operation. What will be the effect of nonperformance of subsection (h)? What type of remedy is available? What type of action may be brought?

SECTION 4: SCOPE OF EXCLUSIVE RIGHTS IN NONDRAMATIC MUSICAL WORKS: COMPULSORY LICENSE FOR MAKING AND DISTRIBUTING PHONORECORDS

1. Summary

Section 4 of H.R. 1506 governs conditions under which mechanical royalties are to be paid when nondramatic music is reproduced via a "digital phonorecord delivery." It amends 17 U.S.C. § 115,

as all other recent bills did; it addresses the rights of writers and publishers by expanding the compulsory license for making and distributing phonorecords to accommodate those delivered by digital transmission. Section 4 first amends the existing compulsory license to permit record producers to distribute phonorecords digitally by adding "digital phonorecord delivery" and other clarifying language. It then adds a new paragraph (3) to §115 to permit the record producer to authorize others to make and distribute digital phonorecords. Copyright owners of underlying music are compensated for digital phonorecord deliveries under the terms of this compulsory license. The recent bills agree in these three respects, but H.R. 1506's section 115(c)(3) and (4) follow and refine the approach of the consensus bill. S. 227 would compensate music copyright owners for only a "specifically identified reproduction." H.R. 1506 operates on the premise that copyright owners of music delivered to consumers as reproductions will also receive mechanical royalties for those reproductions regardless of whether the sound recording that is transmitted as a delivery is identifiable. The Librarian of Congress is to describe the types of identifiable and nonidentifiable deliveries and to take into account efforts "to avoid or evade the reasonable use of available techniques to identify" such deliveries. Rates and terms are to be set by voluntary negotiations; if not, a CARP will make the decisions.

2. **Comment**

S. 227 mandates compensation only for a digital phonorecord delivery that is a "specifically identified reproduction by or for any transmission recipient." The H.R. 1506 definition of digital phonorecord delivery is broader than the S. 227 definition, extending to both identifiable deliveries and those that are not identifiable but nevertheless calculated to result in a reproduction. H.R. 1506 provides for mechanical royalties to writers and publishers in circumstances where because of the nature or characteristics of the transmission service, copying will result. Unless there was a mandate for

appropriate payments to writers and publishers in these cases, use of copyright management information and technological measures for monitoring and identifying when a reproduction has been made would be discouraged. Therefore, where a digital transmission service offers equipment that facilitates copying, the service provider and record company could make arrangements that would facilitate identification of the specific work being transmitted for reproduction. Without facilitating identification by those who have means to do so, writers and publishers are otherwise unable to identify the phonorecords delivered by transmission. Moreover, those who authorize copying by transmission have no inherent incentive to identify works on which they must pay royalties.

In this case, in exchange for a new right to authorize digital phonorecord delivery, compulsory licensees may appropriately be charged with safeguarding music owners' rights. If record producers must risk having sales of phonorecords displaced by digital delivery direct to the consumer's home from a "celestial jukebox," those whose livelihoods depend on mechanical royalties on those phonorecords face the same risk. Writers and publishers believe that it is not sufficient to leave unsettled the matter of who is obliged to pass on copyright management information so that the appropriate royalty can be paid.

The Copyright Office supports Congress' taking definite steps in this area.

SECTION 6: EFFECTIVE DATE

1. Summary

January 1, 1996 is the effective date of H.R. 1506, except for subsections 114(e) and (f), which take effect upon enactment. Subsection (d) also allows sound recording rightsholders and subscription services to begin voluntary negotiations under §114 immediately or as soon as the Librarian publishes a notice in the Federal Register which he is directed to do no later than 30 days after enactment of the bill.

2. **Comment**

Since H.R. 1506 provides for a similar negotiating procedure in §115, we suggest that §§115(c)(4)(A) and (B) should also be made effective on the date of enactment.

II. HISTORICAL BACKGROUND

A. CONSTITUTIONAL GRANT

The United States Constitution grants Congress the power "to promote the Progress of Science and the useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." [12] The work of an author must be a "writing" in order to be eligible for copyright protection.

Section 4 of the 1909 Copyright Act stated that "all the writings of an author" were subject to copyright. But sound recordings were not treated as "writings" in the early part of this century, largely based on the decision in White-Smith Co. v. Apollo Co. [13] The court's narrow reading of what constituted a "writing" underlay the approach legislators took toward bills proposed between 1909 and 1971 that might have defined recorded aural works as the writings of authors. [14] Some courts noted that

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[12] U.S. Const. art I, §8, cl. 8.

[13] 209 U.S. 1 (1908). The Court held that since the perforations on a piano roll were not visually intelligible, the recording was not a copy of the underlying music, and the author of the composition had no control over the use of such a recording.

[14] See, Ringer, "The Unauthorized Duplication of Sound Recordings," Study No. 26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary, U.S. Senate, 86th Cong., 2d Sess. (Comm. Print 1961).

Attempts to provide extended protection for sound recordings occurred frequently in the form of proposed legislation. See discussion of legislative history at 28 et seq. "Performance Rights in Sound Recordings," (continued...)

the contributions of performers rose to the level of a writing, but felt an amendment to the 1909 Copyright Act was necessary. [15] In the 1970s there were a number of cases dealing with unauthorized duplication of pre–1972 sound recordings; these cases either assumed that the performers' contributions were protectable property, or simply stated the principle with little discussion. [16]

In 1971 Congress recognized sound recordings as "writings" deserving copyright protection. Copyright protection was granted, but owners of copyright in sound recordings were not granted the full array of exclusive rights afforded other authors; the controversial public performance right was withheld.[17]

B. LEGISLATIVE HISTORY

Many copyright reform bills have been introduced to provide extension of a public performance right to copyright owners of sound recordings. Opponents argued that a performance royalty would be unconstitutional, and would represent a serious financial burden to users. Proponents felt that such a royalty would be constitutional, that users had the ability to pay, and that performers and record companies deserved compensation for the use of their creative efforts for the commercial benefit of others.

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[14](...continued)
Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Comm. on the Judiciary, 95th Cong., 2d Sess. (1978). (Comm. Print No. 15) [Hereinafter 1978 Performance Rights Report].

(See, e.g., in 1936 with H.R. 11420, and then again in 1937 with S. 2440. Bills were also submitted in 1939, 1943, 1947, 1951, 1967, 1976, 1979, and 1982.)

[15] See, e.g., Waring v. WDAS Broadcasting Station, Inc., 327 Pa. 433 (1937); RCA Manufacturing Co. v. Whiteman, 114 F.2d 86 (2d Cir.), cert. denied, 311 US 712 (1940, and Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).

[16] See e.g., United Artists Records, Inc. v. Eastern Tape Corp., 19 NC App. 207 (1973), and Mercury Records Productions, Inc. v. Economic Consultants, Inc., 64 Wis. 2d 163 (1974).

[17] Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971).

The legislative history of the 1971 Act shows that protection was mainly intended to prohibit unauthorized copying, known worldwide as piracy of phonograms. [18] The Act was passed to create uniform federal protection against unauthorized duplication of sound recordings rather than continue to fight piracy in fifty state courts. [19] Subsequent U.S. court decisions affirmed the constitutionality of the 1971 Act. [20] Passage of the Act also strengthened efforts to smooth U.S. entry into the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms.

Passage of the Sound Recording Act did not quiet the controversy over the extent of protection that sound recordings deserve. The Recording Industry Association of America (RIAA) continued to lobby for increased rights, but others, including broadcasters represented by the National Association of Broadcasters (NAB), continued to oppose performance rights. Representatives of performers, manufacturers, publishers, jukebox interests, and motion picture–interests were also vocal. The concerned parties emphasized the adverse economic effects passage, or nonpassage, of further legislation might cause them.

Additional legislation was eventually overshadowed by concern about passage of a comprehensive copyright revision bill. Congress was troubled by unsuccessful attempts to reach

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[18] Legislative reports on the Act made clear that it was directed only at tape piracy and did not "encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes." H.R. Rep. No. 487, 92nd Cong., 1st Sess. 3 (1971). Piracy was addressed by the United States on an international scope by its ratification of the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms in 1971.

[19] H.R. Rep. No. 487, 92nd Cong., 1st Sess. 2 (1971).

[20] See Shaab v. Kleindienst, 345 F.Supp. 589 (D.D.C. 1972)(sound recordings qualify as writings of an author that may be copyrighted); Goldstein v. California, 412 U.S. 546 (1973)(the term "writing" can be broadly interpreted by Congress to include sound recordings).

compromises not only on the performance rights issue, but also difficult cable and photocopying issues.[21] The new copyright law, the 1976 Copyright Act, did not expand rights of copyright owners of sound recordings to include a public performance right. The House Report stated that:

> [t]he Committee considered at length the arguments in favor of establishing [sic] a limited performance right, in the form of a compulsory license, for copyrighted sound recordings, but concluded that the problem requires further study. It therefore added a new subsection (d) to the bill requiring the Register of Copyright to submit to Congress, on January 3, 1978, a report setting forth recommendations as to whether this section should be amended to provide for performers and copyright owners...any performance rights in copyrighted sound recordings. [22]

The study that Congress required the Copyright Office to undertake was issued in 1978. It placed the Copyright Office squarely in the corner of those advocating public performance rights for sound recordings. That recommendation was reiterated by the Office in a report it issued to Congress in October 1991 titled "Copyright Implications of Digital Audio Transmission Services."

1. The Register's 1978 Report on Performance Rights in Sound Recordings.

In the introduction to its thorough 1978 report, the Register of Copyrights stated:

> Our investigation has involved legal and historical research, economic analysis, and also the amassing of a great deal of information through written comments, testimony at hearings, and face-to-face interviews. We identified, collected, studied, and analyzed material dealing with a variety of constitutional, legislative, judicial, and administrative issues, the views of a wide range of interested parties, the sharply contested arguments concerning economic issues, the legal and practical systems adopted in foreign countries, and international considerations, including the International Convention for the

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[21] See 1978 Performance Rights Report at Chapter IV. See also Olson, "The Iron Law of Consensus", 36 J. COP. SOC'Y 126–27 (1989); D'Onofrio, "In Support of Performance Rights in Sound Recordings", 29 UCLA L. REV. 169, 70 (1981).

[22] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 106 (1976).

Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (adopted at Rome in 1961). [23]

The Copyright Office adhered to the philosophy it traditionally followed to interpret its constitutional mandate; that is, that copyright legislation must ensure the necessary balance between giving authors necessary monetary incentive without limiting access to an author's works. [24] After weighing the arguments of commentators participating in the proceeding and assessing the impact of the information presented to the Office in an independent economic analysis, the Register outlined the Office's conclusions. [25] In essence, the Office concluded that:

> Sound recordings fully warrant a right of public performance. Such rights are entirely consonant with the basic principles of copyright law generally, and with those of the 1976 Copyright Act specifically. Recognition of these rights would eliminate a major gap in this recently enacted general revision legislation by bringing sound recordings into parity with other categories of copyrightable subject matter. A performance right would not only have a salutary effect on the symmetry of the law, but also would assure performing artists of at least some share of the return realized from the commercial exploitation of their recorded performances. [26]

The 1978 Report's discussion of performance rights in sound recordings included a compensation scheme structured as a compulsory licensing system. The goal was to benefit "both

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[23] 1978 Performance Rights Report at 1.

[24] In a narrow view, all of the author's exclusive rights translate into money: Whether he should be paid for a particular use or whether it should be free. But it would be a serious mistake to think of these issues solely in terms of who has to pay and how much. The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions.

Copyright Law Revision, Part 6. Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 89th Cong., 1st Sess. House Comm. Print, at 13 (May 1965). Emphasis added. As quoted in 1978 Performance Rights Report at 174.

[25] 1978 Performance Rights Report 174–177.

[26] 1978 Performance Rights at 177. (Emphasis added).

performers (including employees for hire) and ...record producers as joint authors of sound recordings." [27] Although legislation was introduced following publication of the 1978 report, it was not enacted by Congress.

2. The Register's 1991 Report on Copyright Implications of Digital Audio Transmission Services.

In October 1991 the Register delivered a report on the legal and policy implications of digital audio broadcasting technology. While the performance right issue was not the predominant topic in that report, it was the most controversial. Once again lines were clearly drawn between broadcasters and the recording interests.

After weighing all of the evidence, the Copyright Office again concluded that there were strong policy reasons to equate sound recordings with other works protected by copyright and to give owners of sound recordings a performance right. The Office stated that it:

> [S]upports enactment of a public performance right for sound recordings. The Office concludes that sound recordings are valid works of authorship and should be accorded the same level of copyright protection as other creative works. In fact, as advanced technology permits more copying and performing of American music, the Office is convinced that a performance right...[is] even more essential to compensate American artists and performers fairly. [28]

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[27] 43 Fed. Reg. 12,763 (1978) at 12,766.

[28] U.S. Copyright Office, "Copyright Implications of Digital Audio Transmission Services" 160 (October 1991).

IV. WHY THE UNITED STATES SHOULD ADOPT A PUBLIC PERFORMANCE RIGHT IN SOUND RECORDINGS

The question of whether there should be a public performance right in sound recordings has been debated for a long time, and the Copyright Office has always supported such a right. [29]

Undoubtedly, U.S. performers and producers would benefit if Congress granted public performance rights in their sound recordings enabling these authors to claim their fair share of foreign royalties. Moreover, justice requires that performers and producers of sound recordings be accorded a public performance right. As a world leader in the creation of sound recordings, the United States, should no longer delay in giving its creators of sound recordings the minimum rights many countries give their performers and producers. Unlike many of those countries, the United States already protects sound recordings under copyright law, but it is time to take the next step and recognize a performance right in sound recordings. Finally, protection should be granted swiftly before technology erodes even further the rights that performers and producers of sound recordings should enjoy.

In the past a strong argument for recognition of a performance right in sound recordings was based on trade agreements. United States sound recordings have dominated the world market. Supporters of the right argued that we should strengthen the rights we give to creators and boost our gross national product; i.e., since the United States leads in production of copyrighted music, books, motion pictures, computer programs, and sound recordings, it should also provide a high level of copyright protection for those works both nationally and internationally. In the last few years, the United States has improved

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[29] See, Performance Rights in Sound Recordings: Oversight Hearings before the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary, 103rd Cong., 1st Sess. (1993)(statement of Ralph Oman, Register of Copyrights); and Digital Performance Rights in Sound Recordings Act of 1995: Hearings Before the Senate Committee on the Judiciary, 104th Cong., 1st Sess: (1995)(statement of Marybeth Peters, Register of Copyrights).

copyright protection for foreign authors by implementing both the NAFTA and TRIPS agreements. [30] Some might say that any trade arguments for creating a performance right in sound recordings are less forceful since the United States has already implemented both GATT and NAFTA, and a performance right was not part of the obligations set out in those treaties. In fact, the United States could not support such an obligation because its domestic law does not now accord this protection. [31] Moreover there are still important international considerations that support the creation of such a right.

A. INTERNATIONAL EFFORTS TO IMPROVE PROTECTION

The United States protects sound recordings as a category of copyrightable works. In 1989, the United States became a member of the Berne Convention for the Protection of Literary and Artistic Works which does not extend to sound recordings. The effort by the World Intellectual Property Organization (WIPO) to develop an international consensus on a so-called Model Copyright Law served as the triggering mechanism for full-scale debate on the classification of sound recordings as literary or artistic works. Many countries protect sound recordings under neighboring rights law rather than copyright law.

Discussions on how sound recordings should be protected are intensified by the global realization that digital technology may obliterate the traditional classification of rights. Some of these global concerns were addressed last year in a symposium organized by WIPO in cooperation with the

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[30] Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994); North American Free Trade Agreement Act Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

[31] "Ironically, the United States, who has the most to gain, was recently forced to block an agreement in the GATT that would have created a new international obligation to extend public performance rights to sound recordings. This same foot shooting has occurred in drafting a model law in the World Intellectual Property Organization in the past." (Oversight hearing, supra note 6, at 41, (statement of Jason S. Berman, President, Recording Industry Association of America)).

Ministry of Culture and Francophonie of France. In that conference, Nicholas Garnett, Director General and Chief Executive of the International Federation of the Phonographic Industry, urged that

> The speed of commercial development gives "digital" copyright issues edge and urgency. They affect all rights holders in the intellectual property universe and whether or how we adjust the interests of any right holder can have radical implications for the entire cultural and informational market place. The task of the policy maker is to test the rules of copyright and neighboring rights against the demands of changing circumstance, in order to assure that the principles of copyright and related rights remain valid. It is not always easy. [32]

Mr. Garnett also called for discussion "about fundamental interests, how they can be secured without damage to any part of the creative community and seek a set of balanced intellectual property rights that permits us to serve the public fully and fairly." [33]

The United States would like to see a higher level of international protection for sound recordings and a way to bridge the copyright and neighboring rights systems. This attempt is now focused on the creation of a new instrument to be administered by the World Intellectual Property Organization. [34] Critical issues for discussion include: the scope of the national treatment obligations protection for pre–existing sound recordings (i.e., retroactivity), the scope of the rights and limitations on those rights, and whether audiovisual performers should be included.

The next session on the new instrument, as well as what is known as the Berne protocol, will be held in September of this year. The United States should be in a better position to support its position

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[32] Nicholas Garnett, Recording Industry, the First Cultural Industry Fully Exposed to the Impact of Digital Technology, WIPO Worldwide Symposium on the Future of Copyright and Neighboring Rights at 99 (1994).

[33] Id. at 114.

[34] There have been three committee of experts meetings in Geneva (June, 1993, November, 1993 and December, 1994).

in that meeting with a performance right for digital transmissions of sound recordings on Congress's legislative agenda.

B. CONCLUSION

At this point, there are no overt opponents to the principle of sound recording performance rights. All parties either want some kind of performance rights bill, or do not object to it. This in itself is unprecedented. Like S. 227, H. R. 1506 creates performance rights in sound recordings covering only certain digital transmission services. Because H.R. 1506 is narrower than the Senate bill, it is even less clear whether such a limited right will qualify U.S. authors for royalties on performances of their works where payment is based on reciprocity. What is crystal clear, however is that there should be a performance right in sound recordings, and we have never come so close.

Despite some concerns about the limited nature of the bill, I applaud Chairman Moorhead and his cosponsors for introducing this important piece of legislation and moving the debate forward. The Chairman's commitment to a performance right in sound recordings has motivated the parties to continue to work out their differences. The Copyright Office supports closing the gap in existing copyright law by creating a pragmatic digital public performance right in sound recordings.

Mr. MOORHEAD. Thank you.

Ms. KRETSINGER. Thank you.

Mr. MOORHEAD. The Commissioner's statement suggests that the international norm is to provide an exclusive public performance right in sound recordings. As I understand it, neither the Rome Convention nor the Geneva Phonograms Convention requires its members to provide a sound recording performance right. These are the only two multilateral treaties dealing with sound recordings. Under the Rome Convention, countries may provide a right of equitable remuneration with respect to public performance. This means that the record companies have a right to be paid for any broadcasting to the public of its records, but do not have the exclusive right granted to broadcast. Does H.R. 1506 or S. 227 more closely resemble the international norm? Commissioner.

Mr. LEHMAN. Well, Mr. Chairman, you're absolutely correct that the Rome Convention provides for right of remuneration. However, as I mentioned, we are now at work in the drafting of a new international treaty which would in many ways supplant the Rome Convention—a new instrument on the treatment of sound recordings and other works that in many countries are considered neighboring rights as opposed to droit d'auteur or copyright. One of the central issues that we are discussing in those international talks is this very question about whether we need a right to remuneration or an exclusive right. I must say that one of the issues where I find considerable agreement on the part of at least our European and developed country colleagues is the notion that the right to remuneration will not be adequate in the new digital environment—that we need to have an exclusive right. Let me try to elaborate on the reason for that.

Right now, when sound recordings are publicly performed around the world, they're licensed and treated very much like the copyright rights in the music and the lyrics. In fact, in many countries the same licensing societies license the sound recording rights as the author and music publisher rights. For example, it would be as if we had such a performance right in the United States, and ASCAP or BMI licensed everything.

Now in most of those countries you're dealing with a license protocol—that is, a blanket license. Under this license, where you basically pay just a flat royalty which is a percentage of the revenues of the radio station or the discotheque or the store, whatever it might be. That percentage is then distributed to the copyright owners. Now, even though in many of those countries you're dealing with exclusive rights, that percentage system is, in effect, simply a right to remuneration. The practical effect of such a system is that you're getting money because when you agree to collective license something, you are permitting the whole world to buy it; you do not deny access to this work to any particular group. So the practical effect is not an exclusive right.

That system works really well where you're dealing with the traditional kind of performing rights license that big rights societies like ASCAP, BMI, and their European counterparts license. However, when we look at the new digital environment, what we are going to see—and this point is specifically dealt with in your bill with regard to subscription services and interactive services—situa-

tions in which you don't just broadcast your music for a million people indiscriminately to hear; you are sending your particular record to one person at their specific request. That is much more like going down to Tower Records and buying a record at the record store. It is therefore, very important that if the economy and revenue streams that support those recording industries move from record stores into this digital transmission system, the performers and producers must be able to get paid and have similar kinds of rights that they do when they sell copies in the record store.

In our country, because copyright owners of sound recordings do have the reproduction right, they would probably have some protection. However, in our forthcoming NII report we're going to be recommending some changes to strengthen that a little bit.

In many European countries the right that will be primarily exploited when works are distributed to somebody through their NII or their GII is something they call a right of communication to the public. That, for the most part, equals our public performance right. If that right of communication to the public is not exclusive, then I think we may have a very difficult time assuring U.S. copyright owners that when U.S. sound recordings—as well as all other kinds of works, such as, computer programs or, motion pictures or anything else—are distributed abroad that owners will be able to control their use. However, if these transmissions are classified as communications to the public in those countries, and they don't have an exclusive right, then it's just a right to remuneration, and we're going to have a hard time controlling the use of our products. Furthermore, we're going to have a hard time collecting our fair share because our experience with many of these European governments, particularly with France, for example, has been that wherever you have rights that don't mesh, that are not clearly covered under an international treaty, that the best we can expect is remuneration, and sometimes not even that. What you then see happening is that the revenue streams that are developed in those countries are, under the best and most favorable circumstances for Americans, only returned partly to the American copyright owner. Frequently, a great deal of the proceeds are siphoned off and sent back to their local creative community as a subsidy which is ultimately used to compete right back against us.

So, if we had to go on the Rome Convention theory, we would have only the right to remuneration; we would be opening ourselves up to a great deal of potential mischief because, I hate to say it, but I think it's probably pretty clear that many foreign governments would use our lack of a performance right to decide how much and when we got paid, if anything. Then a great deal of that remuneration would end up being siphoned off to our own U.S. competitors in those countries in the form of subsidies.

Mr. MOORHEAD. Writers and publishers must belong to performing rights organizations like ASCAP and BMI because of their inability to monitor the use of their music. They're, in effect, subject to a statutory license. That's the performing right organization. By law, this licenses nonexclusivity. Should this subcommittee consider the six record companies which controlled over 85 percent of the U.S. market in 1994, and which grossed over $10 billion, to equal the individual songwriter, who I believe has nothing like the

economic or market power of these record companies? What about the performers and the musicians? Are there enough safeguards in H.R. 1506 to assure that they will get what's coming to them?

Mr. LEHMAN. Thank you for asking that question, Mr. Chairman, because I think there's a lot of confusion about what these rights actually are.

First, it is not accurate to say that composers, lyricists, and music publishers who assign rights to license their works to ASCAP and BMI and SESAC operate under a statutory license; they do not. There is no statutory license in our copyright statute that provides for that. In fact, the only provision of our law, and the provision on which they base their entire right to exploit the fruits of their labor, is section 106(4) of the copyright law, which says that the copyright owner has the exclusive rights to—and here it says in the case of "literary, musical, dramatic, or choreographic works, pantomized motion pictures, or other audiovisual works, perform the copyrighted work publicly." It specifically says the exclusive right to do that.

Now, as a practical matter, that exclusive right of the music publisher, the lyricist, or of the composer, which is exclusive to them, is handed over to the performing rights society on a nonexclusive basis. That wasn't always true. Prior to the 1940's, these rights were an exclusive license. However, largely as a result of antitrust enforcement during that period of time and as a part of ASCAP's consent decree that it operates under, they now license on a nonexclusive basis. I think that really gets to the heart of what the question is all about, and that is what we're really dealing with—competitiveness and antitrust concerns. Any property rights owner—and this would be true quite apart from intellectual property; it's true even if you're selling oil or gas, or even real estate—if you have such tremendous market power that you can distort the marketplace, then we have a whole set of antitrust laws for which this committee, the Judiciary Committee, is responsible that intervenes to protect the consumer and other people in the marketplace. In fact, that is what has happened with regard to performance rights in the past with ASCAP.

In fact, Mr. Chairman, in H.R. 1506, you state in the bill in section (d)(3)(B)—the nonexclusive statutory license that's created for the sound recording people—"nothing in this section"—in this statutory license that the record companies have—"annuls or limits in any way * * * the exclusive right to publicly perform a musical work, including by means of a digital transmission, under section 106(4)," which is the right enjoyed by the lyricist and the music publishers and the composers usually through a licensing society. So in this very bill it's recognized that these other creators do enjoy an exclusive right, even though as a practical matter it's exploited in a nonexclusive manner.

Mr. MOORHEAD. Excuse me just a second?

Mr. LEHMAN. Yes, sure.

Mr. MOORHEAD. We have with us the ranking minority member of the full committee, John Conyers, and he has to leave and wants permission, unanimous consent, to put his statement in the record.

Mr. CONYERS. Thank you, Mr. Chairman, and good morning, Commissioner.